



EMPLOYMENT TRIBUNALS

Claimant: Mr Martinho Da Silva

Respondent: Unilever UK Limited

Heard at: Liverpool **On:** 10, 11 and 12 February 2020

Before: Employment Judge Buzzard
Mr G Pennie
Mr W K Partington

REPRESENTATION:

Claimant: Mr R Whalley, Non- Practising Solicitor

Respondent: Mr J Boyd of Counsel

JUDGMENT

The judgment of the Tribunal is that the claimant's claims are all found to be not well-founded and are dismissed.

REASONS

1. Claims

1.1. The claimant's ET1 identified the following claims:

1.1.1. disability discrimination;

1.1.2. race discrimination; and

1.1.3. unfair dismissal.

1.2. At an earlier stage in proceedings, following a case management hearing the claimant withdrew his claims of race discrimination. The claimant pursued at this final hearing only his disability discrimination and unfair dismissal claims.

2. Hearing Preparation

- 2.1. At the outset of this hearing, on the morning of Monday 10 February 2020, the Tribunal dealt with correspondence exchanged by the parties with the Tribunal in late January 2020. As of 29 January 2020, the respondent asserted that the claimant had not complied with case management orders such that the case could not proceed at this hearing. The position of the claimant's representative was, at that time, that the "the Tribunal should be assured that matters will be prepared in good time for hearing." The respondent did not agree, and sought the strike out of the claimant's claim for not complying with the case management orders. The orders the respondent referred to were ones that required the claimant to act in September and October 2019. The parties were notified on 1 February 2020 that any outstanding matters would be dealt with at the outset of the final hearing on 10 February 2020.
- 2.2. The specific orders the respondent referred to were ones that required the claimant to confirm:
 - 2.2.1. The comparator(s) relied on in his direct discrimination claims;
 - 2.2.2. To provide a schedule of loss; and
 - 2.2.3. To serve copies of medical records and evidence. This was in context that medical evidence had been disclosed, but the claimant's representative is alleged to have referred to "*voluminous medical corroboration*", which led the respondent to believe that there was undisclosed medical evidence.
- 2.3. In consideration of the above, at the outset of the hearing on Monday 10 February 2020, there was some uncertainty regarding the exact nature and scope of the claimant's claims.
- 2.4. The entire day on 10 February 2020, the first day of the hearing, was taken in discussing with the parties the scope of the claimant's claim and whether the claim could fairly be heard this week. The Tribunal, following initial discussions, the claimant's representative was given Monday afternoon to finalise the particulars of the claim as pursued. On the morning of Tuesday 11 February, in the light of the then confirmed scope of the claimant's claims, the respondent's representative confirmed that he was in a position to deal with the claims. Accordingly, no application to strike out or postpone the claim was, as matters transpired, pursued.

3. Law Relevant to the Claimant's claims

- 3.1. Part 5 of the Equality Act 2010 ("EqA") applies to employees prohibits discrimination and against and harassment of employees in the workplace. In relation to discrimination s39 states:

"39 Employees and applicants

- (2) *An employer (A) must not discriminate against an employee of A's (B)-*
 - (a) *as to B's terms of employment;*

- (b) *in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*
- (c) *by dismissing B;*
- (d) *by subjecting B to any other detriment.”*

3.2. This prohibits discrimination in the terms of employment, in the way access to training or other benefits is given, by dismissal or by subjecting an employee to any other detriment.

3.3. The right to make a claim in an Employment Tribunal in relation to a breach of these provisions of Part 5 comes from Chapter 3 of Part 8 of the EqA. Specifically, s120 states:

“120(1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to—

- (a) a contravention of Part 5 (work);.....”*

Under this a Tribunal has the jurisdiction to determine if prohibited discrimination and / or victimisation has occurred.

3.4. The definition of discrimination and victimisation come from Part 2 of the EqA. This firstly creates the concept of protected characteristics, the relevant one here being disability. Part 2 Chapter 2 goes on to define what discrimination and victimisation are.

