EMPLOYMENT TRIBUNALS

Claimant: Mr C Mackay

Respondent: Pyramid Display Materials Limited

Heard at: Manchester (by CVP) **On:** 23-26 October 2023 & 2-5 January 2024

Before: Employment Judge Phil Allen
Mrs A Booth
Mr R Cunningham

REPRESENTATION:

Claimant: In person
Respondent: Ms J Duane, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed.

2. The claimant did have disabilities at the relevant time, as defined by section 6 of the Equality Act 2010. Those disabilities were: depression; stress; insomnia; and OCD.

3. The claimant has not proved that he had a disability at the relevant time by reason of anxiety.

4. The complaints of unfavourable treatment because of something arising in consequence of the disability are not well-founded and are dismissed.

5. The complaints of failure to make reasonable adjustments for disability are not well-founded and are dismissed.

6. The complaints of harassment related to sexual orientation are not well-founded and are dismissed.

7. The complaints of harassment related to disability are not well-founded and are dismissed.

8. The complaints of victimisation are not well-founded and are dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent from 2008 until he was dismissed effective on 4 November 2021. He was latterly a business development manager. The claimant claimed that he was unfairly dismissed. He also claimed that he was subjected to discrimination arising from disability, breach of the duty to make reasonable adjustments, harassment and victimisation. He alleged that the harassment was related to sexual orientation and/or disability. The claimant alleged that at the relevant time he had disabilities of: anxiety; depression; insomnia; stress; and obsessive compulsive disorder (OCD). The respondent acknowledged that at the relevant time the claimant was a disabled person as a result of stress and/or OCD but disputed that the other conditions relied upon amounted to a disability at the relevant time. The respondent denied unlawful discrimination, harassment, or victimisation. It contended that the claimant was fairly dismissed for some other substantial reason, asserted to be an irretrievable breakdown in relations between the parties. The respondent also contended that the discrimination, harassment, and victimisation claims (or, at least, the majority of them) had not been brought within the time required and the Tribunal did not have jurisdiction to consider those claims as a result.

Claims and Issues

2. There had been four preliminary hearings previously conducted in this case. At the last preliminary hearing on 8 September 2023 a draft list of issues had been prepared and appended to the case management order (150). That had been expressly subject to amendments. The parties had subsequently agreed a list of issues on 28 September 2023, which had been included in the bundle (151L).

3. On the morning of the first day of the hearing the respondent produced a further amended list of issues. After the claimant had been given the reading time on the first morning of the hearing to consider it, he did not agree to the revised list. Save for one amendment/issue to be read alongside it, the Tribunal confirmed that it would consider and rely upon the agreed list of issues (151L) and not the amended one prepared by the respondent immediately prior to the hearing. One issue was particularly highlighted by the respondent's representative from the respondent's list which she said helpfully clarified an aspect of the response to the claim, which was the way in which the respondent set out the legitimate aims upon which it relied in its defence to the claim for discrimination arising from disability. The Tribunal accepted that specific part of the amended list of issues would be read alongside the agreed

list. The list of issues is appended to this Judgment, being the agreed list (151L) but with the additional content proposed regarding legitimate aims incorporated into it.

4. At the start of the second day, when raised by the respondent's representative as something to be clarified, it was confirmed with the parties that the Tribunal would initially determine the liability issues only, as it would only be possible to determine those issues within the time available. The remedy issues were left to be determined later, only if the claimant succeeded in any of his claims. Issues 3 (remedy for unfair dismissal) and 9 (remedy for discrimination or victimisation) from the attached list, have not been determined in this Judgment.

Procedure

5. The claimant represented himself at the hearing. Ms Duane, counsel, represented the respondent.

6. The hearing was conducted entirely by CVP remote video technology with both parties, all witnesses and the panel members all attending remotely throughout the hearing. The hearing had previously been listed to have been heard in-person, but it was converted to be a remote hearing in the week prior to the hearing, following an application made by the claimant relying upon his conditions and health issues.

7. An agreed bundle of documents was prepared in advance of the hearing. The bundle initially ran to 937 pages (that was pages numbered up to page 865). Where a number is referred to in this Judgment in brackets, that is a reference to the page number in the bundle.

