EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Aisha Callender	**v**	**Accor Invest**

Heard at: London Central
On: 25 – 27 September 2024

Before: EJ G Hodgson
Mr J Ballard
Ms D Keyms

Representation

For the Claimant: did not attend
For the Respondent: Mr Nigel Henry, consultant

JUDGMENT

All remaining claims fail and are dismissed.

REASONS

Introduction

1.1 On 5 January 2024 the claimant brought proceedings that alleged wrongful dismissal and some possible claims of disability and race discrimination.

The Issues

2.1 The issues in this claim are unclear.

2.2 EJ Davidson undertook a case management hearing on 8 April 2024. At that hearing, the claimant alleged she was pursuing claims of disability discrimination and race discrimination.

2.3 Before EJ Davidson, the claimant withdrew her allegation of wrongful dismissal, and that claim was dismissed.

2.4 EJ Davison was unable to identify any specific allegations of disability discrimination or race discrimination. The issues to be decided in the case are recorded under the subheading "further information." As follows:

> **8. The claimant must write to the Tribunal and the other side by 22 May 2024 with the following information:**
>
> **8.1 What type of disability discrimination is being claimed (direct discrimination, indirect discrimination, discrimination arising from disability, failure to make reasonable adjustments, harassment or victimisation).**
> **8.2 In respect of any claim for discrimination arising from disability:**
> **8.2.1 what was the unfavourable treatment;**
> **8.2.2 what thing arose as a consequent of the claimant's disability?**
> **8.3 In respect of any claim for a failure to make reasonable adjustments:**
> **8.3.1 what provision, criterion or practice (PCP) is relied on;**
> **8.3.2 how did the PCP put the claimant at a disadvantage;**
> **8.3.3 what adjustments does the claimant say should have been made?**
> **8.4 What type of race discrimination is being claimed (direct discrimination, indirect discrimination, harassment or victimisation)? What are the details of the complaint? In respect of any complaint of direct discrimination, does the claimant rely on a named comparator or a hypothetical comparator.**

2.5 EJ Davidson recognised that the list of issues had not been finalised. She said this at paragraph 7.

> **7. A draft List of Issues has been drawn up and will require amendment after the claimant has provided further information as ordered below and the respondent has amended its Grounds of Resistance. The parties must liaise in order to finalise the List of Issues after these steps have been taken. If they are unable to finalise the List of Issues, they should apply for a short case management hearing to resolve the issue.**

2.6 The respondent was granted leave to amend the grounds of resistance by 5 June 2024.

2.7 The case management discussion of 8 April 2024 fails to record any specific claim of disability discrimination or any specific claim of race discrimination. The claimant was not expressly granted leave to amend the claim, albeit there was leave to amend the response, following the provision of further information from the claimant.

2.8 The claimant provided further information. The document is not dated. The respondent applied to amend the response on 5 July 2024 and stated the information had been provided sometime in June.

2.9 Ultimately, the respondent filed a further amended response (which is undated). On 16 July, EJ Keogh granted leave to amend the response filed with the application of 5 July 2024. We have assumed that the leave related to the "further amended response."

2.10 The parties did not liaise to agree a list of issues. Neither party applied for a further hearing to clarify the list of issues.

2.11 The original claim form gives particulars of the claims as follows:

> **[I]n response to the way I was treated on the 12th of September 2023 at 10:00 a.m. I am disheartened by the lack of professionalism, and due to the way, I was dismissed without following the right protocols within your employee handbook and employment contract. My response highlights Wrongful dismissal, Discrimination, and lack of professionalism.**
>
> **As the Human Resource Manager, Noemi d'Aniello has expressed, I am not entitled to an appeal I hear by submit a written complaint, which I will be taking further if not acknowledged.**
>
> **Your decision to terminate my contract by breaching of contractual disciplinary procedure by treating a minor performance issue as gross misconduct. This also includes dismissing me as an employee without previous warning and treating a disability as gross misconduct.**
>
> **This situation should have been handled in a one-to-one discussion meeting, with an improvement plan with deadlines; this could have been included to offer me any training or support to get me up to speed and monitor my progress. The only time an immediate dismissal would apply would be if my behaviour broke trust and destroyed my working relationship with the company by committing gross misconduct. Then you would have the right to dismiss me without any pre-notice of this meeting.**
>
> **This act which you have committed as a manager is unethical and wrong. The minutes of the meetings express your highlighting that this was a catch-up meeting with another colleague attending. There was no written notice to notify me of this meeting. This dismissal was very abrupt and unprofessional. This situation left me vulnerable and suicidal.**