3.5. *Direct Discrimination*

3.5.1. Direct Discrimination is defined by s13 of the Equality Act as when:

“13(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

3.5.2. Direct discrimination therefore requires the claimant to identify a comparator. It is clear from the wording of the section, ‘*or would treat others*’ that a hypothetical comparator can be used.

3.5.3. The claimant must establish that he has been treated less favourably than the comparator he uses. Less favourable treatment is not defined in the statute. There is little specific judicial guidance from decided cases dealing with the Equality Act, however the previous discrimination legislation contained similar provisions which do provide guidance. From this it can be seen that the question of whether treatment is capable of amounting to less favourable treatment is a question for a Tribunal to decide, not the claimant. The EAT in **Burrett v West Birmingham Health Authority** [1994] IRLR 7 made it clear that the mere fact that a claimant thinks they are being treated less favourably does not mean that they are. However, the House of Lords in **R v Birmingham City Council ex-parte Equal Opportunities Commission** [1989] AC 1155, [1989] IRLR 173, gave guidance that the test for less favourable treatment must not be onerous.

Whilst not determined by the claimant it must not disregard the perception of the claimant. Ultimately the decision of whether treatment is less favourable is for the Tribunal to make, accounting for the perceptions of the claimant.

- 3.5.4. Establishing less favourable treatment is not however sufficient: for the claim of direct disability discrimination to be made out, the conduct complained of must be also be 'because of' the claimant's particular disability, not because of the impact that disability had on the claimant.
- 3.5.5. The Court of Appeal established in **Owen and Briggs v James** [1982] IRLR 502, that the protected characteristic, in this case disability, does not have to be the only reason for the less favourable treatment. The question is whether it was an effective cause of the treatment. The motive for the treatment is not determinative. It may be because of the claimant's disability even if it was not actually intended to be.

3.6. *Victimisation*

- 3.6.1. Victimisation is defined by s27 of the EqA as (omitting any parts not relevant to the issues in this claim):

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

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.”

- 3.6.2. As matters transpired, the only determinative question was if the claimant had been subjected to a detriment. This is a question of fact for the Tribunal to determine based on evidence.

3.7. *The Burden of Proof - Discrimination*

- 3.7.1. Considering the claimant's claims for discrimination and victimisation the burden of proof is determined by s136 of the EqA. The relevant parts of this section state:

“(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.”

- 3.7.2. This in effect reverses the traditional burden of proof so that the claimant does not have to prove discrimination has occurred which can be very difficult. Section 136(1) expressly provides that this reversal of the burden applies to ‘any proceedings relating to a contravention of this [Equality] Act’. Accordingly, it applies to both the claimant’s discrimination and his victimisation claims.
- 3.7.3. This is commonly referred to as the reversed burden of proof, and has two stages. Firstly, has the claimant proved facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent committed an unlawful act of discrimination? This is more than simply showing the respondent could have committed an act of discrimination.
- 3.7.4. If the claimant passes the first stage then the respondent has to show that they have not discriminated against the claimant. This is often by explanation of the reason for the conduct alleged to be discriminatory, and that the reason is not connected to the relevant protected characteristic. If the respondent fails to establish this then the Tribunal must find in favour of the claimant. With reference to the respondent’s explanation, the Tribunal can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant’s case.
- 3.7.5. It is not necessary for the Tribunal to approach these two elements of the burden of proof as distinct stages. The court of Appeal in **Madarassy v Nomura International plc** [2007] EWCA Civ 33 gave useful guidance that despite the two stages of the test all evidence should be heard at once before a two-stage analysis of that is applied.

