EMPLOYMENT TRIBUNALS

Claimant:	Mr. Przemyslaw Czubak
Respondent:	Marelli Automotive Systems UK Ltd**.**
Heard at:	Newcastle CFCTC in person
On:	30, 31 May 1, 2, 5, 6, 7, 8 June and 31 August 2023 Deliberations on 1 September 2023
Before:	Employment Judge Loy
Members:	A Tarn S Moules
Representation	
Claimant:	In person
Respondent:	Mr Tinnion of counsel
Interpreter:	Mr. Zaborniak (Polish to English)

RESERVED JUDGMENT

The unanimous Judgment of the Employment Tribunal is that:-

1. The claimant's claims of direct race discrimination contrary to section 13 (1) Equality Act 2010 are not well founded and are dismissed.

2. The claimants claims of harassment related to race contrary to section 26 (1) Equality Act 2010 are not well founded and dismissed.

3. The claimant's claims of direct disability discrimination contrary to section 13 (1) Equality Act 2010 are not well founded and dismissed.

4. The claimant's claims of harassment related to disability contrary to section 26 (1) Equality Act 2010 are not well founded and are dismissed.

5. The claimant's claims of discrimination arising in consequence of disability contrary to section 15 (1) Equality Act 2010 are not well founded and are dismissed.

6. The claimant's claims of failures to make reasonable adjustments contrary to sections 20-21 Equality Act 2010 are not well founded and are dismissed.

7. The tribunal has no jurisdiction to consider claims brought for a breach of the GDPR / Data Protection Act 2018 and those claims are dismissed.

REASONS

Background

1. By a claim form presented on 24 August 2022 the claimant claims race and disability discrimination. Specifically, the claimant brought claims of direct race discrimination, harassment related to race, direct disability discrimination, harassment related to disability, discrimination arising from disability and failures to make reasonable adjustments. The claimant also brought claims of breaches of the General Data Protection Regulations.

2. In its response form the respondent denied all liability.

Claims and issues

3. A preliminary hearing for case management purposes took place before Employment Judge Sweeney on 11 November 2022.

4. Employment Judge Sweeney ordered an impact statement and the provision of medical records in order to help establish whether the respondent might accept that the claimant was disabled within the terms of section 6 Equality Act 2010 (EqA) at all or any times relevant to his disability discrimination claims.

5. The claimant was ordered to provide additional information about his complaints to make it clear what acts or omissions were being complained about and the times, places and persons involved. The claimant was also asked to identify the type of discrimination upon which he was relying in respect of each of the acts or omissions he identified. Employment Judge Sweeney also made clear to the claimant that this order was not an opportunity to add to the complaints being made. Employment Judge Sweeney also told the claimant that if he wanted to add any complaints he would need to make an application to amend his claim to introduce them. No application to add to the complaints was made.

6. The claimant provided a document entitled 'Clarity (further information) to Details of Complaint' [32-43] in response to this order.

7. The respondent was ordered to provide an amended response form setting out its position on whether the claimant fell within the terms of section 6 EqA and, if so, at what times.

8. The respondent was also ordered to set out its position on when, if at all, the respondent might accept that it had knowledge of the claimant's disability and its position on knowledge of any disadvantage to which the claimant might be placed by any provision, criterion or practice relied upon by the claimant in support of his claim that the respondent failed to make reasonable adjustments. Knowledge of disability is also required to succeed in a claim for discrimination arising in consequence of disability. Knowledge of disability and knowledge of the disadvantage is required to succeed in a claim for failure to make reasonable adjustments.

9. A second preliminary hearing for case management purposes took place before Employment Judge O'Dempsey on 9 January 2023. The respondent was ordered to provide a re-amended Grounds of Response to provide proper particulars of its denial that the claimant came within the terms of section 6 EqA. Those re-amended Grounds of Response pages 60-65 of the bundle.

10. The parties were ordered to provide an agreed List of Issues for the tribunal's determination. This was to be done by the claimant providing a first draft of the List of Issues to the respondent and the respondent commenting on that draft list. A final form List of Issues was to be prepared identifying issues that:

    a. were agreed;

    b. were not agreed but that the claimant wanted considered;

    c. that were not agreed but that the respondent wanted to be considered.

11. Unfortunately, that process did not produce a List of Issues that would be workable for the purposes of this final hearing. The List produced in response to Employment Judge O'Dempsey's order is at pages 375-429 of the bundle. Any List of 54 pages (a list substantially longer than any of the witness statements in this matter) would in itself be problematic. However, and without any criticism of either the claimant or the respondent's advisors, the List degenerated into an exchange of comments on evidential matters.

12. At the outset of this hearing, the status of the List of Issues was discussed. The tribunal explained to the claimant why it considered that the document at pages 375-429 of the bundle was not a document that could practically be used for the purposes for which it was intended.

13. Mr Tinnion had anticipated this development. At the start of day 1 of the hearing he was already in the process of producing a draft List of Issues for the claimant to consider and upon which the claimant could make comments and any proposed revisions. For that purpose, there was an adjournment at around 15:00 on the first day of the hearing (30 May 2023) and reconvened at 10:00 on the third scheduled hearing day (1 June 2023). Mr Tinnion undertook to provide the claimant with a draft list during the course of 31 May 2023 which he duly did. The draft List of Issues went through 3 revisions before it was in final form. The claimant made additions, deletions and added comments to the original draft produced by Mr Tinnion which were incorporated into version 3. The tribunal

accepted version 3 as the final List of Issues to be used for the purposes of determining the claimant's claims.

14. The claimant was equivocal about the final List of Issues which the tribunal adopted. On the morning of day 3 (1 June 2023), the claimant said that he agreed to the use of version 3 as the final List of Issues. He also said that he would prefer to use what he regarded as his own List which is the document referred to at paragraphs 10 and 11 above.

15. The tribunal undertook its own careful review of the final List of Issues. The tribunal was satisfied that the final List of Issues:

    a. captured each of the complaints and factual allegations set out in the claim form as then particularised in the claimant's additional information referred to at paragraph 6 above;

    b. expressed each of the factual allegations in neutral terms;

    c. identified the date or dates on which each of the complaints took place;

    d. identified the place where each of the complaints took place;

    e. provided the references to the relevant page numbers in the bundle;

    f. identified the witnesses to each of the complaints; and

    g. identified each of the types of discrimination relied upon by the claimant in respect of each of the complaints made.

16. The final List of Issues was the type of document that Employment Judge O'Dempsey appeared to have in mind when he made his orders at the second preliminary hearing. The tribunal also had regard to the fact that it has no jurisdiction to consider and rule upon acts of discrimination not included in the claim form: Chapman v Simon [1994] IRLR 124.

17. At no stage up until the conclusion of final submissions did the claimant seek to add to or remove any of the complaints set out in the final List of Issues.

18. Nevertheless, the tribunal made sure at appropriate times during the claimant's cross examination that there was nothing in his Clarity Document upon which he wished to rely in addition to the matters set out in the final List of Issues. The tribunal also thoroughly read the Clarity Document to ensure that there was nothing of any potential significance within that document but that were not fully identified in the final List of Issues. The tribunal has referred in the rest of these reasons to the final List as 'the List of Issues'.

19. The claimant's position was that the he had two disabilities: an underactive thyroid and insulin resistance. The respondent accepted both conditions were disabilities within the terms of section 6 EqA and that it had knowledge of both of the claimant's disabilities when it received an occupational health report on 17 May 2022 but not before.

The list of issues

The factual allegations

20. Did the following allegations happen?

Allegation 1: On 2 July 2018, at an occupational health appointment Nurse Dawn Mee:

a. said to the claimant *'there's nothing wrong with you, illness and stress has no impact on your performance at work.'*

and

b. omitted vital health information from her occupational health report in particular information relating to the claimant's underactive thyroid and insulin resistance

Types of discrimination: section 13 (1) EqA direct disability discrimination and/or section 20-21 EqA failure to make reasonable adjustments.

Allegation 2: On 12 July 2018, during an absence review meeting Mr S Harrison said twice to the claimant:

a. *'We need a report from work's OH'*

Type of discrimination**:** section 13 (1) EqA direct disability discrimination.

Allegation 3: On 12 July 2018, HR lost a document containing the claimant's health information (HR unaware when)

Types of discrimination: section 13 (1) EqA direct race discrimination; section 26 (1) harassment related to disability; breach of GDPR.

Allegation 4: On 18 July 2018 during a fact-finding meeting about a proposed transfer of the claimant's employment to the respondent's CPM Nissan site Mr S Harrison said:

a. *'you didn't sign medical report'*

b. *Occupational Health can overrule a GP**.***

Type of discrimination: section 13 (1) EqA direct disability discrimination.

Allegation 5: On 30 July 2018, the claimant attended an occupational health assessment conducted by a male occupational health practitioner. On the occupational health report form, the following were either done when they should not have been done or not done when they should have been done:

a. the reason for the claimant's referral to occupational health was incorrectly recorded on the report form;

b. the occupational health report incorrectly focused only on the claimant's stress at work;

c. the occupational health practitioner was not asked by the respondent to answer the question on the occupational health report form *'Does the employee require permanent adjustments to their workplace/role/hours/activity?'**;*

d. the occupational health practitioner was not asked by the respondent to answer the question on the occupational health report form *'Is there any evidence work could be a contributory factor to their condition/illness/absence.'; and*

e. the occupational health practitioner answered *'Not applicable'* to the question *'Additional OH Advice/Guidance.';*

Types of discrimination: section 13 (1) EqA direct disability discrimination and section 20-21 EqA failure to make a reasonable adjustment.

Allegation 6: On a date between January and March 2022, Mr S Baillie said, *'Are you going to the toilet again? I'm going to start timing how much time you spend in the toilet.'*

Types of discrimination*:* section 13 (1) EqA direct disability discrimination; section 13 (1) EqA direct race discrimination; section 26 (1) EqA harassment related to disability; section 26 (1) EqA harassment related to race; sections 20-21 EqA failure to make a reasonable adjustment; section 15 (1) EqA discrimination arising in consequence of disability.

Allegation 7: On a date between January and March 2022, Mr S Baillie said to the claimant *'Everyone is gone and you still walking so slow.'*

Types of discrimination*:* section 13 (1) EqA direct disability discrimination; section 13 (1) EqA direct race discrimination; section 26 (1) EqA harassment related to disability; section 26 (1) EqA harassment related to race; sections 20-21 EqA failure to make a reasonable adjustment; section 15 (1) EqA discrimination arising in consequence of disability.

Allegation 8: On 11 March 2022, Mr S Baillie said to the claimant *'I'm older than you and still walking faster than you.'*

Types of discrimination*:* section 13 (1) EqA direct disability discrimination; section 13 (1) EqA direct race discrimination; section 26 (1) EqA harassment related to disability; section 15 (1) EqA discrimination arising in consequence of disability.

Allegation 9: On a date between January and March 2022, Mr S Baillie said to the claimant *'You going for a break first and still coming back last.'*

Types of discrimination*:* section 13 (1) EqA direct disability discrimination; section 13 (1) EqA direct race discrimination; section 26 (1) EqA harassment related to disability; section 26 (1) EqA harassment related to race; sections 20-21 EqA failure to make a reasonable adjustment; section 15 (1) EqA discrimination arising in consequence of disability.

Allegation 10: On 5 July 2022, Mr S Baillie did not allow the claimant any extra toilet breaks e.g. in between scheduled break times.

Types of discrimination*:* section 13 (1) EqA direct disability discrimination; section 26 (1) EqA harassment related to disability; sections 20-21 EqA failure to make a reasonable adjustment; section 15 (1) EqA discrimination arising in consequence of disability.

Allegation 11: Referring to 5 July 2022 and/or the claimant's requirement for extra toilet breaks generally, Mr Metcalfe said in his grievance appeal outcome letter dated 5 July 2022 [271] that *'The report has confirmed that you do not require any adjustments (such as longer/additional toilet breaks) due to your condition.'*

Types of discrimination*:* section 13 (1) EqA direct disability discrimination; section 26 (1) EqA harassment related to disability; sections 20-21 EqA failure to make a reasonable adjustment; section 15 (1) EqA discrimination arising in consequence of disability.

Allegation 12: On 23 February 2022 at a meeting to discuss PADR Appraisal [123-128], Mr S Baillie lowered the claimant's scores regarding speed/performance and said to the claimant *'too slow on side fit station, that's why I lowered your scores' and 'You must be faster, as it might lead to disciplinary action the future.'*

Types of discrimination*:* section 13 (1) EqA direct disability discrimination; section 26 (1) EqA harassment related to disability; section 15 (1) EqA discrimination arising in consequence of disability.

Allegation 13: On 15 March 2022, Mr S Baillie said through the radio to Lead Operator Tom Collins *'Tell Perez to shut up and hurry up* - Tom Collins told the claimant *'Simon [Baillie] said to tell Perez to shut up and hurry up***.' ("the Radio Incident")**.

Types of discrimination*:* section 13 (1) EqA direct race discrimination; section 26 (1) EqA harassment related to race.

Allegation 14: On 15 March 2022 after the Radio Incident, the claimant confronted Mr Baillie for degrading him over the radio then Mr S Baillie said/did/didn't do the following things:

a. shouted at the claimant

b. *'I can't be on the line every 2 minutes'*

c. *'I use it [CCTV] for quality concerns'*

d. didn't answer when the claimant asked him to identify the quality concerns

e. shouted *'you going nowhere – HR gave me permission to use CCTV. If you are not happy you can go upstairs about it. There's lots of cameras on CMP, there's place for you.'*

f. *'from now on I am timing all of your breaks'*

Types of discrimination*:* section 13 (1) EqA direct race discrimination; section 26 (1) EqA harassment related to race.

Allegation 15: On 15 March 2022, Mr S Baillie publicly humiliated the claimant over the radio, but did/said nothing about Mr I Hughes (White British), who spent five minutes chatting with Mr C Robinson (Line Coordinator) about football.

Types of discrimination*:* section 13 (1) EqA direct race discrimination; section 26 (1) EqA harassment related to race.

Allegation 16: On 15 March 2022, by virtue of his conducted at allegations 13-15 above, Mr S Baillie breached the respondent's CCTV policy.

Types of discrimination*:* section 13 (1) EqA direct race discrimination; sections 20-21 EqA failure to make a reasonable adjustment; breach of GDPR.

Allegation 17: At the time of the Radio Incident the respondent did not have an up to date CCTV policy in place.

Types of discrimination*:* section 13 (1) EqA direct race discrimination; sections 20-21 EqA failure to make a reasonable adjustment; breach of GDPR.

Allegation 18: During the claimant's grievance process, the claimant made requests to the following people to be transferred from Mr Baillie's shift to an alternative shift none of which requests were granted:

a. Mr Stuart Packer

b. Mr Paul Liscombe

c. Mr Trevor Metcalfe

The claimant identifies the following comparators whose requests to transfer from Mr Baillie shift were granted:

a. Noreen Davison

b. Anthony Wray

c. Mal Noko

***Types of discrimination**:* section 13 (1) EqA direct race discrimination; sections 20-21 EqA failure to make a reasonable adjustment.

Allegation 19: On 10 May 2022, Mr P Liscombe stated in his grievance outcome letter [189 para 2] *'We feel satisfied therefore Simon [Baillie] appropriately addressed a specific concern with you and used… the appropriate forum to do it.'*

***Types of discrimination**:* section 13 (1) EqA direct disability discrimination; section 13 (1) EqA direct race discrimination; section 26 (1) EqA harassment related to disability; section 15 (1) EqA discrimination arising in consequence of disability.

Allegation 20: On 10 May 2022, Mr P Liscombe stated in his grievance outcome letter of [190]

> *'We reviewed HR records and there is no medical condition relating to yourself captured on your file. As such, we have no reason to believe Simon [Baillie] was aware of any medical condition which you may suffer from. If an employee has a medical concern and need reasonable adjustments in place in order to cope with the condition, we would ask that Occupational Health in order to review the employee properly understand any medical concerns. As we were not aware of your underactive thyroid and the symptoms you suffer with.'*
>
> NB: the claimant admitted in his further information document the following which is also set out in Mr Liscombe's grievance outcome letter [page 19].
>
> *'Should you need longer/more than average toilet breaks – this will be identified in your OH review and the Company will make appropriate arrangements where possible.'*

***Types of discrimination**:* section 13 (1) EqA direct disability discrimination; section 13 (1) EqA direct race discrimination; section 26 (1) EqA harassment related to disability; section 15 (1) EqA discrimination arising in consequence of disability; breach of GDPR.

Allegation 21: On 10 May 2022, Mr P Liscombe stated in his grievance outcome letter [189]:

> *'We have already discussed the radio situation, which we would classify as a minor deviation from best practice, which has been addressed.'*

***Types of discrimination**:* section 26 (1) EqA harassment related to race.

Allegation 22: On a date after 19 May 2022, the claimant sent a letter to Mr S Harrison via recorded delivery making complaints about the conduct/outcome of his grievance. The claimant received no reply.

Types of discrimination*:* section 13 (1) EqA direct race discrimination; section 26 (1) EqA harassment related to race.

Allegation 23: In July 2022, the claimant experienced shoulder discomfort due to faulty equipment. The claimant received physio at work: of five minutes stretching every hour, but was not given lighter work/weight limit.

The claimant identifies the following comparators who he says received more favourable treatment.

a. Tom Collins (arm): lighter duties and temporary move from the line

b. Noreen Davison (shoulder): moved from line

Types of discrimination*:* section 13 (1) EqA direct race discrimination; sections 20-21 EqA failure to make a reasonable adjustment.

Allegation 24: On dates unspecified, the claimant says that he was less favourably treated in relation to his shoulder discomfort than comparators who were given adjustment in relation to family issues. The claimant identifies the following comparators who he says received more favourable treatment:

a. Mr G Colin

b. Ms P Clavering

Types of discrimination*:* section 13 (1) EqA direct race discrimination; sections 20-21 EqA failure to make a reasonable adjustment.

Allegation 25: On dates unspecified, the claimant says that he was less favourably treated in relation to his underactive thyroid condition than comparators who also had thyroid conditions but who were not subject to the same treatment. The claimant compares the treatment that he says he received about toilet breaks/timing (and comments regarding the same) and the treatment he says he received a relation to his gait/movement/walking speed.

The claimant identifies the following comparators who he says received more favourable treatment oblique did not receive the same less favourable treatment

a. P Wilce

b. J Higham

Types of discrimination*:* section 13 (1) EqA direct race discrimination; sections 20-21 EqA failure to make a reasonable adjustment.

