EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr A G Bailie		(1) ADM Investor Services International Limited (2) Mr F Somerville-Cotton

Heard at: London Central Employment Tribunal

On: 30, 31 October, 1, 4, 5, 6 and 18 November 2019

Before: Employment Judge T Adkin
Mr G W Bishop

Representations

For the Claimant : Mr C Milsom (Counsel)
For the Respondent: Mr T Kibling (Counsel)

JUDGMENT

The judgment of the Tribunal is that the First and Second Respondents did:

(a) Directly discriminate against the Claimant because he was disabled contrary to section 13 of the Equality Act 2010 ("EqA");
(b) Unfavourably treat the Claimant because of something arising in consequence of his disability contrary to section 15 EqA.

The following claims are not well founded and are dismissed by the Tribunal

(a) Indirect discrimination under section 19 EqA;
(b) Failure to make reasonable adjustments under section 20-21 EqA;
(c) Harassment relating to disability under section 26;
(d) Victimisation under section 27.

REASONS

1. By a claim presented on 21 December 2018 the Claimant Mr Glover Bailie presented various claims of disability discrimination. The Claimant was and remained at the time of the hearing Head of Global Equities and Fixed Income in the First Respondent, although he has been absent on sick leave since 18 July 2018. The Second Respondent is the Managing Director and the Claimant's line manager.

The Issues

2. The parties agreed a list of issues relating to liability as follows:

Disability and Knowledge

1. Was the Claimant from January 2018 or at any later time disabled by reason of clinical depression and associated symptoms?
2. When did the First and Second Respondents have actual or, insofar as material, constructive knowledge of the disability?

Indirect Discrimination

3. The Claimant maintains that he was subjected to the following ongoing PCPs by the First Respondent:-
   i. The requirement, expectation and/or practice of:-
      (a) Working excessive hours and also without adequate front office resource;
      (b) Filling the gaps in work left by staff absences and/or vacancies;
      (c) Covering the significant gaps in the Risk Function;
      (d) Project management involvement in the NCA, EP and CASS projects.

      whether in general or after the Claimant's promotion in November 2017;
   ii. The decision not to fill vacant posts and/or ongoing failure to fill vacancies within the Claimant's team;
   iii. The failure to heed and/or act upon the Claimant's request for additional support to Ms Phillips on 3 November 2017, 12 June 2018 and/or 19 July 2018 whether in general or in a timely manner;
   iv. Restructuring the Claimant's department in general and/or without his knowledge or consent.
4. Are the matters identified in Paragraph 4 valid PCPs?

5. Were these PCPs applied in fact and if so when?
6. Did they give rise to a particular disadvantage pursuant to s19 EqA 2010?
7. Insofar as any of the PCPs were indirectly discriminatory:
   i. Having regard to the Employment Tribunal's findings, was the requirement for the Claimant to undertake the necessary work of the department in a timely manner a legitimate aim? And if so
   ii. Were the actual expectations as to the how the Claimant would undertake this work proportionate?
   iii. Is the discriminatory effect no greater than necessary having regards to those aims?

Failure to Make Reasonable Adjustments

8. Was the First Respondent required to make reasonable adjustments as at January 2017 or any point in time thereafter and if after January 2017, when? Did the First Respondent fail to comply with its duty?
9. The Claimant suggests that the following adjustments were reasonable in the circumstances:-
   i. Appointing additional staff to the team;
   ii. Modifying the Claimant's working hours;
   iii. Removing the Risk Function, NCA, EP and CASS responsibilities;
   iv. Not restructuring the department whether in general or without prior consultation;
   v. Implementing the Occupational Health recommendations in full.

Harassment Related to Disability

10. The Claimant relies upon the following as acts of alleged harassment related to disability with the purpose or effect proscribed by s26 EqA 2010:-
    i. Ms Phillips' alleged reply to the Claimant's reporting of his mental health condition as "just stress";
    ii. Mr Somerville-Cotton's alleged comments in the meeting of 6 June 2018;
    iii. Staff announcements as to the Claimant's absence on or before 2 August 2018 above;
    iv. On or before 2 August 2018 the scheduling of a call with the Claimant whilst he was on leave;
    v. The alleged removal of the Claimant's management responsibilities and/or appointment of Ms Williams;

vi. The alleged failure to consult with the Claimant in respect of these changes;

vii. The alleged announcement of the same to the workforce without consulting the Claimant;

viii. Ms Phillips' alleged criticism of the Claimant for attendance at hospital.

11. Having regard to any findings made in respect of the matters in paragraph 10 above, was that conduct unwanted, violated the Claimant's dignity and was that the proscribed purpose or effect of the treatment and related to the Claimant's disability?

12. It is to be noted that the matters identified in paragraph 10 (ii)-(vii) are pursued against both Respondents jointly and severally: and paragraph 10 (i) and (viii) are pursued against the First Respondent alone.

Direct Discrimination

13. The matters at 10 are repeated as allegations of direct discrimination in the alternative:-

i. Are the allegations well-founded?

ii. If so, do they constitute detrimental treatment?

iii. If so, was that treatment on the grounds of the Claimant's disability or perceptions as to the same? To the extent that a comparator is required the Claimant relies upon Ms Williams as an actual and, in the alternative, evidential comparator.

Discrimination Arising in Consequence of Disability

14. Was the Claimant treated unfavourably by the First and Second Respondents because of something arising from the Claimant's disability? The Claimant relies on his:

i. Absence from work;

ii. An inability to cope with a continuing excessive workload;

iii. A perception that the Claimant was insufficiently robust and/or unable to manage the team and that his opinion was no longer valid;

iv. The appointment of a co-head of department?

15. Was the Claimant subjected to the following adverse treatment:-

i. The continued failure to ameliorate the Claimant's workload and/or fill staff vacancies;

ii. Those matters cited at 3 and 10 above;

v. The Claimant's bonus calculation insofar as it was affected by:-

(a) His absence from work;

(b) The presence of a co-head of Department (this leading to the co –head having greater weighting in the bonus pool);

vi. Alleged removal of the Claimant's access to his email account;

vii. The alleged removal of the Claimant's name on the group Christmas card list?

16. If so and in respect of each finding made of discrimination arising in consequence of the Claimant's disability:-

i. Was the taking of steps to avoid placing the Claimant at risk or subjecting him to detrimental treatment a legitimate aim? If so,

ii. Were the steps taken a proportionate response?

Victimisation

17. The Claimant relies upon the following alleged protected acts:-

i. A conversation with Ms Philips after 8 June 2018 with Ms Phillips in which the management of his health was discussed: [20] ET1;

ii. The grievance on 12 September 2018: [32] ET1;

iii. The Claimant's representations at the grievance interviews on 12 and 18 October 2018.

Do these constitute protected acts pursuant to s27 EqA 2010?

18. The Claimant relies on the following alleged detrimental acts:-

i. An alleged failure to act upon the Claimant's complaints and/or provide any or any adequate welfare support;

ii. The dismissal of the Claimant's grievance whether in general and/or in the critical terms of the outcome report;

iii. An alleged failure to adequately investigate the Claimant's grievance;

iv. The alleged failure to respond whether adequately or at all to representations made by the Claimant or on his behalf on 12, 16 and/or 18 October 2018;

v. Those matters set out at paragraph x (vi) and (vii) above.

Are these well founded on the facts? If so were they on the grounds at least in part of prior protected acts and/or that the Respondents suspected the Claimant may do a protected act?

Liability

19. Is the Second Respondent liable:-

    i. As an employee of the First Respondent pursuant to s110 EqA 2010?

    ii. In aiding and/or causing the contraventions pursuant to ss111-112 EqA 2010?

Continuing Act / Just and Equitable Extension

20. Are the claims or any part of them out of time?

21. Do the matters set out above amount to a continuing act of discrimination, harassment and or victimisation? If not, is it just and equitable to extend time?

The Evidence

3. The Parties agreed a 729 page bundle to which some additional documents were inserted during the course of the hearing.

4. There was a witness statement bundle containing nine witness statements.

5. For the Claimant the Tribunal heard oral evidence from:

6. The Claimant Mr [Adam] Glover Bailie himself.

7. Mr Dean Gainsley, a former employee of the First Respondent.

8. Ms Elizabeth Wynne-Roberts, a former employee of the First Respondent.

9. Mr Neil King, a former employee of the First Respondent.

10. Witness statements in support of the Claimant from two of the First Respondent's existing employees Mr Colin Ringrose and Mr Andrew Marshall were not challenged by the Respondents with the result that they did not attend the hearing.

11. For the Respondents the Tribunal heard evidence from:

12. The Second Respondent Mr Fabian Somerville-Cotton, Managing Director of the First Respondent.

13. Ms Gillian Philips, Head of HR for the First Respondent.

14. Mr Diarmuid O'Hegarty, Compliance Director of the Second Respondent.

Procedural Matters

15. On the first morning of the hearing only one nonlegal member of the panel was available. Enquiries indicated that a second member would become available on the second day of the hearing. All parties indicated via Counsel that they would consent to a two member tribunal in preference to the matter being postponed.

16. On the second day of the hearing, following a substantial amount of reading, it was the view of the Employment Judge and Nonlegal Member Mr G W Bishop that asking another member to try to "catch up" reading around the hearing of oral evidence was unrealistic. In accordance with appellate authority, the parties were notified before confirming their consent that Mr Bishop was from the employer panel. With the consent of the parties pursuant to section 4 of the Employment Tribunals Act 1996, the hearing proceeded with a two-member panel.

Submissions

17. Both Counsel produced detail written submissions, for which we are grateful.

18. These were supplemented by brief oral submissions, largely confined to points in reply.

Disability

19. The Claimant was diagnosed on 22 January 2018 with clinical depression. Symptoms include severe migraines, impaired vision, low mood, reduced enjoyment of life and motivation, sleep disruption, weight gain, tearful and negative (including morbid) thoughts for which he has been prescribed a significant number of different medications. The severity of migraine required consideration by a consultant neurologist.

20. Dr Sally Field, a Chartered Clinical Psychologist said this in her report dated 17 June 2019:

> "Mr Bailie reported significant work stress in preceding years. He carried high levels of financial risk for his clients in his work as a Derivatives Broker. Mr Bailie recognised that stress was inherent in his role as a "department head" but felt that over time, this had impacted him personally; his mood and quality of life. Having explored other areas of his life: home life, marriage, social life, physical health etc, it was clear that Mr Bailey was settled in well in other areas of his life, with work as his main stressor…
>
> .. In my clinical opinion Mr Bailie's depressed mood is the result of chronic work stress combined with what he experienced as a lack of support from his employers. The uncertainty around Mr Bailie's work future and the inherent slow progress of grievance/tribunal procedures has impacted Mr Bailie's capacity to fully recover."

21. The parties agreed in correspondence prior to the commencement of the hearing that the Claimant's medical condition met the definition of a disabled person within the meaning of section 6 of the Equality Act 2010 from January 2018 onward.

