EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr Khalil Ur Rahman	v	**Paragon Finance Plc**

PRELIMINARY HEARING

Heard at: **Watford** **On:** **7 – 11 March 2022**

Before: **Employment Judge Bedeau**

Members: **Mr D Bean**
Mrs J Hancock

Appearance:

For the Claimant: **In Person**

For the Respondent: **Mrs R Peck, Solicitor - Partner**

RESERVED JUDGMENT

1. The claims are struck out as they were presented out of time and the Tribunal do not have jurisdiction to hear them.

Alternatively:

2. The claims of direct race discrimination are not well-founded and are dismissed.

3. The claims of direct religious discrimination are not well-founded and are dismissed.

4. The claims of direct disability discrimination are not well-founded and are dismissed.

5. The claims of indirect religious discrimination is not well-founded and are dismissed.

6. The breach of contract expenses claims have not been proved and are dismissed.

7. The claims of failure to make reasonable adjustments are not well-founded and are dismissed.

8. The provisional hearing listed on 4 August 2022, is hereby vacated.

REASONS

1. In a claim form presented to the Tribunal on 13 February 2020, the claimant who worked for the respondent as a Regional Surveyor, claims race, religion and disability discrimination, as well as a claim for other payments, all arising from his employment from 11 February to 22 July 2019.

2. In the response, all claims are denied. The claimant's disability is not admitted. The respondent avers that the claimant was dismissed for poor performance.

The issues

3. At the preliminary hearing on 7 June 2021, before Employment Judge R Lewis, the Judge recorded that disability remains an issue as well as whether some of the claims were presented out of time. The parties were given to 18 June 2021, to agree a list of the legal and factual issues in the case. They complied with the order. The first 13 allegations are of discriminatory treatment, followed by claims of breach of contract. They are as follows:-

   1. From 5 June 2019 onwards, the respondent did not offer refresher training to the claimant and did not provide him with support for his training needs was direct discrimination because of disability, race and religion. This is alleged against Katherine Bodfish and Neil Smith. The comparators are Ms Angela Henry and the claimant's predecessor Regional Surveyor.

   2. On 19 and 25 June 2019, the respondent called into question the motivation of the claimant in his role at a meeting on 19 June 2019, followed by an email dated 25 June 2019, taking into account he did not socialise nor attend pub meetings. This is alleged against Ms Bodfish and Mr Smith. The claim here is indirect religious discrimination. The provision, criterion, or practice is taking part in pub-based meetings, including drinking alcohol.

   3. On 9 July 2029, Ms Bodfish and Mr Smith, required the claimant to attend a meeting on 10 July 2019, at the respondent's Head Office at short notice knowing that surprises were unwelcome because of the claimant's disability. The claims are direct race, disability, and religious discrimination, as well as failure to make reasonable adjustments. He asserts that a reasonable step should have been to give him more notice of the meeting and additional time to prepare. He relies on a hypothetical comparator.

4. On 9 July 2029, Ms Bodfish and Mr Smith, tried bullying the claimant to attend a meeting on 10 July 2019, and indicated an expectation that he would be attending. The claims are direct race, disability, and religious discrimination, as well as failure to make reasonable adjustments. He asserts that a reasonable step should have been to give him more notice of the meeting and additional time to prepare. He relies on a hypothetical comparator.

5. On 9 July 2029, Ms Bodfish and Mr Smith, informed the claimant that the meeting was an informal meeting, then changed the communication to refer to it being a probationary review meeting. The claims are direct race, disability, and religious discrimination, as well as failure to make reasonable adjustments. He asserts that a reasonable step should have been to give him more notice of the meeting and additional time to prepare. He relies on a hypothetical comparator.

6. On 10 July 2029, Ms Bodfish and Mr Smith, cancelled the claimant's jobs preventing him from achieving his targets. The claims are direct race, disability, and religious discrimination, as well as failure to make reasonable adjustments. He asserts that a reasonable step should have been to delay the cancellation of his jobs until he returned from a period of sick leave. He relies on a hypothetical comparator.

7. Ms Bodfish, Mr Smith, and Ms Suzanne Leighton, were not forthcoming in providing the claimant in writing with the reason for the meeting. The claims are direct race, disability, and religious discrimination. He relies on a hypothetical comparator.

8. At a meeting on 19 July 2019, at which Ms Bodfish and Mr Smith, were present, information was "twisted and reinvented" by management. The claims are direct race, disability, and religious discrimination. The claimant relies on a hypothetical comparator.

9. On 22 July 2029, Mr Smith terminated the claimant's employment. The claims are direct race, disability, and religious discrimination. The claimant relies on a hypothetical comparator.

10. Ms Bodfish and Mr Smith, moved swiftly from allowing the claimant to sign off SAV valuations on 5 June 2019 to requiring him to attend a meeting on 9 July 2019 to discuss the termination of his employment. The claims are direct race, disability, and religious discrimination, as well as failure to make reasonable adjustments. He asserts that a reasonable step should have been to give him more notice of the meeting and additional time to prepare.

11. Ms Bodfish and Mr Smith, did not give the claimant an opportunity to deal with any performance issues prior to the termination of his employment. The claims are direct race, disability, and religious discrimination, as well as failure to make reasonable adjustments. He asserts that a reasonable step should have been to give him additional time to demonstrate his performance.

12. The respondent was influenced by discriminatory views about the claimant as a Pakistani Muslim with a disability. The allegation is against Ms Bodfish, Mr Smith, and Elizabeth Edwards. The claims are direct race, disability, and religious discrimination. The claimant relies on a hypothetical comparator. The claimant's evidence is that only Ms Edwards expressed a discriminatory view during the appeal hearing on 23 August 2019, and not Ms Bodfish nor Mr Smith.

13. The claimant's appeal points were ignored at the appeal meeting on 23 August 2019, as set out in the appeal outcome letter dated 20 September 2019. This was after assurances that the claimant's issues would be taken seriously by the respondent's employees, who dismissed them without investigating them with the due respect they deserved. The allegation is against Mr Shaun Kelly and Ms Edwards. The claims are direct race, disability, and religious discrimination. The claimant relies on a hypothetical comparator.

14. Whether the claimant's Type 2 diabetes was a disability under section 6, schedule 1, Equality Act 2010 "EqA", at all material times?

15. Does the claimant have any outstanding expenses which have not been paid by the respondent?

The evidence

4. The Tribunal heard evidence from the claimant who did not call any witnesses. On behalf of the respondent evidence was given by Ms Katherine Bodfish, Operational Manager; Mr Neil Smith, Head of Surveyors; Ms Suzanne Leighton, Senior Human Resources Advisor; Mr Shaun Kelly, Head of Group Property; and Ms Elizabeth Edwards, Human Resources Business Partner.

5. In addition to the oral evidence the parties adduced a joint bundle of documents comprising of 273 pages. The respondent produced in the course of the hearing, it's probation policy.

Findings of fact

6. The respondent is a specialist finance provider, offering a range of savings and lending products in the United Kingdom through Paragon Bank Plc. It is part of Paragon Banking Group Plc. It invests in and manages loan portfolios through its subsidiary, Idem Capital.

7. It operates from an address on Homer Road, Solihull.

8. The claimant commenced employment with the respondent on 11 February 2019, as a Regional Surveyor. He is a Fellow of the Chartered Institute of Housing; a Fellow of the Chartered Institute of Building; a Fellow of the Chartered Association of Building Engineers; a Fellow of the Chartered Management Institute; a Fellow of the Royal Institution of Chartered Surveyors, and a Member of the Association of Project Management. He describes himself as a Pakistani Muslim.

9. Prior to the commencement of his employment with the respondent, he completed a health questionnaire which the respondent received on 4 January 2019. One of the questions on his general health required him to answer whether he had suffered any of the listed conditions. He ticked "diabetes", and stated that it had been diagnosed in July 2018 and that he was taking Metformin for his Type 2 diabetes (pages 47 – 49).

10. He told the Tribunal that during his interview in late 2018 conducted by Mr Neil Smith, Head of Surveyors, Mr Chris Berwick, Director of Operations, who was Mr Smith's line manager, he said that he had concerns about being from a minority ethnic community and discriminatory practices. He felt that he may not fit into the organisation and that a transparent process was needed if the organisation had issues with him and he is having issues with it. He said he repeated his concerns at every subsequent meeting he had with Human Resources, management and Auditors. What he was telling the Tribunal was that right from the outset, he made it clear that he was concerned about racial or religious discriminatory practices and that if there were any he should be told in the spirit of transparency.