Allegation 26: On 5 July 2022, Mr T Metcalfe said the following in his grievance appeal outcome letter dated [261-275]:

'We have reviewed our files and we do not have any document (OH report or otherwise) which refers to your specific illness (thyroid condition) which you consider to be a disability [271]

Again, we do not have any document which refers to your thyroid condition which you have told us you consider to be a disability. [272]

You will speed in some areas was tackled in the PADR – we believe this was appropriate and cannot be considered as harassment. [263]

Our investigations show Simon [Baillie] addressed tact time issues with you verbally, rather than going down a formal disciplinary process as the first point of action, rather going straight to formal disciplinary action.' [269]

***Types of discrimination**:* section 13 (1) EqA direct disability discrimination; section 26 (1) EqA harassment related to disability; section 15 (1) EqA discrimination arising in consequence of disability; breach of GDPR.

Allegation 27: This allegation was withdrawn before the hearing and that withdrawal was confirmed at this hearing.

Direct discrimination: disability/race

21. If all or any of the allegations of direct disability and/or direct race discrimination happened:

    a. Was it less favourable treatment?

    b. If so, was it because of disability and/or race?

    c. Did the treatment amount to a detriment?

Harassment related to disability/race

22. If all or any of the allegations of harassment related to disability and/or race happened:

    a. Was it unwanted conduct?

    b. Did it relate to disability/race?

    c. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating hostile, degrading, humiliating or offensive environment for the claimant?

23. If not, did it have that effect? The tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Reasonable adjustments

24. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability from any date earlier than 17 May 2022? If so, from what earlier date?

25. Did the respondent have the provision, criterion or practice ('PCP') of limiting the number of toilet breaks employees working on the claimant's production line could take? If so, what was that limit?

26. Did the respondent apply that PCP to the claimant and, if so, when?

27. Did the claimant's hypothyroid disability and/or the daily Levothyroxine medication he took to treat it cause the claimant to feel sick and/or get diarrhoea and/or need to go to the toilet more?

28. Did the application of the PCP because of the claimant's hypothyroid disability put the claimant to the substantial disadvantage of not being able to go to the toilet when he needed to?

29. Did the respondent know or could it reasonably have been expected to know that the claimant's was likely to be placed at a disadvantage by all or any of the PCPs

30. Did or would the application of the PCP to the respondent's non-disabled employees on the claimant's production line put them to that same disadvantage?

31. If not, would the adjustment of allowing the claimant to take toilet breaks when he needed to have avoided (or materially reduced) that disadvantage?

32. Was it reasonable for the respondent to have taken that steps and, if so, when?

33. Did the respondent fail to take those steps?

Discrimination arising from disability

34. If all or any of the allegations of discrimination arising from disability happened:

    a. Was it unfavourable treatment?

    b. Did the following things arise in consequence of the claimant's disability?

        - a need for additional toilet breaks
        - a need for longer toilet breaks
        - slower movement including slower walking pace

35. Was the unfavourable treatment because of any of those things?

Jurisdiction: GDPR claims

36. Does the employment tribunal have jurisdiction to consider the claimant's claims alleging a breach of GDPR/ Data Protection Act?

Jurisdiction: time limitation on discrimination claims

37. Are the claimant's claims of discrimination based on acts/omissions which occurred on or before 17 March 2022 prima facie out of time?

38. If all or any of the acts/omissions which occurred on or before 17 March 2022 are prima facie out of time were all or any of those acts/omissions conduct which extended over a period of time? If yes, did that period of time end on/after 18 March 2022 in respect of which the claimant has made a timely claim?

39. If all or any of the acts/omissions which occurred on or before 17 March 2022 are prima facie out of time (whether directly or because any conduct for extending over a period of time ended on/before 17 March 2022), is it just and equitable for the employment tribunal to extend time?

Liability of employees, workers and agents

40. To the extent that allegations 1 and 5 occurred, were the persons identified in allegations 1 and 5 below employees, workers or agents of the respondent in respect of whose conduct the claimant can bring a claim in the employment tribunal against the respondent?

    a. ***Allegation 1***: OH Nurse Dawn Mew

    b. ***Allegation 5***: unknown male OH officer

Evidence

41. The tribunal was provided with an agreed bundle of documents of 503 pages to which additional documents were added during the course of the hearing. The parties also produced written submissions.

42. The claimant gave evidence on his own behalf. He also called his sister, Urszula Czubak, to give evidence on his behalf. The claimant produced a written witness statement of 24 paragraphs over 24 pages. The claimant's sister produced a written witness statement of 2 pages. The claimant and his sister were both cross-examined by Mr Tinnion.

43. The respondent called eight witnesses:

- Mr Steve Harrison, Operations Manager, who produced a written witness statement of 13 paragraphs over 3 pages. Mr Harrison was a Section Leader at the respondent's Nissan CSM site. Mr Harrison was cross-examined by the claimant.

- Mr Simon Baillie, Shift Coordinator, who produced a written witness statement of 28 paragraphs over 6 pages. Mr Baillie worked on the Paint and Assembly

Department and was the claimant's direct supervisor at the time relevant to these proceedings. Mr Baillie was cross-examined by the claimant.

- Mr Barry Christie, Lead Operator, who produced a written witness statement of 11 paragraphs over 3 pages. Mr Christie worked on the Paint and Assembly Department and was under the supervision of Mr Baillie. Mr Christie was cross-examined by the claimant.

- Mr Stuart Packer, Shift Operations Leader, who produced a written witness statement of 16 paragraphs over 4 pages. Mr Packer was cross-examined by the claimant.

- Mr Paul Liscombe, Section Leader, who produced a written witness statement of 21 paragraphs over 5 pages. Mr Liscombe was cross-examined by the claimant.

- Mr Jonathan Grayson, Shift Coordinator, who produced a written witness statement of five paragraphs over 3 pages. Mr Grayson was cross-examined by the claimant.

- Ms Dawn Prior, HR Director, who produced a written witness statement of 31 paragraphs over 8 pages. Ms Prior was cross-examined by the claimant.

- Mr Trevor Metcalfe, Plant Manager for the Interior Business Unit, who produced a written witness statement of 13 paragraphs over 4 pages. Mr Metcalfe was cross-examined by the claimant.

The tribunal's approach to the evidence

44. But before moving to the findings of fact, the Tribunal sets out a number of points of general approach, some of them commonplace in our work.

45. In this case, as in many others, evidence and submission touched on a wide range of issues. Where the tribunal makes no finding on a point about which it heard, or where the tribunal does make a finding, but not to the depth with which the point was discussed, that is not oversight or omission. It reflects the extent to which the point was truly of assistance to the tribunal.

46. While that observation is made in many cases, it is particularly important in this one, where the claimant felt very strongly about a number of issues, and was inexperienced in the law and procedure of this tribunal.

47. The tribunal's approach also included an understanding of proportionality. In the artificial setting of tribunal litigation, the focus is on how the individual claimant was managed. The tribunal must not lose sight of the fact that at the time that the events in question occurred, nobody may have given these events the importance which the artificiality of the tribunal process requires.

48. All of the tribunal's findings of fact were made on the balance of probability.

Findings of fact

49. The respondent is a global supplier to the automotive sector. At its Sunderland sites it manufactures and supplies automotive parts and components. It is located near to the Nissan manufacturing facility at Washington. Nissan is a major customer of the respondent in the North-East of England.

50. The claimant is Polish.

51. In 2011, the claimant commenced work for the respondent as an agency worker.

52. On 3 January 2014, the claimant became directly employed by the respondent as a General Operator on its Paint Assembly & Console Line. The claimant remained employed with the respondent at its Pennywell, Sunderland CKSU site as at the date of this hearing.

53. In 2017, the claimant was diagnosed in Poland with an underactive thyroid. He was prescribed Levothyroxine. In the course of this litigation, the respondent conceded that the claimant was disabled within the terms of section 6 EqA from the date of his diagnosis in 2017. However, the respondent denied having any actual or constructive knowledge of the claimant's disability prior to 17 May 2022.

54. On 24 January 2018, the claimant registered with a UK GP practice. It was noted at that point that the claimant was taking Levothyroxine for his thyroid condition [360].

55. On 26 June 2018, the claimant raised concerns upon being informed that the respondent proposed to transfer him from its CKSU Pennywell site to its CPM site at Nissan, Sunderland. It was common ground that the claimant's contract of employment entitled the respondent to transfer its production operators between its North-East based sites. The two sites are located relatively nearby one another.

56. The claimant had been selected to transfer because of his skill level and experience. The claimant did not want to transfer because of what he said had been discriminatory mistreatment of his brother at the respondent's Nissan CPM site.

57. On 26 June 2018, a grievance meeting took place to discuss the claimant's concerns about the proposed transfer to Nissan CPM site [87-95].

58. On 27 June 2018, the claimant commenced a period of absence from work due to stress and anxiety. It was common ground that this had been caused by the proposal to transfer his workplace to the Nissan CPM site.

59. On 2 July 2018, the claimant attended an occupational health meeting. The respondent had a contract for the provision of occupational health services with an independent company based in Newcastle: Newcastle Premier Health Ltd.

60. The occupational health consultation was carried out by Nurse Dawn Mee. Nurse Mee had no contractual relationship with the respondent. There was a

commercial contract for the provision of occupational health services between the respondent and Newcastle Premier Health Ltd. Nurse Mee was under contract (the nature of which was not referred to in evidence) with Newcastle Primary Health Ltd.

61. The claimant refused to sign off the occupational health report produced by Nurse Mee. The claimant's evidence was that he was not prepared to sign it off because Nurse Mee had omitted vital health information from her occupational health report: the claimant's hypothyroid condition and his insulin resistance (***allegation 1(b)***. The claimant had no credible explanation why Nurse Mee would have done that other than the suggestion that it was at the direction of the respondent.

62. It appeared to be the claimant's position that this was some form of deliberate omission by the occupational health provider. The claimant contended that the respondent had directed its provider not to provide it with disability-related information. The claimant suggested this was so that the respondent could avoid being told by occupational health that the claimant required adjustments because of his hypothyroid condition. The claimant went so far as to suggest that the respondent had entered into an arrangement with its third-party occupational health provider whereby its occupational health provider would turn a blind eye to the health conditions of employees referred to it by the respondent in order to help the respondent facilitate the transfer of the respondent's employees from its CKSU Pennywell site to its Nissan CPM Sunderland site.

63. The tribunal rejected this contention. It had no evidential foundation whatsoever. The tribunal considered it wholly unlikely that the respondent and its occupational health provider would both be prepared to set their professional integrity on one side to achieve such a far-fetched outcome. It would also not be in the respondent's own best interests. Nissan at Sunderland is an extremely important customer to the respondent. Proximity to the Nissan Sunderland assembly plant may indeed be the rationale for the respondent locating some of its production sites in the automotive hub in the North-East of England. The tribunal considered it wholly unlikely that the respondent would have any desire to send to its Nissan CPM site any of its employees who were not fit to be there.

64. There was also not the slightest evidence to suggest that the respondent would adopt such a cavalier approach to its own health and safety obligations to its workforce. The respondent operates a production line where matters of health and safety are plainly of fundamental importance. The evidence of those of the respondent's witnesses who were concerned with operational health and safety, all of which evidence the tribunal accepted, was that they took such obligations extremely seriously.

65. The claimant's contention also ignored the fact that he accepted in evidence that there was no difference whatsoever between the impact of his hypothyroid condition on his ability to work at the CKSU Pennywell site or at the Nissan CPM sites. The tribunal did not consider that this allegation had been thought through by the claimant since it did not seem to make sense even on its own terms.

66. The tribunal will return to this issue below as it was one of a number of extremely serious allegations that the claimant made against the respondent without having any factual basis to support them.

67. The claimant also alleged that Nurse Mee had said to him during the consultation on 2 July 2018 the following:

'There's nothing wrong with you, illness and stress has no impact on your performance at work.' **(*allegation 1(a)*)**.

68. The tribunal rejected this contention. The tribunal considered it to be inherently unlikely that an occupational health professional would say that *'illness and stress'* would not impact on performance at work; or that Nurse Mee would have been likely to say that there was *'nothing wrong'* with the claimant. As will becomes clear from the subsequent referral below, the respondent was not questioning the *bone fides* of the claimant's medical condition of stress and anxiety. The respondent's legitimate interest was in knowing what it could do to help and whether the claimant was likely to be able to return to work from his sickness absence after the factory's summer shut down. The tribunal considered it wholly unlikely that a nurse specialising in occupational health would express a view which runs contrary both to her own professional vocation and to commonsense. The tribunal concluded that the claimant may have simply misunderstood what was being said to him by Nurse Mee.

69. On 12 July 2018, an absence review meeting took place. The meeting was attended by Mr Harrison, a Section Leader at the Nissan CPM site. Mr Harrison was accompanied by an HR Controller, Ms S Wilkinson. The claimant was accompanied by his brother (and work colleague) Szyman Czubak. A great deal of the meeting was taken up with the claimant and his brother expressing their concerns that that Mr Harrison would subject the claimant to mistreatment related to his nationality if he were to transfer to the Nissan CPM site. The basis for this concern was that his brother alleged he had previously been subject to such mistreatment by Mr Harrison at that site.

70. The absence review meeting focused on the claimant's stress and anxiety. A further fit note had been given by the claimant to Mr Baillie, the claimant's direct supervisor on the assembly line at CSUK. The meeting notes are at [97 – 104]. The length of the notes reflects the lengthy discussion between the claimant, his brother and Mr Harrison.

71. At that meeting, the claimant provided the following explanation for not consenting to the release to the respondent of Nurse Dawn Mee's report. He says, *'one issue with nurse report everything to her not listen so not sign consent.'* At no stage during the meeting does the claimant say in terms that the reason he didn't consent to the release of the report was that it did not explicitly mention his hypothyroid condition or insulin resistance.

72. Over the course of the 8 pages of notes of this absence review meeting, the claimant makes only the following reference to his thyroid condition [104]:

'Claimant: Also my health, thyroid issues, bad back prev[iously] not got enough rotation

Harrison: Ok. Physio yes. Thyroid seen GP

Claimant: Yes, seen Dr in Poland can get translated English

Harrison: Need to exp[lain] all to nurse please, can get report

Claimant: Ok. Also stress now and making my health worse

Harrison: Ok. We will wait for medical report

73. The notes of the meeting were signed the same day by all four attendees.

74. The claimant complains in these proceedings **(*allegation 2(a)*)** that Mr Harrison said on two occasions in the meeting words to the effect that*, 'We need report from works OH.'* The respondent accepts that Mr Harrison did say those words as can be seen from the evidential excerpt set out immediately above. The respondent's position was that there is nothing whatsoever wrong with Mr Harrison doing so. Indeed, it was incumbent on Mr Harrison, who was not a medical professional, to get the input and advice from occupational health that he had already unsuccessfully tried to obtain. Mr Harrison's evidence, which the tribunal accepted and which was consistent with the contemporaneous documents, was that he was actively encouraging the claimant to have an open conversation with the occupational health provider including discussing any problems he was having with his thyroid or his back (or indeed any other health related matter of concern to him).

75. In cross-examination, the claimant accepted that Mr Harrison told him to provide occupational health with all of the information he wanted the respondent to know about. There was then the following exchange in cross-examination about ***allegation 2(a)***.

'Question: What was wrong with Mr Harrison saying, 'we need a report from occupational health'

Claimant: Agree, nothing wrong'

76. On 18 July 2018, a further absence review meeting took place. Mr Harrison and Ms Wilkinson were again in attendance. The claimant was accompanied by his sister who was also a work colleague. The claimant was told at this meeting by Mr Harrison that he would not be transferring to Nissan CPM at present. Mr Harrison again encouraged the claimant to see occupational health and to explain everything to them.

77. This reason for the further referral is recorded in the notes of the Occupational Health Report in the following terms:

'PC has been absent from work since 27 June 2018 due to problems with stress and anxiety. His anxiety has been triggered by the proposal to move PC from his usual [place of work] to the CPM line based in the Nissan factory.' [120]

78. The Referral Form itself is at [119a- 119c]. The reason for the claimant's absence from work is identified as stress. The context of the referral is described in the following terms:

'Perez [i.e. the claimant] is one of the employees who was scheduled to transfer from CKSU into our CPM operations - Perez has became absent from 27 June 2018 with stress and anxiety…

Please provide medical advice and guidance if Perez is fit to return, based at his normal place of work, CKSU.

Following further management reviews it is proposed Perez will be remaining at the CKSU site carrying out his normal contractual role… Please advise if will Perez be fit to return to work after the summer shutdown (the shutdown commences Friday, 20 July 2018 for two weeks)?

79. A number of standard questions then follow:

1. Can you confirm the reason for review/absence X

2. Is the employee fit for their full contractual role? If not what are the likely timescales to return to their full contractual role? X

3. Does the employee require a short-term restriction (hours/activity) to their current role to either maintain the attendance at work or facilitate their return to the workplace/role? X

80. The 'X' indicated that the respondent was asking for occupational health to answer those questions as part of the report the respondent hoped to receive**.**

81. There were two additional standard questions against which there was no 'X'.

4. Does the employee require a permanent adjustments to their workplace/role?

5. Is there any evidence work could be a contributory factor to their condition/illness/absence?

82. The claimant was critical of the respondent for not asking the occupational health advisor to answer standard questions 4 and 5 (***allegations 5(c) and (d))***.

83. The tribunal also noted that by the time of this referral to occupational health, the respondent's management had already decided not to transfer the claimant to its Nissan CPM site and had so informed occupational health in the referral form.

84. The true context of the referrals to occupational health assessments on both 2 and 18 July 2018 was the claimant's absence from work due to stress and anxiety caused by his concern at transferring sites and for no other reason. It was the claimant's own position he had no problems at the CKSU site and that he wanted

to remain there. It was the claimant's own position that his stress and anxiety arose solely as a direct result of the prospect of a transfer of to the Nissan CPM site where he said he feared being discriminated against. Neither the claimant's hypothyroid condition nor his insulin resistance had anything to do with the reason for his absence or the reason for his referral to occupational health. It was also the claimant's position in evidence that his thyroid condition was immaterial to his ability to do the work involved at the Nissan CPM site which was essentially the same work as at the CKSU site.

85. In those circumstances, the tribunal easily understood why the respondent did not ask for a response from its occupational health provider to either question 4 or 5. The practical reality is that neither of those questions arose for consideration at that time. Answers to those questions were not sought by the respondent for that and no other reason. They were simply not required. Indeed, it remained unclear to the tribunal why the claimant considered it incumbent on his employer to ask occupational health to answer the contentious questions when his thyroid-related health issues were (on his own case) not the cause of his work concerns or any part of the reason for absence at that time. That remained the claimant's position at of the meetings he attended in July 2018 in which he had also fully participated.

