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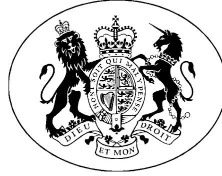

EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Mr S Sullivan	**AND**	Bury Street Capital Limited

Heard at: London Central **On**: 12- 22 November 2018

Before: Employment Judge Glennie
Members: Ms T Breslin
Mr J Carroll

Representation
For the Claimant: Mr J Bacon, of Counsel
For the Respondent: Mr M Lee of Counsel

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. **The complaint of unfair dismissal is well-founded.**
2. **No deduction from any compensation to be awarded is to be made in respect of contributory conduct.**
3. **The Claimant's employment would have been lawfully terminated in any event on 13 March 2018.**
4. **Any compensation awarded shall be the subject of a 20% uplift to reflect the Respondent's non-compliance with the ACAS code of practice.**
5. **All other complaints are dismissed.**
6. **A hearing to determine remedies will take place on a date to be fixed**.

REASONS

1. By his claim to the Tribunal the Claimant, Mr Sullivan, made the following complaints:

1.1 Unlawful deduction from wages.
1.2 Unfair dismissal.
1.3 Discrimination because of something arising from disability contrary to s.15 of the Equality Act 2010.
1.4 Indirect discrimination because of disability contrary to s.19 of the Equality Act.
1.5 Failure to make reasonable adjustments contrary to s.20 and s.21 of the Equality Act

2. The Respondent, Bury Street Capital Limited, by its response disputed all of these complaints.

3. At the conclusion of the hearing, with the consent of the parties, the Tribunal informed the parties of its judgment and, pursuant to rule 62(2) of the Rules of Procedure, reserved its reasons to be given in writing later. This was done because, although the Tribunal had deliberated and reached full conclusions on the issues, there was not sufficient time remaining to deliver the reasons orally. These are the Tribunal's unanimous reserved reasons.

The Issues

4. The issues were the subject of an agreed list, a copy of which has been attached as an annex to these reasons.

5. There was an issue as to whether or not the Claimant was disabled within the meaning of the Equality Act at the material time. The Tribunal will set out the evidence and its conclusions on this issue in a separate section of its reasons and will not cover this aspect in its chronological account of events that follows:

Evidence and Findings of Facts

6. The Tribunal heard evidence from the following witnesses: -

6.1 Dr Jan Wise (whose evidence did not relate to the events in the case but was concerned with the question of disability).

6.2 The Claimant.

6.3 Mr Robert Drake, the Chief Executive Officer/Managing Director and owner of the Respondent (Mr Drake's full name is Robert D'Urban Tyrwhitt-Drake but at all material times including during the course of the hearing he was addressed as Mr Drake).

6.4 Mr Mark Hodgkin, the Respondent's Chief Operating Officer, Chief Financial Officer and Compliance Officer.

6.5 Mr Thomas Isoaho, who was at the material time a salesman.

7 There was an agreed bundle of documents and page numbers in these reasons refer to that bundle.

8 Mr Drake set up the Respondent company in 2005. Its business is that of raising money from "investors" (generally wealth management and institutional investors in Europe and the Middle East) for "clients" who are mainly US based funds or fund managers. The Respondent then receives a percentage of any management and performance fees paid by the investors to the clients.

9 The Respondent is a small concern with something like five or six individuals engaged in it at any given time. Mr Drake is and was at all times in charge of the Respondent and its business. He often consulted Mr Hodgkin, using him as a sounding board for ideas and potential decisions.

10 The Claimant's employment with the Respondent began on 8 September 2008. His contract of employment, at pages 188-200, contained the following relevant provisions:

> 10.1 The Claimant was employed as a Senior Sales Executive.
>
> 10.2 At clause 3 under the heading "hours of work" the contract provided as follows: -
>
> "You shall devote yourself exclusively to the performance of your duties for the company during normal office hours and at all other times necessary for the proper performance of your duties without extra remuneration".

11 At clause 5 under the heading "remuneration and benefits" the contract provided as follows: -

> "5.1 your basic annual salary shall be £80,000 gross…
>
> 5.6 you will receive a bonus of 30% of the net fees received by the company from investments… payment of any such bonus will be made every February and August in respect of the prior six months fees received by the company. On termination of your employment for any reason whether lawful or unlawful or, if earlier the service of notice by either party of termination of your employment, you shall cease to be entitled to any further payments of bonus pursuant to this clause."
>
> Sub paragraph 5 of clause 2.2 of the contract provided for either party to terminate the agreement by giving the other not less than three months' notice in writing.

12 There were a number of purported changes to the contractual terms, each of which was the subject of a document signed by both Mr Drake and the Claimant. These involved a number of changes to the remuneration that the Claimant would be paid, which are not the subject of any issue before the Tribunal. There was, however, an issue as to a purported change to the notice

period under the contract, which was the subject of a signed document dated 27 November 2008 at page 201. This read as follows: -

> "Dear Steve
> Further to our discussion I write to confirm our agreement to change the notice period in your employment contract from three months to one month. This change will affect from today's date. Please sign below to acknowledge this. Yours sincerely, Robert Drake
>
> The Claimant signed and dated this letter on 2 December 2008.

13 The Claimant's case about the change in the notice period was that this was effectively imposed on him and was not effective to vary the contract as there was no consideration for the change. Mr Drake's explanation for the variations in 2008 and 2009 was that in the financial circumstances that prevailed at the time it was essential to reduce costs, without which the business would have closed. He said in paragraph 117 of his witness statement that the variations were agreed with the Claimant. In his oral evidence Mr Hodgkin said that what the Claimant was getting in return for his agreement to the reduced notice period was that he was going to keep his job and that he, Mr Drake, had to do what he could to reduce any contingent liabilities. Mr Drake stated, however, that he did not say in terms to the Claimant "if you don't sign you're likely to lose your job".

14 The Tribunal accepted Mr Drake's evidence about these matters. There was a financial crisis in 2008/2009 and it would have been necessary for the Respondent to reduce costs and liabilities where possible. There was no other reason evident to the Tribunal as to why Mr Drake should have wished to reduce the notice period. The Tribunal also found that, although the matter was not explicitly discussed, the Claimant must have known why the notice period was being changed in this way. The impact of the financial crisis in businesses such as the Respondent was well known at the time and, as we have already observed, there was no other reason why Mr Drake should have been taking this action.

15 It was apparent that, from the early years of the Claimant's employment, there was a degree of tension between him and Mr Drake over the correct approach to the company's business. Mr Drake wanted a way of working whereby all involved observed office hours, made telephone calls in order to obtain business, and documented their activities. The Claimant preferred to follow what Mr Drake regarded as an old fashioned approach of entertaining potential investors with a view to gaining business from them to place with the clients. The Claimant took a more relaxed attitude to any question of office hours, including the time at which he arrived in the morning and the length of the lunch breaks that he took.

16 Nevertheless, although irritated by the Claimant's approach, Mr Drake tolerated this over the years because the Claimant was successful at gaining business and therefore at making money for the Respondent.

17 Some flavour of these matters can be gained from the reviews that Mr Drake undertook from time to time with the Claimant and which he documented. For example, in the July 2011 review (covering the period April to June) at page 274 Mr Drake included the following: -

> "SS [the Claimant] should try to make sure he manages his day to maximum efficiency so as to be on the phone as much as possible during calling time **NB: AGREED SS TO MAKE FIRST CALL EVERY DAY BY 8.45AM! (cut out breakfast meetings, get in to the office earlier!)**

18 In February 2012 Mr Hodgkin mentioned in an email Mr Drake's irritation at what he described as the Claimant's "gentleman's hours". Then in the review carried out on 29 February 2012 at pages 281-282 Mr Drake commented "still coming in late every day even though this was brought up in the review last time". He also stated that the Claimant needed to build up confidence in handling institutional relationships (in contrast to individual wealth managers).

