



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr A Miclosoni

v

Asda Stores Limited

Heard at: Watford, in person

On: 12-15 and, in private, 16 August 2024

Before: Employment Judge Hyams

Members: Mr P Miller
Mr N Ramgolam

Representation:

For the claimant: In person

For the respondents: Ms Amy Rollings, of counsel

UNANIMOUS RESERVED JUDGMENT

1. The claimant was not discriminated against within the meaning of section 13 of the Equality Act 2010.
2. The claimant was not harassed within the meaning of section 26(1) and (4) of that Act.
3. The claimant was not victimised within the meaning of section 27 of that Act.
4. There was no failure to make a reasonable adjustment within the meaning of section 20 of that Act.
5. The respondent did not breach section 15 of that Act by treating the claimant unfavourably because of something arising in consequence of a disability within the meaning of that Act.
6. Accordingly, none of the claimant's claims succeeds and they are all dismissed.

REASONS

The claims made by the claimant and some agreed facts

- 1 On 18 April 2023, the claimant presented an ET1 claim form. It was at pages 24-35 of the hearing bundle. Any reference below to a page is, unless otherwise stated, a reference to a page of that bundle. The ET1 was not accompanied by any separate document stating the details of the claim. The details were stated in boxes 8.2, 9.2, and 15. On page 6 of the claim form, the claimant had the ticked boxes for race and disability discrimination and stated that he was in addition making a claim of victimisation. The claimant was at that time, and remained at the time of the hearing before us, employed by the respondent in a clerical function (which these days usually means, and certainly did in the case of the claimant's work, doing administrative tasks using a computer) in a distribution centre for the respondent. The claimant's job title was "Clerical Colleague". The distribution centre is on an industrial estate in Northampton and was referred to by the parties as the respondent's Brackmills Distribution Centre. We refer to it below as "the DC" or, where it is clearer to do so, "Brackmills". The products distributed from it are all clothing and related products. The ET1 was supplemented by two emails from the claimant to the tribunal dated 21 April 2023, in which he sought permission to add (as clarified in the second of the two emails) a claim of "sex orientation discrimination/ harassment". Those emails were at pages 36 and 37.
- 2 On 11 March 2024, the claimant made a second claim. The ET1 claim form was also not accompanied by a separate document stating the details of the claim. The claim was of victimisation and of a failure to make reasonable adjustments within the meaning of section 20 of the Equality Act 2010 ("EqA 2010") with in the alternative a claim of discrimination arising from disability within the meaning of section 15 of that Act.
- 3 There were two preliminary hearings in relation to the first claim. The first was conducted by Employment Judge ("EJ") Anstis on 20 September 2023 and the second one was conducted by EJ Quill on 7 March 2024. The latter was the result of an application made by the claimant to amend the claim. The record of the first hearing was at pages 72-76. The record of the second hearing was at pages 100-118. The latter record was sent to the parties on 26 March 2024. EJ Quill permitted the claimant to amend his claim in the manner stated in paragraph 4 on page 108.
- 4 The claims were consolidated by an order made by EJ Quill on 16 July 2024.

The issues

- 5 The parties had agreed a list of issues which covered both claims, including the first claim as amended with the permission of EJ Quill. While we had reservations

about the manner in which the legal issues were stated, its statement of the events which the claimant claimed occurred and on the basis of which he advanced his various legal claims and the legal basis for those claims was (albeit with the reservations which we state in paragraph 33 below) helpful. The legal bases stated in the list of issues (but restated by us slightly so that they are stated by reference to the relevant parts of the EqA 2010) were these:

- 5.1 harassment within the meaning of sections 26(1) and 40 of the EqA 2010, with the protected characteristic in respect of twelve claimed events being race and in respect of one, further, claimed event, sexual orientation;
 - 5.2 victimisation within the meaning of sections 27 and 39(4)(d) of that Act in respect of a different series of acts and/or omissions;
 - 5.3 failure to make two claimed reasonable adjustments within the meaning of section 20 of that Act, contrary to section 21 of that Act; and
 - 5.4 in relation to one of those two claimed reasonable adjustments, as an alternative a claim of discrimination within the meaning of sections 15 and 39(2)(d) of that Act.
- 6 What was not said in the list was anything about the manner in which section 136 of the EqA 2010 had to be applied. We pointed that out through EJ Hyams at the start of the hearing and agreed that it would be taken into account in submissions and by us when we were determining the claims. EJ Hyams also referred to the fact that because of section 212(1) of that Act, it was not possible to make a successful claim of both (1) harassment within the meaning of section 26 and (2) detrimental treatment within the meaning of either section 39(2)(d) (which applies to a claim of discrimination of any sort as defined by the Act) or section 39(4)(d) (which applies to a claim of victimisation). However, the claims here as stated in the list of issues were not affected by that factor, as (unusually, but commendably given the legal framework) the claim of harassment was in respect of a set of claimed events about which no other claim was made, and later on in the week, EJ Hyams said that. The claimant then told us that the agreed list of issues did not include his claims, which he had originally advanced and had not abandoned, that the things which he said were harassment within the meaning of section 26(1) and (4) of the EqA 2010 were also directly discriminatory because of the protected characteristic which was relied on in each case. We therefore now state the applicable law and our understanding of how it had to be applied in the light of the relevant case law.

Relevant law

Harassment and direct discrimination

Harassment

7 Section 26 of the EqA 2010 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.”

8 We return to section 26 below, after considering the meaning of the words “conduct related to a relevant protected characteristic”. In order to do that, it is helpful to consider the effect of section 13 of the EqA 2010, which provides:

“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.”

9 There is in the judgment of Underhill LJ in *Unite the Union v Nailard* [2019] ICR 28 an illuminating discussion about the impact (or otherwise) of the use of the words “unwanted conduct related to a relevant protected characteristic” in section 26(1) of the EqA 2010 instead of the words in section 13, namely “because of a protected characteristic”. As we read paragraphs 83-101 of Underhill LJ’s judgment in that case, a mental element is either always or (but for the reasons which we give in the paragraphs 12-15 below, we doubted that it could ever not be required) almost always required in a claim of harassment as much as in a claim of direct discrimination. That element will be either of precisely the same sort as that which is required for a successful claim of direct discrimination, or it will be present as a result of what we will call overtly

discriminatory conduct, such as in the use of overtly discriminatory language, as discussed in paragraph 93(1) of that judgment.

- 10 Paragraph 7.9 of the Equality and Human Rights Commission’s code of conduct on employment (“the Equality Code”) is in these terms.

“Unwanted conduct ‘related to’ a protected characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic.”

- 11 That is a sweeping statement to which reference was not made in *Nailard*. The statement is, however, the subject of the illustrations in the passage in the Equality Code which follows immediately after it, which we now set out.

“It includes the following situations:

- a) *Where conduct is related to the worker’s own protected characteristic.*

Example:

If a worker with a hearing impairment is verbally abused because he wears a hearing aid, this could amount to harassment related to disability.

7.10 Protection from harassment also applies where a person is generally abusive to other workers but, in relation to a particular worker, the form of the unwanted conduct is determined by that worker’s protected characteristic.

Example:

During a training session attended by both male and female workers, a male trainer directs a number of remarks of a sexual nature to the group as a whole. A female worker finds the comments offensive and humiliating to her as a woman. She would be able to make a claim for harassment, even though the remarks were not specifically directed at her.

- b) *Where there is any connection with a protected characteristic.*

Protection is provided because the conduct is dictated by a relevant protected characteristic, whether or not the worker has that characteristic themselves. This means that protection against unwanted conduct is provided where the worker does not have the relevant protected characteristic, including where the employer knows that the worker does not have the relevant characteristic. Connection with a protected characteristic may arise in several situations:

- The worker may be associated with someone who has a protected characteristic.

Example:

A worker has a son with a severe disfigurement. His work colleagues make offensive remarks to him about his son's disability. The worker could have a claim for harassment related to disability.

- The worker may be wrongly perceived as having a particular protected characteristic.

Example:

A Sikh worker wears a turban to work. His manager wrongly assumes he is Muslim and subjects him to Islamophobic abuse. The worker could have a claim for harassment related to religion or belief because of his manager's perception of his religion.

- The worker is known not to have the protected characteristic but nevertheless is subjected to harassment related to that characteristic.

Example:

A worker is subjected to homophobic banter and name calling, even though his colleagues know he is not gay. Because the form of the abuse relates to sexual orientation, this could amount to harassment related to sexual orientation.

- The unwanted conduct related to a protected characteristic is not directed at the particular worker but at another person or no one in particular.

Example:

A manager racially abuses a black worker. As a result of the racial abuse, the black worker's white colleague is offended and could bring a claim of racial harassment.

- The unwanted conduct is related to the protected characteristic, but does not take place because of the protected characteristic.

Example:

A female worker has a relationship with her male manager. On seeing her with another male colleague, the manager suspects she is having an affair. As a result, the manager makes her working life difficult by continually criticising her work in an offensive manner. The behaviour is not because of the sex of the female worker, but because of the suspected affair which is related to her sex. This could amount to harassment related to sex.

7.11 In all of the circumstances listed above, there is a connection with the protected characteristic and so the worker could bring a claim of

harassment where the unwanted conduct creates for them any of the circumstances defined in paragraph 7.6.”

- 12 The Equality Code was issued under section 14 of the Equality Act 2006, section 15(4)(b) of which provides that it “shall be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant”. The propositions set out in the preceding paragraph above did not in our judgment detract from the proposition which we derived from *Nailard* that there has to be a connection in the mind of the person doing the thing about which complaint is made under section 26(1) of the EqA 2010 with one or more protected characteristics within the meaning of that Act. The single example given in illustration of paragraph 7.9 of the Equality Code, namely of a worker with a hearing impairment being verbally abused because he wears a hearing aid, might be better regarded as a claim of a breach of section 15 of the EqA 2010, as unfavourable conduct because of something arising in consequence of the worker’s disability, and if so then the cause of action will arise under section 39(2)(d) of that Act, and not be capable of being harassment also. In addition, at a stretch, the abuse could be said to be “related to” the disability, but certainly there will have been a mental element present, since abuse is the result of an adverse motivation.
- 13 As EJ Hyams pointed out during closing submissions, employment tribunals must surely not lose sight of the fact that a finding of directly discriminatory conduct within the meaning of section 13 of the EqA 2010 is a very serious finding for the individual concerned. Such a finding requires a finding of a mental element in the form of a motivation of the sort discussed by Underhill LJ in paragraph 72 of his judgment in *Nailard*. As EJ Hyams pointed out, a finding of, say, racial harassment under section 26(1) of the EqA 2010 is no less a serious finding: and many would say that it was a more serious finding (with even more adverse consequences for the person to whom it relates) even than a finding of direct discrimination within the meaning of section 13. That is a factor which points firmly in favour of it being recognised that harassment within the meaning of section 26(1) should not be capable of being found where a court or tribunal finds that the impugned conduct was in no way connected in the mind of the alleged harasser with a protected characteristic.
- 14 The examples discussed in paragraph 56 of the judgment of Underhill LJ in *Nailard* are of the same sort as those discussed in the passage of the Equality Code which we have set out in paragraph 11 above, although the third bullet point in paragraph 56 referred to a claim (*Kettle Produce Ltd v Ward*) which (and this is not clear from what is said in paragraph 56, but was clear from the judgment in *Kettle Produce Ltd v Ward*) was of direct discrimination only, so the relevance of that third bullet point is not clear. In any event, the discussion in paragraphs 91-101 of that judgment in our view underlined the need for some sort of connection in the mind of the person accused of harassment within the meaning of section 26(1) of the EqA 2010 with one or more protected

characteristics. The fact that the discussion concerned third party liability did not detract from that general proposition: rather, the fact that the discussion was required resulted from the fact that the decision under appeal in *Nailard* was based on the proposition that an employer could be liable for failing to prevent harassment without having the necessary “proscribed ... motivation” (taking those words from the final sentence of paragraph 99 of the judgment).

- 15 So, for example, being denigratory in the workplace towards women generally, or for example persons from Romania, would in our view be conduct (whether or not it was unwanted) which was related to the protected characteristic of sex or, as the case may be, race. The requirement for a mental connection between the conduct and the protected characteristic would be satisfied by the fact that the use of denigratory language about someone with a protected characteristic would inescapably involve such a connection. But if that conduct were directed at a particular woman or person of Romanian origin, then it would (we thought probably always) also be directly discriminatory within the meaning of section 13 of the EqA 2010: it would be less favourable treatment of them because of their protected characteristic. In that event there would be no need to satisfy the rest of section 26(1) read with section 26(4) of that Act. That in our view helped to illustrate how narrow is the reach of section 26(1) where the conduct which is the subject of complaint is also directly discriminatory. That was because of the additional conditions for liability in section 26(1) and (4), i.e. additional in comparison with the condition for liability under section 13.
- 16 Those conditions needed to be read in the light of the decision of the EAT in *Richmond Pharmacology v Dhaliwal* [2009] ICR 724, and the decision of the Court of Appeal in *Land Registry v Grant (Equality and Human Rights Commission intervening)* [2011] ICR 1390, where Elias LJ said in relation to the claimed harassment in that case:
- “the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.”
- 17 In paragraph 22 of *Dhaliwal*, the Employment Appeal Tribunal (“EAT”), with Underhill P (i.e. Mr Justice Underhill, sitting as the President of the EAT) presiding said this:

“We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person’s dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments

or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.”

- 18 In *Betsi Cadwaladr University Health Board v Hughes* (unreported; UAEAT/0179/13/JOJ, 28 February 2014), the EAT (Langstaff P presiding) said this in paragraphs 12 and 13 of its judgment having just set out paragraph 22 of the judgment in *Dhaliwal*:

‘12. We wholeheartedly agree. The word “violating” is a strong word. Offending against dignity, hurting it, is insufficient. “Violating” may be a word the strength of which is sometimes overlooked. The same might be said of the words “intimidating” etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.

13. It was agreed, too, that context was very important in determining the question of environment and effect. Thus, as Elias LJ said in *Grant*, context is important. As this Tribunal said, in *Warby v Wunda Group plc*, UAEAT 0434/11, 27 January 2012:

“...we accept that the cases require a Tribunal to have regard to context. Words that are hostile may contain a reference to a particular characteristic of the person to whom and against whom they are spoken. Generally a Tribunal might conclude that in consequence the words themselves are that upon which there must be focus and that they are discriminatory, but a Tribunal, in our view, is not obliged to do so. The words are to be seen in context;”.

- 19 *Dhaliwal* is authority for the proposition that the intent of the impugned conduct is relevant. That was said at the end of the following passage in the judgment of that case, the whole of which (including the footnotes, which we have integrated into the text by inserting them in square brackets and putting them into italics) was in our view helpful:

‘14. Secondly, it is important to note the formal breakdown of “element (2)” into two alternative bases of liability—“purpose” and “effect”. That means that a respondent may be held liable on the basis that the effect of his conduct has been to produce the proscribed consequences even if that was not his purpose; and, conversely, that he may be liable if he acted for the purposes of producing the proscribed consequences but did not in fact do so (or in any event has not been shown to have done so) [*Those alternative forms of liability could be described, from the perpetrator’s point of view, as “objective” and “subjective”; but using that terminology risks confusion with the separate question whether the effect on the victim should be judged “subjectively” or “objectively”—as to which, see para 15.*]. It might be

thought that successful claims of the latter kind will be rare, since in a case where the respondent has intended [*We use “intend” as the equivalent verb to the noun “purpose” used in the statute: “purpose” as a verb has an archaic ring. In this context at least there is no real difference between the terms “purpose” and “intention”.*] to bring about the proscribed consequences, and his conduct has had a sufficient impact on the claimant for her to bring proceedings, it would be prima facie surprising if the tribunal were not to find that those consequences had occurred. For that reason we suspect that in most cases the primary focus will be on the effect of the unwanted conduct rather than on the respondent’s purpose (though that does not necessarily exclude consideration of the respondent’s mental processes because of “element (3)” as discussed below).

15. Thirdly, although the proviso in subsection (2) is rather clumsily expressed, its broad thrust seems to us to be clear. A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That, as Mr Majumdar rightly submitted to us, creates an objective standard. However, he suggested that, that being so, the phrase “having regard to ... the perception of that other person” was liable to cause confusion and to lead tribunals to apply a “subjective” test by the back door. We do not believe that there is a real difficulty here. The proscribed consequences are, of their nature, concerned with the feelings of the putative victim: that is, the victim must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created. That can, if you like, be described as introducing a “subjective” element; but overall the criterion is objective because what the tribunal is required to consider is whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Thus if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt. [*This is not to reintroduce a requirement of “purpose” by the back door: the point is not that the perpetrator cannot be liable unless he intended to cause offence but rather that, if he evidently did not intend to, it may not be reasonable for the claimant to have taken offence.*]

The burden of proof

20 Section 136 of the EqA 2010 provides:

- “(1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.”

Direct discrimination

21 There is much case law concerning the application of that provision, and we refer to some of it immediately below. However, we bore it in mind that (as the House of Lords said in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337) in some cases the best way to approach the question whether or not there has been for example direct discrimination within the meaning of section 13 of the EqA 2010 is by asking what was the reason why the conduct or omission in question occurred.

22 We regarded the issues arising in relation to a claim of direct discrimination to be best stated as follows.

22.1 Applying section 136(2) of the EqA 2010, are there (among those things which the tribunal has found were facts) facts from which the tribunal could decide, in the absence of any other explanation, that the claimant was treated less favourably and detrimentally because of a protected characteristic? When asking that question it is possible to take into account the respondent’s evidence about, but not its explanation for, the treatment. That is clear from paragraphs 19-47 of the judgment of Leggatt JSC (with which Lord Hodge, Lord Briggs, Lady Arden and Lord Hamblin agreed) in the Supreme Court in *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] ICR 1263.

22.2 If so, then, applying section 136(3) of that Act, has the respondent satisfied the tribunal on the balance of probabilities that the claimant was not to any material extent so treated?

22.3 Alternatively, applying the decision of the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, what was the real reason for the manner in which the tribunal has found the claimant was in fact treated?

Victimisation

- 23 Victimization within the meaning of section 27 of the EqA 2010 is similar to direct discrimination within the meaning of section 13 of that Act, and the same (or at least a similar) analysis needs to be applied when considering a claim of victimisation, with, however, one or more protected acts taking the place of the protected characteristic for that purpose. That is clear from the judgment of Underhill LJ in *Chief of Greater Manchester Police v Bailey* [2017] EWCA Civ 425, and in particular paragraph 49. Both other members of the court (one of whom was another former President of the EAT: Sir Patrick Elias) agreed with the judgment, so it was in effect the judgment of the court.

Disability discrimination

Introduction and overview

- 24 The first question in a claim of disability discrimination is whether the claimant was disabled at the material time, i.e. at the time when it is claimed that the relevant prohibition in the EqA 2010 was breached: *All Answers Ltd v W* [2021] EWCA Civ 606, [2021] IRLR 612. That case makes it clear also that the question whether a person had a disability at any particular time is to be determined by reference to the evidence in existence at that time: it is not to be determined by reference to evidence which arises later than that time.
- 25 The claimant did not here say that he was disabled before the time from which the respondent accepted was disabled. That may have been a result of the claimant's failure to recognise that unless he pursued a particular point, then we would not be obliged to consider it. In order to avoid us failing to consider a relevant issue, we reminded ourselves of the provisions of section 6 of, and Schedule 1 to, the Equality Act 2010, and the fact that paragraphs 41 and 42 of the judgment of the EAT in *J v DLA Piper UK LLP* [2010] ICR 1052, this was said by Underhill P.

“(2) “Clinical Depression”

41 The facts of the present case make it necessary to make two general points about depression as an impairment. We do so with some caution since the medical evidence before the Tribunal did not contain any general discussion of depression. We have to rely primarily on the inferences that can be drawn from such medical evidence as there is, together with the Guidance and the case-law and the general knowledge acquired from our own experience of depressive illness in the field of employment law and practice. However, we have considered it legitimate to consider also the Report of the Joint Committee on the Disability Discrimination Bill (i.e. what became the 2005 Act). Mr Laddie sent us paras. 71-79 of the Report

following the hearing (see n. 6 below); but the whole of paras. 65-99, and some of the materials referred to in it (in particular the introductory section of the draft NICE guideline on depression), which are available online, seemed to us to be useful. We should make it clear that we have referred to these materials as background only and have not relied on them in deciding any disputed matter on this appeal.

