



THE EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr M Davis

v

P2CG Limited

Heard at: London Central

On: 5, 6, 8, 11, 12, 13 September 2017
3 October 2018
In Chambers: 18-20 December
2018 and 18 March 2019

Before: Employment Judge Glennie
Ms T Breslin
Ms M Jaffe

Representation:

Claimant: Mr C Rajgopaul (Counsel)
Respondent: Ms T Barsam (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaint of direct discrimination because of disability is well-founded in respect of:
 - 1.1 The Claimant's dismissal (issue 4(d));
 - 1.2 The refusal by Mr Peel and Dr Rawling to acknowledge his ill health (issue 4(e)).
2. The other complaints are dismissed.
3. Remedies will be determined at a hearing on a date to be fixed.

REASONS

1. By his claim to the Tribunal the Claimant, Mr Davis, made the following complaints under the Equality Act 2010:
 - 1.1 Direct discrimination because of disability contrary to section 13.

- 1.2 Discrimination because of something arising in consequence of disability contrary to section 15.
 - 1.3 Indirect discrimination contrary to section 19 (which complaint was not ultimately pursued).
 - 1.4 Failure to make reasonable adjustments contrary to section 21.
 - 1.5 Harassment related to disability contrary to section 26.
2. The Tribunal is unanimous in the reasons that follow.

Procedural matters

3. The case was originally listed for hearing over 7 days between 3 and 13 June 2017. At a Preliminary Hearing on 16 February 2017 EJ Pearl vacated that hearing and re-listed the case for 9 days between 5 and 15 September 2017. In the event, the Tribunal was unable to sit on day 3 of that allocation, leaving 8 days available.
4. It was intended that Dr Rawling's evidence would be given on day 6 of the hearing, via video link from Singapore. At the commencement of day 6, Mr Rajgopaul informed the Tribunal that at about 10.30 the previous evening he had received substantial further documents by way of disclosure from the Respondent, followed at about 1.30 am by the metadata for the electronic documents concerned. He said that, on the basis of such examination of the documents as he had been able to undertake, it appeared that his cross-examination of Dr Rawling would be substantially different from what he had intended, and that he was not in a position to deal with it at that time. He would also wish to re-call the Claimant to deal with the new documents. He added that, in order to complete the cross-examination of the remaining witnesses and prepare to cross-examine Dr Rawling, all within the remaining time, he would have to work all night, which would not leave him in a fit state to conduct the case the next day.
5. Mr Rajgopaul proposed that he should be permitted to cross-examine Dr Rawling as far as he was able, that the Tribunal should then hear evidence from the remaining witnesses (Mr Strauss, Mr Angiolini and Mr Knight) and that the Tribunal should then adjourn so as to enable him to prepare further cross-examination of Dr Rawling and re-call the Claimant, all in the light of the further disclosure.
6. Ms Barsam stated that the documents had first been requested after the hearing had commenced, on day 3, and that they had been obtained as quickly as possible. She told the Tribunal that there were around 160 pages, and that they had been provided because of points that were being taken in cross-examination to date. Ms Barsam submitted that it should be possible for the documents to be considered and made the subject of

cross-examination within the time remaining, and that an adjournment would be disproportionate.

7. The Tribunal adopted the approach advocated by Mr Rajgopaul. We considered that it would not be fair, and would be contrary to the interests of justice, to require the Claimant's case to be conducted in a way that was, in practical terms, impossible. Although the adjournment that would follow, and the consequential delay, were regrettable, these factors were outweighed by the prejudice that would be caused to the Claimant if we were to require Mr Rajgopaul to continue within the existing listing. Unfortunately, other events then intervened with the result that the delay proved to be considerably greater than had been envisaged.
8. The hearing then continued until the afternoon of day 7, at which point the Tribunal adjourned until 15 December 2017, additionally reserving 3 days (3-5 January 2018) for deliberations in chambers.
9. One of the members of the Tribunal became unwell and was unable to sit on 15 December 2017. A Preliminary Hearing by telephone was held before the Employment Judge, at which point there was not unanimity between the parties about continuing the hearing with the EJ and one lay member, and there was no prognosis available as to when the unwell member was likely to be available. The chambers dates were vacated.
10. A further PH by telephone on 9 January 2018 proved largely ineffective as there were not before the EJ matching availability details for the Tribunal members and the parties. In the event, it was not possible to resume the hearing until 3 October 2018, when the evidence (from the Claimant and Dr Rawling, again by video link) was completed. A timetable for the provision of written submissions was agreed and the Tribunal met in chambers on 18-20 December 2018. On that occasion, the Tribunal was unable to complete its deliberations, and it met again and did so on 18 March 2019.

The issues

11. The issues were the subject of an agreed list, a copy of which is attached as an annex to these reasons.

Evidence and findings of fact

12. The Tribunal heard evidence from the following witnesses:
 - 12.1 Mr Simon Charnock (called on behalf of the Claimant), at the material time a consultant working for The John Lewis Partnership.
 - 12.2 The Claimant.
 - 12.3 Mr Pip Peel, one of the Respondent's founding directors.

- 12.4 Dr Simon Rawling, also one of the Respondent's founding directors. He ceased having a formal role with the Respondent in December 2016, but remains a shareholder and continues to provide some advice.
- 12.5 Mr Quentin Strauss, Programme Director for the Respondent's programme with John Lewis.
- 12.6 Mr Richard Angiolini, a statutory director of the Respondent and one of its original members. It was common ground between the Claimant and Mr Angiolini that, at the material time, they were good friends as well as colleagues.
- 12.7 Mr Jason Knight, a founding director of the Respondent.
13. The Tribunal also read witness statements from Mr Abu Ansary (who worked for the Respondent as a management consultant between May and September 2016) and Mr Preetam Bhoobun (who generally worked away from the office but was in the Respondent's office from early June to late August 2016). Both of these were witnesses to be called on behalf of the Claimant: the Respondent indicated that their evidence was not challenged, and so they were not called to give live evidence.
14. There was an agreed bundle of documents and page numbers in these reasons refer to that bundle
15. There were very extensive disputes of fact, including disputes as to whether or not particular documents were genuine. Each party maintained that the other was presenting substantial quantities of false evidence. The Tribunal has not attempted to address every point of difference between the parties, including some stark issues of fact, but has concentrated on those which assist us in resolving the issues to be determined.
16. Both counsel made submissions about the overall credibility of the witnesses, submitting (naturally) that their own witnesses were credible while the other party's were not. As will be explained, the Tribunal found the evidence of witnesses on both sides of the case to be unreliable on different matters. We did not conclude that either the Claimant, or the Respondent's witnesses were to be preferred in general terms. We made findings as a matter of probability according to the evidence on the various individual aspects, taking into account the relative degree of plausibility of each party's evidence, and such assistance as could be gained from contemporaneous documents.
17. The Respondent's business is in project and programme management. The company places consultants with clients, charging a daily rate for the consultants' services. The company's gross profit is essentially the difference between what it charges the client and what it pays the consultants.

18. The Respondent company was set up in 2013 by Mr Peel, with Mr Knight and Dr Rawling joining him as equal shareholders. These three, who were identified by the Claimant and others as “the three amigos”, had previously run another company (PIPC) with a similar business, which had subsequently been sold. The Claimant had worked for that company, in a role that involved generating leads for business, and so was well known to Messrs Peel, Knight and Rawling. The intention of the three was to start the Respondent and then to sell the company and the business.
19. The nickname “the three amigos” was, in the Tribunal’s judgment, significant. It showed that the three worked closely together and were likely to share information and confide in one another. The Tribunal found that, of the three, Mr Peel tended to take the lead in general, and did so in relation to matters concerning the Claimant.
20. Dr Rawling met the Claimant in November 2014, on which occasion there was discussion about the possibility of his taking up a role with the Respondent. They met again on 29 January 2015 and agreed that the Claimant would join the Respondent as a Director with a salary of £80,000 plus equity of up to 5% based on performance. Further details of the role were set out in an email of 2 February 2015 from Dr Rawling to the Claimant at page 361. The Claimant was to work 4 days per week so as to allow him to continue with other business ventures. At point 2, Dr Rawling wrote the following:

“We agreed that the role is to secure sales and not just meetings as you did in PIPC. That is, you need to formally land the sale for it to count towards equity (invoiced revenue).”
21. There was a dispute between the parties as to whether it was intended that the Claimant’s role would involve account management, in the sense of remaining active on the account once a sale had been achieved. The Tribunal found that Dr Rawling’s email reflected an intention that the Claimant should remain involved in the process for a stage further than had been the case at PIPC, in that he would not just secure meetings with a view to sales being made, but would be involved in making the sale. This did not, however, amount to account management in the longer term.
22. On 19 March 2015 a Board meeting took place (the minutes being at page 370-373) at which a sales target of £500,000 per annum was agreed for each of the Directors, including the Claimant. Shortly after this, the Claimant introduced the John Lewis Partnership, and in April 2015 that organisation awarded a project to the Respondent. There was a dispute, which the Tribunal found it did not need to resolve for the purposes of the issues in the case, as to the respective contributions by the Claimant and Mr Peel towards securing the business with John Lewis that the Respondent in fact obtained.
23. There was an issue about the Board meeting minutes for 18 June 2015 regarding the John Lewis account. One version disclosed contained, in

paragraph 3.2 at page 472, the following: “MD to reduce JL effort....and focus Q3 on driving an improved pipeline....” Another version at page 476 made no reference to John Lewis, and read “MD to focus Q3 on driving an improved pipeline....” When asked about this in cross-examination, Mr Peel said that he did not know which was the original version, in other words whether the reference to John Lewis had been inserted or omitted. Mr Rajgopaul suggested that the minutes had been amended for the purposes of the litigation. The Tribunal, while troubled by the discrepancy and lack of an explanation for it, was not certain what perceived advantage there might have been either way.

24. A further point about the documents was rather clearer. In June 2015 an issue arose concerning the Respondent’s invoicing of the work for John Lewis. On 30 June 2015 Mr ML of John Lewis sent an email to Mr Peel (at page 489) on this subject. In paragraph 19 of his witness statement Mr Peel referred to this email, saying that in this ML told him about an invoicing error made by the Claimant. The relevant part of that copy of the email read as follows:

“I have been advised that an error was made by your team (Mark Davis) regarding the first contract (meaning there is an additional c£60,000 charge) – Simon has advised that he has been given a variety of explanations for this !!!”

25. There was at page 799.74 an email to the Claimant from John Lewis in response to a subject access request. This stated that the email of 30 June 2015 from ML to Mr Peel had been located, but that it did not refer to the Claimant. When asked about this in cross-examination, Mr Peel agreed that the inclusion of the Claimant’s name gave the impression that ML was criticising him specifically. He also accepted that he had altered the email so as to include the Claimant’s name. Mr Rajgopaul put it to Mr Peel that he had done this for the purposes of the present case, in order to give the impression that John Lewis wanted the Claimant removed from the account, with a view to bolstering the Respondent’s contentions about the Claimant’s performance.
26. Mr Peel denied this. His explanation was that he forwarded the email to Dr Rawling, and that he made the alteration in order to indicate to him that, although ML said that an error had been made by the team, in fact the error had been the Claimant’s. His answer to the question why, in that case, he had not simply sent a separate email to Dr Rawling saying this, was that he did not know.
27. The Tribunal concluded that Mr Peel had altered the email for the reason suggested by Mr Rajgopaul. His explanation did not, ultimately, make sense. Altering the email and then forwarding it to Dr Rawling did not tell the latter that ML was saying that the team had made an error, but that he (Mr Peel) knew or believed that the error was the Claimant’s. It gave the impression that ML was saying that the error was the Claimant’s. It was also revealing, in the Tribunal’s judgment, that in his original witness

statement Mr Peel had relied on this email without referring to the alteration, saying that in it “ML explained that Simon Charnock had informed him that the Claimant had made an invoicing error.....” We concluded that Mr Peel had written this in the hope that the point would not be noticed.

28. There was a dispute about the Claimant’s performance more generally, and what Mr Peel said about this, during 2015. From time to time Mr Peel held review meetings with the Claimant. Mr Peel’s evidence was that at the meeting on 7 September 2015 he told the Claimant that his sales figures were considerably behind target, that he had secured only one account and that although he had been expected to run the account, he had been removed from it. Mr Peel continued that for the review meeting on 14 October 2015, the Claimant was sent his sales figures for the first 6 months to the end of September, and that these showed that he had reached only 19.2% of his target. He said that he told the Claimant that, if his performance did not improve, he might face disciplinary action.
29. Mr Peel further stated that the Claimant was again sent his sales figures for the year to date in advance of the meeting on 30 November 2015, as an attachment to an email at page 551. These showed sales of £149,353 over a period of 8-9 months as against the target for the year of £500,000. He stated that at this meeting he gave the Claimant a formal verbal warning about his performance.
30. The Claimant’s evidence about these events was that Mr Peel did not tell him that he was behind target at either the September or the November meeting; that he did not receive the sales figures in advance of the 30 November meeting; and that Mr Peel did not on that occasion give him a warning.
31. The Tribunal noted that there was at page 545 an email dated 22 October 2015 from Dr Rawling in response to proposals from the Claimant about expenditure on marketing activities which read as follows:

“...my personal view is along the lines of our discussion last week. That is, we have invested heavily in you/Bernie to lead the sales charge so would like to see more return here (and indeed wider farming consistency) before we invest more in sales generation.
32. The Tribunal considered that Dr Rawling’s email indicated some degree of dissatisfaction with the level of business that the Claimant was generating, although not obviously such as to point to disciplinary proceedings or a formal warning. The Tribunal also noted that the Respondent’s disciplinary policy provided (at page 339) that when a verbal warning was given, a note recording this would be placed on the individual’s file. There is no such note, nor any note of the meeting on 30 November.
33. A further point is that the copy at page 551 of Dr Rawling’s email in advance of the meeting, relied on as showing that the Claimant was sent

the sales figures in advance, shows as an attachment “1512 MD Numbers (Dec 16)”, while the copy at page 1492 shows the date of the attachment as Dec 15. The Respondent was not able to explain this discrepancy: the Claimant contended that it showed that the email and/or the attachment were not genuine.

34. The Tribunal was left uncertain about this last point. However, even without this, we found as a matter of probability that Mr Peel did not give the Claimant a formal verbal warning or threaten him with disciplinary action if he did not improve. This meeting took place comparatively early on in the Claimant’s employment, and the Tribunal considered that, if at this stage, Mr Peel had been sufficiently concerned about his performance to take such steps, he would have recorded them in writing. That is not to say, however, that there was no concern at all about the Claimant’s performance at this point. The Tribunal accepted that Mr Peel probably did say that he was not satisfied with the sales made by the Claimant, but found that describing this as a verbal warning was to exaggerate its significance.
35. The Claimant had a further review with Mr Peel, Mr Rawling and Mr Knight on 1 March 2016. Nothing of significance to the issues before the Tribunal arose on this occasion.
36. On 11 March 2016 the Claimant attended his GP for blood tests, as he had been experiencing symptoms that his pharmacist told him might be a sign of diabetes. On 12 March 2016 he was asked to attend A&E at his local hospital as his blood glucose levels were dangerously elevated. A letter of 12 March 2016 to the Claimant’s GP (at page 1211) shows that he was given a diagnosis of diabetes. It was not clear at this stage whether this was Type 1 or Type 2.
37. There was some degree of dispute about what symptoms the Claimant was experiencing at this stage, and how serious they were. In paragraph 145 of his witness statement, the Claimant described increased thirst, frequent and urgent need to urinate, fatigue, blurred eyesight and recurrent infections. By contrast, a report from the Diabetes Clinic dated 16 March 2016 at page 1212 stated “Feels fairly well...not excessively thirsty or tired etc”, while the GP’s notes of the attendance on 11 March 2016 at page 1189 made similar observations.
38. The Tribunal found that there must have been something by way of signs or symptoms that had caused the pharmacist to suggest that the Claimant should have tests for possible diabetes: but that the Claimant’s account of serious symptoms before he received the diagnosis is inconsistent with the medical records quoted above. We found that he was not experiencing, or exhibiting serious symptoms at this stage.
39. A Board meeting took place on 17 March 2016. This took place at a hotel, and was followed by drinks at the bar. In paragraphs 163 and 164 of his witness statement, the Claimant gave a vivid and detailed account of

informing Dr Rawling, Mr Angiolini and Mr Knight of his diagnosis of diabetes, and of their reactions to this. He gave an equally detailed account of informing Mr Peel later that evening at a pub, and of Mr Peel's reaction to the news.

