



EMPLOYMENT TRIBUNALS

Claimant: Mr Dom Aitchison

Respondent: Transport for London Limited

Heard at: London South (by video) **On:** 15 to 19 November 2020

Before: Employment Judge E Fowell
Mrs H Carter
Ms N O'Hare

Representation:

Claimant: Ms E Banton, instructed by Rahman Lowe Solicitors

Respondent: Ms I Ferber, instructed by Eversheds Sutherland (International) LLP

RESERVED JUDGMENT

1. The unanimous decision of the Tribunal is that the claim is dismissed. The claimant's dismissal was not:
 - a. an act of discrimination, whether of direct disability discrimination or discrimination arising from a disability;
 - b. an act of victimisation;
 - c. a failure to make reasonable adjustments;
 - d. an automatically unfair dismissal for making a protected disclosure, or
 - e. in breach of contract.
2. Further, the claimant did not suffer any detriment at work for making a protected disclosure.

REASONS

Introduction

1. Mr Aitchison was employed by Transport for London for about nine months in all, beginning on 15 January 2018. It was a senior position, Senior Commercial Manager, with a salary of £72,000. It was also a new type of role for him. After about four months he went off sick with a combination of anxiety, depression and obsessive compulsive disorder (OCD). Over the next few months his probation period was extended twice, but he did not make a return to work and was eventually dismissed on 25 October. The organisation accepts that he had these three conditions, and that they amounted to a disability at the time of his dismissal.
2. His absence followed some difficult events at work. First, one of his team raised a grievance against him, complaining of being bullied. Then he found out or at least believed that this team member was in a relationship with a senior member of the HR department, and that she had gone above his head to support the grievance. After that, one of his main projects was taken off him and assigned to a colleague on the basis that it was too far behind schedule, something he saw as a demotion. Finally, and largely as a result of these concerns, he was sent an invitation to a probationary review meeting. All this happened in the space of a few days and led to Mr Aitchison going off sick on 11 May, the day of a meeting to discuss the probationary review.
3. Without setting out all of the facts at this stage, over the next few months Mr Aitchison made a series of complaints, grievances and disclosures, some about the events that led to his absence and some follow-up complaints about the way they were being dealt with.
4. Taking them in turn, the first concerned the senior member of the HR department, Ms Sheila Fearon-McCaulsky. He raised her involvement as a public interest disclosure or whistleblowing complaint (“the HR conflict issue”) and then also raised a grievance about his own line manager, Mr Philip Hewson.
5. After that he was assigned to another line manager, Mrs Dorothy Wallace, who had to manage his absence and decide whether he had passed probation. She referred him to Occupational Health and Mr Aitchison raised a complaint about the doctor who saw him.
6. A further public interest disclosure followed about a breach of the relevant procurement regulations, connected with the project which was removed from him.
7. Ultimately, Mrs Wallace took the decision to dismiss him, and that decision was upheld on appeal. The handling of his case by Occupational Health, and a follow up complaint about the handling of the procurement disclosure comprise the third

and fourth protected disclosures relied on.

8. All that gave rise to a series of complaints to this Tribunal. The main allegations are a failure to make reasonable adjustments, or that the dismissal was discrimination arising from his disability, or that it was because of the disclosures or was an act of victimisation. The parties agreed a list of issues before the hearing and the full list of complaints is as follows:
 - a. direct discrimination (under section 13 Equality Act 2010) on grounds of disability;
 - b. discrimination arising from a disability (under section 15 Equality Act 2010);
 - c. failure to make reasonable adjustments (under sections 20 and 21 Equality Act 2010);
 - d. victimisation (under section 27 Equality Act 2010);
 - e. automatically unfair dismissal under section 103A Employment Rights Act 1996 for making a protected disclosure;
 - f. detriment at work under section 47B Employment Rights Act for making a protected disclosure; and
 - g. breach of contract in relation to notice pay (since he alleges that he should have passed his probation period and so become entitled to 12 weeks' pay).

Procedure and evidence

9. In addressing these issues we heard evidence from Mr Aitchison, and on behalf of the respondent from:
 - a. Mr Philip Hewson, his former line manager, whose title at the time was Head of Commercial, Technology and Data;
 - b. Mrs Dorothy Wallace, now retired but then Head of Commercial for Strategy, Planning and Governance;
 - c. Mrs Miriam Kingsley, a chartered accountant and Head of Group Tax, who dealt with Mr Aitchison's grievance;
 - d. Mr Pete McCurry, who was then Head of HR for London Underground, and who has also now left the organisation; and
 - e. Mr Phil O'Hare, Head of Network and Business Services, who held the appeal against Mr Aitchison's dismissal.
10. There was another witness who did not give evidence. Mr Mike Shirbon, Head of

Integrated Assurance, was assigned to investigate the HR conflict issue, but given that time was short and his involvement was more marginal Ms Ferber did not call him as a witness.

11. The agreed bundle ran to 2,740 pages. As the hearing was conducted by video link we had an electronic copy, which was easy to navigate but not so easy to assimilate in the time available. The witness statements ran to a further 200 pages, just over half of which was from Mr Aitchison. Most of our first day was spent just in reading those statements. The remaining evidence and submissions were heard over the next four days, and we took two days for deliberation. It was therefore a document-heavy case, and despite the length of this decision, we have only dealt with the issues so far as necessary to explain our conclusions.
12. Given his disability Mr Aitchison was a vulnerable witness, and we had in mind the relevant guidance from the President of Employment Tribunals. We took a break every 45 minutes or less. Some of his answers were long and sometimes he strayed from the question, but he was anxious to get his side of the story across and seemed engaged and focussed. By the end of the day he was tired, understandably, but he was keen to finish his evidence so we pressed on with caution. We are pleased to say that none of the questions was at all hostile or accusatory. Ms Ferber did not, for example, ask any questions about the whistleblowing allegations, which were for him to prove. So, with this careful selection of points, it was possible to complete his evidence in a day, and Ms Banton had the next two and a half days to cross-examine the five witnesses for the respondent.
13. It is worth emphasising too that there is no complaint of “ordinary” unfair dismissal here, so the procedure adopted by the organisation is not directly relevant. What matters are essentially the reasons behind the decisions taken by the managers in question. Of course if there is obstruction or delay in investigating a complaint, that might indicate a defensive attitude by the organisation, and lend some weight to the view that the complaint lay behind the decision to dismiss. But even if a particular step was unfair or badly handled to any extent it does not follow that it is an act of discrimination, or victimisation or any sort of detriment.
14. Overall, we found the respondent’s witnesses to be credible and sincere, particularly Ms Wallace and Mr O’Hare, whose decisions to dismiss and then to uphold the appeal were the focus of the hearing. That is not to say that we found Mr Aitchison to be in any way misleading. He gave his evidence in a clear and composed fashion. And in a case as well documented as this, there is little room for doubt about what happened. But there were many differences of emphasis, and we felt overall that Mr Aitchison had a mindset that the organisation had been hostile from an early stage, and that his managers were conspiring against him. A particular theme was his concern about the involvement of Ms Fearon McCaulsky. One of her reports, Ms Catherine Watt, was assigned to his own case and he felt strongly, both at the time and at this hearing, that she should not have been involved. That seemed to

us a misplaced concern.

15. Finally on a point of detail, since all of these events took place in 2018 we will not mention the year each time we give a date.

Findings of Fact

Background

16. Transport for London (TfL) is a large, public-sector organisation. Its remit covers all aspects of transport in the capital, including trains, buses and bikes. They have a large and expert HR department together with their own internal Occupational Health team of doctors and other medical practitioners. One of their boasts is that they are a “disability confident” employer.
17. Mr Aitchison joined their Commercial department, but that term may be misleading. For the most part, their commercial activity is concerned with procurement, or spending. It is an organisation with huge buying power, and naturally wants to get the best value for money. That involves economies of scale. As a public sector organisation it also has to abide by legal rules about putting contracts out to tender. Suppliers have to be given a fair chance to compete for the work. These legal rules derive from the EU and in the UK are implemented mainly by the Public Contracts Regulations 2015.
18. Contracts are generally not just for a consignment of goods. They involve meeting the organisation’s needs for a type of item or service for a period of years. When it ends the contract has to be put out to tender again. Mr Aitchison’s previous experience had been in the private sector, mainly in sales, and so he was used to bidding for these contracts rather than awarding them. TfL thought that this experience would be useful, as well as his track record as a senior manager, and so he was taken on at what is designated a Band 4 role. Mr Aitchison described this as being at the bottom of the senior management pyramid.
19. After he accepted the job he was assigned to Mr Hewson’s team, which deals with technology and data. This have an annual spend of £700m. To manage all those contracts there were seven such managers reporting to Mr Hewson, some more senior than others. The title Lead Commercial Manager was above Senior Commercial Manager, although both were at Band 4 for pay purposes, and there were two of them on Mr Hewson’s team, Anthony Fahy and Kevin Fallon.
20. Mr Aitchison was assigned to the End User Computer and Cyber Security (EUC) team. This meant he was managing contracts for hardware, like printers, laptops and mobiles, and was thought to be an easier place to start for someone new to public sector procurement. For this, he had his own team of four managers, covering about 90 contracts. He had to make sure that none of the contracts lapsed unintentionally. Each contract also had to fit into an overall framework or strategy.

There was a general commercial strategy for the department, then strategies within each category, like Cyber or EUC. Mr Hewson had regular round-table meetings with his senior managers to check on progress, and also one-to-one meetings with each of them.

21. The main tool for keeping track of all this was a spreadsheet called the EUC work plan. It showed the expiry date of each contract and the plan for what to do next; whether to renew it, or let it expire, try to renegotiate it or put it out to tender again. Mr Aitchison's job was to ensure these plans were up to date and that they were actioned.
22. Of these various contracts, the largest was called the Reseller Framework. In procurement terms a Reseller is simply someone who buys and sells things on, like a retailer, so as we understand it this framework was rather like a deal with a catalogue company. TfL could then buy from the products in the catalogue. That included all of the commercial teams, not just EUC, so it was of wider interest across the team.
23. This £80m contract was coming to an end at the end of June and arrangements to replace it were behind schedule when Mr Aitchison arrived. What to replace it with was not straightforward. It could be changed to a series of smaller contracts. Or TfL could make use of central government frameworks instead. If the contract were put out to tender again there were questions about how the bids were to be assessed and what the terms of the contract would be. All this was new to Mr Aitchison, it was complex, and involved discussions with internal and external stakeholders.
24. It may be that this was too much to expect of an incoming manager new to this area. The first sign of difficulty was on 9 February, about three weeks into the job, when Mr Aitchison emailed Mr Hewson proposing a way round this. It is possible to apply for what is known as a "single source justification" (SSJ), an internal permission to act outside of the Public Contracts Regulations. Mr Hewson said no. He felt that it was far too early to be thinking in those terms, and there was plenty of time to come up with a proper long-term solution.
25. It is fair to say that there was not a great deal of training provided for Mr Aitchison when he arrived. There was a series of generic training modules called "Managing Essentials" and an additional procurement module called DPA, which licenced Mr Aitchison to carry out procurement work. These were short, online training courses. There were also library resources on the intranet. It was expected that he would learn on the job and make use of expertise within the team, including the Lead Commercial Managers. On the other hand he was keen to share his own knowledge of sales with the rest of the department, and put on a presentation for the Commercial team and others, which was well-received.