22. On the first day of the hearing Mr Milsom invited the Tribunal to keep open whether in fact the Claimant met the definition of disabled earlier than this point. The Tribunal briefly considered a letter from the Claimant's solicitor dated 17 July 2019

which indicated that disability from January 2018 is an agreed position. The Tribunal expressed a concern about going behind what appeared to be an agreed position and in light of this Mr Milsom did not pursue this point further.

The Facts

23. The Tribunal had the benefit of chronology which was agreed between the parties.

24. On 8 April 1996 the Claimant commenced employment with MeesPierson Derivatives Ltd as a Booth Phone Broker. He has been continuously engaged by the First Respondent since that date.

25. The First Respondent is a brokerage which is a wholly owned by a US NYSE-listed agricultural processor and food ingredient provider. The core business of the First Respondent brokerage is commodities brokering including financial derivatives.

26. In March 2013 the Second Respondent Mr Somerville-Cotton was appointed as the First Respondent's Managing Director.

27. In January 2016 the Claimant was promoted to Execution Trading Manager.

28. In this new role in 2016 Claimant began to experience work related stress due to work pressure.

29. On 13 January 2016 had the first of 48 psychotherapy sessions with a Psychotherapist Mr David Abrehart, the last of which was on 17 April 2017. Mr Abrehart characterises the Claimant's presentation in this way

> "significant anxiety and depression symptoms which occurred to a varying degree throughout his therapy. His anxiety and low mood were predominantly and fairly consistently linked with stress at work. After the Christmas break it became apparent that his depressive symptoms had worsened and were resistant to treatment in early January 2017 I recommended that he visited his GP should his Doctor decide that medication might be a helpful treatment option".

30. The Tribunal notes that the agreed chronology suggests that private therapy sessions, including cognitive behavioural therapy, began in January 2017. We consider that, based on documentation from the medical practitioner that this may be a typographic error and should read January 2016. In any event however the precise timing of the commencement of treatment does not affect our legal conclusions since the Respondent did not become aware of this until a later stage than either of these two dates.

31. In August 2016 the VREQ project commenced. This followed a "Voluntary Request" from the Financial Conduct Authority (FCA) to rectify regulatory breaches. High risk clients' work was suspended from trading pending the VREQ

project. This was one of a number of regulatory projects which the Claimant says added to his workload and feelings of stress.

32. On 10 February 2017 it was announced that the Claimant's manager Steve Hanson, Equity Division Manager would be leaving. Mr Hanson was placed on garden leave until 9 May 2017.

33. In February 2017 as a result of the departure of Mr Hanson the Claimant was promoted to Departmental Manager and member of the First Respondent's Executive Committee. In these written reasons the terms 'division', 'department' and 'desk' in relation to the Equity Division are used interchangeably to refer to the grouping which was under the Claimant's management.

34. In April 2017 the NCA and CASS projects commenced. NCA denotes Non-Cash Assets. This was a project to remove clients who held stock in breach of CASS rules. CASS relates to the FCA Client Assets Sourcebook. These were regulatory compliance projects which the Claimant says added to his workload.

35. On November 2017 the EP project commenced, meaning "Elective Professional". This which was a project whereby clients could elect to hold professional status to reduce the regulatory requirement.

Annual Appraisal

36. On 2 November 2017 the Claimant attended an annual appraisal meeting with his line manager Mr Somerville-Cotton. He was assessed against a variety of criteria, against which the vast majority of which he received a grade "3" denoting "On Target" performance on a 5 point scale. There were some grade "4" denoting "Exceeds Expectations", but no other grades were awarded, either higher or lower. There was no suggestion of any underperformance. On the contrary, it was a positive appraisal.

37. Mr Somerville-Cotton made the following comments about the Claimant:

> "The evidence I have points to a collegiate approach to management and decision taking. Just be aware that you will not always get consensus and then you will need to make the call.
>
> We are always developing as leaders and now that Glover [the Claimant] has been given the business head role he will need to develop his skills more quickly as he will need to make decisions himself.
>
> We have had a moment or two when errors have occurred that have root cause around trying to do too much individually. Delegation is as much an art as seizing the initiative.
>
> Glover is calm under pressure but should guard against taking too much on himself.
>
> Glover is ready for this expanded role and his long service at [First Respondent] makes him the standout choice to lead this enlarged

> business unit. On a personal note it has been a pleasure to see Glover given the opportunity, he has waited a long time for this. He has been resolutely supportive of [First Respondent] through the VREQ and has seen the positives when others have only seen dark clouds. I thank you for your support and positive contribution. I wish you every good fortune in your expanded role and look forward to working together in 2018. Thank you Fabian."

38. Also in the appraisal document under the heading 'Succession Plan' the Claimant wrote

> "Darran Crombie and Julia Williams have completely different but complementary strengths, the former dealing and the latter legal. As part of this review I have given them additional responsibilities to deputise for me which I trust will support the personal and professional development as well as free up my time for more strategic planning and action."

Dispute over staffing

39. On 3 November 2017 the Claimant raised concerns about staffing matters with Ms Gillian Phillips, Head of HR. The email is in quite strong terms. He records being cross and upset. The background to this email was the proposed return of Tara O'Connor, an administrator, from maternity leave on part-time rather than full-time hours. The Claimant's preference was to allow part-time working to retain a valued and knowledgeable employee rather than seek a new full-time employee. The Claimant made it clear that he disagreed with a proposal to consolidate administrative support across different functions. Part of this email reads as follows

> "Our department has been exceedingly supportive of the firm over the last year giving Julia's full-time [sic] whilst still completely financially supporting her whilst we simultaneously lost 4 senior members of staff, had 1 on maternity leave and had to integrate the new team. My team have done a tremendous job of managing to get through this time but it has been taking its toll on all of us. However I have continued to be positive and give large amounts of time to matters that although will benefit my team have a much greater impact elsewhere…
>
> …Whilst I acknowledge that you are trying to balance the requirements of the firm, the department and Tara, I have a fundamental difference of opinion that our requirements below can be fulfilled by other departments. I suspect that some menial tasks will be removed and the Department will still be left managing all the rest which will either take my time or that or brokers by the way it will leave us shortstaffed."

40. The reference to Julia was a reference to Julia Williams who had been on full-time release from the Equity Division to deal with regulatory matters.

41. In the remainder of the email taking up over a page in close type he sets out a whole series of administrative support tasks which he is concerned are not going to be adequately supported.

42. Ms Phillips forwarded this email the same day to Mr Somerville-Cotton, although she removed the paragraph in which he refers to being cross and upset.

43. The Tribunal heard evidence that the four senior members of staff were brokers who had left and taken some clients with them. One of the brokers in the Claimant's team, Mr Dean Gainsley, used the term "managed decline" to describe the Equity Division during this period. Mr Gainsley said that it was difficult to bring in new business. While the Respondents reject this characterisation, analysis of the organisation charts for the period February 2016 to 3 August 2018 shows a contraction (February 2016, 22 staff below manager level; February 2017, 21 staff below manager level; February 2018, 17 staff below manager level; August 2018, 14 staff below manager level). Three new brokers joined however, although the Claimant points out that IT systems difficulties caused teething difficulties.

44. The Claimant maintains that there was no great change in desk income. This point is in dispute. The Tribunal does not have sufficient evidence before it to make a finding on desk income. We note that the amount of work in the department was not directly related to income given that particular trades or particular clients generate higher income than others.

45. On 5 November 2017 Claimant sent a follow up email to Ms Phillips on the question of staffing. In it he raised his concerns about lack of support, again in fairly strong terms. In this email he reiterated his "department's urgent need for mid-office support". The email is detailed. He referred to losing two mature brokers Chris and Ant as well as losing others, namely Steve, Roland, Manish and Guy. He mentioned that Tara has been away on maternity leave and that Julia Williams has been off the desk. He complains about having to integrate a team of three new members despite problems with integrating IT systems. He listed a series of regulatory problems that the department is having to deal with. He wrote:

> "The department has been cut back to the bones over the last months and I am proud of how my team has pulled together and we have just about survived during what has been a quiet market."

46. On 8 November 2017 the Claimant sent a further email to Mrs Philips apologising for "venting this on you" and acknowledging that it was not acceptable. He wrote "I now understand that despite all the change so far or in future plans it is understood that we require mid-office/admin support". He then went on to discuss practical matters in the light of only having three days administrative support a week on the desk.

47. On 9 November 2017 there was a meeting between the Claimant, Mr Somerville-Cotton and Ms Phillips to discuss staffing issues in the Claimant's department. This was evidently a constructive meeting. One outcome was to add deputising

for the Claimant officially to the job descriptions for Julia Williams and Darran Crombie. It was agreed to trial a three-day week solution with Tara O'Connor. In this email the Claimant notes that many of the highly time consuming projects of that year would come to an end following year although he then does note ongoing regulatory requirements and other projects such as Gold Tier and SharePoint which he hopes will give longer term benefits with only a short-term increase in work.

48. In 17 November 2017 it was announced that there would be consolidation of the First Respondent's front office from January 2018. The effect of this change was to bring the Fixed Income Desk into a combined Equity and Fixed Income Department, to be led by the Claimant. As part of this change any reference to risk was removed from the Claimant's job description. The significance of this change was to make clear that responsibility for risk lay with the risk department. From the Second Respondent's point of view it was to encourage the Claimant to "let go" of risk which was an area that the Claimant historically focused on.

49. On 4 December 2017 Tara O'Connor returned from maternity leave to work three days a week.

50. On 17 January 2018 the VREQ project ended.

51. Based on a diagnosis 22 January 2018 the parties agreed that the Claimant's ongoing symptoms of clinical depression met the definition of a disabled person from this point onward.

52. On 29 January 2018 the Claimant was absent from work for a short period due to ill health described as being 'high fever and flu aches'.

Risk department

53. The Claimant contends that the First Respondent's risk department was under-performing and as a result this added to his workload. The Second Respondent accepts that the risk department "needed attention" historically, but disputes that the department was underperforming by the time of material events.

54. One of the Second Respondent's actions was to bring in a new Head of Risk, Angela Dawson in 2017. He felt that the Claimant resented Ms Dawson encroaching on his territory as the "risk guy". The Claimant denies this.

55. Although in November 2017 the Second Respondent was trying to encourage the Claimant to relinquish his involvement in monitoring risk, it is clear that the Claimant's doubts about the new Head of the Risk Department Angela Dawson persisted from 2017 into 2018. We accept he felt that Ms Dawson did not have a sufficiently good understanding of the risks that the First Respondent's clients and by extension the First Respondent itself were exposed to. We have seen evidence of the Claimant flagging up concerns about exposure to particular risk positions to the risk department. We understand the Claimant's observation that this is something a reversal of a more conventional situation where brokers take risks and risk departments seek to monitor and control them. It is clear that several of the Claimant's broker colleagues shared his concerns about Ms Dawson. They

did not however criticise the quantitative specialists within the risk department Mickael Soussant and Leo (Tom) Akinyemi.