40. The Respondent's witnesses were united in disputing the Claimant's account and in maintaining that he did not tell them of his diagnosis on this occasion. In summary, their answers to the point in cross-examination were as follows:
 - 40.1 Mr Peel was uncertain about when the Claimant first raised the subject of diabetes, and said that he thought that this was probably in June rather than March: but that whenever it was, the Claimant initially described going for tests rather than having received a diagnosis.
 - 40.2 Dr Rawling's evidence was that the Claimant did not mention diabetes to him at all until a meeting on 15 June 2016 (as to which, see below).
 - 40.3 Mr Angiolini said that the Claimant told him on 23 June that he was having tests, and that they subsequently had conversations about his diagnosis.
 - 40.4 Mr Knight said that his recollection was that the subject was first mentioned to him on 9 June, when the Claimant said that he was having tests.
41. The Tribunal found the Claimant's account unusual in its detail about what he recalled that each individual said on this occasion, and ultimately unconvincing. We considered that it was unlikely that the Claimant was recollecting what was actually said, but rather that he was reconstructing (perhaps unconsciously) what he believed would have been said, assuming that he had revealed the diagnosis he had received. Conversely, if the Respondent's witnesses were wrong on this point, it seemed improbable that they could all be mistaken: it would have to be the case that they knew that the Claimant had revealed his diagnosis but were giving untrue evidence to the contrary. If that were the case, it seemed to the Tribunal unlikely that they would construct such a complex story as the one that emerges from the evidence of the four witnesses as summarised above. On balance, the Tribunal found that the Claimant did not mention his diagnosis, or having tests, on this occasion.
42. There was a further issue as to whether the Claimant was exhibiting symptoms, or changes of behaviour, which would have alerted colleagues to the possibility that he was unwell. This was quite apart from any question of what he may have told them. The Claimant's case was that, at least from the point when he started undergoing tests, he lost a significant amount of weight, lacked energy, suffered from weakened voice projection, came into work late, and took time off for medical appointments. The

Respondent's witnesses all denied being aware of such matters, at least to the extent that they might have thought that the Claimant was unwell.

43. This was not an easy point to resolve, not least because of the parallel dispute about whether the Claimant had told various relevant people about his tests and diagnosis as matters unfolded. Since there was a dispute about that, it was difficult to assess what individuals would have been likely to notice, or what one would expect them to have said or not said in the circumstances. As with other evidential disputes in the hearing, each party was maintaining that the other's case on the point was completely wrong.
44. The Tribunal noted the following points from the oral evidence:
 - 44.1 The Claimant accepted that he was able to continue drinking, although he needed to avoid binge drinking.
 - 44.2 The Claimant also maintained that, in spite of his symptoms, his work performance remained good. For example, when asked about the meeting on 8 June 2016, to which further reference will be made later in these reasons, the Claimant said that criticism of his performance was unfair, because "my sales performance was outstanding".
 - 44.3 The Claimant agreed that his Outlook record did not show him as taking any days off.
 - 44.4 Mr Peel accepted that the Claimant lost weight, but said that there was nothing unusual about how he looked. He said that he did not witness any fatigue and that the Claimant continued socialising.
 - 44.5 Dr Rawling said that he did not notice any lethargy or any particular weight loss, and commented that he himself had lost 5kg.
 - 44.6 Mr Angiolini said that he saw no change in the Claimant's diet or alcohol consumption. He too commented that he himself had lost weight: about 12kg in 6 months. When it was put to him that the Claimant had ceased to be a "high octane" performer, he replied that he had not been high energy before, and that he was "so laid back, he was horizontal". In answer to a question about the Claimant's timekeeping, Mr Angiolini replied that "it would be madness to say he came in late, he was never early."
45. The Tribunal was alert to the possibility that the Respondent's witnesses might have a pre-arranged "line" on this aspect. Their accounts, while essentially unanimous in effect, were not uniform in content. Mr Angiolini in particular appeared to respond spontaneously to the matters put to him.
46. In the event, the Tribunal concluded that, as a matter of probability, the Claimant was not exhibiting symptoms or changes of behaviour that, on their own, would have put the Respondent on notice that he was unwell.

47. Another Board meeting took place on 6 April 2016. It was common ground that Mr Peel had a “rant” at this meeting about the company’s performance in general. He followed this up with an email on 7 April 2016 at page 621, addressed to all Directors, in which referred to the previous day and said that sales performance was unacceptable, and account growth non-existent. He added that if there was not significant progress by the next Board meeting on 23 June, he would make significant changes to the Director team. He concluded that he would be happy to talk the matter through if anyone thought he was being biased or unfair.
48. In paragraph 174 of his witness statement the Claimant stated that, just before the start of the meeting on 6 April, a colleague Mr DY asked him how he was getting on with his diabetes, and he responded in terms that included an expression of frustration at the lack of a definite answer as to whether his diabetes was type 1. The Claimant stated that this was said in front of various people, including Dr Rawling, Mr Angiolini and Mr Elliott, and that Mr Peel arrived about half way through this. When there was a pause, Mr Peel began his “rant” without reference to what the Claimant had been saying about his diabetes.
49. Only Mr Peel of the Respondent’s witnesses was asked about this in cross-examination. He said that he did not recall any conversation about diabetes. The Claimant’s account pre-supposes that he had already informed those present of his diagnosis on 17 March, which the Tribunal has found not to be the case. The Claimant was not saying that it was on this occasion that Mr Peel, or others, first learned of his diabetes. In any event, it would be surprising if Mr Peel had launched into a “rant” about the company’s general performance without any reference to the serious matter that the Claimant says he had been discussing, whether or not he (Mr Peel) had been aware of this previously. On balance, the Tribunal preferred Mr Peel’s evidence on this aspect.
50. In the further information given by the Respondent at page 51 it was stated that at the 6 April meeting Mr Peel gave the Claimant a “further verbal warning” that he faced disciplinary action if his sales performance did not improve. In paragraph 176 of his witness statement the Claimant denied that he was given a warning on this occasion. Although this point was not canvassed with Mr Peel in cross-examination, the Tribunal considered it unlikely that the Claimant was warned of possible disciplinary proceedings at this point. Again, there was no note of such a warning; it would be curious to single out the Claimant in this way at a meeting with the whole team; and Mr Peel did not mention it in his follow-up at page 621.
51. Mr Peel held a review meeting with the Claimant on 14 April 2016. The Claimant’s account was that Mr Peel was not critical of him, and congratulated him for closing a particular sale since the last meeting. He said, however, that Mr Peel made the suggestion that he should account manage the clients after closing sales, and that he resisted this on the basis that he was a marketing consultant, and not an account manager. Mr

Peel's account was that he was taken aback when, rather than producing proposals for improving the Respondent's performance, the Claimant brought in figures intended to demonstrate his success when working for PIPC.

52. There was a management meeting on 2 June 2016 at which, among other things, a potential client in the Claimant's pipeline was downgraded from an "opportunity" to a "lead" on the descending scale of proposal / opportunity / lead. The Tribunal did not find this of itself to be particularly significant. In particular, we did not consider that it showed a discriminatory attempt to set up a case for removing the Claimant from the business. As we have found, the Claimant had not by this time revealed his diagnosis. Furthermore, it was unlikely that the Respondent would try to manoeuvre the Claimant out of the business by creating an impression that he was performing badly when in fact he was performing well. If he was performing well, they would seek to retain him.
53. On 8 June 2016 a performance review meeting took place, attended by the Claimant, Mr Peel, Dr Rawling and Mr Knight. At pages 646 – 648 there was a note of the meeting written by Dr Rawling. The Claimant's evidence was that neither Dr Rawling nor anyone else took any notes at the meeting and that this must have been written after the event. The Claimant also disputed some of the contents of the note, while accepting that some of it reflected things that were said. In paragraph 181.2 of his witness statement he characterised the meeting as an ambush and as a pre-planned and co-ordinated attack.
54. Leaving aside the differences as to precisely what was said and the manner in which the meeting was conducted, the Tribunal found the following:
 - 54.1 It was common ground that Mr Peel was critical of the Claimant's performance.
 - 54.2 It was said that the Claimant's net contribution to the company in the year to date was £6,000 – a proposition which the Claimant regarded as laughable, in the sense that his contribution had been much greater.
 - 54.3 The Claimant was told that the other Directors had all produced plans as required by Mr Peel on 6 April – although the Claimant challenges the assertion that they had actually done so.
 - 54.4 In paragraph 181.1 of his witness statement the Claimant made reference to his medical condition and asserted that Mr Peel's comments were related to his perception of that condition. He did not, however, suggest that he raised the subject of his condition in the course of the meeting. (The Respondent's position being that none of those present knew about it at the time).