11. He was cross-examined on paragraph 7 of his witness statement in which he referred to the interview. He acknowledged that he had mentioned what was allegedly said in the interview for the first time in his witness statement, not in his claim form. He said that he had no issues with the respondent at interview but wanted to know, if they had issues with him, that it should all come out in the open.

12. In evidence Mr Smith said the alleged comments referred to in paragraph 7 of the claimant's witness statement, did not take place during the interview. If it was raised, he would have tried to make the claimant understand and assure him that the respondent is a large corporate body that fully appreciated the benefits of diversity as it employs all nationalities and races.

13. We find that the alleged conversation recounted in paragraph 7 of the claimant's witness statement was an unusual topic for someone to raise at an interview when applying for a position or being considered for a particular post. According to Mr Smith, there was no such discussion. We bear in mind that it was first raised in the claimant's written statement, and not in his claim form which was presented to the Tribunal on 13 February 2020 much closer to the interview date than the witness statement. We were not persuaded that such a discussion took place at his interview.

14. Although he ticked that he was diagnosed with Type 2 diabetes in July 2018, the questionnaire did not invite him to state how his diabetes affected him outside of his work, and he did not advise the respondent that "surprises would be unwelcome due to his diabetes".

15. He was interviewed in relation to the health questionnaire he completed, on 11 February 2019, by Ms Suzanne Leighton, Human Resources Advisor. From the typed notes of the meeting, it is recorded that he told Ms Leighton that he took Metformin tablets to control his diabetes which was first diagnosed 6 months previously. He looked after himself by going to the gym and by dieting. He further stated that his cousin is an Endoscopy Consultant who told him that his blood sugar level results were down. He was the questioned about another medical condition for which he was taking antibiotics. He also said that he had not taken a flu jab at the time. (50-51)

16. The claimant was part of the respondent's surveyors' team. The main function of which was to ensure that properties being purchased by the respondent's clients were those against which the respondent was willing to lend money. Surveyors are required to undertake valuation work to a high standard and in accordance with the Royal Institute of Chartered Surveyors' requirements and Group's directions and guidance notes. The role includes, but is not limited to, monitoring market trends and feeding back where necessary or requested; adding a satisfactory customer journey as part of the mortgage application process; protecting the Group by ensuring that the respondent is lending on properties where it is right to do so with minimal risk; providing a service to multiple arms of the business; and providing guidance and advice on property matters. In addition, Regional Surveyors are expected to take personal responsibility and

pride in achieving the objectives, assisting the wider team to achieve the department's objectives, and helping the Group towards achieving its strategy.

17. Surveyors undertake a wide range of valuations, notably two, the more straight forward valuations are Security Assessment Valuations, "SAVs". The more detailed valuations are Security Investment Valuations "SIVs" which apply to complex properties, including houses of multiple occupation, to which specific council regulations apply. The SIV valuation approach is completely different from the SAV.

18. The claimant was line-managed by Ms Katherine Bodfish, Operational Manager, who did not have a Surveyor's background but had experience in managing teams. She managed the team of Regional Surveyors, dealing with all the day to day operational issues. These include new starter inductions; monitoring activity across the teams; ensuring deadlines are adhered to; and enforcing compliance with Service Level Agreements "SLAs". She reported to Mr Neil Smith, Head of Surveyors.

Expenses

19. At the commencement of his employment the claimant was entitled to receive a company car and be reimbursed for "all reasonable out of pocket expenses, wholly, exclusively and necessarily incurred on the company's business in the performance of your duties, under this contract, provided these have been agreed in advance with your manager, subject always to the production of appropriate receipts". (208).

20. He was sent a copy of the respondent's company car and petrol claims policies which were issued with his offer pack. Expense claims would only be paid if submitted to payroll online by use of a Core Expense form authorised by the correct mandated signatory. The form must be signed by the manager or in their absence, the manager's line-manager or Business Head. (225)

21. We further find that it is stated in the policy that it is the employee's responsibility to submit an expenses claim which must be completed in full and submitted with supporting evidence before the payroll deadline of the 12th of each month.

22. It is not in dispute that the period from Monday 11 and Thursday 21 February 2019, the claimant was without a company vehicle. The respondent arranged for a company car to be delivered o his home on Sunday 10 February 2019, but no one was available to accept and sign for it. The respondent then communicated with the claimant and re-scheduled the delivery of his company car for Wednesday 20 February 2019. However, when the delivery driver called the claimant in advance of delivery, the claimant informed him that he would not be at home to accept the vehicle. This resulted in the respondent incurring a late cancellation charge of £100 plus VAT.

23. On 22 February 2019, a company car was successfully delivered to the claimant and retained by him for the duration of his employment with the respondent. However, during the period from 11 to 21 February, he travelled in the course of his work using his own car but did not submit an expense claim for his milage in

accordance with the terms and conditions of his employment. We shall return to this matter later in the judgment.

The claimant's performance

24. We find that Ms Bodfish was not aware of the claimant's diabetes during his employment as his line manager.

25. Ordinarily it took new starters 2 – 3 months to move from SAVs to SIVs, but in the claimant's case it took 4 months to 5 June 2019. The decision to allow him to move from SAVs to SIVs was signed off by Mr Smith in an email dated 5 June 2019, in which he wrote to the claimant, amongst other things, the following:-

> "Hi Khalil
>
> I tried to call you yesterday to give you the good news that we are happy with your valuation approach on the straightforward cases and therefore your SAV's no longer require checking before sign off. The three that you have passed on to Colin can now be signed off. There will now be an expectation that the more straightforward reports are signed off within 48 hours of the inspection.
>
> I would like to remind you that detail is key and to continue double checking reports for any errors before sign off. Following our conversation and my email on Friday another audit will be carried out at the end of this month to confirm site notes are where they need to be (as per the feedback provided)……"

26. Mr Smith also wrote that he had arranged for the claimant to go out with Mr Colin Midson, Mentor and an experienced Regional Surveyor. He was to observe Mr Midson at four SIVs.

27. Mr Smith then wrote that,

> "Whilst this is an important move forward it does come at a late stage of your probation. Once we are comfortable with your SIV reporting we will require you to demonstrate a number of key operational objectives including a minimum of 2.5 vals per day, coupled with a satisfactory audit, before your probation can be signed off.
>
> Lastly as a reminder we expect our RSs to be the gatekeeper for the region and in doing so taking control of matters arising whether referrals, valuations and turnaround within SLA for all of these. This requires a level of responsibility including guidance, and assertiveness where necessary, with the support officer to ensure appointment booking is implemented that works for the RS to provide for effective working on a daily basis. Put another way, the RS needs to make these things happen rather than reflecting afterwards some things that have gone wrong and may have adversely affected performance." (108)

28. Prior to the 9 June, we find that Ms Bodfish had feedback sessions with the claimant though not formal probationary review meetings. Although the claimant disputed the content of what she recorded, he did not dispute that he had meetings with her on 21 March, 8 April and 9 May 2019 as she had claimed. Her notes were not shown to him at the time or shortly after the meetings, for his comments. We were satisfied that the meetings were held to discuss his performance. (121,136)

29. After the 5 June, we find, that his performance was still being monitored by Ms Bodfish, Mr Smith and Mr Midson. A formal appraisal meeting was arranged for 19 June 2019. A record of what was discussed was in an email sent to the claimant dated 25 June 2019, by Ms Bodfish.

