Case Number: 3201727/2019

EMPLOYMENT TRIBUNALS

Claimant: **Mr John Lawrence**

Respondents: **(1) Insight Strategic Associates Limited**
(2) Mr Justin Baptie

Heard at: **East London Hearing Centre**

On: **8 – 11 September and, in chambers, on 12 October 2020**

Before: **Employment Judge A Ross**
Members: **Mrs M Legg**
Mr P Lush

Representation

Claimant: Ms. Johns, Counsel
Respondent: Mr. Rahman, Counsel

RESERVED JUDGMENT

1. **The complaint of medical suspension under section 64 Employment Rights Act 1996 is dismissed on withdrawal.**

2. **The unanimous judgment of the Employment Tribunal is that the following complaints are dismissed:**

   2.1. Direct disability discrimination under section 13 Equality Act 2010;

   2.2. Disability-related harassment under section 26 Equality Act 2010;

   2.3. Disability discrimination under section 15 Equality Act 2010;

   2.4. Indirect disability discrimination under section 19 Equality Act 2010;

   2.5. Victimisation, under section 27 Equality Act 2010.

3. The judgment of the Majority of the Tribunal is that the following complaints are dismissed:

3.1. Breach of the duty to make reasonable adjustments under sections 20-21 Equality Act 2010;

3.2. Unfair dismissal;

3.3. Breach of contract.

4. The Claim is dismissed.

REASONS

Complaints and Issues

1 This hearing proceeded by Cloud Video Platform ("CVP"). No party complained of how the CVP worked at the hearing. The Tribunal's understanding was that the hearing was as fair as it could have been.

2 By a Claim presented on 12 July 2019, after a period of Early Conciliation, between 13 May and 10 July 2019, the Claimant brought complaints of constructive unfair dismissal, harassment related to disability, direct discrimination, unfavourable treatment because of something arising in consequence of disability, breach of the duty to make reasonable adjustments, victimisation, a claim for medical suspension under section 64 Employment Rights Act ("ERA"), breach of contract and unlawful deduction from wages.

3 At a Preliminary Hearing in October 2019, the Claimant was ordered to provide further particulars of several complaints. The Claimant did not provide a separate document which pleaded the further information that had been ordered. Instead, this Tribunal was informed that the further information was contained in the List of Issues that had been agreed between the parties. The Claimant's failure to set out the further information relied upon was a breach of the case management order. Also, this approach reflects a failure by the Claimant's advisers to recognise the purpose of the Claim is to set out the legal case of the Claimant; this should not be attempted through a List of Issues, which is an agreed document, drawn up by considering the parties' pleadings, and which is intended to be a tool for the parties and the Tribunal (As to the status and use of a list of issues, see Parekh v LB Brent [2012] EWCA Civ 1630 applied in Scicluna v Zippy Stitch Ltd [2018] EWCA Civ 1320).

4 The parties had produced an agreed List of Issues for this hearing, which ran to 10 pages, and contained around 60 or so issues.

5 As a result of the number of liability issues, the Tribunal informed the parties that it would hear and determine the liability issues, to include the issue of contributory fault, in the first instance.

6 At the outset of the hearing, the parties were invited to consider if any of those

issues could be narrowed, not least because the case was listed for only 4 days. Ms. Johns explained that the Claimant would prefer to do this at the point of submissions. The Respondents admitted that the Claimant was a disabled person at all material times due to his mental impairment of depression with anxiety. The issue of whether the Respondents had the requisite knowledge remained in dispute.

7 The Tribunal were concerned that despite the large number of issues remaining for determination by the close of the evidence, the parties did not appear to have focussed on which complaints were pursued and which issues were in fact in dispute. The Tribunal directed the parties at the close of the evidence to mark the List of Issues with the paragraph number of the witness statement, or page reference, that evidenced particular allegations in each case. Ms. Johns, for the Claimant, did this. Mr. Rahman, for the Respondents, did not.

8 In any event, the "Draft List of Issues Annotated on 9 September 2020" prepared by Ms. Johns was of real assistance because it marked those allegations which were withdrawn. The complaint under section 64 ERA was withdrawn; the Tribunal dismissed it.

9 In this set of Reasons, when referring to the List of Issues, the Tribunal is referring to the List as annotated by the Claimant on 9 September 2020.

Evidence

10 The Tribunal read witness statements and heard oral evidence from the following witnesses:

10.1 The Claimant;

10.2 Justin Baptie, Managing Director;

10.3 Angela Dansey, Human Resources Consultant;

10.4 Diana Collins, Human Resources Consultant.

11 The Respondent sought permission to rely on two further witness statements from Kym Wallace and Kara Kelsey. These had been served very late, on 2 September 2020. The Claimant objected to the admission of this evidence. The Tribunal refused the application to adduce the evidence from these two witnesses for reasons given at the time on 8 September 2020.

12 The bundle contained an impact statement from the Claimant. The issue of disability was admitted at the outset. The impact statement was not introduced into evidence; it was not verified as true by the Claimant.

13 There was an agreed bundle of documents (page 1-289); page references in this set of Reasons refer to pages in that bundle.

14 When Mr. Baptie gave evidence, in examination-in-chief, he confirmed that the contents of the ET3 Response and the Respondent's further particulars at p.83 were true.

15 The further particulars at p.83 set out the Respondent's case on the justification defence to the complaints under sections 15 and 19 EQA. Mr. Baptie was not cross-examined on the contents of the further particulars, save where they overlapped with his witness statement. Therefore, the legitimate aims that he incorporated into his evidence were unchallenged by the Claimant. The legitimate aims were: efficiency, protecting privacy and client confidentiality, to ensure an efficient service for its clients and the requirements of the business.

Findings of Fact of the Majority

The Claimant's role

16 The First Respondent is a company offering accountancy services and advised businesses and wealthy individuals. The Second Respondent is its Managing Director had employed 11 people in total at the relevant time. Its turnover was £600,000 with profit estimated as £60,000.

17 The Claimant's role within the Respondent's organisation is in effect that as team manager with day to day management of the team in effect he was second in command and he reported to Mr Baptie. We accepted paragraph 6 of the witness statement of Mr Baptie and his evidence generally on the role and responsibilities of the Claimant.

18 In cross-examination the Claimant accepted that his role included monitoring other members of staff, that at no period prior to the onset of depression of 2019 had he worked at home (other than on the odd of occasion), that it was necessary to put together a paper file in order to deal with a job properly, the managing of work and the allocation of work was part of his role, and that he was responsible for managing staff on a day to day basis with all managerial duties being in his role. The Claimant accepted that his role included monitoring other members of staff on a day to day basis and managing workload and reviewing productivity. Contrary to the Claimant's evidence the Tribunal found that Kara Kelsey (Audit Manager) was not jointly responsible for the management part of the Claimant's role and was not joint second in command; we found that the Claimant was the only manager at team level.

19 Mr Baptie and the Claimant had a weekly meeting to review the practice including billing figures and problem areas.

20 The Claimant would normally carry out the allocation of work. Factors determining allocation included who the account manager was and who did the work on the previous year. Allocation was usually discussed in the Monday team meeting which was chaired by the Claimant.

21 The Claimant's contract of employment provided that he was to be based at the First Respondent's head office. Prior to the symptoms of depression in early 2019 the system of work at the Respondents' practice was set up for the Claimant to carry out his work in the office. Mr. Baptie's work included producing accounts and tax returns, meeting clients to discuss year end accounts and to review their business and meeting potential new clients. The Claimant's role included these tasks as well as his team manager duties.

22 The Claimant agreed in evidence that in order to produce accounts a paper-based file containing hard copy documents had to be produced. A lever arch file was compiled if there was a bigger client, or a cardboard file if a smaller client required accounts producing. The actual accounts were produced using software which we refer to later in these Reasons. This paper file included accounting documents such as back up schedules. The Respondent otherwise used electronic files only for correspondence or emails such as with the Inland Revenue.

23 The Respondent did not have an electronic case management system where all the documents were held in electronic form and stored on a server. Such a system was relatively expensive for this size of firm and would cost between £7,500 - £10,000 per year and would require training costs upfront and downtime whilst it was implemented. This type of system in some larger firms and would have required a big change in the way the Respondent operated.

Alleged Comparators

24 Jane Katz (referred to as Jane Jatz on the list of issues) was the payroll manager for the Second Respondent at the relevant times. She carried out a totally different function to the other employees and was not involved in the accountancy practice or with clients. She worked 20 hours per week (4 hours per day). She had no management function. It was clear to the Employment Tribunal that she was not a statutory comparator and there was no real evidential value as a comparator at all because she had no management of people and never went to the office; beyond the fact that she worked from home on a permanent basis, the degree of comparison was minimal. In respect of Garry Smart, he was a self-employed consultant. He worked for a range of client accountants and assisted the Respondents from time to time. He did specific tasks but not the same work as the Claimant; he did management accounts and book-keeping in general, albeit there was some overlap with the Claimant's work. However, Mr Smart had no management role. He was used as and when required. This was a totally different relationship with the Respondents than that between the Respondents and the Claimant.

Background allegations

25 In his evidence, the Claimant alleged that a former employee had depression and that Mr Baptie would say to him at their weekly meetings that if her depression became a problem he would just get rid of her "just get rid of her". The Claimant claimed this made him uncomfortable disclosing his disability to Mr Baptie because Mr Baptie was intolerant of those with disabilities.

26 In cross-examination, Mr Baptie described this allegation that he was intolerant in this way as ridiculous and he denied making such comments. He explained that the employee in question had been with the business for seven months and then resigned due to caring responsibilities. The Tribunal preferred Mr Baptie's evidence in respect of this allegation because:

26.1 This allegation was not mentioned before paragraph 5 of the witness statement of the Claimant, when it could well have been used in the grievance to support his allegation of disability discrimination. He was after all represented by solicitors when he put the grievance in.

26.2 Had the Claimant believed this about Mr Baptie, we found it very unlikely that he would have raised his disability when he did and in person with Mr Baptie.

The Respondents' knowledge of the Claimant's disability

27 The Claimant did not disclose his impairment to Mr Baptie in November 2018 as he alleged. The Claimant's oral evidence was that he did not mention depression but discussed his issues because he was fearful of the native connotations of the term depression and did not want to be pushed out of the business or treated worse. There was no evidence that he would have any reason to think this. The Tribunal considered the Claimant's recollection about November 2018 to be inaccurate and we accepted Mr Baptie's evidence on the issue of knowledge as largely reliable.

28 After the Christmas party, around 17 December 2018, the Claimant told Mr Baptie that he was having social anxiety, and had not enjoyed the party, and that he had suffered the symptoms before. At this time the Claimant did not mention depression and he accepted in evidence that Mr Baptie could not reasonably have known this was a symptom of the Claimant's mental impairment relied upon. The Claimant admitted that by Christmas 2018, the Respondents would not have known of his depression.

29 On 14 January 2019 the Claimant and Mr Baptie had a regular Monday morning meeting. The Claimant's evidence was that he told Mr Baptie that he had depression. Mr Baptie denied this word was used but accepted the Claimant may have discussed social anxiety but that there was nothing unusual about the meeting.

30 We find that the Claimant probably did used the word depression but did not elaborate because he was concerned of any stigma that might be attached to it, even though there was no evidence that he had reason to believe that Mr Baptie would view him any differently on knowing this.

31 On 22 January 2019, the Claimant told Mr Baptie that he felt unsupported by the team. He did not state that this had a negative effect on his mental health nor on his ability to work. During this meeting, Mr. Baptie agreed that the Claimant could work from home on a Wednesday as required so it was feasible for him to attend his therapist appointment.

32 On that date, according to Mr Baptie's evidence, the Claimant asked Mr Baptie having spoken to his therapist if he would inform colleagues of his condition, because the Claimant did not feel up to doing it. The Claimant's evidence was that Mr Baptie decided to tell all of the team on his own accord. We found that if Mr Baptie was intolerant of disability, as alleged, the Claimant would not have approached Mr Baptie to tell him about how he was feeling. In any event, Mr Baptie brought the team members into one room. The Claimant's evidence was at this meeting Mr Baptie informed the team that they were all on "nutter watch", which humiliated and upset him. Mr Baptie denied making that comment.

33 We preferred the evidence of Mr Baptie on these conflicts of fact because:

33.1 Mr Baptie was generally more reliable and detailed in his evidence.

33.2 There was no complaint about this comment made at the time from the Claimant or anyone else.

33.3 Had such a comment been made, it would have been mentioned by the Claimant or some other witness in the grievance investigation.

33.4 At the time, Mr Baptie was allowing the Claimant time off to attend counselling without complaint. This action would seem inconsistent with someone who was intolerant of persons with a disability. The Claimant accepted in cross-examination that allowing him time off to attend counselling was a helpful thing for the Respondents to do.

34 On 12 February 2019, the Claimant and other staff members attended a training day at the office. The Claimant was late due to traffic and due to this in a state of mind he was feeling more depressed than previously. He was withdrawn and did not engage in sessions. The Claimant alleged that Mr Baptie had used his disability as an example when addressing the team. We preferred the evidence of Mr Baptie that the Claimant's mental health had not been mentioned. We considered that this was the perception of the Claimant because the training had in part focused on support and the Claimant had felt it was focused on him. The Claimant left quickly after the training and later Mr Baptie phoned him to see if he was alright.

35 On 13 February 2019, the Claimant attended work and wanted to speak to Mr Baptie about the training session which he had not enjoyed. Mr Baptie was not present. The Claimant was withdrawn with other members of the team.

36 The Claimant left after half a day due to his symptoms. On the evening of 13 February 2019, Ms Kelsey called Mr Baptie to say she was concerned about the Claimant's behaviour and that he was making things uncomfortable for the team. On 14 February another employee approached Mr Baptie and raised the Claimant's behaviour on 13 February 2019. She had asked the Claimant if he was okay and the Claimant had complained that she had only asked because she had been told to; the Claimant had told her that he felt like shouting. Another employee then told Mr Baptie that she had asked the Claimant if he was alright and he had said "*not really*"; she asked if he wanted to talk about it and he refused stating that he would get angry. Two other employees told Mr Baptie on 14 February 2019 that the Claimant had seemed angry, and was shaking with rage on 13 February 2019. One employee said his tone of voice was aggressive. Mr Baptie's evidence about what he was told and the events prior to the meeting with the Claimant on 14 February 2019 were not challenged in cross-examination.

37 The Claimant had not arrived at work by 11.13am on 14 February 2019 so Mr Baptie called him because he was concerned. The Claimant stated that he was on his way into the office from a client. He arrived at 11.35am. There is no dispute about what happened up to this point. We accepted Mr Baptie's evidence about the presentation of the Claimant on that morning that he was shaking and appeared angry.

38 There was a stark conflict of evidence about the meeting on 14 February 2019. The Tribunal accepted the evidence of Mr Baptie. On arrival at the office, the Claimant had gone straight into the office of Mr Baptie who invited him to sit down. The Claimant stated "*I can't do this*". Mr Baptie was concerned about the Claimant's wellbeing, because his tone was quite aggressive, but also the impact that he was having on his colleagues at work. We found that contrary to the Claimant's allegations, Mr Baptie did not say that the Claimant was useless, he did not shout at the Claimant, he did not swear at the Claimant and he did not say that the Claimant would not be returning to his role. At the meeting, Mr Baptie explained what the other members of staff had raised with him in terms of their concerns about the Claimant's behaviour and that they felt that they were walking on egg-shells around him. Mr. Baptie understood that the Claimant did not want to engage with him at that meeting.