- 54.5 This last point reinforced the Tribunal's finding that the Claimant had not revealed his diagnosis at any stage before this meeting, since if he had done so, it would have been natural to refer to it, whether in terms of the effect his condition had on him, or in terms of what he understood Mr Peel's perception of it to be.
55. On 9 June 2016 Dr Rawling sent to the Claimant a written warning for unsatisfactory performance, at page 649. This referred to the meeting on 6 April and to specific complaints about the Claimant's performance. These included that he had delivered a gross profit contribution of £28,564 by 1 May 2016 against a target for the year of £500,000; that he had no proposals or opportunities listed in the sales pipeline; and that he had failed to produce a credible plan to recover the performance gap. The letter concluded in the following terms:
- "You now have 6 weeks in order to recover the position and get your performance heading back towards your target. If you do not make the necessary performance improvements we will consider further disciplinary action, up to and including dismissal."
56. The Claimant did not reply to this letter, although he was critical of it in paragraph 183 of his witness statement. He contended that Mr Peel, Dr Rawling and, perhaps to a lesser extent, Mr Knight, wanted him out because they perceived that his illness meant that he would not be willing or able to apply himself as before. He said that they saw him as "dead wood and no longer one of the lads."
57. The Tribunal did not accept the Claimant's interpretation of the letter. On our findings, the Claimant had not by this point informed the Respondent of his diagnosis, and so no question of anyone's perception of what that might mean arose.
58. Also on 9 June 2016, the Claimant and Mr Knight met for coffee. It was common ground that the Claimant was angry about what had been said at the meeting the previous day: in cross-examination Mr Knight said that they had "a heated discussion" about that. There was a dispute about what, if anything, the Claimant said about his medical condition. The Claimant's position was that Mr Knight already knew about this, although the Tribunal's finding as explained above is that he did not. The Tribunal therefore rejected, as a matter of logic, the Claimant's evidence that he referred to his condition in terms of it being something already known to Mr Knight.
59. In his witness statement Mr Knight said that the Claimant did not refer to diabetes, or any other illness, in the course of this conversation. In cross-examination he said that the Claimant mentioned going for tests, although he stated that he could not remember the specifics, or mention of any specific condition. In paragraph 8 of his witness statement Mr Knight stated that, after his conversation with the Claimant, he spoke to Mr Peel and Dr Rawling and summarised the discussion that had taken place.

60. On the question of what, if anything, the Claimant said about his condition in the course of the discussion with Mr Knight, the Tribunal found as a matter of probability that this was as described by Mr Knight in cross-examination. We have already given our reasons for finding that the conversation would not have been as stated by the Claimant. A statement that the Claimant was having tests would have been consistent with the facts: he was having tests to establish which type of diabetes he had. Additionally, a statement to Mr Knight at this stage that he was having tests would have been consistent with what we find the Claimant told Dr Rawling on 15 June 2016, which will be explained below.
61. There was no suggestion that the Claimant had asked Mr Knight to keep the information that he was having medical tests confidential, nor could there have been given the Claimant's evidence (albeit we have rejected this) that he had told all three of Mr Peel, Dr Rawling and Mr Knight his diagnosis on the earlier occasion of 17 March. There was no reason for Mr Knight to keep this from the other two, in particular given the closeness of their working relationship. The Tribunal found, as a matter of probability, that an occasion for telling them of this would have arisen fairly soon after 9 June, and that Mr Knight did so.
62. On 10 June 2016 Dr Rawling sent 2 emails to the Claimant offering to meet, in the light of what he had learned from Mr Knight. In paragraph 185 of his witness statement the Claimant said that on the same day he sent an email in reply to Dr Rawling in which he said, among other things, words to the effect that he had missed some urgent appointments for his diabetes, which he now needed to take. The Respondent denied that the Claimant had sent such an email. The Claimant further stated that Dr Rawling had responded with a further email to him, in which he commented "hope all goes well with the docs". Dr Rawling denied this.
63. Immediately after his dismissal, on 5 August 2016, the Claimant sent an email (page 691) to Dr Rawling asking him to send a copy of his email to the latter, Mr Peel and Mr Knight of 10 June 2016. (The Claimant had at this point been locked out of his work email account and so could not find any emails for himself). Dr Rawling sent an email to Mr Peel about this on the same day which read:

"Arse, can't even file things...Did he actually send an email post written warning? I don't remember seeing it."
64. This left the Tribunal with a difficult evidential question. The Claimant was saying that he had sent an email that referred to his diabetes, and that the Respondent had taken advantage of his not having access to his emails so as to deny that this existed. The Claimant had sent an email on 5 August asserting that he had sent an email on 10 June, and Dr Rawling had sent an email on the same date at least suggesting that he had not. Both parties had therefore done something consistent with their stated positions on the email. The Claimant's August email did not, however, contain any clue as to what the June email had said.

65. The Tribunal found, on balance of probabilities, that the Claimant did not send an email in these terms. His evidence about it was unconvincing, in that again he purported to be able to quote it verbatim in paragraph 185 of his witness statement, while saying that this was what he said “or words to this effect”. Furthermore, the Claimant’s account would be consistent only with Dr Rawling already knowing about his diabetes (which the Tribunal has found he did not) and inconsistent with the findings to be explained below about what was said on 15 June 2016.
66. The Claimant and Dr Rawling met on 15 June 2016. Again Dr Rawling provided notes of this meeting (pages 658-659), and again the Claimant’s evidence was that he wrote nothing at the time and so must have created the notes subsequently.
67. In paragraph 187 of his witness statement he Claimant stated that, on the way into the meeting, Dr Rawling asked him how things had gone at the hospital, and that they then had a detailed discussion about his diabetes, which lasted for around 15 minutes. The Claimant said that he told Dr Rawling that the signs were that he had type 1 diabetes, and he was frustrated with the way the tests were being conducted. He then gave details of discussions about such matters as his medication, whether he would need to inject insulin, and the need to protect his remaining pancreatic beta cells. All of this was on the basis that Dr Rawling already knew about the Claimant’s diabetes.
68. Dr Rawling denied that any such discussion took place, and maintained that this was the first occasion on which the Claimant made any mention of the possibility that he had diabetes. He relied on a passage in his note of the meeting which read:
- “MD explained he had a number of tests re potential diabetes / food allergy. SR expressed sympathy and hopes all was well.”
69. Dr Rawling denied that, with regard to what he recorded about the Claimant’s tests, he had created the note with a view to setting up a defence to the present claim. He maintained that the note was contemporaneous, and a fair reflection of what was said at the meeting. As a matter of probability, the Tribunal preferred Dr Rawling’s evidence about the meeting and about the note, for the following reasons:
- 69.1 Although written in the past tense (e.g. “SR pointed out” and “MD explained”), the note appears to be contemporaneous, at least to the extent of having been written very soon after the meeting, if not actually during it. The note refers to performance issues of the sort that had been raised previously, including the gross profit that the Respondent said that the Claimant had generated, a lack of new leads, and the Claimant’s recorded acceptance that the lead that he had generated (Sky) was not giving rise to many opportunities for

generating further business. These are the sort of matters that would be discussed at such a meeting.

- 69.2 The note records Dr Rawling as describing something as “completely untrue (bullshit)”, which might be a surprising thing to include in a document being created for use in a legal hearing.
- 69.3 As will be explained below, Mr Peel and Mr Angiolini both gave evidence that the Claimant told them that he was having tests on 23 June 2016, when a Board meeting took place. If Dr Rawling was intent on concocting evidence for the purposes of this hearing, one might have expected him to say that he also learned this on 23 June. It would not be necessary for him to create an untrue account, and a false note, of being told on the separate occasion of the 15 June meeting.
70. The Tribunal gave thought to the question whether the Respondent’s witnesses might have got together and created a false account containing ingeniously selected details such as points 2 and 3 above with a view to luring us into making the finding that we have in fact made. In the end, we found that to be unlikely, and concluded it was more probable that these elements showed that the account given was true.
71. As the Tribunal has already stated, a Board meeting took place on 23 June 2016. The Claimant’s evidence was that DY asked him how he was getting on with his diabetes before the meeting started. He further said, in paragraph 195 of his witness statement, that after the meeting Dr Rawling ordered a round of drinks: the Claimant asked for a slim-line tonic with his gin and Dr Rawling quipped “slim-line for the lady”. He continued that, later on, he spoke to a number of people including Mr Peel, Dr Rawling and Mr Knight about the effects of diabetes. The Claimant continued that, after the group had moved on to a different hotel bar, Mr Elliott told him that he was “fascinated” about his diabetes, and that they went on to have a conversation about this and about a condition affecting Mr Elliott’s wife.
72. The Respondent’s evidence about 23 June 2016 was as follows. Mr Angiolini said that, after the board meeting, when he and the Claimant (who, as we have recorded, were friends as well as colleagues) were sitting separately from the others present, the Claimant told him he was having tests for diabetes. He said that he was somewhat taken aback by this, as he knew that diabetes could be serious, but that he did not discuss this conversation with anyone else. Mr Peel’s evidence was that after the meeting the Claimant told him that he was having tests, but did not say what for. Dr Rawling did not refer in his evidence to any discussion of the Claimant’s health, but denied the “slim-line for the lady” comment.
73. The Tribunal found it plausible that the Claimant would have said that he was having tests at this stage: he was having tests to ascertain which type of diabetes he had. We also found it plausible that he would tell Mr Angiolini more about the nature of the tests than he would tell Mr Peel. As

a matter of probability, we accepted the Respondent's evidence about what the Claimant said on this occasion.