19 Also in 2012 Mr Drake was considering making a substantial change to the Respondent's business by terminating a relationship with a particular client (M) and beginning a new relationship with a potential client (F). It would not have been possible to work with both because of a conflict of interest. Mr Drake conceded that in the event this had not proved to be a good decision and that additionally it had had the effect of reducing the remuneration that the Claimant would otherwise have received. In the review conducted on 7 September 2012 Mr Drake commented that the Claimant's asset raising performance had been very good, particularly with M, but again said that his start time was 8.45am and that start times after 9am were not acceptable. The note recorded the Claimant as accepting this and commenting that this should not be a problem as F would give him much more to do.

20 The Respondent terminated its relationship with M in September 2012. The effect of this was reflected in the review conducted on 6 March 2013. The Claimant accepted that his performance had been poorer over the second six months of 2012 but said that he found the M decision difficult. Mr Drake commented as follows. "Your work ethic has not been up to scratch, although I sympathise re your recent revenue disappointments re M, that is not a reason for lower productivity". Mr Drake also recorded that the Claimant's communication was poor and must improve. He said that the Claimant was to work with institutional investors as well as traditional wealth managers, and in relation to communication said, among other things, that the Claimant should always prepare meeting notes for the benefits of clients and colleagues (page 302).

21 There were further occasions in March and April 2013 when Mr Drake expressed dissatisfaction with the Claimant's failure to do as he was asked, these being made to the Claimant himself and to Mr Hodgkin. These matters led to a formal warning on 11 April 2013 contained in an email at page 507. This referred to the Claimant offering fee discounts to investors before agreeing this with Mr Drake; taking Fridays off without approval; time management during the working day; and failure to keep proper notes of conversations and client contacts.

22 There then arose in about May 2013 a matter that is of considerable importance in these proceedings. In January of that year the Claimant suffered a dislocated and broken shoulder in a skiing accident. His evidence was that this, added to his anxiety over the loss of the M business and Mr Drake's criticism of him and the disciplinary action in the form of the formal warning, caused him to suffer severe stress, anxiety and depression. In May 2013 he began to suffer from what he described in paragraph 53 of his witness statement as "more extreme symptoms of paranoid delusions".

23 It was not entirely clear to the Tribunal that, even as at the date of the hearing, the Claimant actually believed that the matters that he was describing were delusions. His evidence was clear that, until his dismissal in 2017, he believed that the events that he perceived were real.

24 In short, the Claimant had briefly dated a Ukrainian woman for about two months between March and May 2013. After they had parted he became convinced that he was being continually monitored and followed by a gang or group of Russians connected to this woman. In paragraph 55 of his witness statement he said that he had absolutely no doubt in his mind that this was happening and said (contrary to what he had said in paragraph 53 about paranoid delusions) that this was something that he still firmly believes is happening to him today.

25 The Claimant believed that his use of telephones, email and the internet was under surveillance, and that this extended to his own and the Respondent's IT systems. He believed that the gang watched him and followed him in public, and entered his home while he was out, rearranging objects and furniture in small ways that would be detectable by the Claimant only, but which would show that they could enter his home at will. Among other things, the Claimant said that his conviction that these things were happening led him to not put information in his electronic calendar, or to put misleading information, so as to make it more difficult for him to be followed or intercepted when out of the office.

26 These matters first came to Mr Drake's attention on 26 July 2013 when the Claimant returned to work after a short period off sick. On 27 July 2013 Mr Drake sent an email to Mr Hodgkin at pages 525-526 in which he described this conversation. He said that the Claimant was completely fixated with being stalked by Russians and that this was overshadowing everything in his life. Mr Drake said the Claimant was in a bad place psychologically and physically and that he was shaking and sweating. Mr Drake wrote: -

> "He says he was ill the early part of last week brought on by stress to do with this and he did not return my calls/emails because he had turned everything off – actually he did accept an outlook invitation or two from me so I think he just was not of a mind to communicate. He also thinks we may be being bugged at BSC or, if not, we are in danger of being so".
>
> "It is all extremely weird and makes no sense as I don't see why any gang would invest so much time in someone like Steve".

> "The net is that although there are no doubt some grains of truth to what he is saying, to me it all adds up to extreme paranoia".

Mr Drake also recorded that the Claimant was going to speak to the police about the matter.

27 Mr Hodgkin replied saying that this was extraordinary and asking whether there was any rationale for such harassment, for example an ex-girlfriend. Mr Drake replied in turn that the Claimant had said that it was the Ukrainian ex-girlfriend who was part of the gang and then Mr Hodgkin wrote: -

> "Let's see what the police say, I sense paranoia as well but have not knowledge of it or how it evidences itself".

28 Mr Drake's evidence was that he considered that these matters were a figment of the Claimant's imagination. Mr Hodgkin's evidence was that, although he thought it unlikely that these matters were real, he did not entirely rule it out at this time.

29 On 31 July 2013 Mr Drake sent to Mr Hodgkin a draft of the review he was planning for the Claimant. Mr Hodgkin sent an email on 1 August 2013 at page 529 in which he suggested that the reference to "the Russians" might be omitted because "it goes on file and also it suggests paranoia".

30 In relation to the use of the word "paranoia" or the words "extreme paranoia" Mr Hodgkin said in evidence that what he meant was that he thought that the Claimant needed professional help, but that he was not attempting to diagnose a medical condition. When Mr Drake was cross-examined on the point he said that he thought that the Claimant was clearly suffering from some sort of paranoia or mental illness. The Tribunal accepted Mr Hodgkin's and Mr Drake's evidence on this aspect. There was no reason why they should not have taken slightly different views on this unusual situation and it was plausible that Mr Drake might have taken a firmer or clearer view about what was causing the problem as he had more and closer contact with the Claimant than did Mr Hodgkin.

31 Mr Drake conducted a further review with the Claimant on 1 August 2013, the notes of this being at pages 321-324. Mr Drake said that the Claimant had made a reasonable start on his calling exercises but needed to spend more time reading around the institutional market so that he could be more intelligent about the investors, focussed on what he could sell to them, and could feel comfortable talking to them about their needs. In relation to the Claimant's personal situation Mr Drake recorded this: -

> "This business of being intimidated/followed is not good for you or the firm. Your attendance and behaviour at work has been erratic and from what you have told me it has completely overshadowed your home life".
>
> "It is not enough to hope it will go away, you need to give resolving the situation your total priority now and come up with a plan and take action.

> From a work perspective you need to make sure that it is sorted out once and for all by the beginning of September when we will be extremely busy and you will be required to commit yourself 100% to your job without distractions. If it means rearranging/reprioritising your holiday then you will have to do that"
>
> "Please look to us for help in any direction. As I mentioned, please come and stay with us for a few weeks or with another family, preferably outside of London, this will get you out of the epicentre of the issue and put you in a normal family environment (and away from the spooks!) and it will mean you are with other people 24 hours a day. If you don't come and stay with us I suggest you try to find another family set up, preferably also out of London".
>
> "If you need any other form of advice other than the police, for example some form of therapy/psychiatric assessment please let me know".
>
> "Bottom line, my heart goes out to you, it must be a very difficult time for you, but I do expect action not an inactivity/it will go away approach".

