**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 8000337/2023**

**Held in Edinburgh on 19-22 February 2024**
**Deliberations on 1 March 2024**

**Employment Judge Sangster**
**Tribunal Member Macfarlane**
**Tribunal Member Lithgow**

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| **Mr R Paterson** | **Claimant**<br>**In Person** |
| **Amazon UK Services Limited** | **Respondent**<br>**Represented by**<br>**Mr P Sanga**<br>**Barrister** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The unanimous judgment of the Tribunal is that:

- One of the claimant's complaints of failure to make reasonable adjustments succeeds: the respondent failed to comply with the first requirement in relation to a provision criterion or practice requiring employees to attend occupational health at stipulated times. The respondent is ordered to pay the claimant the sum of **£1,596.99,** including interest, by way of compensation for injury to feelings.

- The claimant's remaining complaints, of unfair dismissal, direct discrimination, discrimination arising from disability, harassment and the

remaining complaints of failure to make reasonable adjustments, do not succeed and are dismissed.

## REASONS

### Introduction

1. The claimant presented complaints of constructive unfair dismissal, disability discrimination (direct discrimination, discrimination arising from disability and failure to make reasonable adjustments) and harassment related to disability.

2. The respondent resisted the claim.

3. A preliminary hearing for case management took place on 20 September 2023, before Employment Judge McFatridge. At the preliminary hearing, orders were issued requiring the claimant to provide further specification, in writing, of each of the complaints brought. In response to the orders issued, the claimant produced further particulars of his claim on 22 & 27 October 2023, extending to 34 and 20 pages respectively.

4. The case then called for a final hearing.

5. The parties lodged separate bundles, extending to 606 and 262 pages respectively.

6. Whilst the claimant had applied, in advance of the hearing commencing, to strike out the response, he indicated at the start of the hearing that he did not wish to insist on that application.

7. The claimant gave evidence on his own behalf at the final hearing.

8. The respondent led evidence from:

   a. Sasha Horn (**SH**), European Capacity Planning Leader for the respondent;

   b. Catherine Mahony (**CM**), HR Business Partner for the respondent.

9. Other individuals referenced in this Judgment are:

a. Amy Templeton (**AT**), Operations Manager for the respondent.

**Issues to be Determined**

10. No list of issues had been prepared in advance of the final hearing commencing. The issues to be determined by the Tribunal were discussed, in detail, at the start of the hearing. That discussion took the whole of the first morning of the hearing.

11. Following the discussion, the Employment Judge prepared a draft list of issues to be determined. That list was provided to the parties for consideration after lunch on the first day of the hearing. Parties confirmed at that point, and again at the start of the second day of the hearing, that the document accurately reflected the issues to be determined by the Tribunal.

12. The issues to be determined were accordingly as follows:

*Constructive Unfair Dismissal*

13. Was the claimant dismissed, i.e.

    a. did the respondent breach the implied duty of trust and confidence, i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant?

    b. if so, did the claimant affirm the contract of employment before resigning?

    c. if not, did the claimant resign in response to the respondent's conduct?

14. The claimant relies upon a course of conduct, set out in his further particulars provided on 22 October 2023, culminating in a final straw, namely the respondent's failure to respond to his emails dated 19 June 2023.

15. If the claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of

the Employment Rights Act 1996 (**ERA**); and, if so, was the dismissal fair or unfair in accordance with s98(4) ERA.

*Disability Status – s6 EqA*

16. Was the Claimant a disabled person for the purposes of the s.6 of the Equality Act 2010 (**EqA**) at the material time as a result of social anxiety, anxiety or bipolar disorder?

*Direct Discrimination – s13 EqA*

17. Did the respondent subject the claimant to the following treatment?

    a. Ceasing meaningful contact with the claimant from 21 March 2023.

18. If so, was that treatment '*less favourable treatment*', i.e. did the respondent treat the claimant less favourably than they treated, or would have treated others ("comparators") in not materially different circumstances? The claimant relies upon a hypothetical comparator.

19. If so, was this because the claimant is a disabled person?

*Discrimination Arising from Disability – s15 EqA*

20. Did the respondent treat the claimant unfavourably by taking the claimant off leading important calls by video around April 2022? If so, was this due to the claimant not performing well on video calls, which arose as a result of social anxiety?

21. Did the respondent treat the claimant unfavourably by placing the claimant on a performance management plan on 7 March 2023? If so, was this due to the claimant having difficulty leading video calls and making errors, which arose as a result of social anxiety/anxiety?

22. If so, was the treatment a proportionate means of achieving a legitimate aim?

23. Did the respondent know or could it reasonably have been expected to know that the claimant was a disabled person? From what date?

*Failure to make reasonable adjustments - s20/21 EqA*

24. The provision, criteria or practices (**PCP**s) relied on by the claimant are:

a. Allowing employees to work from home;
b. Unfairly distributing work among team members, resulting in the claimant having an excessive and unmanageable workload;
c. Requiring that employees attend occupational health at stipulated times;
d. Providing employees with 5 days to consider settlement offers;
e. A requirement for employees of the same level as the claimant to lead video calls;
f. A requirement for employees of the same level as the claimant to interact with senior internal and external stakeholders;
g. Failing to hold welfare discussions, as provided in the respondent's long term absence policy;
h. Failing to ensure appropriate occupational health assessments;
i. Not offering a choice as to whether occupational health assessments would be conducted by telephone or video;
j. Holding grievance meetings remotely; and/or
k. Not informing individuals when they are placed on a performance improvement plan.

25. Did the respondent have such PCPs?

26. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that (following the numbering at 24 above):

a. He found it difficult to interact with colleagues remotely, due to social anxiety;
b. He could not cope with this and became anxious and required to take time off work due to having anxiety/social anxiety and bipolar disorder;
c. The claimant found it difficult to attend morning appointments, as his medication made him drowsy in the mornings;

d. The claimant found it difficult to make decisions within a 5 day period due to the hypermania he was experiencing at the time;
e. The claimant found it difficult to participate in video calls, due to social anxiety;
f. The claimant found it difficult to engage with senior internal and external stakeholders due to social anxiety;
g. Lack of contact and discussion regarding his absence in the period from April to July 2023 increased the claimant's anxiety levels;
h. Lack of occupational health assessments meant appropriate adjustments, to enable the claimant to continue working, were not identified;
i. The claimant found it difficult to participate in occupational health assessments conducted by video due to social anxiety;
j. The claimant found it difficult to participate in his grievance meeting, which was conducted by telephone, due to social anxiety; and/or
k. This increased the claimant's symptoms of mania and anxiety.

27. If so, did the respondent know, or could it reasonably have been expected to know, the claimant was likely to be placed at any such disadvantage?

28. If so, would the steps identified by the claimant, namely (again following the numbering above):

a. Requiring employees to work in the office;
b. Ensuring the claimant had an appropriate/manageable workload;
c. Ensuring that any occupational health appointments were scheduled for the claimant in the afternoon;
d. Allowing the claimant a longer period of time to consider the settlement offer presented;
e. Providing coaching to the claimant in relation to the conduct of video calls;
f. Providing coaching to and/or a mentor for the claimant to build his confidence in engaging with senior internal/external stakeholders;

g. Holding regular welfare discussions with the claimant during his absence;
h. Referring the claimant to occupational health in the period from June 2022 to 8 June 2023;
i. Conducting occupational health assessments by telephone or in person;
j. Allowing the claimant to present his grievance in a face to face meeting; and/or
k. Confirming to the claimant that he was subject to a performance improvement plan.

have alleviated the identified disadvantage?

29. If so, would it have been reasonable for the respondent to have taken those steps at any relevant time and did they fail to do so?

*Harassment – s26 EqA*

30. Did the respondent engage in the following conduct:

a. Mr Horn telling the claimant, on 19 January 2023, to stop hiding behind tech, providing negative feedback and stating *'really looking forward to our next session'*;
b. Giving the claimant an unmanageable workload in the period 19 January to 13 March 2023, and refusing to discuss or adjust this;
c. Placing the Claimant on performance management (in January 2023), but not informing him of this and/or misleading him when he asked and not following the process;
d. Failing to following the Long Term Absence process or provide the claimant with a copy of the process when he requested this, instead disclosing a process named Health Policy;
e. Refusing to address and give redress to the claimant's grievance in relation to reasonable adjustments and not following the grievance procedure in relation to this;
f. Setting up two occupational health appointments for the claimant when only one was required;

g. Misleading the claimant in May 2023 that he was having an appointment with a medically trained professional to discuss his personal health, when this was not the case;

h. Mr Horn stating that adjustments could not be discussed as part of a long term absence meeting;

i. Failing to offer the claimant either a risk assessment or OH assessment in the period from June 2022 to July 2023 and refusing to discuss reasonable adjustments in that period;

j. Requiring the claimant to attend an occupational health appointment at 08:45 and not allowing the claimant to choose whether this should be held by phone or video;

k. Stating that the claimant only had 5 days to consider a settlement proposal;

l. Refusing to engage the claimant on 19 June 2023 when he wrote to both HR and his line manager stating unless reasonable adjustments were discussed he would have to resign; and/or

m. Failing to respond to the claimant's resignation dated 6 July 2023.

31. If so, was it unwanted conduct?

32. If so, was it related to disability?

33. If so, did the conduct have the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

*Time Limits - s123 EqA*

34. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010?

*Remedy*

35. If the claimant establishes any of his claims, to what remedy (pecuniary and non-pecuniary loss) is he entitled? Specifically:

a. What financial losses has the alleged discrimination caused the claimant?

b. What injury to feelings has the alleged discrimination caused the claimant and how much compensation should be awarded for that?

**Findings in Fact**

36. This Judgment does not seek to address every point about which the parties have disagreed. It only deals with the points which are relevant to the issues which the Tribunal must consider in order to decide if the claim succeeds or fails. If a particular point is not mentioned, it does not mean that it has been overlooked, it simply means that it is not relevant to the issues to be determined. The relevant facts, which the Tribunal found to be admitted or proven, are set out below.

37. The respondent is a UK subsidiary of a global online commerce business that sells a range of goods and services to consumers.