39 The Tribunal found that Mr Baptie acted reasonably and he was entitled to raise with the Claimant concerns brought to him by several other members of staff about their manager.

40 The reasons we preferred the evidence of Mr Baptie about the meeting on 14 February 2019 are as follows:

40.1 The Claimant had a good relationship with Mr Baptie until 14 February 2019 on his own evidence (such as to his GP and the OH consultant nurse), and was in a firm where he was happy working up to January or February 2019 (evidenced by the appraisals in the bundle the last of which was November 2018).

40.2 In the written grievance prepared by his solicitors there are few particulars about what exactly is said on 14 February 2019. In the grievance, it is not alleged that Mr Baptie is guilty of any swearing.

40.3 The inference from the Occupational Health report was that the allegation of swearing by Mr. Baptie at the 14 February meeting were not mentioned to the OH Nurse consultant, because there is no mention of swearing in her reference to what she was told by the Claimant about the meeting. It was inconsistent with the Claimant's evidence that, if such swearing occurred, it was not mentioned during that consultation.

40.4 Although the Claimant alleged that Mr Baptie had been shouting, the head office of the Respondent was relatively small consisting of two offices upstairs and two offices downstairs. Had there been shouting someone working in the offices would have heard it and would have mentioned it at least in passing in the grievance interviews.

40.5 After the meeting Mr Baptie sent the letter at page 112. This is a constructive letter and is inconsistent with the type of meeting that the Claimant claims took place. The letter is constructive and looks to the future, envisaging the Claimant working within the business:

"Finally I would like to state that however you may view things at present,

we all do genuinely care for you as an individual and hope that we can come to a reasonable and sensible way forward".

40.6 We found that Mr Baptie was a more reliable witness about the issue of his alleged intolerance to disabled persons.

40.7 At the Claimant's request a further meeting took place at around 6.00pm on 12 March 2019 at which the Claimant provided a fit note from his doctor, which stated that he did not feel ready to work in the office but it would be suitable for him to work from home. At that meeting, it was agreed between Mr Baptie and the Claimant that he could work from home for the following four weeks. The Tribunal found that such a meeting and the fact that it had been requested by the Claimant was at odds with the Claimant's account of what had happened at the meeting on 14 February 2019 such as the allegation that Mr. Baptie had been swearing.

40.8 The Claimant accepted that it was out of character for Mr Baptie to shout at an employee.

41 At the end of the meeting on 14 February 2019, the Claimant was allowed to take time out of work for the rest of that week and the following week (which he took as partly holiday and partly sickness absence), after which the Claimant was due to go on annual leave on 4 March 2019. The Claimant was due to return to work on 11 March 2019.

42 The Tribunal considered that the Claimant's initial perception after the meeting on 14 February 2019 was that Mr Baptie had not behaved in the way that he has alleged in these proceedings. The Tribunal found that the Claimant's perception of Mr. Baptie's conduct on 14 February 2019 given in evidence before us did not arise until after the meeting on 12 March 2019 when he was formulating his grievance. This perception arose because of his anxious state of mind, and because of his over-sensitivity to the complaints that were put to him by Mr. Baptie about his conduct that had been raised by other staff members. These were raised with him following the training day, which he viewed as being a negative experience. It was at that point, whilst absent from work, that the Claimant felt that he could no longer work with other staff in the office.

Knowledge of disability

43 About one week after this meeting, so on around 21 February 2019, Mr Baptie had a discussion with a client who referred to the Claimant previously having a nervous breakdown.

44 The Tribunal considered that this was the point at which the Respondents could reasonably have been expected to know that the Claimant's depressive condition had a substantial and adverse effect on his normal day to day activities which was likely to have been long-term, because the inference from what the client said was that the Claimant's symptoms had recurred, indicating that they were long-term as defined in Sch 1 EQA.

45 Under Sch 8 para 20 EQA, however, the duty to make reasonable adjustments does not arise simply because the employer could reasonably be expected to know that an employee has a disability unless it could reasonably be expected to know that the Claimant is likely to be placed at a disadvantage referred to in the three requirements. As at the 21 February 2019, however, the Respondents could not have known that the Claimant was likely to be placed at the disadvantage referred to in the three requirements in section 20 EQA. By that stage, the Claimant had not asked him to work from home, nor explained that he found it difficult to work in the office with others. The Tribunal found that the Respondents had actual or the required constructive knowledge that the requirement that the Claimant should work in the office placed him at more than a minor disadvantage when it received the Fit Note of 12 March 2019.

The Claimant's access to his work computer after 14 February 2019

46 The Claimant alleged that his access to his work computer was removed on or around 14 February 2019. The Tribunal did not accept this allegation. The Tribunal preferred the evidence of Mr Baptie that any difficulty that the Claimant had in accessing his files or his emails were not intentional. Mr Baptie had not withdrawn his IT access. At the time the Respondents were in the process of changing provider and the main accounting software from IRIS to Digita and due to various updates several staff experienced problems at some stage in connecting. New passwords were subsequently issued by the hosting service. Mr Baptie did not know that the Claimant was not receiving his emails so he was not aware that he had experienced any problem. As soon as the Claimant notified him of his inability to access the IT system, the problem was rectified. Moreover, we found that if the denial of access was deliberate this would be inconsistent with the letter that Mr Baptie had just written of 14 February 2019.

47 In contrast, the Claimant was told to refrain from working at home whilst his absence was treated as sickness absence, in order to aid his recovery, and his IT access was removed on 3 May 2019, so that he could focus on recovery. This was a normal step which the Respondents took where sickness absence of an employee was likely to be longer term.

The meeting of 12 March 2019

48 As we have indicated above, the Claimant arranged to meet Mr Baptie on 12 March 2019 outside working hours at the head office of the Respondents. He told Mr. Baptie that he did not want to see his team. At that meeting he provided a Fit note which is at page 113. The fit note states *"Keen to work but does not feel ready to work in office. Would be suitable to work from home and I think this will aid recovery."* The Fit note covered the period from 11 March 2019 to 7 April 2019. It is noticeable that the Claimant was happy to meet Mr Baptie alone. There was no suggestion at the time or in the grievance that the meeting was not amicable. Mr Baptie agreed with the GP's proposal that the Claimant could work from home for four weeks, but told him that this was not a long-term solution because leading and supporting the team was fundamental to his role.

49 In his oral evidence, the Claimant alleged that, at the meeting of 12 March 2019, he found it very difficult to attend and that Mr Baptie had shown him contempt and had not read the fit note. These allegations were not mentioned before in the grievance nor were they mentioned to the Occupational Health consultant nurse. The Tribunal did not accept

this account of the meeting of 12 March 2019, preferring the evidence of Mr Baptie.

50 The Claimant alleged that on 13 March 2019, his workload decreased and previous clients were taken away from him. The Claimant had brought certain clients with him to the Respondent.

51 It was never put to Mr Baptie that the Claimant's workload had been decreased. We did not accept that allegation and preferred Mr Baptie's evidence on this subject.

52 As for his previous clients being taken from the Claimant, the Tribunal did not accept that allegation. We considered that it was a matter of perception by the Claimant in his depressed state that this had happened. Until he was working from home, the Claimant allocated all the work amongst the accounting team. We found the facts stated in the witness statement of Mr Baptie at paragraph 27 to be proved. Once the Claimant was working from home other team members did the allocation of work. There was no direction to the other staff from the Claimant as to how to allocate the work and there was no evidence that Mr Baptie told them how to allocate it. In any event, some of the lower level work that the Claimant had been doing, was not appropriate for him to have done because it was too junior. The factors that determined the allocation of work were the availability of the account manager to do the work, the nature of the work, and who had dealt with it before, such as in the previous year. The work allocated to the Claimant, as he accepted in the grievance hearing, was not different to work that he had done before; it was work he had allocated to himself the previous year.

53 The Claimant accepted the evidence of Mr Baptie in respect of this allegation (at paragraph 29 of the witness statement). The Claimant had access to his emails and there was no need for them to be forwarded to him. Details of calls made by clients with whom he dealt usually were emailed by the Respondents' employees to him because the phone system did not allow transfer to mobile number and the Claimant did not want other employees to have his home telephone number. Moreover, in all the time that the Claimant worked at home he had no verbal communication with staff at the office; we accepted Mr. Baptie's evidence that he was passive, and waited to be sent work. In addition, routine smaller queries were probably dealt with in the office. The evidence was that the Claimant did not answer his mobile phone when he was working from home (see for example page 142 the interview of Ms John during the grievance investigation). In the grievance interview, the Claimant accepted that he had told Mr Baptie at the meeting on 12 March 2019 he did not want staff to have his home number (see page 256).

Did the Respondents deliberately try to sabotage the Claimant's relationship with his clients?

54 The Claimant had brought certain clients with him when he joined the Respondents' business. The Claimant alleged that the Respondents had deliberately sabotaged his relationship with those clients.

55 The first allegation on the list of issues (that of misinforming his long-standing clients) was not in the Claimant's witness statement (only his impact statement, which was not verified in examination-in-chief) and never put to Mr Baptie in cross-examination. During submissions, this allegation was withdrawn.

56 In respect of allegation 2 (allocating other members of staff to work with the Claimant's long-standing clients), this allegation was not proved. The Tribunal found as above that when he was not working in the office (that is, when he returned from holiday in March 2019) the Claimant did not allocate work and did not give any directions as to how the work should be allocated; indeed, the Claimant did not contact team members by telephone or answer his own mobile telephone. Therefore, allocation was carried out by different team members. There was no evidence that there was any plan or conspiracy to sabotage the Claimant's relationship by allocating work from clients that the Claimant considered his own to other members of staff. We find that these clients were in any event clients of the Respondent's firm, and allocation was likely to have depended on those factors referred to at paragraph 27 of the statement of Mr. Baptie.

57 In respect of the third allegation (the Claimant had been given tight deadlines by work not being completed for long-standing clients properly), the Tribunal found that the Claimant was not given "tight deadlines". It found that this allegation probably rested on miscommunication between the Claimant and Ms John and probably the Claimant's perception of events surrounding work for a particular client. There was no evidence that the incident he refers to at paragraph 24 of his witness statement was designed or intended to engineer his dismissal.

58 The Claimant alleges that on 14 and 15 March 2019 he was put under a lot of pressure when one of his long-standing client's VAT return had not been completed properly or to the expected standard. He alleged that he was then pressured to complete the VAT return to a tight deadline, because Ms John was supposed to be visiting a client the following Monday. As a result, he felt that he had spent three days including the weekend rectifying the errors causing his stress and anxiety and his symptoms became worse because he believed that Ms John was ignoring him when he requested further information.

59 As we have stated above, the Tribunal found that the events shown by the emails at page 144 – 145 did not support the Claimant's perception of events. The first email sent at 15.56 on 15 March is copied to Mr Baptie; Mr Baptie did not know why he was copied in but said that he was copied in on many emails for no particular reason. In this case, the inference we draw is that Ms John copied him in just to keep him updated that she was dealing with the client who was one of the Claimant's long-standing clients and the Claimant was absent from the office. Secondly, when read in its context, the email of 15 March 2019 at 15.56 was not putting pressure on the Claimant to complete a VAT return nor to provide information for its completion. The email reads:

> *"Further to my earlier email I am due to visit* [the client] *again on Monday morning and would be grateful if you could send me an update by the end of the day with regards to the VAT/creditors."*

There was no evidence and no suggestion that the Claimant had telephoned Ms John to ask what her email meant nor to complain about it. This was despite the fact that the Claimant remained team manager throughout. The fact was that he was not communicating with Ms John or other members of staff by telephone during his period working from home. Moreover, the Claimant did not complain by email. His email in response sent on 15 March 2019 at 16.05 merely begins: *"The VAT will be done by Monday morning, there are a number of errors on the creditors so I need to sort these out*

first." The email goes on to request some further information; but at no point does the Claimant suggest that Ms John has put pressure on him nor that he has felt any pressure to complete or provide all the figures necessary to complete a VAT return.

60 The last email in the sequence sent at 16.51 on 15 March 2019 from Ms John explains that she will ask for a bank statement from the client on the following Monday and scan it over when she was back in the office. Then she provided further information of details on cheque stubs. This email is copied to Mr Baptie, but the reason for that appears to be connected to the question of how Xero, the new software system, is to be set up. The email ends with Ms John asking the Claimant for him to complete a process detailing how the book-keeping has been done on Sage so that it can be reviewed for Xero and allocated appropriately.

61 The Tribunal found this demonstrated that there was no plan to sabotage the Claimant's relationship with long standing clients.

The Claimant's grievance

62 In evidence, the Claimant stated that he was in a "*better place*" by 12 March 2019, but on 22 March 2019, the Claimant raised a grievance. The contents of the grievance was set out in a solicitor's letter (page 114ff). The letter states that Mr Baptie had initially been supportive of the Claimant and made reasonable adjustments of time off for therapy and working from home. The grievance included complaints about the alleged treatment of the Claimant by Mr Baptie on 14 February 2019 and that as a result of that meeting his symptoms of depression and anxiety had been made worse. The Claimant went on to complain about his alleged treatment when working from home such as in respect of allocation of jobs. The letter alleged disability discrimination and harassment, alleging that the Respondent company had an obligation under the Equality Act 2010 to make the reasonable adjustments proposed to enable him to carry out his role. The grievance concluded:

> "*Clearly he needs the reassurance that he can continue (to) carry out his role from home, that he will receive the training on the computer systems and that the bullying and harassment will now end. Our client would be prepared to engage in mediation but given his delicate health at the moment the above needs to be addressed and suitable assurance is given to our client to enable him to carry out his work."*

63 The Tribunal found that the tone and content of this grievance letter was in stark contrast to the meeting that had taken place between Mr Baptie and the Claimant on 12 March 2019, which had been sought by the Claimant and had been used to discuss his fit note, and the parties had agreed that he could work from home for four weeks in accordance with the advice from the GP. At that meeting on 12 March 2019, the Claimant had raised none of the complaints which appeared in the grievance letter. The Tribunal found that if the Claimant had been concerned about these matters at the time they occurred he would have raised them in some form with the Respondents. The fact that he did not raise them suggested that the letter contained his subsequent perception of events. In respect of the complaint that the Respondents had failed to make reasonable adjustments for the Claimant, the Tribunal found that this was odd because Mr Baptie had agreed as soon as he was requested to allow the Claimant to work at home for four

weeks.

64 On 22 March 2019, Mr Baptie sought advice from "Practical HR". This was after he had received the grievance. However, he had sought advice by telephone before receipt of the grievance but had been unable to have a substantive conversation with a consultant. Mr Baptie was not experienced in Human Resources matters and had never dealt with a grievance before. Practical HR was a HR consultancy, to whom Mr Baptie paid a monthly fee in return for services which included up to 15 minutes of advice. Advice of greater than 15 minutes had to be paid for on an hourly basis. The retainer and the hourly rate fees were not linked to any outcome desired by the employer.

65 The Tribunal found that throughout his dealings with Practical HR, Mr Baptie relied on their advice and took it. It was not suggested in cross-examination that there was any plan or conspiracy between Mr Baptie and Practical HR to remove the Claimant from his role or to force him out. We found that the Claimant's case in respect of the Respondent's relationship in dealing with Practical HR to be inconsistent; on the one hand the case was put that Mr Baptie was pulling their strings, but on the other hand the complaint was made that he had delegated the decision to them.