Disclosure of his disability

26. In his first week in the new job Mr Aitchison had a meeting with Mr Hewson. It was just over coffee in the canteen. Mr Aitchison told him that he had OCD and anxiety. Mr Hewson was not particularly concerned to hear this: his partner suffered from a similar condition. They discussed it in more detail, and Mr Aitchison explained that he managed perfectly well normally but that big changes or disruptions caused him a problem. The examples he gave were international air travel – he had to fly to Los Angeles from time to time in a previous job – and the birth of his first child. His second child was expected in June, and he said he needed to book some extra time off, on top of his paternity leave, so he could have four weeks off around the time of the birth. Mr Hewson was happy with that. There was no mention of terms like disability or reasonable adjustments.

Problems with the team

27. Returning to his own team, the four members were Jimeko Green, Chris Gilham, Liz Ryan, and Chanel Dykes. Each was a Commercial Officer and naturally each had his or her own strengths and weaknesses. Mr Hewson felt that the team as a whole was underperforming and needed some firmer leadership.
28. On 15 February Mr Aitchison had his first private meeting with Mr Green. The main concern with Mr Green was over the amount of time he took off to carry out public duties as a magistrate. There is a legal right to a reasonable amount of time off for such things, and Mr Green took the most he was allowed each year – 18 days. Mr Aitchison tackled this straight away. The contents of that meeting are apparent from a long email he sent to Mr Green the next day (470G) telling him it needed to come down. It suggested that he was putting his promotion prospects at risk.
29. That was not a good start. Mr Green was entitled to this time off work, both in law and under the organisation's own policy, and Mr Aitchison should not have tried to apply this sort of pressure. Mr Green was certainly unhappy about it. On 20 February he met Mr Hewson to complain. Somewhat surprisingly, we felt, Mr Hewson backed Mr Aitchison up. It may be that he felt this was the sort of firmer leadership that was needed.
30. Mr Green was understandably unhappy about this, and on 8 March he had another one-to-one meeting with Mr Aitchison. That too was summarised in a later email, sent on 12 March (1053). This time Mr Aitchison took him to task over other performance concerns, setting out at some length his view that Mr Green was not proactive (with detailed examples including failing to respond to emails) or lacking attention to detail. Mr Green responded by email, saying he did not feel this was an accurate summary of the meeting. He felt that Mr Aitchison had been "borderline rude" and that it felt like an attack.
31. On the same day Chanel Dykes resigned. She sent an email to Mr Hewson (499) saying that the last six months had been unbearable (a period long which began well before Mr Aitchison's arrival) and went on:

“The micro-management by Dom is unnecessary and patronising and is a form of bullying under TfL’s policy. The way I have been spoken to in my one to ones with Dom is appalling and incredibly unprofessional. I have been ridiculed and humiliated about my writing abilities and my position has been questioned, which has only exacerbated my low mood and anxieties in the workplace.”

32. Again, Mr Hewson was not unduly concerned. He did not think that Ms Dykes *had* been bullied into leaving. He felt this was a reaction to being robustly performance managed. That also surprises us, given the strength of her reaction; two members of one small team had complained within days of each other about bullying or micromanagement, the complaints are very similar and their seriousness was then underlined by this resignation.

The HR Conflict Issue

33. The next day, 13 March, Mr Aitchison had a meeting with his increasingly unhappy team. There must have been some further criticisms of Mr Green because he was so stressed that at one point he left to be sick. (That is recorded in his own grievance and by Mr Shirbon in his interview with Mr Aitchison.) Afterwards Mr Aitchison contacted Mr Hewson for advice via the internal text chat system, called Lync. Mr Hewson suggested contacting Ms Fearon McCaulsky in HR. The HR advisors are known as People Management Advisers or PMAs and Ms Fearon McCaulsky was the PMA Manager. But Mr Aitchison had already noticed from Mr Green’s file that his nominated emergency contact person was Ms Fearon McCaulsky, and assumed they were in a relationship.
34. When it was pointed out, Mr Hewson agreed. He sent an email to Mr McCurry, Ms Fearon McCaulsky’s manager, raising the concern about a potential conflict of interest. She also got to hear about it that day. Her email to Mr McCurry that evening (1189) shows that she was indignant that her professionalism had been brought into question by Mr Hewson (not Mr Aitchison, who was not mentioned). Addressing the substance of the complaint, she said that a number of cultural champions had been appointed to Mr Hewson’s team to gather feedback because of poor scores received in a staff survey, called Viewpoint. These champions had raised a report but the team was not happy with it. They did not feel it went far enough. For that reason she had been to see Mr Wylie the previous week, adding that she had never met Mr Hewson. She had not therefore gone over Mr Hewson’s head to report complaints direct to Mr Wylie.
35. This information was not passed back to Mr Hewson or Mr Aitchison. The day after that, 14 March, Mr Aitchison noticed that his remaining team were all in a meeting together. It was marked private in their diaries. They were at Broadway, a different building, and he assumed it was in Mr Wylie’s office, with HR in attendance. So it proved. When they got back he found out that Mr Green had been sent home to see a doctor. Later that day he was signed off sick with stress.

36. It was this meeting, in which Mr Green was clearly discussed with Mr Wylie, that led Mr Aitchison to believe that Ms Fearon McCaulsky had gone over his head. He was already aware of the conflict issue, but this appeared to be confirmation that Ms Fearon McCaulsky was abusing her position. Mr Hewson emailed his manager, Mr Wylie, on 16 March, who was supportive, and passed the query on to Mr McCurry. Mr McCurry made no response for a few days, which shows that it was a rather sensitive issue. In the meantime, Mr Aitchison carried on dealing with his usual PMA, Ms Ejenavi Agbonkpolo. But it continued to rankle with him. To take one example from many, on 20 March, in his Lync chat with Mr Hewson, (541) he noted that Mr Green was still sending out work emails, so did not look that sick, and speculated

“I wonder how much of that advice was given by Sheila....”

37. Those exchanges also show that he and Mr Hewson were on good terms and saw the issue in the same way.

Chris Gilham

38. As the end of the financial year approached it was necessary to carry out performance reviews. Mr Gilham was due to move to another team, and there had been concerns about his attendance and performance generally in Commercial. He had been involved in the Reseller contract, which was behind schedule, and so Mr Hewson and Mr Aitchison agreed that a score of one – “has not met objectives” – was due for the year. Mr Aitchison was not keen to have this conversation with Mr Gilham, not least because he had only been managing him for a short period, so Mr Hewson sat in on the meeting, which took place on 11 April.
39. Mr Hewson was taken aback by the approach Mr Aitchison took. According to his witness statement:

He brought in a great wodge of emails and notes and immediately started diving into ‘you said this’ and ‘you did that’, looking at the various details of Chris’ performance. He did not take the step back that I had advised, looking at the objectives and hearing what Chris had to say. His body language and mannerisms were completely inappropriate. He was hunched over the documents, finger jabbing and came across as physically intimidating. It was very aggressive and off message. I had to step in and ask Chris to talk through each of his objectives and to say what he felt he had achieved and then asked Mr Aitchison to comment on the same objective.

40. At this point, he went on:

“It dawned on me that if Mr Aitchison had come across in this way when dealing with Chanel and Jimeko, I was not surprised that it was causing such reactions (resignations and grievances).”

41. Given that there had been those reactions already, we accept that this is likely to be

how Mr Aitchison came across in that meeting. There was no real challenge to it at this hearing. And clearly it would have been better had those earlier reactions been taken more seriously. This, however, was something of a watershed for Mr Hewson, and he moved from being supportive to rather distant.

42. Mr Aitchison soon realised the change in attitude. In an email to Mr Hewson on 20 April (1077) he raised the Jimeko Green issue again, complaining that Ms Agbonkpolo would not tell him the substance of the grievance. He did not even know if Mr Green was still in his team and he had had no reply from Ms Agbonkpolo for three days. But he received no response from Mr Hewson to this email either. The next email from Mr Hewson (553) that we were shown was on 25 April, and was a fairly cool response on his part to a long email from Mr Aitchison complaining about the transfer of the Reseller contract. Relations had therefore become distinctly cool over this period from 11 to 25 April. To be clear though, this was not because Mr Aitchison had raised the HR conflict issue, which Mr Hewson supported at the time, but because of the Chris Gilham interview.

The Reseller Contract transferred

43. During this period, on 17 April, there was a departmental team meeting. The Reseller contract was an important topic and Mr Aitchison gave an update on progress. He seemed not to grasp the implications of failure though, and felt that contracts could still be placed after the end date. When challenged on this said that he had done his own research online and they could obtain things later on from an updated catalogue. He argued the point and would not accept the collective view of the room.
44. Mr Fallon and Mr Fahy, the two Lead Commercial Managers, came to see Mr Hewson afterwards. They agreed that it would be better for Mr Fahy to take over, with Mr Aitchison reporting to him on that one project, so that he could give him some coaching. Mr Hewson agreed, and told Mr Aitchison so shortly afterwards. When he was told he became agitated and defensive, and then after the meeting sent the lengthy email on 25 April just referred to (554 to 557). It runs to four pages, and by this stage his emails were getting longer and longer. The content was composed and business-like but he took issue with the decision from every possible angle and saw it as a demotion. This prompted the cool reply from Mr Hewson, that he was happy to discuss these points when they next met.

Mr Green's grievance against Mr Aitchison

45. Mr Aitchison first heard that Mr Green was raising a grievance through a Lync chat with Mr Hewson on 14 April (535), but the written version was not submitted until 3 May (1081). It was detailed and emotional. Mr Green described what he saw as bullying behaviour, particularly over the magistrates' issue, excessive criticism and micromanagement generally. As a result of this was not sleeping, not eating, felt sick at work and went around "in a zombified state". He said he could no longer

work with Mr Aitchison. By then he had already been assigned to a new line manager.