The notes recorded that the Claimant said he was taking steps to help resolve the situation via the Metropolitan Police and a private company. This was a reference to enquiries that he was making via a contact in the police and with a private security company, both of which were based on the premise that the Russian gang was a reality.

32 In relation to work ethic and time keeping Mr Drake stated that neither of these was up to scratch and that he expected an improvement. He also said that the Claimant's communication was improving but he still needed to do a better job. He referred to a start time of 8.30am.

33 As from August 2013 Mr Drake caused some of the accounts previously handled by the Claimant to be passed to a colleague. Then in early September 2013 Mr Drake was in New York with a view to meeting a potential new contact and he asked the Claimant to join him. In paragraph 194 of his witness statement Mr Drake said that he saw the Claimant in both New York, and Connecticut and that he looked well and performed well at the meetings. He said that he was "pretty sure" that he asked the Claimant how he was with regard to the Russian gang issue and that he replied he was still having issues but things were improving; that he had stayed with his sister in the USA and that this had definitely helped him. In cross-examination the Claimant said that he did not remember saying that things were improving, although he might have said this. The Tribunal found as a matter of probability that the Claimant did say something to the effect that he was improving. The Tribunal found it likely that the subject would have been mentioned between the Claimant and Mr Drake. We also found that, if the Claimant had not been able to perform effectively at the meetings with the potential new contact, Mr Drake would not have allowed him to take part, as this was a potentially important source of new business.

34 Following Mr Drake's visit to the United States the Respondent engaged in pursuing business with the new contact. At page 547 there was an email exchange of 12 and 14 October 2013 between Mr Hodgkin and Mr Drake. In this Mr Hodgkin said that he had spoken to the Claimant who said, "he loses drive when he gets stale and these new products have reinvigorated him" Mr Hodgkin also suggested that Mr Drake might do better with "same level conversations rather than boss/employee conversations". Mr Drake replied "I need to change my approach in that case!!!!!" He then went on to say that the Claimant had some very good thoughts in relation to the new fund but created a rod for his own back by offering no visibility in terms of what he was doing day to day. He also expressed concern for the long term in that the Claimant was very much a fund sales person and did not have senior contacts.

35 There was another email exchange on 23 January 2014 at pages 556-557 between Mr Hodgkin and Mr Drake. On this occasion Mr Hodgkin commented that the Claimant had been getting in to the office before him every day and was "incredibly garrulous" which Mr Hodgkin regarded as a good thing. He asked whether Mr Drake had said something to him the latter replied that he had not but added "I am guessing the spooks haven't been bothering him and he has made a couple of NY's resolutions about getting in early and going to the gym" and he wondered whether the Claimant had a new girlfriend.

36 When cross-examined about this period the Claimant agreed that he was enthusiastic at this time. He said, "I was ok until there was a disaster" and that "these people", i.e. the Russian gang, had not gone away.

37 On 25 February 2014 the Claimant, on the recommendation of a friend, consulted Dr Hopley about the Russian gang problem. The Claimant's evidence was that at this stage this matter was still having a massive effect on him, but he was starting to cope with it. Dr Hopley's note at pages 212-214 contains an outline of the Claimant's perceptions and his general background. Dr Hopley noted that the Claimant stated that he enjoyed work and had good client relationships, and that he was well presented and groomed.

38 Following this in May 2014 the Claimant began to consult a psychologist, Ms Watson, attending seven sessions between then and September 2014. Ms Watson's notes at pages 215-216 show that at the second session on 15 May the Claimant reported that his sleep had improved and that he was engaging with friends and using the telephone. He was exploring the idea of ignoring supposed sightings of gang members and he expressed anger with the manager at work (namely Mr Drake), who he felt was pushing him around. On 22 May the Claimant reported feeling less anxious with no gang sightings, and on 12 June reported the situation at work had worsened because of a change to his pay structure. There was no reference to the Russian gang on that occasion and two sessions in July were cancelled, or the Claimant did not attend. On 17 July 2014 the notes record that the Claimant's fears regarding the gang had returned. On 24 July the notes reported that the Claimant was feeling better but was planning to leave his job; and finally on 11 September the Claimant still believed he was being followed but was managing to ignore this and stated that he had made a choice regarding work.

39 Mr Drake conducted another review with the Claimant on 17 July 2014, the notes being at pages 341-343. Mr Drake stated that the Claimant needed to spend more time on developing relationships with the larger ticket investors such as global banks and pension funds. Under the heading "punctuality" the notes record the following: -

> "I am unhappy with your timekeeping which continues to be shoddy and I want you to do a better job on this. You are not the only one in the office and it is not helpful from that perspective you consistently going AWOL".
>
> "You also need to respond more promptly to my email requests to you. This should not be difficult given the amount of time you seem to have on your hands".

Then under the heading personal Mr Drake wrote "I am sorry you are still suffering some issues with "the spooks", pleased you are/have sort some professional help on this".

Mr Drake recorded that he was prepared to have a discussion about partnership potential, but before this could even be considered the Claimant would have to demonstrate his attendance and general performance were not going to be as erratic as they had been, and he needed to show an improvement in his communication and accountability. The review concluded as follows: -

> "I expect you to keep your diary up to date, it is not acceptable just to not turn up in the office when no one knows what you are up to. You also need to answer your phone/respond to texts".
>
> "If you need time out for professional help or any other help just let me know".

40 On the same date Mr Drake sent an email to Mr Hodgkin at page 562 in which he said that the Claimant was not happy going from "50 to 30% trail". What this meant was that the Claimant had reverted to payment of 30% bonus or commission as per the original terms of his contract, there having been an upwards variation to 50%. Mr Drake's explanation, which the Tribunal accepted as the reason for this change, was that a high level of commission on existing business could operate to disincentivise the Claimant from finding new business as he would be enjoying a very high income even without doing so. In the email Mr Drake also said, regarding partnership, that the Claimant had to sort himself out personally and take work more seriously.

41 Mr Isoaho joined the Respondent as a consultant in September 2014, becoming a full-time employee in November 2014. He has remained an employee since then. He sat about 8-10 feet away from the Claimant in the office.

42 In paragraph 10 of his witness statement, Mr Isoaho stated that he had "no idea that [the Claimant] had these issues", meaning his belief that he was being

stalked. In cross-examination, Mr Isoaho said that he knew nothing about the Claimant suffering from paranoia, and that he heard no discussion of such matters in the office. His overall impression was that the Claimant was bored with his work and was not happy in his position with the Respondent, but in a way that was not too unusual. He said in paragraph 9 of his witness statement "It never occurred to me that he may have a serious health issue. I have to say that I was completely surprised when I was told that this is what he is saying."

43 Mr Isoaho's evidence that he did not notice any significant change in the Claimant's appearance or behaviour from when he joined the Respondent until the Claimant's dismissal in September 2017, was not challenged.

44 The Tribunal accepted Mr Isoaho's evidence about these matters. He remains employed by the Respondent, but there was no obvious reason to doubt his evidence, and it was not shown to be unreliable in any particular respect. He did not appear to regard the Claimant unfavourably, saying that he was a good and kind man: but he considered that some of the Claimant's impact statement was exaggerated as it did not match what he saw while working with him.

45 There was then a further exchange of emails between Mr Hodgkin and Mr Drake on 14 December 2014 at pages 572-573. Mr Drake, apparently referring to the Claimant's arrival time that day, complained that he had been completely unapologetic as usual. Mr Hodgkin replied that the Claimant had been very successful with good products and the wealth managers, and that the company had benefitted enormously from his success. He said that "his record keeping drives you nuts – with good reason" and went on to make other comments about the Claimant's product knowledge and approach to the business. Mr Hodgkin then made some more general comments about record keeping system and about who might be an appropriate person to engage if the business were to change direction and re-enter "hedge fund territory".