30. She wrote stating that it was an excellent opportunity to meet with him face to face in order to discuss "matters arising". She continued,

> "The principle[al] concern is that we have yet to see a drive/energy and desire (in a proactive sense) to meet the level of performance required. Furthermore, this is something which has previously been discussed during our 'catch-ups' and has yet to be demonstrated. As the local RS, we expect you to be the gatekeeper for the region and in doing so taking control of matters arising whether referrals, valuations and turnaround which must be within SLA for all of these…
>
> There is a perception that you have not retained previous feedback both in terms of reporting requirements and what is required on site notes. Feedback emails and phone calls can become repetitive and somewhat frustrating to the person providing the feedback…
>
> Basic errors are still occurring on reports with site notes examples that have not been completed fully. There are one of two errors that continue to be demonstrated, that would not be expected at this stage e.g. Parking to the front/side of a house i.e. within the boundary of the security, is not "off-site'" parking – this has been covered on numerous occasions. All SIVs prepared by you will continue to be the subject of a review prior to sign off, which is, I must say, at an unusually late stage of probation/development for this to still be in place.
>
> Given that we have only recently introduced you to SIV reporting, your current vals per day target will remain at 2 per day. However, as previously discussed, prior to probation sign off you will still need to display consistent level of vals per day, at a minimum of 2.5 (Ideally to the target of 3). It is important that you focus on maintaining the acceptable level of vals per day plus reports sign off and other tasks e.g. suitability referrals and validations being completed within SLA. Quality of reporting and the satisfactory completion of site notes is also vital.
>
> You will also need to begin to display an effective working pattern, I note that you are currently trialling inspection days on Tuesdays and Friday's…
>
> It is imperative that you identify any further training requirements or need for support on any aspects that you continue to find challenging or difficult. This must however be to supplement your own research and the development of your market knowledge and confidence in preparing and completing the more complex valuation reports…
>
> In summary, performance and technical knowledge including the completion of valuation reports and site notes have yet to reach the required standard. It was stressed that you must take fully on board the observations/guidance provided at the meeting and demonstrate proactively the performance levels required in order to demonstrate to the business that the employment should be made permanent.
>
> Should there be any aspects of this that you wish to discuss please do not hesitate to give me a call. We also wait to receive a note off you to acknowledge this note/our discussion and set out the points that you have drawn from this meeting with actions to develop urgently." (119-120)

31. It is clear to us that Ms Bodfish highlighted the areas of concern in relation to the claimant's performance; the obligation upon him to inform her of the training requirements he needed; and that performance had to be improved in order for him to pass his probation and remain a permanent Regional Surveyor.

32. On 20 June 2019, Mr Midson emailed Mr Smith regarding the claimant.

> "Hi Neil,
>
> I am really worried about trying to coach Khalil. I don't think he has any valuation or surveying background/experience and so it goes far deeper than just tweaking. I can tell him things, but I don't think he really understands!! I think he needs to receive basic Mortgage Valuation Training for a couple of months before he is let loose (even as you say his measurements and buildings insurance calculations are wrong, which is a fundamental bedrock). There is just so much that is wrong, that I just don't have the time to correct absolutely everything and still be able to do my job.
>
> Would it not be possible for the Audit guys to put a temporary hold on Auditing the Surveyors, to instead spend a month or so, full time, with Khalil.
>
> In my opinion we would be far better taking on a trainee because they would be more open to understanding our methods". (117)

33. This was a management communication between Mr Midson and Mr Smith. In cross-examination, Mr Smith said that the wording in Mr Midson's email he would not have used in describing the claimant, however, he agreed with the substance of what Mr Midson had written.

34. Mr Smith then forwarded the email from Mr Midson to Ms Bodfish. In his email to her dated 21 June 2019, he wrote that having received Mr Midson's email on SIV report/site note, and having taken into account comments about delays being experienced on report submission, felt that he had no option but to suggest to her that the claimant be restricted to SAVs; reintroduce a review of all reports/site notes prior to sign off; urgent audit review of recent site notes and valuations; training day on SIVs plus anything else the claimant identified as training; report to Mr Midson giving feedback; and full management of all tasks being progressed by the claimant in respect of SLAs as well as managing customer expectations.

35. There were complaints about how long it was taking the claimant to sign off his reports.

36. Mr Smith ended his email stating,

> "I'd also like to reinforce the requested note off Khalil in terms of his action plan and points to remember following the meeting this week and full documented notes of the discussion that we had with him on Wednesday this week." (116)

37. On 23 June at 5:45 in the evening, Ms Bodfish emailed the claimant informing him that the respondent was expecting a complaint by a client relating to the length of turnaround on a property he was involved in. She asked him to inform her when he was likely to sign off his report. It had been reviewed by Mr Smith and it required some amendments. (118)

38. On 4 July Ms Bodfish emailed the claimant stating that she had agreed that the respondent's outside surveyors who were independent contractors, would take over some of his cases to enable him to catch up on his outstanding reports. He had 3 cases to complete late in the afternoon and gave details of them, one with an inspection date on 18 June, and two on the 20 June. She asked him to provide her with an update the following morning with anticipated times of when she could expect the reports to be signed off. She then stressed,

> "It is unfair for the Support Team to have to deal with the continuous chases from the brokers/new business, therefore I will need to be able to step in and set the expectations early on in the day."(126)

39. Prior to 9 July 2019, Ms Bodfish said in evidence that issues of concern were coming to a head as the respondent had received two formal complaints, the first was in relation to an inspection undertaken by the claimant on the 10 June 2019 in which a report was not completed until 24 June, being 10 working days from the appointment as opposed to the Service Level Agreement for completing reports that being within 48 hours or two working days. The broker had initiated the complaint and chased the report on 17, 19 and 21 June 2019. The second, was an inspection undertaken by the claimant on 21 June 2019 for which a report was not completed until 5 July. The complaint was initiated by the broker. She told the Tribunal that steps the respondent had taken to try to address the concerns regarding the claimant's performance had not resulted in an improvement and the situation could not continue. From an operational perspective, she needed to find a solution.

40. It is clear that the claimant had not provided Ms Bodfish with an update as she had requested in her email of 4 July, by 5th July.

41. On Tuesday 9 July 2019, she contacted the claimant and asked him to attend a meeting with her the following day, 10 July. He was at a site inspection when she called. She asked him to get in touch when he had finished. This was followed up by an email she sent to him at 4:29 on the same day, in which she wrote,

> "As discussed I was hoping we could have an informal catch up on recent issues we have identified (on the back of our conversations last week) and review where you feel we are and training/steps going forward. I know that you have no appointments booked for tomorrow and as a normal working day I had hoped this was an excellent opportunity to catch up in the Head Office.
>
> Unfortunately, Neil and I are out of the office on Thursday and I note that you have a full day of inspections booked for Friday.
>
> Please come back to me so that we can arrange a suitable meeting place."

42. The claimant replied the same day at 5:42 in the evening stating,

> "Please clarify what this is about as clearly communication has broken down somewhere.
>
> Tomorrow is too short notice for me to change childcare arrangements but I can come in on Thursday but you are not available then but please clarify what this is about in the first instance and what it will cover so I can prepare. As you are aware we have had

> meetings in the past but things have not improved and all these sudden meetings do increase my stress and uncertainty levels.
>
> If you are going down the dismissal route please be clear so I can take the appropriate actions.
>
> I will be working on keeping on top of the surveys I have undertaken today throughout tomorrow as planned but available on the phone so if you like we can discuss things on the phone." (130)

43. We find that Surveyors would carry out their inspections 3 days a week. In the claimant's case, he decided to carry out his inspections 2 days a week, on Tuesdays and Fridays. He would use the remaining days in the week to do his report writing.

44. Ms Bodfish was unaware that on 10 July he would have childcare responsibilities as that was an ordinary work day. If he had childcare responsibilities this should have been discussed with the respondent's managers but there was no evidence he did do so. Further, we find that he made no reference to him being unable to meet with Ms Bodfish on 10 July because of his diabetes and the need for him not to be taken by surprise.

45. On 10 July 2019 at 10:18, in the morning, Ms Bodfish emailed him stating that she was still waiting for a call from him following their exchange of emails the previous day and that it was disappointing that he had not called her first thing as she had requested. She stated that she and Mr Smith were prepared to meet him on that day if it could be arranged. Alternatively, she would need to understand that he was working. She was still unclear what he meant by childcare arrangements. She asked that he should contact her urgently. (128)

46. In response, 22 minutes later, the claimant wrote to Ms Bodfish,

> "I have been trying to do my work but clearly other issues are at play from Paragon and this is not having a good impact on my health so obviously hard to focus on my work.
>
> The message I am getting from your silence about key issues I have raised about Dismissal and the stress this leads to etc have not been responded to so that as a starter needs to be clarified. I have never been asked to attend serious work meeting at such short notice without preparation and while at Paragon I plan my week ahead expecting to be at home on domestic days catching up with my reports etc so plans are made by others expecting me to be at home which can't easily be re-arranged.
>
> I have numerous concerns that I have tolerated to date that will need to be addressed but would like a list of issues from yourselves about your concerns in detail please so I can see if I can address these or not.
>
> The ball is very much in your hands as to how you wish to pursue things but your bullying tactics will not help so please refrain from that.
>
> As I cannot focus on my work today due to the ongoing issues I am seeking advice from my doctors so please sign me off as sick today." (128)

47. He self-certified his sick leave from 10 July returning to work on 15 July 2019.

48. Ms Bodfish decided to take advice from Human Resources in view of the fact that he had accused her of bullying him. She spoke to Ms Elizabeth Edwards, Human

Resources Business Partner, for guidance. Ms Bodfish told the Tribunal that she found the claimant's response to be confrontational and aggressive. It was not the sort of email that she would expect to be sent by one of her direct reports. She understood that an employee facing questions about their performance may be anxious and defensive, but the claimant was a senior and an experienced professional. She did not consider his response to be either justified or reasonable. In her view, his emails revealed a breakdown in their working relationship, and she was not prepared to continue to address the performance concerns the way that she had been doing up to that time. She forwarded the email exchange to Ms Edwards who liaised with Ms Suzanne Leighton, Human Resources Adviser.