4. The Issues

4.1. Unfair Dismissal

- 4.1.1. The respondent denied that the claimant had been dismissed. The position of the respondent was that the claimant had resigned.
- 4.1.2. This was not, however, pursued by the claimant as an unfair constructive dismissal claim. The claimant’s contention was that he had been actually dismissed, after the respondent deliberately and dishonestly misconstrued an email he sent as a resignation. The claimant did not argue in the alternative that he had resigned in circumstances where his resignation was a constructive dismissal. He relied solely on the assertion that he had not resigned.

- 4.1.3. The respondent did not seek to argue that any potential dismissal was fair. The respondent relied solely on their position that the claimant had resigned.
- 4.1.4. Accordingly, the only question to be determined was if the email sent by the claimant amounted to a resignation. If it did, in the absence of a dismissal the claimant cannot have been unfairly dismissed.

4.2. Disability Discrimination

- 4.2.1. The claimant only pursued discrimination claims in relation to the protected characteristic of Disability.
- 4.2.2. The respondent's representative conceded at the outset of the hearing that the respondent did not dispute that the claimant was disabled, and that the respondent was aware of this, from 16 January 2018.
- 4.2.3. The claimant's representative stated at the outset that the claimant asserted he was disabled and that the respondent knew this from 30 November 2017. This was the first day of the claimant's long-term absence, albeit as at 30 November 2017, the absence was certified by a GP for two weeks only, and on the basis of "stress at work".
- 4.2.4. Further, the claimant's position, following clarification at the outset of the hearing and as confirmed at the start of the second day, was that the respondent had committed discriminatory acts and/or omissions between 30 November 2017 and 16 January 2018. On this basis the Tribunal understood the claimant's disability status and the respondent's knowledge of this during that period was a relevant issue. Accordingly, evidence relevant to that issue was considered.
- 4.2.5. As matters transpired, when making submissions the claimant's representative confirmed that the previously alleged discriminatory acts which occurred prior to 16 January 2018 were no longer relied on by the claimant. Accordingly, there was no dispute between the parties that at the time of the remaining alleged discriminatory acts and omissions the claimant was a disabled person and the respondent had knowledge of that disability.

4.3. Direct Disability Discrimination

- 4.3.1. Prior to the hearing the claimant's direct discrimination claim relied on the acts and omissions argued to be less favourable treatment as summarised by Judge Hoey at preliminary case management hearing on 28 May 2019. These were discussed with the claimant's representative, as a number of them did not appear to be relevant, for example because they occurred at a date prior to the 30 November 2017, when it is not the claimant's case that he was disabled at that time.
- 4.3.2. As a result of this discussion, and after giving the claimant's representative the afternoon of 10 February 2020 to take instructions and confirm the acts of less favourable treatment relied on, four incidents were identified. The

Tribunal proceeded to hear evidence in relation to these four alleged acts of less favourable treatment. After hearing that evidence, and the submissions of the respondent, the claimant's representative confirmed in submissions that only two of the stated acts of less favourable treatment were actually relied on. These were:

- 4.3.2.1. the awarding of a performance score of 2/5 to the claimant in February 2018, that score relating to the 2017 calendar year; and
 - 4.3.2.2. the respondent's allegedly deliberate or dishonest interpretation of an email sent by the claimant as a resignation.
- 4.3.3. Neither of these acts of alleged less favourable treatment predated the date from which the respondent accepts the claimant was known to be disabled.
- 4.3.4. The claimant's representative confirmed the nature of the hypothetical comparator that the claimant relied on in relation to his direct disability claim. This was put in writing and provided to the respondent before the start of the hearing of evidence. The comparator relied on by the claimant was constructed as follows:

"A hypothetical long serving employee who has:

- *Suffered what he/she believes to have been a sustained campaign of unfair treatment against him/her;*
- *Raised grievance with the respondent;*
- *Written to the respondent in terms equitable to those of the claimant in his email dated 17th May 2018 (resent 24th May 2018);*
- *Been and remains on long term sickness absence, but not for a mental illness namely anxiety and depression."*

- 4.3.5. It was confirmed that the unfair treatment identified as the first part of this comparator referred to matters that predated the onset of the claimant's disability by up to 18 months. The respondent did not dispute that this was an appropriate construction of the relevant hypothetical comparator.