42 The first point concerns the legitimacy in principle of the kind of distinction made by the Tribunal, as summarised at para. 33(3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs [“clinical depression”] is a mental illness – or, if you prefer, a mental condition – which is conveniently referred to as “clinical depression” and is unquestionably an impairment within the meaning of the Act. The second [“as Dr Brener puts it, Sunday night syndrome, or as Dr Gill puts it, a possible medicalisation of employment problems”] is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or – if the jargon may be forgiven – “adverse life events”. [Endnote 5: But NB that “clinical” depression may also be triggered by adverse circumstances or events, so that the distinction can *not* be neatly characterised as being between cases where the symptoms can be shown to be caused/triggered by adverse circumstances or events and cases where they cannot.] We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most lay people, use such terms as “depression” (“clinical” or otherwise), “anxiety” and “stress”. Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant’s ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering “clinical depression” rather than simply a reaction to adverse circumstances: it is a common sense observation that such reactions are not normally long-lived.’

Section 15 of the EqA 2010

26 Section 15 of the EqA 2010 provides this:

“(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."

27 In *Pnaiser v NHS England* [2016] IRLR 170, Simler P (as she then was) sitting in the EAT gave (in paragraph 31 of her judgment) the following guidance about the manner in which the question whether there has been unfavourable treatment for the purposes of section 15 of the EqA 2010 should be addressed:

"In the course of submissions I was referred by counsel to a number of authorities including *IPC Media Ltd v Millar* [2013] IRLR 707, *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14/RN and *Hall v Chief Constable of West Yorkshire Police* [2015] IRLR 893, as indicating the proper approach to determining section 15 claims. There was substantial common ground between the parties. From these authorities, the proper approach can be summarised as follows:

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

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 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, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).

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

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

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

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

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the ‘something’ leading to the unfavourable treatment is a consequence of

the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

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

- 28 There is the following helpful summary of the applicable principles in paragraph L[377.02] of *Harvey* concerning the question whether any unfavourable treatment "is a proportionate means of achieving a legitimate aim":

"The EAT in *Hensman v Ministry of Defence* UKEAT/0067/14/DM, [2014] EqLR 670 applied the justification test as described in *Hardy and Hansons Plc v Lax* [2005] EWCA Civ 846, [2005] IRLR 726, [2005] ICR 1565 to a claim of discrimination under EqA 2010 s 15. Singh J held that when assessing proportionality, while an ET must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. (Applied *Monmouthshire County Council v Harris* UKEAT/0010/15 (23 October 2015, unreported)). As stated expressly in the EAT judgment in *City of York Council v Grosset* UKEAT/0015/16 (1 November 2016, unreported), the test of justification is an objective one to be applied by the tribunal; therefore while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning, the ET was nevertheless acting permissibly in reaching a different conclusion to the respondent, taking into account medical evidence available for the first time before the ET. The Court of Appeal in *Grosset* ([2018] EWCA Civ 1105, [2018] IRLR 746) upheld this reasoning, underlining that 'the test under s 15(1)(b) EqA is an objective one according to which the ET must make its own assessment'."

Section 20 of the EqA 2010

- 29 Section 20 provides so far as relevant:

"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule

apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

- (2) The duty comprises the following three requirements.
- (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

30 In *Ishola v Transport for London* [2020] ICR 1204, the Court of Appeal decided, as it is said in the headnote, that

"however widely and purposively the concept [of a provision, criterion or practice] was to be interpreted, it did not apply to every act of unfair treatment of a particular employee, as that was not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments was intended to address; that, in context, all three words [i.e. 'provision', 'criterion' and 'practice'] carried the connotation of a state of affairs indicating how similar cases were generally treated or how a similar case would be treated if it occurred again; that, therefore, a one-off decision or act could be a practice, but it was not necessarily".

31 In many cases, a claim of a failure to make reasonable adjustments will be a claim to the same effect as a claim of a breach of section 15 of the EqA 2010, as the two claims are in reality two sides of the same coin. That is clear from what was said by Elias LJ in paragraphs 26 and 27 of his judgment (with which McCombe and Richards LJJ agreed) in *Griffiths v Secretary of State for Work and Pensions* [2016] IRLR 216.

The issues

32 Returning to the claims made here and the issues arising for determination by us, as EJ Hyams said on 12 August 2024, it is often best simply to make findings of fact about what was claimed by both parties to have occurred (or not to have occurred, as the case may be), and then to consider whether the claim, as properly interpreted, is made out by applying the necessary legal tests to the facts as found. We therefore now turn to the evidence before us and then state our findings of fact. We then state our conclusions on the various claims made by the claimant. Despite the fact that we concluded that many of the claims were out of time, we state our conclusions on their factual bases because those conclusions were relevant if nothing else as part of the factual background to the claims which were in time.

- 33 We took as the basis for the factual allegations what was said in the agreed list of issues about the factual basis for the claims, but adapted the statements of the factual issues in the list. That was because we found the list of issues to be an apt indication of the factual issues, but not an accurate statement of them because it was in some respects an inaccurate reflection of the factual issues. In addition, the issues listed as issues 3(iv) and (vii) were one in substance and the same, and the issue stated in paragraph 3(vii) was not a claim as such: it was, rather, a claim of a factual circumstance which was relied on to support the claimant's claim summarised as issue 3(iv). Further, the factual circumstances referred to in issue 3(vii) were relevant also by way of comparison in relation to the circumstances which were the subject of issue 3(v).

The evidence before us

- 34 We heard oral evidence from the claimant on his own behalf and, on behalf of the respondent, from the following witnesses, all of whom were at all material times employed by the respondent:
- 34.1 Mr Adrian Baxter, who was at all material times employed as the General Manager at the DC;
 - 34.2 Mrs Tracey Rosier, who was originally employed at the DC as a Clerical Colleague alongside the claimant and subsequently, as from early February 2020, was promoted to Department Manager, and who was then at all material subsequent times employed as Intake Manager;
 - 34.3 Mr Frank Smith, who was employed at all material times as a Warehouse Colleague at the DC;
 - 34.4 Mr Ahmed Ambar, who was at all material times employed as a Shift Manager at the DC;
 - 34.5 Mr John Williams, who was employed at the relevant time as Planning Manager at the DC;
 - 34.6 Mr Gary Lund, who was at the material time employed as National Planning Manager;
 - 34.7 Mr Nimesh Yadev, who was at the material time employed as Operations Manager at the DC, reporting directly to Mr Baxter;
 - 34.8 Mr Billy Pickersgill, who was at the material times employed at the DC as Dotcom Stock & Systems Manager; and
 - 34.9 Mr Karl Tulinski, who was at the material times employed as Dotcom Operations Manager at the DC.

- 35 We had before us a bundle of documents the index to which was 20 pages long and which, including that index, was 866 pages long.
- 36 We had before us at the start of the hearing some CCTV footage, which had no sound, which showed (visually, of course, only) what had happened in an exchange between the claimant and Mr Smith to which we refer in paragraphs 115-142 below. Late on Tuesday 13 August 2024, we were given some CCTV footage of what happened (again, it had no sound) when Mrs Rosier participated in the conversation to which we refer in paragraphs 143-160 below.
- 37 The bundle contained, at pages 538, 539, 546, 547, 548, 550, and 551, typed, undated documents, containing descriptions of events. Some of them were the result of printing to pdf the underlying words, and some of them were photographs of a physical print-out of the words. The claimant had given them to the respondent on 17 January 2024 in the course of complying with the order for disclosure made by EJ Anstis. He explained to us on 14 August 2024 that he had created them for the purposes of the hearing of his first claim on the basis that he understood from researches on the internet that if his witness statement evidence was not based on documents in the bundle then it would not be admissible. In any event, he referred to them in his witness statement in support of what he said in the witness statement. Evidentially, therefore, they were of no value. However, they had been responded to by the respondent's witnesses.

Our findings of fact

Introduction

- 38 When stating findings of fact, it is usually best to do so by referring to the events as the tribunal found them to be in simple chronological order. Here, however, that would have led to a somewhat disjointed set of findings of fact. That was because
- 38.1 the claims before us were based on, or, we inferred, claimed to be supported by, some alleged factual circumstances which, if they occurred, occurred long before the claims were made and
- 38.2 the claimant's assertions in relation to those factual circumstances and the evidence relating to them emerged in a somewhat piecemeal fashion.
- 39 In our following findings of fact, we therefore take the factual circumstances themselves in chronological order, but where it is helpful to do so we refer to the first time that the factual assertion of the claimant was made, and then state the evidence before us in relation to that factual assertion in the chronological order in which it emerged.

The car parking complaint; issue 3(i)

The witness statement evidence

40 The first event about which the claimant made a claim was an altercation between him and Mrs Tracey Rosier which occurred after the first lockdown was imposed in March 2020 in response to the Covid-19 pandemic. Mrs Rosier agreed that there was an exchange between her and the claimant about the manner in which he parked his car. She said that there was only one such exchange. Her evidence about it was in these terms in her witness statement.

“21 In his first grievance letter Alin mentioned Issue 3(i) – he says that at the beginning of 2020, I asked him on multiple occasions not to park in front of the reception area (after the air conditioning unit). However, I see from the notes of his grievance meeting with James (page 246-7) that this wasn’t a point taken forward as part of the grievance. Alin went on to raise this point as part of his appeal to his second grievance, along with various other historical points that he now raises to the Tribunal. I discussed these with Gary Lund when he interviewed me on 7 June 2023 (page 451.10-15) and I address each of them below.

22 Issue 3(i) the car parking (Alin explains this at p 416). I had only asked Alin once not to park in front of the building in the visitor parking space and to move his car to the main car park. This had nothing to do with race. There are clear signs about this and I would tell any colleague the same, in fact I remember telling another colleague Jay at the time not to park there. It’s completely untrue that I said Alin couldn’t park there because I wanted my husband to park there. He’s a driver for Asda and he parks over near the transport yard in the main car park. He wouldn’t be allowed to park in the visitor parking space either and I’d tell him so if he did. Alin says Dave Preston told me off about this but I have no memory of that, and I see from Gary’s outcome letter that Dave told him the same.”

41 The claimant’s evidence in his witness statement was this.

‘Car park incident - Ms Tracy Rosier

2. During the pandemic time at the beginning of 2020 managers were greeting the colleagues at the reception as they had implemented a series of safety measures and wanted to make sure that colleagues were following them. One day Ms Rosier (Intake department manager) shouted at me in front of other colleagues to get out and move my car from the reception area after the air conditioning unit (although it was correctly parked) to the main car park while I entered the building (p 538).

3. I refused to move my car and told her that parking in the reception area after the air conditioning unit is permitted for all the employees based on the rule "first come first served" I asked her not to shout at me again. On the second occasion, Ms Rosier did the same thing again by shouting at me to go outside and move my car to the main car park, I told her that in addition to the written proof that everybody is allowed to park in front of reception after the air conditioning unit, I have also double checked (just to be on the safe side) with my shift manager at the time Ms Agnes Gajos and she has confirmed that I can park my car in that area as she had confirmation from the "general office/senior management".
4. On the third occasion, I initially intended to park in the reception area after the air con unit, but all spaces were taken. I had no option but to turn around and park in the main car park, as I entered the building Ms Rosier shouted at me "I have told you many times to stop parking in this area why have you attempted to park here again?"
5. It became clear to me that she would not stop harassing me and that day I stopped her inside the warehouse and asked her why she kept harassing me in front of the people regarding the car park as I felt embarrassed and humiliated by her action. She told me that her husband also works for the respondent as a lorry driver, and he has seen me lately when I park in his favourite place, he is not happy, and he complains to her at home, Ms Rosier also said the places in front of the building after the air conditioning unit are for the transport team only (drivers and managers), this was not true, as all the parking spaces from the respondent premises (except the disable spaces and the visitor only) regardless of their position are to be used by all the colleagues based on the rule "First come first served).
6. I was shocked and felt humiliated and discriminated by Ms Rosier's arrogance because my feelings were that somehow she appeared to believe that the rules regarding the car park did not apply to me because I am a second-class citizen/colleague as I come from a different country, and she considers me to be inferior to her and her husband and by parking in a "better parking place" instead of using the main car park I forgot where my place is even though I was entitled to park my car in the parking space that she wanted for her husband.
7. I told her that this was not a reasonable request, and the car park spaces after the air conditioning unit are not her property, therefore I did not accept her instructions and I will continue to park in that area when spaces are available. Ms Rosier told me that I must listen to her because she is the manager and what she says goes, and said

“Everybody is listening to me why can’t you”? I answered “Because your request is not reasonable”.

8. I have complained to operation manager Dave Preston and Tracey Rosier has stopped harassing me regarding where I park my car although I noticed that she has started to display a passive-aggressive attitude toward me since then.
9. On (page 461) there is a reference to Ms Rosier’s explanation of why she asked me to move my car, according to Mr Gary Lund (the person who dealt with my appeal) Mr [sic] Rosier stated that she remembers speaking to me once about where I parked my car “not to park at the front of the building in the visitor parking spaces”, this is not true as she “had a go at me” in three separate occasions and not only once as she claims for parking in front of the building after the air conditioning unit and not at the front of the building on the visitor only spaces, according to my contract a failure to accommodate a genuine request from the management team could result in an investigation and disciplinary action can be taken against me if proved that I was in error, Ms Rosier did not take any disciplinary action against me for refusing her request to move my car regarding this incident, although it is true that Ms Rosier husband is parking his car in the main car park and no longer park in front of reception after the air conditioning unit he only started to do this around the time when I send my email to Mr Baxter and requested Ms Rosier to be relocated (p 294-296) where I made references about this incident and/or around when I contacted Acas/ET regarding my case, in the Spring of 2023.”

42 In paragraph 6 of her witness statement, Mrs Rosier said this.

‘The first time I was aware that Alin has a link with Romania is when he raised his grievance on 27 March 2023 about me making a comment related to Romania (page 352), which was reported to me soon after. This was the first time he mentioned “discrimination”, that I was aware of. His grievance of 10 January 2023 (page 237) did not mention race, or discrimination.’

The documentary evidence

- 43 We had before us no “written proof that everybody is allowed to park in front of reception after the air conditioning unit” of the sort to which the claimant referred in paragraph 3 of his witness statement.
- 44 The claimant first referred in writing to the manner in which Mrs Rosier had spoken to him about car parking in the first part of 2020 in the first of two written

grievances which he stated in 2023. That first one was dated 10 January 2023 and was at page 238. In it, the claimant wrote this.

“In the past Tracy Rosier has bully and harassed me in more than one occasion because I was parking my car in front of the warehouse after the air con unit where the colleagues are allowed to park however she was not happy because as she stated her husband which is a lorry driver like to park there and no longer find spaces available because more colleague prefer to park there and I was one of them I have explained to her that I’ve double check with my shift manager and the place is for everybody to park not just the drivers or a small privilege number of individuals in the end I had to complain to Dave Preston and she finally stopped with her nonsense.”

- 45 The claimant did not press that as part of his first written grievance of 2023. All that he said about it when that grievance was investigated by Mr James Healy was (see page 247) this.

AM My first point is that this could be resolved by mediation, but that happened before, not exactly the same thing but we have history, so I don’t want mediation

JH Have you had mediation before.

AM No. I involved Dave Preston and did not make it formal on that occasion. I believe that I have already given her a chance.”

- 46 On 4 April 2023, the claimant was interviewed by Mr Williams when the latter was considering the appeal against the dismissal by Mr Healy of the claimant’s grievance. There was a record of the interview at pages 385-388. At page 386, the claimant said that “First incident during pandemic about car parking has [been] dealt with by Dave Preston.” At page 387, there was this record of what the claimant shortly afterwards said to Mr Williams.

‘During Covid tracey has often sit in reception greeting colleagues. When I entered the building she shouted at me to go out and move your car. I replied its my right to park there past the air con unit as Patricia sent an email to say colleagues can park there but its first come first serve. She always shouts at me in front of other colleagues never pulls me to one side. So another occasion she done exactly the same thing. I told her Ive got an email and I can park there. I also mentioned with agnes my old shift manager confirmed with general office that I can park there if there is a free space. On the third occasion she asked me why sometimes you park there and why sometimes the main car park. I told her I park in the main car park if there is no space at the top, I realised she wasnt going to stop, I asked her “tell me exactly what your problem is”. She replied “my husband works for asda a lorry driver and he likes to park there, he often complains to me

that he can't get a space there". I told her this is not my problem and I will park there if there is a space. She said "Im the manager Im telling to stop parking there and I dont like to see you". Just to confirm this is background. I wrote an email to DP and KT confirm.'

- 47 On 15 May 2023, the claimant appealed the dismissal of the second of his two written grievances of 2023. We set out that second grievance in paragraph 147 below. The appeal letter was at pages 415-416. It had five numbered appendices. The first one was at page 417. All of that page was relevant, but we record here that it started in this way.

'During the covid-19 pandemic managers at Asda Brackmills were greeting the colleagues at the reception on daily basis at the beginning of each shift, one day Tracy Rosier started shouting at me in front of everyone after I've entered the building to go outside and move my car from the reception area (after the air conditioning unit) to the main car park.

I've told her that it is my right to park in front of the reception area because an email have been sent by the Health and Safety transport manager Patricia Bhaidas with the layout of the warehouse and the parking spaces and that all Asda employee can park it there based on the rule "first come first served".

Few days after Tracy Rosier have done exactly the same think again she shouted at me to go out and move my car while I've entered the building at the beginning of my shift. I have told her that in addition to the email from Patricia my manager at the time Agnieszka Gajos has double checked with the "general office" and confirm it to me that I'm safe to continue parking there when spaces are available and that that area is for all Asda employee to use and not just for a small number of privileged individuals.'

- 48 The claimant did not put before us either an email sent by Ms Patricia Bhaidas or an email from him, the claimant, to Mr Preston about the matter. The claimant said that the respondent's system had deleted the emails. Mr Baxter told us in oral evidence that emails were automatically deleted during the period in question when they were three months old and that staff were told to save a copy of the email in a digital folder if they wanted to retain it.
- 49 Mr Lund was asked by the respondent to determine the claimant's appeal against the dismissal of his second grievance. In the course of doing that (as we record in paragraph 157 below), Mr Lund asked Mr Preston whether or not he recalled anything having been said about the issue of where the claimant could park his car and whether the claimant had written to him about it. There was at page 452.16 an email from Mr Preston to Mr Lund, in the following terms.

"Hi Gary,

Following on from our earlier conversation.

I cannot recall a time where I have needed to manage Tracey Rosier around an incident in the car park. I do not believe there was ever formal process regarding car parking during Covid and where colleagues were required to park. There are strict rules around parking in Visitor or Drop off bays. This is clearly communicated on the side of the building and if colleagues are observed, they are required to move their vehicle to the main car park.

I would not usually manage a Department Manager as I manage through the line and would pick up with their manager who would be the shift manager.

Please let me know if you need any further clarification.

Kind regards

David Preston
General Manager

...
Lutterworth CDC"

The oral evidence and our findings of fact

- 50 Mr Baxter was asked in supplementary evidence in chief about the use of the car parking spaces which the claimant said he had wrongly been criticised by Mrs Rosier for using. Mr Baxter said that there were 15 spaces (to which we refer from now on as "the 15 spaces"). He said that they were allocated to be used by the transport staff, who came in every hour and used those spaces. He said that there was a demand for about 300 car parking spaces for the use of the workforce at Brackmills, and the respondent could not have a situation in which there were for example 300 people trying to park in 15 spaces. He also said, not under oath, but as an interjection from the back of the hearing room during the claimant's cross-examination in response to a question asked of Ms Rollings by EJ Hyams, that it was "unrealistic" to allow the 15 spaces to be used on a first-come first-served basis, although "outside peak times", that approach was "not enforced strictly". During his oral evidence, in re-examination, Mr Baxter said that there were security gates beyond the 15 spaces, and that lorries were required to be permitted to go through them (to get into and subsequently to exit the secure area behind the gates). That was a further reason for limiting the freedom of the non-transport staff to use the 15 spaces. We accepted that oral evidence of Mr Baxter, and we also accepted as true what he had said to us from the back of the room, not under oath, about it being unrealistic to permit the 15 spaces to be taken on a first-come first-served basis, but that outside peak times, the informal prohibition on using them was "not enforced strictly".