56. The Tribunal does not have before it objective or expert evidence from which it could question Ms Dawson's competence. Ms Dawson herself has not given evidence to the Tribunal and it would be wrong to criticise her in any objective sense. We do find however that there was a lack of trust as outlined above.

Market crash

57. On 5 February 2018 the S&P 500 index experienced a "short volatility fund market crash". The consequence for the Claimant was that he worked exceptionally long hours over two days trying to reduce the very significant exposure caused by various clients' derivative positions.

58. The Tribunal received evidence from brokers who describe this as the sort of crash that might occur every 5 years as a matter of impression although there is no predictability nor is this a regular cycle.

59. As a result of the Claimant's efforts a loss in the region of $8m-$10m appears to have been reduced initially to £0.5m, although ultimately crystallised at about £2.2m. The mixture of different currencies comes from the evidence the Tribunal received on this point. The precise figures are not material.

60. At approximately 5.30pm on 5 February Ms Angela Dawson, the head of the risk department told the trading desk that the risk department were short staffed and were leaving and she would cover from home. She returned a call from the Claimant who was still in the office but was unable to help him with the information he needed on real time updated margins and risk. The First Respondent's risk department in Chicago were unable to help him and the Second Respondent was out at an evening at the theatre.

61. The Claimant only left the office at 11.00pm on 5 February and returned at 2.30am on 6 February.

62. Ms Dawson arrived at 9:30am the next morning when she asked the brokers if much was going on, which plainly struck the Claimant and others of his team who gave evidence to the Tribunal as extraordinarily casual given the extreme volatility in the market and the level of financial exposure involved.

63. The Claimant contrasts the support he received over 5-6 February unfavourably with the market crash in 2008 when there was an ongoing conversation between the broker desk and the risk department about what positions had to be reduced.

64. The Tribunal finds that the Claimant found this experience extremely stressful and further that he felt unsupported by both the First Respondent's risk department and management generally. He plainly felt that he had been left on his own to deal with this highly stressful problem.

65. On March 2018 the EP project ended.

Mental health

66. At a meeting on 29 March 2018 the Claimant and Ms Phillips discussed the case of an account executive in the Global Equities & Fixed Income team who had been experiencing some mental health problems. Adjustments have been made to facilitate this individual's return to work, which was ultimately successful. Ms Phillips suggests that the Claimant could have used this meeting as an opportunity to raise his own mental health difficulties. It is common ground however that he did not.

67. On 4 April 2018 the Claimant was referred to a clinical psychologist by his GP.

68. On 25 April 2018 the Claimant had a meeting with Ms Phillips. He told her that he had been seeing a therapist for two years and was suffering from depression. Based on Ms Phillips' contemporaneous notes there was a discussion about depression, stress, mindfulness, the Claimant's suggestion that he needed time and space to think, and meditation. While there is a dispute between the parties as to which matters were raised on 25 April 2018, the Respondents concede knowledge of the Claimant's disability from this point onwards. The Tribunal considers that this concession is realistic and in line with our finding on knowledge.

69. The Claimant contends that Ms Phillips was dismissive of his diagnosis and said that she thought it was "just stress". She denies saying "just stress". We note that in the Claimant's formal grievance sent on 12 September 2018 when this dispute may not have been anticipated the Claimant described the comment as simply "stress". We find that Ms Phillips did not say "just stress" in the way now alleged but in any event was not dismissive in the way contended for by the Claimant. We accept that she made a comment acknowledging that he may have been under stress, in particular given the background of the market crash in early February 2018. She was drawing a distinction between stress and the depression which the Claimant had just reported to her. We find that her tone was sympathetic and appropriate in this meeting.

70. A further conversation took place between the Claimant and Ms Phillips on 4 May 2018, following a meeting between the Claimant and the Finance Director Stuart Jackson in which the Claimant had become tearful. Ms Phillips says that she sent him home and told him to see his doctor.

71. The Claimant's doctor signed him off for two weeks with depression on 4 May 2018.

72. On 18 May 2018 the Claimant updated Ms Phillips by email following an appointment with his GP that day. He was signed off until 10 June 2018. The doctor recommended that he see his therapist and return to see the doctor on 8 June 2018. He apologised for causing his team a greater workload. Ms Phillips responded later the same afternoon saying "Please don't think about work right now, just concentrate on the work you are doing with your therapist and getting you back to a good place."

73. On 25 May 2018 the Claimant emailed Ms Phillips and the Second Respondent "you have very kindly paid me a bonus, this was totally unnecessary and

unexpected" and "more importantly your support at this very difficult time for me." The Claimant may have misunderstood that the bonus related to 2018. In fact it was a retention bonus from May 2017.

74. On June 2018 the NCA project ended.

75. In June/July 2018 the CASS project and related administration completed.

76. On 4 June 2018 the First Respondent had Global Health & Safety week focusing on mental health. This was apparently the first time this had been done.

77. On 6 June 2018, Ms Phillips spoke to the Claimant by telephone and discussed the latter's upcoming GP appointment, his medication, holiday, a phased return to work, therapist's visit, instability in medication. He said that he was willing to talk to Ms Phillips and others about what he was going through, that it was important to open up and he highlighted that he felt there was a lack of empathy and understanding of pressures.

Return to work

78. On 8 June 2018, Mr Bailie called Ms Phillips to say that he had seen his doctor and agreed his return for the following Tuesday.

79. On 8 June 2018 the Claimant's GP gave him a fit note valid for four weeks which cited depression and indicated that he may be fit for work taking account of "phased return over 4 weeks. Building up gradually from half time hours. Sleep disturbance so may need late start or next day off if preceding night bad".

80. The Second Respondent Mr Somerville-Cotton announced to the Claimant's team that he would be returning on 12 June. He wrote in an email on 8 June:

> "I'm pleased to inform you that we anticipate Glover returning to work next Tuesday 12th June.
>
> As you are well aware he has had a period of medical leave and as such he will return to work in a phased way. You have all been a huge support to him and I would ask that you continue as you have. On a practical level I would ask that you avoid pushing too many matters in his direction to soon. Julia and Darren have been representing the team very effectively over the last weeks supported by you all. The beneficial thing to aid Glover's return is for us all to continue to support Julia and Darren with the day to day allowing Glover the space to work his way back to full engagement.
>
> I'm sure we are all much relieved that Glover is able to return to the team and we will all continue to help him whenever we can."

81. This indicated a supportive frame of mind and supportive communication at this stage on the part of Mr Sommerville-Cotton.

82. On 11 June Claimant called Ms Phillips after his scheduled meeting with his therapist. He informed her that he had agreed the phased return with the therapist, mornings only. He updated Ms Phillips on his progress and current condition and confirmed that his low moods seemed to have stabilised.

83. On 12 June 2018 the Claimant returned to work on reduced hours working half days. On his return he spoke to the Second Respondent who told him that he wanted to keep him in the company "in some capacity". The Claimant felt this was a rather odd statement as he had not been led to believe his role was ever in jeopardy. We accept the Second Respondent's evidence that this comment was made in the context of reassuring the Claimant that he would not be made to come back into an onerous workload until he was well.

84. On 13 June 2018 Ms Phillips had catch up meeting the Claimant and Ms Phillips. The Claimant spent time with a number of colleagues. He expressed himself quite candidly and upset some colleagues as a result. Ms Phillips updated Mr Somerville-Cotton in the following terms "Getting there. Still has a lot of views, but that is part of the process, but much calmer." The Claimant suggests that he raised six topics of conversation set out at paragraph 36(A)-(F) for his witness statement, namely:

85. The team had remained under-resourced and he was performing multiple roles at a critical period of regulatory review and change.

86. He felt he was fundamentally covering a role which should have been fulfilled by the risk department.

87. He had been left permanently on-call 24/7 for technical trading and risk enquiries from my team and the back office leaving him unable to switch off and relax.

88. He expressed disappointment about poor management of projects and the company's culture in failing to prioritise the needs of clients which put pressure on the front office (i.e. his team) to maintain and repair client relationships.

89. He discussed the challenges of the team structure and personalities as we had been integrating several groups.

90. He had previously discussed with GLP [Ms Phillips] and reiterated this during this meeting that the Company's attitude towards supporting staff with mental health issues was insufficient and specifically made reference to his own situation and to other colleagues.

91. Ms Phillips does not recall this. There is no contemporaneous note from either party. This is somewhat surprising given that Ms Phillips appears to have been quite diligent about jotting down notes during other discussions. The six topics are set out in precisely the terms captured in the witness statement in the formal grievance submitted by the Claimant's solicitors on 12 September 2018 three months after the discussion took place. In the absence of any other evidence as to what the "lot of views" described by Ms Phillips were, we conclude that these topics were discussed on 13 June 2018.

92. The conversation of 13 June 2018 was significant since this was the first time that it should have been clear to the First Respondent that the Claimant attributed his situation to workplace pressures and the nature of those pressures as he perceived them. We find that this was the first protected act under section 27.

93. On 25 June 2018 Ms Phillips recorded her thoughts on the Claimant's situation in a handwritten note. This is more or less a stream of consciousness in which she reflects on things said to her by the Claimant and tries to balance the need of the First Respondent for the Claimant to come back to work with the need for the Claimant to recover and the question on what the First Respondent can do to help him. There is not a single thread in this note. Rather it captures the complexity of the situation without coming to any clear answers.

Discussion about restructure

94. On 6 July 2018 there was quarterly meeting between the Claimant and the Second Respondent. There was a discussion about restructuring of the Claimant's department. The Claimant alleges that the Second Respondent made a comment about him being 'too touchy feely'. We accept the Second Respondent's evidence that he did not use those exact words but that he was trying to convey a similar sentiment. We find that this had some similarity with the guidance that the Second Respondent was trying to impart in the annual appraisal in November 2017 about having to make decisions as a manager without being able to reach consensus.

95. The Second Respondent's proposal for the structure was to separate out the trading and sales function to reflect a structure more commonly seen in the banking sector. His idea was four person senior leadership team to support the Claimant, namely a Head of Sales, Julia Williams and Head of Trading, Darren Crombie and potentially a Head of CFD's [contracts for difference] namely Dean Gainsley.

96. There was no discussion about making Julia Williams a Co-Head of the department with the Claimant.

97. The Second Respondent felt that the Claimant was "on board" with his proposal. In his oral evidence he was very clear that the structure had been agreed and it was only the timing of the change that was for further discussion.

98. We find that the Second Respondent told the Claimant that they would deal with the restructure when he returned from holiday. We do not accept the Claimant's contention that the Second Respondent assured the Claimant that no decisions would be made without his consent, since we consider it would unlikely that the Second Respondent would bind his own hands in this way. We do find however that the discussion was concluded on the basis that there would be further discussion between the two before the implementation of the restructure.

Last day at work

99. On 18 July 2018 the Claimant had a discussion with Mr Jackson about the outcome of MIFID II, which was the result of the EU Market in Financial Instruments Directive II. There was an impact on the profitability of Claimant's department. In

short the Claimant felt that this had been mismanaged, communication was poor and that management of the First Respondent had changed their position. Mr Somerville-Cotton disagrees. The Claimant plainly felt very upset and went home with a migraine. To date he has not returned to work.