86. There were two further matters of concern to the claimant that occurred during the meeting on 18 July 2018. The claimant complained that Mr Harrison said, *'you didn't sign medical report [108]'* and *'Occupational Health can overrule a GP [109]'*. Those statements are the basis for ***allegations 4(a) and 4(b).***

87. The respondent admits that Mr Harrison said both of those things at that meeting. Both of those statements (or words to that effect) appear in the notes of the absence review meeting of 18 July 2018 [108-111].

88. In cross-examination, the claimant was asked what it was that he was complaining about in respect of the two statements at paragraph 86 above. The evidence was as follows:

'Question: Mr Harrison said you didn't sign the report. That's a fact.

Claimant: Yes.

Question: What is wrong with stating a true fact?

Claimant: Nothing wrong with that.

Question: OH can overrule a GP. No reference to that in your claim form.

Claimant: Agreed.

Question: In fact, he did say it [109A]. What is wrong with him saying that?

Claimant: Nothing wrong with him saying that.

89. Those answers reveal that the claimant was making no direct complaint about either **allegation 4(a) or 4(b)**. The claimant said in cross-examination that he was complaining about the situation as a whole rather than in its particular parts. This was one of a number of occasion when the claimant appeared to be suggesting that the way in which the List of Issues had been constructed failed to reflect in some way the totality of his complaints.

90. The tribunal therefore invited the claimant when he was being cross-examined on these issue to explain what he meant and to take the time he may need to refer to any of the documents that he might want to refer to in order to make plain to the tribunal and the respondent the full nature of the complaints on **allegations 4(a) and (b)** that he intended to make. The claimant provided nothing further by way of explanation despite the invitation he was given and the time he would have been allowed to make plain what was missing that was important for the tribunal to understand. The best the tribunal could make of the claimant's position was that he was complaining about the way in which Nurse Mee and Mr Harrison conducted their respective roles in the occupational health referral and its management. The claimant did not specify in what other way his complaint should be understood other than was already set out in the List of Issues.

91. After several other such invitations to the claimant when he said the same thing about other allegations i.e. when he suggested there might be something that the list of issues had not properly captured, he was unable to provide any explain of wider explanation of what he was implying was missing from the List of Issues. The tribunal came to the conclusion that the claimant was using the suggestion that things were missing from the List of Issues as a way to avoid leaving the impression that the answers he was giving when challenged about what was actually wrong with what he was criticising the respondent for doing or saying revealed that in reality he had no real complaint at all.

92. However, in terms of factual findings there was no dispute between the parties that Mr Harrison had said the things (or words to that effect) ascribed to him by the claimant as **allegations 4(a) and (b)** at the absence review meeting on 18 July 2018.

93. On 30 July 2018, the claimant attended an off-site occupational health appointment with Newcastle Premier Health Ltd. The occupational health professional was an unidentified male. It was not in dispute that this health professional had no direct contractual relationship with the respondent. Like Nurse Mee before him, the unidentified male had a contractual relationship with Newcastle Premier Health Ltd only. The report produced from that consultation is at [120-121]. The claimant signed off this report and consented to its release to the respondent.

94. The claimant makes five complaints about the report. They are as follows:

    a. The OH Report incorrectly records the reason for the claimant's referral to OH.

    b. The occupational health officer focused on the claimant's stress at work only.

c. In the occupational health report, the occupational health officer answered the question, *'Does the employee require permanent adjustments to their workplace/role/(hours)/activity?* as follows, 'An answer to this question was not requested.'

d. In the occupational health report, the occupational health officer answered the question. *'Is there any evidence work could be a contributory factor to their condition/illness/absence'* as follows, *'An answer to this question was not requested.'*

e. In the occupational health report, the occupational health officer answered the question, *'Additional OH Advice/Guidance'* by saying, *'Not applicable.*'

95. These five complaints are **allegations 5(a) to 5(e).**

96. The respondent admitted the facts at **allegations 5 (c), (d) and (e)** above. Those statements are present on the face of the occupational health report at [121].

97. The claimant consented to the release of the report at [120-121] to the respondent. There is no mention whatsoever in that report of the claimant bringing to the attention of the occupational health officer either his hypothyroidism condition or his insulin resistance. This is despite the fact that Mr Harrison had already made it abundantly clear to the claimant at the meeting of 12 July 2028 that he should share whatever medical condition or concern that he had with occupational health including his thyroid condition [104]. At no stage did the claimant provide any explanation for his apparent failure to do so.

98. The tribunal finds that the reason why (and only reason why) the occupational health report focused on the claimant's stress was that stress was the entire rationale for the referral of the claimant to occupational health in July 2018. The tribunal repeats that the claimant was absent from work <u>because of stress and anxiety</u> and not for any reason related to his thyroid condition or insulin resistance. The claimant knew that he had been referred because of stress (and not because of anything related to his thyroid condition). The claimant's fit notes referred to stress and anxiety and to nothing else. It was also the claimant's own case that the stress he was experiencing had been caused by the respondent's proposal to transfer him against his will to the Nissan CPM site where he said he feared discriminatory treatment.

99. In those circumstances, the reason for the referral was not incorrectly stated in the occupational health report at [120-121]. It was correctly stated and the claimant knew very well that it had been correctly stated, not least because the claimant relied upon the stress he was suffering (and not any thyroid condition or insulin resistance) as part of his case not to be transferred to Nissan CPM. The respondent listened to and acceded to the claimant's position and did not transfer him to Nissan CPM either at that time or at any time since.

100. The tribunal can find no fault whatsoever in the focus of an occupational health report being on stress when stress was the sole reason for the referral in the first place and the sole reason why the claimant was absent from work. It would have

made no sense whatsoever for the referral to focus on anything else given that stress and no other condition was the sole reason for the claimant's absence.

101. That is not to say that the claimant should not have raised any collateral health concerns such as his hypothyroidism with occupational health. However, the fact of the matter (which the claimant accepted) was that Mr Harrison had encouraged the claimant to do precisely that. The tribunal finds that as at July 2018 the claimant's pressing concern was to avoid a transfer to Nissan CPM. The claimant knew that his thyroid condition was entirely neutral as between his ability to work at CKSU or CPM. It was his stress condition and not any thyroid condition that would fortify the claimant's case to avoid a transfer to Nissan CPM. The tribunal finds that it is for that and no other reason that the claimant was content at the time for the focus of the referral and focus of the report to be on the specific matter of stress since that condition alone was likely to have any traction in achieving his objective of avoiding a transfer to Nissan CPM.

102. For the same reasons the occupational health report did not need to consider permanent adjustments or whether work was a contributory factor to the claimant's absence. The referral form was a function of the reason for the claimant's absence (stress) and it would have made no sense at all for the referral or the report to focus on what were at the time any non-causative health considerations. The tribunal emphasises that it finds that at the time these events unfolded in July 2018, the claimant was fully aware of all of these considerations.

103. The claimant remained at the respondent's CKSU site. At the beginning of his cross examination the claimant was asked about his treatment between July 2018 and the next (chronologically) of the allegations in these proceedings which occurred in January 2022. The claimant was asked whether he had experienced any problems or was making any allegations of discrimination or other ill-treatment whether because of his nationality or his health conditions between 2018 and the end of 2021. The claimant accepted that he was not making any allegations in relation to that period and that he had not been discriminated against during this period.

104. On 2 June 2021, the claimants attended a medical with the respondent's outsourced occupational health provider. At no point during that report is there any reference at all to the claimant raising issues relating to his hypothyroidism or his insulin resistance whether in relation to work-related difficulties or otherwise. In response to a question about his current development, the claimant says that he is, *'Happy where I am'.*

105. In response to a question inviting the claimant to say ask any questions or make any comments that he might wish to raise, the claimant replied, *'Not at this moment'.* The claimant provided no explanation why he failed to raise his hypothyroidism at this meeting, particularly given his strength of feeling about it at this hearing. If the claimant's hypothyroidism had been causing him any work related difficulties it is unclear why he did not do so. After all, this was at a time when the claimant had already, albeit in 2018, complained that the same occupational health provider had previously failed on two occasions properly to record the medical conditions that he said he had reported to them.

106. The conclusion of this assessment was that the claimant was fit to work with no limitations. Again, this was at a time when the claimant had already complained, albeit in 2018, that it was improper for the same occupational health provider to have failed to provide to the respondent additional occupational health advice and guidance **(allegation 5(e)).**

107. The claimant says that between January and March 2022 he was subjected to numerous discriminatory remarks made by Mr Baillie, his direct supervisor. Mr Baillie had also been the claimant's direct supervisor since before 2018. Specifically, the claimant says that Mr Baillie said to him between January and March 2022:

'are you going to the toilet again? I'm going to start timing how much time you spend in the toilet.' ***allegation 6***

'Everyone's gone and you still walking so slow' ***allegation 7***

'I'm older than you and still walking faster than you' ***allegation 8***

108. Mr Baillie denies making any such comments. The tribunal accepted that slow walking pace and a need to go to the toilet more frequently may be connected to the claimant's underactive thyroid. However, the findings in this paragraph 108 about slow walking place been potentially connected to an underactive thyroid must be read together with the findings at 113 below; and the findings in this paragraph 108 in relation to toilet breaks must be read together with the findings at paragraph 117 below.

109. The claimant provides no dates for any of these comments. Whether as an agency worker or direct employee, the claimant had been working for the respondent by this stage for some 10 years. The respondent undertook its own investigation after it received the claimant's claim form into these alleged comments. Prior to receipt of the claim form, the respondent had not been told by the claimant that he said he had been the subject of such comments at the hands of Mr Baillie despite an extensive grievance and grievance appeal process. That post claim form investigation included interviewing those work colleagues who worked physically closest to the claimant's on the Paint and Assembly line. The following documentary evidence was provided to the tribunal:

    a. Mr I Hughes - Mr Hughes said that he had never witnessed Mr Baillie make any comments about the claimant's walking pace [478]

    b. Mr J Reay - Mr Ray said that he was unaware of Mr Baillie having made any comments to the claimant about his walking pace [479]

    c. Mr J Brown - Mr Brown said that he had never heard any comments relating to Mr Baillie's observations on the claimant's walking pace [480]

    d. Mr T Collins – Mr Collin's said that he had only heard Mr Baillie asking the claimant to pick up his pace of work (not walking pace) on the production line in accordance with the standard operations.

110. In short, there was no evidence to corroborate the claimant's account of Mr Baillie's comments in either live evidence before the tribunal or the documentary evidence with which the tribunal was presented. The claimant sought to suggest that the witnesses to the internal investigation had not been telling the truth to the respondent. The claimant said this was because they were afraid to do so because of the 'hanging rope incident' to which we refer below. For the reasons that the tribunal identify in relation to the 'hanging rope incident' below, the tribunal did not consider it to be remotely likely that any of the claimant's work colleagues were in any way constrained by that incident from giving accurate accounts to their employer.

111. The documentary evidence from the claimant's work colleagues was also consistent about Mr Baillie's style as a supervisor. That evidence must be taken in its context given that the role of supervisor on a busy production line will inevitably involve tensions from time to time. Nevertheless, Mr Baillie was variously described by his subordinates as having a 'fair management style' (Mr Oliver [474]); 'by the book stern but fair' (Mr Christie [476]); 'hands-on, fair, harsh' (Mr Reay [479]) and 'regimental, black-and-white, do job good, if not, not' (Mr Collins [483]. In the context of the work undertaken on an automotive part assembly line, this assessment of Mr Baillie was remarkable only for its general positivity and certainly lent no support to any suggestion that he was prone to mistreat or intimidate or otherwise engender fear in those under his supervision.

112. The tribunal rejected any suggestion that Mr Baillie had done anything which might be likely to prevent those under his supervision from saying anything other than what they genuinely felt about to Mr Baillie's supervision or saying anything other than what they had genuinely heard (or not heard) by way of remarks allegedly made by Mr Baillie about or to the claimant. On that basis, the tribunal accepted that none of those interviewed had heard any of the adverse remarks ascribed to Mr Bailee by the claimant. The tribunal also accepted Mr Baillie's evidence that he had not done so.

113. In those circumstances, the tribunal was not satisfied that the claimant had shown that Mr Baillie did in fact make any of the remarks ascribed to him by the claimant in **allegations 6, 7 or 8**.

114. Mr Baillie accepted that he did make one of the remarks ascribed to him. Mr Baillie recalls saying to the claimant:

'You going for a break first and still coming back last' ***allegation 9***

115. The claimant said that this remark was made on a single occasion. It was therefore common ground that ***allegation 9*** is factually true.

116. The claimant alleged that on 5 July 2022, Mr Baillie did not allow him to take any extra toilet breaks outside of normal break times (***allegation 10***).

117. In cross-examination the claimant significantly changed his position on ***allegation 10***. This is what the claimant said when asked about toilet breaks:

'Question: You accept you could take breaks when you needed to go to the toilet

Claimant: Yes, but I got comments. Not about permission, about comments

118. The difficulty with that answer is it is not what the claimant had been alleging ever since his provision of further information as ordered by Employment Judge Sweeney at the preliminary stages to these proceedings. In his further information the claimant says as follows:

'My employer was and is aware of my illness, metabolism problems caused by my illness, also medication I'm on, still I'm not allowed to have ANY adjustments at all. If I need to use toilet more often (not excessively often, but for example between break times) I'm not allowed…

Restricted toilet breaks… will jeopardise my health

119. The claimant repeats this precise allegation at paragraph 9 on page 5 of his witness statement.

120. When the claimant was challenged in cross-examination about his change of position, he accepted that the allegation that he had not been *allowed* by Mr Baillie to go the toilet between scheduled break times was inaccurate. The claimant's position in cross-examination was that he had been *deterred from asking* for additional toilet breaks due to the alleged comments being made at ***allegations 6-9***. The tribunal has already found at paragraph 113 above that none of the comments underpinning **allegations 6, 7 or 8** were in fact made.

121. The tribunal concluded that the claimant had not been subject to adverse comments regarding his need to go to the toilet (whether attributable to his thyroid condition or otherwise) and it follows that he could not have been deterred by comments that were not in fact made from asking for additional toilet breaks when needed. The tribunal accepted Mr Baillie's evidence that he had never refused any request by the claimant to go to the toilet at any stage when the claimant was under his supervision. The tribunal therefore finds that ***allegation 10*** did not take place at all, even as recast by the claimant during the course of his cross-examination as a 'deterrent'.

122. ***Allegation 10*** is also relied upon factually for the purposes of ***allegation 11*** in which the claimant complains about the finding in Mr Metcalfe's grievance outcome appeal letter that:

'The report has confirmed that you do not require any adjustments (such as longer/additional toilet breaks) due to your condition.'

123. In the light of the tribunal's findings that the facts relied upon by the claimant as constituting ***allegation 10*** did not happen, the tribunal has come to the same conclusion in relation to ***allegation 11***. While ***allegation 11*** is a factually accurate excerpt from Mr Metcalfe's outcome letter, Mr Metcalfe is simply stating a true fact about the contents of the report.

124. The tribunal also concluded that the claimant was materially changing his case during the course of his own evidence and doing so in a way which undermined the reliability of the evidence in his witness statement more broadly.

125. On 23 February 2022, the claimant's annual Performance Development Review ('PADR') took place with his Shift-Coordinator, Mr Baillie. The overall rating given to the claimant was 'Marginal.' This was one of a range of 5 outcomes from 'Outstanding' to 'Unsatisfactory'. Mr Baillie's evidence was that the claimant's PADR was broadly positive. Mr Baillie explained that the overall rating is derived automatically by the software used by the respondent for its PADR process based on the manual scoring of the separate parts of the PADR.

126. Plainly it is Mr Baille's ratings in the 13 different categories in the appraisal form which led to the overall computer-generated rating. There are only two categories in which Mr Baillie gives the claimant a rating which suggests that the claimant was falling below any required standards.

127. The first of those categories is 'Achievement of agreed objectives' in which the claimant is marked as 'Does not achieve objectives.' The accompanying notes which are given in support of that rating includes the comment to which the claimant objects in ***allegation 12***. That comment is as follows:

'Perez does not always hit is tact when working on the console line which results in hours targets not being achieved. Sometimes more effort is needed as we are challenged to hit the customer demand.'

128. The second of those categories is 'Leadership' in which the claimant is marked as 'Does not lead at appropriate times.' There is nothing in the accompanying notes in support of the rating which is in anyway negative. To that extent it was difficult to see why Mr Baillie arrived at the rating he did. Nevertheless, there was no challenge to that rating by the claimant either in his claim form/further information or in the cross-examination of Mr Baillie.

129. The focus was solely on Mr Baillie's rating and notes regarding the claimant's speed on the console line. It was the claimant's case that Mr Baillie had no cause to lower his rating in relation to speed/performance and that Mr Baillie had deliberately lowered the claimant's scores for speed/performance when in fact the claimant was hitting his tact time and Mr Baillie knew that to be the case. The tact time is a reference to the line speed which dictates the pace of work at which the production operators are required to work. Mr Baillie denied that he had deliberately lowered the claimant's scores as suggested. Mr Baillie's position was the claimant was one of the slowest operators on the console line (also referred to as the side-fit station) during the period under review and that the scores he awarded to the claimant reflected that. The claimant's evidence and cross-examination on this point was as follows:

'Question: Page 124 in box 4 shows you marked down

Claimant: He should not say too slow on side-fit, I was meeting tact time

Employment Judge: So you're not saying that you were slow but that was because of your disability

Claimant: Not slow and assessment false'

130. Accordingly, it was the claimant's position that he was working to the tact time and that Mr Baillie's assessment was knowingly false. The claimant did not explain why he regarded the lowering of his scores as amounting to discrimination arising from disability. It was his position that he was achieving the tact time during the period under review. It was explicitly not his position that because of something arising out of his medical conditions (for example an inability to work quickly) he was unable to meet the tact time.

131. The claimant also said in cross-examination that he considered that Mr Baillie was retaliating against him because of the grievance that the claimant had brought against Mr Baillie. The unavoidable difficulty with that contention is that Mr Baillie's grievance was brought on 21 March 2022, approximately one month after the claimant's PADR with Mr Bailee on 23 February 2022. Plainly, Mr Baillie could not be taking into account anything that happened a month later when lowering the claimant's scores at the PADR. It was not suggested that Mr Baillie had for any reason anticipated the claimant's grievance before it was received.

132. The tribunal accepted Mr Baillie's evidence that the reason why he made critical comments about the claimant's tact time was because he had cause to do so. The tribunal was unable to identify any basis for ill-will on Mr Baille's part towards the claimant. Rather, the tribunal find that the claimant who has made allegations against Mr Baillie which the tribunal finds not to be true.

133. On 15 March 2022, an incident of central importance to the claimant and to these proceedings took place ('the Radio Incident'). Mr Baillie said that he saw on the CCTV screen in his console that the claimant had walked away from his work station without completing the task that he was doing.