4.4. Victimisation

- 4.4.1. The claimant's representative confirmed at the start of the hearing that this claim relied on a single victimising act. This was the respondent's allegedly deliberate or dishonest interpretation of the claimant's email of 17 May 2018 as a resignation.
- 4.4.2. The claimant relied up six alleged protected acts in his victimisation claim. Not all of these appeared to predate the detriment argued to flow from them. The respondent did not accept any of the alleged protected acts that predated the detriment relied on were protected acts.

- 4.4.3. As matters transpired the submissions made by the respondent did not address whether the alleged protected acts were in fact protected. The respondent's submissions focussed solely upon whether the alleged detriment had occurred, and whether the detriment was in response to any of the alleged protected acts.

4.5. Reasonable Adjustments

- 4.5.1. The claimant's claim that the respondent discriminated by failing to make reasonable adjustments was discussed at some length at the outset of the hearing. The claimant confirmed the claim was pursued, and the relevant reasonable adjustments were identified.
- 4.5.2. On the basis of this discussion evidence was heard in relation to the alleged failure to make reasonable adjustments. Following the evidence and the submissions of the respondent, the claimant's representative, during his submissions, confirmed that no claim relating to any alleged failure to make reasonable adjustments was pursued.

5. Evidence

- 5.1. All the evidence in this case was heard in a single day. In that day, evidence was heard from the claimant on his own behalf. For the respondent evidence was heard from Ms Cullen, a member of the respondent's HR function who had dealt with a number of matters including being the person who first interpreted the claimant's email as a resignation. In addition, the Tribunal was provided with a substantial bundle of documents.
- 5.2. At the outset of the third day the parties made submissions. These took the form of written submissions made on behalf of the respondent and oral submissions made on behalf of the claimant. During the submissions on behalf of the claimant, in the light of substantial parts of the claimant's claim being confirmed as not pursued, the claimant's representative was provided with a short adjournment to ensure he had full instructions to proceed.
- 5.3. A significant part of the evidence heard and presented did not relate to the matters that were, in submissions, confirmed by the claimant to be pursued. There remained only two live issues for the Tribunal to determine after submissions were heard, which related to the following events:
- 5.3.1. the 2017 performance score of 2/5 communicated to the claimant in February 2018; and
- 5.3.2. the claimant's email of 17 May 2018 which was interpreted by the respondent as a resignation.
- 5.4. Only evidence relevant to the findings in relation to these events is referred to below.
- 5.5. *Performance Score of 2/5*
- 5.5.1. The claimant's position was that he had been deliberately and dishonestly underscored by the respondent as part of a campaign against him.

- 5.5.2. The claimant's evidence was that the campaign against him had commenced a year earlier when he had also been given a performance score of 2/5 for his performance during 2016. That score was given to the claimant before the date he asserts he became disabled.
- 5.5.3. It was not in dispute that during 2017, having been scored 2 / 5 for 2016, the claimant was put onto a Performance Improvement Plan (PIP). Phase one of that PIP had not concluded before 30 November 2017, when the claimant was first absent with the health concerns that amount to his disability. The claimant never returned to work after that date. The evidence of the respondent was that the PIP was suspended, and would have resumed as and when the claimant returned to work.
- 5.5.4. The claimant's evidence was that his disability commenced on or around 30 November 2017. It was no part of the claimant's argued case that he was disabled at any point during 2016, or early 2017, when he had been given his 2016 performance score of 2/5. The claimant's own evidence was that prior to the autumn of 2017 he had had no problems with his mental health.
- 5.5.5. Ms Cullen gave evidence that the claimant's performance score for 2017 had been determined based on the time he was in work, to ensure he was not disadvantaged by his absence. The evidence of Ms Cullen, which was not challenged on this point, was that the respondent seeks to make reasonable adjustments for any employee who is sick, regardless of whether that sickness falls within the scope of the definition of disability in the EqA.
- 5.5.6. The tribunal had the advantage of sight of the comments made on both occasions when the claimant was given a score of 2/5. The evidence of Ms Cullen was that the scores appeared to be correct based on the comments recorded at the time, albeit she had not undertaken the scoring. The evidence from the claimant was that he believed on both occasions he had been underscored.