- 51 Mrs Rosier's oral evidence in answer to supplementary questions in chief included that the claimant was by no means the only person to whom she had spoken about parking their cars in the 15 spaces: she said that she had told "many people" that they should not have parked in those spaces, and that when she had done that, apart from the claimant, they had then gone and moved their cars. In contrast, she said that the claimant had responded that he had a right to park there. What Mrs Rosier did not say, but which emerged from what the claimant himself told us, was that he did not move his car when she told him that he should not have parked there. As a result, he was the only person to whom Mrs Rosier had spoken about parking their cars in the 15 spaces who had not moved his or her car as a result of what she had said to him or her.
- 52 Mrs Rosier also was adamant that she had spoken to the claimant about his car being parked in the 15 spaces only once. She was adamant that the passage which we have set out in paragraph 41 above was not true in so far as it asserted otherwise. We accepted that that was her current recollection. We also concluded that it was more likely than not that she would have remembered the event occurring more than once because it would have been likely to have tried her patience somewhat for the claimant to have said more than once that he had a right to park his car in the 15 spaces and then refused to move it. We therefore concluded that she had spoken to the claimant only once about moving his car. Was that, to any extent, said to the claimant because of his race? We return to that issue in paragraph 199 below, after stating our other findings of fact and drawing all of the relevant threads together.
- 53 Before moving on to the next event, speaking chronologically, about which the claimant complained, we state one more relevant finding of fact here. That is that, given all of the above factors, we were persuaded on the balance of probabilities that a manager in the position of Mr Preston would not have criticised Mrs Rosier for telling the claimant to move his car from the 15 spaces. Rather, we concluded, it was far more likely that if the claimant had complained to him about what Mrs Rosier had about parking in the 15 spaces that he (Mr Preston) would have told the claimant not to park his car in those spaces.

Issue 3(ii): Did Mr Frank Smith say anything to the claimant about the way that he talked at the beginning of 2021, and, if so, what did he (Mr Smith) say?

- 54 At page 386, there was a typed record of something which was recorded by hand on page 379 as having been said by the claimant to Mr Williams when the latter was investigating the claimant's second grievance and in doing so was speaking to the claimant on 4 April 2023. That something was that

"Frank Smith made a comment saying since you've got a british passport you are acting differently because I said hello geezer to Ahmed Ambar."

- 55 That was said in answer to the question stated in the row immediately above it, which was this.

“So this grievance is there anything you havent raised previously that you would like me to look into”.

- 56 Chronologically speaking, that was followed by the claimant saying, in his first ET1 form (which was presented on 18 April 2023), at page 30, this:

“Beginning of 2021 Frank Smith comments about the way I’ve changed the way I talk after becoming British Citizen.”

- 57 In considering whether that was said, and so whether it was to any extent an indication of a tendency on the part of Mr Smith to discriminate because of race (within the meaning of section 9 of the EqA 2010), we took into account the fact that at page 228 there was a copy of the claimant’s “Certificate of naturalisation as a BRITISH CITIZEN”, and that it was dated 9 December 2020. As a result, it was entirely possible that Mr Smith said something to the claimant about the fact that the claimant had become a British citizen. Having said that, Mr Smith did not recall doing so. He was, in fact, absolutely sure that the claimed comment was not said by him. He said when pressed on what was stated in the document at page 546 (to which we refer in paragraph 37 above) in cross-examination that he sat in the same place every time he went for a meal break and put in his earphones, and that he was “100%” sure that he had not said what the claimant stated in that document. At page 546, the claimant had written (as we say in paragraph 37 above, in late 2023 or the first half of January 2024) that Mr Smith had said this:

‘At the beginning of 2021 while I was having diner in canteen at the workplace, Frank Smith who was also in canteen at the time at another table shouted at me “Hei Alin what’s up with the way you talk!? I have notice that since you got that British Passport you have changed the way you talk with people!!”.’

- 58 The rest of what was on that pages was in these terms.

‘Mr Frank Smith made the comment right after he heard me greeting Mr Ahmed Ambar with the phrase “How you doing geezer”?’ (Those are the words Mr Ambar is using very often while greeting peoples).

Mr Smith have been the only individual who appears to have an issue with me acquiring the British Citizenship/Passport by making nasty comments, as all the other colleagues who knew about my achievement have either congratulate me or they have chosen not say anything.’

- 59 Having heard and seen Mr Smith give evidence, and having considered all of the evidence before us relating to the claimant's allegations about what Mr Smith had done, or as the case may be not done, we concluded that Mr Smith did not say the words which we have set out at the end of paragraph 57 above, or anything like them. We also concluded that if Mr Smith said anything to the claimant about the fact that the claimant had recently acquired British citizenship shortly after he had done so, then whatever he did say was light-hearted and in no way negatively motivated (within the meaning of paragraph 72 of the judgment of Underhill LJ in *Unite the Union v Nailard* [2019] ICR 28, to which we refer in paragraph 13 above) by the claimant's race.

Alleged homophobic comments: issues 4-6

- 60 The first time that the claimant alleged that anything which might be called homophobic towards him was in the email of 5 December 2022 which we have set out in paragraph 99 below. The allegation was in these words (only).

"There was another incident recorded in the past when Frank together with another intake colleague made homophobic jokes about myself even though I've asked them to stop previously this was handled by operation manger Karl Tulinski at the time."

- 61 The next time that that allegation was made was in box 8.2 of the first ET1 claim form (which was presented on 18 April 2023), at page 30, where this was said.

"Beginning of 2022 Frank Smith made homophobic joks/ statements about me and my colleague Marius Piciu refering to me as Marius wife."

- 62 Three days later, the claimant sent the email at page 36 to the tribunal, in which he wrote that he would

'like to add another claim for Race Discrimination/Race harassment, after I have gone through the evidennce/ notes I have realize that the incident at the begging of 2022 when Frank Smith came to my table while having dinner in canteen at the work place with my colleagues Marius Piciu and Joanna Gorska, Frank Smith shake Marius Piciu hand and said "congratulations for having dinner with both wives". I have written a letter of complain after the incident and operation system manager Karl Tulinsky has dealt with the case.'

- 63 Less than an hour later, the claimant sent the email at page 37 to the tribunal, which was in these terms.

"Please accept my apologies I have just realize that I have make a mistakein my previous email, the new claim I want to make is for sex orientation discrimination/ harassment."

- 64 The allegation was not as far as we could see the subject of further statements by the claimant (that is to say, we could see no record in the bundle of the claimant saying anything more about it) until he wrote the document at page 547 (to which we first refer in paragraph 37 above), i.e. at the end of 2023 or the beginning of 2024. There, he said this.

‘Before joining the stock and system team around the beginning of 2022 Frank Smith and Jae Hood were making homophobic jokes about myself and another colleagues of mine Marius Piciu by asking Marius “Where is the wife”?, and laughed loudly in front of other colleagues. They were referring at me as Marius Piciu wife despite the fact that I have told them to stop with this statements/jokes as I found them to be humiliating and embarrassing.

One day I was having dinner with two colleagues of mine on the break time at the workplace one female Joanna Gorska and one male Marius Piciu.

Frank Smith came to our table shook Marius Piciu hand and said: “Congratulation Marius you are having dinner with your both wife’s” and immediately went back to his table, leaving all three of us in shock,

My colleague Joanna said “who is he? How is he dare talking like this? We should complain.

Next day I have wrote a letter of complaint and give it to the “general office” although I have stated that I do not want Frank Smith to be investigated formally and just want him to be made aware that his behaviour is totally unacceptable and that he needs to stop immediately and I was later called by Karl Tulinsky who was system operation manager at the time for a more detailed conversation.

During the conversation with Karl he told me that he previously dismissed colleagues for similar offences and he thanked me for being honest by saying that I have previously been involved in banter with both colleagues Frank Smith and Joe Hood although after they started with the homophobic comments I have stopped talking with both of them.

Karl also said that when dealing with bullies the best strategy is to always ignore them because they will eventually get the message and stop, because Karl Tulinsky is someone that “I’ve always look up to” I accepted his advice.

Jae Hood dramatically changed after this incident and I never had problems with him since.’

65 The claimant's final version of what was said in this regard was in paragraphs 11-16 of his witness statement. The final three of those paragraphs were for the most part in the nature of comment rather than evidence. The first three were as follows.

'11. One day around the beginning of 2022 I was in the canteen having dinner with my colleagues Marius Piciu and Joanna Gorska (p,546), out of nowhere Mr Frank Smith came to our table shook Marius' hand and said "Congratulations Marius for having dinner with your both wife's", before this incident Frank Smith and Jae Hood were making jokes referring to me as being Marius Piciu wife although I have told them to stop and I have stopped talking with them because I felt embarrassed and offended by the homophobic abuse.

12. All three of us were left in shock and Joanna said "Who is he? how does he dare say these things? we should complain". The next day I wrote a letter of complaint as I felt humiliated by Ms Smith's comments and handed it to the "general office", and I was later invited by system operation manager Mr Karl Tulinski to a meeting. Karl asked me how I wanted proceed and told me that he had previously dismissed other colleagues for similar offences. I told Karl that I wanted him to speak to Frank Smith and Jae Hood and make them aware of their unacceptable behaviour but not to investigate them formally and potentially lose their jobs.

13. Karl thanked me for presenting the whole picture by informing him that I was involved in banter with Frank and Jae previously (although I stopped talking with them when they started with the homophobic harassment) and advised me not to react to bullies they will eventually stop, and to follow and trust the process and keep report them if they do not stop."

66 Mr Piciu was interviewed by Mr Pickersgill in connection with the respondent's response to the first claim, and the typed record of the interview was at pages 451-452 (the handwritten record being at pages 452.1-452.2). The material part of the record was as follows ("BP" being Mr Pickersgill; "MP" being Mr Piciu).

"BP In 2020 there was an issue that happened in the canteen where yourself, Alin and Joanna Gorska can you remember what happened?
MP No

BP Can you remember Frank Smith saying congratulation for having your dinner for both of your wives?

MP I remember there was a conversation but exactly what was said I can't remember but I remember Alin was annoyed.

BP After Alin appeared upset or annoyed what happened next.
MP Nothing happened next and Alin was never called for any statement.

BP How did you interpret this conversations.
MP Sometimes we do jokes between, however the jokes sometimes goes far. If Frank did say that then I will be more offended than anyone and myself and Alin never crossed the line.

BP How did Frank look when he said this?
MP I do not remember.

BP Can you remember any other time when Alin was offended by any jokes from Frank.
MP No.”

67 Mr Tulinski’s witness statement dealt only with this allegation of the claimant’s. In it, Mr Tulinski said this.

- 3 I have very limited involvement in the allegations Alin has raised as part of his claim. However, I was involved in Issue 4(i), where Alin says that Frank Smith made homophobic comments about him (Alin explains this issue at page 546 of the bundle).
- 4 My recollection is that when Alin reported this incident to me at the time, he said Frank had made comments about Alin’s wife, Adriana, who works with him. I understand Alin is now saying they were about Marius Piciu and implied Marius was his wife. He didn’t mention that to me as far as I can remember. I understand Alin says this happened at the beginning of 2022 – I’m not sure of the date but I think it was earlier than that.
- 5 At the time, I looked into the matter and concluded that Alin and Frank were both engaged in giving each other banter but that Alin felt Frank went too far by saying something about Alin’s wife Adriana. I didn’t reach any definite conclusions about what was said, but concluded it didn’t merit being taken forward to a disciplinary process. At the time, Alin didn’t want it taken any further so I didn’t speak with Frank about it. I think I said I’d have a low-key word but I forgot, I think things were busy at the time with Covid.”

68 Mr Smith’s evidence in his witness statement on the allegation stated as issue 4(i) was that he did not recall the incident. He continued:

“12 ... I can’t imagine saying it. I did used to get on well with Marius, who is a close colleague with Alin, before Alin took against me – so maybe me and Marius were having a joke together. I honestly don’t remember. I

knew Alin was married to a woman and had a child, so why would I suggest Marius was his wife? I can see that when Marius was asked about this in June 2023 he couldn't remember me saying this (page 450 [i.e. page 451; by the time of the hearing before us, all references in witness statements to pages of the bundle were to a number one below the actual page number]. To the best of my knowledge and belief, I did not say anything like what Alin says I said.

13 Alin says he reported this incident to Karl Tulinsky at the time, but Karl didn't say anything to me. Karl is a very upfront person, he's the sort of manager who would come right over and have a word if there was any problem."

69 It was suggested to the claimant in cross-examination that the reference to Mr Piciu being the claimant's wife was the result of the jocular concept of a work wife, which is a concept, it was put to us, which arises from the fact that attending the workplace as a full-time employee usually means that one spends more time with one's colleagues than with one's spouse. The claimant disagreed.

70 Mr Pickersgill said this in his witness statement.

'39 I was also involved in helping Asda to investigate Alin's allegations against Frank in his Employment Tribunal claim, by taking a colleague statement. I interviewed Marius Piciu on 6 June 2023 about Alin's allegation of homophobic comments at Issue 4(i) (page 450). Marius said he could remember that there'd been a conversation that had annoyed Alin but he couldn't remember what was said. He said he couldn't remember any other occasions Alin had been offended by Frank.

40 The idea of the "work wife" is something I've heard of, that people say when a colleague spends a lot of working time with another colleague – in my understanding, it's a joke based around spending lots of time at work so that you end up spending more time with your close work colleague than you do with your loved ones/partners at home. It's never occurred to me to view it as a comment on sexuality or on anything to do with sex. I don't see it as reasonable to be offended about such a comment."

71 We accepted that evidence of Mr Pickersgill.

72 Mr Tulinsky was cross-examined on his recollection and he stood by what he said in his witness statement.

73 In cross-examination, Mr Smith said that he would not have said anything which was homophobic as a member of his close family is gay and saying something

homophobic would be “rude to [his family], whom he “[did] not disrespect”, and that he would “definitely not be homophobic as that would be insulting to people [he cared] about”. He said that he did not recall the alleged conversation. As noted by EJ Hyams (with the note tidied up for present purposes), he then said this.

“I recall you calling me chubby. But not this.

Look at the cameras for whatever day you like and you will see that I do not sit there. I sit with my back to the wall; I put earphones in, watch Netflix and recharge my batteries before going back to work.

The incident didn’t happen.”

- 74 Mr Smith was plainly and understandably anxious about being accused of the wrongdoing of which was accused by the claimant in these proceedings and before then in the workplace, but in any event we found Mr Smith to be an honest witness, doing his best to tell the truth.
- 75 Drawing together all of the threads which we have set out or described in the preceding paragraphs above, we found the reported statement of Mr Piciu set out in paragraph 66 above that “If Frank did say that then I will be more offended than anyone” to be highly material. We thought nevertheless that saying to a man that a man was his wife was not obviously related to sexual orientation, given that the members of same sex marriages in our experience referred to their spouses as the appropriate term for a person of the sex in question. So, a married gay man would (as far as we were aware) normally refer to his spouse as his husband, not as his wife, and a married gay woman would (as far as we were aware) normally refer to her spouse as her wife. We therefore thought that Mr Piciu would probably have been even more offended if Mr Smith had referred to him (Mr Piciu) as the claimant’s husband than if he had referred to Mr Piciu as the claimant’s wife. In any event, we concluded that if Mr Smith had said what the claimant alleged him to have said, then Mr Piciu would have been offended by it, and would have remembered it.
- 76 In those circumstances, we concluded on the balance of probabilities that Mr Smith said something to the claimant and Mr Piciu at the latest at the start of 2022 about which the claimant complained to Mr Tulinski but that Mr Tulinski did not take it up with Mr Smith for the reasons given by Mr Tulinski in paragraph 5 of his witness statement, which we have set out in paragraph 67 above. We also concluded that whatever it was that Mr Smith said at that time was not in any way connected in the mind of Mr Smith with the protected characteristic of sexual orientation.

Issue 3(iii): Did Mr Smith in the spring of 2022 do what the claimant claimed he did when working next to the Claimant on the ‘QC station desk’?

- 77 In response to the question of Mr Williams which we have set out in paragraph 55 above, the claimant said, after referring to the claimed statement of Mr Smith of early 2021 relating to citizenship, this (as set out in the second box on page 387).

‘There was another incident I didnt report because Frank apologised 20 minutes after. We work together at the QC station. I left QC station to go on to the floors. I came back and Frank out of nowhere started shouting at me saying “I will not help you with your boxes” I replied “thats okay I didnt ask you to” then I realised my boxes were sitting on a dollie next to Frank I asked “Who put your boxes on the Dollie” he replied “Were not having this conversation you only Talk to people when you need there help” I said Frank have nothing against you, you need to stop this behaviour then he left. I don’t provoke them, when he comes in the op room I try not to make eye contact with him. after he walked he returned 20 minutes later shook my hand and said “Im better than this” and apologised.’

- 78 That was also referred to in box 8.2 of the first ET1 form. The only words used in that regard were these (on page 30).

“Spring of 2022 Frank Smith is harassing and bullying me on Intake department while working next to each other on QC station.”

- 79 That allegation was the subject of the following passage in the witness statement of the claimant.

‘17. One day in the Spring of 2022 I was deployed to retrieve boxes from the cranes and had to share the same desk with Frank Smith in the Intake department (QC station) we were sitting next to each other. At one point I left the working station and went on the floors to check few locations, on my return Frank started to shout at me “Alin I will not take your boxes from the belt!!”, I replayed “That’s fine I did not ask you to do it” he continues “you only speak with people when you need help”. I then told Frank that there was no need for this behaviour because I did not want any problems with him and he was creating a hostile environment and I was not comfortable sharing the same desk anymore, and I only retrieved a small number of boxes at the time to not interfere with his job.

18. I then spotted my boxes on a dolly next to the belt and asked Frank if he knew how they ended up there as they should be on the belt, he shouted at me “We are not discussing this !!” and left the workplace. After about 20 minutes he returned and said “Alin I want to apologise for my behaviour I’m better than this I’m having a bad day, and he shook my hand”. I’ve told Frank that we should try and forget the past and

move forward because, with my new role, we will interact more often from now on and it would be better to have a good professional relationship. Frank replied “Yeah Yeah Yeah !!”, p 547.’

80 Page 547 was one of the pages to which we refer in paragraph 37 above. Its content was to the same effect as that passage of the claimant’s witness statement.

81 Mr Smith’s witness statement evidence on this factual issue was in the following paragraphs of his witness statement.

“15 I do remember this incident. Alin wanted me to do his work for him, but I wasn’t going to do that – he was getting paid to work for ASDA just like me and he should be doing his job. I felt like Alin was taking advantage. I didn’t shout at him but I did speak sharply to say no I would not take his boxes from the belt and that he should do it himself not ask for my help. What I said had nothing to do with Alin’s race or anything else like that.

16 I did feel I’d been a bit grumpy about this so I said to a colleague that I was going to find Alin and say sorry. My colleague said don’t bother as it was nothing, but I wanted to. It’s rare that I have a grumpy day but that day I had a lot of work on, but I felt it was the right thing to do to say sorry, so I found Alin and I did. He seemed to accept that.”

82 The fact that claimant was, on his own evidence, insistent that he had the right to park his car in the 15 spaces when, given our findings stated in paragraphs 50 and 53 above, he was wrong to say that, was a factor which supported the evidence of Mr Smith to the effect that the claimant had suggested that he, Mr Smith, did something to help the claimant to do his work. Given that factor, but in any event having heard and seen Mr Smith and the claimant give evidence, we accepted and preferred Mr Smith’s evidence on what happened in the spring of 2022 at the QC station desk. Whether or not Mr Smith’s refusal to take the boxes in question from the belt was less favourable treatment of the claimant because of his race, or racial harassment within the meaning of section 26(1) of the EqA 2010, depended (given that there was nothing overtly connected with race in the claimed circumstances) on whether that refusal had anything to do with the claimant’s race. We return to this issue in paragraph 202 below, after stating our material findings of fact on the other incidents in which Mr Smith was alleged by the claimant to have breached the EqA 2010.

Issue 3(iv): The events of October 2022, when the claimant was asked (ultimately by Mrs Rosier) to create new appointments for some items

83 The events of October 2022 which were dealt with in issue 3(iv) of the agreed list of issues were described by the claimant (for example in the heading above

paragraphs 19-21 of his witness statement) as Mrs Rosier minimizing his work. The claimant relied in this regard on a comparison with the manner in which Mrs Rosier responded to an error made by Ms Louise Davis at the beginning of March 2023 (which was the subject of issue number 3(vii) in the agreed list of issues).