2.12 Therefore, in summary, the position is as follows. The ET1 indicated, at paragraph 8.1, that race and disability discrimination were alleged. The narrative, set out above, gave limited details. EJ Davidson was unable to identify any specific allegations of discrimination in the original particulars, and hence made an order for further information. The claimant has made no application to amend, and none has been granted. The issues were not clarified by the parties, nor by the tribunal. It follows that the claims are extremely unclear. It is arguable that there was no claim of race discrimination or disability discrimination set out in the claim form initially. We will consider this further when considering our conclusions.

Evidence

3.1 We identified all documents which appear to be relevant to the claimant's case. In particular we considered the following: the original claim form; the claimant's schedule of loss; the correspondence; the claimant's further information; medical evidence contained in the bundle; the claimant's alleged appeal letter of 20 October 2023 (a document the respondent claims was not sent to it); and the bundle of documents, which included any disclosure from the claimant.

3.2 The respondent relied on four witnesses. Two witnesses , Ms Zsuzsa Szilagyi, HR director Western Europe, and Ms Noemi D'Aniello, HR manager, both gave live evidence. We also received statements for Ms Alice Neubert, vice president of finance, and Mr Martijn Van Der Graaf, chief operating officer Western Europe, but neither attended.

3.3 We understand that Ms Alice Neubert and Mr Martijn Van Der Graaf did not attend, as they were scheduled to attend on day two. However, as the case proceeded in the claimant's absence, they were not available. The respondent did not seek adjournment so they could attend.

Applications

The application to adjourn

4.1 The claimant applied to adjourn the final hearing. On 23 September, the claimant sent the following request:

> **Please change the date. Due to my illness and not feeling very well enough to attend 25-27, I am currently signed off from work.**

4.2 The tribunal did not respond to that request.

4.3 The claimant renewed her request to adjourn on 24 September at 20:21 as follows:

> **Please change the date. Due to my illness and not feeling very well enough to attend 25-27, I am currently signed off from work.**

4.4 The claimant provided no further explanation or supporting documentation. The claimant failed to attend the hearing.

4.5 Adjournment of a hearing is not an automatic right. It is appropriate to take into account all the relevant circumstances, and these may include evidence of a party's engagement with the proceedings, as well as matters directly relevant to the ability to attend the hearing.

4.6 Rule 29 Employment Tribunal Rules of Procedure 2013 permits adjournment of a final hearing. For the assistance of parties, there is guidance on seeking postponements, issued by the president of the employment tribunals, dating from 2013. It is advisable to state why the

application is made and how it would further the overriding objective. All relevant documents must be exhibited. Failure to provide documents may undermine the application for adjournment. It is advisable to seek to discuss the matter with the other parties.

4.7 The tribunal should consider all relevant evidence. Where it is alleged the party cannot attend for medical reasons, the tribunal may expect to receive all medical certificates and supporting medical evidence. There should be an explanation of the nature of the condition. The tribunal should consider any statement from a medical practitioner, and should consider whether there is a prognosis and an indication when the party will be able to attend.

4.8 In this case, the claimant failed to set out the nature of the medical condition, or why that condition prevented her from attending. The claimant failed to send any medical evidence. The applications referred to a fitness for work note, but gave no indication that any doctor had been approached to offer an opinion as to whether the claimant would be able to attend, or when the claimant would be able to attend. The tribunal obtaining the fitness for work note was unlikely to add further to the deliberations or the information provided.

4.9 Further, the tribunal considered all the circumstances. In particular, the tribunal considered whether the claimant had actively engaged with these proceedings. The respondent indicated numerous attempts had been made to secure exchange of witness statements. The respondent had prepared its witness statements ready for exchange in accordance with the directions issued. On 23 September 2024, the respondent had applied for an unless order providing that the claimant exchange witness statements on that day, or in default, the claim be dismissed. The tribunal had not dealt with that application for an unless order prior to the hearing. The application did invite an explanation from the claimant as to why she had not exchanged her witness statement. The claimant provided no explanation, but instead applied to adjourn. Had the claimant given a reasonable explanation, supported by a more detailed explanation, and had she shown that she had engaged actively preparing for the hearing, we may have considered it appropriate to adjourn and seek further evidence.