46. We note, in passing, that since Mr Aitchison no longer needed to manage Mr Green, the HR conflict issue was no longer a practical day-to-day concern. It would be very difficult to manage someone with connections in high places, but that was no longer the case.
47. Although Mr Green made some criticism of Mr Hewson in his grievance, that is only because he supported Mr Aitchison. At this hearing Mr Aitchison said that it was Mr Hewson who was particularly hard on Mr Green, pointing to various comments in the Lync chats, but the fact is that Mr Green's complaint was squarely against Mr Aitchison.
48. Mr Aitchison was told by HR about the grievance that day and contacted his GP surgery for an urgent appointment. He saw the doctor later that day and complained of work-related stress.

Probationary Review Proposed

49. There was a six month probation period for Mr Aitchison's contract. The relevant guidelines provide for a review meeting at weeks 12 and 20, which fell in early April and the end of May, but in practice these were only held if there were any concerns. The first of those milestones was before the Chris Gilham review when all was well, at least as far as Mr Hewson was concerned, but by the beginning of May things were very different. That was when HR sent Mr Hewson a reminder about the need for a 20-week review. He then contacted Ms Agbonkpolo for a suitable template letter to invite Mr Aitchison to a meeting.
50. Things came to a head very shortly afterwards, between 9 and 11 May. Mr Aitchison was alarmed to receive an invitation to a probationary review. He spoke to Ms Agbonkpolo and mentioned his OCD. She then emailed Mr Hewson to ask if he knew about this disability, and that prompted an email from Mr Hewson to Mr Aitchison (586) stating:

"I have been informed by HR that you have informed them that you have a disability. I therefore, as part of my duty of care to you, need to meet with you at the soonest opportunity to understand your disability, and what support and potential reasonable adjustments may need to be made. 9.00 on Friday is the first time that we can meet."

51. Given that Mr Hewson knew about Mr Aitchison's OCD, this rather studied ignorance was surprising and led to an indignant response from Mr Aitchison:

"I am appalled because you knew about my condition ..."

Communications between the two already appear to have reduced to either very formal or acrimonious exchanges in writing.

52. Mr Hewson had also spent some time preparing notes for the probationary review (580), which set out his performance concerns. The main points were:
- a. failure to deliver on the Reseller contract;
 - b. being unwilling to take advice and guidance from peers, including preferring to "google" advice rather than seek support;
 - c. spending his time during meetings typing on his laptop rather than taking part in the discussion;
 - d. not understanding or misrepresenting the outcomes, so that his view of what was agreed was at odds with the others there;
 - e. not providing up-to-date work plans for structured catch-up meetings and in advance for round-table meetings;
 - f. verbal communication with his team reported as aggressive, condescending and unsupportive;
 - g. sending overlong emails, which can appear combative, officious or even aggressive, and spending excessive time on them.
53. There were no positive remarks to balance out these criticisms. Mr Hewson's evidence was that he expected to give Mr Aitchison some extra time to improve rather than simply dismissing him. That seems likely since a template letter from HR had been prepared to that effect (675). It is however a formidable list to address in a short period.
54. The review meeting was booked to take place at 4pm on Friday 11 May. They had a regular monthly catch-up meeting planned at that time anyway, so Mr Hewson's PA simply renamed the existing meeting as a probationary review. That had the unintended effect of re-labelling all their previous catch-up meetings as probationary reviews, something Mr Aitchison spotted immediately. It looked like Mr Hewson was rewriting the record to make it look as though there had been performance concerns for some time. That itself is an indication of his anxiety.
55. All this was being arranged on 10 May, and also that day, to add to his concerns, Mr Aitchison was interviewed in connection with Mr Green's grievance. At a team meeting that day a colleague noted that he seemed upset. The upshot was that he emailed Mr Hewson the following morning to say that he was too sick to attend, and then contacted his GP. He was seen around lunchtime, and his notes record that the problem was "terrible stress with work" with symptoms of dizziness, insomnia, retching, sweating, headaches, and anorexia. He was also, because of his OCD, compulsively checking things. Save for one meeting in September, he did not return to the office.

Mrs Wallace takes over as line manager

56. Although it was not known how long Mr Aitchison would be off work, it was soon clear that Mr Hewson could not continue as his line manager and so Mrs Wallace was asked by Mr Wylie to take over. Her role as Head of Commercial for Strategy, Planning and Governance was a relatively niche one, providing central support to Heads of Commercial in operating divisions, and she had little previous knowledge of Mr Aitchison. Her involvement with him lasted for the next five months. During that period, through no fault of her own, she only had that single meeting with him, on 14 September. He preferred to deal in writing. Given his OCD and anxiety it was perhaps inevitable that this would mean more and more emails from him. She found them increasingly difficult to deal with, both because of their length and frequency, but also their tone, which became distinctly hostile. As described in her statement at paragraph 7:

“I got to the point where I was having to devote almost the whole of my time and attention at work and in my own time at home to dealing with Mr Aitchison’s case and was thereby practically prevented from getting on and doing my day job and enjoying any rest days with my family. I even got to the point that just seeing his name in my inbox made me feel anxious.”

57. They first spoke by phone on 25 May, and he was very pleased to have a new manager. He felt that Mr Hewson was to blame for his absence and was planning to raise a grievance against him. He also told her that there was an outstanding grievance by Mr Green against him, although he did not know what stage that had reached.
58. This was news to Mrs Wallace, who consulted with Ms Watt. It was only then that she found out that she would need to deal with Mr Aitchison’s probationary review as well, with the period due to end on 14 July. They agreed that the priority was to manage his sickness, and that she would then need some input from Mr Hewson into his performance. Later, Ms Watt told her that the grievance against Mr Hewson had arrived, but she was not shown a copy. There was therefore nothing to indicate to Mrs Wallace that this raised allegations of disability discrimination, let alone that this featured in her decision making.

Grievance against Mr Hewson

59. In the early weeks of his absence Mr Aitchison began work on this grievance. When complete it spanned 20 pages plus 107 pages of appendices and documented every aspect of their relationship. The focus was on his disability and on resulting breaches of the Equality Act, identifying direct discrimination, harassment, indirect discrimination, discrimination arising from discrimination and failure to make reasonable adjustments, reflecting considerable research.
60. Remarkably, it is not listed among the protected acts relied on by Mr Aitchison in his

complaint of victimisation, and in fact it received little attention during the hearing. Before the start of evidence we noted that there had been two claim forms lodged by Mr Aitchison, the first on 21 September 2018, before his dismissal. That seemed an obvious omission from the list of protected acts and so we added it. But we were not referred at that stage to the three other emails said to comprise protected acts, all of which are much less obvious candidates, so we did not realise that Mr Aitchison's own grievance was not among them. We were not asked at any stage to treat it as a protected act and so did not do so. In view of our conclusions, it would have made no difference to the outcome, but we mention it because it might otherwise seem a surprising omission.

61. Returning to the grievance itself, it went into some detail about the discussions he had had with Mr Hewson about his OCD on arrival and criticised the lack of any adjustments made at that stage. He complained of the lack of training too. Mr Hewson's communication style was described as both confrontational and sarcastic. He dwelt on the demotion issue before turning to the problems in his team and the difficulty of managing them. In each case, Mr Aitchison felt that it was Mr Hewson who was the cause of the problem, either being negative about them in person or putting him under pressure to do the same.
62. It was sent to Mr Wylie, with a copy to Catherine Watt, and he asked that any grievance meeting was held before 25 June, when his wife was due to have a caesarean.

Investigation into the HR Conflict Issue

63. Also on 31 May he submitted a complaint about the HR conflict issue (1145). He did so by telephone to Mr Clive Walker, the Director of Risk and Assurance. Mr Walker then asked Mr Shirbon to investigate. That subsequent investigation included interviews with Mr Aitchison, Mr Hewson, Ms Fearon McCaulsky and Ms Agbonkpolo. His ultimate conclusion, set out in his report on 9 July, was very much in line with the initial email from Ms Fearon McCaulsky, i.e. that she had gone to see Mr Wylie before any issue was raised by Jimeko Green, and as part of wider concerns about morale in the team. There were, Mr Shirbon found, two processes running in parallel – that morale issue and the specific issue between Mr Green and Mr Aitchison, and she had not breached any TfL policy.
64. Ms Fearon McCaulsky was not in fact at all happy with the report, because it appeared to assume that she was in a relationship with Mr Green. She had not been asked about that in her own interview, and made it clear in her email on 12 July (1280) that she had simply agreed to be an emergency contact for Mr Green because he was a friend and had no family in the UK. We accept that that was the case. She was not asked about it, and Mr Shirbon stated in his report that he did not need to do so because having such a relationship was not a breach of policy. It would have been better to ask however, rather than just assume.

65. She had clearly been anxious about this report for some time. In an email to Mr Shirbon on 25 June (1246), before his report came out, she said that the delay was causing her a level of stress that was difficult to manage. There were further chasing emails from her. When it came out, in her 12 July email, she went on to describe this as a wild allegation, said that it had been made because she and Jimeko Green were black, then said that the report contained what could only be described as lies. (A reference to the implication that they were in a relationship)
66. However, Mr Shirbon made no such finding. Although he did not give evidence, we accept his broad conclusions. Mr Aitchison was not of course in a position to give any information one way or another about the circumstances in which Ms Fearon McCaulsky had gone to see Mr Wylie, let alone about her relationship with Mr Green, and the records of the investigation show that it was gone into in detail. Mr Aitchison had simply raised his concern, one shared by Mr Hewson, and which on the face of it seemed a reasonable one. The matter had therefore been raised and addressed. As far as we can tell that was a conscientious exercise. Mr McCurry, as Head of HR, was aware of the outcome because he received the report. Ms Watt was aware of it too, and she was assisting Mrs Wallace throughout, and like all the PMAs she reported to Ms Fearon McCaulsky for the remainder of Mr Aitchison's employment.

Absence Management

67. Mrs Wallace was not copied in to either complaint, and on 4 June she and Mr Aitchison had another telephone conversation. He had been back to see his GP and was far from well. They agreed that he should be referred to Occupational Health. They discussed the grievances raised by and against him, and it was in this conversation that he told her about the HR conflict issue. She said that if this had been raised through the whistleblowing procedure it should remain confidential and she should not be involved. No mention was made of having to complete a probationary review. After that, Mr Aitchison saw his GP again on 8 June and was signed off again for another four weeks.
68. The Occupational Health referral was completed and sent off on 15 June (643). It took some time because it involved a long, detailed form, in which Mrs Wallace set out as much detail as she could about his OCD; the possible triggers, including the expected arrival of a new baby at the end of June, his medication, his role, the present state of the grievances and his need for clarity around timescales, the pending probationary review, the unsettled team environment, and the plan to get him back to work as soon as possible. She asked for advice on when that might happen, what reasonable adjustments would be needed to do that, and also what adjustments were needed to give him a fair chance of passing his probation.
69. At around the same time Mrs Wallace set about getting some information from Mr Hewson about Mr Aitchison's performance. She asked him to put his views on paper, and got back an email on 14 June (665) attaching the notes he had already

prepared. His covering email referred to “serious concerns regarding Dom’s performance” and suggesting that he had gone off sick on 11 May to avoid having the probationary review meeting. It was clearly a negative assessment.