74. As to the alleged comment by Dr Rawling about "slim line for the lady", the Tribunal noted his denial and his evidence that he himself would drink slim line mixers. We found, however, that as a matter of probability he did say this. Although there was a dispute about the extent and prevalence of the drinking that went on in the course of the Respondent's business, meetings, and associated social activities, it was clear that that on occasions such as this one it was usual for alcohol to be consumed. As a matter of general experience of life, the Tribunal noted that, when people are socialising and drinking together, the conversation is often light-hearted or bantering in tone, and may specifically relate to what individuals are drinking. We found that Dr Rawling made this comment, in a light-hearted manner.
75. The Claimant received a diagnosis of type 1 diabetes on 11 July 2016. In paragraph 198 of his witness statement the Claimant described bumping into Mr Knight and Mr Peel on his way into the office and a conversation ensuing about his weight loss, which he attributed to the medication he was taking. The Claimant continued in paragraph 199 that on arriving in the office he "also told" Mr Angiolini about the confirmed diagnosis. The Claimant had not said in terms that he had told Mr Peel and Mr Knight, and the Tribunal did not take the inclusion of the word "also" as amounting to evidence that he did.
76. In paragraph 11 of his witness statement Mr Angiolini said that he did not recall this conversation specifically. He said that it was possible that on this occasion the Claimant confirmed that he had diabetes, but that if he did, Mr Angiolini was sure that he did not specify which type. He stated that he had met the Claimant on a couple of occasions later in the year, after his employment was terminated, and that even then he was saying that it was unclear whether he had type 1 or type 2 diabetes.
77. The Tribunal found that the Claimant did tell Mr Angiolini of his diagnosis of type 1 diabetes on this occasion. We found the latter's evidence on the point unconvincing: it was not plausible that Mr Angiolini could be uncertain about whether the Claimant mentioned diabetes at all, but certain that if he did, he did not specify which type. Conversely, we found it probable that the Claimant would share with his friend Mr Angiolini the diagnosis that he had just received. The Tribunal considered it most unlikely that it could be the case that the Claimant was still expressing doubt about which type of diabetes was involved months after he had a firm diagnosis.
78. A further point that assisted the Tribunal in reaching this conclusion was the unchallenged evidence of Mr Ansary and Mr Bhoobun. The former's evidence was that, while he was working in the office in July 2016, the Claimant told him that he had recently been diagnosed with type 1 diabetes, and they had some conversations about this. Mr Bhoobun said that while he was working in the office during the period June to August

2016, he saw the Claimant checking his blood sugar levels (although at the time Mr Ansary thought he was injecting insulin). He said that the Claimant spoke openly about having recently been diagnosed with type 1 diabetes. The Tribunal considered that it would be surprising if the Claimant had had such discussions with these two colleagues but not told Mr Angiolini this at about the same time.

79. Returning to 11 July, Mr Knight denied commenting on the Claimant's weight loss. The Claimant further alleged that, when he told Mr Knight that his weight loss was attributable to the medication he was taking, the latter replied "we should keep some back, give a few tablets to any fat munter before shagging them". Mr Knight denied saying this.
80. The Tribunal was left with little, if anything, beyond the respective assertions and denials of this comment. There was some other evidence, in relation to some photographs that were sent around in an unrelated context, of Mr Knight making "jokes" in a broadly similar vein. Ultimately, the Tribunal found that, as a matter of probability, the Claimant did not refer to his medication on this occasion, as he had not yet revealed his diagnosis to Mr Knight or Mr Peel. Consequently, we found as a matter of probability that Mr Knight did not reply in the terms alleged. Perhaps the more significant point is that, whatever Mr Knight may have said on this occasion, it cannot have been related to the Claimant's disability as he was not then aware of this.
81. In paragraph 206 of his witness statement the Claimant described a further conversation with Mr Angiolini in which the latter was sympathetic up to a point, when he said that, in addition to diabetes, he had been told that he might also have coeliac disease. In his oral evidence he said that this occurred on around 20 July, rather than on 18 July as pleaded. The Tribunal considered that this point made little difference to the matter. The Claimant said that Mr Angiolini then added: "what's happening to you man, you're breaking down – think it's time that we took you out to the woods and put you out of your misery", while miming shooting. In his witness statement Mr Angiolini said that he might have made a light-hearted comment, although he did not recall the specific words alleged by the Claimant: these were not words that he would ever use. In cross-examination Mr Angiolini said that he did not make this particular comment, but that there might have been some banter.
82. The Tribunal found that Mr Angiolini did make a comment along the lines alleged by the Claimant, but did so in a light-hearted way, following the expression of some more straightforward sympathy. Again, the Tribunal was left unconvinced by Mr Angiolini's evidence that he might have said something, but not what the Claimant alleged. We found, however, that he made the comment in the course of a friendly exchange with the Claimant.
83. The Claimant also stated that Mr Angiolini repeated this "joke" in a different context at some later date when he reacted adversely to some nuts. Mr Angiolini did not refer to this occasion in his witness statement, and was not

cross-examined about it. The Tribunal did not regard this as surprising: it was not the most significant issue in the case. We found that Mr Angiolini probably did repeat it.

84. The Claimant and Mr Peel had a one-to-one meeting on 13 July 2016. The Claimant's evidence, in paragraph 202 of his witness statement, was that Mr Peel wanted him to spend a week in Leeds, where Sky had an office, with a view to generating more business from that company. The Claimant said that he told Mr Peel that what he was talking about sounded like account management, which was not his role. He also stated that he referred to his health, saying that because of this he preferred not to spend nights away from home, did not feel up to nightly wining and dining of the clients, and that until his diabetes was better controlled, he would prefer to remain office-based.
85. Mr Peel denied that the Claimant mentioned his diabetes or wishing to remain office-based on this occasion, and said that, had he done so, he would have offered to work with him to agree any necessary adjustments.
86. The Tribunal saw no reason why the Claimant should not have mentioned his diagnosis on this occasion, as he was not making any secret of it. Equally, by this time Mr Peel might have heard about it via Mr Angiolini in any event. We found it improbable, however, that the Claimant made the observations about wining and dining, or remaining office-based, given the events of 2/3 August 2016, described below. These indicated a continuing willingness to engage in wining and dining of clients, continuing afterwards with colleagues.
87. In the event, the Claimant and two more junior colleagues went to Leeds on 2 August 2016 with a view to entertaining individual contacts at Sky, staying in a hotel overnight, and returning to London for a meeting at Sky's office in Osterley the following morning. There was some question as to how much the Claimant had to drink on this occasion. In paragraph 207 of his witness statement he said that the group went for drinks, dinner and then more drinks. He stated that he was conscious of limiting his alcohol intake, and while others were drinking cocktails, he stuck to a beer and slim-line gin and tonic. After the meal he took his two colleagues for a drink, and limited his intake to a couple of beers.
88. When cross-examined about this occasion, the Claimant stated that he stayed up until about 2.30 am, went to bed and rose again at about 4.30 in order to catch the 5.05 am train to London. He estimated his overall consumption of alcohol during the evening at around 5-6 pints of beer and 2 gin and tonics.
89. The Tribunal did not find it necessary to make a finding as to precisely how much the Claimant had to drink during the evening, although we found it unlikely that he was giving an underestimate (his evidence was that, when well, 8-10 pints in an evening would not be unusual). The relevant point

was that he was drinking, and had only about 2 hours' sleep before catching the train back to London.