66 Mr Baptie had sought the advice of Practical HR in the first place because within the first week of the Claimant working from home, he believed that the arrangement was not working because it was impacting on the quality of service and having a detrimental impact on the business. The Tribunal accepted his explanation at paragraph 30 of his witness statement. The Tribunal accepted his evidence in cross-examination that the receipt of the grievance made him more cautious about removing the working from home arrangement, not that it caused this decision.

67 On 22 March 2019, Mr Baptie spoke with Angela Dansey, consultant at Practical HR. Ms Dansey advised Mr Baptie to seek the Claimant's consent for an assessment by Occupational Health so that a medical opinion on his health could be obtained and to see if the Occupational Health provider could suggest other reasonable adjustments required to support the Claimant. Consent was provided and an appointment for a telephone assessment with Occupational Health was made for the 1 April 2019. Prior to the assessment a referral form was completed by Angela Dansey. We found that there was nothing unusual about the questions on the referral form which were reasonable and appropriate. There was nothing to indicate that Ms Dansey and the Occupational Health consultant nurse who carried out the assessment were part of any plan or arrangement with Mr Baptie designed to make it difficult for the Claimant to continue in his role. On the contrary, the Tribunal decided that the process of seeking the Occupational Health consultation, the questions asked, and the assessment provided were all genuine and that the process was impartial.

68 On 1 April 2019, an Occupational Health report was provided (page 130 – 131). During the consultation, the Claimant had advised the Occupational Health consultant nurse as follows:

68.1 He had been very well supported by Mr Baptie until 14 February 2019.

68.2 He had responded positively to medication which had been prescribed by his GP and a course of cognitive behavioural therapy.

68.3 He had been told on 14 February 2019 that he was useless and his colleagues did not want to work with him.

69 The last of these statements made to the Occupational Health nurse demonstrates how the perception of the Claimant was wrong about what in fact had happened at that meeting on 14 February 2019.

70 The role of Occupational Health is to advise employers in respect of the state of health of employees and the impact that that might have on their ability to perform the role set out in their job descriptions, and to advice on any limitations or adjustments that would be required. We found that the advice provided by the Occupational Health nurse was genuine and honestly given. In addition, at the grievance hearing, the Claimant accepted that the Occupational Health report was accurate in reflecting his medical situation and in respect of other factual matters at the time.

71 The Occupational Health report included the reports from the Claimant that working from home had enabled him to get back into the swing of the work and demands, and that he was more comfortable in his own home. The Occupational Health nurse's advice was that to manage a team he needed to be able to work closely with them and there were many benefits of coming out, away from home and working with others, and that taking work into the home needed to be well-monitored and individuals needed to be very conscientious about ensuring work did not take over personal/relaxation time. The report recommended that the Claimant was gradually supported/encouraged back into the office environment over the next 3 – 4 weeks. In answer to a specific question as to whether the Claimant was fit to be at work, the advice was as follows:

> *"John is currently working from home, this suits him currently, but as part of his role he is also team leader and so needs to be in the workplace and engaging as part of a team. If a balance can be found which enables him to work at home 1 or 2 days per week, he is likely to find some benefit. This however depends on if he can still meet the demands of his substantive role and or if some accommodation can be made."*

72 On receipt of this, Mr. Baptie agreed that, on the basis that the plan proposed would result in the Claimant returning to work at the office, he would accommodate the adjustments proposed in the Occupational Health report. A plan for a phased return to working at the office was agreed between Mr. Baptie and Ms. Dansey. The evidence of Ms. Dansey was not challenged on this; the formation of this phased return to the office plan was not alleged to be a false attempt to accommodate the Claimant which would not result in him returning to work at the office. The plan was that the Claimant would work 2 days per week in the office for 2 weeks, then increase this to 3 days per week over 2 further weeks, with the Claimant then being able to work at home on 1 day each week, to be reviewed after 3 months.

Grievance hearing

73 The Respondents instructed Ms. Dancey to conduct the grievance meeting and investigation. The Tribunal found that she dealt with them impartially; she had made no plan or agreement with Mr. Baptie. The Claimant's grievance hearing took place on 4 April 2019. The hearing notes are at pages 245 – 285. We found that the notes were an

accurate but not a verbatim record of that meeting. The Claimant's solicitor, Ms Hayes, was allowed to attend the meeting, and represent the Claimant, which she did and adjournments were granted for her to discuss matters with her clients at various points. This was one of a number of adjustments made to accommodate the Claimant's needs. At the grievance meeting the Claimant agreed that the Occupational Health report should be considered at the same meeting. The Tribunal found that this was linked to the grievance and the issue of reasonable adjustments, and that it was not possible to divorce the recommendation in the Occupational Health report from the issue of the adjustment of working from home in reality.

74 In the discussion at the grievance meeting, the Claimant was asked (at page 261) how it was alright to talk to clients but not to colleagues if he was working from home. He stated that he was *"socially withdrawn"* and after 14 February 2019 he was not comfortable going into the office until he was in a much stronger state of mind. He then stated that Mr Baptie had said on 14 February 2019 that members of the team had said they could not work with him; Mr Baptie challenged it and said that his behaviour was affecting members of the team which is what they had said. The Claimant stated (at page 263) that he had asked for a meeting on 12 March 2019 to discuss the fit note of 11 March 2019 and that he wanted to check that it was okay for him to work at home. The discussion at the meeting then included the following (with emphasis added):

> *"AD: Hmmm. How do you think that does work, John, in terms of the fact that you're a Team Leader and that your communicating mostly by email and you're in isolation at home?*
>
> *JL: Well, I'm perfectly happy to do accounts and stuff and I admit the team leadership is a problem at the moment, but that's not – shouldn't have been a long-term problem.*
>
> *AD: Hmmm hmm. Shouldn't have been or shouldn't be in the future? I was just…*
>
> *JL: Shouldn't be. It shouldn't be.*
>
> *AD: I know I'm splitting hairs, but …*
>
> *JL: it shouldn't have been*
>
> *AD: it's quite important.*
>
> *JL: … in the future, but it has become a bigger problem because of what happened on the 14th.*
>
> *AD: Uh-huh. How do you feel that that – I'm kind of, switching it on its head now, what might be the drawbacks of you working from home, what's not so good? Putting your obvious head on, what's not so good?*
>
> *JL: people can't ask me – well, they can ask me questions, actually, but – so, it's just if they've got something they don't know, then they can ask me. But I'd say they can do that by email, so…"*

75 During the meeting, the Claimant accepted that he did not complain with the job list to anyone or the question of allocation when he was working from home, whether by email or phone.

76 When the Claimant was asked at the meeting, he made no allegation that the Respondents had failed to make reasonable adjustments, and only complained about the meeting with Mr Baptie on 14 February 2019.

77 At the meeting, the Claimant was asked what outcome he was seeking. He stated that he was looking for the Respondents to admit discrimination, have an understanding of his condition, and the ability to work at home whenever he needed to. As we noted from the written grievance, the Claimant was not suggesting that working from home would be a short-term or even a medium-term arrangement. He was asking for an open-ended arrangement.

78 The return to work at the office plan was outlined to the Claimant. On the week commencing 15 April 2019, the Claimant was to work two days in the office. At the grievance hearing, the Claimant did not object that he could not work in the office at all.

79 On 8 April 2019, the Claimant's solicitor sent an email to Mr Baptie which included the following:

79.1 It complained that Ms Dansey had indicated that she would prefer Occupational Health over the advice of a GP.

79.2 It stated that the Claimant working from home did not impact on the business.

79.3 It included a further fit note for four weeks which stated: *"keen to work but not ready to work in office environment. Suitable for home working to aid recovery."*

79.4 There was no mention at the grievance hearing that the Claimant could not comply with the return to work at the office plan proposed by Occupational Health.

80 Mr Baptie was surprised by the content of the email of 8 April 2019 given the lack of complaint at the grievance hearing. He took advice from Practical HR even though he was on two weeks annual leave with his family. The objection to the return to work plan had not been raised until he was on annual leave and the Tribunal found it to be quite understandable that he took advice from Practical HR again.

81 Prior to responding, Ms Dansey sent a proposed return to work at the office plan to the Occupational Health nurse consultant by email on 10 April 2019. The plan was as set out in the email at page 150 being as follows:

- The Claimant remained at home for the rest of the week as Mr Baptie was not there to support him.

- The following week the Claimant was to attend on Monday and Wednesday.

- Week three Tuesday and Thursday.

- Week four to attend the office three days.

- Week five to attend the office four days.

- Thereafter for the Claimant to work from home one day per week to be reviewed in three months, with a view to it possible becoming permanent.

82 The Occupational Health nurse responded to say that the proposal was acceptable, and stating that accommodation is always at the business discretion. The Occupational Health nurse stated that if the employer was unable to support the Claimant working from home then he needed to obtain a note from his GP advising that he was unfit for work. The Occupational Health nurse stated that the GP was not the specialist in this area.

83 By email of 12 April 2019, Ms Dansey replied to Ms Hayes email of 8 April 2019. The reply proposed a return to work at the office plan in accordance with the Occupational Health advice. It explained that there was no need for the Claimant to attend the office until Mr Baptie returned from annual leave.

84 The Tribunal considered that the return to work plan was a reasonable proposal in the circumstances, formulated on advice from an Occupational Health professional, and given the size, nature and resources (both staff and financial) of the Respondent. Ms Dansey had checked it with the Occupational Health nurse, who had responded (page 150) with her agreement to it.

85 In her email of 12 April 2019, Ms Dansey finished it by saying that *"in the event that Mr Lawrence does not comply with this reasonable request it is likely to be considered as a disciplinary matter."* In evidence, Ms Dansey stated that what she meant, despite using the word "disciplinary" was that the Respondent used the same procedure for both capability and disciplinary matters and that the word she meant to use was "capability". There was no evidence that any step towards commencing disciplinary action was taken.

86 Part of the Claimant's complaint in respect of constructive unfair dismissal was that the Respondents had continued to fail to take into consideration the advice of the Claimant's doctor over the Occupational Health nurse, in order to facilitate the Claimant continuing to work from home. The Tribunal found that the Respondents did not fail to take into consideration the GP Fit notes and the advice contained upon them. However, it was reasonable for Mr. Baptie to prefer the Occupational Health advice, which he had been recommended to obtain. The Occupational Health advice was impartial and the Occupational Health advice was compiled by looking at the Claimant's job and the workplace of the Claimant. It is true that the Occupational Health advice did not consider the wellbeing of the Claimant alone, but it was entirely reasonable for the Occupational Health advice to have considered the issues that it considered, including the return to work plan. The Occupational Health advice had been sought after Mr Baptie sought

advice from practical HR on receipt of the first Fit note of 11 March 2019, and after Practical HR and Mr Baptie had received the further Fit note on 8 April 2019, further Occupational Health advice was sought. Mr Baptie genuinely and reasonably believed that the Claimant's role required him to work in the office in order to fulfil that role. He based his response to the GP Fit note on the HR and Occupational Health advice that he had received as well as his own experience.

87 As Mr Baptie stated in his witness statement (such as at paragraph 50 and 51), he did take into account the advice from the Claimant's GP and the Claimant's case. He considered that whether the Claimant could work from home on other than a short-term basis (which had already been accommodated) was a business decision and such arrangement had to be sustainable. He concluded the arrangement was not sustainable given the nature of the busy practice, the service level required for clients, and the position of the Claimant, who was required to manage a team of accounts staff.

88 As time went on, after the email of 8 April 2019, Mr. Baptie reasonably understood that the Claimant was seeking to work at home for a longer period, on an open-ended basis, without exercising management responsibilities.

The grievance investigation

89 On 9 April 2019, a grievance investigation was carried out by Angela Dansey. In the course of this, Ms Dansey interviewed five employees who were in work on 14 February 2019 and asked them about what they had witnessed on 13 or 14 February 2019 and about the allocation of work to the Claimant. Ms Dansey found no evidence to support the Claimant's case that he had been shouted or sworn at by Mr Baptie on 14 February 2019; no witness heard any shouting and had never witnessed any bullying. For example, one witness said that it was very likely she would have heard shouting (page 138) and another said she was above Mr Baptie's office and did not hear any shouting (page 139). In cross-examination before us, the Claimant could not explain how five witnesses had heard nothing and he did not allege that they were lying.

90 In terms of allocation of work, one witness, Ms John, said she had received no complaint about how work had been allocated and she had had no verbal contact from the Claimant at all, only contact by email whilst he was working from home.

91 Ms Dansey also obtained a statement from Mr Baptie which is page 155 – 156. This denied the Claimant's allegations and stated that as an employer he had a duty to raise matters with the Claimant when five separate employees had raised concern about the Claimant's behaviour on 13 February 2019.

92 Ms Dansey forwarded her summary of findings after the grievance investigation to Mr Baptie (see page 153 – 154). Her recommendation was that the grievance should not be upheld.

93 Mr Baptie accepted the advice that he was given by Ms Dansey. On 25 April 2019 the Claimant was informed that his grievance was not upheld (see page 163 – 164) this decision explained that a reasonable adjustment had been made to allow the Claimant to work from home for four weeks as per the Fit note of 11 March 2019 had requested, but

this was not a long-term arrangement because leading and supporting a team was a fundamental requirement of the role and the Claimant had not been successfully working from home. Investigation had shown that he was not on hand to support the team, check or allocate work. In particular, the letter pointed out that the fact that the Claimant had had no verbal communication with the business during his period working from home.

94 On 15 April 2019, the Claimant failed to commence the phased return to work at the office that had been outlined to him during the grievance meeting, and to which he had not objected at the time. Mr Baptie considered that he was unable to accommodate the Claimant working from home.

95 In the absence of Ms Dansey, another consultant at Practical HR wrote to the Claimant on Mr Baptie's behalf on 16 April 2019. This explained that the Occupational Health report had recommended a phased return to work at the office, and that the Claimant was not managing the team working from home, that some jobs were unfinished and Mr Baptie did not know why and the Claimant was not working closely with colleagues. The email concluded by explaining that the Claimant would be treated as not fit for work if he did not attend the office and as a result would be paid statutory sick pay only. It was put to Mr. Baptie that this was the first time that the Claimant's performance was raised with him. We accepted Mr. Baptie's response, which was that he was afraid to raise it before and that he could tell from the Claimant's billings that he was not where he would normally be.

96 From 15 April 2019, the Claimant refused to begin a phased return to work at the office. He did not work for the Respondent after that date.

Grievance appeal

97 In an email of 30 April 2019 from his solicitors, the Claimant appealed the grievance decision. In the body of this appeal, the Claimant's case was expressed as follows:

> *"In the grievance outcome you have stated that our client is unable to work from home due to his lack of contact with his team. This was never raised as an issue within the initial grievance letter, and the company seemingly used the opportunity to raise their own concerns. Our client simply needed reassurance that he would be able to continue working with the correct allocation of work given to him."*

In the grievance appeal the Claimant was compared to Jane Katz, who worked from home on a permanent basis as payroll manager. It is notable that in this grievance appeal there is no mention of the adjustment of working from home that was sought being only temporary. The claim that the adjustment was only to be temporary was introduced by the Claimant during his oral evidence but the Tribunal have not found at any point of the grievance that the Claimant stated that the reasonable adjustment sought was only temporary or short-term or for the medium-term.

98 Another HR Consultant was appointed to hear the grievance appeal. However, the Claimant objected because she had responded by email to the Claimant in the absence of Angela Dansey on one occasion before. As a result, Ms Dansey asked Diana Collins, an

associate HR consultant of Practical HR, to hear the appeal.