4.10 The tribunal was not satisfied that there was a good or proper reason why the claimant has failed to prepare her witness statement. This is strong evidence of the claimant not actively pursuing the matter. It is strong evidence of unreasonable conduct of the proceedings.

4.11 The claimant failed to set out a prima facie case for why she could not attend the hearing. She failed to set out any medical evidence in support. To the extent she referred to medical evidence, it was likely to be inconclusive. A fit note may say there is an inability to work, but Fit notes do not give the detail or a prognosis. It is unlikely to be useful evidence of

an inability to attend the hearing. There was no suggestion that there was any other medical evidence that was relevant.

4.12 The claimant had not prepared for the hearing adequately or at all. She provided no explanation for her failure to exchange witness statements, despite being put on notice by the request for an unless order. In the circumstances we were not satisfied it was either necessary or appropriate to seek further information, as there was no indication that any such information existed or would be of assistance. Had the claimant demonstrated that she was actively engaged with the proceedings, or demonstrated that she was pursuing the proceedings, by filing a witness statement, it may have been appropriate to adjourn and seek further evidence. However, in the circumstances we did not consider it appropriate to adjourn generally, or to adjourn for a shorter period to seek further evidence, and hence the application was refused.

4.13 The respondent indicated it wished the tribunal to hear the claim substantively. In the circumstances, the application for an unless order was withdrawn.

The Facts

5.1 The respondent is a management company for hotels across the UK.

5.2 The respondent employed the claimant as an executive assistant until her employment was summarily terminated on 12 September 2023.

5.3 Before being offered employment, the claimant had several interviews. The respondent's requirements were discussed at interview. Mr Martijn Van Der Graaf, chief operating officer, emphasised the respondent was looking for someone who could work independently and accurately. The claimant represented that she was familiar with the type of role and she had no issue working independently or accurately. The claimant did not disclose any health issues. She did not say that she had dyslexia. She did not say had issues with depression or anxiety. She did not disclose any material medical conditions or health concerns during her probation, until the events of 12 September as outlined below.

5.4 Her contract was subject to a three month probationary period during which her performance would be assessed. It provided for termination on one week's notice.

5.5 The contract set out her duties and referred to the key responsibilities as being contained in her job description and written objectives.

5.6 The job description provides an overview of her role which was "to provide support to the COO of Accorinvest Western Europe (UK and Benelux) and support managers with administrative tasks, helping with time management." The specific responsibilities are consistent with that

overview and included arranging travel and accommodation for the COO when required. There was a managerial function in relation to direct reports. The job description required a professional, friendly and efficient presentation. The profile included "good written and verbal communication skills in English and preferable in Dutch and French" and "strong organisational skills."

5.7 The claimant's CV states that she is adaptable and works well independently and also within a team environment. She states "I have strong abilities to work well under pressure and adhere to strict deadlines." It states that she has fifteen years of managerial and sales experience with a track record of success. She states she has "astounding business acumen of logistics, administration, supply chain management and marketing." Her qualifications include an MBA in Project Management – passed with distinction. The CV demonstrates solid work experience with specific experience as a chief officer executive.

5.8 The claimant attended the company's induction first week

5.9 The respondent's evidence described various mistakes and problems during the early part of the claimant's employment. We do not need to set them all out in detail, but we include a number by way of illustration.

5.10 On 18 August 2023, Ms Zsuzsa Szilagyi discussed with the claimant an invitation which had been sent wrongly as a calendar invitation. On 9 August 2023, the claimant failed to attend a meeting with Zsuzsa Szilagyi on time, as another meeting had overrun. The rescheduled meeting on 22 August 2023 led to difficulties and the claimant delayed her attendance, having been delayed at lunch. On 6 September, the claimant's attendance at a meeting with Ms Alice Neubert was cancelled by the claimant at short notice. The claimant missed the deadline of 4 September 2023 for processing the expenses of Mr Martijn Van Der Graaf.

5.11 These and other perceived difficulties led to discussions at a senior level. On 12 September 2023, Ms Noemi D'Aniello and Mr Martijn Van Der Graaf met with the claimant. This meeting had been scheduled by calendar invite on 10 August 2023. The respondent did not confirm prior to the meeting that it would be considering whether to continue with her employment.

5.12 It is the respondent's evidence, which we accept, that there had been discussions with the claimant about her performance, albeit these were not minuted, and were not formal reviews.