49. The claimant spoke to Ms Leighton for advice who took down an account of their discussion. He stated that he had visited his GP as he was subjected to stress and uncertainty. He said that he was engaged in conducting surveys when he received the phone call from Ms Bodfish, but he was unable to attend the meeting due to childcare duties. He complained that all his jobs had been cancelled and believed that he was going to be dismissed. He asked Ms Leighton to clarify the position. He said his doctor said that his blood pressure was high. (132)

50. Ms Leighton told the Tribunal that after speaking to the claimant she wanted to hear what Ms Bodfish had to say in response, and met with Mr Smith, Ms Bodfish, and Ms Edwards on 12 July 2019. A brief note of their discussion was taken. It is recorded that Mr Smith and Ms Bodfish confirmed that the claimant was 5 months into his probation; that they had numerous catch ups; he had a one week induction and feedback; he was an experienced Chartered Surveyor; feedback was not taken on board; there was a lack of urgency in the way in which he conducted work; there was a failure to listen; in relation to report writing and site notes, he had received reminders; sometimes it looked like he did not know what he was doing; he would cut corners because 3 weeks previously he had been told that he needed to improve; some inspection reports were still outstanding; that the respondent had received 2 formal complaints in relation to his work; and he displayed a complete lack of urgency in signing off of his reports.

51. It was agreed by Mr Smith, we find, that upon having been advised of the options available to him by Ms Leighton, a formal probationary review meeting should be arranged and held on Monday 15 July 2019. (133)

52. Ms Leighton then called the claimant on the same day informing him of the meeting scheduled to take place on 15 July. He asked that it be in writing, referred to prejudice and unconscious bias, and questioned the procedure that was followed. He stated that he had not been given time to prepare and feared that his employment would be terminated as the whole process was biased. Ms Leighton asked him if he was raising a formal grievance. He replied saying that he did not want to do so. He stated that he had not been shown how to do SIVs; that he had been passed from Mr Midson to Mr Barry Gill; there had been lots of "toing and froing"; and the outcome of the probationary review meeting was

predetermined as they were not going to listen to him. He agreed to attend at 9:00am on Monday morning after Ms Leighton gave him details of the respondent's grievance policy. (134)

53. Ms Bodfish sent an email to Ms Leighton on 15 July 2019 in which she referred to the claimant's requests for records of their 1:1 meetings. Ms Bodfish replied on the same day by email in which she cut and pasted notes of her meeting with the claimant on 21 March, 8 April, 9 May and her notes. His notes were entered on the respondent's HRE computer system and were not given to him for comment prior to being entered. (136)

54. The claimant was on sick leave until 15 July and until the respondent knew of his return to work date no jobs could be booked for him. As he was expected to be at work on 15 July, he requested that the probation review meeting be postponed and re-scheduled. He was under the impression that dismissal was imminent and that had the effect of increasing his anxiety and stress level making him unable to focus on his work, hence he went on sick leave. (139)

55. He then sent a confidential email to Ms Leighton on 15 July, referring to the fact that the issues they had escalated needed to be de-escalated. He wanted to know that he would not be unceremoniously dismissed at a meeting due to the quick nature of it being arranged. He was unable to attend the meeting "due to it clashing with his own personal commitments at home." He said that he thought about the grievance route but declined to invoke it as he did not wish to escalate matters. He stated he would like to make it clear that he was committed to remaining with the respondent and wished to resolve the issues. He was "ill prepared to attend a probationary review meeting with dismissal on the table." He asserted that "things have escalated out of hand over some basic misunderstandings." Attending a probationary review meeting with the threat of dismissal would also be detrimental to his health due to the increased stress it would generate. He said that it was for that reason that he had always requested written reasons so he could provide responses. (140)

56. The probationary review meeting was re-scheduled to take place on 19 July 2019.

<u>Probationary review meeting 19 July 2019</u>

57. The probationary review meeting went ahead as re-scheduled and was chaired by Mr Smith. In attendance were the claimant, Ms Bodfish, and Ms Leighton. Notes were taken. From the notes it is recorded that the claimant had earlier been reminded of his right to be accompanied at the meeting. He was sent a correspondence list covering the period from 27 February to 4 July 2019, and the concerns around his performance as set out by Ms Bodfish to Ms Leighton, copied by Ms Leighton to him on 16 July. (144 – 149)

58. Mr Smith went through the areas of concern raised by Ms Bodfish, as the claimant's line manager and gave him an opportunity to respond. (150 – 156)

59. On 23 July 2019, he wrote to the claimant referring to the meeting and his telephone call to him on 22 July during which they discussed his, that is, the claimant's, general overall performance during probation. The main concern was

the lack of focus, urgency, proactiveness, communication, management time and workloads to be a "gatekeeper" for the region that the Regional Surveyor's role required. He then listed the concerns the respondent had, covering 9 areas. He then confirmed that it was his decision to terminate the claimant's contract of employment with immediate effect, and that he would receive one week's pay in lieu of notice. He advised the claimant of his right of appeal which should be sent, together with his reasons, to Ms Anne Barnett, People Director, within 5 working days. He then dealt with holiday entitlement which would be paid to him in his final salary. (157 -158)

60. In evidence Mr Smith said that it was the first time he had terminated someone's employment due to poor performance. Where there had been performance issues, the employee would resign before a decision was taken. He denied being influenced by the claimant's alleged disability, race or religion. He further denied that evidence was invented to dismiss the claimant. He was satisfied that Ms Bodfish had properly managed the claimant on a day-to-day basis and updated him, that is, Mr Smith. The performance issues were largely recorded in documents created at the time and demonstrated the seriousness of the respondent's concerns. He stated that SIV training was covered during the claimant's induction by his mentor, Mr Barry Gill.

<u>The appeal</u>

61. The claimant appealed challenging the approach taken by the respondent in relation to SIVs; allowing him to sign off his SAVs; and that at his appraisal on 19 June the respondent called into question his motivation, but his only lack of motivation was in relation to pub meetings, and because of his religion, he did not socialise. He wrote that Ms Bodfish and Mr Smith knew that a refresher course in SIV was a training need to improve turnaround time and this was emphasised at the Regional Surveyors' meeting on 26 June 2019, near Coventry. While others got support for their training needs, he did not. He then dealt with the events referred to in this judgment on the 9 and 10 July. He stated that he tried emailing Mr Smith on 22 July to discuss the return of company equipment but by then the respondent had deleted his email account. The biggest issue was the move from an informal meeting to a probationary review meeting. Management had moved him from signing off SAVs on 5 June to dismissal by 9 July. He also referred to being informed on 22 July by Mr Smith that the decision had been taken that he would not be confirmed in his employment. (159-161)

62. The appeal hearing was held on 23 August 2019, chaired by Mr Shaun Kelly, Head of Group Property, who had no prior knowledge of the claimant, nor had he had any dealings with Mr Smith and Ms Bodfish. He worked in a different area of the respondent's business. In attendance were Ms Edwards and the claimant. Notes were taken. The claimant raised the issue that he was supposed to be trained on SIVs and was not given any feedback. He went through his grounds of appeal in detail and was questioned. He said that during his interview for the role he said to the interviewers that they should be upfront with him. He claimed that a new black female Surveyor who started her employment in March had received a lot of support from Barry and he did not.