90. On 3 August 2016 the Claimant attended, as planned, a series of morning meetings at Sky's offices at Osterley. In paragraph 208 of his witness statement the Claimant said that he and Mr Peel spoke before the meeting, and the latter seemed quite upbeat. He continued that, during the meeting, he had difficulty concentrating and projecting himself, said very little, and when he did speak, showed that he had failed to understand the point being made. The Claimant said that it was customary for Directors to drink and socialise late into the night and to be ready for work the next morning, but that on this occasion "the fatigue made my blood sugars more erratic." He said that Mr Peel's mood seemed to have changed after the meeting, and that he hardly spoke to him as they walked to the exit. The Claimant concluded that "I believe that by this point Pip had decided for sure that my diabetes meant that I did not have the energy to work at the pace he wanted".
91. The Tribunal noted that, in his witness statement, Mr Peel did not mention the meeting at Osterley: nor was he asked about it in cross-examination. When the Claimant was cross-examined about this event, he said that he was "very quiet" on that day, but denied the suggestion that his medical condition had nothing to do with his performance.
92. It was understandable that neither party was keen to emphasise this occasion. Mr Peel might not want to draw too much attention to it, since the Claimant was dismissed the following day and there was a risk, (at least with hindsight) that his performance, which he attributed to his condition, might be regarded as relevant to that decision. Conversely, from the Claimant's point of view, there was an obvious possible alternative explanation for his performance on the day, i.e. the effects of his late night and drinking.
93. The Tribunal concluded that Mr Peel must have known of the Claimant's diagnosis of type 1 diabetes by this time. We have not accepted the Claimant's case that Mr Peel had known of his diabetes (not the particular type) since March. However, Mr Knight accepted that he knew the Claimant was having tests from 9 June onwards; Dr Rawling accepted that he knew that the Claimant was having tests for diabetes from 15 June onwards. Mr Angiolini, Mr Ansary and Mr Bhoobun all knew of the diagnosis of type 1 from soon after 11 July 2016. The Tribunal found it inconceivable that Mr Peel would not have known by this time.
94. On 4 August 2016 Mr Peel called a meeting by way of conference call of all Board members. There were no minutes, Mr Peel saying that this was an ad-hoc meeting. In paragraph 49 of his witness statement he described saying that the Claimant had no improvement plan despite 8 weeks having elapsed. He continued that "any provisional decision to dismiss had to be unanimous across the Board". There was no debate, save that Mr Angiolini

said that, on a personal level, he would rather not be involved. Dr Rawling was then given the job of “having the discussion” with the Claimant.

95. Dr Rawling’s evidence, in paragraph 49 of his witness statement, was that all seven directors were of the opinion that the Claimant’s performance was not good enough, and that they came to the provisional agreement that he should be dismissed, unless in the meeting with Dr Rawling that was to follow he was able to indicate that his performance might recover. In cross-examination Dr Rawling denied the suggestion that he and Mr Peel had decided before the meeting that the Claimant had to go. In answer to a question from Ms Breslin, Dr Rawling said that he had a conversation with Mr Peel on 4 August in advance of the Board meeting, from which he knew that the Claimant’s potential dismissal was going to be discussed. He did not think that any other Board members had any similar prior knowledge.
96. Still on 4 August 2016, Dr Rawling then met the Claimant. He had some pre-prepared notes to assist him with what to say (page 682) and further manuscript notes appear on these. Dr Rawling’s evidence was that these were notes that he made in the course of the meeting, and that they reflected what was said: the Claimant’s evidence was, once again, that Dr Rawling did not make any notes.
97. Dr Rawling’s notes indicate that the Claimant reacted angrily to the statement that his performance was still regarded as unsatisfactory. They record the Claimant saying that he would do whatever it took to take down the company. On page 683 Dr Rawling wrote as follows:

“MD then listed out all the “tests” he is going through – explained the company should not exit people if ill. I explained this is a performance issue and v. sorry to hear MD not in perfect health.....”
98. On this point, Dr Rawling stated in paragraph 53 of his witness statement that the Claimant listed various tests, as he had done on 15 June, and mentioned diabetes as one of the conditions for which he was being tested, although he was not specific about the outcome. The Claimant’s evidence in paragraph 210 of his statement, was that he said that he could not believe that he was being treated in this way, given how long they (i.e. the three amigos) had worked with him, and given that he had been struggling with serious ill health. He continued that he was “gobsmacked” when Dr Rawling replied that he had “absolutely no knowledge” of his ill health.
99. The Tribunal preferred the Claimant’s account of this aspect of the exchanges with Dr Rawling. It was improbable that the Claimant would have said that he was being tested for diabetes when he had received the diagnosis of type 1 on 11 July, and when he had told Mr Ansary, Mr Bhoobun and (as we have found) Mr Angiolini about this at around that time. There was no reason for him to have said something different to Dr Rawling. The latter’s recorded response that he was sorry to hear that the Claimant was not in good health seems unrealistic in the light of his own evidence that the Claimant had told him about having tests on 15 June and

that he had said something similar then. He was not at this point hearing for the first time that the Claimant had health concerns, and would not repeat that he was “sorry to hear” this.

100. Whether it was at the beginning of the meeting (according to the Claimant) or after some discussion (according to Dr Rawling), the latter told the former that he was dismissed. The Claimant then returned to the office, where he encountered Mr Peel. The latter did not mention this in his witness statement, but in cross-examination agreed that he and the Claimant spoke. The Claimant’s account, in paragraph 214 of his witness statement, was that Mr Peel was not willing to discuss the matter and said that the decision was final. This was effectively agreed by Mr Peel, who said that “I told him that in my view the decision had been made”.
101. The Claimant’s evidence continued that he said much the same to Mr Peel as he had said to Dr Rawling about not being able to believe what they were doing, including reference to his diabetes, and that Mr Peel replied in the same terms, that he “had absolutely no knowledge” of his ill health. When cross-examined about this, Mr Peel said that he did not believe that the Claimant spoke about diabetes at this time, and further that he (Mr Peel) did not then know that the Claimant had diabetes. The Tribunal has, of course, found that in fact he did know.
102. The Tribunal again preferred the Claimant’s account of this conversation. We found it probable that the Claimant would have said much the same to Mr Peel as he had just said to Dr Rawling, including making reference to his diabetes. Mr Peel had clearly decided that the Claimant’s dismissal was not open to discussion. It was unlikely that he would entertain any discussion of the Claimant’s health.
103. The Tribunal paused here to consider the various findings that it has made about exchanges during the period 15 June to 4 August 2016, and what these indicate about the Respondent’s knowledge of the Claimant’s condition. We reached the following conclusions:
 - 103.1 We have found that on 15 June the Claimant told Dr Rawling that he was having tests for diabetes, and that on 23 June he told Mr Angiolini that he was having tests for diabetes, and Mr Peel that he was having tests. The Claimant received the diagnosis of type 1 on 11 July, and thereafter told Mr Angiolini about this and made no secret of it in the office, such that Mr Ansary and Mr Bhoobun were aware of it.
 - 103.2 On any view, it was not true that by 4 August 2016, neither Dr Rawling nor Mr Peel had any knowledge of the Claimant’s ill health. The former’s notes of the meeting on 15 June show that the Claimant mentioned tests for possible diabetes. The Tribunal found it implausible that Dr Rawling would have kept this from Mr Peel between then and 4 August.

- 103.3 Furthermore, it was unlikely that if, as they did, Mr Angiolini, Mr Ansary and Mr Bhoobun knew about the Claimant's diagnosis, neither Mr Peel nor Dr Rawling knew, at least by 4 August 2016. The Tribunal found that this was the case whatever the Claimant had said on the subject to Mr Peel on 13 July 2016.
- 103.4 While the fact that the Tribunal has found Dr Rawling's and Mr Peel's accounts of their conversations with the Claimant on 4 August to be improbable does not of itself mean that we are bound to accept the Claimant's accounts, we do find that both of them denied any knowledge of the Claimant's ill health. The Claimant's case is that they did know, and it would be a risky and unusual approach for a Claimant in such circumstances to invent an account of their asserting that they did not know.
- 103.5 The Tribunal finds that the most likely explanation for Dr Rawling and Mr Peel saying to the Claimant in the same terms that they had no knowledge of his ill health, when they did have knowledge of it, is that they had agreed to take this line should he raise it.
104. All of the above leads the Tribunal to conclude that, contrary to their denials, Mr Peel and Dr Rawling knew of the Claimant's diagnosis of type 1 diabetes by the time that the decision to dismiss him was made.
105. Knowledge of the diagnosis does not equate to knowledge of disability. Diabetes does not invariably give rise to disability. To the extent necessary, the Tribunal will address the question of constructive knowledge in its conclusions on the issues, but at this stage it makes the following findings of fact. It is generally known that type 1 diabetes is a lifetime condition, and often has more serious consequences for the individual than does type 2 (as reflected, for example, in Mr Angiolini's reaction when told of the Claimant's diagnosis). In particular, individuals with type 1 are likely to require medication, including insulin, in order to control symptoms that would otherwise have a substantial adverse effect on their ability to carry out normal day to day activities. We find that Mr Peel and Dr Rawling would have known these things, and did know them.
106. Dr Rawling sent the Claimant a letter on 4 August 2016 at pages 686-7 confirming the discussion that had taken place and giving one month's notice of termination of his employment.
107. The Claimant's access to the Respondent's IT systems, including his company email, was removed. In paragraph 215 of his witness statement, he described placing his company laptop in his desk with a note on it asking for it not to be powered up. The Claimant stated that he did this because he suspected that the Respondent would interfere with relevant emails stored on its cloud-based system, and that his laptop would sync with that system if started up, with the result that the same emails would be deleted from it.