8. At the start of the hearing the respondent also introduced a limited number of additional documents. The claimant objected to those documents being relied upon. It was agreed that the documents would be made available and whether any document would be admitted would be considered at the point at which a witness or the respondent's representative wished to rely upon it. Amongst other things, that ensured that the claimant would have time to look at the documents before their admissibility was addressed and determined.

9. We clarified the issues and undertook an initial discussion at the start of the hearing. The witness statements and some of the documents were read during the first morning. On the first morning, we read the documents to which we were referred, in particular by the respondent in a proposed reading list and by the claimant in his witness statement. It was acknowledged by the parties that, in the light of the time available and the need to commence hearing the evidence, we would not read all the documents referred to by all the witnesses during the first morning. We were referred to a number of the documents during cross-examination.

10. The case management order made following the last preliminary hearing on 8 September 2023 also contained a proposed timetable which would enable the case to be heard and determined during the five days available (146). That document

recorded that there had been a conversation at the preliminary hearing about whether the five days allocated would be sufficient as Employment Judge Shotter had concerns. On the first morning of this hearing, our view was that the timetable appeared to be somewhat optimistic, albeit the parties indicated that they would endeavour to adhere to it. The claimant (who was representing himself and had no experience of Tribunals) indicated that he thought that the one and a half days allocated for him to cross examine the respondent's witnesses would be sufficient time. The respondent's representative (that is counsel) also indicated that the one and a half days allocated for cross-examination of the claimant and his two witnesses, would be sufficient time. What was emphasised was that, if possible, we would endeavour to ensure that all of the evidence was heard in the five days available and, if possible, submissions could also be heard in the time allocated. As it transpired, we were right to question the timetable and it was not possible to hear all the evidence in the five days initially allocated.

11. The timetable had outlined that the respondent's witnesses would be heard first, followed by the claimant's evidence. Both parties confirmed that they had prepared for the hearing based upon that order and they had no objection to the case being heard in that way.

12. At the start of the hearing the respondent had provided the Tribunal with a proposed chronology and a proposed list of key people. It was understood that the claimant had drafted a first version of the two documents, but the content of the revised versions had not been agreed (the amended version only having been provided to the claimant on the Sunday evening immediately before the hearing started). At the start of the afternoon of the first day, the claimant confirmed that the contents of the documents were not agreed by him. We therefore did not use those documents and did not have the benefit of an agreed chronology or list of key people. The respondent's representative also produced an opening note upon which she sought to rely at the start of the hearing. The claimant objected to that note, as he was not aware that it was something which would be produced and it was also only provided on the Sunday evening prior to the hearing, so was not something which he had been able to consider. We considered the parties' submissions about that document on the first day and decided that we would not take it into account (something of which the parties were advised at the start of the afternoon on the first day).

13. We were provided with a witness statement for each of the respondent's witnesses and those statements were read on the morning of the first day. The respondent's witnesses were:

a. Ms Lindsay Bradley;

b. Mr Dennis Morgan (there was both a witness statement and a supplemental witness statement for Mr Morgan);

c. Ms Velda Lomas;

d. Mr Colin Doherty; and

e. Mr Michael Hartley.

14. Each of the respondent's witnesses were cross-examined by the claimant, and (where considered appropriate) we asked questions, and they were re-examined by the respondent's representative. Ms Bradley's evidence was heard during the afternoon of the first day. Mr Morgan gave evidence for the whole of the second day. Ms Lomas gave evidence for the morning of the third day. Mr Doherty's evidence was heard on the afternoon of the third day and most of the morning of the fourth day. For the evidence of Ms Bradley and Mr Doherty, at the end of the cross-examination prepared by the claimant, the Employment Judge put to each of them the specific allegations of harassment which were recorded as having been their responsibility, to ensure that we heard their response to those allegations.

15. The claimant agreed to the Tribunal reading Mr Hartley's witness statement on the first day, but he objected to the respondent being able to rely upon his evidence as the statement had only been provided in the late afternoon of the Friday before the hearing. We prepared to hear submissions from the parties about whether he should be able to give evidence on the late morning of the fourth day of the hearing, but the claimant accepted pragmatically that Mr Hartley's evidence could be heard. Accordingly, Mr Hartley gave evidence late morning on the fourth day and was asked one question by the claimant in cross-examination.