- 84 This was another issue which the claimant raised when asked by Mr Williams whether there was anything else he wanted to raise on 4 April 2023, as recorded in paragraph 55 above. At the bottom of page 387, in the final box on that page, the claimant was recorded to have said this.

“I have another example tracey sent Jay to ask to make a reappointment but I did it and something went wrong and they were unable to receive. So next day Simon Fowler informed me I needed to be retrained because intake made a complaint. I went through everything with Louise Davis She said the only mistake I’ve done is attached P/O on cancelled status while trying to make new appointment. However she said and it was confirmed by Simon that intake need to make sure P/O all in active status before asking for new appointment. I immediately realised what had happened and went to challenge tracey and Jay on intake to ask why they didn’t follow correct process. tracey replied we will give the P/O and you will let us know if theres any issue. I strongly believe that tracy Rosier and Frank Smith display this behaviour towards myself because they consider me to be inferior and they will not do it for someone who is british born who will be more likely to report this.”

- 85 That too was then referred to in box 8.2 of the claimant’s first ET1 (at page 30). It was done in these terms (only).

“October 2022 Tracy Rosier created a situation to minimize my work performance.”

- 86 That allegation was then stated in a little more detail in the document stated to be appendix 2 to the claimant’s appeal against the dismissal of his second grievance. That appeal was stated in the document dated 15 May 2023 at pages 415-416, to which we refer in paragraph 47 above. Appendix 2 was at page 418.

- 87 Mrs Rosier’s evidence on the allegation in question was primarily in paragraph 23 of her witness statement, which was in the following terms.

“Issue 3(iv) – Alin says that in October 2022, I created a situation to minimise his work performance (Alin explains this at [418]). He says I told him to create reappointments for cancelled purchase orders, which doesn’t work as purchase orders need to be active before they can be worked on. I never told him to do this – that’s not even part of my job, I wouldn’t know how to do it. I remember that Alin did do them wrong and I did tell Simon about it. I said to Simon maybe he needs a bit more training on this task.

This is all perfectly legitimate and wasn't targeted at Alin, I was simply flagging errors he'd made to his manager, I would for any colleague. It had nothing to do with Alin's race."

- 88 In cross-examination, Mrs Rosier said that the part of the respondent's computer/network system which the Intake department used did not show that the purchase orders in question were inactive. Rather, she said, they were shown there as being active. She also said that she had not said to the claimant (as claimed on page 418) that the claimant would let the Intake department know if there were issues and they would "rectify it". Rather, she said, she said that if there were any problems, then the claimant should "please come and let [her] know as [she would] need a new appointment number." We accepted that evidence of Mrs Rosier.
- 89 As for the circumstances of the error made by Ms Davis in early March 2023, on which the claimant relied by way of comparison, Mrs Rosier said this in paragraph 25 of her witness statement.

'Issue 3(x) – Alin says that on or around 1 March 2023, I had "double standards" by telling another colleague, Louise Davi[s], not to worry about a mistake she had made (Alin explains this at page [423]). I don't remember this particular error Alin says Louise made, but I recall that Louise (who has since retired) was very experienced and if she ever did make a mistake, she'd realise, fix it and report it to me saying sorry. She was very professional. When someone handles a mistake like that, of course I say don't worry about it. When I discover a mistake or if someone is funny about it when I flag a mistake, of course I am less sympathetic about it. It's got nothing to do with race.'

- 90 Page 423 was appendix 5 to the claimant's appeal against the dismissal of his second grievance. It was in these terms (precisely; all errors in the text are original).

'In March 2023 probably 01.03.2023 although I'm not exactly sure about the exact date Louise Davis was working on receiving and she has done a mistake by allocating the appointment to the wrong door number, wants she has realized she told Tracy Rosier who was in the opps room at the time "Sorry about this Tracy" the response from Tracy Rosier was "Don't worry about it".

Compared with the "Ti-Hi incident" when I forgot to give the extra space after I have changed the Ti- Hi and Tracy Rosier waited for me finish my conversation on the phone and then criticised and humiliated me in front of my colleagues by saying "You forgot to give the extra space didn't you? Instead of asking someone else in the office to give the extra space who will have take a few seconds it is very clear to me that Tracy Rosier has

double standards and she treats me differently (because of my nationality and the fact that I have complained in the past to David Preston because she harassed me regarding the parking incidents) then my British born colleagues In this case Louis Davis.

Tracy Rosier can be very nice and polite she is often greeting my British born colleagues Louise Davis, Elaine Jones and Sally Gilbert-Hill with the phrase “How are you my lovely?” however when it comes to me she will not say Hello or speak to me at all unless is something work related and she really has to.’

- 91 We accepted Mrs Rosier’s evidence about the manner in which Ms Davis usually worked and we concluded that Mrs Rosier did not say to the claimant “we will give the P/O and you will let us know if there’s any issue”, or words to that effect in connection with the situation which was described in paragraph 3(iv) of the agreed list of issues. Rather, we accepted Mrs Rosier’s evidence that she merely did what she stated in paragraph 23 of her witness statement, which we have set out in paragraph 87 above.

Issue 3(v): Did Mrs Rosier on 7 November 2022 humiliate the claimant “in front of the whole team for making a minor mistake (the TI-HI incident)”?

- 92 The claimant first raised the issue of the “Ti-Hi incident” on 4 April 2023 when asked by Mr Williams the question recorded in the second box on page 386, in which Mr Williams asked the claimant to “elaborate” on the “other occasions” (i.e. in addition to the thing which was the subject of the claimant’s second grievance, to which we refer in paragraph 143 onwards below) when the claimant said that Mrs Rosier had done something to which the claimant objected. The claimant’s response started in the next, i.e. the third, box on page 386, and the relevant part of it was these words.

‘So one shift colleague asked me to change the [□]. I changed this and start raising a ticket, Tracey came in the ops room and despite having many colleagues available to give extra space which takes less than 10 seconds, she waited for me to finish on the phone raising a ticket and in front of everybody she said you forgot to do the space didn’t you and another occasion her behaviour was much different when Louise Davis while working on receiving she made a mistake and said “sorry tracey” tracy reply was “ Don’t worry about it”.’

- 93 The claimant then referred to the issue in box 8.2 of the ET1 claim form, at page 30, in this way.

“07.11.2022 (The TI-HI incident in the opps room) Tracy Rosier humiliated me in front of the whole team for making a minor mistake.”

- 94 In appendix 3 to the appeal against the dismissal of his second grievance, the claimant expanded that complaint. That appendix was at page 419. The relevant part of it was in these terms.

‘On 07.11.2022 around 4 PM Monica Gornika Intake colleague on late shift came in the opps room and she ask me to change the Ti - Hi for one item , I’ve changed it but forgot to give extra space for the items as I was involved in a phone conversation with Jordan Hillcrane in regards to my HOST application as I was not able to log in, Traci Rosier came in the opps room shortly after front of me and waited in for a while to finish the telephone conversation with Jordan instead of just ask another colleague who could have given the extra space in seconds as this a very easy fix.

Once I’ve became available, she criticized me in front of everybody as she always like to do by saying “You forgot to give Monika the extra space, didn’t you?’

- 95 That was then expanded on further in the document at page 550, to which we first refer in paragraph 37 above. The text on that page was as follows.

“During the TI HI incident Tracey Rosier did not show any interested in resolving the Ti Hi issues from the business/process perspective, she was only interested in criticising me in front of my colleagues because she saw a good opportunity in doing so.

If her mind set would have been set on resolving the issues from the business perspective, she would have asked another colleague from the office to change the ti hi instead of waiting 5 minutes in the middle of the room with a menacing body language for me to finish my phone conversation with Jordan Hillcrane, she would have also come with the items details ready or took them from my desk and give them to one of my colleagues to sort it, as it would take only a few seconds to be resolved.

Also, I have never seen a manager getting directly involved in TI HI issues before, it is always the receiving colleague who is reporting the issues; hence the colleague does not have to stop working because a size is not going through, what the colleague usually do is put the problematic items on the side and continue receiving the next items.”

- 96 Mrs Rosier’s response to that allegation was in paragraph 24 of her witness statement, where she said this.

“Issue 3(v) – Alin says that on 7 November 2022, I humiliated him in front of the whole team for making a minor mistake (the Ti-Hi incident) (Alin explains this at [419]). Again this relates to an error he had made, I found out he had not allocated enough space for the stock that had arrived so I

popped into the office to ask him to sort it out. I spoke appropriately to Alin, just saying you've forgotten to give the extra space for Monika. It's my role as Intake Manager to follow up problems my team have come across – Monika hadn't been allocated the right amount of space by the Stock & Systems Team, so I went into their office to follow that up. I did wait for Alin to get off the phone, because I knew he was the colleague dealing with the task, so why would I tell another of his colleagues about his error, or ask them to fix it? I waited until I could ask him and did so politely. The whole incident was very short and I thought nothing of it at the time. It had nothing to do with Alin's race."

- 97 During the cross-examination of Mrs Rosier, she said that the claimant had failed to allocate sufficient space for the stock in question and that that failure had led to a situation in which the part of the respondent's computer/network system which the Intake team was using was refusing to permit the team to scan in the items in question. That refusal had the effect that the team could not receive the items from the lorry on which they were being delivered. Accordingly, said Mrs Rosier, she needed either the person who was the superuser on the core team, or the claimant, who was on that day responsible for "space management", to do what was required on the part of the respondent's computer/network system to which the core team had access. Mrs Rosier said that the superuser "could have done it but he had other jobs to do" and that the claimant was assigned to do space management, so that it was his job for that day. She said also this (as recorded by EJ Hyams and tidied up for present purposes).

"I stayed there as I did not think you would be long on the phone. I did not listen to your conversation on the phone. I did not know what it was about. You had done the Ti Hi and I needed the space which is why I asked you to do the space. ... I said it not nastily but more a question; did you forget to do the space?"

- 98 We accepted all of that evidence of Mrs Rosier, both in her witness statement and in cross-examination, with the exception of the final sentence of paragraph 24 of her witness statement, which we accepted as a statement of her genuine belief about her motivation. We return to that issue in paragraph 204 below.

Issue 3(vi): What precisely happened on 4 December 2022, when, the claimant claimed, a "heated exchange" took place between the him and Mr Smith, during which things such as wars, religion and slavery were discussed?

- 99 On 5 December 2022, at 18:40, the claimant sent the email at page 232 to Ms Anna Morris, copying it to Mr Simon Fowler, the claimant's line manager, Mr Yadev and Mr Ambar. The subject was "Incident in ops room". This was the first set of circumstances (speaking chronologically) which was the subject of contemporaneous documentation. That documentation was at pages 232-236. The email of 5 December 2022 was in these terms.

“On Sunday 04.12.2022 around 8 PM Frank Smith late shift intake colleague came to the ops room and started chatting with different colleagues nonrelated work subjects. He quickly involved himself in a heat exchange with Aurangzeb Raja and told him YOU ARE AN IDIOT in front of myself, Denis Yurukov, Alexander Savko and Refrefi Koskoviku, the subjects discussed were about wars, religion, slavery, and imperialism just to name a few (Before Frank arrival in the ops room these topics were not discussed colleagues were getting on with their daily tasks). During his argument with Raja specifically Frank displayed an aggressive behaviour and the feeling was that he’s ready to fight this caused Alex Savko to leave the room at one stage he shouted at me Alin come here come here why are you smiling there? (I want to mention that during the whole scene I’ve not said a single word and I’ve avoided eyes contact as I didn’t want this to escalate further) I was also ready to leave the office as it became very uncomfortable however Jae Hood came in and asked Frank to come out because there is work to be done and he already put a few calls out for him to report to intake. On Saturday 03.12.2022 Frank Smith also came into the ops room to discussed nonrelated work subjects and Marius Nagy came at one point and asked him to leave the office and get on with the jobs on intake.

Discussing the subjects mentioned above can be very upsetting for some colleagues with different background because of history however Frank seems to enjoy these discussions which caused Raja a lot of discomfort although he manages to control himself very well. There was another incident recorded in the past when Frank together with another intake colleague made homophobic jokes about myself even though I’ve asked them to stop previously this was handled by operation manger Karl Tulinski at the time.

Can you please investigate this complain and take the relevant action as this is now the second time that Frank behaviour is totally unacceptable although on the first occasion, I’ve asked for the incident to be recorder and asked senior management to made him aware of his unacceptable behaviour but not to be officially investigated. This is now the second time I’m reporting Frank unacceptable behaviour towards the colleagues and myself and against Asda values and I want to be very clear that if it will be a third occasion sadly, I will have no option but to report it to Asda Ethics together with all the evidence I’ve provide you.”

- 100 The claimant’s complaint was resolved informally. That was shown by the email chain at pages 233-235. There was at page 236 a file note made by Mr Fowler on 6 December 2022. Its contents (as with many of the key documents on the disputed events before us) were (unfortunately from the point of view of the length of these reasons) all material. They were as follows.

“As a result of a conversation between myself and Alin it was agreed that Alin was not interested in pursuing disciplinary action against Frank. However, he was interested in making sure that Frank was aware of his error so that it would not be repeated. Alin agreed that if I had a conversation with Frank, explaining the issue and the way Alin felt and Frank was accepting of his error, repentant and apologised to Alin, then this would be an acceptable conclusion to this matter.

Frank concluded on his own that he was in error and apologised to Alin without my interaction. I however, still had my conversation with Frank and recommended that he leaves political, religious, conflict and national history conversations to outside the workplace. I also requested that Frank places work requests into the office as required but does not disturb work pace by hanging about for the results.

Alin has confirmed that he is accepting of the apology and considers the matter closed but expects it to never happen again.

This matter though resolved has been forwarded to Frank’s Shift Manager for consideration on any further action to be taken.”

101 Mr Smith’s witness statement evidence on this incident was in paragraphs 18 and 19, which were as follows.

“18. I remember this incident because this is the false allegation I felt Alin had made about me, that I mentioned to Ahmed part of the disciplinary investigation in March 2023 (page [347]). That shift, I’d gone into the office and there was a discussion going on about religious wars, between Elaine and Alin and others. I joined in with a conversation that was already happening, and tried to deflect Alin away from picking on Elaine I could tell she was not enjoying the conversation. I did air some opinions about Britain having to step in to wars in other countries but I didn’t say anything to Alin about him or Romania and I didn’t suggest we get physical.

19 After the chat I felt like I wanted to smooth things over so I went to find Alin and said let’s not get into all that together. Alin seemed to agree.”

102 We concluded that Mr Smith was capable of being what one might call “loud”, but we also concluded that he was a caring and passionate man. He accepted (as we record in paragraph 135 below) that he was “opinionated”, but we accepted that as far as he was aware, the claimant was not taking part in the conversation of 4 December 2022.

103 Having heard both the claimant and Mr Smith give evidence, we did not accept that Mr Smith said (or shouted) to the claimant “come here come here why are

you smiling there?” We also did not accept that Mr Smith was during the discussion which took place on 4 December 2022 “aggressive” or that he gave any indication that he was “ready to fight”. We accepted in its entirety the evidence of Mr Smith about what happened on that day so far as relevant.

Issue 3(vii): Did Mrs Rosier on 9 January 2023 tell everybody in the office that the claimant did not work and that he abused his breaks?

104 In paragraph 34 of his witness statement, the claimant said this.

“On 09/01/2023 (p [240]), around 9:25 pm after I returned to the office from my ergonomic break Ms Rosier was in front of the office waiting for me and questioned me why the list of reappointments from Paul had not been done she also raised concerns why I am returning late from my ergonomic break suggesting that I abused my break she told me that she will check the CCTV cameras and that she will report me to my manager Mr Simon Fowler for not working and for abusing my breaks (Ms Rosier was angry), I told her that I went for a break at 9:05 and she ironically smiled and said that she will check the CCTV suggesting that I am lying to her after I went inside the office my colleague Mr Alex Savko (superuser on that day) (p 271-274), Ms Aneta Kirulik (p 262-266) and Mr Hengki Taylor (p 268-270) told me that Ms Rosier came to the ops room while I was in my break and told everyone in the office that I do not work, that I abuse my breaks and that she would check the CCTV cameras.”

105 Mrs Rosier accepted that there had been a conversation between her and the claimant on 9 January 2023 and that it was about a list of “reappointments” which “Paul”, i.e. Paul Hicks, had asked the claimant to do. Mrs Rosier was interviewed about the matter on 2 February 2023, which was of course much closer to the time of the incident in question than the hearing before us. She was interviewed by Mr Healy, and the typed-up notes of the note-taker, Mr Mark Jackson, were at pages 283-284. Most of the notes were in our view significant. The most important passage was this one, on page 283.

“So Paul Hicks came to me about 9pm and he put in a list of jobs and Alin was the receiver. I went in and Alin was on his break, I then went back to my desk and then seen Alin coming back from his break. I went over to him outside the office and I had Paul Hicks with me and I asked Alin when the list would be ready to do. He said he already had a list from Marek and it wouldnt get done and be past on to nights. I explained that these boxes were from morning shift and needed to be dealt with on our shift. I asked him If there was any one who could help him and he said he didnt know so I said to him let’s go in and find someone to help. When I got in the office I asked Alex if he could help but he said he was in the middle of doing handover. I dont believe I shouted at him. I was annoyed because the list wasnt done and it needed doing. It was put in a 2015. I did question him

about his break why late when things need doing. He replied he always goes at that time.”

106 Mrs Rosier accepted that she had referred to CCTV, but only in the context of this exchange, which was recorded on pages 283-284 in the following manner.

“JH Allegedly you went into the ops room and asked Alex Sabko and others in there and asked where Alin was?

TR Yeah thats right about 9pm.

JH So you wasnt making remarks regarding Alin of his whereabouts?

TR No. Alex said there was no evidence on the list that was brought in. I said the list was on the table. Alex said I didnt send an email so showed him where it was.

JH Did you say in the ops room that you was going to check CCTV regarding the list?

TR I didnt say I was going to check CCTV but I asked if they wanted me to.

JH Did you want to check the CCTV to check if the list was brought in or to check Alin.

TR No nothing to with Alin but to check the list being brought in.

JH Just to clarify at no point Tracy did not discuss in in the ops room in front of other colleagues Alin not doing his job and raising concerns of not doing his job.

TR Yes that right.”

107 In paragraph 13 of her witness statement, Mrs Rosier said this.

“When I asked Alex to help and expressed surprise that the work hadn’t been completed yet, Alex said there was no evidence of the work having been brought in and no email about it. I went over to Alin’s desk and found the work was still there. I said the list was on the table and asked if they wanted me to check CCTV. I know this was a bit touchy of me but it felt like Alex was suggesting I was making it up that brought the list in at 8.15pm [sic]. I wasn’t talking about checking CCTV to see what Alin was doing or when he was on his break, or anything like that – it was just an offhand comment when I felt I was being challenged about when the list had been brought in. I never actually did check the CCTV.”

108 If what Mrs Rosier said about when she referred to checking the CCTV footage was correct then the claimant had no direct evidence to give in that regard. The document at pages 240-241 was also at pages 238-239, and it was written only the day after the events to which it claimed to relate. However, a close reading of the document showed (despite the possible interpretation of the quotation set

out in the first indent below to the contrary) that it did not support the proposition that Mrs Rosier said to the claimant himself that she would check the CCTV footage. If that was right then the claimant must have referred to the CCTV footage on the basis of what he was told about it by colleagues in the core team (i.e. the team of which he was a member). In fact, it would in the circumstances have served no practical purpose to check the CCTV footage to see when the claimant went for his break, since the issue was not when he went on his break but why the work in question had not been done. In those circumstances, we concluded that Mrs Rosier did not say to the claimant that she would check the CCTV footage, and we accepted her evidence in paragraph 13 of her witness statement, which we have set out in the preceding paragraph above. The document at pages 238-239 included these statements (and for convenience we have repeated here the one that we have set out in paragraph 44 above):

- 108.1 “She also asked me what time I went for my ergonomic break and when I’ve replied she just start smiling ironically and said that she will check the CCTV cameras and speak with Simon next day she also mention this to all my colleagues in the ops room while I was away suggesting that I have done something unacceptable.”
- 108.2 “In the past Tracy Rosier has bully and harassed me in more than one occasion because I was parking my car in front of the warehouse after the air con unit where the colleagues are allowed to park however she was not happy because as she stated her husband which is a lorry driver like to park there and no longer find spaces available because more colleague prefer to park there and I was one of them I have explained to her that I’ve double check with my shift manager and the place is for everybody to park not just the drivers or a small privilege number of individuals in the end I had to complain to Dave Preston and she finally stopped with her nonsense.”
- 108.3 “My feelings are that Tracy Rosier is not just an incompetent DM who refuses to use her common sense and challenge without having her facts right and instead she is retaliating for the issues from the past I cannot understand how she expect for someone to reappoint 4 pages of items in less than two hours? Why is she mentioning in front of my colleagues that she will check the CCTV cameras suggesting that I’ve done something bad? When I’ve told her that I had my break at 9PM she ironically smiling suggesting that I’m lying? Instead of doing her checking quietly in the background if she has any doubts about my performance at work she goes and tell everybody trying to minimize my work and dent my reputation.”