46 Mr Drake replied agreeing with Mr Hodgkin, and commented:

> "Steve is what he is – a savvy but not investment orientated UK wealth management UCITS salesperson. He has done and continues to do a good job in this segment but trying to have him extend his remit beyond that is not going to work".

Mr Drake referred to the question of the apparent adverse effect of the "trail" Mr Drake said that that could not be taken away from the Claimant "meaning that it was in his contract of employment" but it could be made clear to him that he did not have a guaranteed job. He then wrote

> "The list of behavioural issues is very long (natural inability to communicate, paranoia, self-focus)".

47 In preparation for the March 2015 review Mr Drake sent an email to Mr Hodgkin at pages 585-586 on 13 March, setting out a long list of things that he considered that the Claimant should do better. Mr Drake referred to other points in an email of 20 March 2015 to Mr Hodgkin at page 356. Mr Hodgkin replied on

22 March in an email at pages 355-356 in which he observed that the Claimant's behaviour and working methods were deeply irritating to Mr Drake and would be unlikely to be tolerated in any other work place, but that his contribution was something that the company benefited from significantly. He then wrote

> "I do not feel we would really consider firing him for his working so we should not fall into the situation where we are crying wolf all the time in making veiled threats, we have to save them for when the threat is genuine and we feel the firm would be better off without him because of his lack of professionalism etc. I don't think we are there yet so we have to try to mould him in to what we want to both our benefits".

Mr Hodgkin suggested that tasks and any failure to achieve them should be recorded and that Mr Drake could list all the relevant points on the Claimant's review and score them each time so as to provide a record in the case of any worsening of the Respondents stance. Mr Drake agreed that the Respondent did not want to fire the Claimant, but that conversely that he considered that he was not worth the £400,000 plus given how he was operating.

48 There were various versions of the notes of a review meeting held on 1 April 2015, although the Tribunal was not in the event referred to these in the course of the oral evidence. On 9 April 2015 at page 382 Mr Drake sent an email to the Claimant stating that in the July review he had agreed to a salary review at the end of the year, but that

> "In view of your substandard performance on the time keeping, administrative and communication side we have decided not to increase your salary. As regard your asset raising, your commission has increased substantially".

49 On 10 April 2015 at page 602 Mr Drake sent an email to Mr Hodgkin referring to the Claimant's failure to reply to an email from him and to the fact that the Claimant had left early, following which Mr Drake had been unable to find a relevant call sheet on the system.

Mr Hodgkin replied:

> "Either he has a mental problem we need to discuss with him and help him with or he is being obstinate in which case we need to part company."

50 On 17 April 2015 in an email at page 610 Mr Drake commented to Mr Hodgkin that the company would probably have to take the Claimant out of the institutional and FO business as he did not have the investment knowledge to do the job.

51 Another review took place on 1 May 2015 with notes at pages 419-421. The Claimant recorded his job satisfaction at 4 out of 10. Mr Drake recorded his performance in terms of the basic requirements for punctuality, record keeping, general administration, communication, etc at 2 out of 10. He recorded the

Claimant's performance at 6 of out 10, indicating 8 out of 10 for wealth management and 4 out of 10 for other areas.

52 With regard to basic requirements (BR) Mr Drake recorded the following: "… RD made it clear to SS that his BR performance has been in contravention of BSC requirement and past review follow up requirements and cannot continue and if it does he will have no option but to dismiss him. SS acknowledged his BR performance was unacceptable and committed to put this behind him." The note continued that there were discussions about the BR requirements and that the Claimant agreed that he would improve all areas of communication with the team. It was recorded that Mr Drake would work with the Claimant on the UK sector going forward and that, although it was accepted that the Claimant was doing a good job at "ground floor level" with wealth managers, it was crucial to the company's business that there should be senior contact with many of the wealth managers. To this end, that the Claimant and Mr Drake should work as a team.

53 With regard to compensation, the Claimant said that he would like to have partnership equity in the company and Mr Drake stated that as matters currently stood this was out of the question. It might however be given consideration in the future. The note recorded "next discussion on this to be at the beginning of 2016 but SS to understand a dramatic and permanent shift in his behaviour will be required". There was to be no salary increase at this stage given the position about the basic requirements.

54 Further to this, also on 1 May 2015, Mr Drake sent an email to Mr Hodgkin in which he recorded that the Claimant had signed the review and had asked him whether the company wanted him to stay and "I said yes, provided he delivers on the basic requirements. I said I am very excited about the UK opportunity with him and think he and I can do a v good double act in the UK as we come at it from different angles. I also said longer term we will probably have to introduce a discretionary element to how he gets paid given my involvement in the UK".

55 On 12 June 2015 the Claimant replied to an email of the previous day from Mr Drake on the subject of not completing meeting notes with an explanation about that matter and then a wider complaint that he was being left out of the institutional work. The Claimant concluded:

> "You mentioned the other day in passing that you wanted to add a discretionary element to my compensation structure; we discussed my compensation structure at my recent review meeting and we agreed it will remain the same, unless there is a partnership opportunity. I have not agreed to any changes to my compensation and I expect to be compensated as per the terms of my contract".

56 Mr Drake conducted a review with the Claimant on 8 September 2015. This recorded that the Claimant had "raised his game" considerably since the previous review and stated: "improvements in all areas were highlighted and I feel optimistic that you will maintain your performance".

57 Moving to 2016, on 14 January Mr Drake sent a letter to the Claimant, with an invitation to sign it, recording that his holiday allowance would be increased from 25 to 30 days per annum, subject to two conditions. One of these was that if he was absent from the office without a corresponding business appointment entry in the diary his absence would be deemed to be holiday. This was specifically to include going out to lunch and not returning, or not coming in to work before a late morning appointment, in which case it would be assumed that these were half-day holidays.

58 There was a further review on 15 January 2016 in which Mr Drake recorded that the improvement in the Claimant's performance and attitude had continued. He also recorded an increase in salary to £90,000 per annum and he referred to the increased amount of holiday.

59 On 21 July 2016 there was another review, at which Mr Drake wrote:

> "Overall, I am very encouraged with your performance in the past six months, bearing in mind where you were only twelve months ago, you have raised the level of your game and kept it at the higher level. Well done!"

Mr Drake nonetheless commented on the Claimant's "time keeping and elusiveness" still being an issue from time to time and said that, although he was doing a much better job maintaining Salesforce (a record keeping system) than previously, there was still scope for improvement.

60 However, in September 2016 Mr Drake again complained to Mr Hodgkin about the Claimant's absence from the office, saying in an email of 29 September that twice that week the Claimant had failed to return to work after lunch. On 30 September Mr Drake in an email to Mr Hodgkin at page 651 described the Claimant's attitude to a particular business opportunity as "pathetic, he needs to call people and sell the investment concept". He was then critical of the Claimant's ability to sell and said that he did not know anything about investment.

61 On 28 October 2016 at page 655 Mr Drake sent an email to the Claimant complaining about his failure to make entries on Salesforce and asking Mr Isoaho to give the Claimant another training session on this. He asserted that the Claimant must use Salesforce and that "this cannot continue". Nonetheless, in a review conducted on 17 January 2017 noted at pages 464-465, Mr Drake did not record any particular problems with the Claimant's performance.