38. The respondent operates a number of relevant policies applicable to employees, including the following:

a. **Performance Management Policy.** This states that where performance issues are identified the first step will be informal coaching, whereby the individual's line manager will explain what the individual requires to do to improve their performance, and set a review period within which that should take place. The Policy states that the duration of the informal stage will vary on a case-by-case basis. If performance does not improve, employees are entered into 'Pivot' and invited to a Pivot Meeting, at which they will be given the option to remain in employment with the respondent and work on a formal Performance Improvement Plan, or leave with a settlement package.

b. **Health Policy.** This states that when an individual is absent due to illness, welfare calls will take place (albeit no timescales are set out for this). It also states that where an individual is expected to remain unfit to return to work on full duties after 3 months, a medical assessment should be arranged.

c. **Grievance Policy.** This states that grievances will be investigated and that the respondent will aim to inform individuals of the decision in writing, within 7 days of the grievance hearing. Where this is not possible, individuals will be notified of the reasons for that and given an approximate timescale as to when a decision will be reached.

39. The claimant has worked in outsourcing, in various roles, for around 20 years. He has experienced symptoms of social anxiety since he was a child and of general anxiety from at least 2007. The impact of his symptoms vary over time: during some periods they have limited impact but at other times can be entirely debilitating to the extent of panic attacks and becoming housebound. He takes medication for anxiety on a daily basis. In 2019 he was hospitalised for a short period. This was attributed to the claimant having bipolar disorder, albeit that was not formally diagnosed at that time.

40. The claimant's interview for employment with the respondent was conducted by video, by SH, given ongoing restrictions as a result of the covid-19 pandemic.

41. The claimant commenced employment with the respondent as a Capacity Planner in Outsourcing on 5 July 2021. He did not inform the respondent that he had any medical conditions when he commenced employment with them.

42. The claimant's line manager was SH, who is German and lives in Berlin. At the time the claimant's employment commenced, there was one other Capacity Planner in Outsourcing.

43. The claimant's contract stated that he was assigned to the Edinburgh office. At that stage however, where it was possible for them to do so, the respondent's employees continued to be permitted to work from home, following the covid-19 pandemic. Whilst staff were permitted to attend the office, should they wish, few did. Most worked from home. Discussions amongst the team, and with stakeholders internally and externally, was conducted by video calls. The claimant did not raise any concerns with SH about this, and it appeared to SH that the claimant was able to engage appropriately on those calls.

44. On 2 June 2022, the claimant became upset when on a call with a Team Project Manager and was then absent for a few days, due to illness. The Team Project Manager stated to SH that she felt he ought to check in with the claimant as a result. SH discussed this with the claimant on 10 June 2022. The claimant indicated that he was experiencing significant personal difficulties, which he explained to SH, and stated that these personal difficulties were causing him to be stressed/anxious. The claimant did not inform SH that he had a history of anxiety/social anxiety or bipolar disorder at that time.

45. During 2022 the outsourcing team expanded, in that two other Capacity Planners were recruited. This meant that there were 4 Planners in the team: one other who was the same level as the claimant and two who were the level above. This led to a restructure of responsibilities within the team. One of the outcomes of that restructure was that the more senior Capacity Planners would take over responsibility for leading video calls with internal and external stakeholders. This responsibility was accordingly removed from the claimant at that time.

46. A full team meeting was held in Edinburgh from 4-7 October 2022. This was the first occasion the claimant had met SH in person and the first in person team meeting since the covid-19 pandemic. The focus was on team building activities (such as laser tag and escape rooms), as well as identifying and documenting roles/responsibilities of the team and individuals within the team going forward, given the recent expansion of the team. The claimant participated in all the activities and discussions. A document confirming roles/responsibilities was then prepared by SH following the event, which he circulated to the Capacity Planning Team.

47. In addition to a weekly team call, SH held weekly 1-2-1 discussions with each of his direct reports. He had a standard agenda for those discussions, which was attached to each invite. This stated that the topics to be discussed at each weekly 1-2-1 were: Business (Callouts/Open Items/Key Dates/Delivery); Standard Work (project update); Goals Update; Personal Development

(Training/Skills/Tools/Teambuilding); Needs (anything you need my support); and Wellbeing (are you happy).

48. Following the team meeting in Edinburgh, SH regularly raised performance concerns with the claimant, in their weekly 1-2-1 discussions. During these, they discussed the work allocated to the claimant, as identified at the October 2022 meeting and recorded in the document outlining roles/responsibilities circulated thereafter. In accordance with that document, the claimant had 18 'business as usual' (BAU) tasks. The other Capacity Planner of the same level as the claimant had similar duties.

49. In November/December 2022, SH raised with the respondent's HR team that he had concerns about the claimant's performance, which he had been discussing with the claimant. They advised SH to follow the respondent's guidance for managers when dealing, informally, with performance issues (internally known as 'Focus'). This involved SH providing information to HR in relation to the concerns he had in relation to the claimant's performance, and how he intended to seek to address them informally with the claimant. He did so.

50. At their weekly 1-2-1 on 19 January 2023, SH raised concerns again, which he documented in an email following the discussion, in accordance with the Focus guidance. His email included the following *'We have had a detailed discussion on the importance of delivery in our EDI offsite on mid-October where we agreed to put two lists together where we focus on 1) personal support needed and 2) team issues which are bottleneck for improvements. Both are missing till now after reminders in our 1:1s. This is putting me in a difficult spot to provide the right support to you, so I have structured the approach to ensure progress. As we discussed, for the past three months you've had trouble with Delivering Results and also with meeting productivity expectations for your level. At current point I can't rely on your support on all expected items for your Role – while some have improved, some are still outstanding as opportunity.'* He detailed some particular areas where improvements were required and set out the reasons for this. He then stated *'At this point I'd like to make sure that you understand exactly what is*

*expected of you. It's important that you demonstrate improvement in meeting productivity expectations and deliver results. Specifically, I'm expecting that over the next six weeks, you will:*

1. *Communication – written updates to the team about current state of the programs you in charge and data you in charge.*
2. *Detailed list of support needed for you personally and for the team to eliminate bottlenecks.*
3. *Deliver all agreed standard reporting's and weekly data analyses within the established timelines. This includes vendor performance reporting's, STF updates, weekly GO network delivery update emails, and SL miss write-ups by Mondays EOD.*
4. *Deliver the LTF preparation files and meet the standard of high quality with accurate data and in the agreed upon format.*
5. *Ensure a high quality of insights and 100% accurate data at any given time with the assigned deliverables.*
6. *Make sure each input provided to GOCP by peer teams of partners is checked for accuracy and any issues are called out in writing.*

*Again, I'll be supporting you along the way but I need to see your actions taken and reported to me. We'll use our weekly 1:1s to check your progress so that I can give you feedback and coaching, please ensure you have a weekly update ready in writing for our discussion.*

*In today's meeting, we also talked about getting a mentor for you. I have a couple of people in mind I'd like to recommend but let's focus first on the list to find the right area where a mentor can make an impact. Attached also the RACI we will discuss in Monday call again. Keep in mind the core items: 1) as L5 you are there to manage and lead your full area, 2) not to "hide" behind tech, 3) document and communicated proactively, and 4) to meet your set timelines.*

*Let me know if you have any questions or if there's anything I've missed in the meeting notes. I'm really looking forward to our next discussion!.'*

51. SH made the comment that the claimant should not 'hide behind tech' as he felt that the claimant was too focused on (hiding behind) a particular technical project, which the claimant had asked to be involved in, to the exclusion of the BAU tasks allocated to him, which were not being completed. He hoped that, having had the issues and improvement required very clearly highlighted, the claimant would improve. During the meeting, the claimant indicated that he had a desire to do so, and recognised that his performance had been declining. SH wanted to reflect that he felt positive that the claimant could and would improve, and they could move forward and past the performance issues, so concluded the meeting stating that he was 'really looking forward to our next session' to reflect that sentiment.

52. The 18 BAU items which the claimant was responsible for, which had been included on the full list circulated to the team following the October meeting, were extracted from that and provided to claimant as a tracker document, which then formed the basis for ongoing weekly 1-2-1 discussions. These were not new BAU items. The claimant was aware, from the discussion in October 2022 and the document circulated thereafter, that these fell within his remit and he was responsible for these. The tracker document also included reference to 4 projects the claimant was also responsible for. In late January/February 2023 however, the claimant was informed that he was no longer responsible for those projects, to allow him to focus on his BAU tasks.

53. The claimant was on holiday from 27 January to 12 February 2023.

54. By Tuesday 7 March 2023, SH felt there had been insufficient improvement in the claimant's performance. As a result, the claimant was informed, in accordance with the respondent's Pivot procedure, that he could either take a settlement offer and leave the respondent's employment, or he would be moved onto a formal Performance Improvement Plan, details of which were provided to him. He was given 5 working days to consider how he wished to proceed, in accordance with the Pivot procedure. The deadline was subsequently extended to 17 March 2023. Had he indicated he wished to accept the settlement offer, he would have been provided with a settlement agreement and given 10 days to consider the terms of that.

55. The claimant commenced a period of sickness absence, due to anxiety, from Monday 13 March 2023.

56. On 16 March 2023, the claimant sent an email to SH stating, '*I would like to use this 4 weeks to manage my health, due to that reason I am going to withdraw for the period of sick leave from my corporate e-mail, but have copied in my personal, I do ask that I am now given 4 weeks to focus solely on recovery.'* SH took this email as a request from the claimant not to be contacted for 4 weeks, so he could focus solely on his recovery. SH did not contact the claimant in that period, as a result.

57. On 21 March 2023, the claimant sent an email to SH, attaching 4-page grievance document. He stated in the cover email '*At present I don't feel that I am in a position to take part in any grievance process, but I do wish to raise a grievance and once I am feeling better participate…Happy to have a follow up session after my next doctors appointment on the 10th April.'*

58. The claimant disclosed in his grievance that he was suffering from anxiety. He stated that he had mental health conditions at the time he took up his role with the respondent, but had managed his mental impairment in his first year of employment. He stated that he had previously been hospitalised with bipolar disorder. His grievance related to two principal issues, namely:

    a. The performance improvement plan and process in relation to this; and

    b. A failure to make reasonable adjustments. He stated that the respondent had failed to or avoided discussing an *'obvious mental impairment'* and highlighted that the duty arose where an employer knew or *'could reasonably be expected to know'* someone is disabled.