109 Our conclusions stated in paragraphs 52 and 53 above indicated that the claimant’s recollection was not reliable and that he was now forming mistaken views. In addition, what Mrs Rosier said to us was consistent with what she said

to the respondent much closer to the events in question, and in any event we accepted her evidence on those events to which we refer in the paragraphs 105-107 above, and also in the other paragraphs of her witness statement which dealt with those events. Those were paragraphs 12 and 14-16. (Paragraph 11 was just a setting of the scene including by reference to documents in the bundle.)

- 110 In oral evidence, Mrs Rosier said that she would have wanted to be told that the list which had been put on the claimant's desk by Mr Hicks at (as indicated in the passage set out in paragraph 105 above) 8.15pm could not be done before the end of the shift if that was the case, and that it was a concern of hers that the claimant had not said to her team at the time of receiving the list that (1) he would not have time to do it, and (2) no one else in the team of which he was a member would have time to do it before their shifts ended.
- 111 We suspected that that was something of a secondary consideration, but in any event our conclusion on the facts was that Mrs Rosier would have treated anyone else who had done what the claimant did on that day in precisely the same way. We drew that conclusion in part from the fact that Mrs Rosier (1) acknowledged to Mr Healy her frustration, so that she was plainly not trying to hide anything, and (2) accepted that she had referred to checking the CCTV footage, which was capable of being seen as a little aggressive, albeit that it was capable of being justified if there was a need to check to see when the list was put on the claimant's desk. In addition, we found that what she said and did about the list was objectively justified and reasonable in that she was quite reasonably concerned about the fact that the work had not been done and that nothing had been said about the list, such as that it could not be done before the end of the shift. What Mrs Rosier said about the use of CCTV footage was (as can be seen from what we say in paragraph 108 above), we found, not said to, or about, the claimant, so it was not something about which in our view she could reasonably be criticised in these proceedings.

Issue 3(viii): Complaint about the fact that on 21 February 2023 Mr Nimesh Yadev, Operations Manager, rejected the claimant's request for Ms Rosier to be moved to a different department

Issue 3(ix): Complaint about the fact that on 21 February 2023 Mr Adrian (Bob) Baxter rejected the claimant's further request for Ms Rosier to be moved to a different department

- 112 Allegations 3(viii) and (ix) of the list of issues were to the same effect: a complaint that Mrs Rosier was not moved to a different department. In our judgment, no complaint could reasonably have been advanced in that regard, as the respondent had found that she had done nothing wrong towards the claimant, and in our view there was on the facts as found by us no good reason to criticise her conduct towards the claimant.

- 113 For the avoidance of doubt, we could see nothing in the facts before us from which we could draw the inference that either Mr Yadev or Mr Baxter declined to move Mrs Rosier to a different department to any extent because of the claimant's race.
- 114 In addition, the demand of the claimant was that Mrs Rosier no longer came into contact with him in any way, and the respondent had a practice of rotating managers from time to time, so that the claimant was asking the respondent to make a significant exception in relation to her alone. We concluded that if the respondent had concluded that she had discriminated against the claimant within the meaning of section 13 of the EqA 2010 or harassed him within the meaning of section 26 of that Act, then the respondent would have dismissed her unless she had accepted that she had done so and had been completely repentant. However, and in any event, if she had been found by the respondent in the course of determining the claimant's grievance to have done anything that was to any material extent wrong then the appropriate course of action would have been to follow the disciplinary procedure against her in respect of the matter. That possibility was (we saw from page 177) expressly envisaged by the grievance procedure. As a result, in our judgment the claimant could not reasonably say that the respondent should, without following the disciplinary procedure, have moved Mrs Rosier to another department.

Issue 3(xi): Did Mr Smith on 13 March 2023 intimidate the claimant with the use of a forklift truck and threaten to beat up the claimant?

- 115 This aspect of the claim depended on what we found happened as a matter of fact. There was a stark conflict of evidence about what was said by Mr Smith and the claimant to each other on 13 March 2023.
- 116 We looked carefully at the CCTV footage of the event, which, as we have already said (in paragraph 36 above), was visual only (i.e. it had no sound). The claimant asserted (in paragraph 57 of his witness statement) that Mr Smith had acted in a threatening way and said: "I'll meet you outside and we'll sort it". The claimant accepted that he had spoken to a colleague by the name of Holly but ignored Mr Smith. Mr Smith's evidence was that having got on his forklift truck he simply went back to see the claimant to ask him what was the problem, which in our judgment was understandable in the circumstances (which included, as Mr Smith said and the claimant did not deny, they had in the past got on well together). The CCTV footage was in our judgment more consistent with what Mr Smith said than what the claimant said.
- 117 In order to decide the conflict of evidence, we looked at the contemporaneous evidence and at what Mr Ambar said about the circumstances. That was because of what the claimant put in the following passage of his witness statement.

“59. Mr Ambar came and started to check the CCTV cameras in another room, I told Mr Nagy that I did not feel safe, and I wanted to contact the police as there was a strong possibility that Mr Smith would wait for me in the car park to fight, my understanding is that Mr Smith is suffering from heart illnesses and a physical fight with him could have been fatal or he could have caused me injuries, I would have ended being dismissed if I would have engaged in a fight with him because the car park is still technically the respondent property/premises and we were both wearing the respondent uniform plus there is also a strong possibility that I would have ended with a criminal record if I would have engaged with him in a physical fight and because I believe him when he said that he will wait for me outside the warehouse to “sorted out” I thought at the time and I still believe that contacting the police was the right decision.

60. Mr Nagy advised me to go to another room and make the call, I have dial 999 the operator picked up the call after I told him what happened he explained to me that I had called the emergency line and because the crime had not happened yet they cannot come, as they only come with sirens and lights on in emergency’s situations when the crime has been committed, however, he did advise me to call 101 or go to a police station to report the incident and before hanging the phone he asked me to put the phone on speaker and confirm with Mr Ambar who came next to me in the meantime, that I will be escorted to my car either 30 minutes before or after my shift will be finished, to avoid a potential fight with Mr Smith, Mr Ambar has confirmed that he understood the police instructions and will take action accordingly. I was escorted to my car 30 minutes after the shift finished reached home safely, I then replied to Mr Ambar by text message as he asked me to confirm once I was inside the house.”

118 We found Mr Ambar to be an impressive witness: he gave evidence carefully, and we thought that if he had seen unlawfully discriminatory conduct of any sort on the part of Mr Smith then he would have called it out and done something about it. He was at work in the evening of 13 March 2023 and suspended Mr Smith as soon as possible (which was the start of the next shift as the claimant’s allegation about the incident was made at the end of the shift) on the basis of the assertion of the claimant about what had happened on 13 March 2023.

119 Mr Ambar said this in his witness statement by way of background, which we accepted.

“5 Our team was quite multi-cultural, of the six managers reporting to me at the time two were Polish and two were Romanian. None of my team has ever raised with me any concerns about Tracey’s behaviour being discriminatory against race. Frank was a more junior colleague on shift

so I wasn't his direct manager, but he was under my team – again no one has ever raised with me any concerns about him being discriminatory, about race or sexual orientation. I know Frank to be close with a colleague Jay who is of Black Caribbean descent and I don't believe Jay would be close with someone who discriminates because of race.

- 6 It is my view that none of my interactions with Alin, or those I have observed or investigated from colleagues, relate to race or sexual orientation, or occurred as a response or retaliation to Alin raising a grievance or bringing a Tribunal claim. I have never been subject to a disciplinary process in relation to discriminatory conduct. I would describe my race as Black British. I have never experienced anything I would describe as race discrimination when working at ASDA, from colleagues or management.”

- 120 Mr Ambar did not say anything in his witness statement about what, if anything, the police said to him on 13 March 2023, but in oral evidence supplementing his witness statement before he was cross-examined, he said this (as noted by EJ Hyams and tidied up):

“I never had any physical conversation with the police. I know Alin did. I do not know what was spoken about in that conversation.”

- 121 EJ Hyams then asked him whether a speakerphone was used, and he said this:

“I do not remember hearing anything from the conversation. I remember [the claimant] coming over and telling me that police could not come on site but that he could be escorted off site at end of the shift.”

- 122 Mr Ambar said also that the claimant was then escorted off the site at the end of the shift because he was “scared that Frank [i.e. Mr Smith] might be waiting for him outside.”

- 123 Mr Ambar took a statement from the claimant before the shift ended. The notes were at pages 307-309 with a typed copy at pages 310-311. We saw that there was no mention there of the truck that Mr Smith was driving being driven in a pedestrian-only area. All that was said about where the truck was, was this.

“With the corner of my eye I saw reach truck coming towards me, I felt that it invade my personal space and that the RT should not be that close to the entrance to the warehouse.”

- 124 We then looked at the emails which the claimant sent on the next day. He sent the one at the top of page 316 at 14:31 and in it he said this.

“Ahmed Ambar shift retail manager on lates has been taken statement from me last night and he confirm that he saw footages on CCTV camera from the incident sadly the rich truck was used to intimidate me in a pedestrian are only”.

- 125 In addition to the CCTV footage, we had before us (at pages 321-324) photographs of the area in question. It was not a pedestrian-only area. Rather, it had clear lines of demarcation between the areas which were intended to be used by pedestrians and the rest of the area, which plainly could be used by a reach truck.
- 126 We did not think that Mr Ambar would have forgotten the claimant putting his mobile telephone on speaker and hearing what the police were saying to the claimant. That was the kind of thing which would have stuck in his memory, we thought.
- 127 On 15 March 2023, Mr Ambar interviewed Mr Smith about what had happened on 13 March 2023. The typed notes of the interview were at pages 331-333, and the original handwritten notes were at pages 325-330.
- 128 Mr Smith was very upset at the allegations of the claimant, and it affected him greatly. He was required to attend a meeting with a union representative present on 24 March 2023, and at it he said this (as noted in typed form at page 346) when asked about what happened on 13 March 2023.

“I’m sure you’ve seen the camera. My conversation with Alin lasted 10 seconds at most before I drove off. In that 10 secs I had conversation with him, because he looked at me like a piece of rubbish, so I asked him if he had a problem with me and he replied that there wasn’t a problem and he put his hands in the air to say not a problem and then I drove off. You can see my face and I don’t believe that there was anything aggressive or threatening to be seen.”

- 129 He then denied saying to the claimant “let’s meet outside” and he said that there was “past history”. He expanded on that as noted at page 347 in the following manner when asked if there was anything he wanted to add.

“Yes 2 things. There is a past history with Alin which you are aware of. A racial problem which still needs sorting out. Where a false accusation was made. 2nd point. My health and I had to leave the room because I had an anxiety attack because of the way you handled the situation. And my emotions hit me for six and I felt backed into a corner and questioned taking my life. It wasn’t registering in my head what was going on at the time (*Frank gets emotional and wipes tears from his eyes*).

- 130 In oral evidence, Mr Smith explained (in answer to a question from EJ Hyams, which we all saw needed to be asked) that “racial problem” in this way (as noted by EJ Hyams and tidied up for present purposes; the words in square brackets are not recorded but are inserted as they reflect what was said).

‘This [was about] racial problems with Alin saying things to make me feel small and colleagues, through him [saying] racial things. Sometimes I would go into the office to have a job rectified. There would be a little group and Alin would be part of it I and there would be comments like “we are here to take your money and your jobs and your houses”; you just persevere.

Elaine came to me one day very upset saying that an Asian colleague had racially abused [her]. I said to see the shift manager to get it stopped; and from that Simon [Fowler] said that we can only speak about non-personal things and work. We were told “you can only speak about work-related subjects”.’

- 131 Mr Miller asked Mr Smith whether the racial comments were “directed at an individual or was it a general comment about a group?”, and Mr Smith said that the respondent was “a multicultural company” and that the comment was “directed at anyone in the department who was of a GB or UK heritage”. He said that “it was colleagues playing wind up and trying to get a reaction” and that “80% of the people in the office are not British born.”
- 132 The claimant said that Mr Fowler did not say to him that he could speak only about work-related subjects or anything similar to that.
- 133 Mr Miller asked Mr Smith whether he had had any disciplinary action taken against him. Mr Smith then said this (as noted by EJ Hyams and tidied up for present purposes).

“Once; yes; it was a false allegation. I was going through bereavement at the time; and we had a misunderstanding and the colleague falsely alleged that I was going to attack him when I was not even in the warehouse; the video cameras show that I was not in the warehouse at the time. Nothing came out of it; apart from my suspension.”

- 134 Mr Smith was then re-examined on that and he said this (as so noted).

“It was a miscommunication. I was going through a bereavement at time; I had just lost my father. I had a communication [in which] a colleague accused me of attacking him when I was not in the warehouse; but I did not retaliate on the comment; I just left it at that as I was not out for him.”

- 135 Mr Smith then said (as so noted):

“I am very emotional; I am very opinionated. I am very opinionated about football.”

- 136 He was then asked whether he threw things, and his response was that he did not, except when he was suspended by Mr Ambar because of the allegation of the claimant about what happened in the evening of 13 March 2023. At that time, he threw a cup of coffee against the wall. He said that he at that time

“had a breakdown [as he] could not understand why [he] was suspended and [the claimant] was not. It was judgmental. It felt like it was victimisation; it [i.e. his reaction when he threw the coffee cup] was not anger, it was confusion. I apologised to Mr Ambar at the time; and wiped it up.”

- 137 At page 333, there was a record of Mr Smith saying to Mr Ambar at the end of the investigation meeting of 15 March 2023:

“When I walked out the room I thrown my cup as I was frustrated there was no anger involved.”

- 138 While we take it out of chronological order, we mention here that on 6 April 2023 Mr Smith wrote the letter at page 393 in which he said this.

“Dear sir or madam

I would like to put a grievance in against Alin Milosoni

The reason I feel that I need to put in a grievance is that in the past Alin has put two false accusations against me and after the last one made me be suspended I would like you to look into it

So that it does not happen again.”

- 139 By hand it was written on the letter that it was received by “HR 7.4.23” and “Grievance Dropped by Frank Smith 19.4.2023”. Mr Smith said to us (in re-examination) that he made and then dropped the grievance in the following circumstances.

“I thought this would carry on. I was afraid that the claimant would be watching my every movement and I’d be brought up on another false allegation. I would have to go to wife and say I had been suspended for a false allegation. I spoke to Ahmed [Ambar] and I said I would let it run and see what happens; there is no point in making allegations about someone unless something happens. Ahmed made me see sense.”

- 140 On 30 March 2023, the claimant wrote the letter at page 363 “To whom it might concern”, stating in it that he had that day spoken to the police. The text of the letter continued in this way.

“According to police my case is open and awaits confirmation from Asda of the outcome of my grievance and what are the next steps the business will take to facilitate my return to work once they have this information they will move to the next stage (they’ve asked me to call them once ! have this info from Asda.

Both I and the police have concerns about my safety and mental health as I have been harassed for a long period of time and the business have a duty of care and should act accordingly.

I’m kindly asking you to keep me update with the progress of my grievance and assuming that Frank and Tracy will still be employed upon my return to work to start making the necessary changes in advance, at this moment I cannot give you an exact date of when I can return to work.

I want to make it very clear that I will not relocate from the opps room to another department under no circumstances as I work very hard to be part of this team and surely the aggressors should be asked to relocate instead. The denial of my previous request to relocate Tracy to another department seems to have been a poor decisions as the harassment reached another level recently, continue to work with Tracy Rosier and Frank Smith is not acceptable since I have multiple grievances against them for things like racial harassment, defamation of character and assault just to name a few.”

- 141 The reference to a complaint made to the police about Mrs Rosier’s conduct arose in part from the next incident about which the claimant complained, and to which we refer in the next section below. At page 360, there was an email exchange between Ms Anna Morris of the respondent (who sent her email on 30 March 2023, the text of which was at page 361, which referred to “two incidences”, namely “One for threatening behaviour and one for potential hate crime”) and the “Northants Police Control Room”, a member of whose staff had responded on the next day, 31 March 2023, that she had “forwarded this onto the relevant persons for their awareness”. By hand there was this text, which appeared to have been written and signed by “A Morris” on 5/4/23:

“File note: 05/04/23

05/04/23 – Received message on phone to call back PC Gary Dolman [and the number to call was recorded].

PC Dolman confirmed that they will not be taking any action on investigating the matter – he confirmed he has spoken to Alin and explained this on 2 x

occasions. He does not believe this is a Police matter and has to be dealt with through our internal procedure.”

- 142 Having weighed up all of the evidence before us, including that to which we refer below, but particularly because we found Mr Ambar’s evidence to be wholly reliable and we accepted that he had not heard anything being said by the police to the claimant in the evening of 13 March 2023, including on speakerphone, we concluded that the claimant’s evidence in paragraph 60 of his witness statement (which we have set out in paragraph 117 above) was not true, and that he had knowingly exaggerated his account of what had happened on 13 March 2023, both at the time and subsequently. In part for that reason but also because we accepted Mr Smith’s account of what happened on that day, which was, we concluded, supported by the CCTV footage, we concluded that Mr Smith did not threaten the claimant in any way on that day.

Issue 3(xii): Did Mrs Rosier on 23 March 2023 Mrs Rosier when discussing a recent murder in the local area make “comments of a racial nature”?

- 143 The next allegation of the claimant was about something which Mrs Rosier had said on Thursday 23 March 2023. The claimant described what had happened in paragraph 76 of his witness statement, as follows.

‘On 23.02.2023 around the beginning of the shift, Tracy Rosier entered the office, went straight to the receiver desk area, and reviewed some paperwork (p 352-354). On the opposite corner of the room were Elaine Jones, Refrefi Koskoviku and myself, a conversation started in my corner regarding the murder that took place the previous days in Northampton. As soon as somebody asked “who were the criminals”? Ms Rosier moved towards my corner and said “They were Romanians” (there were 5 colleagues with different nationalities at that time in the office) she then got involved with my colleagues Ms Jones and Mr Koskoviku who were sitting next to my desk in conversation for a short time.’

- 144 The claimant continued in the next paragraph of his witness statement:

“Her comments left me in shock, and I felt embarrassed and humiliated, I have become very suspicious about her involvement in the conversation as she came into the office for a different purpose and for her to be involved in casual conversation at the beginning of the shift is unusual as there are other business issues to be solved (Ms Rosier place of work is Intake department, she is not based in our office).”

- 145 There were in the bundle two contemporaneous accounts about what had happened on that day. On page 349 there was an email from Ms Elaine Jones to Mr Ambar dated 25 March 2023 stating simply: “Hi Ahmed, I have attached

my Statement of what happen last Thursday.” The statement was at page 350 and (ignoring topping and tailing) was in these terms.

“I Was working as key Colleague on this day, Surendra was on Receiving, Denis was on No Prime sitting at Simon Desk, Mariusz was on QA sitting opposite Denis, Neil was sitting with Sally on thebox floors helping to get box slots and Refrefi was on space sitting opposite me. Alin was sitting in the corner [i.e. the corner] doing over time on the storage move upstairs.

I saw Tracey about few minutes past 14pm go into the yard, she then come into the opps room

To check with the receiver to see where were up to etc, she then came over to me to say hello etc

We then was discussing in a private conversation between the two of us about the awful stabbing of school boy in Kingsthorpe, Tracey said her son in law was there and witness what happen and been specking to police taking statements, I ask her what nationality was he she told me he was mixed race, which we all know now as the boys photo has been published, thinking it was probably a gang

Related incident I ask her did they know who did it, and Tracey told me they were apparently Romanian, and the father was also there, that was the end of the conversation nothing more said or anything else.

Alin was sitting in the corner finishing of the storage moves etc waiting for jets to drop off then he would go and put away stock. Alin showed no signs of being upset. Later in the shift about 4pm I asked if he wanted me to do the slot moves and he again show no signs of being upset, I also discuss with Alin if would take over the Chase at 6pm as Sally was going home, again he was fine and happy to take over.