62 Then on 6 April 2017 a page 663 Mr Drake sent an email to Mr Hodgkin expressing concerns about the Claimant failing to make calls, working short hours, not updating things, making calls he was not qualified to and not being a team player and he expressed the view that the Claimant was lazy and not competent beyond "basic fund flogging".

63 On 17 July 2017 Mr Drake sent to Mr Hodgkin at pages 671-672 a draft of the Claimant's next review. To this Mr Drake added by way of comments to Mr Hodgkin, not to be put in the review, the following:

> "Steve's time keeping is again bad and he is not taking holiday when I want him to i.e. during the quiet periods. I don't want this to distract from the main part of the discussion so maybe leave any comments off the review?"
>
> "The other major issue compensation wise is that Steve has no incentive to raise seed capital which is the hardest thing. An easy way to address it is to say to him he could be in line for a discretionary bonus if he raises seed capital although he is already way over paid (I'd say a way he'd be on £150,000 max salary and receive a £50/75,000 bonus what do you think?"

It was clear to the Tribunal that at this stage Mr Drake was firmly of the view that the Claimant was being overpaid for what he was doing. The Tribunal noted that Mr Hodgkin replied that he did not consider that the Claimant was overpaid, although he thought he was probably earning "top end".

64 On 18 July Mr Drake again sent an email to Mr Hodgkin on the subject of the Claimant and the review meeting. He said that it was difficult for him as the Claimant said so little, but also commented that the Claimant had split up with his girlfriend the previous week, a point which the Tribunal mentions because it indicates that there was some discussion of personal matters as between Mr Drake and the Claimant.

65 The review meeting took place on 19 July 2017 (although the note of it at page 691-693 suggests that this was 6 July). The Claimant was recorded as stating that the idea of he and Mr Drake working on accounts together had not worked and it was agreed that they would have weekly meetings to discuss this. In terms of compensation Mr Drake stated that the traditional wealth management approach was one of commission, but that in other areas such as UK institutional investors, the compensation would be discretionary based on his assessment of the Claimant's contribution. He then wrote this:

> "I will particularly be looking to compensate you for involving me where you believe this will help BSC win more business with those investors. Should I consider you are doing the opposite I will be reducing your discretionary bonus as I will consider this against the interests of the firm.

66 Further emails passed between Mr Drake and Mr Hodgkin on 27-28 July 2017 at pages 699-792. Mr Drake said that the Claimant's review was rumbling on and referred to the position about commission and discretionary payments. He said that the Claimant had not turned up until after 11am on the Tuesday of that week and had given no reason for this. He wrote "long term these are major issues for BSC as we can't have a coaster who is way over paid nor can we have someone who under shorts for us on the most important accounts. Later on, 27 July, Mr Drake said that he was in the middle of discussions with the Claimant who was saying the goal posts were being moved in terms of his contract and

commission. Mr Drake wrote "he's saying he's having sleepless nights, can't go on may have to leave etc".

67 Later on the same day Mr Drake wrote to Mr Hodgkin that the Claimant was leaving for the Channel Islands and had failed to note this properly on his calendar and he observed "team player, not" followed by a series of exclamation marks. Then he wrote:

> "FYI, I didn't have yet another go at him about eg his appalling time keeping as I was very much in PR mode, ie Steve you would be crazy to leave etc. On the other hand I have not changed our position at all re the comm vs discretionary investors".

Mr Drake then said that he would tell the Claimant that his time keeping would be unacceptable elsewhere, as would his non-communication of movements. Mr Hodgkin replied, "please do so interesting to know why his time keeping is so bad, he is paid a salary and his contract says he need to be there".

68 Then on 10 August 2017 Mr Hodgkin sent an email to Mr Drake at pages 705-706 in which he said that he had been through the review with the Claimant and that he did not have much disagreement with the content. Mr Hodgkin then added a number of points which included that he observed that the Claimant appeared very bloated, and that the Claimant said he was sleeping badly because of these review discussions. Mr Hodgkin said that he brought up time keeping and communication issues, saying that these would not be tolerated anywhere else. Mr Hodgkin asked specifically why the Claimant had not arrived until 10am that morning, to which the Claimant replied something about meeting a salesman, Mr Hodgkin said that he asked whether the Claimant had difficulty getting up in the morning and he said he did not.

69 There was a further email from Mr Drake to Mr Hodgkin on 29 August 2017 at page 712. Mr Drake expressed the view that the way forward was to redesign the Claimant's compensation as discussed, with a split between commission and discretionary payments and then he wrote:

> "So, we won't part ways with Steve for now, unless he won't agree to the above. Longer term I don't see him as being part of the new post UCITS BSC, added to which I am not at all satisfied with the job he does now with the global banks – other super large investors… consequently, we need to have either me or a more capable institutional marketer/junior fully focussing on them. I suggest this is a Q1/2 plan and Steve can either stay with us as UK UCITS marketer or leave, frankly I would prefer the latter as he can't change his ways and is way over paid and holding us back in places".

70 Mr Hodgkin sent Mr Drake an email at page 714 on 5 September 2017 in which he said, among other things not related to the Claimant, that the latter had got in shortly after 9am and looked terrible. On the same date at page 716 Mr Drake sent an email to Mr Hodgkin in which he said that the Claimant was never going to be a good solution outside of tier two or three wealth management and

would never toe the line in terms of punctuality, which he said had a bad effect on the rest of the office, and that he would never be happy with just tier two and three coverage. Mr Drake wrote:

> "So, my conclusion is when he goes not whether as I say, he can stay on the terms I gave him last week or go".

He then asked Mr Hodgkin what was his assessment of the downside if they were to just "part company today".

71 Although the precise sequence of emails was not easy to follow it seems that Mr Hodgkin replied on the same date at page 724 in which he wrote:

> "Re down side my concern is that however much he is an irritant, he has been a good problem to have in terms of his capital raising. Without him I doubt we would be here".
>
> "My recommendation is that we do try to keep him in the medium term, keep him focused on his WM clients get someone good for institutional business then reassess".

Mr Drake wrote a later email on the same day at page 723 in which he expressed further views about the payment of commission and discretionary amounts and then wrote:

> "The issue we both know is we are dealing with a paranoid person any other person would just say fine."
>
> "Also, he can't turn up on time or communicate".

72 Mr Drake and the Claimant met to discuss the latest review on 5 September 2017. Mr Drake's evidence in paragraph 273 of his witness statement was that he told the Claimant that the options were that he could continue to be compensated in respect of wealth management investors on his existing basis and institutional non wealth investments on a discretionary basis, or he would only be employed to cover UK wealth management investors. He said that the Claimant refused to say anything and that following this on the same day Mr Drake prepared a draft review and suggested that the Claimant should stay at home until he signed it, as it was becoming unproductive for all having him in the office. The Tribunal accepted this evidence about the meeting, finding that the Claimant did not wish either of these situations to prevail, nor did he wish to lose his job. It was plausible in the circumstances that he would not say much or anything in the meeting.

73 On 6 September 2017 also at page 727 the Claimant sent an email to Mr Drake saying that he was not feeling well and would get back to him "once I have spoken to someone".

74 There followed on 6 September a further email exchange between Mr Drake and Mr Hodgkin, at pages 728-729. This began with Mr Drake writing: "My

view is that Steve needs to go. He's never going to change his ways and the market's moved on beyond his capabilities." He then stated that the possibilities were that the Claimant could accept the offer made to him (which Mr Drake thought unlikely and would only postpone the inevitable) or that his employment should be terminated. He ended his email by wondering how much it would cost if the Claimant's employment were to be terminated.