59. The claimant set out a timeline in his grievance regarding previous discussions with SH. In that he stated that he had taken 1.5 days sick leave due to anxiety/stress in June/July 2022 and that he had had a discussion with SH on the reasons causing that, which were related to his child. He also recorded that he had had a further discussion with SH in November 2022,

when the claimant informed SH that he had been unable to stay in contact with his child and was now 'burned out' and SH had agreed.

60. The claimant mentioned in his grievance that he was concerned that the respondent would dismiss him *'before the 2 years where [he] could seek unfair dismissal.'*

61. The 4-week period, which the claimant expressly requested for recovery in his email of 16 March 2023, expired on 12 April 2023. On that date the claimant sent a further email to SH stating that he had spoken to his doctor that day and had been prescribed additional medication. The claimant stated it could take at least three weeks for that medication to work, and may result in possible drowsiness or hangover like symptoms. He had accordingly been certified as unfit to work for a further four weeks. He stated, *'perhaps we could arrange a catch up either now, or after my next 4 week appointment in May?'* In his email he also stated that he had commenced early conciliation via Acas. SH was on annual leave on 12 April 2023, when the claimant sent his email. When he returned to work a week later he understood that he had missed the opportunity to catch up with the claimant 'now', and the claimant may not be in a position to be able to participate in a call given his comments about drowsiness/hangover like symptoms, so waited until the next option which the claimant had given, namely after the claimant's next appointment in May.

62. On 19 April 2023, CM contacted the claimant by email to introduce herself and inform the claimant that she would be HR support for the grievance process, which would be heard by AT. She stated that *'in order to ensure we can support you during this process we would like to make a referral to occupational health and would welcome the opportunity to share the referral with you prior to sending to our OH. If you could let me know when would be a good time to call to discuss that would be great.'* The claimant responded suggesting the first week in May for a call. CM and the claimant then had a call to discuss the OH referral on 3 May 2023. The referral was made on 5 May 2023 but, due to an oversight, the referral stated the claimant's previous, rather than his new, telephone number. An appointment was scheduled for

the claimant to attend an occupational health assessment, via video, on 18 May 2023 at 08:30. He was informed of this by CM on 11 May 2023.

63. The claimant moved onto nil pay from May 2023, having exhausted his enhanced company sick pay entitlement.

64. On 11 May 2023, SH emailed the claimant to ask whether there was any update from his doctor's appointment, whether this sick line had been extended and whether he could arrange a call between the claimant and HR. The claimant provided a further fit note dated 10 May 2023, stating that he remained unfit to work for a further 28 days, but stated that he was happy to progress. SH indicated that he would contact HR regarding the next steps and was in regular contact with the claimant thereafter.

65. The claimant did not attend the OH appointment scheduled for 18 May 2023. At 07:50 on 18 May 2023 he sent CM an email stating *'I have Internet issues and will need the OH re scheduled another day?'* At 09:26 that day the respondent submitted a request to their occupational health provider that the appointment be rescheduled.

66. CM confirmed to the claimant that the occupational health assessment would be rescheduled. He requested that it take place the following week. On 22 May 2023 the claimant sent an email to CM stating that his medication was impacting him in the morning, so requested that the OH assessment take place after 3pm. CM acknowledged this request, stating that she would *'reach out to OH and see what they are able to offer.'* All correspondence between the respondent and OH was conducted in writing, via a portal. No request was made for the claimant's appointment to take place in the morning. On 26 May 2023 the claimant was informed that an OH appointment had been made for him and would take place on 7 June 2023 at 08:45, by telephone. He attended that appointment and a report was provided to the respondent later that day.

67. The report stated that the claimant was experiencing severe depression and severe anxiety. It referenced him having social anxiety. It stated that the medical conditions had lasted for 12 months or longer and that the Equality

Act was likely to apply. It provided an estimated return to work date of 1 August 2023.

68. As the grievance and absence processes were being managed separately, SH wrote to the claimant on 24 May 2023 stating that he would also contact OH in relation to any adjustments required for the claimant to return to work. He did so and the claimant was contacted by an Accommodations Consultant from the respondent's Disability and Leave Services (**DLS**) by email on 30 May 2023. The respondent's process is that, whenever there is potentially a requirement for workplace adjustments, DLS will discuss matters with the individual in the first instance, to ascertain if there are straightforward adjustments which can be made. If they feel that occupational health input is required, they will then make that referral. In their email to the claimant the DLS consultant outlined who they were, that they would have a discussion with the claimant to discuss his needs and how best to support him, and review any available medical documentation relevant to that. They indicated in their email that it may be necessary for them to make an occupational health referral to obtain more insight on how the claimant could be supported. The claimant had a discussion with the Accommodations Consultant on 1 June 2023. The claimant indicated to them that he was absent from work with no foreseeable return to work date. In those circumstances, the DLS consultant indicated that it was not the appropriate time to discuss arrangement and adjustments for the claimant's return to work and no occupational health referral would be made at that time. They indicated that the claimant could/should get back in touch with them when he knew when he may be returning to work.

69. On 7 June 2023, SH sent an email to the claimant explaining that *'OH is a process for return-to-work preparation…when you are ready to work, we work with OH to find the right balance of work to start with and take it from there. This is how adjustments to work are discussed and worked out. When you are not ready to work there is no option to make adjustments for the start of your return. The main reason is that OH will make recommendations based*

*on your current situation before getting back to work, not for an unknown future state.'*

70. On 8 June 2023, the claimant sent an email to SH requesting copies of a number of policies, including the respondent's 'Long Term Absence Process'. SH responded, on 19 June 2023, providing the respondent's 'Health Policy', together with the other policies requested. SH provided the Health Policy as this was the absence policy applicable to the claimant's role. Whilst the respondent operated other policies regarding long term absence, this was the policy applicable to the claimant, given the department he worked in.

71. Following an email exchange with the claimant, in which he queried why the grievance process was being delayed pending an OH assessment, CM confirmed to the claimant, on 26 May 2023, that his grievance hearing could take place, if he was happy to proceed with this without OH input. A grievance hearing was accordingly arranged for 8 June 2023 (which was, in any event, after the OH assessment). While the claimant initially indicated that the arrangements for the grievance hearing were fine, prior to the grievance meeting he emailed CM requesting that the hearing take place by conference call, as his internet was not available. He also, separately, emailed AT stating that, as he did not have a working internet connection, he would like the hearing to take place by phone, or alternatively he could attend the Edinburgh office. His request for the grievance meeting to take place by phone was accommodated. AT conducted the hearing and CM attended as a note taker.

72. At the grievance meeting AT indicated that she had some questions for the claimant, specifically around the PIP. These were discussed and the claimant also explained why he felt that SH ought to have made reasonable adjustments as a result of the claimant's mental health issues, but SH had failed to do so. At the conclusion of the meeting, AT indicated that she was unaware of any discussions via Acas and could only consider, and discuss with the claimant, points relevant to the grievance.

73. On 9 June 2023, the claimant sent an email to CM seeking confirmation that both elements of his grievance would be investigated.

74. CM responded to the claimant on 13 June 2023, confirming that both elements would be investigated and that responses to both would be provided in the outcome letter. She confirmed that the next step was for AT to meet with SH, and AT may then wish to meet with the claimant again. CM also sent the claimant the minutes of the grievance meeting on that date. He was asked to review them and confirm if he believed them to be a true reflection of what was discussed and, if not, to confirm what he felt was inaccurate.

75. On 14 June 2023, the claimant sent an email to CM stating that the minutes of the grievance meeting were *'offensively inaccurate'*. He stated that he would *'check my transcript and write my own notes'*, suggesting that he had recorded the meeting, as he had done in respect of a previous meeting with SH. AT met with SH on 23 June 2023 and determined, as a result of doing so, that she did not require to meet with the claimant again. She did however wish to see the claimant's comments in relation to the grievance meeting minutes, and why he felt these were 'offensively inaccurate', prior to finalising her conclusions in relation to the grievance.

76. On 19 June 2023 SH sent an email to the claimant indicating that he understood the claimant may be in a position to return to work on 1 August 2023. (SH's understanding of the claimant's anticipated return to work date came from the OH report. The claimant did not however agree with that assessment and had indicated to DLS and CM that he did not anticipate returning to work in the foreseeable future.) SH stated that he would set up to bi-weekly calls to discuss the claimant's wellbeing and the adjustments required for him to return to work, now that there was an anticipated date for his return. Invites were then sent for those discussions. The claimant did not however attend any of them.

77. At 12:13 on 19 June 2023, the claimant sent an email to SH stating that he could not attend the first bi-weekly meeting as he had a hospital appointment on the date given and was currently '*considering [his] options'*. SH responded at 12:31 thanking the claimant for his reply and asking him to let SH know if a different day worked, so that the date for the call could be adjusted. The claimant did not respond to that email.

78. At 13:28 on 19 June 2023, the claimant sent an email to CM raising concerns in relation to the grievance hearing, particularly that he had only been permitted to speak about the PIP process, not any other elements. He stated that he was considering his options and repeatedly referenced the potential of raising proceedings for constructive dismissal, disability discrimination and harassment. He stated that he had a '*sick note till 11 July and I request now I am given time to consider my next options'* and *'I want to focus now on my health over next two weeks, I will consider my options, I believe that may be to resign at end of my sicknote*'. He stated that, unless he was assured of a return to work, with the 18 actions rescinded and an apology, he would be raising legal proceedings. He stated that he would not be checking emails, but could be contacted by phone. He concluded by stating that he would be in contact by 10 July.

79. Despite the terms of the claimant's email, CM did send a response to him on 26 June 2023, in which she addressed the points he raised. In relation to reasonable adjustments, she confirmed that DLS would not progress matters without an anticipated return to work date, but had confirmed they would reopen the case when the claimant was hoping to return so that any adjustments needed could be put in place for him returning to work. She highlighted that if he the claimant believed notes of the grievance meeting to be incorrect, he should provide details of what he thought was wrong. She concluded her email by stating that AT was in a position to provide the grievance outcome, but wished to understand the basis upon which the claimant disputed the notes of the grievance meeting, prior to doing so.