100. On 19 July 2018 Claimant emailed Ms Phillips "had a bit of a meltdown yesterday" and "saw the doctor this morning to get further medication however both of us are concerned about how well I have been coping. I have really only been getting through one day at a time as I knew my holiday was imminent" and "I really feel my health regressing".

GP certificate

101. The GP's fitness to work certificate dated 19 July 2018 was for 6 weeks. The words "you are not fit for work" are crossed out. It cited depression and indicated "you may be fit for work taking account of the following advice… … Altered hours… Amended duties… Need further reduction in hours and duty for longer period. Would strongly advise occupational health review".

102. On 20 July 2018 the Claimant telephoned Ms Phillips who suggested that he saw a psychiatrist, Dr Bernini, by way of occupational health review. The First Respondent did not have a retained occupational health service. Ms Phillips took the view that this was a mental health issue and so rather than involving an occupational health practitioner, her suggestion was that a psychiatrist be instructed.

103. In this conversation Ms Phillips told the Claimant to go on holiday and forget about work. She told the Claimant that they would sort it all out on his return to work. The Claimant understood this to be a reference to the proposed restructure of his department. Ms Phillips suggests that she only had a limited understanding of Mr Somerville-Cotton's plans as she had not discussed it directly with him and her comment was a mere blandishment more generally about sorting out the medical advice and Claimant's health. We find that she was talking specifically about the restructure, in particular bearing in mind the pleaded case set out in the Respondents' Grounds of Resistance which states that Mrs Philips discussed with the Claimant not making any changes until he returned from holiday (paragraph 4.18).

104. On 23 July 2018 the Claimant began pre-arranged annual leave.

105. Ms Phillips and the Second Respondent met for brief catch-up on the Second Respondent's return from holiday on 23 July 2018. Ms Phillips herself then went on annual leave on 24 July 2018 and returned on 6 August 2018 which was the same day that the Claimant returned.

Restructure

106. On 1 August 2018 the Claimant's team were called into meetings in small groups with the Second Respondent. The Claimant and Mrs Phillips were both at this stage still on annual leave. The groups were told that the Claimant was not

immediately returning to work, his return would not be until September 2018 and that Julia Williams would be placed in charge of the department in a caretaker role.

107. On 1 and 2 August 2018 the Claimant received a number of communications on holiday from members of his team who were concerned following the meetings with the Second Respondent and proposed restructure. It is clear from the number of witnesses who have given evidence in support of the Claimant and the nature of that evidence that a number of members of his team felt a strong sense of personal loyalty to him.

108. On 3 August 2018 one of the brokers Ms Elizabeth Wynne-Roberts had her notification of the changes individually in a separate meeting. The Second Respondent told her that the Claimant would not be returning until "potentially the end of September".

Interpretation of the GP certificate on 19 July 2018

109. Mr Somerville-Cotton says that Mrs Philips was not there to explain it to him and that he mis-read GP's fitness to work certificate dated 19 July and understood that the Claimant would be signed off sick until September. We infer from contemporaneous documents that in the absence of Mrs Philips her assistant Ms Terrie Lewis was present.

110. Mr Somerville-Cotton is a highly intelligent man. The GP certificate is a short single page document with very little information on it. The words "you are not fit for work" are clearly struck out with a line through them. There is a cross indicating "you may be fit for work taking account of the following advice". On Mr Somerville-Cotton's alleged misinterpretation the certificate ran to Thursday 30 August, not September and certainly not the end of September as he told Ms Wynne-Roberts.

111. The Tribunal find that at the time the Second Respondent examined the GP certificate it must have been obvious to him that the GP had indicated that the Claimant should return to work on a future reduction in hours.

Restructuring announcement

112. On 3 August 2018 the restructuring was announced internally by an email prepared by the communications team. This email read as follows:

> "Team,
>
> Our Global Equities and Fixed Income business continues to thrive. To help accelerate the continuous improvement and growth strategy we are making some organisational changes.
>
> These changes will enable our Equity business to be more aligned with industry norms. Going forward our structure will clearly identify the primary roles of Equity Sales and Equity Trading.
>
> - Glover Baillie will continue in his Equity leadership role reporting to me as part of the senior team.

- Julia Williams will take on the role of Co-Head of Global Equities and FI. Julia will have sole overall responsibility for the team, join the ExCom and report to me.

- Darran Crombie who has been overseeing the Equity Trading team on an interim basis will assume that responsibility permanently in the new role of Head of Equity Trading. Darren will report to Julia Williams.

- Dean Gainsley who has been leading the sales effort on CFD's [contracts for difference] will assume the new responsibility of Head of Equity Sales reporting to Julia Williams.

Please join me in congratulating our leaders on their new roles and support them as we move forward into the second half of the year.

Kind regards

Fabian"

113. At 16:57 on 3 August 2018 Ms Terrie Lewis, HR Assistant sent the Claimant, who was still on holiday an email which said "You will potentially return to the office on Tuesday, 7 August 2018, after you have had a discussion with Gillian Phillips and your GP has given you approval to do so."

114. At 23:12 on Friday 3 August 2018 Ms Lewis sent the Claimant, a text asking for his personal email address.

115. At 19:46 on Sunday 5 August 2018 Ms Lewis sent the Claimant forwarded her 3 August email to the Claimant's personal email address. We conclude that these attempts to contact the Claimant out of ordinary office hours in this way were prompted by the expectation that he was about to return to work.

116. The Claimant suffered what he describes as a serious mental breakdown and says he felt undermined, humiliated and considerably distressed. He says this exacerbated his mental and physical conditions. He had continuous migraines and that his sleep was reduced to less than a couple of hours a night. He started to suffer from visual snow which he says continues to affect him. He collapsed whilst travelling home.

6 August & Ms Phillips' voicemail

117. On 6 August 2018 the Claimant returned from holiday and emailed Ms Phillips at 05:51 in the following terms

"I have been exceedingly distressed by the actions and decisions that have been made in both our absences during the last four days and just before my planned return to work. This has had a considerable negative impact on my health, I am now trying to

> move my scheduled doctor review from 15th August to this morning."

118. Ms Phillips left a voicemail for the Claimant which he interpreted as being critical of him for not attending the meeting on that day. The Tribunal accepts that this was the Claimant's perception, but we do not find that Ms Phillips objectively did criticise him.

119. Later on 6 August the Claimant was signed off by his GP until 20 August 2018 for "depression NOS [not otherwise specified]".

120. Meanwhile Ms Phillips was seen by members of the Claimant's team "high-fiving" Ms Williams in the office and congratulating her on her promotion. We accept Neil King's evidence on this point. He was absolutely clear that he had observed this first hand at about three yards away.

121. On 7 August 2018 the Claimant was referred to a psychiatrist by his GP.

122. On 8 August 2018 the Claimant emailed to Ms Phillips to report that he had suffered a migraine attack every day since the middle of last week which was affecting his vision. He indicated that he appreciated her helping to get him the best medical attention but said "as you have been able to tell from our conversations I am not in a fit state to talk about work at present".

123. The same day Ms Phillips emailed the Claimant's team:

> "As you are aware, Glover is currently away from the office on sick leave. To assist Glover in a full recovery, it is vital that he is able to completely switch-off in respect of work related issues. I am asking everyone in the Team not to make any contact with Glover in respect of work related issues or even general feedback on how things are in the office. This is the way that you can be of most help to Glover."

124. On 13 August 2018 the Claimant was referred to a neurologist.

125. On 13 August 2018 Ms Phillips called the Claimant to see how he was.

126. By email on 15 August 2018 the Claimant confirmed to Ms Phillips that he was seeing an eye specialist, a neurologist and psychiatrist in the coming days.

127. On 17 August 2018 there was a subsequent email exchange between the Claimant and Ms Phillips by way of update.

128. On 17 August 2018 the Claimant was signed off work with depression for 3 months.

129. On 22 August 2018 the Claimant acknowledged in an email to Ms Phillips that he knew she was keen to know how he was but said he was very emotional and did not feel confident to speak to her on the phone. He said his migraines reduced his mental clarity. He said that telephone calls increased his anxiety and low mood. He asked the communication should take place by email.

130. On 3 September 2018 by an email from Ms Phillips to the IT department she gave permission for Julia Williams and Darran Crombie regarding forwarding the Claimant emails and granting access to the Inbox while he was away.

131. On 4 September 2018 in an email from the Second Respondent to a client, he indicated that the Claimant would be out of the office for the next few months, probably until next year. He positioned Julia Williams as co-head of the Equity Group and further instructed that now she had sole responsibility for the business in Glover's absence.

132. On the same day the Second Respondent suggested an Out of Office reply be placed on the Claimant's account until mid-December.

133. Also on 4 September, following a conversation with Ms Phillips and Ms Williams Mr Raj Kavia of the IT department removed the Claimant from various email distribution groups and added Julia and/or Darren Crombie into email groups that they were not in.

134. On 7 September 2018 an email went from "IT Service Delivery" to the Claimant with a message entitled "Important Message: Your password expires over the weekend". The message requested that he changed his email address to avoid any issues logging in.

135. On 7 September 2018 Ms Phillips spoke to Dr Paul Bailey who declined to speak to her for understandable reasons of patient confidentiality, as he explained in a letter dated 19 September.

136. On 10 September 2018 Ms Phillips updated the Claimant regarding Keeping in Touch and Occupational Health arrangements.

Grievance

137. On 12 September 2018 in an email from the Claimant's solicitors the Claimant invoked a grievance and agreed to attend Occupational Health meeting. This letter requested that subsequent communications only take place with through the Claimant's solicitors. This specifically named the Second Respondent and Gillian Phillips as being the subject of the grievance. The substance of the grievance substantially overlaps with elements of the claim. In outline the grievance highlighted the Claimant's depression and the progression of symptoms from 2016 onwards, the pressures on him as a result of workload, the events of 5 – 6 February 2018, the failings of the risk department, the failure to address workload, and the events around the announcement of the restructure in early August 2018. It was alleged that there was a failure to observe a duty of care. Criticism was made of the absence of an Occupational Health advisor.

138. This was the second protected act.

139. The grievance was acknowledged by Mr Diarmuid O'Hegarty, the First Respondent's Compliance Director in a letter dated 14 September 2018.

140. On 14 September 2018 the Claimant's solicitors served a data subject access. In a separate letter they raised a concern that the Claimant's access to the First Respondent's IT system had been revoked.

141. On 18 September 2018 Ms Phillips wrote to the Claimant's solicitors regarding occupational health. On 19 September 2018 by letter the Claimant's solicitors wrote to Ms Phillips regarding Occupational Health arrangements and IT access. In her reply Ms Phillips explained to the Claimant's solicitors that his access to IT had not been revoked and in fact his password had expired automatically on 10 September 2018 after an automated email being sent to him on 7 September.