99 The Tribunal found Ms. Collins to be a very experienced HR professional. She was impartial having had no contact with any party before. It was never suggested in cross-examination that she was not independent. The Tribunal found that Ms. Collins was an honest witness, albeit one that had not spent time preparing to give her evidence. She carried out a thorough appeal; her report set out all of the Claimant's case then the Respondent's case, and she made further inquiries before reaching her conclusions. She was asked in cross-examination where she obtained the information for her conclusion that the arrangement of the Claimant working from home was not working well; she could not recall, but it is clear that she was given this evidence by Mr. Baptie (see p.182).

100 When contacted on 7 May 2019, Ms Collins was due to go on annual leave on 21 May 2019, but felt she had time to complete the appeal. In fact, she was not able to complete the appeal before her holiday, because the questions submitted by her to the Claimant were not responded to until an email from the Claimant's solicitor was received late morning on 20 May 2019. This response is at page 202.

101 In addition to the response to the questions, the Claimant's solicitor provided fit notes and a letter from the Claimant's GP (at page 214) and his counsellor (page 215). Ms Collins considered the contents of both documents. Ms Collins considered that much of the content of the GP letter and the report of the counsellor repeated what the Claimant had told them and did not amount to medical opinion on whether the Claimant could work from home satisfactorily or not. Ms Collins interpreted the evidence from the Claimant's GP and counsellor as appearing to state that continuing to work from home <u>if</u> it could be accommodated by the employer was the best position to aid recovery. Ms Collins believed that it was for the Respondents to determine what working arrangements were best for the business and what could be accommodated. She considered that this did not mean that the Respondent was being unreasonable nor that it amounted to discrimination.

102 The GP letter of 23 May 2019 referred to seeing the Claimant on 13 May 2019, and it included the following report of what he was told: his mood had started to deteriorate in October last year and continued to do so; he apparently let his work colleagues know in January; he stated that as a team leader part of his job was to support other colleagues but also to socially interact with other team members and facilitate the function of his team; over time he felt increasingly unable to do so and met with his employer on 14 February 2019 and was apparently told he was not performing well, he would not be able to maintain his current role at work; he said he felt attacked and unsupported and was told to take a week off and he has felt unable to return to the work place since then. The Claimant told his GP that he had a grievance meeting on 4 April 2019 where for two hours he was subject to a similar experience.

103 The Tribunal noted that in his instructions to his GP, the Claimant admitted that part of his job was to support colleagues and to socially interact with them to facilitate the function of the team. Moreover, the inference is that, at this meeting with the GP, Mr Lawrence did not make any allegations about conduct of Mr Baptie in terms of shouting and swearing at the meeting on 14 February 2019. Perhaps most pertinently, the Claimant told the GP that "*he felt attacked and unsupported*", but did not make the same allegations that he made in his evidence nor did he give him detailed particulars.

104 Ms Collins reviewed all the evidence on her return from annual leave. Ms Collins asked the Claimant's solicitor to clarify that the grounds of appeal were these were confirmed by email on 17 June 2019 (at page 220). The grounds included that the Claimant was capable of working from home and this was a reasonable adjustment; again there was no mention of this being a temporary arrangement nor any mention of any period of time over which it would last. Ms Collins also sought the response of Mr Baptie to the responses provided by the Claimant. His responses are at pages 181 – 185. In Mr Baptie's responses he gives detailed particulars to explain both why Ms Katz is not a comparator and why it was not a satisfactory arrangement for the business for the Claimant to work at home. In these responses, as in his evidence before us, Mr Baptie stated that no member of staff had been provided with a mobile phone or a computer to work from home with the very specific exception of Jane Katz. Where people had chosen to work from home on odd days they had provided the equipment or phone required.

105 In respect of the use of Skype, this point was raised by the Claimant's solicitor. Mr Baptie said that the facility for Skype was only in his office and in the boardroom and that it was not set up for any other team members of the office. Mr Baptie believed that the use of Skype was not practical in the business as it was set up, because the Claimant would have to phone the office to set up the Skype meeting with an individual if he wanted to meet them, but most importantly in the Claimant's role he was dealing with paper files, books and records and it was not possible to remotely review a physical file or to help or mentor a member of staff through a job if it was not possible to see what they were looking at. Mr Baptie considered that even just reviewing a file became difficult logistically because the file and client records would either have to be sent to the Claimant or he would have to collect them from the office outside hours, and then the file would need to be dropped off again by the Claimant when no one was there; and after that the queries would need to be discussed by phone or Skype. He considered that that was just not practicable. In addition to those points, Mr Baptie explained why it was necessary for the Claimant to be present at the office for management reasons including the weekly meeting with him and the weekly team meeting with the staff, and he believed misunderstandings could arise and things might get missed with a Skype meeting.

106 The Majority of the Tribunal found that the provision of a mobile phone or use of Skype would not have resolved the problems experienced by the Respondents, nor would it have resolved the disadvantage alleged by the Claimant to arise from the requirement to attend the office for work. The Claimant had not been in contact with colleagues by phone and Mr. Baptie's understanding was that he did not want to speak to any colleagues. The Claimant had not initiated any oral conversation with his team. All communication had been by email, which was a big problem for the Respondents, given the Claimant's role.

107 The Tribunal accepted the evidence of Mr. Baptie that it was not easy, or not possible, to manage the team without face-to-face interaction. Although a Skype meeting could be arranged for some things, the necessary level of day to day control would not be there for the Claimant as manager. The management role held by the Claimant was a fundamental role, which he did well. Kara Kelsey, who had previously carried out similar duties, worked only part-time without any management responsibility; this had been her request after the birth of her second child. It was never put to Mr. Baptie in evidence that all the Claimant's management duties could have been re-allocated on a longer term basis for Ms. Kelsey to become, in effect, the Client Principal, nor whether this was a reasonable adjustment given the burden it would place on her nor the costs implications

for the business. There was no evidence that Ms. Kelsey had done the Claimant's management duties in his absence.

108 As a further adjustment for the Claimant, the grievance appeal was a written exercise with no oral hearing.

109 As is apparent from the above findings of fact, the proposed adjustment of the Claimant working at home was considered at length by Ms. Collins. She recommended that the appeal should not be upheld but she did propose mediation.

110 By letter dated 21 June 2019, Mr Baptie informed the Claimant that the appeal was not upheld again. Mr Baptie had taken the advice of Ms Collins. His decision was a genuine one, which was not taken with the purpose or design of forcing the Claimant out of the business. Moreover, Ms Collins was not part of any scheme or plan to have the Claimant removed from the business.

Response to the grievance appeal decision

111 On 28 June 2019, the Claimant's solicitors sent a letter which stated that the Respondent's had breached the contract of employment due to breach of the implied term of trust and confidence. The letter stated that the Claimant was no longer able to work in the company. In the conclusion, the letter stated that the Claimant would work under protest to allow mediation if he was allowed to work from home and could be paid in full. It was not suggested that this working from home would be for a temporary period.

112 On 2 July 2019, Mr Baptie replied, stating that he would be prepared to undertake mediation but not on the terms proposed with the Claimant working from home and paid in full.

113 Although Mr. Baptie did not offer mediation on the terms desired by the Claimant, this was not connected in any way to the fact that the Claimant had brought his grievance. This was because Mr. Baptie had taken appropriate advice and decided that it was necessary in the interests of the management of the business and maintaining client service for the Claimant to return to work at the office; and that, if he was not fit to return to the office at all, he was absent sick.

Resignation

114 In response on 2 July 2019 (page 243), the Claimant resigned by email sent by his solicitor. The resignation email complained amongst other things of the alleged outburst by Mr Baptie on 14 February 2019 and that the Respondents had not provided the Claimant with the reasonable adjustment of working from home. The letter did not state that working from home was a temporary adjustment. The letter stated that the needs of the business were irrelevant to the issue of whether reasonable adjustment should be made. The Tribunal found that, if correct, this would be a novel interpretation of the duty to make reasonable adjustments.

The Claimant's Pay

115 The Claimant was paid his full pay until 3 May 2019. From that point, he was paid statutory sick pay until his resignation.

Guida Accountancy Limited

116 Following the resignation, Mr Baptie found out from a colleague that the Claimant was involved with another business, Guida Accountancy Limited. On investigation, Mr Baptie found that the company had been set up by the Claimant's partner on 15 May 2019 and that on 3 July 2019 the Claimant's partner had resigned, and the Claimant had been appointed as director of the company.

117 The Majority of the Employment Tribunal found that:

117.1 The new company, Guida Accountancy, was set up as a vehicle for the Claimant to enable him to set up a business essentially competing with that of the Respondent in that it provided accountancy services. The Majority inferred from the primary facts surrounding the creation of the new company, and from the fact that his partner had a job already, that the Claimant's partner had no intention to run the new business.

117.2 From the facts, the Majority of the Tribunal inferred the fact that the Claimant arranged with his partner to set up the business at about the date that the Guida Accountancy Limited was incorporated (i.e. 15 May 2019, see p.186). A further inference drawn by the Majority from the facts found was that his symptoms were improving throughout the period from his commencement on medication in February 2019 and significantly better by about mid-May 2019, when Guida was incorporated. We made this inference in part because he had been receiving medication and had counselling since about January 2019 and because of the adjustments made for him. This led to the Majority concluding that the symptoms of his disability were not such as to substantially and adversely affect his daily activities by mid-May 2019. It is important for the Majority of the Tribunal to emphasise that this finding was consistent with the finding that the Claimant was a disabled person at all material times.

117.3 The Majority did not find that the provision, criterion or practice of attending the office and social interaction put the Claimant at any substantial disadvantage by mid-May 2019 given that the Claimant was planning his own business which was likely to require face-to-face working and social interaction.

117.4 Prior to his resignation, on or around 28 June 2019, at least one client had left the Respondent to join the new firm, Guida Accountancy Limited, with further clients transferring in July 2020, bringing the total number of clients who transferred to six or seven. The Majority of the Tribunal inferred that there must have been some degree of social interaction between the Claimant and the clients involved in this transfer of clients.

117.5 The Majority did not find the Claimant's evidence about how this competitor business was set up and how the Claimant came to be its director to be credible. In examination-in-chief, the Claimant stated that his partner had decided to pass the company to him, but we found that there must be more to this decision than mere whim. We inferred that there was (1) a plan, from the incorporation of the company, involving the Claimant, that the Claimant would run this business when he left the Respondents' employment and (2) the Claimant resigned to work in this business, evidenced by the fact that he resigned on 2 July and was appointed director of the new company on the 3 July 2019.

117.6 The Claimant claimed in cross-examination that he did not begin to work in the new business until 1 August 2019, but the Majority concluded that this is unlikely to be correct or else there was no need to be a director by 3 July 2019. The fact was that one client had already moved on about 28 June 2019 and the rest moved in July 2020.

117.7 We noted that page 172, an email from his solicitor of 3 May 2019, was akin to a letter before action, sent shortly before Guida Accountancy was set up.

The Claimant's evidence

118 In assessing the reasonableness of the adjustment of working from home the Tribunal considered that it was important to record the Claimant's evidence in cross-examination and in answers to the Tribunal's questions about his role and the effect of working from home might have. His evidence included the following:

118.1 He had management responsibility in the business and his role included monitoring other members of staff.

118.2 There was no period prior to the onset of his symptoms of depression in 2019 where he had worked from home for more than the odd day.

118.3 He was not able to do face-to-face meetings (and his solicitor did not assert that he could) but he had offered to do them by Skype.

118.4 It was necessary to put together a paper file to deal with a job properly.

118.5 Managing the work done by the other members of staff and the allocation of work was part of his role.

118.6 The Claimant was responsible for managing staff day-to-day with all managerial duties falling within his role.

118.7 The Claimant accepted that the First Respondent was a small company and it could accommodate reasonable adjustments requested in the short term but not in the long term.

118.8 When it was put to him that he could not keep his finger on the pulse via Skype he stated that Skype would not be ideal but it could be done.

118.9 It was put to him that the Respondents' case was that they were unable to cope with the Claimant working from home for a prolonged period and that it was detrimental to the business. The Claimant responded that it was "*not an ideal situation*".

118.10 The Claimant agreed with paragraph 30 of Mr Baptie's witness statement in its description of his duties.

119 Although the Claimant's case in oral evidence before us was that the reasonable adjustment that he was seeking was to be permitted to work from home on a temporary basis, it was not put to the employer at the time of the events in question (such as during the grievance or during the grievance appeal) that this would be a short, medium or long-term period. At that stage, the Claimant and his GP did not give any indication of when he would be fit to return to work in the office; the evidence in the letter from the GP of 23 May 2019 suggests that a return to work in the office is either not possible or some distance into the future (see p.214). From the evidence that we heard, we decided that the Claimant was seeking an open-ended adjustment where he could work from home over a longer period. In cross-examination the Claimant could not say when he could go back on a phased return to work, but he did say that if adjustments had been made his return could have been quicker and that events on 14 February 2019 had destroyed him. As we have found the Claimant's perception of what had occurred on 14 February 2019 was incorrect as a matter of fact, and that things which he thought had been said to him had not been said. Moreover, although the Claimant said in evidence that events on 14 February 2019 had "*set his condition back months*", this is inconsistent with the fact that he made no complaint at the time. We find that the events on 14 February 2019 had no particular effect on his symptoms.

120 The Claimant did accept that his symptoms of depression and anxiety did impact his ability to do his job in the short term. He accepted that he could not allocate work whilst working from home.

121 In oral evidence, the Claimant made allegations about the meeting on 13 March 2019; he stated that he had found it very difficult to attend, that Mr Baptie had shown contempt for him and had not read the Fit note. We find that this recollection by the Claimant is incorrect and we preferred Mr Baptie's evidence about that meeting, not least because the alleged contempt for the Claimant was never mentioned in the grievance nor to the Occupational Health nurse during the consultation.

122 The Majority of the Tribunal found that the Claimant did exaggerate his symptoms particularly around the time of his resignation. Although his evidence included that he had panic attacks, in the GP letter (at page 213 – 214, 23 May 2019) and in the Fit note, there is no mention of any panic attacks. The Tribunal understood that a panic attack is a specific and often serious symptom of a mental impairment. When this inconsistency was put to him by the Employment Judge, he stated that he had panic attacks only at home after the meeting on 14 February 2019 and that it was not something that he usually suffered from. Given that we have found that the events of 14 February 2019 were not as the Claimant perceived, and by about 12 March 2019, the Claimant was in a "*better place*"

(as he put it), the Tribunal found that he did not have the panic attacks alleged. In respect of the alleged mental state at the date of his resignation, the Claimant stated that it was not good and that he had depression still and had "*quite a way to go*". The Majority of the Tribunal found this to be inconsistent with the setting up of the new business, the fact that the Claimant became a director the day after his resignation, and that former clients were recruited, which involved some social interaction at least. The Majority of the Tribunal inferred that, going forward, the Claimant would need to have at least some social interaction with clients in an office environment, given that client visits and hard copies of documents were likely to be required.

Findings of Fact of the Minority

123 The Minority, Mr. Lush, agreed with the findings of fact set out above, save in respect of the following facts.

124 In respect of paragraph 77, the Minority found that the adjustment sought by the Claimant was open-ended, because the Claimant's symptoms of his impairment were unpredictable.

125 In respect of paragraph 106, the Minority found that the provision of Skype or a company mobile phone could have cured the substantial disadvantage caused by the requirement on the Claimant to attend work at the office. The Minority agreed that all communication being by email did cause a big problem for the Respondents.