5.13 On 12 September 2023, Mr Martijn Van Der Graaf stated they had planned "a catch up". He referred to arrangements to discuss issues experienced by the management committee since the claimant commenced employment. He stated Ms Noemi D'Aniello was in the meeting to take notes. Mr Martijn Van Der Graaf referred to a long "list of

things." He gave as an example his plane ticket where his name had been misspelled. The mistake had caused difficulties and prevented his travelling.

5.14 The claimant admitted that there had been errors, and she gave various explanations. On one occasion she did not have a phone, but stated the error was not deliberate. She accepted she had misspelt Mr Martijn Van Der Graaf's name for a flight ticket with CWT. She said that this was "an error."

5.15 Mr Martijn Van Der Graaf stated that the firm was looking for someone who had a good attention to detail, and then proceeded to discuss various perceived difficulties and mistakes. He sought the claimant's explanation. As the meeting progressed the claimant stated, "I am not careless. I have been struggling with anxiety and I have a little dyslexia." Later she repeated that she had anxiety and depression since 2011, which was not related to the job. When asked how this affected the errors she stated, "I don't think it did. I think it is more me overthink it." She also stated "I had a panic attack when dealing with the expenses for example."

5.16 The claimant asked for an additional two weeks and she was asked for an explanation as to how that would assist. She stated "knowing that now I am being fully watched, I am sure I will get better. Also, I feel less of a burden now that it is out in the open. It has been genuinely hard." She went on to say that she would like "someone to support me in terms of communication."

5.17 The meeting was adjourned for approximately 10 minutes. Mr Martijn Van Der Graaf and Ms Noemi D'Aniello decided to dismiss the claimant. Mr Martijn Van Der Graaf stated that there had been "too many mistakes." He stated it was linked to the attention to detail and was not related to company processes. We accept that he did not believe the claimant's attention to detail was likely improve if more time was given. He stated her employment was terminated with immediate effect. Thereafter, the claimant asked for a list of things she had done wrong. That led to further discussion.

The law

6.1 Direct discrimination is defined in section 13 of the Equality Act 2010.

Section 13 - Direct discrimination

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

6.2 **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 is authority for the proposition that the question of whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. Accordingly:

> **employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. (para 10)**

6.3 **Anya v University of Oxford** CA 2001 IRLR 377 is authority for the proposition that we must consider whether the act complained of actually occurred (see Sedley LJ at paragraph 9). If the tribunal does not accept that there is proof on the balance of probabilities that the act complained of in fact occurred, the case will fail at that point.

6.4 Harassment is defined in section 26 of the Equality Act 2010.

> **Section 26 - Harassment**
>
> **(1) A person (A) harasses another (B) if--**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
> **(b) the conduct has the purpose or effect of—**
>
> **(i) violating B's dignity, or**
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **(3) A also harasses B if--**
>
> **(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,**
> **(b) the conduct has the purpose or effect referred to in subsection (1)(b), and**
> **(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.**
>
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account--**
>
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect.**
>
> **(5) The relevant protected characteristics are--**
>
> **age; disability; gender reassignment; race; religion or belief; sex; sexual orientation.**

6.5 In **Richmond Pharmacology v Dhaliwal [2009] IRLR 336** the EAT (Underhill P presiding) in the context of a race discrimination case, made it clear that the approach to be taken to harassment claims should be broadly the same. The EAT observed that 'harassment' is now defined in a way that focuses on three elements. First, there is the question of unwanted conduct. Second, the tribunal should consider whether the conduct has the purpose or effect of either violating the claimant's dignity

or creating an adverse environment for him or her. Third, was the conduct on the prohibited grounds?

6.6 In **Dhaliwal** the EAT noted harassment does have its boundaries:

> **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. We accept that the facts here may have been close to the borderline, as the Tribunal indeed indicated by the size of its award.**

6.7 Harassment may be unlawful if the conduct had either the purpose or the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

6.8 A claim based on 'purpose' requires an analysis of the alleged harasser's motive or intention. This may, in turn, require the Employment Tribunal to draw inferences as to what that true motive or intent actually was: the person against whom the accusation is made is unlikely to simply admit to an unlawful purpose. In such cases, the burden of proof may shift, as it does in other areas of discrimination law.

6.9 Where the claimant simply relies on the 'effect' of the conduct in question, the perpetrator's motive or intention even if entirely innocent does not in itself afford a defence. The test in this regard has both subjective and objective elements to it. The assessment requires the tribunal to consider the effect of the conduct from the complainant's point of view: the subjective element. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that effect: the objective element. The fact that the claimant is peculiarly sensitive to the treatment does not necessarily mean that harassment will be shown to exist.