16. The claimant had provided a witness statement for himself as well as statements from two other witnesses. The other witnesses did not attend the hearing and the claimant accepted that the evidence of those other witnesses could only be given limited weight as they were not able to be questioned at the hearing. We read the three witness statements on the morning of the first day. The additional witnesses for whom the claimant provided statements were:

a. Mr Kevin Scanlan; and

b. Mr Billy Johnson.

17. At 12.15 pm on the fourth day of the hearing, we had completed hearing the respondent's witnesses' evidence and were in a position where the claimant's evidence was due to be heard. We had raised whether there would be time to complete the claimant's evidence in the time available and whether it would be appropriate to have the claimant's evidence part-heard at the end of the five days allocated. The respondent's counsel indicated that she did not believe that there was sufficient time for the cross-examination of the claimant to be completed in the time available. She said that it was unlikely it could be completed in the one and a half days remaining, but she felt two days or possibly two and a half days would be required. The respondent proposed that the hearing be adjourned and that a further three days of hearing be listed to provide time for the claimant's evidence, and submissions. The claimant highlighted that it would be an issue for him and his mental health if the case was not able to be completed in the time listed. He wished

to commence giving evidence on the fourth day in any event. The available dates in January were also discussed with the parties and they both confirmed that they were available for the 2-4 January 2024, but the respondent's counsel was unavailable for 5 January.

18. We adjourned to consider the best approach to hearing the claimant's evidence in the light of the overriding objective. We reached a decision and returned and informed the parties. It was acknowledged that the case going part-heard was not ideal. The case was not going to conclude in the time available in any event. There was not time to complete the claimant's evidence. On balance and considering the two options, we decided that it was better and in accordance with dealing with the case fairly and justly, for the case to be adjourned and for the claimant's evidence to be heard all in one go when the case reconvened in January 2024. We understood that was not perfect for the claimant. However, in fairness to him, we did not believe that it was right to adjourn the case part-way through the cross-examination of the claimant and did not consider it fair for him either to be under oath for the intervening period or for him to be part-way through his evidence throughout that time. We confirmed that the 2-3 January 2024 (being in practice the fifth and six days of the hearing) would be used to hear the claimant's evidence, which would need to be completed in those two days. Submissions would be heard on 4 January 2024 (the seventh day of hearing). We said we would reach a reserved decision on the liability issues in the remainder of 4 January and the 5 January. It was confirmed that the parties did not need to be available to attend on 5 January as the hearing would be in chambers (that is the panel would be reaching its decision).

19. As there was time available on 26 October and as there remained an outstanding issue regarding documents, we decided to determine the respondent's application to rely upon additional documents not included in the bundle, on the afternoon of the fourth day. The respondent sought to introduce a number of pages disclosed very shortly before the hearing and not included in the bundle, which at the time were numbered: 235A; and 866-893. The respondent wished to be able to rely upon them all in cross-examination. The respondent's counsel made submissions about why they should be admitted highlighting relevance, balance of prejudice, and the overriding objective. She was given the opportunity to say whatever she wished to and to explain the relevance of the additional documents. The claimant objected, highlighting the very late disclosure and additional matters such as the respondent's late submission of the statement of a witness who it had not previously indicated it would call. We adjourned to consider the application.

20. Following the adjournment, we informed the parties of our decision on the additional documents which the respondent had only submitted shortly before the hearing and to which it wished to refer. There was no objection to the addition of 235A. We accepted the respondent's counsel's submission that the key issues were relevance, the balance of prejudice, and the overriding objective (and the matters set out within it). The starting point was relevance. We could not see why pages 869-871 or 880-893 were relevant to the issues which needed to be determined. We refused the application to rely upon those documents. We could see the potential relevance of pages 872-879 and also understood why the relevance of those documents had

only been identified after Mr Scanlon's statement had been received from the claimant (which explained their late disclosure). We agreed that those pages could be relied upon. We also noted that pages 866-868 might be relevant and were technical IT documents which could only have been produced after statements had been received. Those documents were also admitted. Prior to the reconvened hearing, the respondent provided copies of the pages which had been admitted in a single pdf bundle.