75 Mr Hodgkin replied, saying that the last point was the one that concerned him most. He stated that, despite his faults, the Claimant had been and continued to be an asset. He then said that the Claimant's wayward hours, non-communication of his whereabouts, and record keeping, clearly outweighed his contribution in Mr Drake's view, and that therefore he (Mr Hodgkin) accepted that they would part company in due course. He suggested taking legal advice about a strategy to adopt.

76 In his reply, Mr Drake wrote: "The more I think about the more I think we may have gone past the point of no return with Steve. How can we expect to go back to a normal situation with an employee when he tells us he's taking advice on his position"; but then he concluded: "If Steve comes back and says that he wants to sign the rebate letter we can always consider not going ahead for now."

77 Moving to 7 September 2017, the Claimant sent an email at 8:18am at page 737 to Mr Drake and Mr Hodgkin saying that he would be working from home again as he was still not feeling great about the situation. Mr Drake sent the following email at 12:48 on the same day:

> "I have discussed this with Mark and we don't think you are currently in the right frame of mind to be dealing with investors or clients at the moment. I would therefore ask you to please refrain from doing so for now. Anything that needs to be done urgently please let me know and I will take care of it.
>
> I think it is also best that you only contact me or Mark if you need to discuss anything …
>
> Obviously, this situation cannot carry on indefinitely we really need to sort it out so please come and see me and Mark in the office tomorrow at 3pm and we will discuss".

78 The Tribunal found that, as Mr Drake stated in his evidence, he had by this time "pretty well decided" to dismiss the Claimant. This, we found however, was not an absolutely final decision as the Claimant might have elected to agree to the proposed varied terms of payment or to revert to working on UK wealth management only as proposed. In that case, the probability was that his employment would have continued for the time being.

79 Then at 13:09, still on 7 September 2017, the Claimant sent an email to Mr Drake, copied to Mr Hodgkin, saying that he had seen the doctor that morning and had been told he should stay out of the office for the next four weeks, and that he would be sending a doctor's note. Mr Drake response to Mr Hodgkin was

to say in an email "I don't see why he can't come in to discuss as requested he isn't contagious or bed bound".

80 The Tribunal found that the news that the Claimant would be staying out of the office for the next four weeks was what caused Mr Drake to decide that his employment would be terminated at that stage. In this connection, the Tribunal noted that at page 738 there was an email at 15:35 on 7 September in which Mr Drake asked the Respondent's IT provider to cancel the Claimant's web access ability immediately so that he could not access the server remotely and so as to give Mr Drake access to his emails. He wrote:

> "We most probably will be serving notice on him tomorrow afternoon at which point we will then ask you to cancel his email account as well"

The Tribunal found this to be the best guide as to when it was that Mr Drake decided that the Claimant's employment was to be terminated.

81 Mr Drake then sent a further email to the Claimant at 16:55 on 7 September at page 739. He asked the Claimant to confirm the assumption that the doctor's note would state that his absence was for a stress related reason. He referred to the discussions that had been taking place and then wrote the following:

> "I feel it's only fair to let you know that if you don't meet with us tomorrow I will still discuss your situation with Mark and we will come to a decision about your future. Obviously, it would be much better if you are there so we can see if we can work on a way forward. You should also note that one of the options we will discuss tomorrow is, given the situation and in particular your attitude/skill set and the future direction of the business, whether the best thing to do is go our separate ways and for us to give you notice of the termination of your employment".

82 The Claimant's evidence was confusing about whether he knew that it was intended that this meeting would take place on 8 September 2017. In his witness statement he accepted receiving the email at page 737, which referred to the meeting at 3pm, but denied receiving that at page 739, saying in paragraph 197 that the next communication he received was the letter of 12 September. In cross-examination the Claimant said that at this point the meeting was not at the forefront of his mind, and that "it seemed to me I had been signed off and did not need to go to the meeting."

83 Mr Hodgkin's evidence was that on 8 September 2017 he went to the proposed venue for the meeting and waited for about half an hour. He made no further attempt to contact the Claimant.

84 It was not necessary for the Tribunal to reach detailed conclusions about these matters in order to decide the issues before us. We found that the important points were that the Claimant was signed off sick; that he did not attend the meeting; and that there was no further attempt by the Respondent to contact him, to find out how he was, or to re-arrange the meeting.

85 The Claimant did not, then, attend for a meeting on 8 September or respond to Mr Drake's email of 7 September. At 16:55 on 8 September 2017 Mr Drake sent an email to the Claimant at page 205 giving him three months' notice of termination of his employment. By way of explanation he said the following.

> "We have come to the conclusion that the problems with your employment (as discussed previously in a number of meetings with you) cannot be resolved. There are two factors that have led to this conclusion. Firstly, we do not think that you have or are capable of requiring the required skill set to fulfil your role in the business. As you know, the business has significantly changed and we have tried to help you transition but this has not been a success, we have therefore come to the conclusion that you are not capable of fulfilling this role.
>
> The second part is your attitude – you need to be willing to change and put in the hard work required to acquire new skills and to change your behaviour you have shown no appetite to do this and in addition your behaviour at work has not improved (time keeping, lack of communication. Unauthorised absences, lack of record keeping etc). I know that Mark has warned you recently that your behaviour would simply not be tolerated in any other business and that you would have been dismissed if you worked elsewhere. It was an attempt by Mark to encourage you to change and to demonstrate to you the seriousness of the situation – but his attempt was not successful"

86 This email was sent to the Claimant work account, and so could not have been read by him as his access to that had been cut off. Then on 12 September 2017 Mr Hodgkin sent a letter at page 207-208 essentially repeating the same information.

87 Finally, on 20 September 2017 Mr Hodgkin sent a further letter to the Claimant at page 210 stating that the Respondent had taken advice about the statutory minimum notice period, and that consequently his last day of employment would be 10 November 2017, reflecting 9 weeks' notice.

<u>The applicable law and conclusions</u>

88 The Tribunal first considered the issue as to disability, the relevant period being August 2013 to the date of the decision to terminate the Claimant's employment, 8 September 2017.

89 Section 6 of the Equality Act provides that:

> *(1) A person (P) has a disability if -*
> *(a) P has a physical or mental impairment, and*
> *(b) The impairment has a substantial and long-term effect on P's ability to carry out normal day-to-day activities.*

90 Section 212(2) of the Equality Act provides that an effect is substantial if it is more than minor or trivial.

91 Paragraph 2 of Schedule 1 to the Equality Act provides as follows:

> *(1) The effect of an impairment is long-term if –*
> *(a) It has lasted for at least 12 months,*
> *(b) It is likely to last for at least 12 months, or*
> *(c) It is likely to last for the rest of the life of the person affected.*
>
> *(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.*

92 In **SCA Packaging Limited v Boyle** **[2009] IRLR 1056** the Supreme Court held that, in these provisions, "likely" means something that could well occur, as opposed to something that is more likely than not to happen.

93 Dr Wise examined the Claimant on 11 September 2018 and produced a report dated 29 September 2018. In the section headed "Opinion" at page 1208, Dr Wise gave a possible diagnosis of a persistent delusional disorder, stating that other diagnoses might be reasonable, and that the particular diagnostic category would not alter the effect on normal day-to-day activities. On page 1209 Dr Wise stated that, for clinical purposes, the condition was present continuously, as a mood disorder would need to be in remission for 6 months for it to be regarded as a new episode rather than an existing one. Dr Wise also stated that, in his opinion, there was an impairment within the meaning of the Equality Act, and that the Claimant suffered from this during the whole of the period in question. He also expressed the opinion that there was a substantial adverse effect on the Claimant's ability to carry out normal day to day activities, again throughout the whole of the relevant period.