80. The claimant did not respond to that email. He did not, at any stage, provide any details to the respondent as to the basis upon which he felt the minutes of the grievance hearing were inaccurate.

81. The claimant sent an email to SH and CM at 00:47 on 6 July 2023, intimating his resignation, with immediate effect. He stated he intended to proceed with Employment Tribunal proceedings. The claimant's employment terminated that day. He did not receive any acknowledgement of his resignation. He raised employment Tribunal proceedings on 9 July 2023.

82. The grievance outcome was sent to the claimant on 11 August 2023. His grievance was not upheld.

83. The claimant now lives back at his family home in the Highlands. He has not undertaken any work since his employment with the respondent terminated. His psychiatrist has stated that he is unfit to work. The claimant does not think he will work again.

84. The claimant was formally diagnosed as having social anxiety in June 2023. At that time, it was noted that he had also experienced the symptoms of anxiety since 2007.

85. The claimant was formally diagnosed as having bipolar disorder in November 2023, as a result of his history since early adulthood, which included episodes of moderate to severe depression (when he neglects personal care, such as hygiene and nutritional intake and loses interest in activities and daily living), as well as episodes of hypermania (significantly impacting his judgment and decision making, one of which led to hospitalisation in 2019).

**Observations on Evidence**

86. The claimant agreed that he first informed the respondent that he had bipolar disorder in his grievance. He stated in his pleadings however that he had expressly informed SH, on the call on 10 June 2022, and at the in-person event in October 2022, that he had experienced anxiety and social anxiety for a number of years. SH stated that he was not informed of this by the claimant. On balance, the Tribunal concluded that the claimant had not informed SH of this, on either date, for the following reasons:

    a. The terms of the claimant's grievance, in which he stated that he had an *'obvious mental impairment'*, and that the duty arose where an employer *'could reasonably be expected to know'* someone is disabled. Not that he had expressly informed SH of this.

    b. The timeline included in the grievance, where he set out what he discussed with SH, which did not include that the claimant had informed him that he anxiety/social anxiety or a history of this, just that

he had taken 1.5 days off due to stress/anxiety in June/July 2022 and that this was caused by personal issues and in November 2022 that he was 'burned out'.

c. In cross examination the claimant initially stated that there had been insufficient time to discuss any health issues at his 1-2-1 at the in-person event in Edinburgh, in October 2022, but later stated that he *'believed [he] would have mentioned difficulties with mental health'.*

d. The claimant confirmed in response to questions from the Tribunal that he simply told SH that he was experiencing personal issues which were causing him to feel anxious/stressed and struggling to cope.

e. SH gave evidence that others he worked with have mental health issues and discussed the measures he took to support them. The Tribunal concluded that, had he been aware the claimant was experiencing similar issues, he would also have taken appropriate measures to support the claimant.

87. The claimant's position was that certain documents in the bundle were forgeries, particularly some of the manager referral forms produced by the respondent. He relied upon the different format of the documents and the differing content. The respondent's position was that there were two different formats as initially the respondent created a word version of the referral documents. These were used internally as draft documents, until they were agreed. Once they were agreed, they were inputted onto the portal which the respondent used for all communication with their occupational health provider. Only certain individuals had access to that portal. Print outs from the portal appeared in the bundle also, but had a differing format to the initial word documents. The Tribunal, on balance, concluded that the respondent's explanation adequately explained the different formatting of the documents and that they had not been falsified by the respondent. Nothing however turned on these documents: the key document was the subsequent occupational health report, which was not disputed.

88. Similarly, in relation to an email trail regarding weekly meetings, the claimant suggested that this was a forgery as a result of the fact that an email from him was not included in the trail. The Tribunal did not accept that this was the case. The Tribunal concluded that the omission of the claimant's email was adequately explained by SH, who stated that for his own records he attached his email summarising the terms of that month's discussion to the previous month's summary, so that he could readily see the summaries of previous discussions, in chronological order.

**Submissions**

89. The respondent provided their written submission, extending to 23 typed pages, at 14:20 on the last day of the hearing. The Tribunal took time to read this, resuming at 15:15. The respondent then spent an hour taking the Tribunal through the key points of his submission.

90. The claimant then made a brief oral submission. In summary he stated that:

    a. He was a disabled person at the relevant times;

    b. The respondent failed to follow their policies in relation to performance management, absence and grievances, as well as the Acas code in relation to grievances; and

    c. The respondent has falsified/forged the occupational health referrals contained in the bundle.

91. Given the limited time which the claimant had had to digest the respondent's written statement, he was offered the opportunity to provide any supplementary comments in writing by 27 February 2024. He subsequently did so. The respondent then provided additional written comments, in response, on 29 February 2024.

92. The further written submissions were reviewed and considered by the Tribunal in advance of the members' meeting for deliberations, held on 1 March 2024.

**Relevant Law**

*Disability Status*

93. Section 6(1) EqA provides:
*'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.'*

94. Schedule 1 EqA contains supplementary provisions in relation to the determination of disability. Paragraph 2 states:

*'The effect of an impairment is long-term if-*
*(a) it has lasted at least 12 months,*
*(b) it is likely to last for at least 12 months, or*
*(c) it is likely to last for the rest of the life of the person affected.'*

95. Paragraph 5 of the schedule states:

*'5(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if –*

*(a) measures are being taken to treat or correct it; and*
*(b) but for that, it would be likely to have that effect…*

96. The 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (the **Guidance**) does not itself impose legal obligations, but the Tribunal must take it into account where relevant (Schedule one, Part two, paragraph 12 EqA).

97. The Guidance at paragraph B1 deals with the meaning of '*substantial adverse effect'* and states *'The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which*

*may exist among people. A substantial effect is one that is more than a minor or trivial effect.'*

98. Paragraph D3 Provides that:

*'In general, day-to-day activities are things that people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities.'*

99. D16 provides that normal day-to-day activities include activities that are required to maintain personal well-being. It provides that account should be taken of whether the effects of an impairment have an impact on whether the person is inclined to carry out or neglect basic functions such as eating, drinking, sleeping, or personal hygiene.

100. The Equality and Human Rights Commission: Code of Practice on Employment (2011), at Appendix 1, sets out further guidance on the meaning of disability. At paragraph 16 it states '*Someone with impairment may be receiving medical or other treatment which alleviates or removes the effects (although not the impairment). In such cases, the treatment is ignored and the impairment is taken to have the effect it would have had without such treatment. This does not apply if the substantial adverse effects are not likely to occur even if the treatment stops (that is, the impairment has been cured).'*

101. In ***Goodwin v Patent Office*** [1999] IRLR 4, the EAT held that in cases where disability status is disputed, there are four essential questions which a Tribunal should consider separately and, where appropriate, sequentially. These are:

a. Does the person have a physical or mental impairment?

b. Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?

c. Is that effect substantial?

d. Is that effect long-term?

102. The burden of proof is on a claimant to show that he or she satisfies the statutory definition of disability.

*Direct Discrimination*

103. Section 13(1) EqA states:

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

104. The basic question in a direct discrimination case is: what are the grounds or reasons for treatment complained of? In ***Amnesty International v Ahmed*** [2009] IRLR 884 the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh Borough Council*** [1990] IRLR 288 and (ii) in ***Nagaragan v London Regional Transport*** [1999] IRLR 572. In some cases, such as ***James***, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as ***Nagaragan,*** the act complained of is not inherently discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in ***R (on the application of E) v Governing Body of the Jewish Free School and another*** [2009] UKSC 15.

105. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions), as

explained in the Court of Appeal case of ***Anya v University of Oxford*** [2001] IRLR 377.

106. In ***Shamoon v Chief Constable of the RUC*** [2003] IRLR 285, a House of Lords authority, Lord Nichols said that it was not always necessary to adopt a sequential approach to the questions of whether the claimant had been treated less favourably than the comparator and, if so, why. Instead, they may wish to concentrate initially on why the claimant was treated as they were, leaving the less favourable treatment issue until after they have decided on the reason why the claimant was treated as they were. What was the employer's conscious or subconscious reason for the treatment? Was it because of a protected characteristic, or was it for some other reason?

107. For direct discrimination to occur, the relevant protected characteristic needs to be a cause of the less favourable treatment *'but does not need to be the only or even the main cause' (*paragraph 3.11, ***EHRC: Code of Practice on Employment (2011)***). The protected characteristic does however require to have a '*significant influence on the outcome'* (***Nagarajan v London Regional Transport*** 1999 ICR 877).

*Discrimination arising from disability*

108. Section 15 EqA states:

*"(1) A person (A) discriminates against a disabled person (B) if – (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

*(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."*

109. Guidance on how this section should be applied was given by the EAT in ***Pnaiser v NHS England*** [2016] IRLR 170, EAT, paragraph 31. In that case it is pointed out that 'arising in consequence of' could describe a range of

causal links and there may be more than one link. It is a question of fact whether something can properly be said to arise in consequence of disability. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

110. There is no need for the alleged discriminator to know that the 'something' that causes the treatment arises in consequence of disability. The requirement for knowledge is of the disability only (***City of York Council v Grosset*** [2018] ICR 1492, CA).

*Failure to make reasonable adjustments*

111. Section 20 EqA states:

*'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.'*

112. The duty comprises three requirements. 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.'* The third requirement is a '*requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid'.*

113. Section 21 EqA provides that a failure to comply with the first or third requirement is a failure to comply with a duty to make reasonable adjustments and that A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

114. Further provisions in Schedule 8, Part 3 EqA provide that the duty is not triggered if the employer did not know, or could not reasonably be expected to know that the claimant had a disability and that the provision, criteria or practice is likely to place the claimant at the identified substantial disadvantage.

*Harassment*

115. Section 26(1) EqA states:

*'(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.'*

116. Section 26(4) EqA states:

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

*(a) the perception of B;*

*(b) the other circumstances of the case;*

*(c) whether it is reasonable for the conduct to have that effect.'*

117. There are accordingly 3 essential elements of harassment claim under section 26(1), namely (i) unwanted conduct, (ii) which relates to a relevant protected characteristic and (iii) that has the proscribed purpose or effect.