Neil came over to the office about 5 -5.30pm saying is Alin going home I said no probably joking. Then Surendra took phone call it was Alin wanting to speak to Denis, then Denis with a smile saying Alin going home someone upset him, I didn't know what to believe because I was the Key colleague, and I should have been told.”

146 At page 351 there was an email from Mr Ambar to Mr Fowler, with the subject line “statement”. It was sent at 13:03 on 26 March 2023 and its text was this.

Hi,

I had a call from Alin at around 5ish on Thursday asking if I've got an envelope and if I was going upstairs. I told him I had no plans but what happened?... he just said its happened again, when I went upstairs I saw Alin with a letter in his hand, I asked him what happened, and he told me that Tracey was in ops rooms talking to one of the colleagues regarding work, but she immediately started talking to Elaine about the murder case that few of the ops room colleagues were talking about, during that

conversation, according to Alin Tracey had made a comment that apparently the boy who stabbed someone was Romanian. I tried speaking to Alin if Tracey was speaking directly to him, he replied no but she knows am Romanian and that why she said. I tried to make him aware maybe that what she has heard, but Alin kept insisting if the police have no lead until now, how she can know the boy is Romanian. I passed Alin the envelope. Alin said he was on overtime so at 6 it will be best for him to go home.”

147 The claimant put the letter at page 353 into the envelope. Its text was this.

‘Dear Ahmed,

On Thursday 23/03/2023 around 3 PM Tracy Rosier came into the opps room to do some checking on the receiver corner/area, A conversation started regarding the crime that took place in Kinghstorpe [sic] recently were a 16-year boy was stabbed to death.

Tracy immediately joined the conversation and stated: “They were Romanians” when somebody asked who the people were involved.

She also said that one of her relative recorded the incident on dash camera, although this may be possible, I think it’s extremely unlikely the criminals were wearing signs saying We are Romanians and murder the victim.

According to BBC news “No details about the victim have been released” and” Dept Insp Simon Barnes that although arrests have been made, the force was still appealing for witnesses and an increased police presence would remain in the area”. The BBC article was published 3 hours ago.

It is astonishing that Tracy Rosier already know that the criminals were Romanians at this moment when the police investigation is live, and no sentence was made in the court.

This is clearly another attempt of Tracy Rosier to humiliate and embarrassed me in front of my colleagues as she perfectly knows I’m a Romanian national as we work together for eight years.

I have been the subject of racial discrimination for a long period of time and Tracy Rosier and Frank Smith does not seems [sic] to stop, therefore I’m asking you to start an investigation immediately as my mental health is being severely affected and this madness needs to stop immediately.

The colleagues who witness the incident were: Denis Yurukov, Refrefi Koskoviku and Elain Jones.

Best regards,

Alin Miclosoni
Stock and Systems Core”

- 148 That read in part as if it had been written after 23 March 2023 (“On Thursday 23/03/2023 around 3 PM Tracy Rosier came into the opps room”), and in part on 23 March 2023 (“The BBC article was published 3 hours ago.”). In addition, at page 356 there was a letter dated 27 March 2023 to the claimant stating that the writer, who was Claire Dodridge, the “People & Community Administrator” at Brackmills, had received the claimant’s “letter dated 27.03.2023” and that she had “assigned a manager to hear [his] Grievance” and that the manager would be “in touch with [the claimant] shortly”. At page 362 there was a letter dated 30 March 2023 from Mr Williams, inviting the claimant to attend a meeting to discuss the grievance on 4 April 2023. The claimant then sent the letter dated 30 March 2023 the text of which we have set out in paragraph 140 above. Ms Morris then sent the claimant the letter dated 31 March 2023 at pages 365-366. In it, among other things, Ms Morris said this.

“We received your letter of grievance against Tracey Rosier on the 27th March 2023, after which we wrote to you to acknowledge we had received it, also on the 27th March 2023. As you are currently absent from work due to stress, Simon Fowler contacted you to ask if you would be willing to attend site for us to hear your grievance during your current period of sickness absence, for which you confirmed you would. I believe you also confirmed this during your recent depot visit with Ahmed Ambar, Shift Manager.

Your grievance will be heard by John Williams, Planning Manager, and this has been scheduled to be heard on Tuesday 4th April at 2pm. A letter inviting you to the hearing was posted out to you yesterday.”

- 149 The claimant told us that his grievance was the undated letter at page 353 which we have set out in paragraph 147 above. We saw that there was before us no letter from him to the respondent dated 27 March 2023.
- 150 Mr Ambar was, he said in paragraph 9 of his witness statement, asked to interview “the relevant witnesses that [Mr Williams] identified because “the incident happened on [Mr Ambar’s] shift”. Mr Ambar’s witness statement continued:

“9. ... I interviewed Refi and Hengki, the notes of which are at pages 366-367, 369-371 of the bundle. I believe they told me the truth, they’d have no reason to lie to support Tracey or to go against Alin.

- 10 On 23 March 2023 I was involved in a similar conversation about the local crime. I wasn’t in the ops room for the conversation Alin was involved in, but earlier in the day we Shift Managers were chatting about

the news story too – it was something many colleagues were talking about and sharing information about. Tracey was involved in this conversation and explained that her son-in-law had been passing at the time of the incident and had given a statement to the police, and that he'd told her that the alleged perpetrators were Romanian. She was just passing along information she'd been told by her son-in-law."

- 151 The colleague by the name of "Hengki" told Mr Ambar that she was not working on that day, as recorded by hand in the notes taken on 3 April 2023 at page 367 and typed up on page 368. "Refi" (i.e. Mr Koskoviku) was interviewed shortly afterwards, as noted by hand on pages 370-371 and typed up at page 372, where he was recorded to have said this.

"It was chatting about the stabbing and after Tracey came in and joined conversation with ELAINE, she heard from a relative by the eye witnesses, these people were Romanian that stabbed the boy and that's it. So she was just repeating what a family member had told her and that's it."

- 152 Mr Ambar pressed him on that, by asking him "From your understanding, do you feel that TRACEY was targeting Alin by the Romanian part?", and Mr Koskoviku replied:

"I don't know about that. I didn't see anything like that. She was just chatting."

- 153 The claimant was interviewed by Mr Williams on 4 April 2023, and the typed notes were at pages 385-388. We have already referred to them in paragraphs 46, 54, 77, 84, and 92 above. On 6 April 2023, Mrs Rosier wrote and signed the note at page 389 about the events of 23 March 2023. Mr Williams then interviewed Mr Koskoviku, as recorded on pages 390-391 by hand and in typed form on page 392. Mr Williams then interviewed Mr Yurukov on 11 April 2023. Handwritten notes of the interview were at pages 394-395 and the typed up version was at page 396.

- 154 On 20 April 2023, the claimant sent Ms Morris the "Transfer request" at page 400, in which he asked to be "relocated in Dotcom to stay away from the aggressors". The claimant had previously worked in the Dotcom department.

- 155 On 2 May 2023, Mr Williams completed an "adjournment note" of which there was a copy at pages 403-404. Mr Williams then, on the next day, in the letter at pages 405-406 dated 3 May 2023, informed the claimant of the outcome of his (Mr Williams') investigation into the claimant's grievance set out by us in paragraph 147 above. We noted in particular the following passage on page 406.

"I have reviewed the CCTV footage on the 23/04/2023 at 14:21 which shows Tracey walk to the middle of the room having a conversation with

Elaine Jones & Refrefi Koskoviku (Stock and Systems colleagues), she does not look at you during this conversation, she also does not suddenly move across the room as you allege. You have also confirmed she didn't look at you when she was discussing the murder.

In the notes you touched on incidents in the past that have led up to this point, but you have confirmed they have already been dealt with and you were just updating me on the history with Tracey and Frank.

After reviewing all the information available, The CCTV footage does not show you in any distress at the time of the conversation and Tracey was not facing you at the time of the conversation. The statements from the witness's confirm this was a general conversation and not directed at you personally. The witnesses have confirmed that Tracey joined their conversation, and when asked a question regarding what nationality the murderer was, she answered their question based on what she knew. I cannot find any evidence that she was intentionally trying to humiliate or embarrass you.

I therefore do not uphold your grievance that Tracey intentionally humiliated and embarrassed you regarding your nationality.

There is history between you and Tracey which I feel could cause misunderstanding if not addressed and resolved. Therefore, I am advising that some mediation between yourself and Tracey should be arranged to help to improve your working relationship moving forward. Mediation should be mutually agreed so please let me know if this is something you wish to explore."

- 156 Mr Williams did not interview Mrs Rosier in the course of his investigation into the grievance set out in paragraph 147 above. The claimant appealed against the dismissal of the grievance. He also declined to enter into mediation with Mrs Rosier. Mr Lund heard the claimant's appeal. Mr Lund did interview Mrs Rosier to find out what was her recollection of what happened on 23 May 2023. The interview was recorded in the notes at pages 452.10 to 452.15. They were the original handwritten notes, taken by Ms Morris. In paragraph 12 of his witness statement, Mr Lund said that Mrs Rosier told him that she "in fact did not even know at the time that [the claimant] had a link with Romania". Mr Lund continued:

"I believed then, and still believe now, that Tracey is being honest with her account of the incident. I felt she was simply pleased to have some information, from her family's own experience, to share with colleagues about what was a hot topic of conversation that day, so she shared it".

- 157 Mr Lund recorded in the following part of his witness statement that he had as part of his investigation, because the claimant raised the issue, spoken to Mrs

Rosier and Mr Preston about the car parking incident to which we refer in paragraphs 40-53 above. We have set out in paragraph 49 above Mr Preston's email to Mr Lund which resulted from Mr Lund speaking to Mr Preston at that time.

158 Mr Lund's determination of the appeal was stated in the letter dated 11 July 2023 at pages 460-463. Among other things, Mr Lund wrote (on page 461) that he accepted that an interview of Mrs Rosier "would have been appropriate to gather more detail", and that he would "make [his] recommendations to the site accordingly". However, Mr Lund said at the bottom of page 462 that he had "reached the conclusion to uphold the decision of the original grievance."

159 We have already (in paragraph 42 above) set out paragraph 6 of Mrs Rosier's witness statement. For convenience, we now repeat it. There, Mrs Rosier said this.

'The first time I was aware that Alin has a link with Romania is when he raised his grievance on 27 March 2023 about me making a comment related to Romania (page 352), which was reported to me soon after. This was the first time he mentioned "discrimination", that I was aware of. His grievance of 10 January 2023 (page 237) did not mention race, or discrimination.'

160 After careful consideration of all of the evidence before us, we accepted Mrs Rosier's evidence in that paragraph. We also concluded that the conversation about which the claimant complained was a repeat of the one which Mr Ambar described in paragraph 10 of his witness statement, which we have set out in paragraph 150 above. For both of those reasons, we concluded that what Mrs Rosier said on 23 March 2023 was in no way directed at the claimant. We concluded too that all that Mrs Rosier did was to report what she had been told by her son-in-law.

Issue 8a: Was there a 66% reduction in the occasions that the claimant was deployed to the 'receiving' task by the respondent to any extent because the claimant had done a protected act and, if so, was that detrimental treatment within the meaning of section 39(4)(d) of the EqA 2010?

161 The claimant claimed that the amount of time that he spent doing the task of receiving was reduced after he stated his grievance against Mrs Rosier in respect of the events of 9 January 2023 and then in April 2023 made his first claim to this tribunal, and that that reduction was the result of the fact that he had stated that grievance and/or made that claim. He did not say that he had lost pay as a result of such reduction.

162 It was Mr Yadev's evidence that the task of receiving was not in demand. What he said in his witness statement about this aspect of the claim was as follows.

“I know Alin has said at Issue 8(a) that we have reduced the occasions he has been assigned to the receiving task. I’m not sure when he means, but when he was in our team, Simon [Fowler] and I didn’t consciously reduce that allocation and I don’t think it was reduced. If it was, it certainly wasn’t in retaliation for him raising his January 2023 grievance or his April 2023 Tribunal claim, since both of these things happened while or after he was off sick and moved to Billy’s team [i.e. that of Mr Pickersgill]. I know that at the time Alin was in Simon’s team, we had quite a few new colleagues who needed training up on the five key work tasks for Retail Clerical Colleagues, so it’s possible that once Alin had been trained being as a receiver, he got a few less receiver shifts while we focused on the training of some others who weren’t yet trained. I don’t understand why Alin is interested in this task more than others, to my knowledge only two people out of Simon’s team of 27 have asked to focus their work on receiving, so it’s not a popular task. On the other hand, I understand 21 of the team have asked me to focus their work on the space task, which is a popular task. Simon explains some of this to HR on page 446 [i.e. page 447] of the Bundle.”

- 163 When giving oral evidence, Mr Yadev, after being referred to the email from Mr Fowler to Ms Morris at pages 447-448 (which was dated 25 May 2023) which contained an analysis of the situation concerning the allocation of the task of recovery, said that in the 11 weeks covered by the document during which the claimant was working before his sickness absence in 2023, the claimant worked 38 shifts, of which three were in the role of superuser, and that he did 36 different jobs. In the 11 weeks after the claimant had returned to work after his sickness absence, said Mr Yadev, the claimant worked 49 shifts, during which he was superuser 11 times, and that he otherwise rotated around 46 different jobs. He then said that the claimant was allocated to do the task of receiving 13 times in the 11 weeks before his period of absence because of sickness, and 4 times in the period after he was so absent. The fact that the claimant worked as a superuser more after he was sick than before being absent because of sickness may therefore (said Mr Yadev) have resulted from the fact that he was training others on the task of receiving before he was so absent.
- 164 The claimant said that he did not accept that he did only three superuser shifts in the period before he was absent through sickness in 2023. We (through EJ Hyams) said that he should advance his case in that regard by reference to the documentary evidence in closing submissions, but he did not say anything in that regard in his written and oral closing submissions.
- 165 In those circumstances we could see nothing in the factual circumstances before us from which we could draw the inference that the manner in which the claimant was allocated to do the task of receiving was to any extent the result of the fact that he had made his first claim to this tribunal. In coming to that conclusion, we took into account the fact that Mr Fowler did not give evidence to us. We were

told that it was because he had a pre-booked holiday at the time of the hearing before us, but we did not regard that as a very strong reason for not giving evidence as the case had been listed to be heard on 20 September 2023 (as recorded on page 72 it was listed by EJ Anstis on that date). However, Mr Fowler had carried out a careful analysis of the matter on 25 May 2023 and recorded that analysis in the email at pages 447-448, as we record in paragraph 163 above. In that email, Mr Fowler had written this.

- “• Tracey Rosier has nothing to do with Stock & Systems Task deployment.
- I create the task deployment rota for each week based on and/or a consideration of; workload, head count, skills, preference, fairness, rotation, restrictions, training.
- Alin has been receiving training and more recently extra exposure to the Key Colleague task since completing the training for the other 6 main Stock & Systems tasks. The Key Colleague is the last training task to be completed for all new Colleagues as it requires an understanding of the other tasks first. (The Key Colleague task was one of his main reasons for joining my team from the Dotcom team as there was not enough opportunity on dotcom for him to do this role).
- In my opinion the Receiving task is not widely considered by the team to be the best task. 27 Colleagues (87%) of the team across 3 shifts are trained on receiving. 13 Colleagues have shown an interest in being assigned to this task on a regular basis. Only 2 colleagues would love to be assigned to this task every shift. In comparison there are 21 Colleagues that have expressed a wish to be included on the Space task. In general, the Colleagues that have expressed a wish to be included in the receiving role may have the opportunity to do it once a week. However, this is not always possible due to other deployment considerations (see above) and continuing to assign the task to all those that are trained to ensure their knowledge is kept up to date.
- At no point have I not included Alin on the receiving task for the reasons he has outlined. No one has requested this of me either, including Alin. During absence depot visits Alin has mentioned that he should not be near Tracey or Frank for fear of what may happen. The role of Receiving would physically put him closer and working directly with Intake Colleague Frank and Manager Tracey.”

166 The claimant did not assert (either in his witness statement or in his oral evidence) that he had asked to be given the task of receiving. That in our judgment was a critical factor which meant that Mr Fowler’s oral evidence was unlikely to have added anything material for present purposes.

167 We noted that the claimant did take issue with part of the analysis of Mr Fowler, but only by saying that it was incomplete. The claimant had put before us a series of documents which he said completed the picture (pages 552-573 and 704-705).

We did not think that those documents added to the weight of the evidence in favour of the claimant's assertion that he had been treated detrimentally by not being allocated the task of receiving as a result of the doing by him of a protected act.

168 In paragraph 90 of his witness statement, the claimant said this.

“Mr Fowler had issued a document (p 446 [i.e. page 447]) and on the last bullet point made references to my request to not be near my aggressors out of fear of what may happen “During absence depot visits Alin has mentioned that he should not be near Tracey or Frank for fear of what might happen” however these conversations were during our depot visits, sometime after he already has reduces my deployment on receiving task with 66%, it appears to me that he used explanation as a justification for his previous decision to reduce my shifts on the receiving task without my consent because I never agreed with such a course of action, Mr Fowler did not sat down with me and to discuss what is the best way to go forward and together to find the best solutions”.

169 The claimant accepted during cross-examination that if he did the work of receiving then he was more likely to come into contact with Mrs Rosier and that if he did come into contact with her then he would find it stressful. As a result, we were unable to see how he could credibly say that it was detrimental treatment of him not to allocate him to the work of receiving, not least because he himself wanted to avoid being caused to come into contact with her.

The factual issues arising in regard to issue 8b onwards

170 With one exception, to which we refer in paragraphs 176-178 below (it was the issue stated in paragraph 8c of the list of issues, and was a complaint that Mr Pickersgill had “on or around 14 August 2023 ... failed to send any email to rest of team to notify them of the Claimant's arrival upon his return to work”), there was only one further factual basis, i.e. over and above the factual matters to which we refer above, for the issues starting with issue 8b and going on to issue number 19 (ignoring for the purpose issues 20-22, which concerned remedy). That further factual basis was that the claimant was not permitted to do the work of a super user on and after 14 August 2023 to the extent that he wanted. We therefore state here our factual findings about that issue.

171 Issue 8b was the claim that the claimant was treated detrimentally within the meaning of section 27 of the EqA 2010 by being told in Mr Pickersgill's email of 14 August 2023 that he would not be permitted to do the work of super user. The background to that email could be seen in part in the emails at pages 468 and 470. As Mr Pickersgill told us (in the passage of his witness statement which we have set out in paragraph 175 below), that work was called the “operations” role in the Dotcom Stock & Systems department (“Dotcom”), to which the respondent

referred as “ops”. The other claims made by the claimant in relation to the work of operations in Dotcom all related to things done, or not done, by Mr Pickersgill.

- 172 The email in which the claimant was told by Mr Pickersgill that he would not be able to do the operations role was at page 470 and was dated 9 August 2023. It was in these terms.

“Hi Alin

After much consideration I will be unable to offer a four week trail [sic] for returning to the ops role. This will be unfair to my other colleagues who have worked constantly on dotcom stock and systems.

When you return you will be a normal dotcom clerical colleague and I can offer all the other roles within my department just not the ops role and I look forward having you in my team supporting the dotcom operation.

If you have any questions please let me know.”

- 173 As was apparent from that email, it was sent to the claimant before he returned to work from his absence on account of sickness. That absence had (we saw from paragraph 13 of Mr Pickersgill’s witness statement) started on 24 March 2023.

- 174 As indicated in paragraph 34.8 above, Mr Pickersgill was the manager of the Dotcom team. It was his evidence (given in paragraph 14 of his witness statement and orally to us) that (1) there was no vacancy in the Dotcom team and (2) he had no choice about the claimant being placed in the team. We accepted that evidence.

- 175 The following parts of Mr Pickersgill’s witness statement were an informative and, we found, except to the extent that we describe in paragraphs 182-188 and 190 below, accurate statement of the situation which gave rise to the claimant’s claims to the tribunal about doing operations work in the Dotcom team.

“2 In my current role, I am responsible for 26 colleagues who deal with all the issues that happen with stock and systems for the online business, which we refer to as “dotcom”. Our warehouse staff are organised into two departments, dotcom and retail. The retail colleagues deal with the business of the physical stores. Simon Fowler is Stock & Systems Manager for the retail business. Our teams process stock delivery notes so that when stock arrives on site there is a place to put it; and we manage any errors, cancellations and customers orders.”