70. The same day she had an email from Mr Aitchison telling her that his GP had advised a complete break from any work communications for two weeks, starting on 21 June, as his wife’s delivery approached. In view of that they brought forward his next phone call to 18 June.
71. His absence had now lasted over a month and in this discussion she explained that they had reached the stage of the first informal meeting of the Attendance at Work policy. She also said that his probationary review still had to be done. The probation period was coming to an end on 14 July and so she proposed extending it by three months. As she reported to Catherine Watts afterwards (703) he was very unhappy about this. He felt that he had done enough to show that he had met the required standards. However, the three month extension was confirmed in writing on 20 June, and a probationary review meeting arranged for 8 August, by which time it was hoped that he would be back at work.
72. He wrote back the following day (709) with a full and formal three-page letter. It made two main points: firstly, the outcome of the grievance against Mr Hewson was, he hoped, that he would be redeployed elsewhere, so that needed to be sorted out before he returned to work or had a probationary review; secondly, there had been no mention of any performance concerns by Mr Hewson until 10 May, and they had to be seen against positive comments from him and others. He referred to his “exemplary performance” and his shock at having his probation period extended. The letter was copied to Mr McCurry in HR so that he could have assurance that this extension of his probation period was approved by them, something which already showed a lack of trust in Mrs Wallace.
73. Also on 20 June Mrs Wallace was told the outcome of Mr Green’s grievance (707). This had been carried out by Adrenne Reid, Head of Facilities, and she provided a short email summary of the position that morning. Allegations of bullying and victimisation had *not* been upheld, but she had upheld an allegation of “undermining and belittling behaviours”. It said that an outcome letter had been sent to Mr Aitchison and that local management (i.e. Mrs Wallace) should now take appropriate action in respect of the outcome.
74. That was also the date on which Mr Aitchison was interviewed by Ms Miriam Kingsley, Head of Group Tax, over his grievance against Mr Hewson, a meeting attended by Catherine Watt.
75. All this was just before the requested two-week period of silence, which ended on 5 July, during which a sick note was received asking for this to be extended to four weeks – i.e. 19 July. A further certificate then signed him unfit for work until 22 August. This was a considerable extension, and fell after the date of the adjourned

probationary review meeting which had just been arranged.

76. Mrs Wallace was then on annual leave from 21 July for two weeks, so she was not around to make contact with Mr Aitchison at the end of his four week silence, but she arranged another point of contact. She left a letter to be sent to him (746) which went on 23 July. It is a detailed and fairly formal summary of the position. It summarised their recent discussions, reminded him that the probationary review meeting was listed for 8 August, and explained that it would need to consider his attendance, the points raised Mr Hewson (which he had not seen) and the outcome of the grievance by Mr Green. Mrs Wallace also chased Occupational Health on 20 July (733) for some advice ahead of the probationary review, aware that he had an appointment on 26 July.

Mrs Kingsley's grievance investigation

77. During her absence, his grievance against Mr Hewson was investigated further by Mrs Kinglsey. At their meeting on 20 June she explored with him the discussions he had had with Mr Hewson about his OCD, and whether any reasonable adjustments had been considered. Mr Aitchison said he had not asked for any as it would have undermined Mr Hewson. They discussed the normal pattern of team meetings, the training available and the assistance available from other members of the team, and then went on to cover the points already described – the demotion issue, his view that Mr Hewson had an authoritarian management style and the Chris Gilham appraisal. Naturally she also interviewed Mr Hewson, together with Mr Fahy and Mr Fallon.
78. The outcome report (1684) summarised her conclusions over four pages plus appendices. It did not uphold the grievance. In short, she felt that the level of guidance and support was adequate, and that as a Band 4 manager he should be expected to identify any shortcomings in his own knowledge. He had been encouraged to team up with Mr Fahy and Mr Fallon, and the transfer of the Reseller contract was an opportunity to learn from them. He had compared his situation unfavourably to that of a colleague and contemporary, Dierdre Critchley, particularly as she was not invited to a probationary review, but that was because there were no performance concerns in her case. His allegation that Mr Hewson's failure to respond to his emails was an act of harassment was also rejected. She felt that emails were not the most appropriate way to raise concerns and have a debate. Nor did she accept that Mr Hewson's approach was responsible for "the destruction of my whole team" as he put it.
79. A copy of the report was forwarded to Ms Watt on 1 August. There is no record of it being sent to Mrs Wallace and she could not recall seeing it. She thought she must have been told about later by Mr Wylie, her own line manager, with whom she had her own meetings from time to time. He had received it from Mrs Kingsley on 2 August, and in her email to him she added (1711):

“Please note that I found some of Philip's written communication not to be as supportive and tolerant as I would have expected, although this did not amount to harassment, as Dom contended. I have written to Philip advising him to take more care over the tone of his communication, to ensure it is kept measured and appropriate, and takes into account how others at the receiving end may interpret it. He has confirmed that he has taken this on board.”

80. Mr Aitchison did not accept the report and appealed the outcome on 7 August, on the grounds that the report was shoddy and incomplete. He could not accept the view that was taken. That became vividly clear during his own evidence at this hearing, when he was taken to the notes of interview with Mr Fahy (1700). These record:

Found that DA was always trying to get one over people to prove that he was correct, he sent tortuously long emails when he was advised just to meet with others.

81. He refused to accept that Mr Fahy would have said such a thing, both before us and at the time. He raised it by email with Ms Kingsley on 3 August (1714). He also found it hard to accept that Mr Fahy had said,

“He spent all of his time on the Reseller project speaking to suppliers and schmoozing with them rather than focusing on the correct things”

82. Because he refused to believe her, Mrs Kingsley arranged for Mr Fahy to sign every page of the notes. She too was finding Mr Aitchison's emails a strain, but gave no hint of that in her replies. His evidence before us however was that she was furious, and he maintained his position when questioned – “I honestly think this is made up.” That perhaps illustrates the depth of suspicion on his part, which again we regard as misplaced. Ms Kingsley's investigation struck us as thorough and conscientious, as shown by the observations passed on to Mr Hewson, and we accept that the notes are accurate.

Return to work approaches

83. When Mrs Wallace returned from holiday on 6 August she was unaware of all this. She was also unaware that Mr Aitchison had commenced early conciliation through ACAS on 24 July. This would have been handled by the HR department. She did find an email from Mr Aitchison attaching a letter from his GP advising that he was not fit to attend the probationary review. Oddly, nothing had arrived from Occupational Health and Mr Aitchison did not mention them. She agreed to the adjournment. His sick note expired on 22 August and she was unsure if he was going to be back by then. She emailed on 20 August asking him to update her. His reply the next day (760) was heavy on sarcasm, perhaps reflecting his recent disappointment over the grievance issue:

“Dorothy,

I've just picked this up – I hadn't realized you'd been waiting 1 complete working day for a response from me during my sick leave, so thanks for bearing with me.

I am so encouraged to hear from you, as it's now been 4 weeks since the end of the period of no contact advised by my doctor....”

84. He went on to say that he had been signed off again until 13 September and suggested she follow up with Jill Collis on the Occupational Health referral. Ms Collis was Director of Health and Safety.
85. The background, which Mrs Wallace did not know at the time, was that Mr Aitchison was seen by a doctor in Occupational Health on 26 July. A report was prepared on him (1291) but he was not happy with it. Firstly, the doctor said in their meeting that he was not fit to attend a probationary review meeting, but the report said that he was - it appears that she changed her mind on that point. Secondly, he was told that a copy of the disputed report had already been sent to management, although it later turned out that that was not the case. According to his witness statement, telling him this was “intended to taunt him and cause him hurt”. It is difficult to know why a doctor would wish to do such a thing, or why he would think that, but the result was that no report was provided to Mrs Wallace and in the meantime he raised a complaint about the way in which this had been handled. It was only on 11 September that Mrs Wallace found out from Occupational Health that Mr Aitchison had initially given his consent to the release of a report and then withdrawn it, and she could not obtain any further details from Ms Watt.
86. The return to work date of 14 September was now fast approaching. As with the previous deadline, it was unclear whether Mr Aitchison would be coming back, but the day before he emailed in a more positive vein (843), to say that his GP had advised that he was fit to return. He said he understood they would be focussing in the meeting on reasonable adjustments to support his onward employment. This focus on redeployment did not sit easily with Mrs Wallace, and there was no mention of a probationary review.
87. That probationary review meeting had now been scheduled by Mrs Wallace (no doubt on advice) for 19 September, only a few days after his potential return to work. It would, with hindsight, have been much better to allow a bigger gap. Mr Aitchison wanted at least a weeks' notice of any documents to be discussed at that probationary review meeting, which meant sending them *before* the return to work meeting. Those documents included the detailed comments from Mr Hewson, or at least a version of them, as described below. These were forwarded together with the invitation letter, various TfL policies and procedures, the outcome of the grievance by Mr Green (or at least the two page email summary) and other correspondence.
88. Mr Aitchison emailed Mrs Wallace on 12 September (861), having received all this, to make a number of points. He noted that he was allowed a representative, but

that was only something afforded to those in their second probationary review meeting and, he said, “in the event that their employment is to be ended.” He wanted to know if that was the case. There were no clear targets for improvement either, which he seemed to expect to be set out in the agenda. Lastly, he said that to pretend that extending his probationary review in this way and presenting it as a reasonable adjustment was “nothing short of despicable”.

89. It is against that rather hostile background that his email the following morning (843) has to be seen:

“Good news – I saw my doctor earlier and she feels my health has improved to the extent that I may now be fit for work, taking into account a number of recommendations from which I might benefit. With that in mind I look forward to returning to work tomorrow, which we’d all be hoping would happen.”

90. It is hard to accept that Mr Aitchison did see it as good news. It seems more likely that he had formed the view that Mrs Wallace did not want him back, and so this was the best way to thwart her. In any event, the additional recommendations were significant and proved to be stumbling blocks.