63. It was put to him by Ms Edwards that what he was alleging in relation to the way he had been treated, was that he believed that Ms Bodfish and Mr Smith were racists. He responded by saying that their reaction was to terminate his employment when he asked for examples of his quality of work and not getting his site notes. He was then asked by Ms Edwards if they were racist why would they employ him. He response was that religion was a factor. The hearing started at 11.40 and finished at 1.20pm. (169-176)

64. During his evidence before us the claimant alleged that Ms Edwards had said during the appeal meeting words to the effect "Your type trying it on" and "all your kind are like this". Both Mr Kelly and Ms Edwards categorically denied that she made such comments and went as far as to accuse the claimant of lying.

65. We find that such comments or similar comments, are not recorded in the notes nor did the claimant provide a written account of the appeal hearing in which such comments appear. The only contemporaneous record is that produced by the respondent, and we find that Ms Edwards did not make the alleged statements.

66. As the claimant raised the issue about Halal food and the buying of drinks during the appeal, Mr Kelly interviewed Mr Smith and Ms Bodfish who gave an account consistent with our findings of fact in relation to the provision of vegetarian food and that there was no requirement to buy a round of alcoholic drinks. (178)

67. On 20 September 2019, Mr Kelly sent to the claimant his outcome letter. He was satisfied that there were probationary review meetings with the claimant on 8 and 21 March, 8 April and 9 May. Further, there was an extensive record of regular feedback/discussions with him during his employment. In relation to the lack of support for SIVs, he concluded that the claimant made no requests for further assistance after the field day with Mr Midson on 10 June 2019. He was asked to share his documents with Mr Barry Gill and Mr Smith to gain feedback, thereafter he was given continuous on the job feedback in relation to his SIVs. There was a record of a specific feedback relating to his SIVs dated 20 to 25 June 2019.

68. In relation to knowledge and agreement of childcare arrangements, although the management team were aware that he had a young child there was no agreement in place between him and his line manager, Ms Bodfish, regarding his personal responsibilities towards childcare within working hours.

69. Regarding the allegations of racism, Ms Leighton had advised him on 12 July that he could raise a grievance regarding his concerns about unconscious bias and prejudices and sent him a copy of the grievance procedure, but he took no further action. Mr Kelly was unable to substantiate the claimant's allegations of racism, in that, he had been treated differently compared with other employees in a similar situation. He was satisfied that the claimant's ethnic background had no bearing on the decision to end his employment.

70. In relation to Ms Leighton's communication with him, Mr Kelly found that she had provided the correct procedural information regarding general performance procedures during probationary periods.

71. Having taken all matters into consideration, Mr Kelly concluded that it was his decision to uphold the original decision to terminate the claimant's employment, and that it was final. He then reminded the claimant to return company property by close of business on Friday 20 September and to arrange a mutually agreeable date and time in which to do so. (187-188)

Professional subscriptions

72. It is part of the claimant's case that he was paying professional subscriptions to a number of professional bodies and that it had been the practice of his previous employers to pay either all or part of the subscriptions proportionate to the time worked with them. We reject that assertion. There is no obligation on a current employer to re-imburse an employee professional subscriptions incurred prior to the commencement of their employment unless there is a contract to that effect, a policy, or practice. No such evidence was provided by the claimant.

Respondent's probation policies

73. The respondent produced two probation policy documents, one dated August 2007 and the other one December 2016. Both refer to the probationer being on a 3-month probationary period. However, in the claimant's case, he was on probation of 26 weeks. It appears that the policy the respondent drafted and revised, was overtaken by the introduction of its internal computer human resources recording system. Records of 1:1 meetings with the employee on probation are not disclosed to the employee for his or her comments as it is taken on trust that the manager managing the probationer would correctly enter the outcome of meetings on the respondent's HR system.

74. In the Tribunal's view we would suggest, that the whole procedure be open and transparent and that all records of meetings with the probationer should be recorded and given to the probationer for his or her comment before being entered on to the system.

75. As it had been the respondent's policy not to make available its records to the probationer. It is a policy of general application irrespective of race, religion, and/or disability.

The claimant's attendance at meetings at which there would be alcoholic

76. In relation to the allegation raised by the claimant that, as a Muslim, he was required to attend pub meetings and to buy a round of alcoholic drinks. His evidence was that at the Regional Surveyors' meeting which were organised once every other month, it was expected that those attending would buy drinks after the evening meal when talking at their tables or in groups.

77. We find that at the venues both alcoholic and non-alcoholic drinks were available. There was no obligation, either express or implicit, on anyone that they should buy a round of drinks. Some chose not to drink alcohol.

78. The claimant was never asked to go to the bar, nor did he volunteer to do so.

The absence of Halal food at social events

79. The claimant alleges that Halal food was not provided at the Regional Surveyors' meetings. Ms Bodfish said that before the meetings, they would organise the dietary requirements of those attending. The claimant had made her aware that he was prepared to eat fish and vegetarian food. There was no specific request that Halal food should be provided, and we accept that evidence. Fish and vegetarian meals were provided but on the occasion in question that the claimant had raised it as an issue, he arrived late, and none was available.

The absence of diabetic food

80. The claimant said in paragraph 39 of his written statement that there was also no diabetic food available. This was not put to the witnesses in cross-examination by him. It was not an issue raised during the course of the hearing. Further, it was unclear what foods he had in mind for diabetics. We received no evidence in support of this assertion and were unable to make findings of fact.

The claimant's comparators

81. Ms Angela Henry, the claimant's comparator, commenced employment at the same time as the claimant. During her probationary period there were concerns about her performance. In particular, SIVs were a challenge for her. It was decided to extend her probationary period in order to provide her with additional support and feedback. We find that she was not failing to meet deadlines and proactively engaged with her line manager in discussions about her training needs. The claimant was failing to meet deadlines. Refresher training was not specifically offered, and he did not ask for it. He received SIV training as part of his induction and was given the opportunity of working alongside his Mentor before undertaking SIVs by himself. At all times he had access to his Mentor, Mr Smith, and the other Regional Surveyors for help, advice and assistance. We have concluded that Ms Henry's circumstances were different to the claimant's and is not an appropriate comparator.

82. The claimant also referred to a Regional Surveyor, who was employed prior to him being employed by the respondent but who had left. Little is known about the circumstances of that individual to draw a realistic comparison.

Disability

83. Onn 17 January 2022, the respondent representatives emailed the Tribunal and the claimant that the claimant's Type 2 diabetes is admitted but did not have actual or constructive knowledge that his disability puts him at a substantial disadvantage.

Submissions

84. We have taken into consideration the submissions by the claimant and by Mrs Peck, on behalf of the respondent. We have also taken into account the authorities and relevant statutory provisions we have been referred to. We do not propose to repeat their submissions herein having regard to Rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended.

The law

85. Under section 13, Equality Act 2010, "EqA", direct discrimination is defined:

> "(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."

85. The protected characteristics are set out in section 4 EqA and includes race, disability and religion.

86. Section 23, provides for a comparison by reference to circumstances in a direct discrimination complaint:

> "There must be no material difference between the circumstances relating to each case."

87. Section 136 EqA is the burden of proof provision. It provides:

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

88. In the Supreme Court case of Hewage v Grampian Health Board [2012] ICR 1054, it was held that the tribunal is entitled, under the shifting burden of proof, to draw an inference of prima facie race and sex discrimination and then go on to uphold the claims on the basis that the employer had failed to provide a non-discriminatory explanation. When considering whether a prima facie case of discrimination has been established, a tribunal must assume there is no adequate explanation for the treatment in question. While the statutory burden of proof provisions has an important role to play where there is room for doubt as to the facts, they do not apply where the tribunal is in a position to make positive findings on the evidence one way or the other.

89. In Madarassy v Nomura International plc [2007IRLR 246, CA, the Court of Appeal approved the dicta in Igen Ltd v Wong [2005] IRLR 258. In Madarassy, the claimant alleged sex discrimination, victimisation and unfair dismissal. She was employed as a senior banker. Two months after passing her probationary period she informed the respondent that she was pregnant. During the redundancy exercise in the following year, she did not score highly in the selection process and was dismissed. She made 33 separate allegations. The employment tribunal dismissed all except one on the failure to carry out a pregnancy risk assessment. The EAT allowed her appeal but only in relation to two grounds. The issue before the Court of Appeal was the burden of proof applied by the employment tribunal.