126 Although paragraph 107 above was agreed, the Minority considered that although there was no evidence that Ms. Kelsey did perform the Claimant's managerial duties in the absence of the Claimant, there was evidence at paragraph 21 of the Claimant's witness statement that she potentially could do so.

127 In respect of paragraph 117 above:

127.1 Paragraphs 117.1 and 117.4 were agreed.

127.2 Paragraphs 117.2 and 117.3 were not agreed. Mr. Baptie adopted an all or nothing approach to the issue of the requirement for the Claimant to work at the office; he did not try adjustments and no solution was attempted. If there had been communication by Skype, the Claimant may have felt more confident about a return to the office. If the Claimant was well, he would have returned to the office.

127.3 In respect of 117.5, the Minority agreed with the facts found by the Majority, save as follows. The Minority found that the new business was a fall-back position for the Claimant (who was on Statutory Sick Pay at the time the company was incorporated) if he decided to leave the Respondents' employment, because at the time it was set up his grievance appeal was outstanding.

127.4 The facts stated in paragraphs 117.6 and 117.7 were agreed.

128 In respect of paragraph 123 above, although the Minority agreed with the findings of fact of the Majority up to the last two sentence (7 lines), the Minority found that the Claimant would be working from home in his new business and social interaction would not be required.

The Law

129 The Tribunal directed itself to the relevant law as follows.

Breach of the duty to make reasonable adjustments

130 In practice, when hearing complaints of disability discrimination, an Employment Tribunal should first deal with the complaint alleging the failure to make reasonable adjustments: see Archibald v Fife Council [2004] IRLR 651 at paragraph 32.

131 Given the carefully drawn statutory duty to make reasonable adjustments, it is helpful to set out section 20 Equality Act 2010 ("EQA") at the outset:

> "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.
>
> (4) The second requirement is a requirement, where a physical feature 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.
>
> (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid."

132. A statutory Code of Practice on Employment has been published by the Equality and Human Rights Commission 2011 ("the Code"). Courts are obliged to take it into consideration whenever relevant. Chapter 6 is concerned with the duty to make reasonable adjustments, and emphasises that the duty is one requiring an employer to take positive steps to ensure disabled people can progress in employment. The Code includes:

> 132.1 The phrase "provision, criterion or practice" (which is not defined in the EA 2010) should be construed widely so as to include any formal or informal

policies, rules, practices, arrangements including one-off decisions and actions.

132.2 Paragraphs 6.23 to 6.29 of the Code give guidance as to what is meant by "reasonable steps". 6.23 provides:

"The duty to make adjustments requires employers to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments. The Act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case."

132.3 Paragraph 6.28 identifies some of the factors which might be taken into account when deciding whether a step is reasonable:

- *"whether taking any particular steps would be effective in preventing the substantial disadvantage;*
- *the practicability of the step;*
- *the financial and other costs of making the adjustment and the extent of any disruption caused;*
- *the extent of the employer's financial or other resources;*
- *theavailabilitytotheemployeroffinancialorotherassistancetohelpmake an adjustment (such as advice through Access to Work); and*
- *the type and size of the employer. "*

133. Ultimately, the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case: see paragraph 6.29.

134. The Employment Tribunal considering a claim that an employer has discriminated against an employee by failing to comply with the duty to make reasonable adjustments must identify:

a. the relevant provision, criterion or practice made by the employer; and/or

b. the relevant physical features of the premises occupied by the employer and/or the auxiliary aid required;

c. the identity of non-disabled comparators (where appropriate); and

d. the nature and extent of the substantial disadvantage suffered by the Claimant.

135. The above steps follow the guidance provided in Environment Agency v Rowan [2008] IRLR 20 at paragraph 27, approved in Newham Sixth Form College v Sanders [2014] EWCA Civ 734.

136. Although there is no formal burden on the claimant to establish what adjustments should have been made, there must be evidence before the tribunal to trigger the duty (and also evidence that a particular adjustment would have been effective).

137. Substantial disadvantage is such disadvantage as is more than minor or trivial.

138. In Archibald v Fife, the House of Lords held what steps are reasonable depends on the circumstances of the particular case, which the employment tribunal must establish (paragraph 43).

139. In applying Archibald v Fife, in Chief Constable of South Yorkshire v Jelic [2010] IRLR 744, the EAT held that the test of reasonableness was an objective one, for Employment Tribunals to decide. The EAT also emphasized that each case turned on its own facts.

140. This Tribunal reminded itself that even where the duty is engaged, not all adjustments will be reasonable even where they overcome the disadvantage.

141. The Tribunal also considered the following passage in Griffiths (at paragraph 80):
"The section 20 duty is normally relevant when looking into the future; it is designed to help prevent treatment which might give rise to a section 15 claim from arising. But that is not the purpose of the section 20 complaint here. It is really a staging post in challenging in order to invalidate the written warning – treatment which has already arisen. In my view there is a certain artificiality in arguing the case in that way. I respectfully agree with some observations of HH Judge Richardson in *General Dynamics Information Technology Ltd v Carranza* [2015] ICR 169 para. 34 when he said that dismissal – and I would add any other disciplinary sanction – for poor attendance can be quite difficult to analyse in terms of the reasonable adjustments duty, and that:-

"Parties and employment tribunals should consider carefully whether the duty to make reasonable adjustments is really in play or whether the case is best considered and analysed under the new, robust, section 15"."

Requirement of knowledge

142. The requirement of knowledge under section 15(2) EQA compared to the knowledge required to trigger the duty to make reasonable adjustments (Sch 8 para 20 EQA) are similar but not identical. Neither party suggested anything turned on the differences between the two types of knowledge, but the Tribunal kept the difference in mind in reaching its conclusions.

143. The duty to make reasonable adjustments does not arise if the employer does not know, and could not reasonably be expected to know, that an employee has a disability and is likely to be placed at a disadvantage referred to in the three requirements within section 20: EQA 2010 Sch 8 para 20.

144. The legal principles emerging from the appellate cases on the application of the knowledge provisions relevant to section 15(2) EQA were summarised in A Limited v Z [2020] ICR 199. Of these principles, the following are relevant when considering complaints under sections 20-21 EA 2010.

144.1 The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of section 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long- term effect, see Donelien v Liberata UK Ltd UKEAT/0297/14 at paragraph 5, per Langstaff P.

144.2 The question of reasonableness is one of fact and evaluation, see Donelien v Liberata UK Ltd [2018] IRLR 535 CA at paragraph 27; nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.

144.3 The approach adopted to answering the question thus posed by section 15(2) is to be informed by the Code, which (relevantly) provides as follows:

"5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.

5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

144.4 The question is not what the respondent might reasonably have been expected to do, which was to make inquiries into the claimant's mental health, but to consider what the respondent might reasonably have been expected to know after making those inquiries.

145. In respect of the knowledge requirement before the duty to make reasonable adjustments arises, the Code gives the following guidance on para 8 Sch 20 EQA, at paragraphs 6.19 – 6.21.

145.1 An employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

145.2 If a disabled person expects an employer to make a reasonable adjustment, they will need to provide the employer – or someone acting on their behalf – with sufficient information to carry out that adjustment.

Harassment

146. Section 26 provides, where relevant:

> "(1) A person (A) harasses another (B) if –
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of –
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> …
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect."

147. Paragraph 7.9 of the Code states that "related to" in section 26(1)(a) should be given "a broad meaning in that the conduct does not have to be because of the protected characteristic".

148. The Code continues that "related to" includes a situation where the conduct is related to the worker's own protected characteristic, or where there is any connection with a protected characteristic.

149. In respect of the proper application of section 26(1)(b) and (4), which deal with the proscribed consequences of the unwanted conduct, we considered Dhaliwal v Richmond Pharmacology [2009] IRLR 336. Although that was a case decided before the Equality Act 2010, the provisions in issue were at section 3A Race Relations Act 1976, and were similar to those in section 26. We find it helpful to set out the following extracts of the judgment of Underhill J(P):

> "14 Secondly, it is important to note the formal breakdown of "element (2)" into two alternative bases of liability – "purpose" and "effect". That means that a respondent may be held liable on the basis that the effect of his conduct has been to produce the proscribed consequences even if that was not his purpose; and, conversely, that he may be liable if he acted for the purposes of producing the proscribed consequences but did not in fact do so (or in any event has not been shown to have done so). It might be thought that successful claims of the latter kind will be rare, since in a case where

> the respondent has intended to bring about the proscribed consequences, and his conduct has had a sufficient impact on the claimant for her to bring proceedings, it would be prima facie surprising if the tribunal were not to find that those consequences had occurred. For that reason we suspect that in most cases the primary focus will be on the effect of the unwanted conduct rather than on the respondent's purpose (though that does not necessarily exclude consideration of the respondent's mental processes because of "element (3)" as discussed below).
>
> 15 Thirdly, although the proviso in subsection (2) is rather clumsily expressed, its broad thrust seems to us to be clear. A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. … The proscribed consequences are, of their nature, concerned with the feelings of the putative victim: that is, the victim must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created. That can, if you like, be described as introducing a "subjective" element; but overall the criterion is objective because what the tribunal is required to consider is whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Thus if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt. See also our observations at para 22 below.
> …
>
> 22 On that basis we cannot accept Mr Majumdar's submission that Dr Lorch's remark could not reasonably have been perceived as a violation of the claimant's dignity. We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase..."

150. Paragraph 15 above is authority for the proposition that the criterion in section 26(4) EA were overall objective criterion. The Tribunal found that, applying Dhaliwal and the reasoning of Underhill J, this was a correct interpretation of the law.

151. The Tribunal considered Paragraph 22 of Dhaliwal, and Paragraph 13 of Grant v HM Land Registry [2011] IRLR 751.

152. We directed ourselves that not every unwanted comment or act related to a protected characteristic may violate a person's dignity or create an offensive atmosphere. We considered that, at least as a matter of practice rather than law, more than in other areas of discrimination law, context is everything in cases where harassment is alleged. Put shortly, the context in which words are used or acts occur is relevant to their effect.

Direct Discrimination

153. Section 13 EQA 2010 provides:

> "A person (A) treats another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

154. The required comparison must be by reference to circumstances. Section 23(1) EQA provides:

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

155. Whether the comparison is sufficiently similar will be a question of fact and degree for the tribunal, see Hewage v Grampian Heath Board [2012] ICR 1054.

156. In Shamoon, at 9-11, Lord Nicholls gave guidance as to how an employment tribunal may approach a complaint of direct discrimination and explained that it was sometimes unnecessary to identify a comparator:

> "…*employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others*."

Causation in direct discrimination cases

157. If the Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason: see the observations of Lord Nicholls in Nagarajan v London Regional Transport [1999] ICR 877 as explained by Peter Gibson LJ in Igen v Wong [2005] ICR 931, paragraph 37.

Discrimination arising from disability

158. Section 15 EA provides:

"*(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."

Causation

159. The Equality and Human Rights Commission's Code of Practice on Employment states that the consequence of a disability "*includes anything which is the result, effect or outcome of a disabled person's disability*": see para 5.9.

160. There are two parts to the causation test:

a) There must be "something arising" in consequence of the Claimant's disability; and

b) The unfavourable treatment must be because of that "something arising."

161. In Pnaiser v NHS England and anor [2016] IRLR 170 EAT, Simler J summarised the proper approach to determining section 15 EA claims in paragraph 31

162. As noted in Pnaiser, the causal link between the "something" that causes unfavourable treatment and the disability may include more than one link. Simler P concluded that the tribunal had applied too strict a causation test (paragraph 66):

> *"The critical question was whether on the objective facts, her refusal to return arose in 'consequence of' (rather than being caused by) her disability. This is a looser connection that might involve more than one link in the chain of consequences."*

163. In City of York Council v Grosset [2018] ICR 1492, Sales LJ noted that section 15(1) posed two questions. The first question involves examination of the employer's state of mind (did A treat B less favourably because of an identified "something"); the second question of whether the "something" for section 15 purposes arises in consequence of the employee's disability is an objective matter. See Grosset at paragraphs 37-38.

Employer's knowledge of causal link

164. It is no defence if the respondent did not know that the 'something' leading to the unfavourable treatment was a consequence of the disability: see City of York Council v Grosset [2018] ICR 1492.

Burden of proof

165. As with other types of discrimination complaints, a claimant bringing a complaint of section 15 discrimination bears an initial burden of proof. He/she must prove facts from which the tribunal could decide that an unlawful act of discrimination has taken place.

166. This means that the claimant has to show:

- That he was disabled at relevant times;
- That he has been subjected to unfavourable treatment;
- A link between the disability and the "something" that is said to be the ground for the unfavourable treatment;
- Evidence from which the tribunal could infer that the "something" was an effective reason or cause of the unfavourable treatment.

167. If the claimant proves facts from which the tribunal could conclude that there was section 15 discrimination, the burden shifts, in accordance with section 136 EA, to the respondent to prove a non-discriminatory explanation, or to justify the treatment under section 15(1)(b).

168. Simler P stated in Pnaiser that:

> "*Although it can be helpful in some cases for Tribunals to go through the two stages suggested in Igen v Wong, as the authorities demonstrate, it is not necessarily an error of law not to do so, and in many cases, moving straight to the second stage is sensible*".

Justification defence: Proportionality

169. Section 15(2)(b) requires the putative discriminator A to show that "the treatment" of B is a proportionate means of achieving a legitimate aim. The focus is therefore upon "the treatment"; and the starting point therefore must be that the tribunal should apply s.15(2)(b) by identifying the act or omission which constitutes unfavourable treatment and asking whether that act or omission is a proportionate means of achieving a legitimate aim: Buchanan v Commissioner of Police for the Metropolis [2016] IRLR 918.

170. The correct test for assessing whether treatment is proportionate was explained (looking at section 15 EQA in the housing context) in the Supreme Court in Akerman Livingstone v Aster Communities [2015] AC 1399 at paragraph 28 (per Baroness Hale):

170.1 Is the objective sufficiently important to justify limiting a fundamental right?

170.2 Is the measure rationally connected to the objective?

170.3 Are the means chosen no more than is necessary to accomplish the objective?

170.4 Are the disadvantages caused disproportionate to the aims pursued?

Put in context, the fourth stage asks: does the treatment strike a fair balance between the

employer's needs to accomplish its objective and the disadvantages thereby caused to the Claimant as a disabled person?

171. Baroness Hale sat in both the above case and in Homer v Chief Constable of West Yorkshire Police [2012] IRLR 601, in which essentially the same key principles were set out. At paragraph 25, Baroness Hale explains:

> *"To some extent the answer depends upon whether there were non-discriminatory alternatives available"*

172. The judgment of the Court of Appeal in Hardys & Hansons plc v Lax [2005] IRLR 726, [2005] ICR 1565, concerned an appeal relating to a complaint of indirect discrimination on the grounds of sex. The Court held that it is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. The Court emphasised that there is no room to introduce into the test of objective justification the 'range of reasonable responses' which is available to an employer in cases of unfair dismissal.

Indirect discrimination

173. Section 19 EQA provides as follows:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if -
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

174. Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead, it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment - the PCP is applied indiscriminately to all - but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to

anticipate or to spot: see Essop v Home Office [2017] UKSC at paragraph 25.

175. There is no finding of unlawful discrimination until all four elements of the definition are met.

176. The requirement to justify a PCP should not be seen as placing an unreasonable burden upon respondents. Nor should it be seen as casting some sort of shadow or stigma upon them. There is no shame in it. There may well be very good reasons for the PCP in question - such as fitness levels in fire-fighters or policemen: see Essop at paragraph 29.