142. On 24 September 2018 the Claimant met with Arrow VSS (an external occupational health) about adjustments for the grievance investigation. In an undated letter [received by the Respondent on 3 October] Helen Hackett, Rehabilitation Consultant made the following recommendations regarding adjustments for the grievance investigation:

> "The meeting is held at a venue close to his home as he is finding it difficult to travel due to the dizziness.
>
> He needs to see an agenda 48 hours prior to the meeting as he is unable to respond quickly and needs time to gather his thoughts to be able to respond.
>
> He takes a break every 30 minutes to restore mental clarity.
>
> He has chosen a colleague to accompany him to the meeting."

143. On 10 October 2018 there was an initial grievance meeting the Claimant and Mr O'Hegarty, which the Claimant relies upon as the third protected act.

144. As part of the investigation of the grievance Mr O'Hegarty interviewed both Ms Phillips and the Second Respondent.

145. On 16 October 2018 the Claimant's solicitor wrote further in respect of adjustments and to clarify the way in which the Claimant's treatment was described as being disability discrimination.

146. On 18 October 2018 there was a fourth grievance meeting with the Claimant, which he relies upon as being the fourth protected act.

147. On 24 October 2018 Mr O'Hegarty concluded the grievance and sent a report sent to the Claimant's solicitors, dismissing the grievance and suggesting workplace mediation. In respect of the announcement of 3 August 2018, the allegation of discrimination was rejected and Mr O'Hegarty concluded "if anything, it appears to have been an honest attempt to develop the Department and to include Glover as a leader in that department".

148. By a letter of 24 October 2018 the Claimant's solicitors response rejected the outcome and indicated that he would pursue matters by way of initiating legal proceedings.

149. In the remainder of October 2018 and into November there was correspondence between the Claimant's solicitors and Mr Hegarty regarding mediation and legal representation.

150. On 1 November 2018, Dr Paul Bailey, the Claimant's treating Consultant Psychiatrist was recommending to the Claimant a day care programme with peer support and commented that this might "enable him to see that his situation is far from unique, that his employer's conduct is probably more anonymous than personalised and that the symptoms of his injury are significant and entirely valid".

151. On 5 November 2018 the Claimant's GP signed him off for a further three months with depression.

152. On 20 November 2018 Dr Bailey confirmed that he considered it an "entirely reasonable adjustment" for the Claimant to have representation by a lawyer during a workplace mediation.

153. On 11 December Mr O'Hegarty wrote reiterating that he did not consider that legal representation at a mediation was the appropriate way forward and further that he would have see the instructions and context given to medical practitioner making recommendations in this respect.

154. On 21 December 2018 the Claimant presented a claim to the Employment Tribunal.

155. On 18 January 2019 the Claimant's GP signed him off for a further three months with depression.

156. On 4 February 2019 Mr O'Hegarty sent a letter to the Claimant's solicitors regarding an income protection claim against the insurer Generali and a potential workplace mediation.

157. On 11 February 2019 the Claimant's solicitors highlighted that his psychiatrist had recommended that legal representation would be a reasonable adjustment for the Claimant at the mediation. Mr O'Hegarty replied on the same day explaining that the First Respondent had not had a response to his request for the instructions given to Dr Bailey and Dr Bailey's reasons for this recommendation. He explained that the First Respondent's concern was that legal representation in this context would undermine the conciliatory and forward-looking nature of workplace mediation. He indicated a willingness to consider this point further on receipt of the instructions and reasons requested.

158. There was a further exchange between the Claimant's solicitors and Mr O'Hegarty in letters on 12 and 13 February 2019. By his letter of 13 February Mr O'Hegarty suggested jointly instructing a medical expert on the question of legal representation as a reasonable adjustment. This was acknowledged on 14 February by Ms Khan the Claimant's solicitor who said that she would revert on return from annual leave.

159. Unfortunately the matter was left in abeyance until Mr O'Hegarty chased on 2 April 2019. In this email Mr O'Hegarty mentioned that Generali the Income Protection insurers had separately suggested their own mediation.

160. By a letter of 4 April 2019 the Claimant's solicitors stated the position that the Claimant "wants to be legally represented at a Mediation to enable him to properly engage in the process". In his reply on 9 April 2019 Mr O'Hegarty reiterated his concerns about the basis of the medical advice for legal representation at a mediation. He set out his view of workplace mediation that this should be not to debate legal arguments but rather to discuss how the parties feel and find a way for the parties to work together again with the mediator acting as a neutral, constructive facilitator and not the judge.

161. On 15 April 2019 the Claimant was signed off as not fit for work with depression for a further three months.

162. Unfortunately the question of a workplace mediation has not been resolved to date.

The Law

163. The Equality Act 2020 contains the following provisions

> 6 Disability
>
> (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 adverse effect on P's ability to carry out normal day-to-day activities.
>
> (2) A reference to a disabled person is a reference to a person who has a disability.
>
> (3) In relation to the protected characteristic of disability—
>
> (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
>
> (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.
>
> 19 Indirect discrimination
>
> (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.

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

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

23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

26 Harassment

(1) A person (A) harasses another (B) if—

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

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

(i) violating B's dignity, or

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

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act—
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.

164. In considering reasonable adjustments claims, tribunals are required to have an analytical approach (*Environment Agency v Rowan* [2008] ICR 218). The correct approach is to identify (i) the PCP; (ii) non-disabled comparators, where appropriate, (iii) the nature & extent of substantial disadvantage. This is in order to consider the extent to which taking the step would prevent the effect in relation to which a duty was imposed.

165. *Knowledge* – Paragraph 20(1) of Schedule 8 to the EqA provides that a person is not subject to the duty if he does not know, and could not reasonably be expected to know that an interested disabled person has a disability AND is likely to be placed at a disadvantage by the employer's PCP para 20(1)(b).

166. Case law has established that a PCP can arise from a one-off or discretionary decision (e.g. *British Airways plc v Starmer* 2005 IRLR 862, EAT). This proposition has been supported by the EHRC Employment Code at para 4.5.

167. In *Richmond Pharmacology v Dhaliwal* [2009] ICR 724 the EAT (Underhill, P) emphasised both the subjective and objective elements of a claim of harassment under section 26. There is a minimum threshold and following guidance was given at paragraph 22:

> "it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase"

CONCLUSIONS

Disability & knowledge

168. [**Issue 1**] Was the Claimant from January 2018 or at any later time disabled by reason of clinical depression and associated symptoms?

169. The Parties agree that the Claimant was disabled from 22 January 2018.

170. [**Issue 2**] When did the First and Second Respondents have actual or, insofar as material, constructive knowledge of the disability?

171. Our finding is that the date of knowledge of disability in this case is 25 April 2018.

172. The Claimant admits he was highly reluctant to reveal to his employer that he had been having mental health difficulties as he feared for the effect on his career.

173. Significantly, the Claimant's first sickness absence attributable to his disability (i.e. depression) was on 4 May 2018 on which date he was signed off for two weeks.

174. We accept Ms Phillips' evidence that she had for many years dealt with front office staff in broker roles who were quite often highly stressed and sometimes needed to rant to her before going away with no requirement for action to be taken. Specifically in the case of the Claimant she said that she did not know him well on a personal basis and found him a private person. His complaints to her earlier than 25 April and particularly in November 2017 should be seen in that context.

175. We have considered whether the Claimant's 'outbursts' in November 2017 required the Respondents to investigate further. This was an internal wrangle between management over resources. The Claimant was plainly stressed and upset. It would be reasonable to conclude that his new role meant he felt under more pressure. He later apologised to Ms Phillips. We do not consider that the First Respondent in these circumstances, based on the circumstances at that time, was under an obligation to make further enquiry at this point.

176. We accept the Second Respondent evidence that "he was not aware that there was anything wrong with the Claimant". He says that the Claimant was quite introverted and that the first time he was aware of any problem was late or April early May 2018.

Indirect Discrimination

177. The Claimant maintains that he was subjected to the following ongoing PCPs by the First Respondent:-

178. [**Issue 3i**] The requirement, expectation and/or practice of:-

179. [Issue 3**(i)(a)**] *Working excessive hours and also without adequate front office resource* – the way that this PCP has been framed is that the words "excessive" and "adequate" invite the Tribunal to make value judgments.

180. Dealing with '*excessive hours*' first, other than the events of 5-6 February 2018 which were exceptional, the Claimant's evidence is that he was working 50-55 hours a week. In the context of the management role that he was performing and the level of remuneration he was receiving (e.g. £446,000 for 2017) the Tribunal does not find that the hours worked by the Claimant were 'excessive'. We accept the evidence of Mr Gainsley and Ms Wynn-Roberts that hours were dictated by the market, longer hours were sometimes necessary, but neither of them regularly worked long hours. None of the Claimant's supporting witnesses gave evidence to the effect that the team were working excessive hours.

181. We accept the Second Respondent's evidence that the Claimant worked longer hours than some but not all and that as head of the team his workload was to a significant level dictated by himself. The Second Respondent clearly identified that the Claimant had a difficulty with delegating and with letting go of matters e.g. analysis of risk. His comments in the November 2017 appraisal were clearly intended to encourage the Claimant to delegate. The change in the job description was directed to encourage the Claimant to focus less on risk. These appear to the Tribunal to be appropriate actions taken by the Second Respondent as the Claimant's line manager. The Tribunal is not satisfied on the evidence that there was a requirement, expectation and/or practice of working excessive hours.

182. Regarding '*without adequate front office resource*', it is clear that a team of brokers had left. We note that they took some clients with them. The Tribunal has not seen any direct evidence of the effect of these departures on the volume or value of transactions carried out by the Claimant's department. The Claimant's reference to a "quiet market" on 5 November 2017 suggests some sort of slow down. Mr Gainsley commented on the difficulty in winning new work which suggested an absence of work rather than an overload. We accept the Second Respondent's evidence that there were teams of consultants who were carrying out the regulatory compliance work. While this was creating some work for the front office, this was known to be short term in duration.

183. We find that three new team members had joined the team. Tara O'Connor returned from maternity leave on 4 December 2017. Julia Williams returned from a secondment outside of the Claimant's team.

184. The Tribunal does not find that it would be fair to conclude that there was a PCP of the First Respondent of operating 'without adequate front office resource'.

185. [**Issue 3(i)(b)**] *Filling the gaps in work left by staff absences and/or vacancies* – this is substantially similar to 3(i)(a) 'without adequate front office resource' dealt with above.

186. [**Issue 3(i)(c)**] *Covering the significant gaps in the Risk department* – based on an organisation chart dated October 2019 the Risk & Credit department was comprised of Angela Dawson, Brett Peake, David Mitchell, Mickael Soussant, Leo (Tom) Akinyemi, Geraldine Kilkenny, Ellen Say. We do not have the equivalent chart for earlier years.

187. The Second Respondent had brought in Ms Dawson, qualified accountant with experience in derivative product control in 2017. Messrs Soussant and Akinyemi were quantitative specialists.