5.6. *The Claimant's resignation*

- 5.6.1. The claimant's resignation took the form of an email. There was no suggestion that the email had been a follow up to an oral resignation.
- 5.6.2. The Tribunal had the advantage of being able to read that email in full. The email was dated 17 May 2018. The email was sent to Ms Cullen. It set out a number of complaints from the claimant about the way he had been treated by his manager, before concluding with a statement, emphasised by the claimant in bold font, which stated:

"It is clear to me that through the actions of the business I feel this being dealt a detriment to where I have no other choice than to resign and initiate a claim against Unilever for constructive dismissal."

5.6.3. The claimant's evidence was that he did not believe that amounted to a resignation, and that he had not indented it to be a resignation.

5.6.4. The claimant was taken in evidence to an email he had sent on 21 February 2018 to Ms Cullen to raise a grievance. In that email the claimant stated, without any bold or similiar visual emphasis:

"I feel that there is no point and I have no other alternatives but formally start Unilever grievance process against....."

5.6.5. The claimant's evidence was that his email of 21 February 2018 was not in any way ambiguous. His evidence was that it clearly stated he was raising a grievance. There was no dispute from the respondent over this assertion.

5.6.6. The claimant was asked to explain the basis upon which, if the email of 21 February 2018 was unambiguous, the email of 17 May 2018 was different. The claimant, under cross examination, explained after some consideration that it was the absence of the word "*formally*", which he had included when referencing the grievance but had not included when referencing his resignation. It was the claimant's evidence that the respondent should have understood the absence of the word "*formally*" was significant.

5.6.7. Ms Cullen was taken in re-examination to earlier correspondence that had been sent to the claimant, by her, on 1 December 2017. This clearly stated:

"You have raised a number of concerns in your email and we would like the opportunity to investigate those concerns to reach a resolution. This can either be done informally or if you wish to raise the matter formally, you will need to follow the steps in the formal grievance policy."

5.6.8. There was no suggestion made that the claimant had not received this email.

5.6.9. The claimant's representative repeatedly asked Ms Cullen in cross examination why she had not sent a response to the claimant's email of 17 May 2018 earlier than she did, which was on 24 May 2018. There was no dispute between the parties that on receipt of previous correspondence from the claimant a substantive response, holding response or at the least acknowledgement was sent within a day or two. The evidence of Ms Cullen was that she had felt the need to seek guidance, as she was unsure if the complaints raised by the claimant in his resignation email were matters that should be responded to. This response was given on each of the six occasions that Ms Cullen was asked this question, before the Tribunal intervened to direct that the cross examination should move to different questions. Ms Cullen's evidence was very clear and very consistent. At no point, despite being repeatedly pressed, did Ms Cullen's evidence change. Ms Cullen was clear that she had, from initial receipt of the claimant's 17 May 2018 email, been clear in her mind that it was a resignation.

5.6.10. The claimant's email was acknowledged on 24 May 2018 by Ms Cullen. This confirmed that his resignation was accepted.