Discrimination by Victimisation

177. Section 27 EQA provides, where relevant:

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

178. The detriment must be "because of" the protected act, but this is not a "but for" test: see Bailey v Chief Constable of Greater Manchester [2017] EWCA Civ. 425. Although motive is not required, the necessary link in the mind of the discriminator between the doing of the acts and the less favourable treatment must be shown to exist: see R (E) v Governing Body of JFS [2009] 1 AER 319, approving Nagarajan v London Regional Transport [1999] IRLR 572 on this point.

179. If the tribunal is satisfied that the protected act is one of the effective reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason.

Burden of proof in discrimination cases

180. We reminded ourselves of the reversal of the burden of proof provisions within section 136(2) EQA 2010, as explained in Igen v Wong [2005] EWCA Civ. 142 and Madarassy v Nomura [2007] ICR 867.

181. In Igen v Wong, at paragraph (11) of the Appendix, it is pointed out that, if the burden of proof shifts, it is necessary for an employer to prove that the treatment was in no sense whatsoever on the grounds of the protected characteristic, because "no discrimination whatsoever" is compatible with the Burden of Proof Directive. The guidance in Igen v Wong was approved by the Supreme Court in Hewage v Grampian Health Board.

182. The guidance given by Mummery LJ in Madarassy was expressly endorsed by the Supreme Court in Hewage v Grampian Health Board [2012] IRLR 870 where Lord Hope added at paragraph 31:

> "The complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the complainant which is unlawful. So the prima facie case must be *proved*, and it is for the claimant to discharge that burden."

183. Lord Hope emphasised the point that the burden of proof provisions have a role to play where there is room for doubt as to the facts necessary to establish discrimination, but that in a case where a tribunal is in a position to make positive findings on the evidence one way or another, they have no role to play.

184. In respect of the application of the burden of proof provisions in complaints of breach of the duty to make reasonable adjustments, we considered the guidance in Project Management Institute v Latif [2007] IRLR 579 (Elias P, as he then was, presiding) at paras 44, 53-54. In short, the Claimant must prove the facts necessary to prove discrimination. If the burden shifts, the employer must show the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one to make.

Constructive Dismissal

185. Section 95(1)(c) ERA provides that there is a dismissal when the employee terminates the contract with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.

186. The burden was on the employee to prove the following:

(i) That there was a fundamental breach of contract on the part of the employer;

(ii) That the employer's breach caused the employee to resign;

(iii) The employee did not affirm the contract and lose the right to resign and claim constructive dismissal.

187. The propositions of law which can be derived from the authorities concerning constructive unfair dismissal are as follows:

187.1 The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment:

see *Western Excavation Limited v Sharp*.

187.2 It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: see *Malik v Bank of Credit and Commerce International* [1998] AC20 34h-35d and 45c-46e.

187.3 Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, Browne-Wilkinson J in *Woods v Wm Car services (Peterborough) Limited* [1981] ICR 666 at 672a; *Morrow v Safeway Stores* [2002] IRLR 9. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship.

187.4 The test of whether there has been a breach of the implied term of trust and confidence is objective as Lord Nicholls said in *Malik* at page 35c. The conduct relied as constituting the breach must impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer.

187.5 A breach occurs when the proscribed conduct takes place: see *Malik*.

187.6 Reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach; but it is not a legal requirement: see *Bournemouth University v Buckland* [2010] ICR 908 at para 28.

187.7 In terms of causation, the Claimant must show that she resigned in response to this breach, not for some other reason. But the breach need only be an effective cause, not the sole or primary cause, of the resignation.

188. In Kaur v Leeds Teaching Hospital NHS Trust [2018] IRLR, the Court of Appeal approved the guidance given in Waltham Forest LBC v Omilaju (at paragraph 15-16). Reading those authorities, the following comprehensive guidance is given on the "last straw" doctrine:

188.1 The repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence: Lewis v Motorworld Garages Ltd [1986] ICR 157, per Neill LJ (p 167C).

188.2 In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (Glidewell LJ at p 169F)

188.3 Although the final straw may be relatively insignificant, it must not be

trivial.

188.4 The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

188.5 The final straw need not be characterised as 'unreasonable' or 'blameworthy' conduct, even if it usually will be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy.

188.6 The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality referred to.

188.7 If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect.

188.8 If an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign, soldiers on and affirms the contract, he cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.

188.9 The issue of affirmation may arise in the context of a cumulative breach because in many such cases the employer's conduct will have crossed the *Malik* threshold at some earlier point than that at which the employee finally resigns; and, on ordinary principles, if he or she does not resign promptly at that point but "soldiers on" they will be held to have affirmed the contract. However, if the conduct in question is continued by a further act or acts, in response to which the employee does resign, he or she can still rely on the totality of the conduct in order to establish a breach of the *Malik* term.

188.10 Even when correctly used in the context of a cumulative breach, there are two theoretically distinct legal effects to which the "last straw" label can be applied. The first is where the legal significance of the final act in the series is that the employer's conduct had not previously crossed the Malik threshold: in such a case the breaking of the camel's back consists in the repudiation of the contract. In the second situation, the

employer's conduct has already crossed that threshold at an earlier stage, but the employee has soldiered on until the later act which triggers his resignation: in this case, by contrast, the breaking of the camel's back consists in the employee's decision to accept, the legal significance of the last straw being that it revives his or her right to do so.

188.11 The affirmation point discussed in Omilaju will not arise in every cumulative breach case. "There will in such a case always, by definition, be a final act which causes the employee to resign, but it will not necessarily be trivial: it may be a whole extra bale of straw. Indeed in some cases it may be heavy enough to break the camel's back by itself (i.e. to constitute a repudiation in its own right), in which case the fact that there were previous breaches may be irrelevant, even though the claimant seeks to rely on them just in case (or for their prejudicial effect)." (per Underhill LJ).

189. We note that a breach of trust and confidence has two limbs:

189.1 the employer must have conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee; and

189.2 that there be no reasonable or proper cause for the conduct.

Submissions

190. Counsel for the parties made oral submissions, by going through the List of Issues. Regrettably, neither Counsel set out some of the more complex law in this area in short or digestible points, which was probably the product of the unwieldy number of complaints and issues. After the Tribunal explained that it was difficult for them to read authorities that were referred to but not produced (particularly as this was a CVP hearing), Mr. Rahman sent to the Tribunal by email various authorities, but some provided were only a PDF of the headnote.

191. The Tribunal took into account each submission made by the parties even if each point is not addressed separately below.

Conclusions of the Majority

192. Applying the facts found and the law above to the issues between the parties, the Majority of the Tribunal reached the following conclusions.

Constructive dismissal

Issue 1: Breach of the implied term of trust and confidence by not making reasonable adjustments and not paying salary

193. Although this part of the Claimant's case on constructive dismissal was not distinguished by Counsel in submissions from the constructive dismissal complaint pleaded in issue 2 (which rested on the "last straw"), the Tribunal have considered this separately. This part of the Claimant's case appears to rely on two separate breaches: a failure to make reasonable adjustments and a failure to pay the Claimant his full pay.

194. The Tribunal concluded that the Claimant was not entitled to his full pay. The Claimant's contract of employment (clause 7) evidenced that the First Respondent had not agreed to pay the Claimant contractual sick pay. From 15 April 2019, the Respondents required the Claimant to begin a phased return to work at the office. He refused to do so, and did not work for the Respondent after that date. The most appropriate way for the Respondents to treat the absence in those circumstances was as sickness absence, rather than absence without permission.

195. The Claimant was paid in full to the end of April 2020, which was more than he was contractually entitled to be paid, and thereafter he was paid Statutory Sick Pay in accordance with his contractual entitlement.

196. In the circumstances, where the Claimant refused to attend the office at all or engage in a phased return, and the Respondent acted reasonably, such as by following occupational health advice and the advice of his HR consultants to form and implement such a plan, there was no breach of the implied term of trust and confidence in the failure to pay the Claimant his full pay for May or June 2020. The Claimant may have disagreed with the Respondents' phased return plan, but the Respondents did not act so as to seriously damage the employment relationship by attempting to implement the plan.

197. The Majority of the Tribunal concluded that the Respondents did not breach the implied term of trust and confidence by refusing to make the adjustments sought by the Claimant from 15 April 2019 onwards, including that of allowing the Claimant to work at home full-time on an open-ended basis, for the reasons set out below.

198. The conclusions of the Minority of the Tribunal are set out below. The Majority disagreed with the Minority in part because it decided that there was no breach of the duty to make reasonable adjustments, whether by failing to provide an auxiliary aid or otherwise. The Majority found that the adjustments relied upon at this hearing would not have had any effect on the alleged substantial disadvantage, because the Claimant was passive and avoiding all oral communication with his team. Moreover, there was no breach of the duty to make reasonable adjustments in circumstances in which the Claimant had not been flexible by attempting the return to work plan proposed.

Issue 2: Series of incidents sufficient to amount to a breach of the implied term of trust and confidence?

199. At the outset of her submissions, Ms. Johns confirmed that the Claimant's case was that the events listed at 2a – 2o on the list of issues were not alleged as individual breaches, and that this was a "last straw" case.

200. As we have explained, Mr. Baptie did not shout or swear at the Claimant during the meeting on 14 February 2019, nor did he tell him that he should consider continuing to work for the Respondents. The Tribunal accepted the evidence of Mr. Baptie about the

events on 13 and 14 February 2020 for reasons set out above.

201. Given that the remainder of the events within sub-paragraphs 2a) – 2(o) are not alleged as individual breaches, the Tribunal does not need to provide conclusions in respect of each of them.

202. In any event, as set out in the findings of fact, the Tribunal found that allegations 2b, c, d, e, g, i, j, k, l, m, n, and o were not upheld.

203. For the avoidance of doubt, the Tribunal unanimously concluded that there was no campaign of harassment or victimisation. In particular, although the Tribunal found that the grievance investigation could have been more thorough and more rounded in respect of the examination of the Claimant's case, there was no evidence of harassment or victimisation. The grievance and the grievance appeal were handled in an impartial way, by experienced HR consultants.

204. Mr. Baptie did not act in an unreasonable way by relying on the advice of the HR consultants; it is difficult to understand what else he could have done in the absence of a HR manager within the First Respondent. Moreover, as the Managing Director and the only person more senior that the Claimant within the business, he was entitled to make the decisions based on their advice, even if complaints within the grievance involved him; he had acted in a reasonable way in the first place by getting an independent HR consultant to investigate the grievance. There was no evidence that he influenced or forced Ms. Dansey to reach the conclusions that she reached.

205. On the issues raised at 2i and 2k, the Claimant's case was inconsistent in any event. At paragraph 36 of the Claimant's witness statement, the allegation was that Ms. Dansey had pre-judged the grievance; but the particulars of the Claimant's case in the List of Issues alleged that the Second Respondent was involved in the grievance and his decisions were not impartial.

206. In respect of allegation 2j, in submissions, Ms. Johns accepted that the Claimant was not suspended.

207. The Tribunal concluded that Mr. Baptie did consider mediation: see findings of fact above and p242. It was a reasonable decision for him not to agree mediation on the conditions proposed by the Claimant; and it was certainly not a decision that was capable of forming part of a series of events amounting to a breach of the implied term of trust and confidence.

208. In respect of allegations 2f and 2h, the conclusions of the Majority and the Minority are set out below. The Majority concluded that the Respondents did make reasonable adjustments and were not liable for disability discrimination. The allegation at 2(m) is misconceived.

209. The Majority of the Tribunal concluded that Mr. Baptie did not breach the implied term of trust and confidence by the matters set out at issues 2(a) – 2(o).

Issue 3

210. The Majority of the Tribunal found that there was no repudiatory breach of contract

by the Claimant.

211. The Minority of the Tribunal found that there was a repudiatory breach for reasons set out below.

Issue 4: Did the Claimant resign in response to any repudiatory breach?

212. In any event, the Majority of the Tribunal did not find that the Claimant's evidence about how Guida Accountancy Limited was formed, and why, to be credible. If the new business was not being pursued by the Claimant as his business, the Claimant would have been more flexible about his job and the return to work at the office plan. The Majority inferred that the Claimant did not engage with the plan and resigned solely because he wanted to pursue this business venture, which explains why he was appointed Director of Guida the day after his resignation.

Issues 6 to 9: Unfair dismissal, Polkey and Contributory fault

213. The Majority of the Tribunal found that there was no dismissal. The Claimant resigned.

214. In any event, if the Majority was wrong about this, and the dismissal was unfair, it concluded that it was not sustainable for the Claimant to work from home. Paper files would need to be transported back and forth to his home, and there were performance concerns. It was difficult to see how the Claimant could continue working at home with his lack of any oral communication and the problems posed by the lack of a manager allocating work, monitoring the team, and the supervision of files. The Tribunal considered that within one month the difficulties caused by him working at home, whether or not he was provided with Skype and a mobile phone, would have caused a large impact on this small business. We concluded that the Claimant's termination of his employment would have occurred only one month later even if the adjustments relied upon had been made.

Issues 11-12: The Respondent's knowledge of disability

215. The List of Issues drafted by the parties did not correctly set out the issues of knowledge which the Tribunal were required to determine. The Tribunal directed itself in accordance with the law set out above.

216. The Tribunal unanimously agreed as follows:

216.1 The Respondents did not know, and could not reasonably be expected to know, that the Claimant had a disability in November 2018, nor in December 2018, nor in January 2019. The relevant findings of fact are repeated.

216.2 The Claimant did not inform Mr. Baptie of the severity of his depression on 14 February 2019. We accepted Mr. Baptie's account of that meeting.

216.3 However, the Respondent could reasonably have been expected to know by about 21 February 2019 that the Claimant was a disabled person, because by that stage Mr. Baptie had the requisite constructive

> knowledge. Given the presentation of the Claimant on 13 and 14 February 2019, which appeared to be out of character for the Claimant, the symptoms of his depression could be seen to be having a more than minor or trivial effect on the Claimant's ability to control his mood. Furthermore, the information received from the client coupled with the information received from the Claimant, should have made the Respondent make further inquiries about the fact that the Claimant's symptoms appeared to have recurred. These inquiries would have revealed that the symptoms had recurred; there is no suggestion that the Claimant was in denial or hid his symptoms.

217. Under Sch 8 para 20 EQA, the duty to make reasonable adjustments does not arise simply because the employer could reasonably be expected to know that an employee has a disability unless it could reasonably be expected to know that the Claimant is likely to be placed at a disadvantage referred to in the three requirements. As at the 21 February 2019, however, the Respondents could not have known that the Claimant was likely to be placed at the disadvantage referred to in the three requirements in section 20 EQA. By that stage, the Claimant had not asked to work from home, nor explained that he found it difficult to work in the office with others. The Tribunal found that the Respondent's had the knowledge required by Sch 8 para 20 EQA on 12 March 2019: see paragraphs 43-45 above.

Issues 24 – 25: Duty to make reasonable adjustments

218. Given the complaints of breach of the duty to make reasonable adjustments, the list of issues is not the tool that the Tribunal would have expected from parties who are legally represented. Part of the problem lies in the number of complaints over all, which has removed focus on the need to identify specific breaches of the duty to make reasonable adjustments, and part lies in the failure of the list to set out each of the necessary legal and factual issues which are identified in Rowan.