94 Dr Wise also stated, with reference to tests specifically directed to exaggeration or faking, that the indications of these were very low.

95 The Claimant's impact statement at pages 1171 to 1188 described adverse effects on the day-to-day activities of sleeping and engaging in social interaction. He presented these as applying from May 2013 onwards, with some help being derived from the sessions with Ms Watson in 2014. He stated that he remained, however, anxious about the Russian gang and Mr Drake's intentions towards him, and that things took a substantial turn for the worse in April 2017 with the discussion of altered terms as to remuneration.

96 The Tribunal reminded itself that the issues as to impairment, and effect on day-to-day activities are not matters for decision by medical experts, but by the Tribunal. They are to be distinguished from purely diagnostic or clinical conclusions.

97 The Tribunal found that, as from around May 2013, there was a substantial adverse effect on the Claimant's ability to carry out normal day to day activities of

sleeping and social interaction. By 27 July 2013 Mr Drake had recorded that the Claimant's belief about the Russian gang was having a significant effect on him, and on 1 August 2013 Mr Drake linked poor attendance and erratic behavior on the Claimant's part to this. The fact that Mr Drake observed these effects assisted the Tribunal in deciding that they were present at the time.

98 The Tribunal concluded, however, that the substantial effect on the Claimant's ability to carry out normal day-to-day activities did not, at this stage, continue beyond September 2013. We did so for the following reasons:

98.1 If there had been such an effect, Mr Drake would have observed it and probably would not have allowed the Claimant to take part in the important meetings in New York in September 2013. Mr Drake had not forgotten about, nor was he ignoring, the Claimant's problem: as we have found, there was some discussion of this, and the Claimant probably said that things were improving.

98.2 On all accounts, the Claimant appeared re-invigorated by October 2013.

98.3 The Claimant conceded a number of important points in cross-examination. Although commenting that Mr Drake had not specifically asked him, the Claimant agreed that he had not told him that his security concerns were causing him to avoid giving information about his appointments or whereabouts, or to avoid keeping a diary. He agreed that he did not discuss with Mr Drake the effect of his condition on the day-to-day activities described in paragraph 33 of his impact statement (at page 1179), and agreed that he did not speak to Mr Hodgkin about being followed. Contrary to what he said about neglecting personal hygiene, he accepted that he in fact showered every morning.

98.4 In their email exchanges, Mr Drake and Mr Hodgkin commented freely about the Claimant: between September 2013 and 27 July 2017, when Mr Drake commented on the Claimant complaining of sleepless nights, they did not mention anything which could be understood as referring to a substantial adverse effect on the ability to carry out normal day-to-day activities. The Tribunal found it likely that they would have commented had they observed such an effect; and that they would have observed it had it been present.

98.5 From September 2014 onwards, Mr Isoaho did not notice anything about the Claimant that indicated a substantial adverse effect on the ability to carry out normal day-to-day activities. The Tribunal would have expected him to have noticed such an effect had it been there to be observed, given that he was working in close proximity to the Claimant.

98.6 Although Dr Wise stated that he had no reason to disbelieve the Claimant's account, he also said in cross-examination that he could not be sure about the impact of the Claimant's condition.

98.7 It was important, in the Tribunal's judgment, to distinguish between the Claimant's continuing belief in the Russian gang, and the effect that such a belief had on his ability to carry out normal day-to-day activities. The Tribunal accepted that the Claimant's delusional beliefs persisted throughout the material period: but the evidence did not show that a substantial adverse effect on his ability to carry out normal day-to-day activities also persisted.

99 The Tribunal found that there was again a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities from at the latest July 2017 (as evidenced by Mr Drake's draft review of 17 July 2017) or, at the earliest, around April 2017 (as evidenced by Mr Drake's email to Mr Hodgkin of 6 April 2017). Both of these made reference to a deterioration in the Claimant's time keeping and performance, and reflect in the Tribunal's judgment a deterioration in his mental condition.

100 It does not matter for the purposes of determining the issues in the case which of these was the date at which this deterioration took effect, or whether it was even a little earlier than April 2017: because the Claimant's employment came to an end on 8 September 2017, at which point that substantial effect was continuing.

101 The Tribunal found that, during this period, it was not likely that the substantial adverse effect would continue for at least 12 months. In 2013 the substantial adverse effect had lasted for around 4-5 months, as the Tribunal has found. During this period in 2017, the Claimant was under particular stress by reason of the discussions about the basis of his remuneration. These were not going to continue indefinitely, and it was likely that his condition would improve once they were resolved. The Tribunal concluded that, so far as this episode in 2017 is concerned, it was likely that the substantial adverse effect would continue, like that of 2013, for a number of months, but for rather less than 12 months.

102 For substantially the same reasons, and having regard to paragraph 2(2) of Schedule 1 to the Equality Act, the Tribunal found that the relevant effect was not (either in 2013 or 2017) likely to recur within the meaning of that provision.

103 The Tribunal's conclusions on this aspect lead to the finding that the Claimant was not, during his employment, disabled within the meaning of the statutory definition. The substantial adverse effect on his ability to carry out normal day to day activities continued for about 4-5 months in 2013: did not then apply for over 3.5 years: and then occurred again for something up to 5 months in 2017. In neither case was it likely that the substantial adverse effect would continue for 12 months or more.

104 The Tribunal's finding that the Claimant was not disabled at the material time means that the complaints under the Equality Act are unsuccessful.

105 Should the Tribunal be wrong in its conclusion about disability, such that the Claimant was disabled within the statutory definition during his employment or any part of it, the findings made above would lead the Tribunal to conclude that

the Respondent did not have knowledge (including what it could reasonably have been expected to know) of that disability. The Tribunal refers here in particular to its findings about what Mr Drake and Mr Isaoho observed, and about what the Claimant accepted in cross-examination. That finding would additionally be fatal to the complaints of discrimination arising from disability and failure to make reasonable adjustments.

106 Given its decision on these issues, the Tribunal did not consider it necessary or proportionate to make findings on the individual allegations of discrimination and failure to make reasonable adjustments. Doing so would have involved the Tribunal's deliberations going part-heard for a considerable period of time and a consequential greater delay in the promulgation of its reasons.

107 The complaints under the Equality Act therefore fail.

108 The Tribunal then turned to the complaint of unfair dismissal. The Respondent conceded that the dismissal was "procedurally unfair". Although this concession means that the complaint of unfair dismissal must succeed, it leaves substantial issues to be resolved by the Tribunal.

109 The first of these is as to the Respondent's reason for dismissing the Claimant. Section 98 of the Employment Rights Act provides as follows:

> *(1) In determining….whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
> - *(a) The reason (or, if more than one, the principal reason) for the dismissal, and*
> - *(b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

110 The potentially fair reasons listed in subsection (2) include a reason related to the capability or qualifications of the employee, and a reason related to the conduct of the employee.

111 The Tribunal noted the guidance given by the Employment Appeal Tribunal in **UPS Limited v Harrison UKEAT/0605/12**. The Tribunal should first make factual findings as to the employer's reason or reasons for the dismissal, and then consider how those reasons are best characterized.