- 5.6.11. Earlier on 24 May 2018 the claimant again emailed Ms Cullen. This was approximately two hours before his resignation was acknowledged. In this email, the claimant stated he was disappointed to have had no response to his 17 May 2018 email.
- 5.6.12. The claimant's 24 May 2018 email was argued by the claimant's representative to amount to conduct consistent with him still being an employee of the respondent. The content of the email does not, however support that position. It is clear that the claimant is seeking acknowledgment and some sort of update about how his complaints were being dealt with. The content of the email cannot be read as casting doubt on the belief of Ms Cullen that the claimant had resigned.
- 5.6.13. There was no challenge to the claimant's evidence that at that point the claimant did not understand or believe he had resigned.
- 5.6.14. The evidence of Ms Cullen was that the claimant's email of 24 May 2018 prompted her to respond to the claimant's resignation email. Her further evidence, which was supported by documents before the Tribunal, was that Ms Cullen had in fact sought guidance regarding whether and how she should respond to the claimant's complaints which were included in his resignation email.
- 5.6.15. When the claimant received the acceptance of his resignation he responded to Ms Cullen the same day to say he "*..did not resign nor I confirmed to you on my email of the 17th of May 2018 that I am resigning..*".
- 5.6.16. Ms Cullen's evidence, which was not challenged on this point, responded by referring the correspondence to a manager, Jenny Canning, for review. This was not in the format of an appeal, and the claimant was not invited to any meeting or to comment.
- 5.6.17. Mrs Canning reviewed the correspondence with the claimant, including his resignation email. The conclusion of Mrs Canning was confirmed to the claimant in a letter dated 31 May 2018. This stated:

"It is clear to me that your email of 17th May 2018 comprises your immediate resignation, given in writing to the company"

- 5.6.18. Mrs Canning did not appear as a witness, however her written conclusion, which was sent to the claimant, was before the hearing.

6. Conclusions

6.1. Unfair Dismissal

- 6.1.1. The conclusion of the Tribunal was unanimously that the email of 17 May 2018 was clear and unambiguous. The claimant resigned in writing.
- 6.1.2. The Tribunal considered whether the context of the claimant's previous correspondence would support the claimant in an argument that the language he had used is something the respondent should have understood to be ambiguous or not a resignation. The claimant's previous

correspondence is found to reinforce the respondent's assertion that the claimant had resigned. The similarity of the wording to that used by the claimant to commence a grievance, which he is clear is not in any way ambiguous, is significant. The similar wording in the resignation was given the additional emphasis of bold font.

- 6.1.3. The claimant's reliance on the absence of the word "*formally*" from the resignation email is not found to be credible or to undermine the clear meaning of the words used. The claimant had been told, prior to this, that grievances could be dealt with formally or informally. This is a well-known position for workplace disputes, clearly understood by Ms Cullen as a member of the respondent's HR team. There is no such thing as an informal resignation, accordingly the use of the word formal in a statement of resignation would not impact the meaning.
- 6.1.4. The delay in acknowledging the claimant's resignation, or at least a holding or acknowledgement response is not found to be significant. The evidence of Ms Cullen, that she was seeking guidance, is accepted as credible and relevant. Whilst the respondent employed the claimant, they would have an obligation to deal with complaints raised. Not to do so may have exposed them to claims based on that failure. The same cannot be said for an employee who has resigned.
- 6.1.5. It is entirely credible Ms Cullen would seek guidance regarding whether and how complaints raised by an employee at the point of resignation should be dealt with. In any event, that guidance took only a week to obtain.
- 6.1.6. The fact that Ms Cullen was prompted to reply to the claimant by his email of 24 May 2018 is not found to be significant. The claimant's email of 24 May 2018 merely seeks to chase a response to his complaints. If read in context and from the perspective of a person who read the claimant's earlier email and accordingly understands the claimant to have resigned, it does not infer or suggest that the claimant still considered himself to be an employee. It suggests that the claimant still wanted his complaints to be looked into.
- 6.1.7. In the circumstances, it is found that the claimant, whether he regrets it now or not, clearly sent a resignation email to the respondent which was not ambiguous. This was accepted. This resignation terminated the claimant's employment. There was no dismissal.
- 6.1.8. Accordingly, the claimant's unfair dismissal claim must fail.