6.10 The requirement to take into account the complainant's perception in deciding whether what has taken place could reasonably be considered to have caused offence reflects guidance given by the EAT in **Driskel v Peninsula Business Services Ltd [2000] IRLR 151**, which concerned the approach to be taken by employment tribunals in determining whether alleged harassment constituted discrimination on grounds of sex. In **Driskel** the EAT held that although the ultimate judgment as to whether conduct amounts to unlawful harassment involves an objective assessment by the tribunal of all the facts, the claimant's subjective perception of the conduct in question must also be considered.

6.11 Section 136 Equality Act 2010 refers to the reverse burden of proof.

Section 136 - Burden of proof

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

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to--

(a) an employment tribunal;
(b) …

6.12 **In considering t**he burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [2003] IRLR 323** which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258.** We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246.** The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

Appendix

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

6.13 Discrimination arising from disability is diefined by sec 15 Equality Act 2010

6.14 15 Discrimination arising from disability

(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.

6.15 In **Pnaiser v NHS England** [2016] IRLR 170, EAT, Simler P at [31] gives extensive guidance on the general approach to be taken by a tribunal under s 15. . A very short précis might be as follows:

(1) Was there unfavourable treatment and by whom?
(2) What caused the impugned treatment, or what was the reason for it?
(3) Motive is irrelevant.
(4) Was the cause/reason 'something' arising in consequence of the claimant's disability?
(5) The more links in the chain of causation, the harder it will be to establish the necessary connection.
(6) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
(7) The knowledge requirement is as to the disability itself, not extending to the 'something' that led to unfavourable treatment.
(8) It does not matter in which order these matters are considered by the tribunal.

6.16 Causation must not be too loose. Section 15 requires the tribunal to isolate the 'something' in question and to establish whether the 'something' was caused by the disability and if that 'something' caused the unfavourable treatment[1] (a two-stage test): In **Basildon & Thurrock NHS Foundation Trust v Weerasinghe** [2016] ICR 305, Langstaff, P said this at paragraph 26.

[1] It must be a material cause.

> **26 The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The tribunal has first to focus on the words "because of something", and therefore has to identify "something"—and second on the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages. In addition, the statute requires the tribunal to conclude that it is A's treatment of B that is because of something arising, and that it is unfavourable to B.**

6.17 The law relating to reasonable adjustments is set out at section 20 of the Equality Act 2010.

> **Section 20 - Duty to make adjustments**
>
> **(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
>
> **(2) The duty comprises the following three requirements.**
>
> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **(4) …**
>
> **(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.**
>
> **(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.**
>
> **(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.**
>
> **(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.**
>
> **(9) …**

6.18 In considering the reverse burden of proof, as it relates to duty to make reasonable adjustments, we have specific regard to **Project Management Institute v Latif 2007 IRLR 579** we note the following:

> **… the Claimant must not only establish that the duty has arisen, but there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred, that there is a breach of that duty. There must be evidence of some apparently reasonable adjustments which could be made.**

Conclusions

7.1 As noted above, the claims in this case have not been identified prior to the hearing. The first question, therefore, is what claims were pleaded?

7.2 We have regard to **Chandhok v Tirkey EAT 190/14** in which Langstaff P considered the starting point.[2] The claimant is expected to set out the claim in the ET1. Langstaff P stated -

> **…an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.[3]**

7.3 Whilst it is common for tribunals to order further and better particulars, a tribunal should be careful to distinguish between clarification of claims which have been pleaded, and an invitation to simply add new claims without amendment. All additional facts may require amendment. It should not be assumed that particularisation is particularisation of existing claims. Particulars may introduce new claims which cannot proceed absent amendment. It is particularly important to have regard to the need for amendment when new claims are being introduced, whether intentionally or otherwise.

7.4 As to what would constitute a claim that has been brought, we have regard to the Court of Appeal guidance in **Housing Corporation v Bryant** 1999 ICR 123. Buxton LJ put it as follows:

> **...it is not enough to say that the document reveals some grounds for a claim of victimisation, or indicates that there is a question to be asked as to the linkage between the alleged sex discrimination and the dismissal. That linkage must be demonstrated, at least in some way, in the document itself.**
>
> **..the words making the necessary causative link between the making of the complaint of discrimination and the dismissal were absent from the application. But if this is to be taken as a question of construction, as a matter of law, and not merely of the judgment and assessment of the Chairman, the absence from the document of any such linkage must be fatal: because the issue of construction is whether the document makes a claim in respect of victimisation.**

[2] see in particular paragraphs 17 and 18.
[3] see paragraph 18

7.5 We have considered the case management order of EJ Davidson carefully. It identifies no claim of disability discrimination or race discrimination.