219. For example, the date of the alleged breach or breaches is not specified in the list of issues. At the hearing, and in submissions, Counsel for the Claimant did not submit the date of the alleged breach or breaches. The date when the duty arises may not be (and often will not be) the date when the duty is breached: see Morgan. This absence of key particulars made the job of the Tribunal more difficult.

220. In the revised and annotated list of issues, the Claimant relied on a single PCP of the requirement for face-to-face team work and the requirement for the Claimant to be physically on hand to support the team, check and allocate work. The Respondents accepted in submissions that the PCP which placed the Claimant at a disadvantage was the requirement to attend work at the office. The Claimant's submissions effectively relied on the same PCP. In submissions, Counsel for the parties did not identify the extent of the disadvantage to the Claimant caused by the PCP.

221. The Tribunal concluded that the PCP was the requirement for the Claimant to work at the office. The disadvantage arose from the Claimant's symptoms of anxiety, specifically social anxiety, and depression.

222. A non-disabled comparator would be a Client Principal, who was number 2 in the same organisation, who suffered no disadvantage by attending the office and carried out face-to-face work with the accounting team.

223. The Majority found that the disadvantage at which the Claimant was placed by the PCP was substantial by 14 February 2019.

224. The Respondents had the requisite knowledge that the PCP placed the Claimant at a more than minor disadvantage on 12 March 2019, when Mr. Baptie was handed the Fit note recommending that the Claimant work from home.

225. Therefore, the duty to make reasonable adjustments was not triggered on 21 February 2019, when Mr. Baptie learned that the Claimant was likely to be a disabled person.

226. However, there is no dispute that suitable adjustments were made by the Respondents from 14 February 2019, by allowing time off, after which the Claimant went on annual leave. Subsequently, on 12 March 2019, Mr. Baptie agreed that the Claimant could work from home for the following 4 weeks as suggested by the GP Fit Note.

227. Turning to issue 25, which sets out adjustments which were alleged not to be made, the Majority concluded as follows.

228. In respect of issue 25(a), this begins in a confused way, because the Respondents obviously did consider the Claimant's disability by making several reasonable adjustments for him. These included being allowed to work from home for a period from 12 March 2019, sending him emails about client's calls whilst he worked from home, the agreement that his solicitor could attend the grievance meeting, the agreement that the grievance appeal should be in writing, and the adjustment of a phased return to work at the office over 4 weeks with 1 day per week working from home.

229. Moreover, issue 25(a) alleges that a reasonable adjustment would have been to alter the duties of his existing post. This was never suggested by the Claimant; his case was that he could do the same duties of Client Principal if adjustments were made.

230. The substance of issue/complaint 25(a) is that the Claimant should have been allowed to continue working from home and use Skype to contact clients or team mates.

231. The Majority of the Tribunal concluded that permitting the Claimant to continue to work from home was not a reasonable adjustment. We found that Mr. Baptie's evidence was compelling on this point and that the Claimant's evidence, if anything, tended to support the Respondents' case that working from home for longer than 4 weeks was not a reasonable adjustment on the facts in this case; we repeat paragraph 118 above ("The Claimant's evidence" section). In assessing the question of the reasonableness of this adjustment, we considered the relevant matters identified by the Code and concluded as follows:

231.1 The First Respondent is a small employer. It had only one employee, the Claimant, who had team manager duties.

231.2 The adjustment sought, that the Claimant would work from home on an open-ended and longer term (even if not permanent) basis, was not practicable for all the reasons given in Mr. Baptie's evidence. In particular:

a. The nature of the Claimant's role, which required him to have his finger on the pulse by monitoring the work being done in the office, required him to be present in the office when not visiting clients.

b. The nature of the Respondent's business required working with a paper file for the accounts documents such as schedules.

c. It was not practicable to deal with the day-to-day support required for staff if working from home. The Claimant would not be able to look at the documents and understand the point on which support or direction was required.

d. Whilst working from home, the staff in the office had to collate a paper file for the Claimant, which he collected from the office out of hours, because he did not want to see anyone. The Claimant then had to return the paper file.

e. The Claimant would not have been able to chair the Monday weekly meeting effectively nor to allocate work effectively if he could not see what the work involved.

f. Whilst the Claimant had been working at home, he had been working in isolation. He had not contacted the Respondent's office by telephone at all. The lack of communication and engagement by the Claimant meant that a longer term arrangement of the Claimant working from home every day was not practicable.

g. Levels of service provision by the Claimant had fallen, because when a client called, he could not be put through to the Claimant at home, because the Claimant did not want his home number used. On occasion, this led to the Claimant calling back after receiving an email from the office; but the client was not available; and this caused the client to ring again, only to find that the Claimant was not available to take his call.

h. The Claimant himself accepted that for him to work from home for a prolonged period was "*not ideal*" for the First Respondent business. The Tribunal inferred that this was an admission by the Claimant that in his role, it was only possible to work from home for a relatively short period.

i. The working from home adjustment sought was open-ended. It was not reasonably practicable for the Respondents' business to continue without the Claimant in the office, and without close and regular communication from him, for an indefinite period.

231.3 The adjustment would have required either another team manager being appointed and/or the purchase of a case management system, so that all

files and case management were electronic. These adjustments were not reasonable given the size, turnover and profit of the First Respondent.

231.4 The use of Skype would not have alleviated the disadvantage caused by the anxiety symptoms, because Skype meetings would require face-to-face meetings with his colleagues whom he believed had said negative things about him. Although these meetings would be by video, the whole point of them is that they permit face-to-face meetings and the Claimant's position was that he could not deal with the team members face to face.

231.5 Although the First Respondent business could have arranged for the Claimant and all staff members to have Skype, and although we heard no evidence about the cost of it for all team members, the use of Skype was not a reasonable adjustment in any event, in the circumstances of this case, for the following reasons:

a. The First Respondent's business relied essentially on paper files.

b. Key roles of the Claimant required him to allocate work, monitor work, and support the other members of the accounting team, which he could not perform when he could not see the paper files referred to.

c. The use of Skype, if it were to work at all, would require the Claimant to be provided with either a paper copy of the file, or to receive a query then attend work out of office hours to view the file, before replying the following day. In a busy office environment, where customer service was a key requirement of the business, this was not practicable.

d. As Mr. Baptie recognised, there was a difference between Skype being used on an occasional basis for a specific meeting and Skype being used on a constant basis throughout the day in the Claimant's role where he was required to be hands on and understand the work being done by the other accounting staff.

e. The Claimant admitted that the use of Skype would not be ideal, from which we inferred he accepted that Skype would lead to his ability to perform his managerial functions being reduced, if not removed in some instances.

232. In respect of issue/complaint 26(b), as the Majority of the Tribunal pointed out above, a Skype weekly meeting with his team would have required face-to-face meeting with them, albeit by video. This adjustment would not have reduced or alleviated the substantial disadvantage of the symptoms of social anxiety; the Claimant had made clear through his actions that he did not want social interaction with, nor to orally communicate with, his team.

233. In respect of issue/complaint 26(c), the provision of a mobile phone to enable the Claimant to work from home was not a reasonable adjustment. It was not practicable for the Claimant to only work from home when not visiting clients. We repeat paragraph 211.2 a-i above.

234. In any event, the Claimant was not communicating with his team by use of his own mobile phone; he had not answered his phone at all when permitted to work from home. Given the fact that he was not using the telephones available to him, and emails were minimal, the provision of a mobile phone could not have reduced the substantial disadvantage produced by the PCP. The evidence was that his own actions meant that the adjustment alleged was not reasonable.

235. Issue/complaint 26b alleges that the Respondents failed to make reasonable adjustments to his job role to allow him to work at home. No other adjustments are identified. Insofar as this is not dealt with above, the Majority concluded that there was no evidence to suggest any reasonable adjustment that was not made for the Claimant.

236. It is important to emphasise that the phased return plan did include adjustments. We found that these were reasonable adjustments in the circumstances. These included, over 3 weeks, a return to work in the office on 4 days per week, and then a longer term adjustment to allow the Claimant to work from home on 1 day per week for 3 months.

237. Further, and in any event, the Majority found that the nature and extent of the disadvantage at which the Claimant was placed by the PCP was not to the degree that he alleged throughout the period from the date at which he was informed that he should engage in a phased return to work at the office up to the date of resignation. In particular, the Majority found that the Claimant's account of his symptoms from about April 2019 until his resignation, which he gave in his evidence, was incorrect. The Claimant's oral evidence was inconsistent with the medical and other evidence. For example, the Claimant was asked by the Employment Judge what his mental state was at the point of resignation on 2 July 2019. The Claimant responded that it was not particularly good, he was still suffering from depression, and although improving due to hard work with his counsellor, he still had quite a long way to go. The Majority found this assessment from the Claimant was inconsistent with what happened immediately after resignation, when the Claimant immediately became the director of Guida on 3 July 2019, because this led to an inference of a plan of action formulated some time in advance. The inference drawn by the Majority was that his symptoms were improving throughout the period from his commencement on medication in February 2019 and significantly better by about mid-May 2019, when Guida was incorporated, probably due to a combination of the adjustments made for him (including working from home on a temporary basis), anti-depressant medication and that he had had counselling over an extended period.

238. In short, the Majority of the Tribunal concluded that the PCP relied upon did not put the Claimant at a substantial disadvantage from about 15 May 2019. After that point, he had decided not to return to work in the office, but to resign in order to run his new business venture, Guida Accountancy.

Issues 13-14: Direct Discrimination

239. The Tribunal unanimously concluded that pursuing the complaints of direct disability discrimination demonstrated a lack of proper consideration of the merits by the

Claimant or his advisers.

240. It should have been clear well before the final hearing that Jane Katz and Gary Smart were not statutory comparators. The Tribunal repeats its findings of fact at paragraph 24 above. Furthermore, they were very weak evidential comparators, because their roles were so different from that of the Claimant. In any event, the direct discrimination complaints also alleged that the Claimant was a comparator, which was misconceived.

241. The Tribunal decided that a non-disabled hypothetical comparator, a Client Principal with the same role of the Claimant, would not have been allowed to work at home from 12 March onwards, nor from 3 May until his resignation.

242. The complaint at issue 13(c) tried to introduce an alleged breach of the duty to make reasonable adjustments as less favourable treatment. This was misconceived, because the two complaints are mutually inconsistent: a complaint under section 20-21 EQA requires that there is a PCP which is applied equally to every employee, whereas a complaint under section 13 EQA requires proof of less favourable (not the same) treatment.

243. There was no evidence to support the allegation that the Claimant was forced to resign because of his disability. There was no basis in fact to support such an allegation.

Issues 15-16: Harassment

244. Issue 16 does not correctly set out the statutory questions posed by section 26(1) and (4) EQA. The Tribunal directed itself to the relevant sub-sections and the authorities above.

245. The Tribunal unanimously concluded that Mr. Baptie's treatment of the Claimant, although unwanted, did not have as its purpose the violation of his dignity, nor the creation of the proscribed environment. In general, we accepted Mr. Baptie's evidence as reliable.

246. The complaints at 15(a) and (b) must fail. The Tribunal accepted Mr. Baptie's evidence about events on 14 February 2019. We repeat the findings of fact at paragraphs 36-42 above.

247. Complaint 15(f) is not understood as an act of alleged harassment. Ms. Johns has annotated the list of issues to refer to pp 163-165, which is simply the grievance outcome letter from Mr. Baptie; no witness evidence is referred to. The Claimant does not provide evidence that the grievance hearing violated his dignity or had the effect on him proscribed by section 26(1)(b) EQA, so it is unclear how this complaint could have succeeded: see, for example, paragraph 31 of the Claimant's witness statement. The Tribunal found that this complaint was not proved on the Claimant's own case.

248. In any event, the Tribunal accepted the evidence of Ms. Dansey and Ms. Collins in respect of the grievance and grievance appeal and we repeat the relevant findings of fact above. There was no evidence that they reached their recommendations on the instruction, control or undue influence of Mr. Baptie. The Claimant agreed that the Occupational Health report could be discussed at the same meeting as the grievance.

249. The Claimant was represented by a solicitor at the grievance meeting, who could have raised individual points or issues at the meeting if she did not believe that they were satisfactorily covered. The Claimant and his solicitor were able to take adjournments as required. His solicitor did not complain at the end of the meeting that relevant points or additional issues had not been addressed, as demonstrated by the notes.

250. In the circumstances, it was not reasonable for the Claimant to feel that the conduct of the grievance had violated his dignity nor that it had the proscribed effect in section 26(1)(b) EQA.

251. In respect of 15(h), Ms. Dansey, on behalf of the Respondents, did state that the Claimant would be subjected to disciplinary action if he did not return to work on 15 April 2019. However, the List of Issues as annotated by Ms. Johns does not refer to any evidence from the Claimant to support the complaint of harassment; and his witness statement merely refers to him being "*surprised*" (paragraph 35) by the email. This much should have been apparent from the exchange of statements.

252. Although the Tribunal accepted Ms. Dansey's evidence that she had not stated what she had intended in this email, namely that capability proceedings would be started, even if the Claimant believed that this email from Ms. Dansey had the proscribed effect, it was not reasonable for it to do so. This was because this was a single, one-off, email, and the Respondents made no attempt to initiate any disciplinary proceedings. Moreover, at the time it was sent, the Claimant was refusing to obey a management instruction that he should return to work in the office on a phased return, so there was a good reason for the Respondents to take some management action.

253. The Claimant has produced no evidence to prove that complaint 15(i) had the proscribed effect on him. Ms. Johns has annotated the list of issues to refer to p171, an email from Ms. Dansey sent on 2 May 2019 (which includes that Mr. Baptie has made the further reasonable adjustment of paying the Claimant in full up to 3 May 2019) but none of the Claimant's witness evidence is referred to.

254. Furthermore, Issue 15(i) appears to involve some confusion in the Claimant's case, because the Claimant was not working from home from 6 May 2019, but he received SSP from 6 May until his resignation.

255. In any event, the Tribunal concluded that, even if the proscribed effect was proved by evidence, it was not reasonable for the unwanted conduct to have the effect. On any view, the Claimant had enjoyed working with the Respondents until February 2019 (or at least had worked without complaint), the Respondents had made various adjustments for him because of his disability, there was no contractual entitlement to sick pay, and the decision that the Claimant would be paid only SSP was in accordance with the occupational health and HR advice. The Tribunal decided that, probably as a result of the symptoms of his anxiety and depression, the Claimant perceived that the decision to pay him SSP was a hostile act, even though it was a reasonable management step taken with HR advice.

256. In respect of complaint 15(j), the List of Issues does not identify the part of the Claimant's evidence which proves this complaint of harassment; the Claimant's evidence does not state that the Respondents approach to the professional evidence before it had the effects proscribed by section 26(1) EQA.

257. In any event, the Tribunal repeats the findings of fact above. The Respondents were entitled to choose to rely on the advice of the Occupational Health consultant nurse and to make management decisions based on that advice. It was not reasonable for the Respondents' assessment of the evidence before it in the circumstances of this case, and based on HR advice, to have the effect relied upon by the Claimant. On an objective view, an employer is entitled to take the advice of an occupational health professional who has consulted the employee and produced a detailed report.

258. In respect of complaint 15(n), this issue is misleading in that the evidence was that the Claimant did not usually work from home at all. In any event, Ms. Johns annotated the List of Issues to refer to p.171 again. There was no evidence from the Claimant that not allowing him to carry on working at home was an act of harassment; and this allegation was not put to Mr. Baptie in cross-examination. Further, had the Claimant adduced evidence that the effect of this instruction on him was the prohibited effect within section 26(1) EQA, it was not reasonable for it to have that effect in the circumstances, particularly given Mr. Baptie had taken advice from an OH consultant nurse and a HR consultant, and where the Claimant had been informed (on 2 May 2019, p171) that he should refrain from working and focus on his recovery.