188. One 'gap' that plainly existed was between the Claimant's expectations of Ms Dawson and what the Second Respondent was asking her to do in 2017-8. The Second Respondent saw Ms Dawson's role as being wider than simply market risk. He did not envisage her providing real-time support. He did not consider her to be an options specialist. This may explain why the Claimant felt unsupported in the highly pressured circumstances of 5 – 6 February when he felt that real-time support was required. Ms Dawson did not see this as being her role. It seems

particularly unfortunate that other members of the risk team were not available on that occasion.

189. There was a problem of trust. The Claimant described his concern feeling that he had to be "both poacher and gamekeeper", meaning that he was expected to take risks as a broker but also analyse the risk. It is clear from various email that he was raising concerns about specific risk exposure with the risk team.

190. The Tribunal accepts that the Claimant did not fully respect Ms Dawson's abilities and he doubted whether risks that that he could see developing were being adequately analysed by the risk department. Some of his broker colleagues appeared to share his doubts about Ms Dawson's relevant experience. They were not critical of the quantitative specialists within the team however.

191. Notwithstanding the removal of risk responsibilities from his job description it appears that the Claimant continued to carry out his own analysis of risk in parallel to the Risk department. While the Tribunal find that these perceptions and lack of trust existed, it does not have objective evidence that there was a 'gap' in the risk department's coverage, nor does it have the expertise to make this assessment nor expert evidence from which this conclusion could be drawn.

192. The Tribunal does not consider that the Claimant's perception of inadequacies in the risk department, albeit a genuinely held perception, should be characterised as a PCP operated by the First Respondent. The scheme of section 19 is to protect disabled people from policies, criteria or practices which while seeming to apply neutrally to all, disadvantage them. We do not consider that section 19 is engaged by a situation in which a disabled person perceives inadequacies in the way another department in their employer is run.

193. [**Issue 3(i)(d)**] *Project management involvement in the NCA, EP and CASS projects*. The Tribunal accepts that the Claimant was involved in helping to support these compliance and regulatory activities, although also accepts the Respondents' evidence that these were principally implemented by teams of consultants and others such as Julia Williams who was seconded for a period of time. We find that as a manager the Claimant had involvement with these regulatory projects.

194. We accept that there was a PCP here namely a practice that managers assist with the rollout of necessary regulatory or compliance matters.

195. [**Issue 3ii**] *The decision not to fill vacant posts and/or ongoing failure to fill vacancies within the Claimant's team* – the Claimant says that vacant posts were not filled by the First Respondent. By contrast the Second Respondent says he was not aware of any issues about not filling vacancies. While the evidence does suggest that there were fewer brokers in 2018 than there had been in previous years, this appears to be in large part the result of a team move in circumstances where some clients moved with the team moving. This is not the same as the loss of specific individuals in a unique functional role which would lead an obvious gap.

196. The Tribunal does not consider that it has sufficient evidence to identify particular vacancies or posts that were not filled. Accordingly we do not find that this PCP is established.

197. [**Issue 3iii**] The failure to heed and/or act upon the Claimant's request for additional support to Ms Phillips on 3 November 2017, 12 June 2018 and/or 19 July 2018 whether in general or in a timely manner – we consider that the reference to 12 June 2018 in the list of issues should have been to the catch up meeting 13 June.

198. The Claimant's communications on each of these three dates were qualitatively different one to another and the context was different in each case. The 3 November communication was written at a time over 2 ½ months before 22 January 2018, the date the Claimant was agreed by the parties to meet the definition of disabled. By the time he met the definition of a disabled person matters had to some extent moved on, particularly in view of the Claimant's email of 8 November and the meeting on 9 November 2017. The fact that there was a meeting at this stage suggest that Ms Phillips had not failed to heed this request. Indeed she discussed it with him.

199. The 13 June discussion appears to have been treated by Ms Phillips as part of the Claimant saying his piece to her and other colleagues and communicating things which he had not communicated before. At this stage the Claimant was on a phased return to work and remain on full pay. He was given flexibility in his hours. It is difficult therefore to say that there had been a failure to heed what he was saying since on any view his workload was significantly reduced at this stage.

200. On 19 July the Claimant reported a bit of a meltdown and that his health was regressing. Ms Phillips suggested he saw a psychiatrist by way of an occupational health review. She told the Claimant to go on holiday and forget about work. Again we do not consider that this was a PCP of failing to heed the Claimant.

201. [**Issue 3iv**] *Restructuring the Claimant's department in general and/or without his knowledge or consent* – although in some circumstances a one-off discretionary management decision may amount to a PCP, the Tribunal does not find that the early August 2018 restriction should properly be construed as a PCP. We consider that this more naturally falls under the schemes of section 13 and 15 which we deal with below.

202. [**Issue 4**] Are the matters identified in Paragraph 3 valid PCPs? This is deal with above.

203. [**Issue 5**] Were these PCPs applied in fact and if so when?

204. There were a number of overlapping regulatory compliance projects, as detailed in our findings of fact. On 17 January 2018 the VREQ project ended. The EP project ended in March 2018. In June 2018 the NCA project ended. In June/July 2018 the CASS project and related administration completed.

205. [**Issue 6**] Did they give rise to a particular disadvantage pursuant to s19 EqA 2010?

206. *Group disadvantage* - regarding project management involvement in the NCA, EP and CASS projects, we do not consider that there is evidence that involvement by a manager in compliance *per se* would give rise to a particular disadvantage for people with depression per section 6(3)(b) EqA. We do not consider that this is self-evident or that we can take judicial notice of this.

207. *Individual disadvantage* – although we note that the Claimant complained about regulation as part of a general complaints about staffing and matters on his agenda, we did not find that these regulatory projects caused particular disadvantage to the Claimant. We accept the evidence that teams of consultants were responsible for implementing changes relating to compliance and that Julia Williams was seconded to this area for a period. We note Dr Field's opinion which attributes the Claimant's work stress to high levels of financial risk for clients rather than to work load or particular projects such as compliance.

208. [**Issue 7**] Insofar as any of the PCPs were indirectly discriminatory:

209. [**Issue 7i**] Having regard to the Employment Tribunal's findings, was the requirement for the Claimant to undertake the necessary work of the department in a timely manner a legitimate aim?

210. Focussing specifically on the compliance projects, we accept that this was necessary work and compliance with regulation is a legitimate aim.

211. [**Issue 7ii**] Were the actual expectations as to the how the Claimant would undertake this work proportionate? It has not been necessary to consider this issue in view of our findings above.

212. [**Issue 7iii**] Is the discriminatory effect no greater than necessary having regards to those aims? It has not been necessary to consider this issue in view of our findings above.

Failure to Make Reasonable Adjustments

213. [**Issue 8**] Was the First Respondent required to make reasonable adjustments as at January 2018 or any point in time thereafter and if after January 2018, when? Did the First Respondent fail to comply with its duty?

214. Neither the particulars of claim, nor the list of issues identify separate PCPs for the reasonable adjustments claim. We have proceeded on the basis that the same PCPs identified for the claim of indirect discrimination are also relied upon for the reasonable adjustments claim. We have broken down this issue into:

215. *PCP* – it follows from the discussion above that the only PCP characterised by the Claimant which the Tribunal accepts is under issue 3(i)(d) namely the practice that managers assist with the rollout of necessary regulatory or compliance matters.

216. Substantial disadvantage – did requirement for managers to assist with the rollout of necessary regulatory/compliance matters cause a substantial advantage to a person with disability?

217. For similar reasons as are dealt with in the context of 'particular disadvantage' under Issue 6 above, we do not find that assisting with regulatory and compliance matters caused the Claimant substantial disadvantage in comparison to persons who were not disabled.

218. We accepted the Second Respondent's evidence that there were teams of consultants responsible for the work in this area. Julia Williams had been seconded for a period to work on regulatory matters.

219. *Knowledge of disability & substantial disadvantage* – Had we been required to consider knowledge of substantial disadvantage, we would have found that First Respondent only had knowledge of substantial disadvantage from 13 June 2018. This was the meeting at which the Claimant stated that he felt that the period of regulatory review and change, among other factors, was placing pressure on him that was exacerbating his symptoms.

220. By June 2018 the VREQ, EP and NCA projects had all come to an end and the CASS project was about to end. The Claimant was on reduced hours by this stage.

221. [**Issue 9**] The Claimant suggests that the following adjustments were reasonable in the circumstances:-

222. We have not found substantial disadvantage. If however the Tribunal is wrong on that point, we have considered the adjustments contended for.

223. *Appointing additional staff to the team* – the Tribunal's finding is that the Claimant was suffering from depression. He appears to have struggled with delegating and with "letting go" of risk responsibilities (we acknowledge that this was based on his genuine concern in the case of risk). By the time the Claimant made it clear to the First Respondent that regulatory matters had been causing him particular concern, the volume of activity related to regulatory matters was beginning to abate. It appears to the Tribunal that it was the Claimant rather than the team that were struggling. Adding more members to the team would have been the wrong solution to the problem. We would not consider that there was a failure to make a reasonable adjustment in this respect.

224. *Modifying the Claimant's working hours* – by the time the First Respondent was aware of the Claimant's alleged substantial disadvantage he was already on reduced hours as part of a phased return. There was no failure to make an adjustment here.

225. *Removing the Risk department, NCA, EP and CASS responsibilities* - by the time substantial disadvantage contended for was known by the First Respondent the regulatory requirement was beginning to abate. In respect of the risk element we consider that as a result of the intervention of the Second Respondent, the First Respondent had taken appropriate actions in respect of removing risk responsibilities from the Claimant's job description. We would not consider that there was a failure to make reasonable adjustments on this point.

226. *Not restructuring the department whether in general or without prior consultation* - it is unhelpful that this proposed adjustment is expressed in negative terms and in

two parts. It makes it somewhat difficult to grapple with the positive adjustment that is being contended for. We consider that there are two elements.

227. The first is not restructuring the department as an adjustment. We do not consider that the First Respondent was required to keep the Department static as an adjustment. This appears to run counter to much of the other elements of the Claimant's claim that he was unsupported and was doing too much. We consider that the First Respondent was entitled to restructure, and this might potentially have been an advantage to the Claimant. We would not consider that there was a failure to make an adjustment of keeping the Department the same.

228. The second element is whether the Department should have been restructured without prior consultation. Expressing this in positive terms it would seem that the adjustment contended for was consultation. There was in fact consultation. The Second Respondent was actively discussing with the Claimant a restructure of the department on 6 July 2018. We would not consider that there was a failure to make reasonable adjustments on this point.

229. *Implementing the Occupational Health recommendations in full* - the recommendations made in the report of Ms Hackett about adjustments for a grievance investigation were complied with. A short agenda was discussed in email correspondence between Mr O'Hegarty and Ms Khan acting for the Claimant on 4 – 5 October 2018. The hearing was held close to his home. It is not suggested that an absence of breaks cause difficulties.

230. A point pursued in the Claimant's written submissions is regarding the recommendation of the psychiatrist Dr Bailey that it was a reasonable adjustment for the Claimant to have legal representation at a workplace mediation. It seems on the face of it that this goes outside of the Claimant's pleaded case. Dr Bailey was a psychiatrist rather than an occupational health specialist. The PCP and substantial disadvantage are unclear. No point has been taken by the Respondents on this however.