Return to Work meeting

91. They met the following morning from shortly after 10 until he left for some therapy scheduled for 13.30, so it was a long meeting. This was their first and only meeting apart from seeing each other from time to time when he reported to Mr Hewson. There were just the two of them. She had seen nothing amiss with the positive email from the day before and it had given her the impression that this would be a constructive meeting, but that was not the case. She described to us that he was aggressive and seemed to have a good deal of pent up frustration. She also suspected that he was recording the meeting as he had his phone on the table and one of the reasonable adjustments he wanted was to be allowed to record meetings. In hindsight she wished that she had taken breaks to diffuse the tension. Given the circumstances we accept that it was a tense meeting and that he struck her as aggressive.
92. The recommendations he referred to in his earlier email were set out in the fit note he had obtained from his GP earlier that morning (842). The relevant box was ticked stating “you may be fit for work, taking account of the following advice.” Below that, all four of the standard boxes were ticked for a phased return to work, altered hours, amended duties and workplace adaptations. In the comments section it stated:

“Providing greater support in work place - manager to be clear in objectives - ideally written instructions.

Consider redeployment to more suitable environment and include training specific to new role.

Flexibility with working hours, sufficient break times.

Allowed to attend ongoing therapy sessions during the working day.

Reduced hours with gradual increase in hours over 6 weeks”

93. Her handwritten notes show that they went through these points in detail, and he expanded on them to some extent. For example, he requested the temporary removal of Senior Commercial Manager responsibilities. They also discussed him working from home, and more practical issues like how the time off for therapy would be logged and recorded. Before the meeting she had given some thought to work he could be assigned in the interim, including a Brexit related project, reporting to her, which she mentioned, and some governance work. In fact, they agreed that he would make a start on the Brexit work, while she got back to him on the package of adjustments, and she emailed him with some information (850) at 12.55, which must have been just after he left. As we understand it he had a copy of these notes to take away with him, to avoid any later changes, and she wrote on them (857):

“I will take away the request for a reasonable adjustment to consider redeployment away from Commercial, David Wylie’s team + training for new role.”

94. This would clearly require some consideration. But she was happy to support the majority of the requests, subject to taking advice on the request to record meetings, which would also affect other people.

95. That afternoon, at 16.02, he set all his requests out again in an email (863). Since his complaint of failure to make reasonable adjustments is an important part of his overall claim, we will set out the main sections. He sought:

- Redeployment and a change of work duties, which is not representative of a demotion, and with training specific to that new role.
- Provision of greater support in the workplace, e.g. my manager summarising task requirements and key communications in writing.
 - For the avoidance of doubt, this is in order for me to have a greater understanding of what's being asked of me (having never been given formal objectives), and not something I'm asking for "at the end of every conversation". Frankly, I found it highly inappropriate you sought clarity on that point.
 - I am also hopeful that workplace practices' might be adapted to facilitate the recognition and potential value of different approaches, even if they come about having arisen from a disability. For example, someone like myself who has OCD, may be meticulous, highly focussed and committed in their approach, which can be very valuable in a professional, commercial environment if managed positively. Conversely, to regard it as, for example, not wanting to take advice from others or getting caught up in minutiae and

excessive amounts of detail, is very damaging.

- Recording meetings to the extent I wish to do so and arranging for the facility to enable me to do that.
 - As discussed, ideally this would be video recording, but if that's not possible, then audio recording would really help me. With the move towards Smart Working, across the wider business, hopefully this should not be very challenging to facilitate - essentially it's just recording what might be live streamed virtue of a conference call (such remote conference calling being something which many of us working on the Smart Working initiative have been keen to implement).
- Time off for therapy during the working day, more flexibility with working hours as necessary (Initially, with the phased return to work, as discussed and outlined below), and with more flexible break taking during internal meetings
 - Most importantly, if I feel I need breaks at any point or I need to break during a meeting, for example, I do not expect to have that used against me amid claims that my performance or conduct has fallen short of expectations. Obviously I will take breaks as discreetly and infrequently as possible, to minimise the business impact. Had this sort of adjustment been offered to me many months ago, I might not have resorted to remaining in "Round Table" meetings using my laptop a means to have a break from interactions with colleagues (albeit whilst still working), and accordingly, it might not have been suggested that such actions were a weakness on my part, thereby falsely representing the quality of my conduct and/or performance.

96. All this supports our view that he came across as aggressive in the meeting. It is essentially a renewal of the arguments about the unfairness of his treatment, all in the guise of reasonable adjustments. There was no hint of flexibility. The request to record meetings had now grown to videoing meetings and all of these adjustments were based on the first point being accepted, that he be redeployed.

97. Mrs Wallace had, we conclude, fully intended that the outcome of the meeting would be a return to work, with suitable adjustments, to find a way forward and deal with the probationary review in due course, but this gave her cause for concern, both because of the way he behaved and because of the demands themselves, particularly the statement that he could not work anywhere in Commercial.

98. There was some dispute at this hearing about what exactly was said, or meant, by a role outside of Commercial, whether it was a role not reporting to David Wylie, or a role not managed by his manager, Simon Kilonback. Her oral evidence was that when he first raised the point, about not working anywhere in Commercial, she thought it was a throwaway comment, then he added, "not for David Wylie", and then "or Simon Kilonback" or words to that effect. We accept that, and also that she was taken aback by this request.

99. It was only after the meeting, when she considered the Fit For Work statement requiring redeployment, that she realised how impossible this was. There were eight departments in the Commercial Team employing between 700 and 1000 staff in total. She too was in Commercial. She reported to David Wylie. Mr Aitchison was a Senior Commercial Manager, and there simply were no corresponding roles elsewhere.
100. This was a turning point and she decided he could not return to work on these terms. We considered her reasons carefully, and having done so we accept that they were the genuine reasons. They are also understandable in the circumstances; this sort of redeployment was simply not viable, and given his demeanour anything short of his full demands would only lead to further disputes. His probationary review was just around the corner, so starting a substantial new role of any sort in the interim was always going to be difficult. The fact that she had found some work he could do on an interim basis supports our view that she was willing to help him back to work. (It also supports our view that she had an open mind about the probationary review). Sadly, however, things had gone beyond the point of no return. His mood and symptoms had got worse, given all the ongoing disputes. Had there been some constructive dialogue, some give and take, things might have been recoverable, but it was not to be.
101. That view was formed by Mrs Wallace after a discussion with Ms Watt. She then emailed Mr Aitchison at 17.44 (857) to tell him that she had explored the issue but there was no viable alternative role that did not report to Mr Wylie and so, unless he felt able to return to Commercial, he would have to remain off sick.
102. He responded the following Monday (891) emphasising that he had never expected immediate redeployment, and had been happy to continue working on the Brexit contingency plan. He seems to have been genuinely disappointed, and also annoyed that he was nevertheless expected to attend the probationary review meeting, which was in two days' time.

Probationary review

103. The probationary review was arranged for 19 September. It is still hard to see how any useful purpose was served by having it so close to the return to work meeting; even if he had made a successful return, it did not allow any reasonable opportunity for him to demonstrate his abilities before the assessment. We infer that it was felt that his probation period could not carry on indefinitely, in the teeth of his protests, so things would have to be brought to a head.
104. Mr Aitchison wrote to Mr Wylie about this on 18 September (897 and 894), the eve of the meeting, making the point that he had had no opportunity to prove himself on a return to work, and requesting that the meeting was put back. He wanted to make written representations and needed time to do so.

105. There was some confusion at the time over whether he was going to attend the next morning or not. He did not, and in the end it was agreed that he would make written representations instead.
106. Mrs Wallace remained concerned about the lack of any advice from Occupational Health (899). She then emailed Mr Aitchison on 17 September to say that she had contacted them again and made an appointment for him to see a different doctor on 25 September and would pass on the referral paperwork to them that day. She also asked Rikard Moen, the new Head of Occupational Health, to contact him about the issues he had with the previous referral. This incident is revealing, for it shows that Mrs Wallace was not aware how intractable the dispute with Occupational Health had become. She attempted to engage with senior people to overcome any difficulties, but to no avail. Mr Aitchison responded that he had not had an adequate response to his earlier complaints and wanted an external Occupational Health assessment. Only that would do, and so he did not attend the appointment on 25th. He did however consent to the release of the earlier report (749), together with an addendum prepared by him (1404).
107. This report had been prepared following his original visit on 26 July. It was of very limited assistance. Asked whether he would be able to manage an acceptable standard of performance, the somewhat Delphic response was that he had a long-term condition and might have relapses from time to time, and that past attendance was the best indicator of future attendance. The timescales for a return were unknowable, but it would need the work-related issues to be sorted first. That was the only reasonable adjustment put forward too. Psychological support (unspecified) would be useful for his support, and a discussion with him about triggers and stressors.
108. The three-page, closely typed addendum from Mr Aitchison was considerably longer. It criticised the vagueness of the report, and quoted a passage of conversation from the consultation with the doctor – which must therefore have been recorded – indicating that he should definitely not attend the meeting, followed by agreement by the doctor that there might have been some discrimination involved in (Mr Aitchison’s words) “trying to force me to attend this meeting on 8th August”. That was the previous date for his probationary review.
109. The rest of the addendum went into his dispute with the doctor. He explained that he requested an immediate copy of the notes of the consultation and the doctor refused, insisting that it was a medical record and that he raise a subject access request; further, he had signed to agree to his *manager* receiving a copy of the report, not the PMA team, and going on to argue that this was all an attempt (including by Mrs Wallace) to coerce him into attending a probationary review. He described it as “a detriment of a truly callous nature, facilitated by the actions of my line manager, the HR team and latterly, even medical professions employed by TfL.”

110. This was therefore before Mrs Wallace for the probationary review on 25 September. She had also obtained some further input from Mr Hewson into Mr Aitchison's performance, which appears at page 827. Clearly this was the most important single aspect in any performance review.
111. As an aside, the first ET1 was lodged on 21 September, just after the original date when the probationary review had been expected, but Mrs Wallace was not aware of this.
112. Mr Hewson by this stage provided Mrs Wallace with what he described as an updated version of his original notes, which had of course been prepared for his own use at the meeting to be held on 11 May. This is at page 811, and he inserted additional comments or explanations at places in the text. This was the version then supplied to Mr Aitchison shortly before his return to work meeting. It struck us however that this was much more than an update. For example, the original version at page 581 starts:

"First Probation Review

11 May 2018

Dom Aitchison: team member

Name of companion (if any);

Nature of companion (colleague / Trade Union Representative)

Philip Hewson; Line Manager

In accordance with TfL Policy I've asked you to attend a First Probation review since your current performance is not at the expected standard...."

113. The updated notes on the other hand commence:

Dom Aitchison (DA)- Probation Review Preparation Notes.

Objectives.

The End User Computing and Cyber Security category is comprised of approximately 90 contracts each allocated to a member of the EUC team.