7.6 It is clear the claimant complains generally about dismissal. Taking the most generous view of the claim itself, it may be possible to say that there was some juxtaposition between the allegation of an unfair treatment when being dismissed, and either race or disability discrimination. However, the essential words of causation are not set out in the claim form. Moreover, it would have been possible for the claimant to say at the case management discussion that her intention was to say that the dismissal amounted to some form of discrimination, but she failed to do so.

7.7 Perhaps the nearest the claimant comes to setting out a claim is in the following passage in which she says, "Your decision to terminate my contract by breaching of contractual disciplinary procedure by treating a minor performance issue as gross misconduct. This includes dismissing me as an employee without previous warning and treating a disability as gross misconduct." It may be possible to interpret this as a claim of direct disability discrimination, or possibly a reference to conduct arising in consequence of disability, which caused the respondent to dismiss. However, if that were intended, it is surprising it was not identified at the case management hearing. We do not ignore the possibility that the dismissal may be advanced as an allegation of detrimental or unfavourable treatment.

7.8 The claimant, at the invitation of EJ Davidson, filed further information. It may have been helpful for her to inform the claimant that any new claims would require amendment, and absent amendment they could not proceed. The fact that new claims may have been envisaged could be inferred from the granting of leave to file an amended response, but that is not conclusive. Whatever the intended position, the order created a degree of uncertainty and, unfortunately, may have encouraged the parties to seek to find the "essential case elsewhere than in the pleadings."

7.9 We have considered the further information. Whilst there are general accusations of unfair treatment, it is not clear that the intention of the further information is to say the dismissal was some form of discrimination.

7.10 We are not persuaded that the claim form sets out any specific allegation of any form of disability discrimination, albeit we have set out our reservations above, and had the claimant expressly relied on the dismissal at any time, we may have found the dismissal was advanced as some form of disability discrimination. The claim does not sets out any allegation of race discrimination.

7.11 In the circumstances, we find there are no pleaded claims on which we could adjudicate. As the claimant has failed to set out adequately the nature of the claims to be pursued there are one or two consequences. First, if there is no pleaded claim, the claim cannot succeed and should be dismissed. Second, if it is accepted that there is some form of pleaded claim, it is so indistinct and poorly set out that the respondent cannot know the case it is to answer, and the tribunal cannot know the case it is to judge. In the absence of a clarifying application to amend, to the extent that the claims have been pleaded, they should be dismissed because the conduct in failing to particularise the claim is unreasonable, and there cannot be a fair hearing. It follows that the claim should be dismissed.

7.12 Lest we be wrong in that approach, we have considered the claimant's further information on the assumption that the effect of EJ Davidson order was to allow an amendment without further consideration. We will consider each of the claims that appear to be set out by the claimant.

Disability

7.13 It is not clear from the ET1 what the claimant alleges to be the disability. The claim form fails to set out the nature of the disability. During the meeting on 12 September 2023, the claimant referred to dyslexia. However, that has not formed part of her claim.

7.14 There is some reference to suffering from depression and anxiety for a period of over ten years, albeit not in the ET1.

7.15 We have some documentary evidence. There is a psychological therapies referral form from 2010. It is clear that she felt tired at the time and she was sleeping more than expected. There was a wish to discuss coping strategies. There is reference to her suffering from anxiety and depression and a further GP referral form in 2017, but neither depression nor anxiety appears to be the main reason for the referral, the referral being related to pregnancy. There is a GP letter from 24 October 2018 which refers to depression and anxiety since 2011 including panic attacks and anxiety. It states she suffers with stress and low mood. The letter of 21 May 2024 is perhaps the most helpful document. It confirms the claimant had anxiety and depression from 2011. She ceased to take ant-depressants in 2022 and signed up for talking therapy from August 2023. It states anxiety and depression affect her everyday life and working abilities "when stressed."

7.16 The claimant gives further details in the additional information. She refers to suicidal thoughts and panic attacks. She states there can be physical problems such as heartburn, headaches, aches and pains, and hair loss.

7.17 It follows that we do have some evidence of stress and anxiety. We have no specific evidence of dyslexia, or to the extent dyslexia is alleged, its effect on day-to-day activity.