90. The Court held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex and a difference in treatment. Those bare facts only indicated a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

91. The Court then went on to give a helpful guide, "Could conclude" [now "could decide"] must mean that any reasonable tribunal could properly conclude from all the evidence before it. This will include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the claimant is like with like, and available evidence of the reasons for the differential treatment.

92. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the tribunal at the first stage from the hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual orientation or pregnancy. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the claimant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.

93. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected characteristic, for example, either race, sex, religion or belief, sexual orientation, pregnancy or gender reassignment.

94. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable in order to be non-discriminatory. In the case of B-v-A [2007] IRLR 576, the EAT held that a solicitor who dismissed his assistant with

whom he was having a relationship upon discovering her apparent infidelity, did not discriminate on the ground of sex. The tribunal's finding that the reason for dismissal was his jealous reaction to the claimant's apparent infidelity could not lead to the legal conclusion that the dismissal occurred because she was a woman.

95. The tribunal could pass the first stage of the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently clear that the reason for the treatment is non-discriminatory, it may not be necessary to consider whether the claimant has established a prima facie case, particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant about drinking and dismissed him for doing so. It would be difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age or sex. This was approved by Lord Nicholls in Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, judgment of the House of Lords.

96. The claimant has to prove that the act occurred and, if so, did it amount to less favourable treatment because of the protected characteristic?, Ayodele v Citilink Ltd [2017] EWCA Civ 1913.

97. Unreasonable conduct does not amount to discrimination, Bahl v Law Society [2004] IRLR 799.

98. Section 19 EqA, on indirect discrimination, states:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

99. In determining justification, an Employment Tribunal is required to make its own judgment as to whether, on a fair and detailed analysis of working practices and business considerations involved, a discriminatory practice was reasonably necessary and not apply a range of reasonable responses approach, Hardy & Hansons plc v Lax [2005] ICR 1565.

100. In the case of Seldon v Clarkson Wright & Jakes [2012] ICR 716, a judgment of the Supreme Court, Lady Hale held that,

> "The measure in question must be both appropriate to achieve its legitimate aim or aims and necessary in order to do so…, paragraph 50 (5).
>
> The gravity of the effect upon the employees discriminated against has to be weighed against the importance of the legitimate aims in assessing the necessity of the particular measure chosen…, paragraph 50 (6)
>
> 55. It seems, therefore, that the United Kingdom has chosen to give employers and partnerships the flexibility to choose which objectives to pursue, provided always that (i) these objectives can count as legitimate objectives of a public interest nature within the meaning of the Directive and (ii) they are consistent with the social policy aims of the state and (iii) the means used are proportionate, that is both appropriate to the aim and (reasonably) necessary to achieve it."

101. Section 20, EqA on the duty to make reasonable adjustments, provides:

> "(1)Where this Act imposes a duty to make reasonable adjustments on the person, this section, sections 21 and 22 and the applicable Schedule apply; for those purposes a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion of practice of A's put a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as is reasonable to have taken to avoid disadvantage."

102. Guidance has been given in relation to the duty to make reasonable adjustments in the case of Environment Agency v Rowan [2008] IRLR 20**,** a judgment of the EAT. An employment tribunal considering a claim that an employer had discriminated against an employee by failing to comply with the duty to make reasonable adjustment must identify:

> (1)the provision, criterion or practice applied by or on behalf of an employer, or
>
> (2)the physical feature of premises occupied by the employer;
>
> (3)the identity of a non-disabled comparator (where appropriate), and
>
> (4)the identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the provision, criterion or practice applied by or on behalf of an employer and the physical feature of premises. Unless the tribunal has gone through that process, it cannot go on to judge if any proposed adjustment is reasonable because it will be unable to say what adjustments were reasonable to prevent the

provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.

A tribunal deciding whether an employer is in breach of its duty under section 4A, now section 20 Equality Act 2010, must identify with some particularity what "step" it is that the employer is said to have failed to take.

103. The employer's process of reasoning is not a "step". In the case of General Dynamics Information Technology Ltd v Carranza [2015] ICR 169, the EAT held that the "steps" an employer was required to take by section 20(3) to avoid putting a disabled person at a disadvantage, were not mental processes, such as making an assessment, but practical actions to avoid the disadvantage. To decide what steps were reasonable, a tribunal should, firstly, identify the pcp. Secondly, the comparators. Thirdly, the disadvantage. In that case disregarding a final written warning was not considered to be a reasonable step.

104. In relation to the shifting burden of proof, in the case of Project Management Institute v Latif [2007] IRLR 576, EAT, it was held that there must be evidence of a reasonable adjustment that could have been made. An arrangement causing substantial disadvantage establishes the duty. For the burden to shift;

> "…it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.", Elias J (President).

105. Paragraph 6.10 of the Code 2011 provides:

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

106. In relation to the comparative assessment to be undertaken in a reasonable adjustment case, paragraph 6.16 of the Code states:

> "The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly and unlike direct or indirect discrimination - under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's."

107. The proper comparator is readily identified by reference to the disadvantage caused by the relevant arrangements. It is not with the population generally who do not have a disability, Smith v Churchills Stairlifts plc [2006] IRLR 41, Court of Session.

108. In the case of Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216, a judgment of the Court of Appeal, Elias LJ gave the leading judgment. In that case the claimant, an administrative officer, was employed by the Secretary

of State for Work and Pensions. She started to experience symptoms of a disability identified as viral fatigue and fibromyalgia. She was absent for 62 days for a disability related sickness. After her return to work her employer held an attendance review meeting. Its attendance management policy provided that it would consider a formal action against an employee if their absence reached an unsatisfactory level known as "the consideration point". "The consideration point" was 8 days per year but could be increased as a reasonable adjustment for disabled employees. The employer decided not to extend the consideration point in relation to the claimant and gave her a written improvement notice which was the first formal stage for regular absences under the policy. She raised a grievance contending that the employer was required to make two reasonable adjustments in relation to her disability, firstly, that the 62 days disability related absence should be disregarded under the policy and the notice be withdrawn. Secondly, that in future "the consideration point" be extended by adding 12 days to the eight days already conferred upon all employees. Her employer rejected her grievance and proposals.

109. Before the Employment Tribunal the claimant argued that her employer failed to make the adjustments and was in breach of the section 20 EqA 2010, the duty to make reasonable adjustments. It was conceded that she was disabled within the meaning of the Act. The tribunal, by a majority, found that the section 20 duty was not engaged as the provision, criterion, or practice, namely the requirement to attend work at a certain level to avoid receiving warnings and possible dismissal, applied equally to all employees. The Employment Appeal Tribunal dismissed the claimant's appeal upholding the tribunal's findings and adding that the proposed adjustments did not fall within the concept of "steps". It further held that the comparison should be with those who but for the disability are in like circumstances as the claimant.

110. The Court of Appeal held that the section 20 duty to make reasonable adjustments had been engaged as the attendance management policy had put the claimant at a substantial disadvantage but that the proposed adjustments had not been steps which the employer could reasonably have been expected to take. The appropriate formulation of the relevant pcp in a case of this kind is that the employee had to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. Once the relevant pcp was formulated in that way, it was clear that a disabled employee's disability increased the likelihood of absence from work on ill health grounds and that employee was disadvantaged in more than a minor or trivial way. Whilst it was no doubt true that both disabled and able-bodied alike would, to a greater or lesser extent, suffer stress and anxiety if they were ill in circumstances which might lead to disciplinary sanctions, the risk of this occurring was obviously greater for that group of disabled workers whose disability resulted in more frequent, and perhaps longer, absences. They would find it more difficult to comply with the requirements relating to absenteeism and would be disadvantaged by it.

111. The nature of the comparison exercise under section 20 is to ask whether the pcp puts the disabled person at a substantial disadvantage compared with a non-disabled person. The fact that they are treated equally, and may both be subject to the same disadvantage when absent for the same period of time, does not eliminate the disadvantage if the pcp bites harder on the disabled, or a category of them, than it does on the able-bodied. If the form of disability means that the disabled employee is no more likely to be absent than a non-disabled colleague, there is no disadvantage arising out of the disability but if the disability leads to disability related absences which would not be the case with the able-bodied, then there is a substantial disadvantage suffered by the category of disabled employees. Thereafter the whole purpose of the section 20 duty is to require the employer to take such steps as may be reasonable, treating the disabled differently than the non-disabled would be treated, to remove a disadvantage. The fact that the able-bodied are also to some extent disadvantaged by the rule is irrelevant. The Employment Tribunal and the Employment Appeal Tribunal were wrong to hold that the section 20 was not engaged simply because the attendance management policy applied equally to everyone.