21. Following our decision on documents, the respondent's counsel said that it was noted that the Tribunal had excluded pages 880-893. She stated that she would be cross-examining the claimant and if it became clear from cross-examination that the documents were relevant, she would revisit the position. The respondent's counsel also asked for it to be noted that whilst the respondent would endeavour to work to the timetable, the respondent would not accept being guillotined. She highlighted that things might arise during the questions and answers which might require more time. She said that we should exercise our discretion if those things arose. She highlighted that the claimant had indicated that he had thought that one and a half days would be sufficient for cross-examination of the respondent's witnesses and had taken considerably longer. There needed to be equality and fairness. When questioned about what she was asking us to do, the respondent's representative indicated that she wanted it noted. It was confirmed that it would be noted, which is why it is referred to in this Judgment.

22. When the hearing reconvened on 2 January 2024, the claimant made applications regarding documents. He sought to be able to rely upon a number of additional documents which he provided. He provided: a chronology which he said had been made contemporaneously; a reference from a Joanne Furnival; and a medical report dated 23 December 2023. He was given the opportunity to explain why those additional documents should be admitted. The respondent objected and explained why. It was also contended by the respondent that, if the reference of Joanne Furnival was admitted, it wished to also provide and rely upon an email from Tom Breslin of 6 September 2023 (which addressed the same issue). We adjourned briefly (early on 2 January 2024, the fifth day of hearing), made a decision and informed the parties of the decision made. We took into account the importance of relevance, the balance of prejudice, and the overriding objective (and in particular avoiding unnecessary formality and seeking flexibility in the proceedings). We agreed to admit the reference from Joanne Furnival and the email from Tom Breslin, as we accepted their potential relevance, and the claimant could be cross-examined about those documents (if relevant). We also agreed to consider the up-to-date medical report, and the parties would be able to address the report's relevance (or lack of it) if required. However, we decided not to allow the chronology document to be admitted and relied upon, as we were unable to identify its relevance.

23. The claimant gave evidence on 2 and 3 January 2024 (the fifth and sixth days of hearing), was cross-examined by the respondent's representative at length, and we also asked a few limited questions. The respondent's counsel completed her cross-examination in the two days proposed.

24. During the claimant's cross-examination on the fifth day, he was asked about work which he was alleged to have undertaken outside of his employment, whilst employed by the respondent. He denied that he had done so, but also provided some explanation about being pressured to undertake certain additional work. Having asked that question, the respondent's counsel then sought to rely upon a number of the documents which we had previously determined should not be admitted, being invoices containing the claimant's name (882). The claimant objected to her being able to do so. The respondent's representative was allowed the opportunity to explain why she said they should be admitted, and the claimant was given the opportunity to respond. We adjourned the hearing, reached a decision, and returned and informed the parties of that decision. It was noted that the application to admit those pages had previously been considered and determined on 26 October 2023 (the fourth day of hearing). There had been no material change in circumstances since that decision, save that the respondent's representative had asked a question about work the claimant had done outside of his employment. There was prejudice to the claimant if documents previously excluded were now admitted simply because the respondent's representative had asked a question about them. It was noted that there had been no allegation raised about the claimant working outside of his employment at any previous point in the conduct of the case, whether in the list of issues or the pleadings. It had not been held out as being part of the reason for the claimant's dismissal. We did not find that it was in the interests of justice for the previous decision to be varied or set aside (under rule 29). We found that there had been no material change in circumstances since the application. There can be out of the ordinary cases when it is appropriate to vary or set aside a previous case management decision when there has not been a material change in circumstances, but those occasions are rare. In this case we found that there was neither any material change in circumstances, nor any other particular reason necessitating such a decision in the interests of justice. The respondent had previously been given the opportunity to address the relevance of the documents and its representative had not explained the documents' relevance previously. The application was refused.