108. Dr Rawling's evidence, in his supplemental statement, was that he understood from the Respondent's Operations Manager that there was indeed a note in the terms stated on the Claimant's laptop. He continued that there was no reason to treat the Claimant's laptop differently from any other returned by an employee who was leaving, and that it was therefore returned to the pool. Solicitors instructed by the Claimant wrote to the Respondent on 12 August 2016, whereupon the laptop was "set aside", but then at some point thereafter it was returned to circulation.
109. In answer to questions from the Employment Judge, Dr Rawling said that over time "they" must have thought that there was no claim coming in, so he presumed that a decision to return the laptop to use was made. He said, "I believe that's how it happened but I can't say I witnessed it myself". The Tribunal noted that Dr Rawling's evidence did not, ultimately, identify who decided to power up the Claimant's laptop or when exactly this occurred.

The applicable law and conclusions

110. The Tribunal returned to the list of issues. Issue 1 was as to whether the Claimant was at the material time disabled within the meaning of the Equality Act 2010. It is common ground that he was.
111. Issues 2 and 3 concerned the state of knowledge or belief as to the Claimant's disability of the relevant individuals involved in his complaints.
112. The Tribunal's factual findings on this are, in summary, as follows:
 - 112.1 The first that anyone knew about his condition was on 9 June 2016 when the Claimant told Mr Knight that he was having tests, without specifying for what.
 - 112.2 From 15 June 2016 Dr Rawling knew that the Claimant had been having tests for potential diabetes. Mr Peel and Mr Knight would have known the same from soon after that date.
 - 112.3 All three knew of the Claimant's diagnosis of type 1 diabetes from a point after 11 July 2016, and certainly by 3/4 August 2016.
 - 112.4 Anyone who knew of that diagnosis would also have known that this is a lifetime condition and that, unless controlled by medication, it would have a significant effect on the individual's ability to carry out normal day to day activities. Anyone who knew of the diagnosis could reasonably be expected to know that it could give rise to disability.
113. The impact of these findings will be discussed in relation to the individual causes of action where knowledge is relevant.

The burden of proof

114. Mr Rajgopaul, in his submissions, placed substantial reliance on the provisions in section 136 of the Equality Act, which are as follows:

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

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

115. In **Igen v Wong [2005] IRLR 258** and **Madarassy v Nomura [2007] IRLR 246**, both decided under the previous anti-discrimination legislation, the Court of Appeal identified a two stage approach to the burden of proof. At the first stage the Tribunal would consider whether the facts were such that, in the absence of an explanation from the Respondent, it could properly find that discrimination had taken place. In **Madarassy** the Court of Appeal emphasised that this should be a finding that the Tribunal could *properly* make. There would have to be something (which might not in itself be very significant) beyond a difference in protected characteristic and a difference in treatment that would enable such a finding to be made. In the event that the Tribunal found the facts to be of this nature, the burden would be on the Respondent to prove that it did not discriminate against the Claimant.

116. In **Ayodele v Citylink [2018] IRLR 931** the Court of Appeal confirmed that this approach applied under the current legislation, and that the Tribunal can take account of evidence adduced by the Respondent (including any failure to adduce evidence) at the first stage.

117. The Tribunal will refer to the burden of proof in making the findings set out below.

Direct Discrimination because of disability

118. Section 13 of the Equality Act provides as follows:

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

119. As stated by Lord Browne-Wilkinson in **Nagarajan v London Regional Transport [1999] IRLR 572** and as held by the Court of Appeal in **Owen & Briggs v James [1982] ICR 618**, it is not necessary for the treatment concerned to have occurred wholly or exclusively because of the discrimination complained of. The “because of” test is satisfied if the protected characteristic had a significant influence on the treatment.

120. In issue 4 the Claimant complained of six acts of direct discrimination, at paragraphs (a) to (f). Of these, paragraphs (a) to (c) referred to events on 6 April and 8 June 2016. Given the Tribunal’s finding about the

Respondent's knowledge of the Claimant's disability, that disability cannot have had a significant influence on the treatment of which he complains.

121. The position is different as regards the decision to dismiss the Claimant (issue (d)), which was made on about 4 August 2016 and communicated to him on the same day. The Respondent, through Mr Peel in particular, has firmly denied that the Claimant's disability played any role in the decision. Indeed, Mr Peel (the primary decision maker) denied knowing of the Claimant's condition at the time. There was evidence in the form of the earlier criticisms of the Claimant's performance, and the written warning given on 8 June 2016 that (whether justifiably or not) Mr Peel was, for necessarily non-discriminatory reasons given his lack of knowledge of the Claimant's condition, dissatisfied with his performance. This dissatisfaction was sufficient for the Claimant's continued employment to be put at risk in the follow-up warning letter of 9 June 2016.
122. That said, the Tribunal considered that the following matters were relevant when considering the question whether the facts were such that, in the absence of an explanation, it could properly find that the decision to dismiss the Claimant was significantly influenced by Mr Peel's knowledge of the Claimant's disability:
 - 122.1 The Tribunal has found that, contrary to their evidence, the "three amigos", and Mr Peel in particular, knew that the Claimant had a diagnosis of type 1 diabetes at least by 3/4 August 2016. We infer that they (and Mr Peel in particular) have maintained this denial because they know that the Claimant's disability was a factor in his dismissal.
 - 122.2 The Tribunal has also found that Mr Peel and Dr Rawling adopted a common approach of telling the Claimant on 4 August 2016 that they had no knowledge of his ill health, when in fact they knew of the diagnosis. We infer that they did so because they knew that this was a factor in the decision to dismiss him, and that (in non-technical terms) it should not be.
 - 122.3 Mr Peel has embellished his account of being dissatisfied with the Claimant's performance from as far back as 2015. In particular, the Tribunal has found that he altered the email of 30 June 2015 on page 489 for the purposes of this litigation. We find that he did so in order to give the false impression that John Lewis had been critical of the Claimant when they had not. We infer that he did so because he knew that the Claimant's disability had been a factor in the decision to dismiss, and that he felt that it was necessary to bolster the Respondent's case to the contrary.
 - 122.4 Additionally, we have found that Mr Peel has exaggerated his account of giving the Claimant warnings on 30 November 2015 and 6 April 2016. We infer that he did this in order to bolster the

Respondent's case in a similar way to that found in sub-paragraph 3 above.

123. On the basis of these inferences from the facts as we have found them, the Tribunal considered that it could properly find that the Claimant's disability was a significant influence on the decision to dismiss him.
124. The burden was therefore on the Respondent to prove that it did not, in any way, discriminate against the Claimant in deciding to dismiss him. We found that the Respondent did not discharge this burden, essentially for the reasons that led us to conclude that we could properly make a finding of discrimination. The inferences that we have drawn cause us to find against the Respondent's explanation that the decision to dismiss was purely because of the Claimant's performance and was not influenced by his disability. On the basis of the inferences that we have drawn, the Tribunal finds that the Claimant's disability played some substantial part in the decision to dismiss him. We considered that, as a matter of probability, Mr Peel took into account the Claimant's disability as something that meant that his performance was unlikely to improve, or at least lessened the chances of that occurring.
125. What would have occurred in the absence of the discrimination is not something that has been canvassed so far, and remains at large as an issue in relation to remedies.
126. Issue (e) is the complaint that Dr Rawling and Mr Peel "refused to acknowledge" the Claimant's ill health on 4 August 2016. This is the complaint, which we have found established on the facts, that both denied any knowledge of his ill health. This does not, perhaps, add a great deal to the complaint that the dismissal was because of the Claimant's disability, as it was a part of the events surrounding the dismissal.
127. However, to the extent that this can be regarded as a separate act from the dismissal, the Tribunal found that this also occurred because of the Claimant's disability. The Tribunal drew an inference in a similar way to those drawn above. We inferred that Mr Peel and Dr Rawling agreed to deny all knowledge of the Claimant's disability because they knew that it was, in truth, a factor in the decision to dismiss him.
128. In relation to issue (f), the Tribunal has found that there was not an email of 10 June 2016, at least in the terms alleged by the Claimant, and so this complaint has failed on the facts.
129. The Tribunal has therefore found that complaints (d) and (e) under direct discrimination are well-founded.