In January 2018 the EUC comprised of Liz Ryan (CM), Chanel Dykes (CO), Chris Gilham (CM) and Jimeko Green (CM).

As DA joined CT&D in January 2018 I did not set his objectives using the SMRF form (as DA would not be eligible for SMRF in March 2018) but instead set and managed his objectives at our Structured One to Ones (held every four weeks) and at the CT&D "Round Table" (my senior management team meeting held every two weeks).

114. In short, it is a completely different document. That may be understandable, since

Mr Hewson was preparing information for Mrs Wallace, who would not be so familiar with the composition of the team and the nature of the role, but they should not have been written in such a way as to suggest that these were the original notes prepared for the hearing on 11 May – “Dom Aitchison (DA) - Probation Review Preparation Notes”. The point was not however raised at this hearing. Mrs Wallace had seen the original version, and asked Mr Hewson for more evidence to support those comments, but she made no comment in her evidence on the altered format. We conclude that she attached no great importance to it.

115. And unlike the first version, this new one did contain some positive comments. The summary (822) stated:

“DA's performance from his commencement to his last day in the office on 10 May was mixed- with some very strong elements but some areas of concern.

DA was energetic and active; he had a strong sense of accountability and was keen to own deliverables. He was willing to take on new challenges and was not afraid to take on difficult conversations with stakeholders and team members.”

116. The various criticisms made in the original version were however all still present. Needless to say, this view was not shared by Mr Aitchison. He was provided with an electronic copy of this document and made extensive comments on it. These rival points of view have already been set out above, and was very much the same exercise undertaken in the grievance process concerning Mr Hewson. Mrs Wallace summarises the points at paragraph 86 of her witness statement, but in short, he felt that Mr Hewson had not set him clear objectives or proper feedback; he was unsupported; his disability was behind the long emails and drilling into things; it also made it more difficult to manage the meetings and give the sort of immediate, off-the-cuff feedback that was expected; and that Mr Hewson was the authoritarian one, and was mainly responsible for the slippage on the Reseller contract.
117. Mrs Wallace had all this material, including a considerable amount of documentation from Mr Aitchison, and set about a comprehensive review of the written evidence. She also took the view that this was ground already covered in the grievance process, and discussed that with Ms Watt. That grievance process was still underway. Mrs Kingsley had given her decision at the beginning of August but there was an appeal outstanding. He had until 15 October to make written submissions about that, so she thought it best to wait until the outcome was known. We agree. Had they been in his favour, it would have made a material difference to the outcome, and in any event there was the risk of different managers coming to a different view of the matter. Mr Aitchison did not agree however, and thought the processes should be entirely separate. The outcome of the grievance appeal was not received until 24 October (2107). It was conducted by Ms Maureen Jackson, another senior manager, and was a review of Mrs Kingsley's decision, rather than a complete rehearing. Suffice to say, she did not find any fault in the approach taken.

118. Mrs Wallace then went on to make her decision too. Perhaps inevitably, given the negative overall assessment by Mr Hewson, the fact that Mr Hewson had been largely exonerated in the grievance process, and the length of his absence, she decided that Mr Aitchison had not met the required standard. Her reasons were grouped under three headings: conduct, performance and attendance. “Conduct” was a reference to the problems with his team members, particularly the grievance by Mr Green. This had been partly upheld through a separate and detailed process and would be impossible for any manager to ignore. It seems to us the most significant concern, particularly as it was not a one-off but was reflected in his dealings with Mr Gilham and Ms Dykes. Attendance was a further concern, although that is so closely connected with these other differences with his manager and reports that it appears to us less significant. Mrs Wallace placed some weight on it however, linking it to his disability and applying the Occupational Health advice that past attendance is the best indicator. The main area of her focus however was on performance, and for this purpose she considered Mr Hewson’s comments against the competency framework for managers at Band 4. Putting aside the other concerns about his interaction with colleagues, there was now a clear difficulty in returning him to a similar role in future, given the effects of his condition. Although she took the view that these effects had been identified in hindsight, and although she had no great help from Occupational Health, a long list of reasonable adjustments was requested, starting with redeployment. If that could be managed, what about the others – his manager summarising task requirements for him, with key communications in writing, recording meetings, breaks, therapy, etc. What he appeared to be describing was a very different working arrangement, with much of the decision making, and the need to interact with others face to face, or at least in real time, taken off him.
119. She set out her conclusions in an eight-page report at page 983. It recited a good deal of history covering events during his absence, the evidence of his performance from Mr Hewson, and the conduct issues. On page 990 she then gives a summary:
- “It is important to note that the role of a senior manager anywhere In TfL requires the ability to deal effectively on a day to day basis with ambiguity, uncertainty, changing priorities and pressure to deliver with limited resources. Senior managers are expected to be role models and exhibit high standards of conduct and behaviour in their Interactions with colleagues, employees and stakeholders.
- Given the evidence gathered during this Review, taking into account the requirements of the specific role of Senior Commercial Manager and the general characteristics and expectations of TfL senior manager roles, together with consideration of Dom’s Interaction with colleagues during this period, I conclude that Dom did not meet the performance and conduct requirements of the role that he was employed to undertake during this probation period.”
120. That then marked the end of Mr Aitchison’s employment with TfL. Since he had not passed his probation period he only received one week’s notice, so 25 October was

his last day. Shortly afterwards he contacted ACAS again about a second claim and lodged a further claim form on 24 January 2019. By then, his appeal had been dismissed.

The appeal meeting

121. The appeal was lodged on 30 October, and was dealt with by Mr O'Hare, Head of Network Business Services. He was an impressive witness and explained that he had been with the organisation for over 30 years, working his way up from, in his phrase, the rank and file.
122. Having gone over the factual background extensively already, we will not repeat it again. He had not met Mr Aitchison before and was from outside the Commercial department. He met Catherine Watt, whom he did not know either, on 21 November to be briefed on the background, and she then sent him the outcome letter and report. In due course he was provided with all of the material that Mrs Wallace had before her. Ms Watt made arrangements for the hearing, which included the services of a stenographer so that Mr Aitchison could have an immediate copy of the notes.
123. The meeting took place on 30 November. Mr Aitchison was accompanied by his Trade Union representative but presented his case himself, having all the facts at his fingertips. Again, Mr O'Hare's impression was that Mr Aitchison was being aggressive. He described him as being on the offensive from the off, and was agitated that Ms Watt was there. He wanted her to leave, and said this was a reasonable adjustment. He had sent his appeal to Simon Kilonback and to Tricia Wright, Group Human Resources Director, in order to avoid it being dealt with by the same people, and in fact he objected to them seeing that email at all, even though it was not labelled private or confidential.
124. In that email he had raised allegations that he was dismissed for making disclosures, allegations which he was not then willing to discuss. It is not easy to follow the logic of that approach, but presumably he felt that if Mr O'Hare knew about these disclosures, he too would be biased against him and refuse the appeal.
125. The appeal was intended to be a review of the previous decision, not a complete rehearing, and Mr O'Hare laboured to understand what the real grounds of appeal were. One issue was that the probationary review had been put back twice, rather than simply allowing him to pass. He also objected to the reliance on his attendance, said that performance objectives had not been set and that the grievance outcome was based on unreliable evidence.
126. After the meeting, having obtained the stenographer's notes, it transpired that Mr Aitchison had recorded it all anyway, without permission.
127. Mr O'Hare's seven-page outcome letter was also thorough (2464). He did not find

any breach of the probation policy, found it was appropriate to take his absence into account, and that the lack of objectives point had been fully considered by Mrs Wallace. He did focus on the return to work issue, and why Mrs Wallace had refused this, concluding that in the absence of Occupational Health advice about this health, this too was reasonable.

Other investigations

128. That concluded the dismissal process. In the meantime there had of course been a number of other processes underway. To give an indication of the extent of them, Mr Hewson's witness statement records that he was interviewed about all this a number of times:

- a. on 21 May by Adrenne Read about the grievance by Mr Green;
- b. on 22 June by Mike Shirbon about the HR conflict;
- c. on 29 June by Miriam Kingsley about the grievance against himself;
- d. in August by Ms Dili Origbo about the whistleblowing complaint about the Reseller contract.

129. Other managers will have had a similar experience. The HR department would also have been dealing with the legal claims issued, and so it is no surprise to us that his dismissal was reported by email to Mr Kilonback and Ms Wright. It may however be more convenient to consider what effect all this had on his dismissal and other treatment as part of our conclusions. First, we will set out the relevant tests we have to apply.

Applicable Law

130. The applicable provisions of the Equality Act are as follows:

13. Direct discrimination

- (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.

15. Discrimination arising from disability

- (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.”

20. Duty to make adjustments

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

27. Victimisation

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
 - (a) B does a protected act, or
 - (b) A believes that B has done, or may do, a protected act.
- (2) Each of the following is a protected act—
 - (a) bringing proceedings under this Act
 - ...
 - (d) making an allegation (whether or not express) that A or another person has contravened this Act.

131. There is also a particular provision dealing with the burden of proof:

136. Burden of proof

- (1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

132. This involves a two-stage approach: in the first stage the claimant has to prove facts from which the Tribunal *could* conclude, in the absence of an explanation from the respondent, that discrimination had occurred; and if so, there is a second stage, when the respondent has the burden of proving that this was not the case, in fact that the act in question was not to any extent tainted by discrimination.

133. Similar provisions apply to public interest disclosures, this time in the Employment Rights Act 1996. Under section 47B:

- (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

134. And under section 103A:

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

135. In the case of dismissal, the burden is on the claimant to show that the test is met.

Conclusions

Knowledge

136. There is no dispute that the respondent knew about Mr Aitchison's anxiety and OCD, but they say that they did not know about his depression. From our consideration of the medical records this is only mentioned later and does not seem to feature in any of the discussions with Mrs Wallace, so we accept that this was not known, but the point is immaterial. He had a disability - OCD and anxiety - of which they were aware. Perhaps undue attention was paid to his diagnosis with OCD. His level of anxiety seems to us to have been very high throughout this process, and no doubt affected how he dealt with things.
137. But when did they know? Certainly Mr Hewson was aware from January, when Mr Aitchison told him directly about these two conditions. That seems to us sufficient. He had actual knowledge of the conditions, and they in fact amounted to a disability. It is not necessary that he knows enough of the Equality Act to realise that it would amount to a disability in law. The test is even broader however. Schedule 8 of the Act requires that he show he did not know or that he "could not reasonably be expected to know" – what is known as constructive knowledge. The response made by Mr Hewson, according to his own evidence, was that he recognised the significant effect this had on his own partner. The fact that he was able to manage in most respects on a day to day basis is no answer. He could reasonably be expected to know, for example, that Mr Aitchison might suffer a relapse given certain stressful events, as he described, and that in those circumstances he would be unable to carry out normal day to day activities. We take the view that the respondent knew or ought to have known of his disabilities from the time of the conversation in the canteen.