112 The Tribunal has already expressed its finding that the immediate cause of Mr Drake's decision to dismiss the Claimant was the news that he would be absent from the office for four weeks. We found that this amounted to the final straw. In particular, we found that what Mr Drake said about the Claimant not being contagious or bed-bound indicated a degree of suspicion about how ill he really was. It was the Claimant's sickness absence that pushed Mr Drake into deciding that he should be dismissed at that point. This was not, however, the totality of the reason or reasons for the decision. The Tribunal found that the following were also factors in Mr Drake's decision:

112.1 His belief that the Claimant would not sign the proposed new remuneration terms.

112.2 The fact that the Claimant was stated to be taking advice on his position, which Mr Drake regarded as something that would prevent a return to normal relations.

112.3 Mr Drake's continuing discontent with the Claimant's failure to adhere to the BRs (basic requirements) that he sought.

113 The Tribunal found that the factual reasons for the dismissal were all of these together. This set of reasons could not, taken overall, be regarded as falling within either of the types of potentially fair reasons (capability or conduct) relied on by the Respondent. The failure to adhere to the BRs could be so regarded, but the Tribunal found that this was only a relatively minor consideration at the time.

114 The Tribunal also found that this set of reasons did not amount to some other substantial reason of a kind such as to justify the Claimant's dismissal. Being signed off sick for 4 weeks would not justify dismissal. Mr Drake's belief that the Claimant would not sign up to the new terms would not justify dismissing him, at least not until that belief had been put to the test. The Claimant taking advice on his position would not be a reason that would justify dismissing him: there were significant negotiations on foot about his remuneration and there was prospect that he and the Respondent would be parting company. It would not be at all unusual for an employee to take advice in such circumstances.

115 The Tribunal therefore found that the complaint of unfair dismissal was well-founded, on the basis that the Respondent has failed to show that the reason, or principal reason, for the dismissal was one that fell within the requirements of section 98(1).

116 The Respondent further relied on the principle in **Polkey**, arguing that a different procedure would have led to the same result, and on contributory conduct.

117 The conclusions that the Tribunal has already expressed in relation to the reasons for the dismissal led it to conclude that there should be no deduction for contributory conduct. The only element of Mr Drake's reasons for dismissing the Claimant that could amount to blameworthy conduct was the failure to adhere to the BRs, and we have found that this was a minor, background aspect of the decision. Sections 122(2) and 123(6) of the Employment Rights Act both refer to the Tribunal making such reduction on account of conduct as it considers just and equitable: we did not consider that it would be just and equitable to make a reduction on account of this element.

118 The Tribunal then considered what would have occurred if a reasonable procedure had been followed. In the first instance, had the Respondent acted reasonably, the meeting set for 8 September 2017 would not have taken place

until the Claimant had returned to work from sickness absence, after 4 weeks or perhaps longer.

119 What then would have happened is not easy to determine, but the Tribunal reached the following conclusions:

119.1 There was a small chance that the Claimant would have agreed to the proposed new terms, although this was very unlikely.

119.2 It was more likely that the Claimant would have stated that he wished to continue working in the wealth management sector only and that the Respondent would have accepted this for a limited period. It would not have been in the Claimant's financial interests to resign. As to the Respondent's likely reaction to this, Mr Hodgkin had suggested that the Claimant should continue in this role in the medium term and, acting reasonably, the Respondent would not have dismissed him in the short term for refusing to make the transition to the new remuneration scheme.

119.3 Again assuming that the Respondent acted reasonably, the Claimant's failings in terms of the BRs would not have led to his dismissal in the first instance. However, Mr Drake would not have tolerated this indefinitely and would have been acting reasonably in imposing warnings (as suggested by Mr Hodgkin) and ultimately in dismissing the Claimant if (as the Tribunal found probable) he proved unable to comply with the BRs in the longer term.

120 The Tribunal concluded that, rather than adopting a percentage formula to express the various uncertainties, these would be fairly reflected by a finding that the Claimant's employment would have ended around 6 months after the actual date of termination. We therefore found that, under the principle in **Polkey**, the Claimant's employment would have ended on 13 March 2018, and that any award of compensation for unfair dismissal should reflect this. The Tribunal emphasises that this finding is intended to reflect all the possibilities and uncertainties, rather than meaning that there was a particular likely event on that date.

121 There was then the issue as to the impact of the ACAS Code of Practice. The Tribunal found that there was a failure to comply with paragraphs 9 (informing the employee of the problem); 12 (holding a meeting, in the sense that the Claimant was not given a reasonable opportunity to attend since he was signed off sick, and no attempt was made to contact him or re-arrange the meeting); 13 (right to be accompanied); and 26 (opportunity to appeal).

122 The Tribunal considered that these were serious breaches, which rendered the dismissal process seriously unfair. We concluded that the appropriate uplift in compensation to reflect this was 20%.

123 The remaining complaints were of unlawful deduction from wages contrary to section 13 of the Employment Rights Act. The complaints related to:

123.1 A shortfall in the Claimant's notice pay, in that he contends that he was entitled to 3 months' notice but was only paid for 9 weeks.

123.2 Bonus payments for the period from 1 July 2017 to 8 December 2017, comprising the period up to 8 September 2017 when he was given notice, the period from then until 10 November 2017 when the notice given expired, and the additional period of 28 days to 8 December 2017 referred to above.

124 Mr Lee relied on **Delaney v Staples [1992] ICR 483** where Lord Browne-Wilkinson stated that claims for pay in lieu of notice in respect of termination of the contract could not be brought under the wages legislation, in contrast with claims for wages in respect of time actually worked or spent on garden leave. Mr Bacon did not point to anything to contradict this. Although Mr Bacon referred to a complaint of "breach of contract / deduction from wages" in paragraph 1.1 of his written closing submissions, there was in fact no complaint of breach of contract made in the claim form and no application to amend with a view to raising one. The Tribunal found that the complaint in respect of notice pay failed under the principle in **Delaney v Staples**.

125 So far as the complaint about bonus payments is concerned, Mr Lee accepted that, if anything was due before or during the notice period, this could be recovered as a deduction from wages. He relied on clause 5.2 of the contract of employment, which we have quoted above, but the material part of which read as follows:

"Payments of any such bonus will be made every February and August in respect of the prior six months fees received by the Company. On termination of your employment for any reason whether lawful or unlawful or, if earlier, the service of notice by either party of termination of your employment, you shall cease to be entitled to any further payments of bonus pursuant to this clause."

126 Mr Lee contended that the Claimant had been paid bonus in the ordinary way in August 2017 (which was the case) and that no further payment fell to be made. Mr Bacon relied on clause 2.4 of the contract, which provided in part:

"Your salary and other benefits will remain payable in the normal course during any such period [i.e. notice period]……..

127 The Tribunal concluded that the general terms of clause 2.4 should be read subject to the specific provision of clause 5.2 about the payment of any bonus. "Salary and other benefits" would include elements beyond any bonus: had clause 5.4 not existed then there would be no reason to read it as not including any bonus. Clause 5.2, however, makes a specific exception for bonus payments, and the Tribunal found that it prevailed over clause 2.4.

128 The complaints of unlawful deduction from wages therefore failed. It was not therefore necessary for the Tribunal to decide the issue about variation of the notice period. Had it been necessary to do so, we would have found that there was consideration for the variation, in that the Claimant knew that his job was at

risk if he did not agree to the variation. The consideration for agreeing to the variation therefore lay in protecting his continued employment.

129 The complaint of unfair dismissal is therefore the single successful complaint. The parties may be able to agree on remedy: if not, they should write jointly to the Tribunal with dates to avoid, a time estimate, and any proposed case management orders.

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Employment Judge Glennie

Dated: ……3 May 2019……..……………………..

Judgment and Reasons sent to the parties on:

……14 May 2019..

………...

For the Tribunal Office