Discrimination arising from disability

130. Section 15 of the Equality Act provides as follows:

- (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 be expected to know, that B had the disability.*

131. In issue 6 the Claimant complained of the same six acts as complained of under direct discrimination as also being acts of discrimination because of something arising from his disability. The “something(s) arising from” his disability were set out in issue 5.

132. In relation to these last matters, the Tribunal found as follows:

132.1 Issue (a): The Tribunal has, broadly, found that there was an assumption along the lines that the Claimant would be less capable of, or less committed to, doing his job, once his type 1 diagnosis was known. We have found that the Respondent directly discriminated against the Claimant by dismissing him: it is not therefore necessary to determine whether this might also be an act of discrimination because of something arising from disability. If it were necessary, however, the Tribunal would find that this was established, for the reasons already given in relation to direct discrimination.

132.2 Issue (b): The Tribunal has not found that the Claimant's energy levels were reduced in a way that came to the Respondent's attention.

132.3 Issue (c): The Tribunal has not found that the Claimant suggested being office-based for a period.

132.4 Issue (d): The Tribunal has not found that the Claimant arrived late in a way that came to the Respondent's attention or caused concern.

132.5 Issue (e): The Tribunal has not found that the Claimant took time off for medical appointments in a way that came to the Respondent's attention or caused concern.

132.6 Issue (f): Little was said about the question of health insurance premiums. The Tribunal agreed with Ms Barsam's submission that it was unlikely that any concern about increased health insurance premiums would be a significant factor in the Respondent's decisions about how to treat the Claimant, and we found that it was not.

133. It follows from the above that only issue (a) of the complaints of discrimination because of something arising in consequence of disability is potentially engaged, but this has already been fully covered by the Tribunal's decision that the dismissal was an act of direct discrimination.

Failure to make reasonable adjustments

134. Sections 20 and 21 of the Employment Rights Act 2010 include the following provisions about the duty to make reasonable adjustments:

20 (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.

21 (1) A failure to comply with the first, second or third requirement is a failure to make reasonable adjustments.

135. The Tribunal found that the complaints of failure to make reasonable adjustments largely re-cast the considerations that arose in relation to the complaint of direct discrimination by dismissing the Claimant.

136. In the interests of proportionality, and in order to avoid further extending the time taken in its deliberations (and, consequently, the time taken to promulgate this judgment) the Tribunal first considered whether it should determine all of the issues arising under this head of claim, given its conclusion that the Claimant's dismissal was an act of direct discrimination. We concluded that we should not do so, because:

136.1 Paragraph 20(1) of Schedule 8 to the Equality Act provides that:

A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know –

(b).....that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first.....requirement.

136.2 The Tribunal's finding on the Respondent's knowledge of the disability, including constructive knowledge, is that the Respondent, through the "three amigos", knew or could reasonably be expected to know, that the Claimant had a disability from a point after 11 July 2019.

136.3 Before that date, the Respondent did not know, and could not reasonably have been expected to know, that the Claimant had a

disability. Up to that point, the Claimant had revealed only that he was having tests, and (to Dr Rawling on 15 June and Mr Angiolini on 23 June) that he was having tests for diabetes. That would not have been sufficient for the Respondent to be reasonably expected to know that he had a disability: the tests might have been negative, and diabetes does not necessarily equate to a disability. As we have found, the Claimant was not exhibiting symptoms that would have given rise to actual or constructive knowledge of disability.

136.4 The Tribunal has not been able to find precisely when after 11 July 2016 the Respondent knew about the type 1 diagnosis. We have found that it was no later than 3/4 August. On any view, the period between the Respondent's acquisition of the relevant knowledge, and the decision to dismiss the Claimant, was short. The maximum period is around 3 weeks.

136.5 The Tribunal found it unrealistic to engage in a lengthy analysis of a complaint of failure to make reasonable adjustments over such a period. The reality of the case, on the Tribunal's findings, is that the Respondent (primarily in the person of Mr Peel) moved virtually directly from learning of the Claimant's disability to dismissing him. The effect of the Tribunal's finding that the dismissal was an act of direct discrimination is that determining that there were adjustments that should have been made would be a redundant exercise: they would all be based on the proposition that the Claimant should not have been dismissed.

Indirect discrimination

137. In the event the complaints of indirect discrimination, which essentially recast those that preceded them in the list of issues, were not pursued.

Harassment

138. Section 26 of the Equality Act provides as follows:

(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.

139. In issue 16 the Claimant complained of seven acts of harassment. Issues (a)-(e) pre-date knowledge of the Claimant's disability on the part of those

alleged to be involved (Mr Peel, Dr Rawling and Mr Knight) and so cannot have been related to the disability. Additionally, the Tribunal has found against the Claimant on the facts of issue (e).

140. Issue 7(f) concerns the conversation between the Claimant and Mr Angiolini in which, as the Tribunal has found, the latter made a comment to about putting him out of his misery while miming shooting. We have also found that this comment was made in a light-hearted manner, and in the context of Mr Angiolini (the Claimant's friend) having expressed some sympathy for the Claimant's situation regarding his health.
141. The Tribunal accepted that this was unwanted conduct, in that it was a joke directed at the Claimant that he did not like. It was related to the Claimant's disability as it was specifically concerned with his diagnosis.
142. The Tribunal was satisfied that Mr Angiolini did not tell the joke with the purpose of violating the Claimant's dignity, or of creating a harassing environment for him. The Claimant himself said in paragraph 206 of his witness statement that he did not believe this to be the case.
143. We reminded ourselves of the provisions of subsection (4) of section 26 of the Equality Act. This provides that, when deciding whether conduct had the relevant effect, the Tribunal must take into account:
 - (a) *The perception of [the Claimant];*
 - (b) *The other circumstances of the case;*
 - (c) *Whether it is reasonable for the conduct to have that effect.*
144. The Claimant's evidence about his perception was, as we have stated, that he did not believe that Mr Angiolini meant any harm by what he said, but that "this was too close to the bone". He stated that he would not have minded too much if it had been said once, but that repeating it in front of others was degrading and humiliating. The Tribunal accepted this, with the caveat, that the description "degrading and humiliating" was, we considered, over-stating the matter to a degree.
145. As the Tribunal has found, the circumstances of the case include a jokey or bantering atmosphere within the Respondent's organisation. They also include that he and Mr Angiolini were good friends; and that he did not protest the first time that the latter made the remark.
146. The Tribunal concluded that it was not reasonable for this conduct to have the relevant effect, for the reasons given in the preceding paragraph. It was, we found, a somewhat unfortunate but ultimately trivial remark made by a friend who was, at the time, sympathetic towards the Claimant's health problems.

147. Issue (g) concerned the denials by Mr Peel and Dr Rawling of knowledge of the Claimant's ill health. We have already found that these amounted to acts of direct discrimination. Section 212(1) of the Equality Act provides that harassment and direct discrimination claims are mutually exclusive. This particular issue therefore can go no further.

Time limits

148. No issue as to time limits arises in relation to the complaints that the Tribunal has held to be well-founded, for the reasons set out below.
149. Both of the acts concerned occurred on 4 August 2016.
150. The Tribunal referred to section 140B of the Equality Act. The Claimant notified ACAS of his complaint within 3 months of that date, on 31 October 2016. The ACAS certificate was issued on 15 November 2016. The certificate on the Tribunal's file is addressed to the Claimant's postal address, and so is deemed to have been received by the Claimant on the date on which it would be delivered in the ordinary course of the post, namely 16 November 2016. The relevant time limit was due to expire on 3 November 2016, during the period beginning with receipt of the early conciliation request and one month after receipt of the certificate. The last date on which the claim could be presented within time was therefore one month from 16 November 2016, i.e. 15 December 2016, which was the date on which the claim was presented.

Further conduct of the case

151. The parties should now liaise with regard to proposing dates for a remedies hearing, and any case management orders that may be required. It may be that the most effective way of dealing with this will be by way of a telephone preliminary hearing: the parties should discuss this and apply to the Tribunal accordingly.

Employment Judge Glennie

Dated: 19 June 2019

Judgment sent to the parties on:

21 June 2019

For the Tribunal Office