134. This was a topical issue on the assembly line because only a few days before the Radio Incident a significant quality concern had arisen on the same part of the line. Another production operator, Mr Hughes, who is white British, had walked away from the line without first completing a part. That had resulted in a defective part being delivered to Nissan, the respondent's key client. This generated a quality complaint from Nissan which Mr Baillie had to look into. When inquiring into what had gone wrong, Mr Baillie looked at the CCTV which showed that Mr Hughes had walked away from the line before he had completed assembling the part in question. This led Mr Baillie to give an instruction to all team members (including the claimant) that operators must always finish the part they are working on before they walk away from the line. The purpose of this instruction was to prevent a reoccurrence of the same quality concern happening again.

135. A quality complaint from the site's most important client is a serious matter to the respondent and it is expected to provide an explanation to the customer . On 13 March 2022, once the reason for the defective part being shipped to Nissan had been identified, the team (including the claimant and Mr Hughes) was asked by Mr Baillie to gather round and watch a video replay of what Mr Hughes had done

wrong. It was, for obvious reasons, a learning point for the entire team working on that part of the production line including the claimant.

136. On 15 March 2022, Mr Baillie noticed on the CCTV monitor he could see from his work pod the claimant walking away from the line without completing the part he was working on. This was only two days after the instruction at paragraph 134 had been given. Mr Baillie considered that this was a failure by the claimant to comply with the very instruction that he had issued and which had led to a quality complaint from Nissan only two days previously. Mr Baillie decided that he needed to address the matter with the claimant straightway.

137. Mr Baillie's work pod was a substantial distance from where the claimant was working on the line. In order to address the problem, Mr Baillie used a remote walkie talkie radio to issue an instruction to the Team Leader (Mr Tom Collins) who was working on the assembly line where the claimant was working. The content and tone of that instruction was contested. The claimant says that immediately after Mr Baillie spoke to Mr Collins over the radio, Mr Collins said to him:

'Simon says tell Perez to shut up and hurry up'

138. The claimant says that Mr Collins was passing that message on from Mr Baillie. It is what the claimant says he heard from Mr Baillie via Mr Collins which is ***allegation 13.***

139. The claimant accepted in cross-examination that he did not directly hear what Mr Baillie had said to Mr Collins over the radio. His position was that he could infer from what Mr Collins had said to him straightaway that Mr Baillie had said essentially the same thing to Mr Collins.

140. In the claimant's own grievance letter [133], the claimant says:

'Next shift [Mr Bailee] told Tom [Collins] that I should stop talking and hurry up'

141. In his grievance appeal outcome hearing letter [267], Mr Metcalfe (Plant Manager Interior Business Unit) records the claimant as having said at his appeal hearing that what the claimant believed was said by Mr Baillie down the radio was:

'…tell him to shut up and get back to work'

142. During his interview with Mr Liscombe on 20 April 2022 when Mr Liscombe was investigating the claimant's grievance, Mr Baillie is recorded in the notes of that interview [154] as saying that what he said over the radio to Mr Collins was:

'[I] shouted to the lad on line Tom Collins to inform Perez [the claimant] to finish part.'

143. Mr Baillie was interviewed again by Mr Liscombe on 6 June 2022 specifically about precisely what he said on the radio. Mr Baillie says as follows in the notes of that interview [223-224]:

'Mr Liscombe: Reason to get on the radio to Team

Mr Baillie: previous concern… outcome Ian Hughes walked away from part 4 times during assembly. Built wrong part… Identified on camera. Walk away from a part when assembling

…

Looked on camera seem Perez walked away from part

left part on bench

…

Spoke to Perez about him walking away part

144. During his interview with Mr Liscombe on 21 April 2022, Mr Collins is recorded in the notes of the interview [167] as saying that Mr Baillie said to him:

'Please tell Perez [the claimant] to get on with it. Perez is on an easy job'

145. Mr Collins was interviewed again by Mr Liscombe on 4 May 2022 specifically about precisely what was said on the radio. The following question and answer is recorded in the notes of this second interview [184-185]:

'Mr Liscombe: word for word on radio

Mr Collins: … Tom can you please tell Perez belts full. Please tell Perez to crack on.

Mr Liscombe: who could hear this

Mr Collins: anyone ... on radio three

146. Radio 3 is a reference to one of 13 channels that those supervisors with a walkie-talkie radio could tune into in the factory to relay messages.

147. In cross-examination, it was put to the claimant that no witness corroborated the claimant's contention that he was told to 'shut up' either from the evidence of Mr Baillie himself, that of Mr Collins or from any other witness. It was also an allegation in these proceedings (***allegation 15***) that the claimant considered that he had been publicly humiliated by Mr Baillie as a result what Mr Baillie had said over the radio.

148. In cross-examination, it was put to the claimant whether he would have had any objection if Mr Baillie had said *'finish the part' or words to that effect'*. The claimant confirmed that there would be *'nothing wrong with that.'*

149. When the claimant was asked during cross examination what he objected to in the words that Mr Baillie allegedly used, his reply was: *two things: the words 'shut up and hurry up' and being wrongly accused'.* The claimant thought he was been told to stop talking in a curt manner and wrongly being accused by Mr Baillie of having made a quality error (referred to by the witnesses as a 'quality concern') when the claimant was firmly of the view that he had not done so. The claimant felt very strongly about the fact that he felt he had been wrongly accused of making a quality concern.

150. Dealing first with the claimant's contention that he was being wrongly accused of having made a quality error. The difficulty with that contention s that it was never Mr Baillie's position that a quality concern had occurred. Mr Baillie's position, which the tribunal accepted as entirely genuine, was that he was trying to prevent a quality concern arising. His position was not that a quality concern had arisen on 15 March 2022. Mr Baillie's clear, consistent and understandable position was that he had only recently received a quality concern from Nissan which had been tracked back to Mr Hughes. That was investigated and a de-brief presentation had been given to the whole team. An instruction not to leave the line before finishing assembling a part was given. Mr Baillie's specific concern was that only two days after that instruction had been issued he observed the claimant walking away from the line without having completed the assembly of a part. Identifying that a quality concern might arise from certain conduct is plainly not the same thing as identifying that a quality concern had arisen on this occasion from that conduct. It is clearly within Mr Baillie's remit in his supervisory capacity to address conduct which may give rise to a quality concern. Mr Baillie's remit is not restricted only to addressing conduct which has already caused a quality concern.

151. The tribunal concluded that the claimant has simply misinterpreted what Mr Baillie was unhappy about. The tribunal finds that what the claimant was corrected about was that he had repeated the conduct of Mr Hughes which had in that earlier case led to an actual quality concern in respect of which a clear instruction had been given. The question of wrongful accusation that a quality concern had actually happened simply does not arise. That position does not change either because the claimant misunderstood what was said to him by Mr Baillie or because he now feels very strongly about matters.

152. Turning to the remaining part of ***allegation 13***: the words used by Mr Baillie. The tribunal prefers the evidence of Mr Baillie and Mr Collins to that of the claimant. The claimant was not consistent in what he says about what he heard. The claimant's own position in evidence was that he did not hear what Mr Baillie had said on the radio to Mr Collins. This is in itself inconsistent with an allegation that the claimant was publicly humiliated. The claimant never explained why if he did not hear what was said by Mr Baillie over the radio, why anybody else (let alone on a scale that might fairly be described as 'public') should have been able to do so. The claimant brought no evidence from any of his colleagues to say that they had heard Mr Baillie speak to Mr Collins about the claimant over the radio that day.

153. Mr Collins evidence was that colleagues at a level to which radios were given out and who had their walkie-talkies tuned into channel 3 may have been able to overhear. The tribunal had initially got the impression that the radio was some form of Tannoy system the purpose of which was to distribute verbal communications to everyone in a particular area of the factory. It was accepted in evidence by the claimant that this was not the case and that only certain supervisory levels of staff were issued with walkie-talkie radios.

154. In terms of the specific words, the tribunal noted that there was no high degree of consistency from any of the witnesses involved. The tribunal has concluded that this was because the information communicated by Mr Baillie to Mr Collins was of an unremarkable nature. It is axiomatic that in a busy large-scale production line environment, that those in a supervisory capacity will need to address straightaway any form of conduct that they consider inappropriate. It is good practice to do that as and when the conduct is first observed.

155. The tribunal finds that to Mr Baillie and Mr Collins the specific words used were rather less important than the message they were intended to convey. The documentary evidence of Mr Collins is the nearest that the tribunal has to an account of the Radio Incident from someone uninvolved in the dispute. That evidence was not provided in a witness statement and was not subject cross-examination. Nevertheless, the contemporaneous documentary evidence records what was said by Mr Collins at the time when he was specifically asked on two occasions what Mr Baillie had said over the radio. Mr Collins does not mention anything about Mr Baillie asking him to tell the claimant to shut up.

156. Moreover, the conduct about which Mr Baillie was concerned was the claimant walking away from the line in much the same way as Mr Hughes had done in connection with the quality concern raised by Nissan. It was of much less concern to Mr Baillie what the reason was that the claimant (or Mr Hughes before him) had walked away from the line. Whether the reason was to talk to somebody or for some other reason was a subsidiary matter. The tribunal was therefore satisfied that the words used by Mr Baillie were those need to convey the message to the claimant that he should not walk away from the line without completing the part he was assembling and that those words did not involve anything disrespectful or inappropriate. The tribunal also notes that while words do of course matter, in an industrial setting there are occasion when words are used more robustly than in other working environments.

157. To the extent that anything was said at all about the claimant talking, there was inconsistency in the claimant's own versions of what happened. In his grievance letter he says the instruction was to *'stop talking'*. In these proceedings, the claimant says that Mr Baillie used the rather less cordial imperative instruction *'to shut up and hurry up'*. The claimant accepted in evidence that if it had been an instruction to stop talking there would have been nothing wrong with that form of words. The tribunal finds that Mr Baillie asked Mr Collins to tell the claimant not to walk away from the line and to *'stop talking'.*

158. The tribunal therefore concludes that the claimant was told by Mr Baillie through Mr Collins not to walk away from the assembly line without finishing assembling the part and that Mr Baillie did so in a way that was unobjectionable. Plainly, it

will be a matter of somewhat frequent occurrence on a busy production line that supervisors ask operators to do less talking and more working.

159. After the message was conveyed to the claimant, the claimant (on his own account) confronted Mr Baillie. This happened at the claimant's next break. The tribunal finds that it is very likely that there were raised voices during this confrontation. Whatever the objective merit of the claimant's perceptions, he plainly genuinely felt that he had been badly treated. However, the tribunal does not agree and finds that Mr Baillie was not the only one raising his voice and that that it was the claimant not Mr Baillie that initiated any shouting. After all, this was a confrontation instigated by the claimant who was upset and angry about his perceived mistreatment. The claimant accepted in cross examination that he did not say to Mr Baillie at any stage during this confrontation that the treatment he perceived he had been subject to was because of his nationality.

160. The tribunal therefore finds in connection with the Radio Incident that:

a. Mr Baillie did not shout at the claimant **(*allegation 14 (a)*).**

b. Mr Baillie did explain that he could not be 'on the line every two minutes' and that he said that to provide an explanation for using the CCTV and the radio **(*allegation 14 (b)*).**

c. Mr Baillie said that he used CCTV for quality concerns, but at the same time tribunal notes this does not mean that Mr Baillie only used it for quality concerns that had occurred and those words are perfectly consistent with Mr Baillie's position that he used the CCTV and radio because he saw conduct by the claimant which he thought might be likely to cause a quality concern **(*allegation 14 (c)*)**.

d. There is no significance to the contention that Mr Baillie was unable to identify a quality concern. For the reasons the tribunal has already identified, it was not Mr Baillie's position at any stage that what he had observed was in fact a quality concern in the sense that what he had observed was the assembly of a defective part **(*allegation 14(d)*).**

e. Mr Baillie did say that there were lots of cameras in the factory. In so doing, Mr Baillie was simply making a statement of fact. The tribunal finds that was by way of explanation to the claimant that he was not being singled out at all but that the use of CCTV to monitor the workplace was a routine matter in the factory **(*allegation 14(e)*).**

f. Mr Baillie did not say to the claimant *'there was a place for you on CMP [Nissan site]* where *'there's lots of cameras.'* The point being made by Mr Baillie was there are cameras everywhere at all sites and that all employees at all levels can be seen on them **(*allegation 14(f)*).** That was simply a statement of fact.

g. The claimant's contention that Mr Baillie was threatening him with a transfer to CPM is expressly rejected by the tribunal. The tribunal considered this to be the claimant summoning up for the purposes of this litigation the proposed transfer to Nissan CPM site some 4 years earlier which the respondent decided not to

enforce given the claimant's own objection. In March 2022, there was no suggestion of any operational need for any transfer of staff to the CPM Nissan site.

h. Mr Baillie did not say to the claimant that *'from now on I am timing all of your breaks'.* The tribunal expressly rejects this contention and again finds that the claimant is introducing matters about which he complains elsewhere in this litigation in an attempt to portray Mr Baillie in a negative light and in the hope of thereby fortifying his claims. The tribunal has found at paragraphs 107-113 above that Mr Baillie did not at any stage prevent or criticise the claimant for taking toilet breaks. It is consistent with that finding that the tribunal also rejects the contention that Mr Baillie was threatening to time the length of the claimant's breaks in general.

i. The tribunal also notes that Mr Baillie immediately apologised to the claimant for using the radio to convey his message. The tribunal finds that apology entirely inconsistent with the contentions of the claimant at **g and h** above which, if true, would represent a doubling down by Mr Baillie on the legitimacy of his actions.

161. The final factual matter for determination in relation to the Radio Incident, is the contention that Mr Baillie publicly humiliated the claimant over the radio and did not say anything about Mr Hughes (white British) who spent five minutes chatting with Colin Robinson (Line Coordinator and white British) about football.

162. ***Allegation 15*** is predicated on a number of the claimant's colleagues having been able to overhear what was said by Mr Baillie to Mr Collins over the radio. The tribunal finds it significant that neither the claimant nor the respondent's internal investigators who were able to find any witness able to corroborate the claimant's allegation that Mr Baillie had said publicly over the radio that the claimant should 'shut up'.

163. The tribunal finds that there is no evidence of anyone overhearing what was said by Mr Baillie to Mr Collins on 15 March 2022, not even the claimant himself. There was the possibility that other team leaders or supervisors who were tuned into the same channel as Mr Collins and Mr Baillie might have overheard something. Only to that limited extent does the tribunal find that Mr Baillie's comments could be considered to have been made publicly. The tribunal also repeats its findings at paragraphs 152-153 above.

164. Turning to Mr Robinson. The claimant accepted in cross examination that he was not in a position to say whether Mr Baillie could or couldn't have seen Mr Hughes talking when Mr Baillie was viewing the CCTV footage on 15 March 2022. It is of course not possible for Mr Baillie to have been able to know that they were allegedly talking about football. In his cross examination, the claimant provided the reason why the claimant thought Mr Baillie might not have picked up Mr Robinson for talking if Mr Baillie had seen Mr Hughes talking with Mr Robinson on the CCTV. The relevant part of cross-examination was as follows:

'Question: Mr Baillie did not spot anything and it had nothing whatsoever to do with you being Polish

Claimant: Mr Baillie did not pick up on this because Mr Robinson was senior.

165. Accordingly, it was the claimant's own position that it was Mr Robinson's seniority to the claimant that explained any failure by Mr Baillie to pick Mr Robinson up for talking.

166. It is important to contextualise the Radio Incident. Only two days earlier on 13 March 2022, Mr Baillie had reviewed CCTV footage and picked up Mr Hughes for walking away from the line without finishing the assembly of a part. That was exactly the same treatment as the claimant received. Moreover, in Mr Hughes case, Mr Baillie he had required the full team (including Mr Hughes) to review the CCTV and witness the error on Mr Hughes' part which had led to the quality concern from Nissan. The tribunal considered that had much more potential to be publicly embarrassing than what happened to the claimant in the Radio Incident.

167. The tribunal finds that Mr Baillie did not notice Mr Hughes talking to Mr Robinson when he viewed the CCTV on 15 March 2022. The tribunal also rejects any contention that Mr Baillie would have been reluctant to tackle Mr Hughes if he had seen him talking because he had shown no such reluctance two days earlier when investigating the quality complaint from Nissan. The tribunal also notes that Mr Baillie's principal concern was not that he saw the claimant (or anyone else) talking. Mr Baillie's principal concern was that the claimant had walked away from the assembly line without finishing the assembly of the part he was working on.

168. The respondent admits that the conduct of Mr Baillie on 15 March 2022 breached the companies CCTV policy. That was because the CCTV policy in place at the time did not extend to processing data for the purposes of exercising a quality control function**.** ***Allegation 16*** is therefore admitted factually.

169. The respondent admits that it did not have an up-to-date CCTV policy in place on 15 March 2022. This is essentially a repetition of allegation 16. ***Allegation 17*** is therefore admitted factually.

170. It was common ground that as at the date of these proceedings, the respondent now has an up-to-date CCTV policy which allows it to process data for quality assurance purposes. It was also common ground that any breach of the CCTV policy in place as at 15 March 2022 was a matter which affected all employees at all levels and did not differentially impact the protected characteristics relied upon by the claimant in these proceedings.

171. Put simply, any failure to have an up-to-date CCTV policy at the relevant time was a failure which applied or would apply equally to all employees of the respondent and would not disadvantage any of those employees or differentially impact the claimant for either race or disability reasons. The tribunal notes in that regard that it was common ground that Mr Hughes, who is white British, had an actual quality concern recorded on CCTV and that CCTV footage was replayed by the respondent in the presence of all team members, including Mr Hughes and the claimant, as a learning point for the team as a whole.

172. On 21 March 2022, the claimant raised a written grievance [133-136]. On 13 April 2022, the claimant attended a grievance meeting with Mr Packer, Shift Operations Leader. The notes of that meeting are at [137-142]. On 15 April 2022, Mr Packer commenced a period of annual leave and passed the handling of the claimant's grievance to Mr Liscombe, Section Leader. Between 20 April 2022 and 6 June 2022, Mr Liscombe undertook the following investigation meetings:

    a. Mr Baillie on 20 April 2022 [147-156], 21 April 2022 [158-164], 4 May 2022 [177-183] and 6 June 2022 [223-224].

    b. Mr Tom Collins on 21 April 2022 [165-168] and 4 May 2022 [184-185].

173. In a letter dated 10 May 2022 [186-195] Mr Liscombe provided the claimant with a grievance outcome letter setting out his findings in relation to each of the points of grievance that the claimant had raised. Mr Liscombe upheld none of the claimant's grievances.

174. On 16 May 2022, Mr Liscombe had a grievance outcome meeting with the claimant in which he discussed the outcome with the claimant. The notes of that meeting are at [462 – 470].