Discrimination Arising from Disability

138. The main complaint is under section 15, discrimination arising from disability, and although not expressly stated in the list of issues, the unfavourable treatment is clearly his dismissal. There is relevant guidance for Tribunals on this question and related areas from the Equality and Human Rights Commission Code of Practice,

which it may be convenient to set out first:

"Introduction

5.1 This chapter explains the duty of employers not to treat disabled people unfavourably because of something connected with their disability. Protection from this type of discrimination, which is known as 'discrimination arising from disability', only applies to disabled people.

...

How does it differ from direct discrimination?

5.3 Direct discrimination occurs when the employer treats someone less favourably because of disability itself (see Chapter 3). By contrast, in discrimination arising from disability, the question is whether the disabled person has been treated unfavourably because of something arising in consequence of their disability.

Example:

An employer dismisses a worker because she has had three months' sick leave. The employer is aware that the worker has multiple sclerosis and most of her sick leave is disability-related. The employer's decision to dismiss is not because of the worker's disability itself. However, the worker has been treated unfavourably because of something arising in consequence of her disability (namely, the need to take a period of disability-related sick leave).

...

What does 'something arising in consequence of disability' mean?

5.8 The unfavourable treatment must be because of something that arises in consequence of the disability. This means that there must be a connection between whatever led to the unfavourable treatment and the disability.

5.9 The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. The consequences will be varied, and will depend on the individual effect upon a disabled person of their disability. Some consequences may be obvious, such as an inability to walk unaided or inability to use certain work equipment. Others may not be obvious, for example, having to follow a restricted diet.

Example:

A woman is disciplined for losing her temper at work. However, this behaviour was out of character and is a result of severe pain caused by cancer, of which her employer is aware. The disciplinary action is unfavourable treatment. This treatment is because of something which arises in consequence of the worker's disability, namely her loss of temper. There is a connection between the 'something' (that is, the loss of temper) that led to the treatment and her

disability. It will be discrimination arising from disability if the employer cannot objectively justify the decision to discipline the worker. ...

Relevance of reasonable adjustments

5.20 Employers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments (see Chapter 6).

5.21 If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified. ..."

139. So, the question of reasonable adjustments is also very relevant here. The starting point however is to ask what is the "something arising" in consequence of his disability? The five points relied on in the list of issues, with some rewording, are as follows:

- a. his sickness absence;
- b. his communication, which can be direct and tense, as well as his need to send long emails, thus affecting his interaction with others within his team;
- c. his complaints raised against him (by Jimeko Green);
- d. his excessive drilling into matters, and the need for written rather than oral instructions, affecting his performance;
- e. the respondent's perception that he was unsuitable for senior management.

140. Taking these in turn, his absence from work is an obvious consequence of his disability.

141. It is true that there is no medical evidence to support the connection between the long emails and drilling into matters - (b) and (d) above – but our view is that this connection is fairly self-evident. It became obvious that during his period of sickness absence his condition got worse and worse, with longer and longer emails, for example. The style of his emails also became more and more exasperated, not to say aggressive. It may be that he simply became embittered by the rejection of all his complaints, but the scale and tenor of these complaints is completely out of the ordinary. This is not just someone being tenacious in their own defence, it is his anxiety and OCD talking. That much was clear soon after he went off sick, and it seems to us that Mrs Wallace recognised that and so showed considerable patience.

142. The complaints made against him by Mr Green and Ms Dykes also bear the same hallmarks. They complaint of him micro-managing them, of his communication style being terse and even "borderline rude". And that was born out by Mr Hewson's own

observation of the appraisal of Mr Gilham. Again, this is an unusual degree of insensitivity to the effect of his behaviour on others, and we do not require medical evidence to make the connection between this and his disabilities.

143. The final “something” is about his suitability for senior management, and this appears to relate to the work done by Mrs Wallace, considering the behaviour’s matrix as it applied to a senior manager. Again, it seems to us that he did struggle with key aspects of work at this level.
144. His job description (141) came with an initial list of competencies ticked, and a note that he should refer to the Competency Framework for more detail. Without setting out all of the 12 out of 15 competencies applicable to him, they cover things like strategic thinking, communications, commercial thinking and team leadership.
145. The competency framework is part of longer TfL document, called *Our behaviours, our performance* (324). That begins with the key *behaviours* for the organisation and goes on to define the competencies for managers at each level.
146. Without setting them all out, they fully bear out the description quoted above at paragraph 119 from Mrs Wallace’s statement, and call for a proactive management style, with the ability to coach and develop more junior members of staff.
147. It is easy to see how Mr Aitchison’s disabilities would make it difficult for him to consistently apply such an approach. The adjustments he was seeking were essentially to forgo many of these requirements, such as the need to engage with others, to communicate, lead, motivate, and develop.
148. We accept therefore that all of these manifestations of his condition influenced the decision to dismiss him. The next question is whether those steps were a proportionate means of achieving a legitimate aim?
149. Many of the points made by or on behalf of Mr Aitchison were to the effect that he had different skills and attributes, which ought to have been valued and supported, rather than insisting on this standard model, or list of requirements. There may be room for some flexibility in their application, and of course each manager will have their own strengths and weaknesses, but in considering the test under section 15 it is for the employer to define the aim, which are to meet the behaviours and competencies appropriate to the role, and that aim is certainly a legitimate one.
150. The next and main question therefore is whether dismissal was a *proportionate means* of ensuring that he, like other senior managers, met this requirement. Just how far should the employer go in such circumstances, faced with a disabled employee who is also a senior manager?
151. To provide some frame of reference it may be helpful to start with a simpler and more usual case. Most section 15 cases involve long-term absence. That is the

most common “something arising” and the question then is whether dismissal is justifiable. In *O’Brien v Bolton St Catherine’s Academy* 2017 ICR 737, CA, (in which Ms Banton appeared) the Court of Appeal considered one such case. Ms O’Brien had been off work for some time before being dismissed. The Employment Tribunal found that her dismissal was unfair under ordinary principles and that decision was upheld. But the Court went on to find that the test of proportionality under section 15 was essentially the same as the test of reasonableness in unfair dismissal cases. Lord Justice Underhill explained:

53. ... “I accept that the language in which the two tests is expressed is different and that in the public law context a “reasonableness review” may be significantly less stringent than a proportionality assessment (though the nature and extent of the difference remains much debated). But it would be a pity if there were any real distinction in the context of dismissal for long-term sickness where the employee is disabled within the meaning of the 2010 Act. The law is complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law.
152. That is a reasonable yardstick in this case too. Although Mr Aitchison was in his probation period, and had not acquired the necessary two years’ service, no lower standard of fairness or reasonableness should be applied.
153. If it were just a question of the length of his absence, the test for unfair dismissal purposes would be whether the reasonable employer could be expected to hold the job open any longer. That would depend on all the circumstances, including the ability of the employer to manage without him or her. But the premise behind that question is that once better, he or she would be able to pick up where they left off, and from then on would have a satisfactory level of attendance.
154. That does not necessarily follow here. Mr Aitchison had gone off sick following a relapse, and his behaviour at the time of his dismissal may have been very untypical of his previous behaviour, but that relapse had arisen out of the ordinary pressures and demands of the role. Granted there were new and unfamiliar aspects to it, and training was limited, but in a very short period of time Ms Dykes had left and Mr Green had gone off sick. The complaint by Mr Green was upheld, and we see no reason to assume that it was unjustified. Similarly, the delays in the Reseller Framework appear to have been largely to do with a reluctance to take advice and engage with others. His reaction to that demotion, in complaining about it at length, was then a precursor to a whole swathe of complaints, which themselves are difficult to reconcile with the behaviours expected, such as being collaborative, taking responsibility and finding solutions. At the time of his dismissal there seems to have been no prospect of any real improvement in his levels of anxiety, but even if he could have returned to his January state of mind, it is difficult to see how the same issues and problems would have been avoided. In particular, any employer in those circumstances is likely to have been very wary about him managing others, which

is after all the first and most obvious requirement of any manager.

155. That seems to us the perspective being applied by Mrs Wallace. She was principally concerned with the question of whether he should pass his probation period, which is simply another way of asking whether he was able to meet the requirements of the job, the legitimate aim. She also considered whether he could do so with reasonable adjustments, and concluded that none of those suggested were reasonable, because the end result would be a wholesale departure from those requirements. If there were no such adjustments that could be made, it follows that there was no real alternative to dismissal, and (having considered the proposed reasonable adjustments below) we accept that that was the case.

Direct discrimination

156. Since we find against Mr Aitchison on the section 15 claim, it follows that his complaint of direct discrimination must also be dismissed. He has to show that he was treated less favourably than someone in the same circumstances apart from the disability, which means comparing him with someone with all the same disadvantages of his condition – the “somethings arising” – but without being actually disabled as a result.
157. The basis of this claim in the list of issues is that Mrs Wallace showed stereotypical assumptions in her probation report that he would not be able to meet the requirements of the role, but stereotypical assumptions are not themselves “less favourable treatment.” They are often relied on to connect the two elements of direct discrimination – the protected characteristic and the treatment. But what has to be shown is that he was dismissed “because of” his disability, where someone without that diagnosis would not have been, i.e. that the diagnosis of a disabling condition was the motivating factor, not the consequences of the disability. There is no evidence to support that view and so no question of the burden of proof shifting to the respondent.

Failure to make reasonable adjustments

158. The starting point with a complaint of failure to make reasonable adjustments is to identify the provision, criterion or practice (PCP) at work which places the employee at a disadvantage. Here there are two relied on; that staff maintain adequate attendance and adequate performance. The aim of any adjustments therefore must be to enable Mr Aitchison to meet the required standards of attendance and performance. It is not, for example, sufficient simply to accept a lesser or different level of performance, and that does not seem to have been appreciated.
159. There is a lengthy list of proposed adjustments, but it is similar to the emailed list that Mr Aitchison sent to Mrs Wallace after the return to work meeting. Some can be taken shortly, but we will deal with them in turn.