118. The Equality and Human Rights Commission: Code of Practice on Employment (2011) explains, at paragraphs 7.9-7.11, that 'related to' has a broad meaning. It occurs where there is a connection with the protected characteristic. Conduct does not have to be 'because of' the protected characteristic.

119. In cases where disability related harassment is asserted, the mere fact that unwanted conduct occurs at a time when a claimant satisfies the definition of a disabled person does not mean that it is related to disability. Something more will be required to demonstrate this. As stated by His Honour Judge Taylor in the case of ***Worcestershire Health and Care NHS Trust v Mrs A Allen*** [2024] EAT 40 '*It is important to note that it is the "conduct" that must be "related to" the protected characteristic. Thus, if it is asserted that a failure properly to investigate a grievance alleging discrimination constitutes harassment it is not sufficient that the grievance was related to the protected characteristic, the failure properly to investigate the grievance, which constitutes the conduct, must be related to the protected characteristic. Accordingly, it will generally be necessary to consider the mental process of the person who considered the grievance and decide whether the failure to investigate was related to the protected characteristic, such as if the person considered that protection of the protected characteristic is of no importance and so did not treat the grievance as seriously as other types of grievance would have been treated.'*

120. Not all unwanted conduct will be deemed to have the proscribed effect. In ***Richmond Pharmacology v Dhaliwal*** 2009 ICR 724, EAT, Mr Justice Underhill stated *'not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred),*

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

121. Mr Justice Langstaff affirmed this view in ***Betsi Cadwaladr University Health Board v Hughes and ors*** EAT 0179/13, stating *'The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.'*

122. An *'environment'* means a state of affairs. A one-off incident may amount to harassment, if it is sufficiently serious to have a continuing effect (***Weeks v Newham College of Further Education*** EAT 0630/11).

*Burden of proof*

123. Section 136 EqA provides:

***'****If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision.'*

124. There is accordingly a two-stage process in applying the burden of proof provisions in discrimination cases, explained in the authorities of ***Igen v Wong*** [2005] IRLR 258, and ***Madarassy v Nomura International Plc*** [2007] IRLR 246, both from the Court of Appeal. The claimant must first establish a first base or prima facie case of direct discrimination or harassment by reference to the facts made out. If the claimant does so, the burden of proof shifts to the respondent at the second stage to prove that they did not commit those unlawful acts. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the Tribunal to conclude that the

complaint should be upheld. If the explanation is adequate, that conclusion is not reached.

125. In ***Madarassy***, it was held that the burden of proof does not shift to the employer simply by a claimant establishing that they have a protected characteristic and that there was a difference in treatment. Those facts only indicate the possibility of discrimination. They are not, of themselves, sufficient material on which the tribunal 'could conclude' that, on a balance of probabilities, the respondent had committed an unlawful act of discrimination. The Tribunal has, at the first stage, no regard to evidence as to the respondent's explanation for its conduct, but the Tribunal must have regard to all other evidence relevant to the question of whether the alleged unlawful act occurred, it being immaterial whether the evidence is adduced by the claimant or the respondent, or whether it supports or contradicts the claimant's case, as explained in ***Laing v Manchester City Council*** [2006] IRLR 748***,*** an EAT authority approved by the Court of Appeal in ***Madarassy***.

*Constructive Dismissal*

126. Employees with more than two years' continuous employment have the right not to be unfairly dismissed, by virtue of s94 ERA. 'Dismissal' is defined in s95(1) ERA to include what is generally referred to as constructive dismissal. Constructive dismissal occurs where the employee terminates the contract under which he/she is employed (with or without notice) in circumstances in which he/she is entitled to terminate it by reason of the employer's conduct (s95(1)(c) ERA).

127. The test for whether an employee is entitled to terminate his contract of employment is a contractual one. The Tribunal requires to determine whether the employer has acted in a way amounting to a repudiatory breach of the contract, or shown an intention not to be bound by an essential term of the contract (***Western Excavating (ECC) Ltd v Sharp*** [1978] ICR 221). For this purpose, the essential terms of any contract of employment include the implied term that the employer will not, without reasonable and proper cause, act in such a way as is calculated or likely to destroy or seriously damage the

mutual trust and confidence between the parties (***Malik v Bank of Credit and Commerce International Ltd*** [1998] AC 20).

128. Conduct calculated or likely to destroy mutual trust and confidence may be a single act. Alternatively, there may be a series of acts or omissions culminating in a 'last straw' (***Lewis v Motorworld Garages Ltd*** [1986] ICR 157).

129. As to what can constitute the last straw, the Court of Appeal in ***Omilaju v Waltham Forest London Borough Council*** [2005] IRLR 35 confirmed that the act or omission relied on need not be unreasonable or blameworthy (although it will usually be so), but it must in some way contribute to the breach of the implied obligation of trust and confidence. Necessarily, for there to be a last straw, there must have been earlier acts or omissions of sufficient significance that the addition of a last straw takes the employer's overall conduct across the threshold. An entirely innocuous act on the part of the employer cannot however be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence in the employer.

130. In order for there to be a constructive dismissal, there must be a breach by the employer of an essential term, such as the trust and confidence obligation, and the employee must resign in response to that breach (although that need not be the sole reason - see ***Nottinghamshire County Council v Meikle*** [2004] IRLR 703). The right to treat the contract as repudiated must also not have been lost by the employee affirming the contract prior to resigning.

131. The Court of Appeal in ***Kaur v Leeds Teaching Hospital NHS Trust*** [2018] IRLR 833 set out guidance on the questions it will normally be sufficient for Tribunals to ask in order to decide whether an employee has been constructively dismissed, namely:

    a. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

b. Has he or she affirmed the contract since that act?

c. If not, was that act (or omission) by itself a repudiatory breach of contract?

d. If not, was it nevertheless a part (applying the approach explained in ***Omilaju***) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the implied term of trust and confidence?

e. Did the employee resign in response (or partly in response) to that breach?

132. If an employee establishes that they have been constructively dismissed, the Tribunal must determine whether the dismissal was fair or unfair, applying the provisions of s98 ERA. It is for the employer to show the reason or principal reason for the dismissal, and that the reason shown is a potentially fair one within s98 ERA. If that is shown, it is then for the Tribunal to determine, the burden of proof at this point being neutral, whether in all the circumstances, having regard to the size and administrative resources of the employer, and in accordance with equity and the substantial merits of the case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (s98(4) ERA). In applying s98(4) ERA the Tribunal must not substitute its own view for the matter for that of the employer, but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.

**Discussion & Decision**

*Disability Status*

133. The Tribunal considered each of the questions posed in ***Goodwin v Patent Office***, when considering whether the claimant was a disabled person as a result of a physical impairment and reached the following conclusions:

a. **Did the claimant have a physical or mental impairment?** The Tribunal accepted, from the medical records produced by the claimant, that he has suffered from anxiety since at least 2007 and he continues to take medication on a daily basis for this. Whilst the claimant was only formally diagnosed with social anxiety in June 2023, the Tribunal accepted, from the evidence provided in his impact statement, that the claimant had experienced the symptoms of this from childhood. Similarly, whilst the claimant was only formally diagnosed with bipolar disorder in November 2023, the report confirming that diagnosis noted that he had *'a history of episodes of depression, moderate to severe and hypomanic episodes. This has been his mood pattern since early adulthood'*. The report stated that the 'overall history' was consistent with bipolar disorder, and suggested that the claimant may be at the point of *'transitioning from Bipolar II to Bipolar I in later life'.* In light of these points, the Tribunal accepted that the claimant had anxiety from 2019 and social anxiety and bipolar disorder from childhood and early adulthood respectively. The Tribunal accepted that these constituted mental impairments for the purposes of the EqA.

b. **Was there a substantial, adverse effect on the claimant's ability to carry out day to day activities?** The Tribunal accepted that the claimant's mental impairments had an adverse effect on the claimant's ability to carry out normal day to day activities: he experienced periods of moderate to severe depression (where he neglects personal care, such as hygiene and nutritional intake and loses interest in activities and daily living) and periods of hypermania (impacting his judgment and decision making, one of which led to hospitalisation in 2019) as a result of bipolar disorder. His anxiety can cause panic attacks and would have an adverse impact on his ability to carry out day to day activities, but for his medication. His social anxiety causes an intense fear of situations in which he may be judged negatively, which leads to symptoms such as trembling, sweating, nausea, dizziness and causes the claimant to avoid common social situations which would require interaction with strangers

or unfamiliar people. The Tribunal concluded that the effects of each impairment were substantial, i.e. they were more than minor or trivial.

c. **Was that effect long term?** The Tribunal concluded that by the time the claimant's employment with the respondent commenced he had experienced effects outlined above for more than 12 months. The effects were accordingly, at that point, long term.

134. For these reasons the Tribunal concluded that the claimant was a disabled person, as a result of anxiety, social anxiety and bipolar disorder throughout the period of the claimant's employment with the respondent.

*Knowledge of Disability*

135. The Tribunal then considered whether the respondent had actual or constructive knowledge that the claimant was a disabled person as a result of anxiety, social anxiety and/or bipolar disorder.

136. The Tribunal found that the respondent first became aware of the claimant having bipolar disorder and anxiety on 21 March 2023, when the claimant submitted his grievance. They were not aware prior to that. Whilst the claimant had informed SH, on 10 June 2022, that he was experiencing stress/anxiety as a result of personal issues he was experiencing at that time, he did not inform SH that he had a history of anxiety/social anxiety or bipolar disorder at that time. The Tribunal concluded that the respondent could not reasonably have been expected to know that the claimant had any medical conditions at that time. It was reasonable for them to believe that he was simply suffering from reactive stress/anxiety as a result of the personal difficulties he was experiencing at the time. Similarly, whilst the claimant commenced a period of sickness absence on 13 March 2023, and submitted medical certificates stating that he was unfit to work due to anxiety thereafter, there was no reason for the respondent to believe this was as a result of any underlying condition, rather than simply a reaction to the instigation of the Pivot process, at that stage. It was only on receipt of the claimant's grievance

that the respondent understood there to be underlying conditions of anxiety and bipolar disorder, and only on receipt of the occupational health report on 7 June 2023 that the respondent was informed that the claimant experienced social anxiety.