“7 The duties of the Clerical Colleague team rotate between what we in Dotcom call ops (troubleshooting), box exceptions/hanging exceptions (receiving stock), pre-wave (matching website content to our stock lists, to ensure we can fill customer orders), consolidation (making space) and PI (stock-counting). The duties in the Retail and Dotcom Stock &

Systems subteams are pretty much the same, although we use different names for them. In his claim Alin sometimes mixes and matches these terms so I will explain them here.

- (a) In Retail they refer to “receiving” which for us in Dotcom is similar to “exceptions”, which we split into box exceptions (stock we receive in boxes) and hanging exceptions (stock we receive on hangers). The receiving task is about receiving stock when it arrives on site and logging its receipt on the system, while the exceptions task is about sorting out any issues with stock when it moves to the Dotcom receiving area. Some people like being on this task and some people don't - because it's quite labour-intensive and busy. Alin's view is that box exceptions is undesirable as you have to sit at a workstation next to the receiving all day; but he likes hanging exceptions, which is essentially the same role but sitting in a corner of the warehouse instead.
 - (b) In Retail they refer to the “superuser” which for us in Dotcom is “ops” - it means the Key Colleague, meaning the person acting in the role of effectively deputy to the manager (me or Simon) for that shift. Some people like being the Key Colleague but some people don't - it's the most stressful task as you have to deal with problems and last-minute issues, and you're responsible for decision-making and directing others. In this role you have to interact with the Intake Manager about any issues that crop up with stock arriving. All this means that the task requires good people skills, adaptability and an ability to cope well with stress. Alin's view is this is a desirable role.
- 8 In Dotcom, we work in three shifts, early, late and nights. Alin works on the late shift, 2pm until 10pm. During the week there are around 11 people on shift, during the weekend around 5, unless someone is absent for sickness, holiday etc in which case there are fewer people. Each colleague is deployed on one of the above tasks for the whole day - if they happen to finish all their work that day, they move onto helping with consolidation (making space).
- 9 I usually do the rota for the next day, the day before; and I very rarely do it more than a week in advance. My main thought when doing the rota is to try to give people something different to do than what they did the day before, so as to mix things up for them to keep it fair and hold their interest. This is not always possible based on holidays, sickness and other absence, and to accommodate the preferences of the team, which I try to do in order to maintain good working relationships.”

176 Mr Pickersgill's witness statement contained the following passage, which we also accepted, subject to what we say in paragraphs 182-188 and 190 below..

- “15 As we were an established team with our own usual practices, and I didn’t know Alin’s capabilities, I initially told him he would be working on all Clerical Colleague tasks other than the ops/superuser task, since I had enough people trained up and keen to do that Key Colleague role (see page 469 [i.e. page 470]). My decision had nothing to do with Alin’s grievances or claims or anything else like that, it was an operational decision that I would have made no matter who the new colleague was. I need to get to know a new colleague, working out their level of training and capability and their capacity for stress, and build trust with them, before I can assign them to act in this troubleshooting role. Ideally, I also need that person to bed in well with colleagues before I start putting them in the role of telling those colleagues what to do; especially since the new, extra colleague would effectively be displacing existing colleagues from that senior role that they liked doing.
- 16 However, Nimesh then came to talk to me and flagged that doing the ops/superuser task was a particular concern for Alin - he really wanted to do that Key Colleague role, and Nimesh had told him he could. He drew my attention to the email chain at page 467 where Nimesh had agreed with Alin that after four weeks in post, I would assign ops/superuser shifts to him. I spoke with Bob, and my direct manager Karl, who explained that Alin did have experience of the ops/superuser role.
- 17 At the time, I did not believe Alin had a disability. To my mind, Alin had been experiencing stress as a reaction to disputes he was having with colleagues at work, he had had support with that and now felt ready to return to work (as noted in the notes of our return to work interview, page 472, which both Alin and I signed). Later, when Bob told me in November 2023 that Alin had said to him that he was disabled, I decided to explore this with Alin (I talk about this later). I only became aware that Alin has a disability in legal terms in June 2024 as part of preparing my evidence for this Employment Tribunal process. I now know that ASDA believes he was disabled with anxiety and/or depression and/or post-traumatic stress disorder, from 24 March 2024. This is because Alin first raised symptoms with his GP on 24 March 2023 (page 338) and his GP records that he had no prior history of those symptoms (see page 574), so ASDA considers the relevant effect was not long-term/likely to be long-term until a year after that. I am not an expert in these matters but as his current manager I need to tell the Tribunal about ASDA’s position.
- 18 Upon Alin’s return to work on 14 August 2023 I went through the return to work form with him (see the notes signed by both of us on page 470-473) and he then started work. Alin explained that he wanted to avoid

stress and “intake” colleagues, due to his dislike of Tracey Fowler and Frank Smith. Alin said he did not want any special treatment, he just wanted to return to work. With the benefit of my additional briefing from Bob/Karl about Alin’s skills, I worked with Alin to support his return to work, understand any challenges he faced in returning and participating in light of his health, and put in place a plan of action. I accommodated the four-week phased return as set out in Alin’s email exchange with Nimesh on page 467. We didn’t set out a detailed and structured plan beyond that - the plan was simply that Alin would work shifts on all the different tasks and train up in the ways of the current Dotcom team in that way, then take on the ops/superuser task after his phased return.

19 On that date, I did not inform Alin that he would not be permitted to perform the super-user job - rather it had already been agreed as part of the 8 August meeting that he would avoid that stressful and challenging work for the first four weeks. This was a measure put in place to support Alin, which had nothing to do with his Tribunal claim or his January grievance.

20 It’s correct that I did not send an email to the team to notify Alin of his return. It is not ASDAs standard practice to send an email when a colleague returns from leave, but it’s true that I do often do this. At the time I simply did not think to do this - my action or lack of action had nothing to do with Alin’s Tribunal claim or his January grievance - I just forgot. I did tell colleagues verbally that he was coming.”

177 We accepted that evidence of Mr Pickersgill about the reason why he did not send an email to the team welcoming the claimant to the team. We concluded that the failure to do so was in no way caused at least consciously by the fact that the claimant had stated a grievance or made a claim to the tribunal. We were told that Mr Pickersgill had been a human resources manager, so it was likely that he was aware that the claimant was being forced on his team because of some kind of problem, but we concluded that any subconscious unwillingness to welcome the claimant was the result only of the facts that (1) the claimant was not chosen by Mr Pickersgill to join the Dotcom team, and (2) the claimant was not filling a vacancy in the team.

178 That conclusion was supported by what Mr Pickersgill said in the next paragraph of his witness statement, which was this.

‘21 On 28 September 2023 I had a follow-up meeting with Alin to check how he was after his phased return (see the signed notes page 474-475). He reported that things were good, he’d been welcomed, he had no issues to raise and he was happy to interact with “intake” colleagues. I started to rota him on to the ops/superuser task.’

179 The next few paragraphs of Mr Pickersgill's witness statement were not complimentary about the claimant. We, through EJ Hyams, tested Mr Pickersgill on them, and he was evidently uncomfortable about the fact that he felt that he had to give evidence to us in that way, but we concluded that he was also plainly honest and sincere in what he said, which was as follows.

"22 Whilst this is delicate, as Alin is still working with my team, I do need to be truthful in my evidence that in my view Alin was not getting on with the team very well. We work in a diverse team including people from Romania, Albania, Scotland, England, India, Russia, Poland, Lithuania, Portugal, Ukraine and people of various religions. A large proportion of my other team members had mentioned to me that they found Alin difficult to work with, particularly when he is on the ops/superuser task, as they felt he enjoyed the seniority of it and wasn't very collaborative, and made some teasing comments that others did not enjoy. I don't want to get into this in detail as no official complaints have been made and I want to maintain our working relationship with Alin as a current colleague, but I want to be clear that I had to balance supporting each of my team members alongside supporting Alin and his particular wishes. To be clear, to my knowledge the rest of my team don't know about Alin's allegations about discrimination and I believe their concerns are linked solely to his behaviour not to any victimisation.

23 It felt to me like Alin had decided what tasks he wanted to do, and then kept pushing in various ways to get more and more of that type of work. As I've already explained, colleagues within the team work on a variety of roles in any one shift or week and do not get to pick and choose. Alin wanted to do the ops/superuser task and he didn't want to do box exceptions, he says because it meant he had to spend time on his own. I don't understand that, as hanging exceptions also involves a lot of time on your own, but is more isolated as it's in a corner of the warehouse rather than at the desk next to the receiving area where other people come and go. Conversely, the ops (what Alin calls superuser) task involves spending the most time on your own of all the tasks, as you're based in an office alone. It didn't feel like Alin's requests were linked to disadvantages he faced because of his health, more like his simple personal preferences."

180 We accepted that passage in its entirety. The witness statement continued:

"24 I did not delay Alin's training, as he alleges. He was immediately deployed on all the different tasks over his phased return, training on the job. I did have to carefully arrange his shadowing shifts on the ops (what Alin calls superuser) tasks, as I wanted to arrange those for him with the two colleagues he got on well with and not those who had expressed a preference to avoid working closely with him. Over August

2023 to May 2024, he was taking alternating Tuesdays as holiday and I was allocating the following week Tuesdays as a rest day, to accommodate his studying or that of his wife (Alin needs time off for childcare when his wife is studying). He has also consistently taken one day a week off as holiday. All this may have meant the number of ops (what Alin calls superuser) shadowing shifts were fewer than he would have preferred - but we had not made any agreed plan about how many shifts he'd do or how quickly he would train up."

181 We accepted that paragraph in its entirety. The witness statement continued:

"25 In my view, Alin was looking for slights or challenges and was not being sensitive to the needs or ways of others. He did not seem to accept that I and other colleagues are seeking to support him or simply getting on with our day jobs, rather than trying to get at him. For example, on 11 October 2023 he spent significant time preparing an email to a colleague to complain that she had not said "please", even though she had said "thank you" in her request - see my file note at page 481 [i.e. page 482] and the email Alin found offensive at page 482 [i.e. page 483]. The colleague, Agata, is a manager so was entitled to direct colleagues what to do, but Alin did not like this. Also, on 12 October 2023 I found a big sticker on a drawer marking it loudly as for Alin's and two colleagues' use only, when the drawers are for all colleagues to use; when I asked Alin about it he seemed to suggest a colleague was responsible, but the CCTV showed him sticking it on (see my file note and follow-up email page 483 [i.e. page 484] and 484 [i.e. page 485]). These sorts of behaviours were not helping his relationship with his colleagues. I did not make up or fabricate these incidents, as Alin alleges; nor did I tell Alin that these incidents were why he couldn't do the ops/superuser task on the weekend."

182 The file note at page 484 was in these terms.

"I arrived to work on the 12/10 to find a big sticker with a no entre [sic] road sign over one of the draws in the systems office stating this is Alins, Tatiana's and Marius draw do not touch. I emailed both Alin and Marius asking who had done this. Alin replied verbally stating Marius will be really annoyed at this as he spent ages working with this sticker, however, I knew it was Alin who had done this as he was on ops. And I have checked CCTV."

183 The email at page 485 was in these terms.

"Hi both

I have removed the label from your draw, this label is just going to annoy people. Just put your names and that is it.

We are supposed to be adults in this warehouse this sort of behaviour is childish please do not let it happen again.

Think when we have visits from senior management how does this look.”

184 The claimant’s written closing submissions were relatively brief. They contained six bullet points, five of which were about the facts, and some other paragraphs making submissions about the application of the law. The final two bullet points concerned the drawer label issue, and were in the following form.

- “• During the cross-examination of the drawer/sticker incident” bundle page number 484 Mr Pickersgill showed inconsistency when asked about the details of this incident, he stated on the file note “I knew it was Alin who had done this as he was on ops. And I have checked the CCTV however he sent the email to both Mr Piciu and myself if I had attached it would have been no need to attach Mr Piciu in the email when asked about why he did not attach Ms Tatian in the email as her name was also written on the sticker he said that I spoke with her 20 minutes after I notice the sticker, however, she is a late shift colleague meaning she started her shift at 2 pm and Mr Pickersgill sent the email at 7:31 in the morning,
- Also, in his witness’s statement paragraph 25 he stated “when the drawers are for all colleagues to use” However in his email he said “I have removed the label from your drawer” indicating that he accepts that it is our drawer. He stated in the file note “I emailed both Alin and Marius asking who this had done” However his email in the bundle page number 485 does not mention this request.’

185 We accepted that paragraph 25 of Mr Pickersgill’s witness statement was inconsistent with the documents at pages 484 and 485 in that in the witness statement it was said that “the drawers are for all colleagues to use”, but that in those documents, Mr Pickersgill implicitly accepted that the drawer in question had been allocated for the use just of the claimant and his two named colleagues. We return to paragraph 25 of the witness statement in paragraphs 190-193 below.

186 Mr Pickersgill’s witness statement continued:

“26 On 5 November 2023 Alin emailed me giving his view that he was not getting allocated to the ops/superuser task fairly - both as to number of shifts and days of shifts (no weekends). I spoke with him about that and explained I disagreed and was doing my best to support him. I can see on page 490 that Alin said to Bob he’d told me around this time that he was disabled - that’s not true, he’d not said that to me by that point.

27 It was shortly after this that Bob notified me that Alin had said he is disabled. I therefore invited Alin to a meeting on 13 November 2023 to undertake an HSE stress risk assessment. At the meeting Alin reported a number of concerns - the notes are at page 493-501. In light of that, I held another meeting on 15 November 2023 to further explore his concerns (page 502-505). I then held a meeting on 29 November 2023 to go through a wellness recovery action plan (WRAP) (page 507-508 [i.e. pages 508-509]) - part of the Asda policies (see page 194)."

187 The first three bullet points in the claimant's written closing submissions were in the following form.

- On bundle page 507, Mr Pickergill stated that my request to work as a superuser was via email, however during the cross-examination, he confirmed that my request to be a superuser was during the meeting on 08/08/2023 bundle page 468 and confirmed that he was informed by Mr Nimesh on the meeting that I will be allowed to work as superuser.
- Mr Nimesh confirmed during the cross-examination that Mr Pickersgill had informed him that Mr Tulinsky did not agree with his decision and changed it, Mr Pickersgill surprisingly on bundle page 507, he stated that he spoke with Bob as Mr Tulinsky was on holiday.
- It appears that Mr Pickersgil went to see Mr Nimesh and told him that he had spoken with Mr Tulinsky who agreed with him that I would not be allowed to work as a superuser but in reality, he never did, in other words, he tricked Mr Nimesh this is because on the same document in the bundle page 507 he stated that "Also when Karl returned from holiday he also confirmed that he will be able to complete all roles".'

188 At page 507 there was a document which was stated to be a "Statement regarding Alin Miclosoni", and to have been written by Mr Pickersgill on 27 November 2023. The first paragraph was in these terms.

"My first interaction with Alin was when I was informed that he would be joining my team following his absence and I believed at the time that he would only be a clerical colleague. He then raised prior to his return that he also wanted to be one of my ops colleagues. This request was via email, and I responded stating that it would be unfair to my current colleagues as they have worked their [sic] longer, however I look forward to having you in my team and I can offer all other jobs within dotcom stock and systems. After speaking to Bob as Karl was on holiday Bob informed me that he would be able to complete all roles. Also, when Karl returned from his holiday he also confirmed that he would be able to complete all roles."

189 Mr Pickersgill's witness statement continued:

- '28 The WRAP set out various ways we would support Alin, including that, if Alin felt emotional and unable to cope, he could take a break or leave his shift if necessary and, if available, he would be granted holiday for this absence. I explained that if holiday was not available however, this would be considered as sickness absence. We discussed that the ops (what Alin calls superuser) task is the most stressful job in the 'Dotcom' department and, if Alin needed to leave his shift during the weekend, it would be difficult to find cover for Alin given the lower numbers on shift on the weekend and that I don't work on the weekend. On that basis, I explained that I would not appoint this task to Alin at weekends, until he felt in a better mindset, but this would be kept under review. In the meantime, I would do my best to ensure that Alin was deployed on the task as frequently as other colleagues, during the week.
- 29 The other reason I had for not assigning Alin to this work on the weekend was that I was not present on the weekend. I was conscious that, using his words, he viewed Tracey and Frank as "aggressors" and he wanted to avoid interacting with them. When I'm on shift I can help to facilitate that - and I can be there to step in quickly if there seems to be an issue. In most other tasks of a Clerical Colleague there is very little need to interact with the Intake Manager Tracey, but in the ops/superuser task that interaction is needed - so I can't support Alin with that on the weekends. I did explain this to Alin.
- 30 At the meeting of 29 November 2023, I explored with Alin his wish to see occupational health, but I felt it was not necessary given that I'd already agreed everything Alin asked for, apart from the weekend ops/superuser task and his wish to avoid box exceptions. I didn't believe OH would be able to provide helpful advice about whether or not Alin's health prevented him from doing box exceptions, as they don't have detailed knowledge of the particular tasks. I did not feel it was necessary to involve OH given the support already identified through the WRAP process. I know the box exceptions task is unpopular with the team because it is a heavy workload so can be a bit dull and perhaps quite hard work to get through it all, so it felt likely that this was Alin's objection to the task rather than it being something I could see he needed because of his health.
- 31 I then received a fit note from Alin saying that he was only fit for work if he was not assigned to work "sitting alone in a corner for a prolonged amount of time" (page 517). This seemed to be referring to the way Alin describes the box exceptions task, but in my view the task was not a lone task as it is located at the workstation next to the receiving area, where others pass by.

- 32 I took all the information I had into account and reached a decision about adjustments to Alin's role to support him following his stress risk assessment, setting these out in a file note at page 519 which was shared with Alin and which I talked through with him in a meeting that day, 7 December 2023 (see page 522-524). It's clear from this note the very many ways in which Alin was receiving particular support and favourable treatment. To be clear, I titled the note "reasonable adjustments" because that's usual practice, but I did not have in mind a legal definition, I just meant what support was reasonable to help Alin.
- 33 Alin has told the Tribunal that ASDA has a provision or rule that specifies that "only physically disabled and non-disabled employees can perform the superuser task on weekends, not mentally disabled employees". This is not true - we don't have a rule like that. We have a rule that people must take breaks at certain times and not leave their duties; this rule is especially important on the weekend, when there would be no one to cover an unplanned break. We also sought to support Alin with his health and make adjustments to his role to help him to participate in work. We do need to make sure colleagues are medically fit for their roles and that our operational needs are met on each shift. In order to support Alin's wish for unplanned breaks in response to stress, which in my opinion was more likely to occur in the ops/super-user role it being the most stressful role, I wanted to make sure that there was cover for those breaks - which there is, during the week, but not on the weekends. I didn't put this in place based on assumptions, but rather on the evidence before me including what Alin was telling me.
- ...
- 35 When Alin continued to raise concerns via his fit notes regarding box exceptions work, I made an OH referral on 12 February 2024 (page 529). The report (page 601-602) recommended several of the adjustments which were already in place, and advised that Alin was fit to remain in work if he is permitted to "back away from" situations that may make him feel under threat and, if operationally feasible, to avoid carrying out the 'box exception' task. Allowing flexibility for Alin to take short breaks if he feels emotional was also suggested, which again had already been implemented. Accordingly, I met with Alin on 19 February 2024 to discuss the report and carry out a stress risk assessment (SRA). Clearly now that we had formal health advice about this, I confirmed that Alin would not be deployed on 'box exceptions' and could split his allocated break up throughout the day if needed. I also agreed he could have assigned buddies, Tatiana and Marius.