112. There is no reason artificially to narrow the concept of what constitutes a "step" within the meaning of section 20(3). Any modification of or qualification to, the pcp in question which would or might remove a substantial disadvantage caused by the pcp is in principle capable of amounting to a relevant step. Whether the proposed steps were reasonable is a matter for the Employment Tribunal and must be determined objectively.

113. In the case of Kenny v Hampshire Constabulary [1999] IRLR 76, a judgment of the Employment Appeal Tribunal, it was held that the statutory definition directs employers to make reasonable adjustments to the way the job is structured and organised to accommodate those who cannot fit into existing arrangements.

114. The test under is an objective test. The employer must take "such steps as….is reasonable in all the circumstances of the case." Smith v Churchills Stairlifts plc [2006] IRLR 41.

115. The Tribunal's breach of contract jurisdiction is in the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. It must be a claim that "arises or is outstanding on the termination of the employee's employment", article 3.

Conclusions

Out of time

116. The respondent submitted that the discrimination claims have been presented out of time. The last act in the list of issues, is the 23 August 2019. The primary limitation period ended on 22 November 2019. ACAS was notified outside this period on 14 December 2019. The claimant had not provided a good and sufficient reason for the delay. Extending time is the exception and not the rule.

He came across to us as someone familiar with equality and diversity issues. We were not persuaded that time should be extended on just and equitable grounds. These claims are, therefore, out of time and are struck out as the Tribunal does not have jurisdiction to hear and determine them. However, if we are in error, we consider the claims in more detail.

Allegations 1 - 13

117. In relation to allegation 1, the respondent accepts that it did not offer refresher training to the claimant. However, during his induction he did receive SIV training. He also went on a field day; he had feedback from his reviews; he had a Mentor; and he did not identify that he needed SIV training when asked in Ms Bodfish's email dated 25 June 2019, to identify any training needs.

117. Ms Henry is not an appropriate comparator as there were no concerns about the timings of her reports and valuations.

118. It is difficult to see in what ways the respondent would have treated anyone differently. The claimant had not satisfy the onus upon him to establish less favourable treatment because of his race and religion being a Pakistani Muslim.

119. In relation to direct disability discrimination, there is no dispute that he suffers from Type 2 diabetes and is a disability. The issue is one of knowledge, actual or constructive. Ms Henry is not an appropriate comparator as her circumstances were materially different from those of the claimant's. It is also difficult to see how a non-disabled Regional Surveyor would be treated any differently as training and mentoring would have been provided and no action would be taken on refresher SIV training if not asked for when invited to do so, as was the case in Ms Bodfish's 25 June 2019 email.

120. We have applied section 136 and the judgment in the case of Madarassy in all of the direct discrimination claims.

121. The direct discrimination claims are not well-founded and are dismissed.

122. Allegation 2 is to the statement that the claimant lacked motivation. This is a claim of indirect religious discrimination because he was required to attend pub-based events and/or to socialise where there was alcohol. We have found that there was no such pcps. Those attending the social events were not required nor felt like they must drink and buy a round of drinks. Non-alcoholic beverages were available and consumed by some of those who attended. The claimant said that he was not asked to go to the bar, nor did he do so of his own volition.

123. The pcps as set out by the claimant was never applied by the respondent. This claim is not well-founded and is dismissed.

124. In relation to allegation 3, the claimant alleges that the respondent required him to attend a meeting on 10 July 2019 at its Head Office, at short notice, knowing that surprises were unwelcome because of his disability. His claims are direct disability, race and religious discrimination, as well as the failure to make reasonable adjustments. There is no dispute that on 9 July, Ms Bodfish required him to attend a meeting the following day. His work was checked by her for that day; his performance was an issue and there were complaints made against him from clients of the respondent. A non-disabled, non-Pakistani, and a non-Muslim Regional Surveyor whose performance was an issue and who had been complained against would have been required to attend a meeting at short notice to address their performance concerns in order to reduce number of complaints. The request was not an act of bullying but a serious attempt at addressing performance issues. He did say to Ms Bodfish that he was involved with childcare.

125. We were not satisfied that he had established less favourable treatment because of his protected characteristics. Accordingly, the direct discrimination claims are not well-founded and are dismissed.

126. With regard to the claim of failure to make reasonable adjustments, there was no evidence that the respondent's witnesses knew or ought to have known, that for the claimant, surprises were unwelcome. A non-disabled person with childcare responsibilities, would equally be disadvantaged if they were required to attend a meeting at short notice. In addition, we were not satisfied that the claimant was substantially disadvantaged in being required to attend the meeting. There was no medical evidence in support of his assertion that surprises were unwelcome. Mr Smith and Ms Leighton had information on the claimant's diabetes but no knowledge that surprises were unwelcome. This was not in his health questionnaire. This claim is not well-founded and is dismissed.

127. Allegation 4 is similar to allegation 3 except that the claimant asserts that the invitation to attend the 10 July meeting was bullying. We have already addressed the bullying allegation above. For the same reasons given in relation to the direct discrimination claims and the claim of failure to make reasonable adjustments, they are not well-founded and are dismissed.

128. As regards allegation 5, the respondent informed the claimant on the 9 July 2019, that the 10 July meeting was informal then changed it to a probationary review meeting. It is unclear how the claimant puts this down to direct disability discrimination because the 10 July meeting was intended to be informal, and he did not attend. The meeting was rescheduled for 12 July 2019 but changed to 19 July as a formal probationary review as there had been concerns raised about the claimant's performance, and he was given time to prepare for it. He went on sick leave from 10 July, returning on15 July.

129. We were not satisfied that the claimant had established, the first stage of the burden of proof test of less favourable treatment because of disability, race and

religion, as a hypothetical comparator, a Regional Surveyor, not of his protected characteristics, would not have been treated any differently as time would have been given to prepare for a formal probationary meeting.

130. In relation to the failure to make reasonable adjustments, it is unclear what the provision, practice, or criterion the respondent applied generally in the workplace. If it is not allowing its staff to prepare for probationary review meetings, the claimant was not disadvantaged as he was given time to prepare. At his request he received the documents the respondent relied on prior to the meeting.

131. We have come to the conclusion that these claims are not well-founded and are dismissed.

132. Allegation 6 comprises of claims of direct disability, race and religious discrimination, in that, the respondent cancelled the claimant's jobs effectively preventing him from achieving his targets. He further claims failure to make reasonable adjustments as the respondent should have delayed cancelling the jobs until he returned from a period of sick leave.

133. The respondent transferred three inspections to the panel which were previously undertaken by the claimant, on 9 July 2019. It took that step to avoid further delays and complaints being made from its clients. The hypothetical comparator would have been treated in the same way if they had missed their targets and complaints were made. The claimant had not established less favourable treatment in relation to the three protected characteristics.

134. In relation to failure to make reasonable adjustments, it is unclear what the appropriate pcp is. The claimant was behind in his work and there were complaints. Even if there is a discernible pcp, that being the respondent refusing to delay decisions on cancelling jobs until the employee return from a period of sick leave, it would not have overcome any disadvantage as their still would have been complaints about his work not being done.

135. We have come to the conclusion that this claim is not well-founded and is dismissed.

136. In relation to allegation 7, the respondent did not provide the claimant with the reasons for the probation meeting, the written reasons for the meeting were given to the claimant in writing on 12 and 16 July 2019. Claims of direct disability, race and religious discrimination are not well-founded.

137. In allegation 8 the claimant claims that during the meeting on 19 July 2019, information was "twisted and reinvented" by Mr Smith and Ms Bodfish which amounted to direct disability, race, and religious discrimination.

138. He requested that evidence about the respondent's concerns be sent to him prior to the probation review meeting. He received the evidence on 16 July 2019. Although he alleged that the information provided could have been tampered with, there was no evidence to support claim. The respondent acknowledged that by the 5 June 2019, he could sign off SAVs, but concerns were raised later, and by 9 July, Ms Bodfish wanted to have an informal meeting with him to discuss the concerns.