175. During the grievance process, the claimant alleged that he made requests to Mr Packer, Mr Liscombe and Mr Metcalfe (Plant Manager for the Interior Business Unit) to transfer from Mr Baillie's supervision to a different part of the same site. The claimant identified the following comparators who he alleges had their requests to transfer away from Mr Baillie's shift granted **(*allegation 18)***:

    a. Noreen Davison (British)

    b. Anthony Wray (British)

    c. Mahl Loko (Zimbabwean)

176. There was the following exchange in cross examination relating to these comparators:

    'Mr Tinnion: This relates to a need for more resource on the Mould Line. Some operators on the Product Line moved from product to mould. Mr Baillie will say that Noreen Davison volunteered to transfer and the Mahl Noko, who used to work on the Mould Line also volunteered to transfer.

    Claimant: yes

    Mr Tinnion, Mr Baillie will say that Tony Wray was transferred to Mould Line against his will.

    Claimant: I don't know.

    Mr Tinnion: you didn't want to move to Mould.

    Claimant: no, my problem was with Mr Baillie

    Mr Tinnion: you didn't volunteer whereas Noreen Davison and Mahl Noko did volunteer

    Claimant: at that time, no

Mr Tinnion: Mr Wray is white British and he was forced to move. You were treated more favourably than your white British colleague who was forced to transfer

Claimant: in this case, yes

Mr Tinnion: it is not an apples to apples comparison

Claimant: yes, different. I was discriminated against.

Mr Tinnion: no two totally different situations.

Claimant: yes, two different situations.

Mr Tinnion: You were an experienced valued employee on Product Line. That was the reason that you remained on Product Line .

Claimant: I don't know why I was kept but I wanted to be away from Simon [Baillie].

177. Accordingly, the claimant accepts that in 2021 when the need for more resource on Mould Line arose he did not volunteer to transfer to the Mould Line unlike Noreen Davison and Mahl Noko. The claimant accepts that Anthony Wray was more favourably treated because he, unlike the claimant, was forced to transfer to Mould Line against his will.

178. The respondent admits that in Mr Liscombe's grievance outcome letter [186-195] he wrote the following:

'We feel satisfied therefore that Simon [Baillie] appropriately addressed a specific concern with you and used the appropriate forum to do it [189]'

179. ***Allegation 19*** is therefore admitted factually***.***

180. The specific concern that Mr Baillie was addressing was the claimant's tact time (i.e. speed of work) on the console cell at his PADR in February 2022. The tribunal accepts the evidence of Mr Liscombe that he looked into this aspect of the claimant's grievance, examined the evidence and was satisfied that genuine concerns had previously been raised in the period under review about the claimant's tact time.

181. The tribunal also accepts Mr Liscombe's findings made during the claimant's grievance that it was entirely appropriate of Mr Baillie to have raised those concerns in the claimant's February 2022 performance review meeting. The tribunal also agreed with Mr Liscombe that a performance appraisal was an appropriate forum in which to raise such an issue.

182. Accordingly, the tribunal is able to make a clear positive finding that Mr Liscombe made the statement he did in his grievance letter outcome for the simple reason that his inquiries revealed that there had been genuine concerns about the claimant's tact time on the console line and for no other reason at all.

183. This was an allegation being made against Mr Liscombe. It was not suggested that Mr Liscombe was himself aware of the claimant's thyroid condition or insulin resistance or that he was on notice to make inquiries as to whether either of both of those conditions might constitute disabilities in the terms of section 6 Equality Act 2010.

184. Mr Liscombe also made inquiries into other case involving white British operators and he found that where there were similar concerns with tact times, Mr Baillie also raised the matter with those colleagues. There was therefore no difference in treatment identified.

185. The respondent accepts that in Mr Liscombe's grievance outcome letter [186-195] he wrote the following:

'We reviewed HR records and there is no medical condition relating to yourself captured on your file. As such, we have no reason to believe Simon [Baillie] was aware of any medical condition which you may suffer from. If an employee has a medical concern and need reasonable adjustments in place in order to cope with the condition, we would ask that Occupational Health in order to review the employee properly understand any medical concerns. As we were not aware of your underactive thyroid and the symptoms you suffer with.'[190]

186. ***Allegation 20*** is therefore admitted factually.

187. The tribunal accepts the evidence of Mr Liscombe that at the time he wrote that paragraph, he was genuinely unaware of any reference to medical conditions in the claimant's HR records.

188. The tribunal has had the advantage of seeing the 'lost document' **(allegation 3)**. It is the document at [104]. Document [104] is a single page from notes of an absence review meeting between the claimant and Mr Harrison which took place on 12 July 2018 [97-106]. This is the only document that at the time of Mr Liscombe's grievance outcome letter of 10 May 2022 which the tribunal has seen in which there is any reference to the claimant's thyroid condition. The tribunal rejects the suggestion by the claimant that Mr Liscombe somehow deliberately didn't find the document or that for unspecified reasons having seen the document he nevertheless committed himself to writing in the terms seen at [190].

189. The tribunal considered there to be a fundamental inconsistency in the claimant's position regarding the 'lost document.' At various stages of these proceedings, the claimant was prepared explicitly to say that the respondent's witnesses were lying under oath/affirmation to the tribunal. The judge pointed out to the claimant just how serious an allegation that was. It was also pointed out to the claimant that if there was any substance to such an allegation the tribunal would not shrink from conscientiously considering it and reaching a decision accordingly. However, there was not the slightest evidential basis for any of the allegations that the respondent's witnesses were lying to the tribunal. Indeed the claimant didn't seem to feel the need to back up his contention with any evidence that the respondent's witnesses were doing so./

190. For the purposes of ***allegation 20***, the claimant was at one of the same time prepared to make allegations that the respondent's witnesses were lying to the tribunal under oath/affirmation while being fully aware that the respondent had given frank disclosure of the document containing page [104]. It did not appear to the tribunal at all likely that the respondent's witnesses would be prepared to lie to the tribunal in evidence and yet disclose a document which went some way

to supporting the claimant's factual case. In any event, any suggestion of dishonesty on the part of Mr Liscombe (or any of the other of the respondent's witnesses) is rejected in its entirety by the tribunal.

191. **Allegation 20** is made all the more unlikely in the light of the express encouragement by Mr Harrison on the very same page i.e. [104] when Mr Harrison says to the claimant that he

'Need [to] exp[lain] all to nurse please, can get report'

192. It is clearly not the actions of an employer wishing to hide medical information to expressly encourage the claimant to make sure that he explains all of his medical conditions to the occupational health nurse so that the respondent can then receive a fully informed occupational health report. Quite the reverse.

193. Furthermore, Mr Liscombe during the grievance process made a point of arranging another referral to occupational health for the claimant to take place on 17 May 2022. The express purpose of this report was to ensure that the respondent could put in place appropriate support mechanisms, including any need for longer or more frequent breaks toilet breaks.

194. The tribunal also accepted the evidence of Mr Liscombe that when he searched for the 'lost document' along with HR, they focused on the occupational health records rather than the wider records held in the HR department. That was a natural working assumption. The tribunal accepted that it was only when preparing for these proceedings, when the claimant's HR records as a whole were thoroughly considered, that the document which includes the page at [104] was identified and then disclosed in these proceedings at the appropriate time.

195. The claimant says that he told the respondent where to find the document in question. In fact, what the claimant told the respondent was that the document was in his HR records and was no more specific than that. He did not contextualise the meeting at which the reference to his thyroid had been made, he did not provide a date or any other information that might have made it easier for the claimant to identify the document. The reality is that the respondent was looking for a single reference to 'thyroid issues' contained within the notes of an absence review meeting which considered broader matters in the context of ill health from stress caused by a proposed transfer of the claimant to the Nissan CPM site.

196. The respondent accepts that Mr Liscombe's in his grievance outcome letter [186 –195] wrote the following:

'We have already discussed the radio situation, which we would classify as a minor deviation from best practice, which has been addressed' [189]

197. ***Allegation 21*** is therefore admitted factually in the sense it is an accurate quotation from Mr Liscombe's letter.

198. It was common ground that Mr Baillie apologised very shortly after the Radio Incident on 15 March 2022. Mr Baillie was apologising for using the radio. He was

not apologising for using the radio because the claimant was Polish. There was no evidence whatsoever that Mr Baillie's use of the radio had anything remotely to do with the claimant's nationality. Mr Baillie's explanation, which the tribunal accepted on the basis it made a good deal of commonsense, was that he used his radio because he wanted to nip the matter in the bud. Mr Baillie was working a significant distance away from the claimant when he saw the claimant walking away from the line and it was only because Mr Baillie was so far away that he used his radio to get his message to the claimant. Furthermore, the claimant made no attempt at all to demonstrate any evidential foundation for a link between Mr Baillie's use of his radio and the claimant's nationality.

199. The high point of the claimant's case on this allegation was that he said in cross-examination that he was *'the only person treated that way'.* However, even on the claimant's own evidence he did not go so far as to say expressly that he was the only person treated that way *because he was Polish.*

200. The tribunal concluded that Mr Liscombe correctly assessed the degree of Mr Baillie's indiscretion correctly. Even though there were a number of radio channels and Mr Baillie was using only one of them, both the respondent and Mr Baillie personally both acknowledged that it was far from best practice to use a radio to communicate a performance concern. However, the tribunal concluded that no considerations of nationality played any part in the decision by Mr Baillie to use the radio to communicate with Mr Collins.

201. Mr Baillie saw the claimant on CCTV disobeying his instruction issued only two days earlier. Mr Baillie was some distance away from the area where the claimant was working. The tribunal finds that Mr Baillie was motivated only by his desire to prevent a re-occurrence of the quality concern with Nissan that had occurred as a consequence of Mr Hughes's actions and the using the radio was simply the quickest way to deal with what he saw. There was nothing more to it than that.

202. The tribunal concludes that if Mr Baillie had seen Mr Hughes or any other production operator to whom he had issued the instruction not to walk away from the assembly line before finishing putting a part together, then Mr Baillie would have taken exactly the same steps including the use of the radio to make his point. The tribunal can see no connection in the slightest between the use of the radio and the claimant's nationality.

203. On an unspecified date after 19 May 2022, the claimant sent a letter to Mr Harrison via recorded delivery. That letter is at [211]. The claimant did not receive a reply to that letter **(allegation 22)** .The letter is headed 'Complaint'. In that letter, the claimant is highly critical of the way in which Mr Liscombe handled his grievance. The letter is also critical of Mr Harrison himself. The claimant says that Mr Harrison lost documents belonging to the claimant's brother when Mr Harrison was the claimant's brother's shift coordinator at the respondent's CPM Nissan site. The claimant says that in 2018 Mr Harrison lost the claimant's sensitive data. This appears to be another reference to the document at [104]. The claimant says as follows in his letter about that:

'It's weird pattern each time when confidential documents getting lost your name is involved. Please investigate with HR support what are you doing with

documentation and why GDPR procedures are breach. I will be contacting Information Commissioner Office as documents that would support my grievance were on purpose lost.'

204. The tribunal has already found that documents were not lost either on purpose or as a result of carelessness. What happened was a single reference in a document from 2018 i.e. the document containing the page at [104] was not discovered when enquiries were made of its whereabouts at the request of the claimant. There are occasions when reasonable searches for a document do not identify that document. As the tribunal as already said, there was a single reference to a thyroid issue on one page of a longer document which was on the claimant's HR file. The tribunal is satisfied that the document was neither lost on purpose nor lost as a result of carelessness. Nor were there any deliberate failures to find it during the course of the claimant's grievance process or at all.

205. It was also a document which fell rather short of being a 'smoking gun' in respect of any of the claimant's internal grievance complaints or any of the legal complaints in these proceedings. The tribunal repeats the finding that it has already made that the tribunal can identify no sense of reluctance on the part of the respondent to get to the bottom of the claimant's medical conditions whether in 2018, 2022 or at all.

206. On the contrary, in 2018 the claimant was encouraged to explain everything to the occupational health nurse. The is recorded at [104] immediately underneath the claimant's reference to his thyroid issues. The respondent's position at these proceedings was that it is not an organisation with internal medical expertise. It therefore relies upon its external occupational health service to inform and advise it on matters relating to the medical condition of its workforce and the implications for matters such as workplace adjustments. That is commonplace in industry and the tribunal found no evidence at all that the respondent acted other than in accordance with it.

207. An appointment for essentially the same purpose was made by Mr Liscombe during his handling of the claimant's grievance which led to the claimant's appointment with occupational health meeting on 17 May 2022. Simply put, the content of the document at [104] was a routine reference to a medical condition which the respondent sought in 2018 and 2022 to follow-up. It was common ground that the claimant had no complaint about his treatment throughout 2019 and 2021 while his medical conditions were a constant during that entire period.

208. In July 2022, the claimant suffered a shoulder injury as a result of using equipment the claimant describes as faulty. The claimant was referred to occupational health and had a telephone consultation with the outsourced provider on 17 May 2022. That report identified two short-term adjustments: first, that over the next four weeks the claimant should be allowed to take a five minute break each hour to rest; and, secondly, the claimant should be allowed within that five minute break to perform any physio exercise that may be beneficial. The claimant accepted in cross examination that he was given these adjustments.

209. The claimant's point was that another employee, Tom Collins, got more favourable adjustments. Mr Collins, who is white British, was given light duties

and a temporary move from the line. In contrast, the claimant says he got five minutes every hour **(allegation 23)**. It was, however, common ground that the adjustments identified by occupational health as being appropriate for the claimant's condition were provided to him in line with the occupational health report [205 – 206].

210. The claimant accepted in cross examination that he did not know what occupational health advice had been provided to the respondent for Mr Collins. The claimant also accepted in cross examination that occupational health did not in his own particular case advise the respondent to move the claimant from the production line. The tribunal concluded that the respondent was simply following the occupational health advice it received on a case by case basis.

211. The claimant also compared his treatment to the treatment of Noreen Davison, who is white British. Noreen Davison also suffered a shoulder injury and was moved from the production line. The claimant again accepted in cross examination that he did not know what occupational health advice the respondent received in relation to Noreen Davison.

212. It was put to the claimant in cross examination that had occupational health advised a temporary move from the line that adjustment would have been made for him. The claimant agreed that the respondent would have done so in those circumstances.

213. The claimant also compared his treatment with the treatment of two other employees: Gary Conlin and Paula Clavering. In both cases the claimant said that on unidentified dates in 2022, that adjustments were made for both employees for family-related issues. Mr Conlin was given several weeks of phased hours and Ms Clavering was allowed to leave work to walk her dog during working hours in exchange for her working during her breaks.

214. The claimant made the point that in comparison he got five minutes rest per hour whereas Mr Colin and Ms Clavering were given much more generous adjustments for non-medical reasons. **Allegation 24** is that Mr Conlin and Ms Clavering were given support and adjustments whereas the claimant who had genuine health issues was threatened with disciplinary action and told that he was not allowed any adjustments due to his illness and that he was restricted from having additional toilet time.

215. That is problematic for the claimant. The claimant accepted in cross examination that he made no request during 2022 to change his working arrangements or duties or place of work for family-related issues. The claimant was asked in cross examination whether if he had applied and had applied for a good reason his request would probably have been granted. The claimant's response was *'I don't think so'.*

216. There was a dispute about whose dog Ms Clavering was allowed to walk. The respondent said it was her poorly mother's dog. The claimant says it was Ms Clavering's own dog. The tribunal finds that the respondent's evidence is to be preferred to that of the claimant on this point. It is inherently unlikely that a business operating a busy and paced production line would acquiesce to a

request from an employee (whether or not working on the production line itself) for the purposes of walking his or her dog. It is easy to imagine the chaos that would ensue if employees were given that degree of indulgence.

217. The tribunal finds that Ms Clavering made a case to the respondent based on the support that she needed to give to her mother while her mother remained unwell. The tribunal also finds that had the claimant made a request for adjustments in the same or similar circumstances to those of Ms Clavering, the respondent would in principle have given the claimant the same adjustment. The tribunal also finds that the claimant's nationality had nothing whatsoever to do with any superficial difference in the treatment provided to Ms Clavering all Mr Conlin. In all cases, the respondent was just doing its best to meet the needs of its employees for flexibility. It is those different needs and different occupational health advice that explains the difference in treatment and nothing else.

218. The claimant complains **(allegation 25)** that the treatment he received regarding toilet breaks relating to his gait, walking speed and timing of breaks and the related comments about those things amounted to less favourable treatment when compared with colleagues Mr Wilce and Mr Higham. Mr Wilce and Mr Higham also has thyroid conditions.

219. The tribunal has already found at paragraph 113 above that no such treatment occurred and that no such comments were made. It follows that there were no comments made about any of those things.

220. On 16 May 2022, the claimant appealed against Mr Liscombe's grievance outcome. A grievance appeal meeting was held on 14 June 2022. The notes of meeting or at [228-252]. By a letter dated 5 July 2022 [261 – 275], Mr Metcalfe provided the claimant with the outcome of his grievance appeal. Mr Metcalfe addressed all 40 points of appeal in his 14 page appeal outcome letter.

221. **Allegation 26** is a direct quotation (albeit with minor inaccuracies) from Mr Metcalfe's grievance outcome letter at [271], [272], [263] and [269]. The claimant takes issue with the fact that the respondent was unable to find any document relating to the claimants thyroid condition and the criticism by Mr Baillie of the claimant's pace of work. The tribunal has already made findings in relation to both of those matters.

222. **Allegation 26** is therefore admitted factually.

The relevant law

Direct disability discrimination

223. Section 4 EqA provides that race and disability are protected characteristics.

224. Section 13 EqA concerns direct discrimination and provides that:

"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.

225. The test requires a comparison exercise in order to determine whether the treatment complained of is because of disability. The requirements of an appropriate comparator is set out in section 23 EqA. Section 23(1) provides as follows:

"23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13 …there must be no material difference between the circumstances relating to each case."

226. Section 23(2) EqA provides that where the protected characteristic is disability the comparison of the circumstances relating to each case for the purposes of section 13 include a person's abilities.

227. The EHRC Code of Practice (2011) at para 3.23 explains that although the circumstances need not be identical, the circumstances that are relevant to the way the claimant was treated must be the same or nearly the same for the claimant and comparator. Where there is no appropriate actual comparator, it is incumbent on the tribunal to consider how a hypothetical comparator would have been treated: Balamoody v UK Central Council for Nursing, Midwifery and Health Visiting [2002] ICR 646, CA.