- 36 I did not intentionally assign Alin fewer shifts in comparison to his colleagues regarding the super user/ops task. I aimed to allocate it once a week to everyone who wanted to do it. I see that Alin has prepared his own document at page 536 setting out what he says are the ops/superuser shifts of him and others in the team. Without laboriously going through each and every shift rota (which it looks like Alin has included in the bundle) I don't know that this document is fully accurate, but it might be about right. In any event it shows that Alin is one of six people on his shift of ten/eleven people who do this task - so at least four people aren't getting any allocation. He has Tuesdays off as holiday/rest day each week and as a support measure is not doing the ops/superuser task on the weekend, so I need to work around this in allocating shifts. He is also not doing the box exceptions task, which impacts on his rota rotations. I consider that Alin gets an appropriate allocation of this ops/superuser task and his race or allegations of discrimination certainly haven't been factors in my decision-making process around the rotas.
- 37 I understand Alin says that I failed to follow the return to work process. This process is set out in ASDA's policy at page 208-210 of the bundle and as can be seen from the above, I did agree a phased return for Alin and hold return to work meetings to facilitate his return. I think what Alin means is that I did not end up assigning him to super-user tasks on weekends - as he goes on to explain in his allegation. I've addressed this above, but to be clear I have not "fabricated documents" at all, and in particular I've not done so in order to stop Alin from doing super-user shifts. I don't know what Alin means by this. Possibly he is suggesting that I have only reported my day-to-day performance or conduct concerns so that I can use these things to stop him getting those shifts. This is not true, as explained above I have genuine and ongoing concerns of that nature but in any event have continued to treat Alin fairly and with adjustments in relation to the super-user shifts.'
- 190 We accepted that the claimant's written closing submissions set out in paragraphs 184 and 187 above accurately pointed out some flaws in the evidence of Mr Pickersgill. However, we concluded from those flaws only that the witness statement had been drafted without sufficiently careful thought and that Mr Pickersgill had not checked it sufficiently carefully. We did not conclude from those flaws that what Mr Pickersgill said in the rest of his witness statement was to any extent untrue. Apart from those flaws, we accepted Mr Pickersgill's evidence which we have set out above. That was for the following reasons.
- 191 The problem with the drawer label as far as Mr Pickersgill was concerned was not that the claimant had sought to stop others using the drawer but that the language used by the claimant (which was probably devised by him as he ordered the stickers from Amazon, as he said and as was clear from pages 478-

479) was provocative. We also saw that the document at page 484 (which was stated to be a "General File Note"; we have set out the text in paragraph 182 above) showed that Mr Pickersgill had not written to the third colleague named on the drawer label. That was Tatiana (spelt on the label at page 480 "Tetiana"). However, that only showed that at worst, Mr Pickersgill had picked on the claimant and Marius, but the email at page 485 which we have set out in paragraph 183 above suggested that Mr Pickersgill had formed the clear view that Tatiana was not involved in the incident. As for the language itself, it was in the form of a "Polite Notice", which was the standard form on Amazon, with the added message:

"PLEASE DO NOT TOUCH!!!

Marius, Tetiana & Alin only".

- 192 That was somewhat territorial, and we could see why Mr Pickersgill took exception to it. As he said in his email at page 485, it was "just going to annoy people".
- 193 Similarly, we could see that the documents at pages 482-483, to which Mr Pickersgill also referred in paragraph 25 of his witness statement, bore out entirely what he said in that paragraph about the situation to which they related.
- 194 It was claimed in paragraph 8e of the list of issues that Mr Pickersgill had "over the period 12 September 2023 until 11 March 2024 (the date of Claim 2) ... failed to follow the return to work process and/or has fabricated documents with the purposes of using them to stop the Claimant from being assigned to the 'super-user' task on weekends." The claimant identified those documents in the heading above paragraph 129 of his witness statement, namely: "Agata email, draw in the office and break abuse/using mobile phone between 11-13 October 2023". They were (1) the documents referred to in the passage of Mr Pickersgill's witness statement set out in paragraph 181 above, which included page 484, which we have set out in paragraph 182 above and (2) page 486 (to which we have not yet referred). The document at page 486 was in these terms.

"Following a complaint from a colleague I have reviewed cctv And confirmed that Alin has been sat at the hanging Exceptions desk using his phone whilst she [sic] should have been on hanging exceptions.

I have had a detailed conversation with him about this issue
And informed him that if it happens again, I will investigate it.

He completely denied this and stated he would not do this. So, I informed him that I have checked CCTV and he first response was it wasn't just me there was others there too. I explained that we are discussing your actions not others. He then went on to complain that it wasn't his idea to do it and people have been sat there before he joined my team."

- 195 Mr Pickersgill was cross-examined on that document and asked a question by EJ Hyams about it. We were satisfied that the document was not a fabrication.
- 196 It was asserted in paragraph 8f of the agreed list of issues that it was a detriment within the meaning of section 27(1) of the EqA 2010 that “Billy Pickersgill refused to refer the Claimant to OH prior to agreeing reasonable adjustments for the Claimant on 7 December 2023”. The claimant cross-examined Mr Pickersgill on the fact that Mr Pickersgill did not agree to refer the claimant to an occupational health practitioner, as recorded in the handwritten note of a meeting with the claimant which he had on 29 November 2023. The note was at page 508. What he was plainly seeking, as could be seen from what Mr Pickersgill was recorded at page 508 to have said, was to have an occupational health practitioner advise the respondent not to put the claimant on box exceptions. Mr Pickersgill was there recorded to have said: “OH will not tell us not to put you on box exceptions as they don’t know the roles in the warehouse.” We have already indicated in paragraphs 189 and 190 above that we accepted paragraph 30 of Mr Pickersgill’s witness statement, which we have set out in paragraph 189 above. In those circumstances, we did not see the fact that the claimant was not referred to an occupational health practitioner as being in any way detrimental to the claimant within the meaning of section 27(1) of the EqA 2010. That was because it was not going to be a benefit to him to be referred to occupational health. In any event, we concluded that Mr Pickersgill’s sole reason for not referring the claimant to occupational health at that time was what Mr Pickersgill said in paragraph 30 of his witness statement.
- 197 While the claimant claimed in paragraph 139 of his witness statement that the fact that Tatiana Terranova was now available to take over from the claimant if he had to stop working on operations at the weekend meant that it made no sense for the claimant not to be given the operations role at weekends, Mr Pickersgill said in cross-examination that having her working at weekends did not in practice lead to what he called “an additional resource”. That was because members of the Dotcom team who could take weekends as part of their holidays did do that, so that in practice the fact that Ms Terranova was now working weekends did not affect the situation. We accepted that evidence of Mr Pickersgill.

Our conclusions on the various claims of the claimant

- 198 In the following paragraphs below, we state our findings on the various claims of the claimant by referring to the factual issues under the headings of the legal claims. The statement of the factual issue is intended to be read as being a statement to the effect that the claimed facts were sufficient to found the legal claim in question, so that where we say that the claim stated in the issue did not succeed, or had to fail, we mean that that legal claim did not succeed, or had to fail.

(1) The claim of harassment within the meaning of section 26(1) and (4) of the EqA 2010 and/or of direct discrimination within the meaning of section 13 of that Act

Issue 3(i): what Mrs Rosier told the claimant about parking at the beginning of 2020

199 We have stated in paragraphs 50-53 above our factual findings on this claim. Given those findings and having stood back and assessed the question in the light of all of the evidence before us, we concluded that what Mrs Rosier said to the claimant early in 2020 about parking his car after (i.e. beyond, or behind) the air conditioning unit was objectively justified and in no way connected in her mind with the protected characteristic of race.

200 Separately, and for the avoidance of doubt, we came to the conclusion that what Mrs Rosier said then was not intended to violate the claimant's dignity, or create for him an intimidating, hostile, degrading, humiliating or offensive environment. Nor, we concluded, did it have the effect of violating the claimant's dignity or creating such an environment for the claimant. That was because it was objectively justified and it was not reasonable for the conduct to have that effect.

Issue 3(ii): Did Mr Frank Smith say anything to the claimant about the way that he talked at the beginning of 2021, and, if so, what did he (Mr Smith) say?

201 Our findings of fact stated in paragraph 76 above meant that this claim could not succeed.

Issue 3(iii): Did Mr Smith in the spring of 2022 do what the claimant claimed he did when working next to the Claimant on the 'QC station desk'?

202 As we say in paragraph 82 above, we preferred Mr Smith's evidence to that of the claimant about what happened in this regard. There was in our judgment nothing in our above findings of fact from which we could in the absence of an explanation from the respondent draw the inference that the conduct was to any extent done because of the claimant's race or (if it meant anything different) related to the claimant's race within the meaning of section 26(1) of the EqA 2010. (Where we say below that we found that the required mental element did not exist, we mean what we have just said.) There was nothing remotely overtly race-related even in the claimant's description of the event. For all of the reasons in this paragraph, the claim stated in issue 3(iii) had to fail.

Issue 3(iv): The events of October 2022, when the claimant was asked (ultimately by Mrs Rosier) to create new appointments for some items

203 We have stated our findings of fact on this issue in paragraph 91 above. Given those findings, we concluded that what Mrs Rosier did in October 2022 in relation

to the claimant was the same as what she would have done to anyone else, no matter what their race. We concluded that the required mental element did not exist. There was nothing remotely overtly race-related even in the claimant's description of the event. For all of the reasons in this paragraph, the claim stated in issue 3(iv) had to fail.

Issue 3(v): Did Mrs Rosier on 7 November 2022 humiliate the claimant "in front of the whole team for making a minor mistake (the TI-HI incident)"?

204 Given our findings of fact stated in paragraph 98 above, we concluded that Mrs Rosier did not do what was claimed in issue 3(v), and that she did nothing like it. We concluded that the required mental element did not exist. There was nothing remotely overtly race-related even in the claimant's description of the event. For all of the reasons in this paragraph, the claim stated in issue 3(v) had to fail.

Issue 3(vi): What precisely happened on 4 December 2022, when, the claimant claimed, a "heated exchange" took place between the him and Mr Smith, during which things such as wars, religion and slavery were discussed?

205 We have stated our findings of fact on this issue in paragraph 103 above. Given those findings, we could not see anything in the things that were discussed on 4 December 2022 which was connected in the mind of Mr Smith with the claimant's Romanian nationality. Certainly there was in our judgment no fact before us from which the inference that it was so connected could be drawn.

206 In addition, we did not see in what Mr Smith said anything that was intended to violate the claimant's dignity, or create for him an intimidating, hostile, degrading, humiliating or offensive environment. Nor, taking into account not only the claimant's perception, but also the circumstances of the conversation of 4 December 2022, which included that the conversation was one to which Mr Smith came, so that he did not start it, did we conclude that it had the effect of violating the claimant's dignity or creating such an environment for the claimant. In saying that, we took fully into account the fact that Mr Smith referred to the UK in his view "having to step in to wars in other countries". While that was a controversial statement, it could not in our view reasonably be said to have had such an effect.

207 For those reasons, the claim stated in issue 3(vi) did not succeed.

Issue 3(vii): Did Mrs Rosier on 9 January 2023 tell everybody in the office that the claimant did not work and that he abused his breaks?

208 Given the fact that there was nothing overtly related to race in the circumstances asserted by the claimant which led to the claim stated as issue 3(vii) being made by him, and given our findings of fact stated in paragraphs 108-111 above, that claim had to fail.

Issues 3(viii) and 3(ix); the claim that rejecting the claimant's request for Mrs Rosier to be moved to a different department was directly discriminatory or racial harassment

209 We have stated our factual findings on these claims in paragraphs 112-114 above. There was nothing overtly related to race in the rejection of the claimant's request for Mrs Rosier to be moved. We concluded that the required mental element was not present in the mind of either Mr Yadev or Mr Baxter. What they did was, we concluded, not intended to violate the claimant's dignity, or create for him an intimidating, hostile, degrading, humiliating or offensive environment. Nor, we concluded, did what they did have the effect of violating the claimant's dignity or creating such an environment for the claimant. That was because the refusal to move Mrs Rosier was objectively justified and it was not reasonable for the conduct to have that effect. Thus, the claims stated as issues 3(viii) and 3(ix) did not succeed.

Issue 3(xi): Did Mr Smith on 13 March 2023 intimidate the claimant with the use of a forklift truck and threaten to beat up the claimant?

210 Given our findings of fact stated in paragraph 142 above, this claim failed on the facts. For the avoidance of doubt, we concluded that in whatever Mr Smith did do there was not the required mental element and that what he did was not intended to violate the claimant's dignity, or create for him an intimidating, hostile, degrading, humiliating or offensive environment, nor did it in fact, applying section 26(4) of the EqA 2010, have the effect of doing either of those things.

Issue 3(xii): Did Mrs Rosier on 23 March 2023 Mrs Rosier when discussing a recent murder in the local area make "comments of a racial nature"?

211 We state our findings on the facts of this claim in paragraph 160 above. Given those findings, we concluded that the required mental element did not exist.

212 In addition, we concluded that what Mrs Rosier did in fact say was not intended to violate the claimant's dignity, or create for him an intimidating, hostile, degrading, humiliating or offensive environment. Nor, we concluded, applying section 26(4) of the EqA 2010, did what she said have the effect of violating the claimant's dignity or creating such an environment for the claimant.

Alleged homophobic comments: issues 4-6

213 Given what we say in paragraphs 75 and 76 above, we concluded that the claim of what we will call sexual orientation harassment within the meaning of section 26(1) and (4) of the EqA 2010 failed. That was because whatever it was that was said by Mr Smith at the time was not related to the protected characteristic of sexual orientation. If we had had to go further and apply section 26(1)(b) and (4), then we would have concluded that (1) whatever was said was not intended by Mr Smith to violate the claimant's dignity or create for him an intimidating, hostile,

degrading, humiliating or offensive environment, and (2) it did not have the effect of doing either of those things.

(2) The claim of victimisation within the meaning of section 27 of the EqA 2010

Issue 8a: Was there a 66% reduction in the occasions that the claimant was deployed to the 'receiving' task by the respondent to any extent because the claimant had done a protected act and, if so, was that detrimental treatment within the meaning of section 39(4)(d) of the EqA 2010?

214 Given what we say in paragraphs 162-169 above, this claim had to fail.

Issues 8b-8f: Did Mr Pickersgill subject the claimant to detrimental treatment within the meaning of section 39(4)(d) of the EqA 2010 by doing any of the things which it was claimed in paragraphs 8b-8f of the list of issues he did?

Issue 8b

215 Despite taking into account the fact that discriminators or persons who have victimised within the meaning of section 27 of the EqA 2010 do not normally accept that they have discriminated or as the case may be victimised, having heard and seen Mr Pickersgill give evidence, and having heard and seen the claimant give evidence, we concluded that

215.1 even though there was something in the factual circumstances before us from which we could have drawn the inference that Mr Pickersgill had treated the claimant detrimentally by telling the claimant on 14 August 2023 that he would not be permitted to do the work of super user because the claimant had stated a grievance or made his first employment tribunal claim, namely the flaws in Mr Pickersgill's evidence as identified by the claimant in the closing submissions which we have set out in paragraphs 184 and 187 above,

215.2 on the balance of probabilities, Mr Pickersgill had not treated the claimant detrimentally for that reason. That was because we accepted the evidence of Mr Pickersgill in paragraphs 15, 16, 18, 19 and 21-22 of his witness statement which we have set out in paragraphs 176, 178 and 179 above and because we accepted that his reasons for not initially permitting the claimant to do the work of operations in the Dotcom team were as stated in those paragraphs, and only in those paragraphs.

Issue 8c

216 Our finding in paragraph 177 above was determinative (against the claimant) of the claim stated in paragraph 8c of the list of issues.

Issues 8d-8f

217 We could see nothing in the facts as found by us in paragraphs 176, 178-181 (ignoring the text set out in paragraph 181 for this purpose), and 186-197 above from which we could draw the inference that Mr Pickersgill did any of the things referred to in paragraphs 8d-8f of the list of issues because the claimant had done a protected act within the meaning of section 27 of the EqA 2010. We also concluded on the basis of those findings of fact that Mr Pickersgill's acts and omissions concerning the claimant had nothing whatsoever to do with the fact that the claimant had done a protected act. That was for the following reasons. Mr Pickersgill was, given what he said in paragraph 39 of his witness statement, plainly aware of the claimant's first employment tribunal claim from at the latest 6 June 2023. However, there was in the circumstances (despite the flaws in Mr Pickersgill's evidence pointed out in the submissions set out by us in paragraphs 184 and 187 above) nothing from which we could draw the inference that Mr Pickersgill's acts and omissions about which the claimant complained to us were to any extent done because the claimant had done one or more protected acts, and in any event we were persuaded at least on the balance of probabilities that what Mr Pickersgill did in relation to the claimant was done only for what he genuinely perceived to be the business needs of the respondent. For those reasons, we concluded that the claims stated as issues 8d-8f did not succeed.

(2) The claim of a failure to make reasonable adjustments within the meaning of section 20 of the EqA 2010

218 It was claimed by the claimant that it was a provision, criterion or practice ("PCP") to require "Warehouse Operatives ... to interact with the Intake Manager". That was in our judgment not a PCP within the meaning of section 20 of the EqA 2010 (or, in fact, section 19 of that Act). Rather, it was something which affected only the claimant, because of his animosity towards Mrs Rosier. In addition, and in any event, we could not see how a PCP could arise in relation to the position of the Intake Manager as such, since the Intake Manager might not be Mrs Rosier.

219 It was also claimed by the claimant that it was a PCP that "only physically disabled and non-disabled employees can perform the superuser task on weekends, not mentally disabled employees". That was in our view much closer to a PCP, but it was not entirely apt. We concluded that there was a PCP that a superuser was not likely suddenly to become unwell and unable to complete his or her shift.

220 However, the claimant did not contend to us that he was disabled before the time when the respondent accepted that he was, which was (as stated in the agreed list of issues) 24 March 2024. On that basis, all of his claims of disability discrimination had to fail.

- 221 Nevertheless, we could see that it was going to be helpful for the parties to know our conclusions on the claims made of breaches of the EqA 2010 on the basis that the claimant was disabled within the meaning of that Act. An additional reason why we thought that we should consider the claimant's claims of disability discrimination was that it was possible that the claimant had not realised that (1) it was up to him to press the point that he was disabled before 24 March 2024, and (2) he could not rely on us to take it for him. Having said that, we did point out to him before closing submissions that he was not asserting that he was disabled before 24 March 2024, and he did not subsequently make that assertion. Accordingly, what we say now about the claims based on the proposition that the claimant was disabled at the material time is said purely for the sake of completeness.
- 222 The respondent submitted that even the second claimed PCP was merely a specific measure taken in relation to the claimant. That was because it was really another way of putting the first PCP, since the likelihood of the claimant becoming too unwell to complete his shift arose from the possibility of him coming into contact with Mrs Rosier or Mr Smith.
- 223 Alternatively, not assigning the claimant to be a superuser (in fact, it was the operations role to which he was not assigned in the period in relation to which the claim was in time, given what we say below about the jurisdictional issue of time) was specific to him and therefore, applying *Ishola*, it was not a PCP.
- 224 We accepted the second of those submissions of the respondent but remained of the view that there was in place a PCP in the form of a requirement that a person carrying out the operations role in the Dotcom team at the weekend was not likely suddenly to become unwell and unable to complete his or her shift. However, assuming that the claimant was a disabled person at that time,
- 224.1 while the application of that PCP did put the claimant at a substantial disadvantage as compared with persons who were not disabled in that it precluded him from doing that role at weekends (but not during the week, when Mr Pickersgill and other managers were present),
- 224.2 we could not see any steps which it would have been reasonable to take to avoid that disadvantage being experienced by the claimant.
- 225 For the avoidance of doubt, it was in our judgment not a reasonable step within the meaning of section 20 of the EqA 2010 to employ any additional manager at weekends when the claimant was working in order to enable the claimant to fulfil the operations role at those weekends.

(3) The claim of a breach of section 15 of the EqA 2010: the claim of discrimination arising from a disability

- 226 Looking at the matter from what one might call the opposite direction (or the other side of the coin) in the form of section 15 of the EqA 2010, we concluded that it was a proportionate means of achieving the legitimate aim of avoiding interruptions to the operations of the respondent at the weekend to decline to assign the claimant to undertaking the operations (or superuser) role at weekends. That was not least because the claimant was able to be assigned to fulfil that role during the week, but it was also because there was no financial detriment to the claimant from not being able to fulfil that role.
- 227 For the avoidance of doubt, we accepted that it was proportionate not to employ any additional manager at weekends when the claimant was working in order to enable the claimant to fulfil the operations role at those weekends.

(4) To what extent were the claims made out of time?

- 228 Finally, we record here that we came to the conclusion that there was no conduct extending over a period within the meaning of section 123(3)(a) of the EqA 2010, and that it was not just and equitable to extend time to any extent. The latter conclusion was arrived at on the basis that the claimant put no evidence before us to support the proposition that it was just and equitable to extend time, and because there was nothing in the circumstances which in our view made it just and equitable to extend time. Accordingly, the claim was in time only in respect of events occurring on and after the date which the parties (in our view correctly) agreed in this respect, namely 8 December 2022.

Employment Judge Hyams

Date: 10 September 2024

SENT TO THE PARTIES ON

2 October 2024

FOR THE TRIBUNAL OFFICE