160. The first is modifying the sickness absence procedure and discounting disability related absence. Self-evidently, this would not help Mr Aitchison to meet the performance requirement. He would simply have remained off work.
161. The second is “considering the impact of the Claimant’s disability and the effect of this upon the claimant’s interaction with others within his team and personality”. This is too vague in our view to amount to a legal obligation, and appears to be simply a way of suggesting that the organisation disregard any problems that might arise from his style of communication. For the reasons already given, this was a central aspect of the required performance.
162. The third is “training for management to understand the claimant’s disability.” Again, this is another way of asking for allowances to be made on the performance front. Mrs Wallace did give evidence about this too, and felt that it would have been impossible in practice to train all of the internal and external contacts Mr Aitchison had or would have, in order for these allowances to be made. It also seems to us that even with some further training or insight on the part of Mr Green, for example, he would still have found Mr Aitchison’s tendency to micro-manage very difficult to accept.
163. The fourth proposal is that he receive written instructions. That reflects his concern about lack of clear guidance, but we have not in fact found that he was lacking in clear guidance. The main tool for managing and controlling his work was the master spreadsheet or EUC workplan which was in writing and did have timescales for each project. It was discussed and reviewed at the round table and one-to-one meetings. There was no problem caused in the Reseller project by lack of understanding, simply that it was not progressed in time. The nature of the role involves prioritisation, and working through others to achieve the required ends, so it is hard to see that any worthwhile instructions in writing would be any more detailed than his existing job description. If, on the other hand, this means more frequent and detailed instructions, that undercuts his whole purpose as a senior manager. The behaviours booklet says that Band 4 and above is the highest level of seniority, requiring “a high degree of autonomy and strategic thinking” in respect of each of the Respondent’s key “behaviours”.
164. The fifth adjustment appears to be just such a request - “modifying performance objectives and appraisal methods”. This is also vague. Questions were put to Mr Aitchison by the panel about that sort of detail he expected. He suggested that he might be told that by the end of week two or three on a contract to have done the early market engagement, by the end of week four to solidify procurement strategy, by week six to meet with stakeholders, to know that he was on the right track. That may have been helpful, but whether in writing or verbally, that degree of step-by-step planning is essentially what was needed for the level below Mr Aitchison, and does not in any way address the performance disadvantage.

165. The sixth proposal is “greater support by recognising the potential value of different approaches, such as the value of the Claimant’s meticulousness, focus and commitment.” There was some recognition by Mr Hewson of Mr Aitchison’s contribution, but again this is simply too vague to form the basis of a legal liability. It seems again to be a request to make greater allowances, without saying how far that should stretch. Praise or encouragement by themselves would not have overcome the performance disadvantage.
166. The seventh is modifying duties. Again, the modification is not explained, but it if means to take duties away, it is difficult to see that as anything other than having a reduced role, which Mr Aitchison was intent on avoiding.
167. The eighth adjustment is recording meetings. We do not accept that that would have helped and so cannot be a reasonable adjustment. Unlike the other points, which have some basis in his fit note, there was no medical evidence to support this idea, and if anything it seems likely to have estranged him from his colleagues, who would obviously be more constrained in talking to him. Recording of meetings is often put forward as an adjustment where, for example, a person has a learning difficulty, or a hearing problem, not for someone of Mr Aitchison’s capabilities. The request seems to have emerged during his complaints to TfL, like having a copy of minutes straight away, and say more about his defensive mindset in those meetings than the requirements of his substantive role. We cannot see how this would help with either disadvantage.
168. The ninth is “better training for the claimant, such as a structured introduction to procurement”. That appears to be going over old ground. He had received little training in his new role, and further training might have been desirable on a return to work, simply as a refresher, but not because of any disadvantage caused by his disability. If this is a complaint unconnected with his dismissal, and Mr Aitchison seeks compensation for the initial failure, there is a time-limit issue, which was not addressed, but in any event, this lack of knowledge was not a disadvantage caused by his disability, and if it was, we are not satisfied that at that initial stage Mr Hewson was not aware of any such disadvantage. Knowledge of the substantial disadvantage is also required, and in our view that was not shown until he went off sick.
169. The tenth adjustment is that he ought to have had an independent Occupational Health assessment. Such an assessment is not an adjustment in itself, but a means of identifying what is required. In any event, the reason for this request is not any special expertise which the TfL Occupational Health lacked, but Mr Aitchison’s dispute with them.
170. Number 11 is redeployment, at the same level. Again, there seems to be a different purpose behind this request. Mr Aitchison had clearly fallen out with Mr Hewson and wanted a fresh start, but that would not help him meet the performance

requirements of a role at that level, or avoid any disadvantage caused by his condition.

171. Each of the individual adjustments put forward therefore suffers from the same flaw that it does not address the disadvantage in question. There is no obligation on an employee to suggest a reasonable adjustment but these are the ones put forward in the list of issues, and we can see no other obvious candidates. The reasonable adjustments complaint must therefore also be dismissed.

Victimisation

172. The victimisation complaints all rely on complaints to Occupational Health. They are not confined to the dismissal; Mr Aitchison also blames Mr McCurry for refusing his request that Ms Watt not be present at the appeal hearing, and then a further request that Mr McCurry himself (as someone more senior than Ms Fearon McCaulsky) attend the appeal meeting instead. On that aspect, Mr McCurry gave clear evidence that he was not influenced by the complaints to Occupational Health and that was not challenged. In any event there were perfectly sound reasons for his decisions. He is not a trained PMA, and Ms Watt had all the background knowledge. It is easy to see how difficult it would be for Mr O'Hare to understand the points he was making without her knowledge of the background. It was not therefore, in our view, unfavourable treatment at all.
173. We do not quite see in any event why Mr McCurry would regard complaints about the Occupational Health referral as so sensitive that they would influence his decision making on who should attend the appeal meeting. None of these complaints concern the HR conflict issue.
174. The same applies to the decision making of Mrs Wallace. In our view she was simply attempting to resolve a particularly difficult workplace situation, navigating her way round the obstacles they presented, including the Occupational Health dispute.
175. It is for Mr Aitchison to prove, in such cases, that the dismissal or other treatment was "because of" one of the protected acts. In the context of victimisation, that means asking, what was *the real reason* for them?¹ By no means can it be said that initial burden of proof was satisfied on that issue.
176. The first protected act (1306) is the complaint in which he quotes from a recorded conversation, when the doctor apparently states that there may have been discrimination. We accept that that is enough to make this a protected act, but it is in the main a complaint about poor service. The second complaint (1303) was about the change of advice over attending the probationary review, and the third (1313) was about releasing the report without his consent. Finally, there was the first ET1.

¹ *Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065, HL*

177. There is nothing to show that Mrs Wallace knew of the ET1, and this was not put to her. Ms Banton closed her cross-examination without any mention of these points, and was reminded about them. When it was explored, Mrs Wallace's evidence was that she was aware of the Occupational Health dispute in broad terms, and had Mr Aitchison's addendum report by the end, setting out his unhappiness with them, but that it did not make any difference to her. We accept that. It was certainly not suggested to her that this was in fact the real reason for her decision, or anything of the sort. The real reasons, we are satisfied, were those given. For the avoidance of doubt, we do not find that the complaint he made about discrimination by Mr Hewson played a part either. Mrs Wallace advised Mr Aitchison as the outset that this was the process to follow, and was content to await the outcome of the appeal process before proceeding. That too seems entirely professional and appropriate.

Whistleblowing allegations

178. Very similar considerations apply to the whistleblowing complaints. The first of these concerns the HR conflict issue. Again this was not put to Mr McCurry, and on this aspect too Ms Banton closed her cross-examination without raising it with Mrs Wallace. When it was raised, it was simply to establish that she was aware that some such complaint had been made, and that she later dismissed him.

179. It is not clear to us what legal obligation Mr Aitchison thought was being breached here, but we accept that he reasonably believed this concern was true and it was in the public interest, since it would affect a wider group of people at work concerned with there being fair HR processes in place, particularly in the public sector. However, there is simply nothing to show that Mr Aitchison was dismissed or otherwise subjected to a detriment as a result. It was simply something in the background of Mrs Wallace's thoughts and, as already found, it was conscientiously examined by Mr Shirbon.

180. The same applies with greater force to the procurement issue. This has hardly been mentioned in this long decision, since it played a small part in the hearing. The disclosure was made to Mr Kilonback (2129) on 6 August. Mr Aitchison said that the Reseller Framework had been extended to allow a new contract to be awarded to a specific supplier, and that this was a breach of the rules. This was then passed to Tricia Wright. Mr Aitchison's concern is that his email from Ms Wright had been drafted for her by Ms Fearon McCaulsky. That is as far as it goes, and that fact emerged from the extremely full disclosure which seems to have been provided in this case. We can see nothing sinister in this. Mr Aitchison raised his concerns with some of the most senior staff at TfL, who have staff members to whom they can delegate them. What has to be shown, to repeat, is that he was dismissed etc "because of" this complaint, or any of them. Mrs Wallace was clear about her reasons, we accept them, and whatever Mr Aitchison's suspicions, this is a very considerable distance from establishing a different reason.

181. The same applies to the follow up complaints about Occupational Health and over this procurement issue. Standing back from all these allegations, it is clear that the HR department had to handle and co-ordinate all these processes. That is their job. The main burden of all this fell on Catherine Watt but there are good reasons for one person to carry the load. She reported to Ms Fearon McCaulsky. We accept that Ms Fearon McCaulsky was indignant about the HR conflict issue. We also agree that Ms Watt supported other managers, such as Mrs Kingsley, but there is nothing at all to show that she had any particular axe to grind with Mr Aitchison.

Notice pay

182. The final complaint is over the notice pay. On this point the contract of employment (129) provides that the probation period may be extended by three months, and that during that period his notice period is only one week. It does not go into further possibilities, such as what might happen if the employee is off sick for months and so not in a position to return by the end of the probation period. The implication is that they will be dismissed, so the three month extension is as much a concession for the employee as a tool for the employer.

183. Since the contract does not deal with it expressly, the consequences of a further extension have to be implied. Terms can be implied in a number of ways, such as by applying the “officious bystander” test. Here, if such a bystander had said, “but what happens if you are off sick for months with a disability, are you automatically dismissed or can the employer give you a further extension?” The answer would have to be in favour of an extension. And then if a further question was raised about whether the employee was then entitled to their notice pay in full, whether or not he passed probation, the sensible answer would have to be “no”. The length of the notice period is in our view inseparable from passing probation. We also note that the final delay here was to allow for the outcome of the grievance appeal, which was meant to assist Mr Aitchison.

184. It follows that for all of the above reasons the claim must be dismissed. It is unfortunate that the sheer number of complaints has meant that so many negative answers have been required, but that is the result of our conclusions on the main points; essentially that the reasons given by Mrs Wallace for the dismissal were genuine and valid; that there were no reasonable adjustments compatible with the nature of the role, given Mr Aitchison’s difficulties with it, and that none of the decision makers were materially influenced by the other complaints raised.

Employment Judge Fowell

Date 14 December 2020