*Direct Discrimination*

137. The claimant asserted that the respondent ceased meaningful contact with him from 21 March 2023, and that this was an act of direct disability discrimination. The Tribunal considered whether the alleged treatment occurred, whether it amounted to less favourable treatment and if so, what the reason for that treatment was: was it because of disability?

138. As set out in paragraph 56 above, on 16 March 2023, the claimant had sent an email to SH requesting a period of 4 weeks to focus solely on his recovery. SH did not contact him in the period up to 12 April 2023 as a result of that request, not because of disability. In the period from 12 April to mid-May 2023, SH initially did not contact the claimant due to SH being on annual leave. SH understood from the claimant's email, which he saw on his return to work, that wanted to have a catch up after his next 4-week appointment in May. SH did not contact the claimant in that period as a result of that, not because of disability. SH was in regular contact with the claimant from mid-May onwards, seeking to discuss his return to work and the adjustments required to enable this. CM did not contact him regarding the grievance initially given his comments in his email of 21 March 2023 that he didn't feel in a position to take part in any grievance process at that stage and his statements that contact should be after 4 weeks/his next doctor's appointment. CM did not contact the claimant immediately on receipt of the grievance as a result of that request, not because of disability. She was in regular contact with him from 19 April 2023 onwards regarding an OH assessment and the grievance process.

139. Given these findings, the Tribunal concluded that the claimant's complaint of direct discrimination does not succeed.

*Discrimination Arising from Disability*

140. In relation to the claims of discrimination arising from disability the Tribunal started by referring to section 15 EqA.

141. Section 15(2) states that section 15(1) will not apply if the employer did not know, and could not reasonably have been expected to know, that the claimant had the disability. As indicated above, the Tribunal concluded that the respondent did not know, and could not reasonably have been expected to know that the claimant had a disability prior to receipt of his grievance on 21 March 2023. As a result, the claimant's complaints of discrimination arising from disability must fail. Both complaints relate to decisions taken by the respondent prior to them being aware, and before they could reasonably have been expected to know, of the claimant having social anxiety and bipolar disorder.

142. The claimant's complaints of discrimination arising from disability are accordingly dismissed.

*Reasonable Adjustments*

143. The duty to make reasonable adjustments arises when an employer knows, or ought to know, that the employee had a disability *and* that the PCP is likely to place the employee at the identified substantial disadvantage. Given the Tribunal's findings at paragraph 136 above, the Tribunal concluded that the earliest the respondent's duty to make reasonable adjustments for the claimant could have applied was on receipt of his grievance on 21 March 2023.

144. In relation to each PCP asserted, the Tribunal considered whether the respondent had such a PCP and, if so, whether this was applied after receipt of the grievance (the earliest point at which the duty could have been triggered), whether the PCP placed the claimant at a substantial

disadvantage in comparison to those who do not have the same disability and whether the respondent was aware that the claimant was likely to be placed at this disadvantage. The conclusions reached, in relation to each asserted PCP, are set out below.

a. **Allowing employees to work from home.** The respondent did have this PCP. This applied from the start of the claimant's employment. At that time however the respondent was not aware that the claimant was a disabled person. From 21 March 2023, when they became aware, the claimant was absent from work. He did not return to work prior to the termination of his employment. He was accordingly not placed at the asserted disadvantage, as he was not at work and there was no date proposed for him to return, so he was not likely to be placed at the disadvantage asserted. The duty to make reasonable adjustments was accordingly not engaged.

b. **Unfairly distributing work among team members, resulting in the claimant having an excessive and unmanageable workload**. The Tribunal did not accept that work was unfairly distributed among team members, or that the claimant had an excessive and unmanageable workload. His workload was consistent with his role. The asserted PCP was accordingly not established and the duty to make reasonable adjustments did not arise.

c. **Requiring that employees attend occupational health at stipulated times.** The Tribunal concluded that the respondent did require employees to do so. The asserted PCP was accordingly established. The Tribunal accepted that the claimant was placed at a substantial disadvantage as a result of that PCP, when he was required to attend an occupational health appointment at 08:45 on 7 June 2023, in that the medication he was taking for his anxiety impacted him in the mornings. The respondent was aware that the claimant was a disabled person at that time and that he would be placed at that substantial disadvantage,

as he had expressly informed them of this. The duty to make reasonable adjustments was accordingly engaged.

d. **Providing employees with 5 days to consider settlement offers.** The Tribunal concluded the respondent did have this PCP. It was applied, in relation to the claimant, on 7 March 2023. The respondent was not aware, at that time, that the claimant was a disabled person. The duty to make reasonable adjustments was accordingly not engaged.

e. **A requirement for employees of the same level as the claimant to lead video calls.** The respondent did have this PCP up to October 2022. It was then taken over by other Capacity Planners, of a higher grade. At the point the claimant was required to lead video calls, the respondent was not aware that the claimant was a disabled person. The duty to make reasonable adjustments was accordingly not engaged.

f. **A requirement for employees of the same level as the claimant to interact with senior internal and external stakeholders.** The respondent did have this PCP up to October 2022. It was then taken over by other Capacity Planners, of a higher grade. At the point the claimant was required to interact with senior internal and external stakeholders, the respondent was not aware that the claimant was a disabled person. The duty to make reasonable adjustments was accordingly not engaged.

g. **Failing to hold welfare discussions, as provided in the respondent's long term absence policy.** The Tribunal did not accept that this PCP was established. The applicable Health Policy stated that meetings would be held but did not stipulate timescales for this. Welfare meetings were not initially held with the claimant because he requested that there be no contact with him, not because of any failure on the respondent's part. When the claimant was then invited to welfare meetings, he did not attend. The asserted PCP was accordingly not established and the duty to make reasonable adjustments did not arise.

h. **Failing to ensure appropriate occupational health assessments.** The Tribunal did not accept that this PCP was established. The respondent arranged for an occupational health assessment to take place on 18 May 2023, but this was cancelled on the day of the assessment by the claimant. As the asserted PCP was not established, the duty to make reasonable adjustments did not arise. In any event, as stated in ***Spence v Intype Libra Limited*** UKEAT/0617/06 *'The carrying out of an assessment or the obtaining of a medical report does not of itself mitigate or prevent or shield the employee from anything. It will make the employer better informed as to what steps, if any, will have that effect, but of itself it achieves nothing.'* Obtaining an occupational health report is accordingly not a reasonable adjustment, of itself.

i. **Not offering a choice as to whether occupational health assessments would be conducted by telephone or video.** The Tribunal concluded that the respondent did have this PCP and employees were simply informed of the way in which the assessment would be conducted. He did not attend the occupational health assessment scheduled for 18 May 2023, due to internet issues. The assessment rescheduled for 7 June 2023 took place by telephone. The claimant was not therefore placed at the substantial disadvantage asserted. The duty to make reasonable adjustments was accordingly not engaged.

j. **Holding grievance meetings remotely**. The Tribunal concluded that the respondent did have a practice of holding grievance (and other) meetings remotely. While the Tribunal accepted that this practice may have placed the claimant at a substantial disadvantage in comparison to those who do not have social anxiety, as he found it more difficult to engage in remote discussions, it concluded that the respondent was not aware that the claimant was likely to be placed at this disadvantage. The grievance document had simply stated that the claimant had anxiety. Whilst the occupational health report did indicate that the claimant had social

anxiety, it did not mention that the claimant found it more difficult to engage in conversations which were held remotely – either by video or telephone and, significantly, in advance of the grievance hearing, the claimant had specifically requested that the grievance hearing take place by telephone. In these circumstances, the Tribunal concluded that the respondent could not reasonably be expected to know that holding the grievance meeting remotely was likely to place the claimant at the identified substantial disadvantage. The duty to make reasonable adjustments was accordingly not engaged.

k. **Not informing individuals when they are placed on a performance improvement plan.** The Tribunal concluded the respondent did have this PCP in relation to employees being managed under Focus. It was applied, in relation to the claimant, in January 2023. The respondent was not aware, at that time, that the claimant was a disabled person. The duty to make reasonable adjustments was accordingly not engaged.

145. As indicated above, the Tribunal concluded that the duty to make adjustments was engaged only in relation sub paragraph c. The Tribunal considered the adjustment proposed by the claimant, to ascertain whether the steps proposed could have eliminated or reduced the disadvantage to the claimant and, if so, whether or it would have been reasonable for the respondent to have taken that step. The Tribunal concluded that holding the meeting in the afternoon would likely have alleviated the disadvantage experienced by the claimant. The medication he was taking only impacted him in the mornings. The Tribunal concluded that it would have been reasonable for the respondent to take that step: It was practicable for them to do so; would involve no disruption to the respondent (other than sending an email to occupational health requesting this); and it would have cost nothing. The Tribunal accordingly concluded that the respondent failed in its obligation to make reasonable adjustments in relation to this.

*Harassment*

146. The Tribunal considered each allegation of harassment, considering whether there was unwanted conduct, whether it related to disability and, if so, whether the conduct had the proscribed purpose or effect. The Tribunal was mindful that, before the burden of proof can shift to the respondent, the claimant requires to establish, on the balance of probabilities, that he or she has been subjected to 'unwanted conduct' which has the proscribed purpose or effect and must also adduce some evidence to suggest that the conduct could be related to disability.