231. In the interests of achieving resolution on this point, we consider that we have heard sufficient evidence and submissions on this point to determine the question of whether we consider in the circumstances of this case legal representation at a workplace mediation was a reasonable adjustment.

232. We acknowledge that an adjustment need only have some prospect of ameliorating disadvantage (*Leeds Teaching Hospital NHS Trust v Foster* EAT 0552/10).

233. Had the Claimant been contending for an adjustment to be accompanied by a colleague, friend or family member at the mediation the Tribunal would have little difficulty in concluding that this was a reasonable adjustment.

234. Mr O'Hegarty's evidence was that he was concerned about allowing the Claimant to attend with a lawyer, firstly because he had not seen the instructions which had led to Dr Bailey's recommendation but secondly that he considered it would be counter-productive have legal representation at the mediation. These concerns

were set out in the correspondence between him and Ms Khan the Claimant's solicitor in emails and letters in February and April 2019.

235. Legal representation at a mediation of a legal dispute is quite normal. It is quite clear that Mr O'Hegarty explained in correspondence that his conception of this workplace mediation was very different. The focus was on enabling the Claimant to return to work, facilitated by a neutral mediator rather than on a "legal" conclusion i.e. findings or adjudicating on blame.

236. Ultimately the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case (paragraph 6.29 EHRC Employment Code).

237. It is the assessment of the Tribunal that by attending with a lawyer (presumably an employment law specialist), this would qualitatively change the nature of the exercise. Most employers, acting reasonably, do not allow employees to bring external lawyers into internal workplace meetings or processes. The Tribunal considers that in the circumstances of this case the First Respondent was not required, as a reasonable adjustment to allow legal representation at workplace mediation.

238. It follows that we do not consider that there was a failure to make reasonable adjustments.

Harassment Related to Disability

239. [**Issue 10**] The Claimant relies upon the following as acts of alleged harassment related to disability with the purpose or effect proscribed by s26 EqA 2010:-

240. We have reminded ourselves of the authority of *Dhaliwal*, and in particular the guidance that not every unfortunate phrase should lead to legal liability.

241. [**i**] *Ms Phillips' alleged reply to the Claimant's reporting of his mental health condition as "just stress"* - we find that the phrase "just stress" was not used, and in any event the comment about stress was not dismissive in the way contended for by the Claimant. We find that Ms Phillips was drawing a distinction between stress and depression to clarify and confirm her understanding.

242. We have considered all the circumstances of the case and whether to it is reasonable for the conduct alleged to have had the effect contended for (section 26(4)(b)&(c) EqA). We find that the Claimant is a private person and found this conversation uncomfortable given his understandable reluctance to talk about it. We do not consider however objectively that Ms Phillips behaved in a way such as to constitute harassment under section 26.

243. [**ii**] Mr Somerville-Cotton's alleged comments in the meeting of 12 June 2018 'he wanted to keep him in the company "in some capacity"'. At this stage the Claimant was still unwell and on reduced hours. We find that the Claimant interpreted the phrase "in some capacity" in a negative way, since it seemed to suggest changes in his role.

244. We consider that the best contemporaneous evidence of the Second Respondent's mindset and attitude to the Claimant is his email of 8 June 2018, which was supportive in tone and which clearly envisaged a temporary transition back to "full engagement".

245. We accept the Second Respondent's evidence that at this stage the comment about "some capacity" was short-term and not intended to suggest that the Claimant would not be returning to his role in the long term. Although this was unwanted conduct and it did relate to disability, we do not consider, that objectively that the Second Respondent's words amounted to harassment.

246. [**iii**] *Staff announcements as to the Claimant's absence on or before 2 August 2018* – these announcements were made at a time when the Claimant was not present. In essence the team were told, in the Claimant's absence, that he was not returning to work and that Julian Williams would be in charge in a caretaker role. We do not consider, that objectively that this announcement amounted to harassment.

247. [**iv**] *On or before 2 August 2018 the scheduling of a call with the Claimant whilst he was on leave* – we have not received sufficient evidence to conclude that a phone call was scheduled on or before 2 August 2018 at all and in any event not circumstances which might amount to harassment.

248. [**v**] *The alleged removal of the Claimant's management responsibilities and/or appointment of Ms Williams* – the finding of the Tribunal is that this amounts to discrimination under sections 13 and 15 rather than harassment.

249. [**vi**] *The alleged failure to consult with the Claimant in respect of these changes* – the finding of the Tribunal is that this amounts to discrimination under sections 13 and 15 rather than harassment.

250. [**vii**] *The alleged announcement of the same to the workforce without consulting the Claimant* – the finding of the Tribunal is that this amounts to discrimination under sections 13 and 15, considered below rather than harassment.

251. [**viii**] *Ms Phillips' alleged criticism of the Claimant for attendance at hospital* – we understand from the claim form that this relates to a voicemail left by Ms Phillips on 6 August. The Claimant was plainly extremely distressed, having seen the nature of the restructure that had been communicated. We have no doubt that a voicemail from Ms Phillips was unwelcome at this time, however we do not conclude from the evidence on this point that objectively an act of harassment had occurred.

252. [**Issue 11**] Having regard to any findings made in respect of the matters in paragraph 10 above, was that conduct unwanted, violated the Claimant's dignity and was that the proscribed purpose or effect of the treatment and related to the Claimant's disability? These have been dealt with under issue 10 above.

Direct Discrimination (section 13)

253. *Comparator* – during submissions the Tribunal explored with Counsel the characteristics of an appropriate hypothetical comparator. Notwithstanding the

framework contained within the list of issues, Mr Milsom for the Claimant was adamant that this is a situation in which a hypothetical comparator is not helpful and the Tribunal should simply consider "the reason why". We accepted this submission and consider the section 13 claim on this basis.

254. [**Issue 13**] The matters at 10 are repeated as allegations of direct discrimination in the alternative:-

255. [**i**] *Ms Phillips' alleged reply to the Claimant's reporting of his mental health condition as "just stress"* – we do not accept that exactly these words were used and do consider that a comment about stress rather than depression was less favourable treatment.

256. [**ii**] *Mr Somerville-Cotton's alleged comments in the meeting of 12 June 2018 "in some capacity"* – again the Tribunal has considered these comments and considered the email of 8 June sent a few days earlier. We do not consider that these comments amounted to less favourable treatment.

257. [**iii**] *Staff announcements as to the Claimant's absence on or before 2 August 2018 above* - the suggestion to the team appears to have been on an interim basis. The word caretaker was used to describe Ms Williams' role. This might to be expected in the case of any manager who was undergoing a period of somewhat extended sick leave. We do not consider that this was less favourable treatment.

258. [**iv**] *On or before 2 August 2018 the scheduling of a call with the Claimant whilst he was on leave* - we are not satisfied on the evidence that this scheduling of a call took place and in event not satisfied that there is any evidence from which we might reasonable infer less favourable treatment. The initial burden on the Claimant is not therefore satisfied.

259. [**v**] *The alleged removal of the Claimant's management responsibilities and/or appointment of Ms Williams* – we find that the implication of the announcement of 3 August 2018 was to remove management responsibilities from the Claimant. Julia Williams was expressed to have "sole" overall responsibility for the team. The communication does not contain any suggestion that this is a temporary or caretaker arrangement. By contrast, particularly the parts about growth strategy, congratulating leaders in their new roles, and aligning with industry norms and supporting them as they move forward all suggests that this is a permanent change.

260. We are fortified in this conclusion by the frantic attempts to contact the Claimant on 3 and 5 August shortly before his return to work and also the absence of any clarification to the Claimant subsequently that the change was temporary. It must have been very clear to the First and Second Respondents that the Claimant was very significantly distressed from 6 August onward. Despite this no one at the First Respondent explained or clarified to the Claimant that this was simply a temporary state of affairs in August or in September in response to his grievance. In the Claimant's grievance at paragraph 31 [248] he set out in terms that although the verbal announcement referred to temporary caretaker positions the email announcement shows the changes were permanent. If he was wrong about this the Respondents had a clear opportunity to correct this and did not.

261. We conclude therefore that by the time of the 3 August 2018 announcement the intention was that this was a permanent change. This plainly detracted from the Claimant's role. This was less favourable treatment.

262. What was the cause of the treatment? We infer from the circumstances that by 3 August the fact that the absence was due to a mental health disability rather than merely an absence for some other sort of cause materially influenced the discussion to make Julia Williams Co-Head. This was less favourable treatment than an individual without a disability might expect. We consider a *prima facie* case has been made out. We have rejected the Respondents' explanation that it was believed that the Claimant had been signed off for a further period. Addressing the reason why, we conclude that it was because of the Claimant's disability.

263. [**vi**] *The alleged failure to consult with the Claimant in respect of these changes* - we accept that the Second Respondent had in mind changes and had discussed these with the Claimant in July. The part about giving Julia Williams "sole overall responsibility for the team" and making her Co-Head, we find however were not discussed.

264. Having a Co-Head imposed without any consultation on this proposal was less favourable treatment than an individual without a disability might expect. We consider that making a junior colleague Co-Head of Department with senior manager without consultation would be very unusual and calls for an explanation. We consider a *prima facie* case has been made out. We are not satisfied with the Second Respondent's explanation in respect of the Co-Head element. There had been no consultation on a Co-Head and we also reject the explanation about the misinterpretation of the GP certificate. Addressing the reason why, we conclude that it was because of the Claimant's disability.

265. [**vii**] *The alleged announcement of the same to the workforce without consulting the Claimant* – again there had been some consultation in July but not in respect of the changes to Julia Williams' rule.

266. For similar reasons to those given above we consider that the announcement of 3 August which was in terms that we find were permanent, was less favourable treatment and because of the Claimant's disability.

267. [**viii**] Ms Phillips' alleged criticism of the Claimant for attendance at hospital. We do not accept that the voice message was critical and it follows that we do not consider that this was less favourable treatment.

Discrimination Arising in Consequence of Disability (section 15)

268. [**Issue 14**] Was the Claimant treated unfavourably by the First and Second Respondents because of something arising from the Claimant's disability? The Claimant relies on his:

269. *Absence from work* - the Tribunal finds that the absence from work *did* arise because of the Claimant's disability.

270. *An inability to cope with a continuing excessive workload* - we have found above that we do not consider that the workload was "excessive" and do not find that this part of the section 15 claim has been made out.

271. A perception that the Claimant was insufficiently robust and/or unable to manage the team and that his opinion was no longer valid – we consider that this element is misconceived. A perception about lack of robustness, etc might be a stereotype leading to action might be the basis of a section 13 direct discrimination claim. We do not consider that such a stereotype should be treated as something arising.

272. *The appointment of a co-head of department?* Again and for similar reasons, the Tribunal considers that the appointment of a Co-Head was direct discrimination rather than something arising.