7.18 The letter of 21 May 2024 gives evidence that the anxiety and depression did have an effect on a day-to-day activity.

7.19 We accept that either the depression anxiety and recurred, or it lasted for more than a year. We accept that the claimant has had depression or anxiety which has had a substantial adverse effect on day-to-day activity, and in particular her ability to work when stressed. We find that she is disabled by reason of depression and anxiety. We find there is insufficient evidence to establish the alleged dyslexia was an impairment or that it had a substantial adverse effect on day to day activity.

7.20 The respondent had neither direct not constructive knowledge of the claimant's disability until the meeting on 12 September 2023.

Discrimination arising from disability.

7.21 As to what was the matter which arose in consequence of disability, she states that she was affected severely. She states "All people can experience poor attention to detail or have trouble focusing sometimes." She states stress is a contributing factor. However, the further information does not clearly say any error or oversight was caused by any disability.

7.22 What is intended to be the allegation of unfavourable treatment is unclear. The claimant refers to distressing personal circumstances. Her grandfather was dying of cancer. She states she requested to work from home from 1 to 12 September 2023. She does not appear to allege that she was unable to work from home and what is said to be the unfavourable treatment is unclear.

7.23 Whatever the position, the circumstances described in the further information are wholly new and do not appear in the claim form. There is a general allegation that the respondent could have supported her more, but this does not appear to be a section 15 claim, it is possible it is intended as some form of reasonable adjustments claim.

7.24 Having regard to the original claim form, it may be possible to say that the allegation of unfavourable treatment, to the extent it has been pleaded at all, is the allegation that she was dismissed because of her mistakes, and that those mistakes were caused by her disability.

7.25 The claimant was treated unfavourably in the sense that she was dismissed. We accept she was dismissed because she failed her probation. She failed her probation because she made numerous mistakes.

7.26 It is for the claimant to point to facts form which we could find a causal link between the alleged disability and the matter which is said to arise in consequence. The claimant's CV, and the claimant's statements during

interview, suggest that she can work independently and she has good attention to detail. It is possible that someone who is depressed may be more prone to errors. However, depression is not the only reason for errors. Simple carelessness or inattention will suffice. We do not accept there are facts from which we could find, on the balance of probability, that it was the claimant's depression or anxiety, as opposed to simple inattention, which caused the relevant errors and difficulties. It follows that we do not accept the claimant was dismissed for any matter arising in consequence of discrimination.

7.27 In any event, if we were wrong about that we would need to consider the defence of justification (was the treatment a proportionate means of achieving a legitimate aim).

7.28 The tribunal should have regard to the needs of the respondent. It should then undertake a balancing exercise between the effect of the discrimination and the needs of the business. In considering this, we have regard to the representations made by the respondent and the importance of the position that she occupied. Her role required attention to detail. For example booking flights required her to enter the names accurately. She failed to do so. The respondent is entitled to expect the claimant to be able to deal with simple administrative matters. The failure of attention to detail led to an executive being unable to board the flight, plans were disrupted, and money wasted. The claimant had represented that such routine administrative tasks were within her capability. We find the aim was efficient administration. The means was to dismiss staff who did not perform administrative tasks efficiently. It was a proportionate response, as the disruption caused was significant and likely to be repeated. We find that the respondent was justified in dismissing the claimant.

7.29 We accept that there was no reason to believe that the claimant's attention to detail would improve, it was likely that further difficulties would occur.

7.30 It follows that any section 15 Equality Act 2010 claim fails.

<u>Reasonable adjustments</u>

7.31 We have considered the allegation of failure to make reasonable adjustments.

7.32 The respondent could not have known of any disability until 12 September 2023. The claimant failed to bring to the attention of the respondent the possibility of any disability, or the fact that any depression anxiety, either existed or could have any effect on her ability to work. The respondent does not come under a duty to make any adjustments until it either has actual or constructive knowledge of the disability which may cause substantial disadvantage.

7.33 The claimant's case, as it is set out in the further information states she did not ask for reasonable adjustments until the meeting on 12 September 2023. This was the first time the respondent could have come under a duty, as it is the first possible date of actual or constructive knowledge.

7.34 It is not clear what the claimant alleges to be the relevant PCP, and as noted none is set out in the original claim form. In the further information, there is reference to the need for someone with an attention to detail. There is also reference to shadowing,

7.35 We accept that the respondent did require the claimant to have a high level of attention to detail. It also required her to shadow individuals and learn the new job and culture.