147. The Tribunal reached the following findings in relation to each alleged act of harassment.

a. **Mr Horn telling the claimant, on 19 January 2023, to stop hiding behind tech, providing negative feedback and stating, *'really looking forward to our next session'*** It was not disputed that SH made these comments and provided negative feedback. The Tribunal accepted that, from the claimant's perspective, this was unwanted. There was no evidence however, from which it could be concluded or inferred that the conduct was related to disability. The claimant has not therefore discharged the burden on him to adduce some evidence to suggest that the conduct could be related to disability. The complaint under s26 EqA in relation to this accordingly does not succeed. For the avoidance of doubt, even if the burden had shifted, SH gave cogent evidence as to why he made the comments and why he provided negative feedback. None of these were related to disability. The Tribunal also accepted that SH was not aware, at that time, that the claimant was a disabled person. The Tribunal would therefore have found that the conduct was entirely unrelated to disability.

b. **Giving the claimant an unmanageable workload in the period 19 January to 13 March 2023, and refusing to discuss or adjust this.**

The Tribunal did not accept that this conduct was established: the claimant's workload was not unmanageable, and SH did not refuse to discuss or adjust this. The claimant's workload was discussed with him on numerous occasions and the 4 allocated projects were removed by SH, to enable the claimant to focus on BAU tasks. The complaint under s26 EqA in relation to this accordingly does not succeed.

c. **Placing the claimant on performance management (in January 2023), but not informing him of this and/or misleading him when he asked and not following the process.** It was not disputed that the SH took steps to manage the claimant's performance, in accordance with the respondent's Focus guidance, in January 2023. This was informal performance management - in effect, a pre-curser to any formal procedure. The Tribunal concluded that it was clear to the claimant (or ought to have been, from the terms of the claimant's discussion with SH on 19 January 2023, and SH's subsequent email to the claimant) that his performance was being managed. The Tribunal did not accept that the claimant asked SH if his performance was being managed and was informed that it was not: had he been asked, the Tribunal concluded that SH would have informed the claimant that it was, as this is precisely what SH was doing. The Tribunal also concluded that SH followed the respondent's Focus guidance in taking the steps he did. Whilst this conduct (managing the claimant's performance) may have been unwanted by the claimant, there was no evidence from which it could be concluded or inferred that the conduct was related to disability. The claimant has not therefore discharged the burden on him to adduce some evidence to suggest that the conduct could be related to disability. The complaint under s26 EqA in relation to this accordingly does not succeed. For the avoidance of doubt, even if the burden had shifted, the Tribunal would have concluded that the claimant was placed in performance management as he was not performing in his role, which the claimant himself accepted in evidence. The Tribunal also accepted, in any event, that SH was not aware, at that time, that the claimant was a disabled

person. The Tribunal would therefore have found that the conduct was entirely unrelated to disability.

d. **Failing to follow the Long-Term Absence process or provide the claimant with a copy of the process when he requested this, instead disclosing a process named Health Policy.** The Long-Term Absence policy, which the claimant had in his possession, was not applicable to the claimant. It was accordingly not followed. The applicable policy was the Health Policy. This was provided to the claimant. Failing to follow a policy which was not applicable and the provision of the applicable policy, in response to the claimant's request, did not constitute unwanted conduct. The complaint under s26 EqA in relation to this accordingly does not succeed.

e. **Refusing to address and give redress to the claimant's grievance in relation to reasonable adjustments and not following the grievance procedure in relation to this**. The claimant's grievance was that the PIP process was unfair, and the respondent failed to make reasonable adjustments. He set out in his grievance document why he felt that was the case. AT met with the claimant and asked the questions she felt were necessary to clarify the points raised. While those questions may have focused on why the claimant believed the PIP process was unfair, the claimant also explained his position that he felt there had been a failure to make reasonable adjustments, and this was recorded in the minutes of the meeting. Any doubt as to what was being investigated was clarified by CM's letter of 13 June 2023, which clearly informed the claimant that both elements would be investigated and addressed in the outcome letter. Both elements were ultimately addressed in the outcome letter. There was however a delay in issuing that, as AT had wished to understand why the claimant felt the minutes of the grievance meeting were 'offensively inaccurate'. Beyond stating that, the claimant did not provide any details to the respondent as to why he felt the minutes were inaccurate, despite their requests that he do so. The Tribunal accordingly did not accept that the respondent refused to address and give redress to the claimant's

grievance in relation to reasonable adjustments. To that extent, the asserted conduct is not established and the complaint of harassment in relation to that must fail. The Tribunal did accept that the respondent failed to follow the grievance procedure in relation to timescales however. The grievance procedure stated that the respondent would aim to provide an outcome in 7 days. It stated that where that was not possible, the individual would be informed of the reasons for that and given an approximate guide of when a decision will be reached. That was not done. The Tribunal accepted that, from the claimant's perspective, this was unwanted. There was no evidence however, from which it could be concluded or inferred that the conduct, in not informing him of this, was related to disability. The claimant has not therefore discharged the burden on him to adduce some evidence to suggest that the conduct could be related to disability. The complaint under s26 EqA in relation to this accordingly does not succeed. For the avoidance of doubt, even if the burden had shifted, the Tribunal concluded that the respondent believed that the claimant understood that they were, from 13 June 2023 onwards, waiting for his comments in relation to the grievance meeting minutes, before concluding the process and it was accordingly unnecessary to inform him that they would not be adhering to the 7 day timescale, as a result. This was entirely unrelated to disability.

f. **Setting up two occupational health appointments for the claimant when only one was required.** It was not disputed that the respondent sought, via SH and CM, to arrange two separate occupational health appointments: one to address whether he was fit to participate in the grievance process, and one to address whether he was fit to return to work. That conduct was, from the claimant's perspective, unwanted. There was no evidence however, from which it could be concluded or inferred that the conduct was related to disability. The claimant has not therefore discharged the burden on him to adduce some evidence to suggest that the conduct could be related to disability. The complaint under s26 EqA in relation to this accordingly does not succeed. For the avoidance of doubt, even if the burden had shifted, the Tribunal would

have concluded that SH and CM were simply following internal policy in managing the claimant's absence and grievance separately, and thus instructing separate occupational health assessments. While the Tribunal had some sympathy for the claimant's position that this was not necessary, it was not, in any way, related to disability and therefore could not amount to harassment.

g. **Misleading the claimant in May 2023 that he was having an appointment with a medically trained professional to discuss his personal health, when this was not the case.** This refers to the discussion the claimant had with DLS, as set out in paragraph 68 above. The claimant was not mislead as to who he would be having a discussion with on 1 June 2023. DLS sent an email to the claimant on 30 May 2023 clearly setting out their role and stating that, if they felt it necessary, they would then make a referral to occupational health. It was accordingly apparent from that email that DLS were not, themselves, part of occupational health. While the claimant may have believed that the individual he spoke to was a medically trained professional, he was not misled into that belief. The asserted conduct was accordingly not established and the complaint under s26 EqA in relation to this does not succeed.

h. **Mr Horn stating that adjustments could not be discussed as part of a long-term absence meeting.** The claimant relied upon SH's email to him dated 7 June 2023, as set out in paragraph 69 above, in relation to this point. That email did not state that adjustments could not be discussed as part of a long term absence meeting, it stated that occupational health would only be involved in considering what adjustments are required to assist an individual to return to work, once the individual has indicated that they would be fit to return to work in the foreseeable future. That was an explanation of the respondent's policy. The email does not state that SH would not discuss adjustments with the claimant in any meetings that they had in relation to the claimant's

absence. The asserted conduct has accordingly not been established and the complaint under s26 EqA in relation to this does not succeed.

i. **Failing to offer the claimant either a risk assessment or OH assessment in the period from June 2022 to July 2023 and refusing to discuss reasonable adjustments in that period.** It was not disputed that the claimant was not offered a risk assessment and reasonable adjustments were not discussed in that period, or that in the period up to April 2023 he was not offered an occupational health assessment. Whilst that conduct may have been, from the claimant's perspective, unwanted. there was no evidence from which it could be concluded or inferred that that conduct was related to disability. The claimant has not therefore discharged the burden on him to adduce some evidence to suggest that the conduct could be related to disability. The complaint under s26 EqA in relation to this accordingly does not succeed. For the avoidance of doubt, even if the burden had shifted, the Tribunal would have concluded that no risk assessment or occupational health assessment was offered, and reasonable adjustments were not discussed, in the period from June 2022 to 21 March 2023, as the respondent did not have actual or constructive knowledge that the claimant had any underlying medical conditions. From 21 March to 12 April 2023, the respondent did not contact the claimant as a result of his request not to be contacted. They did not offer a risk or OH assessment or discuss reasonable adjustments in that period as a result. CM took steps to arrange an occupational health assessment from 19 April 2023 onwards. Reasonable adjustments were not discussed from 12 April onwards as the claimant did not have a proposed return to work date. All of these reasons were entirely unrelated to disability.

j. **Requiring the claimant to attend an occupational health appointment at 08:45 and not allowing the claimant to choose whether this should be held by phone or video.** As set out above, the Tribunal found that the claimant was required to attend an occupational health appointment at 08:45 and was not permitted to choose whether

this should be held by phone or video. The Tribunal accepted that, from the claimant's perspective, this was unwanted. There was no evidence however, from which it could be concluded or inferred that the respondent's conduct, in doing so, was related to disability. The claimant has not therefore discharged the burden on him to adduce some evidence to suggest that the conduct could be related to disability. The complaint under s26 EqA in relation to this accordingly does not succeed. For the avoidance of doubt, even if the burden had shifted, the Tribunal would have concluded that it was standard procedure occupational health assessments to take place by video and that times be allocated randomly. Neither of these were related to disability in any way. The Tribunal would therefore have found that the conduct was entirely unrelated to disability.

k. **Stating that the claimant only had 5 days to consider a settlement proposal.** It was not disputed that the claimant was given 5 days to consider a settlement proposal. The Tribunal accepted that, from the claimant's perspective, this was unwanted. There was no evidence however, from which it could be concluded or inferred that the respondent's conduct, in setting this timescale, was related to disability. The claimant has not therefore discharged the burden on him to adduce some evidence to suggest that the conduct could be related to disability. The complaint under s26 EqA in relation to this accordingly does not succeed. For the avoidance of doubt, even if the burden had shifted, the Tribunal concluded that 5 days was the respondent's standard procedure, given to everyone, it was in no way related to disability. In fact, the respondent was not aware, at that time, that the claimant was a disabled person. The Tribunal would therefore have found that the conduct was entirely unrelated to disability.

l. **Refusing to engage the claimant on 19 June 2023 when he wrote to both HR and his line manager stating unless reasonable adjustments were discussed he would have to resign.** The Tribunal did not accept that this conduct was established: As set out at paragraphs 77 & 79 above, both SH and CM responded to the claimant's emails of

19 June 2023. Neither refused to engage. Rather, it was the claimant who requested that he not be contacted and that he be *'given time to consider [his] next options'*. As the asserted conduct is not established, the complaint under s26 EqA in relation to this does not succeed.

m. **Failing to respond to the claimant's resignation dated 6 July 2023.** It was not disputed that the respondent did not respond to the claimant's resignation. The Tribunal accepted that, from the claimant's perspective, this was unwanted, and it may have had the proscribed effect. There was no evidence however, from which it could be concluded or inferred that that conduct, the respondent's failure to respond, was related to disability. The claimant has not therefore discharged the burden on him to adduce some evidence to suggest that the conduct could be related to disability. The complaint under s26 EqA in relation to this accordingly does not succeed. For the avoidance of doubt, even if the burden had shifted, the Tribunal concluded that the lack of response was simply due to poor practice/an oversight. The Tribunal would therefore have found that the conduct was entirely unrelated to disability.