273. [**Issue 15**] Was the Claimant subjected to the following adverse [unfavourable] treatment:-

274. *The continued failure to ameliorate the Claimant's workload and/or fill staff vacancies* - we do not consider that there was a failure to ameliorate workload and or fill vacancies and in any event this was not because of the Claimant's absence.

275. {Those matters cited at 3 and 10 above} [3**i**] The requirement, expectation and/or practice of:-

276. Working excessive hours and also without adequate front office resource;

277. Filling the gaps in work left by staff absences and/or vacancies;

278. *Covering the significant gaps in the Risk department* – taking all three of these very similar points together – we do not consider that there were excessive hours worked, inadequate front office resource or gaps in the risk department. In any event we do not consider that this treatment arose because of the Claimant's absence.

279. Project management involvement in the NCA, EP and CASS projects - while we do find that the Claimant had involvement in these regulatory projects this did not arise as a result of his absence from work.

280. [3**ii**] *The decision not to fill vacant posts and/or ongoing failure to fill vacancies within the Claimant's team* – this is substantially similar to matters dealt with above. This did not arise from the Claimant's absence.

281. [3**iii**] The failure to heed and/or act upon the Claimant's request for additional support to Ms Phillips on 3 November 2017, 12 June 2018 and/or 19 July 2018 whether in general or in a timely manner - for reasons given above we do not accept that there was such a failure.

282. [3**iv**] Restructuring the Claimant's department in general and/or without his knowledge or consent. This is substantially similar to v, vi, vii below and dealt with below.

283. [**i**] *Ms Phillips' alleged reply to the Claimant's reporting of his mental health condition as "just stress"* – for similar reasons to those given above we do not consider that this was unfavourable treatment.

284. [**ii**] *Mr Somerville-Cotton's alleged comments in the meeting of 6 June 2018* – for similar reasons to those given above we do not consider that this was unfavourable treatment.

285. [**iii**] *Staff announcements as to the Claimant's absence on or before 2 August 2018 above* – for similar reasons to those given above we do not consider that this was unfavourable treatment.

286. [**iv**] *On or before 2 August 2018 the scheduling of a call with the Claimant whilst he was on leave* – for similar reasons to those given above we do not consider that this was unfavourable treatment.

287. [**v**] *The alleged removal of the Claimant's management responsibilities and/or appointment of Ms Williams* - we find, for similar reasons to those discussed more fully in the context of less favourable treatment in the section 13 claim above, that this was unfavourable treatment.

288. We find that the Claimant's absences were a material cause of this treatment. We accept the Claimant's submission that the Second Respondent had become impatient at the Claimant's absences. The Second Respondent's case is that he took action because he was expecting the Claimant to be off sick for a further period. While the Tribunal does not accept the precise detail of the Second Respondent's evidence on his misinterpretation of the GP certificate in the period 1-3 August, we do find that in a broader sense the Second Respondent was materially influenced in his decision-making by the Claimant's absence.

289. We find the Claimant's absences were a material cause of the unfavourable treatment in respect of management responsibilities and Ms Williams' appointment.

290. [**vi**] *The alleged failure to consult with the Claimant in respect of these changes* – we accept that there had been some consultation, but we conclude that the failure to consult over the Julia Williams Co-Head changes was unfavourable treatment.

291. For similar reasons to allegation [v] we find that by early August the Second Respondent had grown impatient with the Claimant's absence and that this was because of the Claimant's absences.

292. [**vii**] *The alleged announcement of the same to the workforce without consulting the Claimant* – we find that the announcement on 3 August without consultation was unfavourable treatment.

293. For similar reasons to [v] and [vi] above, we find that this was because of the Claimant's absences.

294. [**viii**] *Ms Phillips' alleged criticism of the Claimant for attendance at hospital* - we do not find that this was criticism and do not find unfavourable treatment.

295. [**Issue 15v**] The Claimant's bonus calculation insofar as it was affected by (i) his absence from work and (ii) the presence of a co-head of Department (this leading to the co –head having greater weighting in the bonus pool) – we consider that we do not have evidence to determine this point which ought to be considered at a remedy hearing.

296. [**Issue 15vi**] *Alleged removal of the Claimant's access to his email account* - the Tribunal is entirely satisfied that the Claimant did not receive unfavourable treatment in this respect. It is clear that the Claimant did not respond to a request to update his password with the result that he was locked out of the system. Unchallenged witnesses on behalf of the Claimant give evidence of conversations they had with IT staff in September 2018. The evidence of what the IT staff said is hearsay.

297. We accept that conversations with IT staff took place but consider that the precise context and detail has been lost in time. We consider the most likely explanation is that this is a reference either to removal of the Claimant from various internal email groups, at a time when the First Respondent was trying to avoid bombarding him with emails or alternatively the password had expired.

298. Based on our findings we are satisfied that there is no discriminatory conduct in this respect.

299. [**Issue 15vii**] *The alleged removal of the Claimant's name on the group Christmas card list*? The Claimant gave no evidence himself in respect of the allegation but relies on the witness evidence of Neil King. It is said that Julia Williams had instructed that the left over Christmas cards signed in 2017 should not be re-used in 2018.

300. The Tribunal would find it surprising if a firm sent identical cards at Christmas to clients in consecutive years. It is clear from the organisation chart the teams had changed year on year. We do not find that there was unfavourable treatment. We do not consider that this claim is well-founded.

301. [**Issue 16**] If so and in respect of each finding made of discrimination arising in consequence of the Claimant's disability:-

302. Was the taking of steps to avoid placing the Claimant at risk or subjecting him to detrimental treatment a legitimate aim?

303. It is open to the First Respondent to justify unfavourable treatment under section 15(1)(b).

304. The Respondents introduced a document from the Financial Conduct Authority, Entitled "Statement of Principles and Code of Practice for Approved Persons". This was as a result of the Tribunal inviting the Respondents to substantiate their case that there was a regulatory need to take the action that was taken. We are not satisfied based on the evidence provided that there was a regulatory need to make the announcement made on 3 August 2018 in circumstances where there were designated deputies for the Claimant's role. It is not clear to us based on this

evidence that the regulation required any action to be taken in the circumstances of this case, i.e. a period of sick absence.

305. The Tribunal accepts however that providing leadership is a legitimate aim.

306. Were the steps taken proportionate? The relevant unfavourable treatment is the appointment of Ms Williams/removal of Claimant's management responsibilities, the failure to consult regarding Ms Williams and the announcement without consulting the Claimant.

307. If these changes had genuinely been interim/caretaker and announced as such on 3 August and explained to the Claimant as such, we consider that this would have been a proportionate means of providing leadership and clarity around that leadership.

308. Our finding however is that the structure announced on 3 August was a permanent change, that was being announced one working day before the Claimant was due to return from holiday. There was no pressing need either from a leadership nor from a regulatory point of view which made it proportionate to take this action. It follows that we are not satisfied that the First Respondent has justified this action so as to make out the section 15(1)(b) defence.

Victimisation

309. [**Issue 17**] The Claimant relies upon the following alleged protected acts:-

310. A conversation with Mrs Philips after 8 June 2018 with Ms Phillips in which the management of his health was discussed: [20] ET1. This must be a reference to the conversation on 13 June 2018. We find that, looked at very broadly, to the extent that this conversation related to the First Respondent's attitude and treatment of those with mental health issues it was a protected act.

311. The grievance on 12 September 2018: [32] ET1 – it is conceded by the Respondents that this a protected act pursuant to s27 EqA 2010

312. The Claimant's representations at the grievance interviews on 12 and 18 October 2018 – it is conceded by the Respondents that this was a protected act.

313. [**Issue 18**] Alleged detrimental acts:-

314. An alleged failure to act upon the Claimant's complaints and/or provide any or any adequate welfare support –

315. We do not find that Claimant suffered any detrimental treatment as a result of the conversation on 13 June. We find that Ms Phillips allowed the Claimant to talk about a variety of problems and understood that he needed to talk about this. Her treatment of the Claimant was reasonable and sympathetic. The First Respondent's treatment of the Claimant was entirely appropriate until events in August 2018. We do not find that the events in early August 2018 were influenced by the conversation on 13 June.

316. Considering the period from 12 September 2018 onward, on which date the next protected action was made, the submission of the grievance. On 18 September Ms Phillips wrote to the Claimant's solicitors regarding occupational health, on 19 September she confirmed that his access to IT had not been revoked, on 24 September the Claimant met with Arrow VSS (OH provider) and on 10 October Mr O'Hegarty met with the Claimant to discuss his grievance, which concluded on 24 October after further investigations. We do not accept that there was a failure to act on the Claimant's complaints, nor do we accept that there was a lack of adequate welfare support

317. The dismissal of the Claimant's grievance whether in general and/or in the critical terms of the outcome report.

318. Mr O'Hegarty made genuine attempts to break the deadlock and get the Claimant back to work, despite his perception that the Claimant's solicitor was taking an unnecessarily adversarial approach.

319. We do not consider that the fact that the grievance was dismissed was in itself an act of victimisation. We consider that Mr O'Hegarty dealt with the grievance in a reasonable way and made findings that were not influenced in a detrimental way by the fact that discrimination had been alleged.

320. This allegation does not succeed.

321. *An alleged failure to adequately investigate the Claimant's grievance* – the Tribunal did not consider that there was failure in this respect which would amount to detrimental treatment.

322. Those matters set out at paragraph x (vi) and (vii) above - (access to email account & removal of Claimant's name on group Christmas card list) – the Tribunal does not consider, for similar reasons as are set out above, that there was detrimental treatment in respect of either of these allegations.

323. None of the claim of victimisation succeeds.

Liability

324. [**Issue 19**] Is the Second Respondent liable:-

325. Section 110 of EqA provides:

> 110 Liability of employees and agents
>
> (1) A person (A) contravenes this section if—
>
> (a) A is an employee or agent,
>
> (b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and
>
> (c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

326. As an employee of the First Respondent pursuant to s110 EqA 2010?

327. The Second Respondent was an employee of the First Respondent. Our finding is that the permanent restructure announced on 3 August was his decision and was something for which the First Respondent was liable. It follows that the Second Respondent is also liable for the allegations which succeed under section 13 and section 15.

328. In aiding and/or causing the contraventions pursuant to ss111-112 EqA 2010? It has not been necessary to consider this in view of our finding under section 110.

Continuing Act / Just and Equitable Extension

329. [**Issue 20**] Are the claims or any part of them out of time? Taking account of the ACAS conciliation period the claim in relation to the events of and leading up to 3 August 2018 are in time.

330. [**Issue 21**] Do the matters set out above amount to a continuing act of discrimination, harassment and or victimisation? If not, is it just and equitable to extend time? It has not been necessary to consider this.

Remedy

331. The parties are ordered to send to the Tribunal proposed directions (agreed as far as possible) by 4pm on Thursday 2 January 2020 for a suggested two day remedy hearing in preparation for a **30 minute telephone hearing at 4.30pm on Monday 6 January 2020**.

Employment Judge Adkin

Date 19/12/2019

WRITTEN REASONS SENT TO THE PARTIES ON

19/12/2019

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant (s) and respondent(s) in a case.