139. We found no evidence that either Mr Smith or Ms Bodfish, or both, had altered the evidence in relation to the concerns they had about the claimant's work or of the records of meetings and feedback given to him. We accept that he was not given copies of the records of meetings shortly after they happened, but that applied to all staff and the claimant was not singled out. As he accused Ms Bodfish of bullying him, advice was given by Ms Leighton, and Mr Smith decided on having a probationary review meeting. The claimant's relationship with Ms Bodfish had broken down. He could have challenged the respondent's account of the meeting on 19 July, but he did not do so. We did not make findings of fact from which we could decide that he had established less favourable treatment on the three protected characteristics. The direct disability, race and religious discrimination claims are not well-founded and are dismissed.

140. Allegation 9 is that the dismissal of the claimant on 22 July 2019 was an act of direct disability, race and religious discrimination. Although the respondent felt that the claimant should have been signed off to complete SAVs earlier than on 5 June 2019, no action was taken curtailing his probation. There were a several objectives to be met before his probation could be confirmed. This was made clear by Ms Bodfish in her email of 25 June 2019, referring to the 1:2:1 meeting she had with the claimant on 19 June.

141. Although the respondent could have rescheduled another informal meeting, circumstances changed, serious concerns were raised about the claimant's performance, and he accused Ms Bodfish of bullying him. It was management's assessment of the situation as being serious that led to the decision to hold a probationary review meeting.

142. From the objective evidence, Mr Smith expressed that the main concern was the claimant's lack of focus, urgency, proactiveness, communication, management time and workloads to be a "gatekeeper" for the region that the Regional Surveyor's role required. He informed that claimant of 9 areas of concern. It was his decision to terminate the contract of employment with immediate effect, on payment of one week's pay.

143. Applying the judgment in Shamoon, the real reason for the claimant's dismissal was his performance not disability, race, and/or religion. A hypothetical comparator would have been treated the same if there were similar concerns

about their performance. Accordingly, these claims are not well-founded and are dismissed.

144. The claimant next claimed in allegation 10, that Ms Bodfish and Mr Smith moved swiftly from allowing him to sign off SAVs on 5 June 2019, to requiring him to attend a meeting on 9 July 2019, to discuss the termination of his employment. This was, he contended, direct disability, race, and/or religious discrimination. In addition, a failure to make reasonable adjustments, in that he was not given more notice and time to prepare.

145. We have already addressed this failure to make reasonable adjustments in relation to allegations 3 and 4. The respondent and Ms Bodfish were unaware of the claimant's childcare arrangements in work time and was not told by him that surprises were unwelcome because of his diabetes. In fact, he did not attend the meeting but went on sick leave from 10 to 15 July 2019.

146. As regards the direct discrimination claims, the meeting was not on the 9 July but was arranged for the 10 July when he did not attend. It was not to discuss his dismissal but the concerns which arose and was to be an informal meeting. We have not made findings of fact in support allegation 10. The direct discrimination and failure to make reasonable adjustments claims are not well-founded and are dismissed.

147. Allegation 11 is that the respondent, namely Ms Bodfish and Mr Smith did not give the claimant an opportunity to deal with any performance issues prior to the termination of his employment. The claims are direct disability, race, and/or religion discrimination, as well as the failure to make reasonable adjustments.

148. The claimant had 1:2:1 meetings with Ms Bodfish about his work and, in line with the respondent's practice, was not given a copy of what was recorded on the system. The meeting on the 19 June 2019 with Ms Bodfish and Mr Smith was held to discuss his performance. Issues such as his drive, energy, responsibility and assertiveness, not responding favourably to feedback, reporting errors, displaying an effective work pattern, amongst others, were discussed. He was encouraged to identify further training he needed. It was also open to him to discuss Ms Bodfish's outcome email dated 25 June 2019.

149. The proposed meeting on 10 July, being informal, was a further opportunity to discuss his performance.

150. We have not made findings from which we could decide that the claimant was treated less favourably because of his protected characteristics.

151. It is not clear what the pcp is in the failure to make reasonable adjustments claim. In any event, the respondent was prepared to accept that he should have been signed off for SAVs well before 5 June 2019. In that regard additional time was given to him to improve in that area of his work because by

5 June it was four months when it would normally take around two to three months. We have come to the conclusion that the claimant, through his meetings with Ms Bodfish and at the joint meeting on 19 June, was given additional time to address his performance before his employment was terminated on 22 July 2019.

151. His direct disability, race, and/or religious discrimination, as well as the failure to make reasonable adjustments, are not well-founded and are dismissed.

152. Allegation 12 is direct disability, race, and/or religious discrimination, in that, discriminatory views about the claimant as a Pakistani Muslim with a disability, were made during the appeal hearing on 23 August. Although the claimant cites Mr Smith, Ms Bodfish and Ms Edwards, the allegation is against Ms Edwards.

153. We have already found that Ms Edwards did not make the discriminatory statements attributed to her. There are no facts as found upon which we could decide that the claimant was directly discriminated against because of his disability, race, and/or religion discrimination. These claims are also not well-founded and are dismissed.

154. In allegation 13 the claimant asserts that, during his appeal against his dismissal, his appeal points were ignored and dismissed after assurances were given that they would be investigated. Mr Shaun Kelly and Ms Edwards are cited as the perpetrators of his discriminatory treatment because of disability, race, and/or religion.

155. We are satisfied that Mr Kelly was independent as he was from a different area of the respondent's business and had no prior dealings with the claimant, Ms Bodfish and Mr Smith. We refer to our findings in paragraphs 61 to 63. The claimant was given time to explain his grounds of appeal. He accused Mr Smith and Ms Bodfish of discriminatory treatment in not providing Halal food and in requiring the claimant to buy drinks. They were interviewed by Mr Kelly who found the allegations unsubstantiated. The appeal lasted one and a half hours.

156. We have not made any findings in support of allegation 13 from which we could decide that the claimant was discriminated against because of his disability, race/and or religion. The claims are not well-founded and are dismissed.

<u>Expenses claim</u>

157. In relation to the claimant's expenses claim, they were presented out of time. His employment was terminated on 22 July 2019. The primary limitation period expired on 21 October 2019. Early ACAS conciliation notification was on 14 December 2019, and the Certificate was issued on 14 January 2020. The claimant cannot avail himself of the extension to time as conciliation was not with the primary limitation period. We were not provided with a good reason for

the delay. He is an intelligent man well versed in equality and diversity issues having considered his documents in this case. He was and is able to engage in research on his employment rights and had access to his professional bodies for advice. It was reasonably practicable for him to have presented his breach of contract claim in time. They are, accordingly, struck out.

158. If we are in error in relation to our above conclusion, we refer to our findings of fact in paragraphs 19-23, above. We have come to the conclusion that the respondent is not legally obligated to pay the claimant's expenses as he failed to complete an expenses form at the required time.

159. In relation to paying professional subscriptions, we repeat our conclusions stated in paragraph 72 above, that there is no legal requirement on a current employer to pay the professional subscriptions of an employee for the period they were working for a previous employer. No evidence of this being a well-recognised industrial practice was presented during the hearing by the claimant and the respondent did not enter into a contractual arrangement to pay such subscriptions. Alternatively, the expenses claims have not been proved and are dismissed.

Credibility

160. We have found the respondent's witnesses to be credible when giving evidence. They admitted that the system of not allowing a probationer to see the notes of their 1:2:1 meetings and of any other meetings, was not transparent. They also acknowledged that it was possible to reschedule the informal meeting, but events had taken matters beyond the informal stage. Mr Smith said that the wording in Mr Didson's email to him about the claimant, he would not have used.

161. In relation to the claimant, we did not accept his evidence on what he allegedly said to his interviewers when he was being interviewed for the post of Regional Surveyor. On professional subscriptions, we rejected his claim that the respondent was required to pay the subscriptions for the time when he worked for a previous employer. In relation to his appeal against dismissal, he wrongly accused Ms Edwards of making a racist statement. He was never asked to buy a round of alcoholic drinks at the respondent's organised social events, and he did not ask that Halal food be provided.

162. Where there was conflict in the evidence, we preferred the evidence given by the respondent's witnesses.

162. Having regard to our above conclusions, the provisional remedy hearing listed on 4 August 2022, is hereby vacated.

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Employment Judge Bedeau

Date: 17 June 2022

Sent to the parties on:

17 June 2022

For the Tribunal:

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