228. Section 136 EqA identifies where the burden of proof lies. It is for the claimant to prove facts sufficient to establish a prima facie case. At this stage, the tribunal must have regard to all of the facts, from whichever party the evidence originated. A prima facie case is established if, in accordance with section 136(2), there are facts from which the tribunal could decide, in the absence of any other explanation, that the employer contravened the provision concerned. A difference in status and a difference in treatment is not, without more, sufficient material from which a tribunal 'could decide' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination: Madarassy v Nomura International [2007] ICR 867. That is not a rule of law, however, there should be some fact or feature which the tribunal identifies as potentially capable of supporting an inference of discrimination: Jaleel v Southend University Hospital NHS Foundation Trust: [2023] EAT 10.

229. However, there will be no contravention if the employer shows that it did not contravene the provision: section 136(3). This is the second stage and it is only reached if the claimant has successfully discharged the burden on him/her; it requires careful consideration of the employer's explanation for the treatment complained about: Igen Ltd v Wong [2005] ICR 9311 approved by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054.

230. It is not always obligatory to follow the two-stage process, particularly where the tribunal is in a position to make positive findings on the evidence one way or another (Hewage).

231. In the case of direct discrimination, it is necessary to consider the mental processes, conscious or unconscious, operating on the mind of the alleged discriminator: Amnesty International v Ahmed [2009] ICR 1450 EAT. Motive is

irrelevant. In order for the treatment to be 'because of the protected characteristic', it is sufficient that it was an effective cause. It need not be the main or sole cause.

232. In some cases, the best way to approach the question whether or not there has been direct discrimination within the meaning of section 13 EqA is by asking what was the reason why the conduct or omission in question occurred. That is the effect of the decision of the House of Lords in: Shamoon v Chief Constable of the RUC [2003] ICR 337.

Discrimination arising from disability

233. Section 15 EqA concerns discrimination arising out of disability and provides that:

"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."

234. 'Unfavourably' must be interpreted and applied in its normal meaning; it is not the same as 'detriment' which is used elsewhere in the EqA.

235. Guidance on the correct approach to a claim under section 15 EqA was provided by Simler P (as she then was) in Pnaiser v NHS England [2016]IRLR 170. The EAT gave the following guidance:

- 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 respect relied on by 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 amounts to an effective reason for or cause of it.

- 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'. 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 a disability may require consideration, and it would be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

236. A respondent may objectively justify unfavourable treatment if it can establish that the treatment was a proportionate means of achieving a legitimate aim. To be proportionate, the treatment must be an appropriate means of achieving the legitimate aim and also reasonably necessary in order to do so: Homer v Chief Constable of West Yorkshire [2012] UKSC at [20-25].

237. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. It is for the tribunal to conduct that balancing exercise and make its own assessment of whether the latter outweighs the former: there is no range of reasonable responses test. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardys and Hanson plc v Lax [2005] EWCA Civ 846 Pill LJ at [19-34].

Harassment

238. Section 26 EqA provides as follows:

' (1) A person (A) harasses another (B) if-

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

(4) in deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account

(a) The perception of B;

(b) The other circumstances of the case;

(c) Whether it is reasonable for the conduct to have that effect .

239. The tribunal has had regard to the guidance given by the EAT in Richmond Pharmacology v Dhaliwal [2009] IRLR 336 as reviewed by the Court Of Appeal in Pemberton v Inwood [2018] EWCA Civ per Underhill LJ at [85-88].

Failure to make reasonable adjustments

240. Section 20 EqA read with Schedule 8, provides that an employer who applies a PCP to a disabled person which puts that disabled person at a substantial disadvantage in comparison with persons who are not disabled, is under a duty to take such steps as are reasonable to avoid that disadvantage. Section 21 provides that a failure to comply with a duty to make reasonable adjustments in respect of a disabled person is discrimination against that disabled person. Section 212 (1) EqA provides that 'substantial' means 'more than minor or trivial'.

241. A respondent is not subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know both that the complainant has a disability and that he or she is likely to be placed at the relevant substantial disadvantage (Schedule 8, para 20 EqA).

242. When considering a reasonable adjustments claim, a tribunal must identify:

- the provision, criterion or practice applied by or on behalf of an employer;
- the identity of non-disabled comparators (where appropriate); and
- The nature and extent of the substantial disadvantage suffered by the claimant: Environment Agency v Rowan [2008] ICR 218, EAT at [27] per Judge Serota QC.

243. The tribunal must also identify how the adjustment sought would alleviate that disadvantage, although an adjustment may be reasonable even if it is unlikely wholly to avoid the substantial disadvantage: Griffiths v Secretary of State for Work and Pensions [2017] ICP 160 at [29]. The nature of the comparison disabled and non-disabled people is not like that between claimant and comparator in a direct discrimination claim: it is immaterial that a non-disabled person with all the characteristics of the disabled person but for the disability would be treated equally, what matters is whether *'the PCP bites harder on the disabled, or a category of them, than it does the able-bodied'* as a result (for example) of the disabled person being more likely to be disadvantaged by the PCP than a non-disabled person: Griffiths at [58].

244. The duty to make reasonable adjustments may frequently involve treating disabled people more favourably than those who are not disabled.

245. As Simler P in Sheikholeslami v Edinburgh University [2018] IRLR held:

> 'The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant

disadvantage as between those who are those who are not disabled, and whether what causes the disadvantage is the PCP…

The Equality Act 2010 provides that a substantial disadvantage is one which is more than minor or trivial: see section 212 (1). The EHRC Code of Practice states that the requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people: see paragraph 8 of App 1. The fact that both groups may suffer a disadvantage in consequence does not eliminate the claim. Both groups might be disadvantaged but the PCP may bite harder on the disabled or a group of disabled people than it does on those without disability. Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability.'

246. The concept of a PCP is one which is not to be construed narrowly or technically. Nevertheless, as the Court Of Appeal said in Ishola v Transport for London [2020] IRLR 368:

'[To] test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of the disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. However widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief that the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability -related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP in the 2010 Act. In context, and having regard to the functional purpose of the PCP in the 2010 Act all three words carry the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurs again. 'Practice' connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again if a hypothetical similar case arises.'

247. What is reasonable is a matter for the objective assessment of the tribunal: Smith v Churchills Stairlifts plc [2006] ICR 524, CA. The tribunal is not concerned with the processes by which the employer reached its decision to make or not to make particular adjustments, nor with the employer's reasoning: Royal Bank of Scotland v Ashton [2011] ICR 632, EAT.

248. Although EqA does not set out a list of factors to be taken into account when determining whether it is reasonable for an employer to take a particular step, the factors set out in the Disability Discrimination Act 1995 are matters to which the tribunal should generally have regard including, but not limited to:

- the extent to which the step would prevent the effect in relation to which the duty was imposed;
- the extent to which it was practicable for the employer to take the step;
- the financial and other costs that would be incurred by the employer in taking the step and the extent to which it would disrupt any of its activities;
- the extent of the employer's financial and other resources;
- the availability to the employer or financial or other assistance in respect of taking the step;
- the nature of the employer's activities and the size of its undertaking;
- where the step would be taken in relation to a private household, the extent to which taking it would: (i) disrupt the household or (ii) disturb any person residing there.

249. Section 136 EqA provides that the claimant bears the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred, in the absence of an explanation, that the duty has been breached. There must be evidence of some apparently reasonable adjustment which could be made, at least in broad terms. In some cases the proposed adjustment may not be identified until after the alleged failure to implement it and this may even be as late as the tribunal hearing itself. Once that threshold has been crossed, it is for the employer to show that the proposed adjustment is not reasonable: Project Management Institute v Latif [2007] IRLR 579, EAT.

Jurisdiction

250. The general rule under section 123(1)(a) EqA is that a claim concerning work-related discrimination under Part 5 of the EqA (other than an equal pay claim) must be presented to the employment tribunal within the period of three months beginning with the date of the act complained of. For this purpose: conduct extending over a period is to be treated as done at the end of that period (section 123(3)(a) EqA); failure to do something is to be treated as done when the person in question decided on it (section 123(3)(b) EqA); in the absence of evidence to the contrary, a person is taken to decide on a failure to do something either when the person does an act inconsistent with deciding to do something or, if they do no inconsistent act, on the expiry of the period in which they might reasonably have been expected to do it (section 123(4) EqA).

251. Time limit is subject to the extensions of time permitted by the ACAS Early Conciliation provisions, i.e. by virtue of section 140B EqA, but as with other cases, the early conciliation period does not extend time where the primary time limit has already expired.

252. If a claim is not brought within the primary time limit, the tribunal has a discretion under section 123(1)(b) EqA to extend time if it considers it is just and equitable to do so.

253. The burden is on the claimant to persuade the tribunal that it is just and equitable to extend time: Robertson v Bexley Community Centre t/a Leisure Link [2003] EWCA Civ 576, [2003] IRLR 434 at [24]. The discretion whether or not to extend time is a broad one to be exercised taking account of all relevant circumstances, in particular the length of and reasons for the delay, and balancing the hardship, justice or injustice to each of the parties: Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23. In that case, Underhill LJ, giving the judgement of the Court Of Appeal at [37] deprecated the practice that developed following the judgement of the EAT in British Coal Corporation v Keeble [1997] IRLR 336 of referring to the checklist in section 33 of the Limitation Act 1980, holding that while it would not be an error of law for a tribunal to consider those factors, *'I would not recommend taking it as the framework for its thinking'* when considering the exercise of discretion under section 123(1)(b) EqA.

254. Although the length and reasons for the delay will always be relevant, there is no rule of law that time cannot be extended even where there is no explanation for the delay: Concentrix CVG Intelligent Contact Ltd v Obi [2022] EAT 149, [2023 ICR at [50] per Auerbach J.

255. In appropriate cases, the substantive merits may be relevant, provided that the tribunal is properly in a position to make an assessment of them: Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132 at [63]. The fact that an internal appeal is ongoing is not ordinarily sufficient of itself for time to be extended, although it is one factor to be taken into account: Apelogun-Gabriels v Lambeth [2001 ICR 713 at [16].

256. The EAT has held that where delay in presenting a claim is attributable to incorrect legal advice from the claimant's solicitor, this should not be visited on the claimant by refusing an extension of time, notwithstanding that the claimant may have a valid claim in negligence against the solicitor, since this would confer a windfall on the respondent: Chohan v Derby Law Centre [2004] IRLR 685. This does not mean that time should be extended in all such cases, but that all other factors must also be considered.

257. When considering whether time should be extended to hear a complaint about a series of acts constituting a course of conduct, the tribunal should consider the prejudice suffered by the respondent if it has to deal with the early allegations as well as the most recent ones, and may which different conclusions in respect of different parts of the same case as to whether time should be extended: Concentrix at [68]-[72].

Liability of employees, workers and agents

258. Section 109 EqA provides that anything done by an employee in the course of his or her employment is treated as also done by the employer of that employee. The same principle applies as between agent and principal.

259. Section 110 EqA provides that an employee (which for this purpose includes a worker) may be personally liable if that employee does something which amounts to a contravention of the Act by the employee's employer. The same principle applies as between agent and principal.

260. The effect of these provisions is that an employer is not responsible for any act done by employees of a third party even if such an act would contravene the EqA had it been done by one of its own employees. In short, an employer is not liable under the EqA for the acts of third parties. The same principle applies as between agent and principal.

Conclusions

261. Applying the law to the facts as tribunal has found them in relation to each of the allegations the tribunal has come to the following conclusions.

262. ***Allegation 1***

263. Did the following allegations happen?

On 2 July 2018, at an occupational health appointment Nurse Dawn Mee:

a. said to the claimant *'there's nothing wrong with you, illness and stress has no impact on your performance at work.'*

and

b. omitted vital health information from her occupational health report in particular information relating to the claimant's underactive thyroid and insulin resistance

Types of discrimination: section 13 (1) EqA direct disability discrimination and/or section 20-21 EqA failure to make reasonable adjustments.

264. At paragraphs 67 – 68 above, the tribunal found as a fact that Nurse Mee did not say to the claimant what is alleged in allegation 1(a).

265. At paragraphs 63 – 65, the tribunal found as a fact that Nurse Mee did not omit vital health information from her report. The tribunal has expressly rejected the claimant's contention that Nurse Mee was doing the respondent's bidding by omitting such information. The tribunal has found that when the claimant went back to occupational health on 30 July 2018, having being encouraged to raise his thyroid condition with occupational health he again appears not to have done so based on the report the respondent received. The likely reason for that is that the claimant's focus in June-July 2018 was to avoid a transfer to the CPM Nissan site to which the claimant's thyroid condition had no relevance.

266. While not strictly necessary to the tribunal's decision making, the respondent could not in any event have been liable for the actions of third parties who were not their employee, worker or agent. The rejection of the claimant's contention that Nurse Mee was acting at the behest of the respondent means that no question of agency arises. It was common ground that Nurse Mee was neither a an employee or worker of the respondent.

267. Having so found it follows that the claimant's Equality Act claims arising from **allegation 1** must fail.

268. ***Allegation 2:*** On 12 July 2018, during an absence review meeting Mr S Harrison said twice to the claimant:

a. 'We need a report from work's OH'

Type of discrimination**:** section 13 (1) EqA direct disability discrimination.

269. At paragraph 75 above, the tribunal has set out the claimant's response in cross examination where he agreed there was nothing wrong with Mr Harrison saying that the respondent needed a report from occupational health.

270. The claimant was quite right to accept that there was nothing wrong with Mr Harrison seeking occupational health report for the claimant. Plainly, an employer seeking to inform itself about health conditions of its employees that may impact at work is to be encouraged. This allegation did not sit very well with the claimant's contentions that the respondent was unwilling to know the truth about his medical conditions. In fact, the opposite was the case.

271. In any event there was no less favourable treatment involved in an anodyne everyday statement of fact the purpose of which was for the respondent to gather the facts necessary to further consider the impact of the claimant's medical conditions on the workplace. A hypothetical comparator would have been treated in precisely the same way in a similar situation.

272. In those circumstances it follows that the claimant's Equality Act claim in **allegation 2(a)** must fail.

273. ***Allegation 3:*** On 12 July 2018, HR lost a document containing the claimant's health information (HR unaware when)

Types of discrimination: section 13 (1) EqA direct race discrimination; section 26 (1) harassment related to disability; breach of GDPR.

274. This allegation is considered along with the ***allegation 20*** below which is factually related.

275. ***Allegation 4:*** On 18 July 2018 during a fact-finding meeting about a proposed transfer of the claimant's employment to the respondent's CPM Nissan site Mr S Harrison said:

a. 'you didn't sign medical report'

b. Occupational Health can overrule a GP.

Type of discrimination: section 13 (1) EqA direct disability discrimination.

276. At paragraphs 87 the tribunal records that the respondent accepts that Mr Harrison said both of those things at the meeting of 18 July 2018. The problem for the claimant lies in his answer to the cross examination questions relating to this allegation which are set out at paragraph 88. In cross examination, the claimant accepted that there was nothing wrong with Mr Harrison saying that the claimant didn't sign the earlier occupational health report. It was, of course, the claimant's own case that he did not sign it and he had his own reasons for not doing so. Mr Harrison was simply stating a fact which was not just true but was agreed by the claimant.

277. Similarly, in relation to the statement that an occupational health advisor can overrule a GP, the claimant also agreed both that this was not an allegation in the claim form and there was nothing wrong with Mr Harrison saying it. From the tribunal's own experience, the purpose of occupational health advice is to ensure that medical advice is tailored specifically to the workplace. All Mr Harrison was saying was that specific occupational advice can be more helpful than generic advice since it is contextualised. It is commonplace in industry for an occupational health department or external provider to have a high degree familiarity with the industrial context in which those referred to it are required to work. This is just a statement reflecting what occupational health do. The tribunal can identify not the slightest basis for criticism of the respondent when Mr Harrison said the things that are attributed to him in connection with this allegation.

278. The tribunal would like to say something more about this allegation since it was one of the examples of the claimant trying to suggest that there was some form of limitation in the List of Issues and that the excerpts in the List of Issues did not do his case justice. As the tribunal says at paragraph 89 above, the claimant was given as much time as he might need to explain why he implied that his case was not been fully put in relation to this allegation. As the tribunal records at paragraphs 90 and 91, the claimant was unable to enlighten the tribunal about what was missing from the allegations as recorded in the List of Issues and that it was important for the tribunal to know. This happened on a number of occasions during cross examination and no point did the claimant expand or clarify what it was that he wanted to say that was not reflected in the List of Issues. The tribunal says at paragraph 91 above, the tribunal came to the conclusion that the claimant was suggesting things were missing from the List of Issues as a way to avoid leaving the impression that the answers he was giving actually revealed that he had no complaints to make it all.

279. In any event there is no les favourable treatment involved in this allegation. The things said by Mr Harrison were obvious and unobjectionable and were not said because of the claimant's disabilities.

280. In those circumstances, the claimant's claims under the Equality Act in respect of allegations 4(a) and (b) fail.

281. ***Allegation 5:*** On 30 July 2018, the claimant attended an occupational health assessment conducted by a male occupational health practitioner. On the

occupational health report form, the following were either done when they should not have been done or not done when they should have been done:

a. the reason for the claimant's referral to occupational health was incorrectly recorded on the report form;

b. the occupational health report incorrectly focused only on the claimant's stress at work;

c. the occupational health practitioner was not asked by the respondent to answer the question on the occupational health report form *'Does the employee require permanent adjustments to their workplace/role/hours/activity?**';***

d. the occupational health practitioner was not asked by the respondent to answer the question on the occupational health report form *'Is there any evidence work could be a contributory factor to their condition/illness/absence.'; and*

e. the occupational health practitioner answered *'Not applicable'* to the question *'Additional OH Advice/Guidance.';*

Types of discrimination: section 13 (1) EqA direct disability discrimination and section 20-21 EqA failure to make a reasonable adjustment.

282. The tribunal's findings of fact on ***allegation 5*** are at paragraphs 76-85 and 95-103 above. A paragraph 84 the tribunal finds that the context in which the referral which preceded the absence review meeting between the claimant and Mr Harrison, was the claimant's stress and anxiety that had arisen because of his concerns over an impending transfer to the Nissan CPM site. That was the entire rationale for the referral to occupational health. As is set out also paragraph 84, it was the claimant's own position that his thyroid condition was entirely neutral as between what was essentially the same work as his current CKSU site and the Nissan site. In other words, his thyroid condition was on his own evidence irrelevant to the referral. Mr Harrison simply wanted to know whether or not the claimant was likely to be in a position to return to work after the summer factory shutdown.

283. It follows that the reason for the claimant's referral is not incorrectly stated on the report form. It is correctly stated. ***Allegation 5(a)*** therefore fails factually.

284. The same conclusion applies to **allegation 5(b),** the occupational health report correctly focused on the claimant stress at work because that was the reason for his absence from work and nothing else. The tribunal simply could not understand what was objectionable in circumstances where the claimant's own position was he was off work because of stress and anxiety (and nothing to do with his thyroid or any other condition) that the occupational health report would focus solely on the actual medical reason for his absence. **Allegation 5(b)** therefore fails factually.