7.36 As for the disadvantage, the claimant states "the lack of patience or support during my employment was evident." It is unclear what the claimant is suggesting. And to the extent this is considered in the further information, it is unclear what is said to be the disadvantage arising out of the PCPs identified. Viewed broadly, it may be inferred that the disadvantage was either the stress caused her or the consequences of acting on her mistakes.

7.37 We accept that there was a PCP of requiring attention to detail and that could disadvantage an individual who did not have the ability to give attention to detail. In that sense, the claimant could be at a disadvantage, but it is her case the she did have good attention to detail, and to the extent she did not, a short extension of time would resolve any difficulty.

7.38 Her lack of attention to detail led directly to her dismissal. There is a comparative exercise to be undertaken. There is little if any evidence that her lack of attention to details was caused by the disability. At the meeting on 12 September, she denied any link. Anyone who showed a similar lack of attention to detail would have been treated in the same way. We cannot assume that persons who did not have the claimant's disability would have been less prone to making the errors that the claimant made, or would be any less likely to delay, or be late for meetings. We are not satisfied that that the PCP put the claimant at a substantial disadvantage in comparison with persons are not disabled, as we are not satisfied that in this case the claimant's disability had any effect on her ability to pay attention to detail.

7.39 As regards the adjustments, it appears to be the claimant's case that she should have been given more time, this would appear to be for a period of two weeks after 12 September. In addition, she should have had some form of job shadowing or buddy.

7.40 We do not accept that such and an adjustment would have been reasonable to make. There is no evidence on which we could find that allowing further time, or introducing some form of shadowing or buddying,

would have improved the claimant's attention to detail, and it would not have lessened the disadvantage.

7.41 As previously noted, we do not accept that there is a claim of failure to make reasonable adjustments in the original claim form. If we are wrong then one has pleaded, with considered nature of it, and it fails on its merits.

Direct discrimination

7.42 The claimant refers to being punished for small mistakes. It is possible the claimant is simply referring to the allegations made on 12 September. It is possible that she is referring to the dismissal, albeit she has not identified dismissal as a specific act of discrimination.

7.43 We accept that the claimant was accused of making errors. We accept the claimant was dismissed. Those are potentially detrimental acts. We do not have a clear statement of the claimant's race. It appears from the documents that she refers to herself by reference to colour as "black."[4] A difference in race and a difference in treatment is not enough to establish race discrimination. The claimant has pointed no fact from which we could infer race discrimination. This claim fails.

7.44 To the extent it could be put as direct disability discrimination, it also fails. The comparator would have to have the same abilities. This would include the ability to pay attention to detail. There is not fact from which we could conclude the comparator would not have suffered the same detrimental treatment.

Harassment

7.45 There is no reference to harassment in the ET1.

7.46 In the further information, the claimant refers to the final meeting, which is the meeting of 12 September. She stated during the meeting she was left "ashamed and embarrassed with my condition." She also refers to a lack of support.

7.47 There is no evidence from which we could find that the intention was to harass the claimant. The respondent called a meeting because it had legitimate concerns based on strong evidence that the claimant lacked attention to detail and this was affecting, materially, her performance. Mr Martijn Van Der Graaf was reasonable to ask the claimant to provide an explanation. As part of that discussion, the claimant identified the conditions of dyslexia, depression and anxiety. There was some discussion and the claimant was asked to explain.

[4] See her further information.

7.48 It is possible the claimant felt uncomfortable. However, where there is no fact from which intent to harass could be inferred, whether harassment took place will depend on the effect. When considering effect, whilst we must take into account the claimant's perception, there is still an objective consideration. Not all references to disability will be acts of harassment. The claimant raised possible disabilities as part of her explanation. It was reasonable and appropriate for the respondent to discuss that. We have considered the minutes. There is nothing which would suggest any inappropriate questioning. We find the conduct did not have the effect of harassing the claimant.

7.49 If there is a claim of harassment before us , We have considered the merits, and we dismiss it.

Jurisdictional points

7.50 As no claim succeeds on its merits, we do not have to consider if any amendment is required for the claim to proceed, or if any amendment has been granted or when. Any claim that was introduced by amendment would raise the possibility of it being out of time. We do not need to consider that further, but we observe time remains a possible substantive issue.

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Employment Judge Hodgson

Dated: 15 November 2024

Sent to the parties on:

21 November 2024
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For the Tribunal Office