148. For these reasons, the claimant's complaints of harassment do not succeed and are dismissed.

*Jurisdiction - Discrimination*

149. The Tribunal considered the relevant time limit, as set out in s123 EqA, and whether the established complaint was brought within that time limit. Time started to run from the date the respondent failed to make the reasonable adjustment. That was in the period from the request on 23 May 2023 and the claimant being informed of the appointment time on 26 May 2023. The claimant presented his claim on 9 July 2023. He accordingly brought his claim within the requisite time limit and the Tribunal has jurisdiction.

*Constructive Unfair Dismissal Claim – s94 ERA*

150. In considering the claimant's claim of constructive dismissal, the Tribunal considered the tests set out in ***Kaur v Leeds Teaching Hospital NHS Trust***. The Tribunal's conclusions in relation to each element are set out below.

151. **What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?** The Tribunal noted that the most recent act on the part of the respondent, which the claimant relied upon as causing or triggering his resignation, was the failure to respond to his emails of 19 June 2023.

152. **Has he or she affirmed the contract since that act?** The Tribunal noted that the claimant resigned on 6 July 2023. The Tribunal found that the claimant had not affirmed the contract since the most recent act on the part of the respondent, which the claimant stated caused, or triggered, his resignation. He was absent from work throughout that time, on nil pay, and it was a short period.

153. **If not, was that act (or omission) by itself a repudiatory breach of contract?** The Tribunal did not accept that the respondent failed to respond to the claimant's email of 19 June 2023. Both SH & CM responded, despite the claimant indicating to CM that he was requesting time to consider his options. Given that the asserted omission was not established, it did not amount to a repudiatory breach.

154. **If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term?** The Tribunal concluded that the circumstances relied upon as the final straw were not established. The respondent did respond, stating that reasonable adjustments would be considered when the claimant had a proposed return to work date. The respondent had reasonable and proper cause for responding in this manner. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but

mistakenly, interprets the act as hurtful and destructive of their trust and confidence. The test of whether the employee's trust and confidence has been undermined is objective. The responses provided cannot, viewed objectively, contribute in any way to a series of actions which cumulatively constitute a repudiatory breach of contract.

155. Whilst there is no requirement to do so, given this finding, the Tribunal also wish to record its findings in relation to the other conduct relied upon by the claimant.

a. **Failure to make reasonable adjustments.** The Tribunal's conclusions in relation to these complaints are set out above. The Tribunal concluded that the respondent failed to make reasonable adjustments in relation to the timing of the occupational health appointment held on 7 June 2023.

b. **Failing to action a risk assessment or occupational health assessment from 13 March to 8 June 2023.** For the reasons set out in paragraph 147.i. above, the Tribunal concluded that the respondent had reasonable and proper cause for not doing so, under explanation that the Tribunal found that from 19 April 2023 onwards CM was in fact seeking to arrange an occupational health assessment.

c. **Giving the claimant an unmanageable workload and refusing to vary this.** As set out above, the Tribunal did not accept that the claimant's workload was unmanageable. The Tracker included BAU tasks which were normal for an individual of the same level as the claimant. Whilst projects were initially also allocated to the claimant (and this too would be normal for an individual at the same level as the claimant), these were subsequently removed to allow him to focus on his BAU tasks only.

d. **Not informing the claimant that his performance was being managed under Focus.** As set out above (see paragraph 147.c.), the Tribunal concluded that it was (or at very least ought to have been) apparent to the claimant that his performance was being managed from

19 January 2023 onwards. The Tribunal concluded that the claimant had not expressly asked SH whether his performance was being managed and SH had not informed the claimant that his performance was not being managed. The Tribunal concluded that the respondent had reasonable and proper cause for seeking to manage the claimant's performance.

e. **Delaying the grievance process by seeking occupational health advice before proceeding with the grievance hearing**. The Tribunal concluded that the respondent had reasonable and proper cause for seeking to ensure that the claimant was fit to participate in the grievance process, before proceeding with a grievance hearing, given the circumstances. The claimant was informed by CM on 19 April 2023 that she was arranging the OH appointment to ensure that proper support could be provided to the claimant in the grievance process. Having been informed of that, was open to the claimant to state that he wished to simply proceed with his grievance without input from occupational health, as he ultimately did.

f. **Providing OH with the wrong telephone number for the claimant, meaning they were unable to contact him.** CM accepted in evidence that she had done so on 5 May 2023. The Tribunal concluded that this was simply an oversight on her part. Her doing so did not adversely impact the claimant however, as he was informed, on 11 May 2023, that the OH assessment was scheduled for 18 May 2023.

g. **Delays in OH referrals.** The claimant stated that the respondent delayed in making OH referrals. He stated that the first referral ought to have been made on 3 May 2023, but it was in fact made on 5 May 2023. The Tribunal concluded that this delay was not unreasonable. The claimant stated that the second referral ought to have been made on 18 May 2023, but was not made until 26 May 2023. The Tribunal did not accept that this was the case. The evidence demonstrated that the respondent had contacted their occupational health provider at 09:26 on 18 May 2023 to

request an alternative appointment for the claimant. The delay in arranging this was accordingly on the part of the external provider.

h. **SH misleading the claimant, in May 2023, that he was having an appointment with a medically trained professional.** As set out in paragraph 147.g. above, the Tribunal concluded that, given the terms of the email from DLS to the claimant on 30 May 2023, he was well aware that his discussion was to be held with an Accommodations Consultant from DLS, not occupational health.

i. **Not treating the claimant's grievance as a complaint of harassment.** The respondent did not treat the complaint as one of harassment as the claimant did not mention harassment in his grievance. His complaint related to his PIP being unfair and failure to make reasonable adjustments. It was reasonable for them to proceed in that manner.

j. **Holding the grievance hearing remotely.** The Tribunal's conclusions in relation to this are set out in paragraph 144.j. above. It was reasonable for the respondent to hold the grievance meeting by telephone, when the claimant had expressly requested that they do so.

k. **The respondent refused to consider both parts of the claimant's grievance or discuss a resolution at the grievance hearing.** The Tribunal's conclusions in relation to the first part are set out in paragraph 147.e. above. The minutes of the grievance hearing demonstrate that the claimant spoke to both elements of his grievance at the hearing. CM then confirmed to him in writing, on 13 June 2023, that both elements of his grievance would be investigated and addressed in the outcome letter. In relation to the failure to discuss a resolution, this related to AT's refusal to discuss negotiations which had been taking place with Acas. It was proper for her to refuse to do so in that forum, particularly as, as she indicated to the claimant, she was unaware of those discussions and had not been involved in them.

l. **Delaying the grievance outcome beyond 7 days.** As indicated in paragraph 147.e above, the Tribunal concluded that the delay in the provision of the grievance outcome was due to the claimant stating that he disagreed with the content of the grievance minutes, but failing to provide details of why he disagreed to the respondent. They made the claimant aware that they were waiting for that information from him, to enable them to finalise the decision in relation to the grievance. In these circumstances there was reasonable and proper cause for the delay.

m. **Refusing to discuss reasonable adjustments with the claimant.** As highlighted above, the respondent initially did not discuss reasonable adjustments with the claimant as they had no actual or constructive knowledge of his disabilities, they were then respecting his request not to be contacted and latterly they did not do so as the claimant indicated that he did not envisage returning to work in the foreseeable future. They accordingly had reasonable and proper cause for their actions.

156. In summary therefore the Tribunal concluded that the respondent followed its policies and had reasonable and proper cause for its actions towards the claimant, other than in relation to:

a. An oversight in providing the incorrect contact details for the claimant to occupational health on 5 May 2023; and
b. The timing of the occupational health appointment on 7 June 2023.

157. The Tribunal concluded that neither of these constituted a fundamental breach of contract by themselves or viewed together, notwithstanding the fact that the second was found to amount to a breach of the duty to make reasonable adjustments. They do not constitute actions which are calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties.

158. Accordingly, even if a last straw had been established, the Tribunal would have concluded that there were no individual acts which constituted a fundamental breach of contract, nor was there a course of conduct which, viewed objectively and cumulatively, amounted to a repudiatory breach of the implied duty of trust and confidence.

159. **Did the employee resign in response (or partly in response) to that breach?** Given the Tribunal's conclusions above, this did not fall to be answered. The Tribunal's concluded that there was no breach.

160. Given these findings the Tribunal concluded that the claimant was not constructively dismissed by the respondent. His claim of unfair dismissal is accordingly not successful and is dismissed.

**Remedy**

161. The Tribunal upheld one complaint of failure to make reasonable adjustments, in respect of the timing of the occupational health appointment on 7 June 2023. No financial loss flows from that. The claimant did not give specific evidence in relation to how he felt about that incident, in isolation. The Tribunal concluded from the claimant's evidence though that he was unhappy about it, particularly as he had only recently requested the afternoon appointment and it was then not accommodated. The Tribunal noted however that the claimant did not seek to change the time of the appointment once it had been made or raise any concerns about it in his subsequent correspondence and discussions with the respondent.

162. In the circumstances, the Tribunal considered that an award at the lower of the lower Vento band was appropriate, namely **£1,500**. Interest of **£96.99** from 7 June 2023 to date (295 days @ 8%) is also payable.

Employment Judge Sangster

**Employment Judge**

27 March 2024

**Date of Judgment**

**Date sent to parties** 28/03/2024