285. The tribunal's factual findings in respect of ***allegation 5(c)*** are at paragraph 85 above. The tribunal can see no basis for criticism of the respondent for not asking for responses to questions four or five on the respondent's standard occupational health referral form. There was simply no reason at all to believe that there were any need for permanent adjustments whether work can be a contributory factor to the claimant where the claimant's absence from work was by common consent attributable to a proposed transfer of site and nothing else. The tribunal repeats that it was the claimant's own position that is thyroid condition had no bearing on his ability to work at either site. The claimant's case was that he feared being discriminated against by Mr Harrison should he transferred to the Nissan CPM Site. The claimant's position was that his brother had suffered discrimination on the grounds of his nationality at the hands of Mr Harrison, an allegation about which the tribunal expresses no view. It was that concern which had caused stress and anxiety. It was the stress and anxiety which gave rise to the referral to occupational health. The claimant never made clear why in those circumstances there was any need for the respondent to ask for advice on permanent adjustments.

286. ***Allegation 5(c)****,* while factually accepted, is entirely explained by the circumstances and context in which the occupational health referral was arranged. The tribunal could not identify even the slightest connection, however broadly based, between the disabilities relied upon in these proceedings (underactive thyroid and insulin resistance) and the omission of a requirement that advice be given on permanent adjustments. The issue simply did not arise for consideration at the time. The tribunal also reminds itself about its finding at paragraph 74 above regarding the earlier meeting of 12 July 2018. Mr Harrison encouraged the claimant to have an open conversation with occupational health including discussing any problems he might have with his thyroid or his back (or anything else) [104].

287. Similarly, it would have been superfluous for the respondent to ask for advice whether work could be a contributory factor to the claimant's absence. It was the claimant's explicit position that his absence was because of stress caused by the concern and anxiety at the suggestion of a transfer to Mr Harrison's supervision at Nissan CPM site. At no stage did the respondent suggest that the claimant's recent absence was not genuine. The claimant had already told the respondent what the connection was between his absence and the work. The respondent's management response was to decide against transferring the claimant to Nissan CPM site to keep them at CKSU site. That is the outcome that the claimant wanted. **Allegation 5(c)** therefore fails on the basis that the omission from the advice sought was for and solely for reasons entirely unconnected to the claimant's disabilities. In relation to the claim of a failure to make a reasonable adjustment, it is difficult to see what adjustment more helpful to the claimant could have been made over and above than to retain him on the very site at which he wished to stay.

288. The final criticism is ***allegation 5(e)***. It is that the occupational health advisor answered the question in relation to ***'Additional OH Advice/Guidance'*** by saying ***'Not applicable'.*** This is a criticism of the occupational health advisor and not the respondent. As we have said at paragraph 266 above, the respondent cannot be liable for the acts or omissions of third party advisors.

289. This was again a criticism that the tribunal found hard to understand. Mr Harrison is recorded at [104] actively encouraging the claimant to raise any issues he wished to raise (such as his underactive thyroid) with occupational health. It was therefore entirely in the claimant's hands what he wished to discuss with the occupational health advisor and for the occupational health advisor to report accordingly.

290. ***Allegation 5(e)*** therefore fails on the grounds that:

a. the respondent cannot be liable for the actions of third parties that are not their employees, workers or agents;

b. there is no less favourable treatment than a comparator without a thyroid disability; and

c. there is no PCP identified and no comparative substantial disadvantage.

291. ***Allegation 6:*** On a date between January and March 2022, Mr S Baillie said, *'Are you going to the toilet again? I'm going to start timing how much time you spend in the toilet.'*

Types of discrimination*:* section 13 (1) EqA direct disability discrimination; section 13 (1) EqA direct race discrimination; section 26 (1) EqA harassment related to disability; section 26 (1) EqA harassment related to race; sections 20-21 EqA failure to make a reasonable adjustment; section 15 (1) EqA discrimination arising in consequence of disability.

292. ***Allegation 7:*** On a date between January and March 2022, Mr S Baillie said to the claimant *'Everyone is gone and you still walking so slow.'*

Types of discrimination*:* section 13 (1) EqA direct disability discrimination; section 13 (1) EqA direct race discrimination; section 26 (1) EqA harassment related to disability; section 26 (1) EqA harassment related to race; sections 20-21 EqA failure to make a reasonable adjustment; section 15 (1) EqA discrimination arising in consequence of disability.

293. ***Allegation 8:*** On 11 March 2022, Mr S Baillie said to the claimant *'I'm older than you and still walking faster than you.'*

Types of discrimination*:* section 13 (1) EqA direct disability discrimination; section 13 (1) EqA direct race discrimination; section 26 (1) EqA harassment related to disability; section 15 (1) EqA discrimination arising in consequence of disability.

294. The tribunal's factual findings in relation to ***allegation 6, 7 and 8*** are at paragraphs 107-113 above. The tribunal has concluded at paragraph 113 that Mr Baillie did not make any of the remarks ascribed to him in ***allegations 6, 7 or 8.*** In those circumstances, all of the Equality Act claims arising from ***allegations 6,***

7 and 8 must fail on the grounds that the claimant has failed to establish the underlying facts upon which these three allegations are based.

295. ***Allegation 9:*** On a date between January and March 2022, Mr S Baillie said to the claimant *'You going for a break first and still coming back last.'*

Types of discrimination*:* section 13 (1) EqA direct disability discrimination; section 13 (1) EqA direct race discrimination; section 26 (1) EqA harassment related to disability; section 26 (1) EqA harassment related to race; sections 20-21 EqA failure to make a reasonable adjustment; section 15 (1) EqA discrimination arising in consequence of disability.

296. ***Allegation 9*** is accepted as a matter of fact. Mr Baillie made this remark on one occasion between January and March 2022. The difficulty that the claimant has in establishing an breach of the Equality Act is that the remark has nothing to do with either of the protected characteristics relied upon by the claimant. The remark is essentially saying that the claimant was (on one occasion) observed by Mr Baillie as the first to leave his work station to start his break and the last to return from it.

297. A remark of that nature is in the tribunal's experience not at all unusual for a supervisor to make in the context of a paced manufacturing environment where a person. Mr Baillie was not motivated by the claimant's nationality when making that remark. Mr Baillie was simply describing the claimant's conduct in the workplace as he observed it. Had Mr Baillie observed the same conduct by an employee of a different nationality the tribunal finds that he would have made the same comment. The claimant has not established any facts from which the tribunal might conclude that the reason for the difference in treatment was his race/nationality. The claimant has in those circumstances not discharged the initial burden of proof on direct race discrimination.

298. The remark has noting whatsoever to do with the claimant's disability. Properly construed, the remark is no more than a comment that the claimant on that particular occasion was quick to start his break but slow to end it. The remark was not said because the claimant had an underactive thyroid. It was said solely because that is what Mr Baillie observed.

299. The remark has nothing to do with something arising from the claimant's disabilities. The something arising can only be slow movement. However, Mr Baillie's criticism has nothing to do with the claimant's slow movement. The first party of the remark is predicated on the claimant moving more quickly than his colleagues not less quickly.

300. In these circumstances, all of the claimant's claims under the Equality Act arising out of ***allegation 9*** must fail.

301. ***Allegation 10:*** On 5 July 2022, Mr S Baillie did not allow the claimant any extra toilet breaks e.g. in between scheduled break times.

Types of discrimination*:* section 13 (1) EqA direct disability discrimination; section 26 (1) EqA harassment related to disability; sections 20-21 EqA failure to

make a reasonable adjustment; section 15 (1) EqA discrimination arising in consequence of disability.

302. The tribunal's findings of fact in relation to ***allegation 10*** are paragraphs 116-121 above. The claimant significantly changed his position on this allegation during the course of his cross-examination. The claimant's ultimate position was that he was not *prevented* from going to the toilet by Mr Bailie, but was *deterred* from asking to do so by the comments at ***allegations 6-9*** .

303. There are fundamental difficulties with the reliability of the claimant's evidence on this point given the way in which he changed his position from clear factual allegations of not being allowed by Mr Baillie to go to the toilet to the rather more nuanced position he adopted in his oral evidence. The tribunal's conclusion is that there was no such deterrent and Mr Baillie's evidence that he has never refused a request from the claimant to go to the toilet is accepted.

304. The tribunal has also found that the remarks in ***allegations 6-8*** did not happen and it must follow that remarks that were never made cannot have acted as any form of deterrent to the claimant from asking for toilet breaks as and when he needed them.

305. That leaves ***allegation 9*** and the tribunal concludes that the somewhat mundane remark in ***allegation 9*** is wholly unlikely (and in fact did not) deter the claimant from requesting toilet breaks when he needed them. Indeed, the remark does not relate to toilet breaks at all given that the comment is node in respect of a group of people. It is more likely to have been made about a lunch break

306. The tribunal also notes that at no stage did the respondent receive any occupational health advice that the claimant in fact needed any additional toilet breaks either because of his thyroid condition or otherwise. In any event, the tribunal accepted Mr Baillie's evidence that the claimant would have been given additional or longer toilet breaks if he needed them. The tribunal also notes that throughout 2019, 2020 and 2021, the claimant experienced no problems at work under Mr Baillie' supervision while the tribunal heard no evidence of any change in the claimant's medical condition after his diagnosis in 2017. The tribunal finds that what changed was the relationship between the claimant and Mr Baillie after the Radio Incident on 15 March 2022 only after which the vast majority of the claimant's allegations surfaced.

307. There was no PCP limiting the toilet breaks of the claimant or anyone else. The was no disadvantage to the claimant who was never not permitted a toilet break and was not deterred form asking for a toilet break.

308. In these circumstances, all of the claimant's claims under the Equality Act arising out of ***allegation 10*** fail.

309. ***Allegation 11:*** Referring to 5 July 2022 and/or the claimant's requirement for extra toilet breaks generally, Mr Metcalfe said in his grievance appeal outcome letter dated 5 July 2022 [271] that *'The report has confirmed that you do not require any adjustments (such as longer/additional toilet breaks) due to your condition.'*

***Types of discrimination**:* section 13 (1) EqA direct disability discrimination; section 26 (1) EqA harassment related to disability; sections 20-21 EqA failure to make a reasonable adjustment; section 15 (1) EqA discrimination arising in consequence of disability.

310. The claimant faces similar difficulties in ***allegation 11*** to those he faces in relation to ***allegation 10.*** It is accepted that in his grievance outcome report Mr Metcalfe does say that *'The report has confirmed that you do not require any adjustments (such as longer/additional toilet breaks) due to your condition.'* That was a statement of fact by Mr Metcalfe. The report referred to is the occupational health report at [205-207].

311. At [206] the occupational health advisor expressly addresses the claimant's disabilities in this case (underactive thyroid and pre-diabetes) and the workplace implications of those conditions. The recommended adjustments (which it was common ground were implemented) did not include any recommendation for longer or additional toilet breaks despite the claimant's medical condition plainly being considered at the occupational health assessment. Mr Metcalfe was simply stating an objective fact about a material point in the relevant sentence from his grievance appeal outcome letter.

312. The tribunal accepted the respondent's evidence that reasonable adjustments would have been provided to the claimant including longer or additional toilet break ***if*** they had been recommended. But they were not. The tribunal cannot see how Mr Metcalfe's statement involved any less favourable treatment, disability-related unwanted conduct having the prescribed effect or a failure to make reasonable adjustments. In truth, Mr Metcalfe was merely recording that occupational health had not recommended an adjustment of longer or additional toilet breaks. Had the claimant required that adjustment despite the occupational health advice, the tribunal was satisfied that it would have been forthcoming.

313. ***Allegation 12***: On 23 February 2022 at a meeting to discuss PADR Appraisal [123-128], Mr S Baillie lowered the claimant's scores regarding speed/performance and said to the claimant *'too slow on side fit station, that's why I lowered your scores' and 'You must be faster, as it might lead to disciplinary action the future.'*

***Types of discrimination**:* section 13 (1) EqA direct disability discrimination; section 26 (1) EqA harassment related to disability; section 15 (1) EqA discrimination arising in consequence of disability.

314. The tribunal's factual findings in relation to ***allegation 12*** are at paragraphs 125-132 above. At Paragraph 132, the tribunal has found that Mr Baillie had proper cause to say in the performance review process that the claimant should address his pace of work on the side-fit station. It was the claimant's case that he was ***not*** slow and that he ***was*** keeping up to speed. The claimant's claim under section 15 EqA is not understood in these circumstances. The claimant is ***not*** saying that he was slower because of something arising out of his disabilities. His position was to the opposite effect. The tribunal finds that the reason why Mr Baillie made the remark about the claimant's pace of work was that he genuinely and

reasonably believed it was warranted. That has nothing to do with the claimant's disabilities at all whether for the purposes of section 13 or section 26 EqA.

315. In the circumstances, all of the claimant's claims under the Equality Act arising out of ***allegation 12*** fail.

316. ***Allegation 13:*** On 15 March 2022, Mr S Baillie said through the radio to Lead Operator Tom Collins *'Tell Perez to shut up and hurry up* - Tom Collins told the claimant *'Simon [Baillie] said to tell Perez to shut up and hurry up***.' ("the Radio Incident")**.

Types of discrimination*:* section 13 (1) EqA direct race discrimination; section 26 (1) EqA harassment related to race.

Allegation 14: On 15 March 2022 after the Radio Incident, the claimant confronted Mr Baillie for degrading him over the radio then Mr S Baillie said/did/didn't do the following things:

a. shouted at the claimant

b. *'I can't be on the line every 2 minutes'*

c. *'I use it [CCTV] for quality concerns'*

d. didn't answer when the claimant asked him to identify the quality concerns

e. shouted *'you going nowhere – HR gave me permission to use CCTV. If you are not happy you can go upstairs about it. There's lots of cameras on CMP, there's place for you.'*

f. *'from now on I am timing all of your breaks'*

Types of discrimination*:* section 13 (1) EqA direct race discrimination; section 26 (1) EqA harassment related to race.

Allegation 15: On 15 March 2022, Mr S Baillie publicly humiliated the claimant over the radio, but did/said nothing about Mr I Hughes (White British), who spent five minutes chatting with Mr C Robinson (Line Coordinator) about football.

Types of discrimination*:* section 13 (1) EqA direct race discrimination; section 26 (1) EqA harassment related to race.

317. The tribunal's findings of fact in relation to ***allegations 13, 14 and 15*** are at paragraphs 133-167. The tribunal has expressly found that no considerations of race motivated Mr Baillie when he used the radio/walkie-talkie to ask Mr Collins to pass an instruction to the claimant. The tribunal has found that Mr Baillie would have spoken to a British operator in the same way. Mr Baillie was exasperated to see the claimant doing the very thing that Mr Hughes had done shortly before the Rado Incident.

318. The best evidence that the tribunal had about how Mr Baillie would have retreated a British operator in the same or similar circumstances to how the claimant was treated on 15 March 2022 was the way in which Mr Baillie actually treated Mr Hughes on 13 March 2022. That involved gathering all the team together to watch a CCTV replay of Mr Hughes leaving his workstation before finishing the assembly of a part. The claimant has not established any facts from which any inference of direct race or direct disability discrimination could be drawn. Mr Baillie's purpose was to ensure that there was no repeat of the previous quality concern and to the extent that the claimant perceived the incident to have had the prescribed effect it was not reasonable for him to have done so.

319. In the circumstances, all the claimant's claims under the Equality Act arising out of ***allegation 13*** fail.

320. The tribunal's findings of fact in relation to ***allegations 14 (a)-(f)*** are at paragraphs 160 – 161 above. ***Allegation 14(a)*** fails on its facts. The tribunal has found that paragraph 160(a) Mr Baillie did not shout at the claimant. It follows that the alleged discrimination could not have occurred.

321. ***Allegations 14(b) and (c)*** are accepted factually. However, there is not the slightest evidence that Mr Baillie saying that he can't be on the line every two minutes or that he used CCTV for quality concerns has anything at all to do with the claimant's nationality. Nothing in what was said gives rise to even the slightest suggestion that there was a link to the fact that the claimant is Polish. This was an incident that was instigated by the claimant when in his own words he 'confronted' Mr Baillie.

322. ***Allegation 14(d)*** is a simple misunderstanding. As the tribunal has found at paragraph 160, the claimant thought that Mr Baillie was criticising him for a quality concern that had occurred. It was Mr Baillie's position that he was addressing conduct on the part of the claimant that he thought might be likely to cause a quality concern. Mr Baillie was perfectly entitled to do so. Mr Baillie does not have to wait for an actual quality failure to take place before taking management action. He is plainly entitled to take preventative action as part of his supervisory functions.

323. ***Allegation 14(e)*** is admitted. Mr Baillie was simply explaining to the claimant that there was CCTV in place to monitor the workplace which was routine. It was simply explaining why he had used CCTV to issue an instruction. Describing the existence of cameras around a factory does not give rise to any issues connected with the claimant's nationality at all.

324. ***Allegation 14 (f)*** fails on its fact .The tribunal does not accept that there was any explicit or implicit threat to the transfer claimant to Nissan CPM site. The prospect of a transfer was four years or so before the incident on 15 March 2022 and there was no evidence whatsoever that there was any prospect of a transfer in the first half of 2022.

325. For the reasons given, the claimant's claims under the equality act arising from ***allegation 14*** all fail.

326. The tribunal's findings of fact in relation to ***allegation 15*** are at paragraphs 162 – 167. It was found that the claimant was somewhat overstating matters when he says that he was publicly humiliated by Mr Baillie. The tribunal accepted Mr Baillie's evidence that he did not see any conversation between Mr Hughes and Mr Robinson taking place at the time that he observed the claimant walking away from his workstation. That evidence was unchallenged. If Mr Baillie did not see Mr Hughes and Mr Robinson talking there can be no factual basis sufficient to shift the burden of proof to the respondent.

327. The tribunal also accepted Mr Baillie's evidence that had he seen any non-work related talking, he would have challenged it. In cross examination, the claimant also said that he thought Mr Robinson not been challenged by Mr Baillie due to Mr Robinson's seniority not because of his nationality. On his own case, the claimant's nationality had nothing to do with the differential treatment of Mr Robinson. The tribunal repeats its conclusions at paragraph 318 above regarding the actual treatment of Mr Hughes. Failing to see a conversation between Mr Hughes and Mr Robinson had neither the purpose or effect of bringing about the prescribed effect in the terms of section 26 EqA and to the extent that the claimant may perceived matters to have produced that effect it was not reasonable for it to have done so.