259. In respect of issue 15(o), the Claimant was not excluded from client communications whilst it was agreed that he could work at home. The Tribunal repeats the findings of fact at paragraphs 46-47 above. A significant part of the difficulties arising from the Claimant working at home were that he failed to communicate adequately with staff in the office whom he was supposed to manage.

260. The Respondents were entitled to give him the instruction that, to aid recovery, he should refrain from working whilst at home and entitled to remove his IT access from 3 May 2019. In the circumstances, it was not reasonable for that direction to have the effect alleged, even if the Claimant did not agree with it.

261. In respect of issue 15(p), the Claimant's case is misconceived. First, paragraph 36 of his witness statement (the paragraph cited in the list of issues) states as follows: "*Within the same email chain, it was also clear that Justin was not addressing my concerns at all or taking the process seriously. He confirms that he "only skimmed this very briefly" and left it to Angela to write a response.*" The first point to note is that the words alleged in the complaint particularised in issue 15(p) were not given in evidence, even on the Claimant's case (the email complained about is not part of the bundle and neither party sought to have it added). The second point to note is that, even on the Claimant's case, the email that he refers to was not sent to him, but to Angela Dansey; the inference is that Mr. Baptie did not intend or expect that the Claimant would see it. Thirdly, and more to the point, Mr. Baptie sent that email when he was on two weeks of annual leave with his family, which was the first annual leave that he had had for 7 months (which the Claimant would have known given their working arrangement of weekly meetings prior to 14 February 2019). Therefore, whatever the effect that this email had on the Claimant, it was not reasonable for it to have this effect. Fourthly, this passage in the Claimant's statement also demonstrates the Claimant's over-sensitivity at the time, because it should have been obvious that Mr. Baptie did not intend him to see his email. The fact that Ms. Dansey displayed a lack of care in including the private email to her in an email chain when emailing the Claimant does not convert what happened into an act of harassment.

262. In respect of complaint 15(q), Ms. Johns annotated the List of Issues to refer to p.221, the grievance appeal decision. There was no evidence from the Claimant that the grievance appeal was an act of harassment. There was no evidence that it created the effect prohibited by section 26(1) EQA. For example, at paragraph 47 of his witness statement, the Claimant states that: "*It was clear that the Appeal had not been dealt with impartially and fairly and that Justin had simply forwarded the findings of the HR company without giving it any attention or thought regarding my situation. It made me feel as though he did not care about me or my situation at all.*"

263. Moreover, if this passage is sufficient evidence of the proscribed effect, it demonstrates that the Claimant's perception was that the appeal had not been dealt with impartially or fairly. This perception was incorrect as a matter of fact; the Claimant did not identify in evidence, nor in cross-examination of Mr. Baptie or Ms. Collins, what was unfair about the appeal. This passage also demonstrates that the Claimant was over-sensitive at the time.

264. Furthermore, the grievance appeal decision explains that the Respondents appointed Diana Collins to conduct the investigation into the points appealed and to make recommendations. The outcome letter includes her report and recommendations, and states that the decision not to uphold the appeal is based on the recommendations. Therefore, if the grievance appeal did have the proscribed effect, it was not reasonable for it to have done so, given the circumstances where Mr. Baptie had instructed an independent HR officer and been transparent about the contents of her report and recommendations. The fact that the Claimant disagreed with the recommendations does not convert the appeal decision into an act of harassment.

Issues 17-19: Discrimination arising as a consequence of disability

265. In respect of issue 17b, Ms. Johns accepted that the Respondents did not suspend the Claimant. The email referred to by her annotation of the list of issues (at p.171) states no such thing.

266. The Claimant was not paid his salary, but only SSP, from 3 May 2019. This was unfavourable treatment. It was something that arose in consequence of his disability. By this time, the Respondents had actual or constructive knowledge that the Claimant was a disabled person.

267. The Claimant disputed that he was fit to return to work in the office for 4 days per week after a phased return. The management instruction was that he should do so, based on the advice received by the Respondents.

268. The question is whether the Respondent's payment of SSP only was a proportionate means of achieving a legitimate aim.

269. The Tribunal concluded that the legitimate aims were as set out in the Further Particulars provided.

270. Broadly, the treatment of the Claimant was rationally connected to the efficient running of the business and the requirements of the business. There was no contractual provision for payment of full pay when an employee was absent because they were not fit for work.

271. The means chosen – the payment of SSP rather than full pay - was no more than necessary to accomplish the legitimate aims.

272. The disadvantage of not being paid in full was proportionate to the aims pursued. Under the terms of the contract, this was the least worst result for the Claimant. The Claimant was refusing to engage with a phased return to the office, despite an instruction to do so. Work and wages go hand in hand; by refusing the instruction, the Respondents could have taken an alternative view that nothing be paid because the Claimant was performing no work.

Issues 20-23 Indirect discrimination

273. The Tribunal concluded that the PCP was the same PCP identified above in respect of issue 24. The Respondent applied that PCP to non-disabled persons.

274. There was no evidence of comparative disadvantage, namely that this PCP put disabled people generally, nor those disabled through depression and anxiety, at particular disadvantage compared to non-disabled employees. Accordingly, the Tribunal unanimously concluded that this complaint had no prospect of success. It should have been withdrawn at the outset, when the Tribunal entreated the parties to consider which of the many issues had real prospects of success.

275. In any event, the Tribunal concluded that, even if comparative disadvantage were shown, the Respondents have shown that the PCP was a proportionate means of achieving a legitimate aim. The evidence of Mr. Baptie on the legitimate aims advanced in the further particulars was not challenged. Given those aims, and the management duties of the Claimant, the requirement to attend the office was proportionate, particularly given the proposed phased return, up to 4 days per week, with review after 3 months.

Issues 26-28 Victimisation

276. The Respondents accepted in submissions that the Claimant's written grievance was a protected act and that not upholding the grievance was sufficient to amount to a detriment.

277. The Tribunal unanimously concluded that the Respondents were not guilty of the two acts of victimisation alleged.

278. The grievance process was both fair and impartial; indeed, adjustments were made to enhance fairness or the perception of fairness such as by permitting the Claimant to be represented by a solicitor, by the appeal being conducted in writing (at the Claimant's request), and by changing the appeal officer to Ms. Collins. We repeat the relevant paragraphs in the findings of fact above, particularly 64-65, 99 and 110.

279. The Respondents offered the Claimant mediation as explained in the findings of fact. Mr. Baptie did not offer mediation on the terms desired by the Claimant, but this had nothing to do with the grievance.

Issue 30: Breach of Contract

280. The Claimant resigned. The Majority of the Tribunal found that he was not constructively dismissed.

Issues 31 to 34: Unlawful deduction from wages

281. The Claimant was not suspended. This allegation was withdrawn at submissions.

282. The Tribunal unanimously concluded that the Claimant was not contractually entitled to full pay from 3 May until his resignation because he was not fit to work in the office, and the Respondents instructed him to work on a phased return to the office. The fact that the Claimant disagreed with the decision of Mr. Baptie does not give him any contractual entitlement to full pay, not least because his case was that he was not Fit to work in the office (confirmed in the GP letter of 23 May 2019).

283. The Respondents were entitled to pay the Claimant SSP for the period complained of. There was no unlawful deduction from wages. There was a written agreement for payment of SSP when absent through sickness: see clause 7 of the contract of employment (p.88).

Conclusions of the Minority

284. The Tribunal reached unanimous conclusions in respect of each issue, except in respect of the following issues, on which the Minority of the Tribunal decided as follows.

Issues 24-25 Breach of the duty to make reasonable adjustments

285. The statutory provisions have been outlined. The relevant duty to make adjustments for an employee with a disability is covered by the first and third requirements. The first is where a provision, criterion or practice of the company's places a member of staff with a disability at a substantial disadvantage, and the company should take reasonable steps to avoid the disadvantage. The third requirement is to take reasonable steps to provide an auxiliary aid to a disabled member of staff.

286. In this case, the only adjustment made was that the Claimant could work from home for a limited period. Initially, this was for occasional days when he had counselling, which was near his house. It was then changed to the Claimant working at home full-time. The respondent argued that this made it impossible for him to do the part of his role that involved managing the team of office-based staff. The Respondents' main concern seems to have been to get the claimant back to working in the office as soon as possible, without adequately exploring other reasonable adjustments that could have been tried.

The relevant law

287. In Archibald v Fife Council 2004 ICR 954 HL, Baroness Hale recognised that "the duty is unique because it requires a degree of 'positive action' from employers to alleviate the provisions of provisions, criteria or practices (PCPs) as well as the non-provision of auxiliary aids or the physical features of the work place on disabled employees and job applicants."

288. The employer's duty does not end with one or more initial adjustments. The employer has a duty to consider making further adjustments and keep the position under

review: see Bynon v Wilf Gilbert (Staffordshire) Ltd ET Case 1301482/08. The duty to make the adjustments is on the employer: Cosgrove v Caesar and Howie 2001 IRLR 653, EAT. This is particularly important with a member of staff with depression. Unlike a physical injury, recovery from depression is less predictable, and the duty of care from an employer needs to be flexible.

289. The claimant was a senior member of staff, very experienced in his work, and presumably was an asset to the company. However, this was not reflected, in my opinion, in the behaviour by the respondents. It is important to look at the circumstances of each individual case on its merits.

290. The respondent has 11 staff. However, there is no exception for small employers from the need to make 'reasonable adjustments'. (EHRC *Statutory Code of Practice* 6.3)

Auxiliary aids

291. When the Claimant was working from home, he requested two auxiliary aids to support him. One was a company mobile phone so that he could be contacted direct by clients he was working for, and could ring them. The cost of a basic mobile phone would have been less than £50; 'pay as you go' could have been used if the company wanted to avoid committing to a long-term contract, although a 'sim only' contract could have been obtained for less than £15 a month.

292. The lack of provision of a mobile phone meant that colleagues at the First Respondent's office had to take messages for the Claimant and pass them on by phone or email. This took their time and was not always reliable.

293. The second auxiliary aid the claimant requested was the use of *Skype* (subsequently replaced by *Microsoft teams*) to communicate better with his colleagues. This could have included running the Monday morning staff meeting which allocated work. The Respondents already had *Skype* installed on a couple of its computers, and could have taken out extra licences for some staff to be able to communicate directly with the Claimant. For a company with a turnover of £600,000 and annual profit of £60,000, in my opinion this would have been affordable.

294. In my opinion, the expenditure on both auxiliary aids would have enabled the claimant to work more effectively from home. The cost was also reasonable for a company of this size. It can be argued that the availability, cost and likely effectiveness of any equipment will obviously be relevant considerations in determining what is reasonable. For example, it will usually be reasonable for an employer to provide an adapted keyboard or software package to an employee, but it is less likely to be reasonable for an employer to provide an adapted vehicle, owing to the much higher cost, unless it was specifically needed for the job.

Working from home

295. The Respondents did initially allow a limited working from home for the claimant, on days when he was receiving counselling. They then allowed the Claimant to work from home full-time, but after two months said that the arrangement was not working, and put him on statutory sick pay from the beginning of May.

296. The only focus of the Respondents seems to have been to get the Claimant back to working in the office in his normal role. However, in my opinion there were other options open to the Respondents.

297. The Claimant had shown that he could work from home, collecting the client files from the office out of hours and returning them when he had completed the work. While the tribunal was told that the Respondent's clients used paper files, the Respondents' employees worked electronically, and therefore they could have communicated with the claimant if they needed advice on a particular piece of work. This was shown in evidence when the claimant had communicated with a colleague, Georgia John, about a VAT return he was working on (See documents p.144 to 145).

Other options

298. The tribunal can put forward its own view on what the employer could have done in terms of reasonable adjustments. In Smith v Churchill Stairlifts pic [2006] ICR, 524 CA, the Court of Appeal confirmed that the test of reasonableness in this context is an objective one, and it is ultimately the employment tribunal's view of what is reasonable that matters. A claim of a failure to make reasonable adjustments may, therefore, require a tribunal to take the unusual step of substituting its own view for that of the employer.

299. The opinion of the Minority is that the Respondents were too rigid, and there is no evidence that they considered other alternatives. How was the Claimant's managerial role covered when he was on holiday, or on a short sickness absence? Kara Kelsey, the company's audit manager, had managed the staff team previously. Although she worked part-time, she had the experience to do this, and could have run the staff meetings to allocate the work, possibly discussing them with the Claimant beforehand.

300. The Respondents could also have looked at a temporary restructure, with the Claimant only working at home, and giving up some of his managerial role on a temporary basis. Possibly this could have involved a temporary reduction in his salary to reflect the loss of managerial responsibility. Possibly, without the pressure of not fulfilling this role, this may have helped the Claimant recover more quickly. (see paragraph 8 of Claimant's impact statement).

301. Was there disruption for the Respondents? Because of their actions, the First Respondent was going to lose their second most senior member of staff. This meant either restructuring the staff roles to cover his work and managerial responsibilities, or recruiting a replacement. They also lost some clients due to the claimant leaving the firm. A more flexible approach could have benefitted them in the long term.

302. The EHRC *Code* paragraph 6.9 says: "In order to avoid discrimination, it would be sensible for employers not to attempt to make a fine judgement as to whether a particular individual falls within the statutory definition of disability, but **to focus instead on meeting the needs of each worker** and job applicant." (emphasis added). The Respondents did accept at the tribunal that the Claimant had a disability, but in my opinion should have focussed more flexibly on meeting his needs.

303. Therefore, for all the above reasons, the Respondents failed to provide all the reasonable adjustments they could have done for the Claimant. The Minority upholds this part of the claim.

Constructive dismissal

304. The Minority of the Tribunal concluded that, given that there was a breach of the duty to make reasonable adjustments, there was a breach of the implied term of trust and confidence, entitling the Claimant to resign.

305. The Minority of the Tribunal concluded that the fact that the Claimant had set up a new business was only one reason for his resignation. The new business venture was a fall-back position, if his grievance did not succeed on appeal and if reasonable adjustments were not attempted so as to enable him to work from home.

306. In terms of fairness, the dismissal was unfair because the Respondents had not tested out potential reasonable adjustments, which may have enabled the Claimant to stay on working for the Respondents.

307. The Minority concluded that it was impossible to speculate on whether the Claimant would have remained in employment if not dismissed because the reasonable adjustments referred to were not made. The Claimant held a senior position and was suffering financial loss. If his health recovered, it was likely he would want to go back to work.

Breach of Contract

308. The Minority concluded that the Claimant was dismissed in breach of contract and entitled to his notice pay.

Summary

309. The Majority of the Tribunal have concluded that all the complaints have failed.

310. The Minority of the Tribunal has concluded that the complaints of direct discrimination, harassment, the complaints under section 15 EQA, indirect disability discrimination and victimisation all fail.

311. The Minority of the Tribunal agrees that all the complaints should be dismissed save as follows. The Minority has concluded that the complaint of breach of the duty to make reasonable adjustments outlined at issues 24-25 should be upheld. The Majority has also concluded that, if the conclusion in respect of the breach of the duty to make reasonable adjustments was correct then, logically, other conclusions flow from it, including that the complaints of constructive unfair dismissal and breach of contract should be upheld.

312. The Claim is dismissed. The provisional remedy hearing shall be vacated.

Employment Judge A. Ross
Date: 10 November 2020