6.2. *Direct Discrimination - Resignation*

- 6.2.1. Given that it is found the claimant resigned, the alleged less favourable treatment of dismissal cannot be found to have occurred.
- 6.2.2. Irrespective of the fact that the claimant was not dismissed, the Tribunal do not find any other form of less favourable treatment flows from the respondent's handling of the claimant's resignation. There was no credible

evidence presented to suggest that in accepting a clear and unambiguous resignation as a resignation, there was a deliberate or dishonest act by the respondent aimed at victimising or discriminating against the claimant because of his disability.

- 6.2.3. Other than the fact the claimant was disabled, nothing in the evidence supported a contention that the interpretation of the claimant's resignation was in any way connected to his disability. The explanation of the respondent of the basis for their acceptance of the claimant's email as a resignation, was persuasive. It showed that the acceptance was in no sense whatsoever connected with the claimant's disability or health, instead it was a simple response to an explicit written resignation. That resignation came with clear reasons for resigning that appeared to be rational and logical.

6.3. Direct Discrimination – Performance Scoring

- 6.3.1. The evidence did not support the claimant's contention that the respondent deliberately or dishonestly underscoring him because of his disability. There was no credible evidence that the respondent had in any way deliberately or dishonestly underscoring the claimant in 2017, or that the scoring of the claimant in 2017 had been in any way materially differently approached than it had in 2016.
- 6.3.2. The evidence of Ms Cullen, explaining her understanding of the performance scores given to the claimant, appear to be entirely credible, realistic, logical and sensible. Nothing in the case presented suggests that the claimant's status as a disabled person had any influence on his performance score, before or after he became disabled.
- 6.3.3. The claimant's 2017 score appeared to reflect a credible, logical and consistent continuation of the claimant's previous performance. The contemporaneous comments recorded in relation to the claimant's 2017 score were consistent with the contemporaneous comments made in relation to his 2016 score. For 2016 the claimant scored 2 out of 5. Following this, during 2017, the claimant was put on a Performance Improvement Plan. That plan was incomplete as at the date the claimant commenced the absence that continued until his resignation. It is not surprising, or in any way untoward, therefore, that the claimant's performance score for 2017 was the same as for 2016.
- 6.3.4. Even if the claimant is correct that the respondent was deliberately or dishonestly underscoring him, that underscoring started in 2016. This was well before he had acquired the protected characteristic of disability he relies on for his direct discrimination claim. The agreed hypothetical comparator, which would be somebody who the respondent was, for non-disability related reasons, underscoring, would also have been underscoring. There was no evidence to support a contention that the claimant was treated differently as a consequence of his disability.
- 6.3.5. Accordingly, the claimant has not presented sufficient evidence of facts from which, irrespective of any explanation, it could be inferred that there

was discrimination. For this reason, the claimant is not found to have reversed the burden of proof to the respondent.

- 6.3.6. Regardless of this, the respondent has presented persuasive evidence that the claimant's performance scores were in no sense connected with his disability. The respondent has given a credible, logical and clear explanation of the reasons for the scores which is accepted as establishing that the scores were in no sense connected with the claimant's health.
- 6.3.7. Accordingly, the claimant's direct discrimination claims must fail.

6.4. Victimization

- 6.4.1. The only detriment relied on by the claimant in his victimisation claim was the alleged deliberate or dishonest interpretation of his email of 17 May 2018 as a resignation. For the reasons set out above this is not found to have been a detriment.
- 6.4.2. Further, as stated above, the respondent's interpretation of that email has been found to have been for proper reasons. There was no evidence that would support the claimant's contention that it was in response to any alleged protected act.
- 6.4.3. Accordingly, the claimant's victimisation claim must fail.

Employment Judge Buzzard

Date: 24 February 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

27 February 2020

FOR THE TRIBUNAL OFFICE

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