328. ***Allegation 16:*** On 15 March 2022, by virtue of his conducted at allegations 13-15 above, Mr S Baillie breached the respondent's CCTV policy.

Types of discrimination*:* section 13 (1) EqA direct race discrimination; sections 20-21 EqA failure to make a reasonable adjustment; breach of GDPR.

329. ***Allegation 16*** is accepted factually. However, it was common ground that not having an up-to-date CCTV policy entitling the respondent to process data for quality control purposes affected everyone at the site equally regardless of nationality, any other protected characteristic or anything else. The claimant candidly accepted that in cross examination. Nevertheless, he did not withdraw the claim. The tribunal asked the claimant what he expected the tribunal to do in circumstances where it appeared to be his own case that his nationality had nothing whatsoever to do with the shortcomings in the respondent's CCTV policy or its impact on him. The claimant's response was that it was 'his lived experience',

330. It follows that the claimant accepts that he was not treated less favourably than a British comparator because of his Polish race or at all. It was also common ground that Mr Baillie had used CCTV footage to determine what had gone wrong with the quality concern caused by Mr Hughes. Mr Hughes is British. Mr Baillie's breach of the CCTV policy did no have that the purpose or effect of violating the claimant's dignity, creating humiliating, offensive etc environment for the claimant or, if it did so, it was not reasonable for it to have had that effect.

331. For those reasons, both of the claimant's claims under the Equality Act arising out of ***allegation 16*** fail. The tribunal simply has no jurisdiction at all over breaches of data protection legislation.

332. ***Allegation 17:*** At the time of the Radio Incident the respondent did not have an up to date CCTV policy in place.

Types of discrimination*:* section 13 (1) EqA direct race discrimination; sections 20-21 EqA failure to make a reasonable adjustment; breach of GDPR.

333. ***Allegation 17*** is accepted factually. The tribunal repeats its conclusions in respect of allegation 16 above. All employees were affected equally by any shortcomings in the CCTV policy and there was no suggestion that it impacted in any way differentially on Polish nationals. The claimant was accordingly not less favourably treated than anyone else. The claimant accepted in cross examination that he was not put in a worse position than any other employees by the absence of an updated CCTV policy being in place. The claimant plainly suffered no comparative substantial disadvantage as a result of the respondent not having an updated CCTV policy in place on 15 March 2022.

334. For the reasons given, the claimant's claims under the Equality Act arising out of ***allegation 17*** fail. The tribunal simply has no jurisdiction at all over breaches of data protection legislation.

335. ***Allegation 18:*** During the claimant's grievance process, the claimant made requests to the following people to be transferred from Mr Baillie's shift to an alternative shift none of which requests were granted:

d. Mr Stuart Packer

e. Mr Paul Liscombe

f. Mr Trevor Metcalfe

336. The claimant identifies the following comparators whose requests to transfer from Mr Baillie shift were granted:

d. Noreen Davison

e. Anthony Wray

f. Mal Noko

Types of discrimination*:* section 13 (1) EqA direct race discrimination; sections 20-21 EqA failure to make a reasonable adjustment.

337. The tribunal's findings of fact in relation to ***allegation 18*** are at paragraphs 175 – 178. The claimant seeks to compare himself on and after 15 March 2022 with comparators who transferred to the Mould line in 2021.

338. Dealing with each comparator in turn. Noreen Davison and Mahl Noko both volunteered to move to the Mould Line. It was common ground that the claimant

did not volunteer in 2021. The claimant was not moved to Mould Line in 2021 because he did not volunteer in 2021 despite having had the opportunity to do so. In the circumstances, the claimant was not treated less favourably than Noreen Davison or Mahl Noko and the claimant is not making a comparison in materially the same circumstances.

339. Anthony Wray was forced against his will to move to the Mould Line. Mr Baille therefore treated the claimant more favourably than Mr Wray since the claimant was not required to move against his will. Indeed, it was the claimant's contemporaneous written evidence that he was at that time happy on Product Line under Mr Baillie's management.

340. The respondent accepted that it had a practice at the relevant time of requiring the claimant to work on line under Mr Baillie's management. However, the claimant was not put to any substantial disadvantage in comparison to those also working on line under Mr Baillie's management either because of his thyroid condition or at all. Mr Hughes, who is British, was in precisely the same position and treated the same way as the claimant.

341. In the circumstances, all of the claimant's claims under the equality act arising out of ***allegation 18*** fail.

342. ***Allegation 19:*** On 10 May 2022, Mr P Liscombe stated in his grievance outcome letter of 10 May 2022 [189 para 2] *'We feel satisfied therefore Simon [Baillie] appropriately addressed a specific concern with you and used… the appropriate forum to do it.'*

Types of discrimination*:* section 13 (1) EqA direct disability discrimination; section 13 (1) EqA direct race discrimination; section 26 (1) EqA harassment related to disability; section 15 (1) EqA discrimination arising in consequence of disability.

343. The tribunal's findings of fact in relation to ***allegation 19*** are at 179 – 185 above. It is notable that it was no part of the claimant's grievance appeal that Mr Liscombe reached his conclusions either generally, or specifically in relation to the claimant's PADR, because the claimant was Polish or because the claimant had a thyroid.

344. The claimant accepted that Mr Liscombe took his grievance seriously. The tribunal finds that Mr Liscombe conscientiously considered the claimant's grievance and came to his views on its merits in good faith and with supporting evidence.

345. The claimant was accordingly not treated less favourably because of his thyroid condition or because he is Polish and the claimant has not established any fact sufficient to establish an initial case to shift the burden of proof to the respondent.

346. Mr Liscombe's conclusions on the claimant's grievance had neither the purpose nor effect of violating the claimant's dignity, creating humiliating, offensive etc environment for the claimant or, if it did so, it was not reasonable for the claimant to perceive it that way.

347. The claimant's case under section 15 Equality Act remains not understood. It was the claimant's case that he was making the tact time, so there is no room for the argument that the claimant's slower pace was something arising in consequence of the claimant's disability. The claimant failed to identify what was the 'something' he relied upon and accordingly he did not satisfy a key element necessary to found a claim under section 15 EqA.

348. For those reasons, all the claimant's claims under the Equality arsing out **allegation 19** fail.

349. ***Allegation 20:*** On 10 May 2022, Mr P Liscombe stated in his grievance outcome letter of **10 May 2022** [190]

> *'We reviewed HR records and there is no medical condition relating to yourself captured on your file. As such, we have no reason to believe Simon [Baillie] was aware of any medical condition which you may suffer from. If an employee has a medical concern and need reasonable adjustments in place in order to cope with the condition, we would ask that Occupational Health in order to review the employee properly understand any medical concerns. As we were not aware of your underactive thyroid and the symptoms you suffer with.'*
>
> NB: the claimant admitted in his further information document the following which is also set out in Mr Liscombe's grievance outcome letter [191].
>
> *'Should you need longer/more than average toilet breaks – this will be identified in your OH review and the Company will make appropriate arrangements where possible.'*

Types of discrimination*:* section 13 (1) EqA direct disability discrimination; section 13 (1) EqA direct race discrimination; section 26 (1) EqA harassment related to disability; section 15 (1) EqA discrimination arising in consequence of disability; breach of GDPR.

350. The tribunal's findings of fact in relation to ***allegation 20*** are found at paragraphs 186 – 196. The tribunal's conclusions in relation to ***allegation 3*** are considered together because of the common factual background to these two allegations.

351. The tribunal accepted Mr Liscombe's evidence that he looked for but could not find the 2018 note at [104] which contained a reference to 'thyroid issues'. Mr Liscombe explained that he looked through the claimant's OH records and not through all of the claimant's HR records. The tribunal was satisfied that the reference to reviewing 'HR records' is nothing more than inaccurate wording on Mr Liscombe's part. Mr Liscombe had an understandable reason to confine his inquiries to the OH records (which are kept in the HR Department). That reason was that he believed he was looking for some form of medical information and that the OH records would be the natural place to find it.

352. Having so found, this ***allegation 3*** fails factually. The document at 104 was not 'lost' by HR. It was in the claimant's records all along from 2018. Mr Liscombe's failure to find it when looking into the claimant's grievance in April/May 2022 had an entirely credible innocent explanation. The standard to which the management

of workplace grievances is to be measured is, of course, not a counsel of perfection'.

353. Mr Liscombe's conclusion that in January to March 2022 Mr Baillie had not been aware of the claimant's thyroid condition was reasonable on the facts as Mr Liscombe was able to ascertain them. Mr Liscombe failed to locate the document at page 104. There had been no mention of the claimant's thyroid condition in any occupational health report at that stage. It was common ground that the claimant had had no problems at work throughout 2019. 2020 or 2021. The focus of the claimant's health concerns in 2018 had been stress and anxiety. It is perfectly understandable that Mr Baillie may quite simply have forgotten what was after all a passing reference to thyroid issues in an absence review meeting on 12 July 2018. Mr Baillie encouraged the claimant to raise those issues with occupational health back in 2018 and it is very likely that he thought no more of it.

354. The tribunal is unable to identify anything in Mr Liscombe's outcome letter which is anything other than professional and supported by the information he identified in the series of interviews he carried out. Mr Liscombe gave the claimant's grievance thorough and conscientious consideration and come to reasoned and explained conclusions. It was perfectly proper for Mr Liscombe to say that if the claimant has medical concerns and may need adjustments to cope with any workplace implications of those conditions that the respondent will ask its occupational health provider to have a consultation with the claimant and make recommendations. That is just common sense.

355. Similarly, there is nothing remotely discriminatory in Mr Liscombe stating that if the claimant needs longer or more than average toilet breaks that this will be identified at an occupational health review with the claimant and where possible adjustments made. That is again just common sense. It was after all, part of the claimant's case that he needed adjustments for his thyroid condition that he wasn't being given (or deterred from being able to access). It seemed to the tribunal wholly contradictory for the claimant at the same time to be taking an objection to Liscombe putting in place the very steps that the claimant elsewhere in these proceedings criticises the respondent for not having already taken.

356. In the circumstances, nothing in ***allegation 20*** involves any less favourable or unfavourable treatment. The claimant has established any facts sufficient to shift the burden of proof. Mr Liscombe's statements in the grievance outcome letter had neither the purpose nor effect of violating the claimant's dignity, creating humiliating, offensive etc environment for the claimant or, if it did so, it was not reasonable for the claimant to perceive it that way.

357. All of the claimant's Equality Act claims arising out of ***allegation 20*** fail.

358. ***Allegation 21:*** On 10 May 2022, Mr P Liscombe stated in his grievance outcome letter [189]:

> *'We have already discussed the radio situation, which we would classify as a minor deviation from best practice, which has been addressed.'*

Types of discrimination*:* section 26 (1) EqA harassment related to race.

359. The tribunal's findings of fact in relation to ***allegation 21*** are at paragraphs 197 – 202 above. The tribunal repeats its conclusions in relation to ***allegations 13 - 15***. Mr Baillie apologised shortly after using the radio to issue the instruction on 15 March 2022. The tribunal is satisfied that Mr Liscombe reached his view that this was a minor deviation from best practice which had been addressed in good faith. Neither Mr Baillie's actions nor Mr Liscombe's statement about the Radio Incident in his grievance outcome letter had anything to do with the claimant's nationality. Nothing in Mr Liscombe's outcome letter had either the purpose or effect of violating the claimant's dignity etc or to the extent that it did it was unreasonable for the claimant to perceive it that way.

360. For those reasons, all the claimant's Equality Act claims arising out of ***allegation 21*** fail.

361. ***Allegation 22:*** On a date after 19 May 2022, the claimant sent a letter to Mr S Harrison via recorded delivery making complaints about the conduct/outcome of his grievance. The claimant received no reply.

Types of discrimination*:* section 13 (1) EqA direct race discrimination; section 26 (1) EqA harassment related to race.

362. The tribunal's findings of fact in relation to ***allegation 22*** are at paragraphs 203-208 above. The tribunal has found that the claimant's letter sent on 19 May 2022 did not reach Mr Harrison. There is therefore no treatment by Mr Harrison (or the respondent) for the purposes of the claimant's claim of direct race discrimination. Equally, there is no conduct by Mr Harrison (or the respondent) upon which to base a claimant disability-related harassment. Mr Harrison simply did not receive it. There was a suggestion in these proceedings that HR received a copy, but the allegation was made against Mr Harrison and no one else.

363. It follows that Mr Harrison would have behaved exactly the same way in respect of a letter he did not receive from a British employee. To the extent there was any conduct at all, that conduct is plainly not related to the claimant's nationality and nor does it have the purpose of effect of violating the claimant's dignity etc or, if it did so, it was not reasonable for it to have been perceived in that way.

364. For those reasons, all the claimant's Equality Act claims arising out of ***allegation 21*** fail.

365. ***Allegation 23:*** In July 2022, the claimant experienced shoulder discomfort due to faulty equipment. The claimant received physio at work: of five minutes stretching every hour, but was not given lighter work/weight limit.

The claimant identifies the following comparators who he says received more favourable treatment.

a. Tom Collins (arm): lighter duties and temporary move from the line

b. Noreen Davison (shoulder): moved from line

Types of discrimination*:* section 13 (1) EqA direct race discrimination; sections 20-21 EqA failure to make a reasonable adjustment.

366. The tribunal's findings of fact in relation to ***allegation 23*** are to be found at paragraphs 209-213. The claimant seeks to compare himself with how two of his colleagues, Mr Collins and Ms Davison, were treated in connection with their physical injuries.

367. The difficulty for the claimant is that he seems to be asserting that he has the right to some form of no less favourable treatment than colleagues who have physical injuries. In order for a comparison to be meaningful the circumstances in the two situations must not be materially different. In respect of Mr Collins and Ms Davison the tribunal did not consider that the claimant was treating like with like.

368. There is no right under the Equality Act to receive identical treatment to colleagues. It all depends on context and similarity. As the tribunal has found as a fact, the respondent was in each case simply following the occupational health advice it received. The claimant had no evidence to suggest that the adjustments that were made for Mr Collins and Ms Davison were anything other than the recommendations that occupational health advised in their cases . It was not a question of giving more favourable treatment of Mr Collins or Ms Davison. It was a question of making appropriate adjustments on a case by case basis.

369. This allegation also relates to the claimant's shoulder injury that he experienced due to faulty equipment, not his thyroid. The claimant also accepts that he was given the adjustments that were recommended by occupational health in his own case, namely five minutes per hour for stretching and physio. The claimant also accepted in cross examination that if occupational health had advised in his case for him to be moved to another line on a temporary basis, that adjustment would have been made for him. There was accordingly no evidence at all of any need for Mr Baillie to move the claimant to another line either out of medical necessity or as a reasonable adjustment. The claimant also failed to identify any PCP upon which his claim for failure to make a reasonable adjustment was based.

370. All of the claims under the Equality Act arising out of ***allegation 23*** fail.

371. ***Allegation 24:*** On dates unspecified, the claimant says that he was less favourably treated in relation to his shoulder discomfort than comparators who were given adjustment in relation to family issues. The claimant identifies the following comparators who he says received more favourable treatment:

    a. Mr G Colin

    b. Ms P Clavering

    Types of discrimination*:* section 13 (1) EqA direct race discrimination; sections 20-21 EqA failure to make a reasonable adjustment.

372. The tribunal's findings in respect of ***allegation 24*** are at paragraphs 214 – 217. Again, the claimant is comparing his own situation with very different circumstances. He compares himself to Mr Conlin and Ms Clavering. The claimant says that they were given more favourable adjustments/treatment than he was when their needs were personal and his were medical.

373. It was common ground that at no stage did the claimant ever request any workplace adjustments for personal/family related reasons. The claimant cannot compare his own position with those of his colleagues in different circumstances the detail of which has not been provided to the tribunal. The claimant seems to be making a rather generalised complaint about overall fairness in the workplace rather than about direct race discrimination or race related harassment. It was nevertheless satisfied that there was no meaningful comparisons to be drawn for the purposes of section 13; and that there was no PCP identified and no comparative disadvantage because of the claimant's thyroid condition which is a requirement of a claim under section 20/21 EqA.

374. All of the claimant's Equality Act claims arising out of ***allegation 24*** therefore fail.

375. ***Allegation 25:*** On dates unspecified, the claimant says that he was less favourably treated in relation to his underactive thyroid condition than comparators who also had thyroid conditions but who were not subject to the same treatment. The claimant compares the treatment that he says he received about toilet breaks/timing (and comments regarding the same) and the treatment he says he received in relation to his gait/movement/walking speed.

    The claimant identifies the following comparators who he says received more favourable treatment:

    a. P Wilce

    b. J Higham

    Types of discrimination*:* section 13 (1) EqA direct race discrimination; sections 20-21 EqA failure to make a reasonable adjustment.

376. The tribunal's findings in respect of ***allegation 25*** are set out at paragraph 218 – 221. The tribunal has found that comments were not made regarding the claimant's toilet breaks, timing of his toilet breaks, or the claimant's gait/movement/walking speed. It follows that if the matters complained of didn't happen then no discrimination of any sort could have taken place.

377. ***Allegation 26:*** On 5 July 2022, Mr T Metcalfe said the following in his grievance appeal outcome letter [261-275]:

    > *'We have reviewed our files and we do not have any document (OH report or otherwise) which refers to your specific illness (thyroid condition) which you consider to be a disability. [271]*
    >
    > *Again, we do not have any document which refers to your thyroid condition which you have told us you consider to be a disability. [272]*
    >
    > *You will speed in some areas was tackled in the PADR – we believe this was appropriate and cannot be considered as harassment. [263]*
    >
    > *Our investigations show Simon [Baillie] addressed tact time issues with you verbally, rather than going down a formal disciplinary process as the first point of action, rather going straight to formal disciplinary action.' [269]*

***Types of discrimination**:* section 13 (1) EqA direct disability discrimination; section 26 (1) EqA harassment related to disability; section 15 (1) EqA discrimination arising in consequence of disability; breach of GDPR.

378. ***Allegation 26*** is accepted factually.

379. The tribunal repeats its conclusions in respect of ***allegations 3 and 20*** referred to at paragraphs 349-356 above about the 'lost' document [104]. There was no document describing the claimant's thyroid condition as a disability.

380. The tribunal repeats its conclusions in respect of ***allegation 12*** referred to at paragraph 314 above in respect of the PADR appraisal in February 2022. The tribunal was satisfied that Mr Metcalfe, like Mr Liscombe and Mr Baillie before him reached conclusions which were reasonable and after conscientious consideration of the claimant's performance.

381. The tribunal was satisfied that none of Mr Metcalfe grievance appeal outcomes of conclusions had either the purpose or effect of violating the claimant's dignity creating humiliating, offensive etc environment for the claimant or, if it did so, it was not reasonable for the claimant to perceive it that way**.**

Employment Judge Loy

10 April 2024