25. After the evidence was heard, each of the parties was given the opportunity to make submissions. It had been confirmed, prior to the adjournment on the fourth day, that the respondent's representative would be relying upon both written and oral submissions and the possibility of a written submission document was highlighted to the claimant. It was agreed at the end of the sixth day (the second day of the reconvened hearing), that written submissions would be provided by each party by 9.30 am on the seventh day, with oral submissions to commence at 11.30 (providing time to read the documents provided). Both parties indicated that they wished to largely rely upon written submissions, with limited verbal submissions in addition. The documents were provided in accordance with the approach agreed, or (in the claimant's case) not long after. The claimant sought additional time to complete reading the respondent's submissions before oral submissions were heard, and that was agreed as being half an hour, which was granted. Brief oral submissions were made when the hearing reconvened and we also asked some limited questions during those submissions.

26. Judgment was reserved. We took the time remaining on the seventh day and the eighth day (4 and 5 January 2024), to reach our decision in chambers. Accordingly, we provide the Judgment and reasons outlined below.

Facts

27. The Tribunal heard a considerable amount of evidence about a wide variety of issues. All of the evidence heard was considered when this decision was made. However, in this Judgment, we will not endeavour to refer to all of the evidence heard and considered.

28. On his first claim form, the claimant stated that he had worked for the respondent from 7 July 2008. On its response, the respondent said the start date was 8 May 2007. The Tribunal was provided with a single page employment contract signed by the claimant on 8 May 2007 which showed that date as his start date (154). There was also an offer letter of 1 April 2011 (155) which addressed some changed terms when the claimant was offered the role of Business Development Manager. In the bundle was a further unsigned employment contract (156) which was far lengthier than the first contract and which recorded the claimant's job title as being Business Development Manager with a start date for continuous employment of 7 April 2008 and a contract commencement date of 1 September 2011. There was no evidence given about the start of the claimant's employment by any witness, but in asking questions in cross-examination, the claimant put the position that he had first started employment with the respondent on 8 May 2007 but had then left and returned on 7 July 2008. The claimant disputed that he had received the second contract document. It was the evidence of Ms Lomas that it was the contract held on his HR file (she had not been employed at the time of his recruitment). In cross-examination, the claimant in fact confirmed that the contract (that is a copy of it) was sent to him in October 2021.

29. The respondent had a grievance policy and procedure to which the Tribunal was referred (393G). That stated that if an employee had a formal grievance they should, in the first instance, put it in writing addressed to their line manager. The policy provided for a meeting to be arranged and an outcome given. Stage two involved a right of appeal, with an appeal meeting. The policy did not expressly provide for a grievance investigation to take place, but Ms Lomas' evidence was that grievance investigations had been undertaken in other cases.

30. On 17 February 2016 the claimant raised a grievance (201). It related to the conduct of a colleague, Mr Aird. At the end of his grievance letter, the claimant said that the situation was now causing him unnecessary stress at work. A meeting was held on 23 February 2016 conducted by Mr Richardson, who was at the time responsible for HR (203). In that meeting the claimant referred to the fact he said he had asked Mr Morgan for help as he couldn't cope. He also informed Mr Richardson that he had received counselling from April to December 2015 once a month. We were not provided with any document which recorded any outcome or decision reached in response to the grievance or that recorded anything done in the light of what the claimant informed Mr Richardson about his health. Mr Morgan's evidence

was that Mr Richardson remained employed by the respondent in 2021, although by that time he had ceased to be responsible for HR and was working part-time.

31. During cross-examination, when he was asked about what appeared to be his issues with various employees, the claimant's evidence was very clearly that he only had significant issues with two employees of the respondent: Mr Aird; and Ms Bradley. Most of the evidence heard by the claimant related to the claimant's issues with Ms Bradley. The documents provided to the Tribunal did evidence the claimant raising complaints on occasion about a number of other employees of the respondent.

32. The claimant is a gay man. It was his evidence that he preferred to keep his private life entirely separate from work. He chose not to come out at work and part of his complaint was that Ms Bradley had asked him about being gay and spoken to others about him being gay. Ms Bradley denied that she had done so and, in her witness statement, explained with reference to a close-relative why she was particularly aware of the importance of not discussing someone's sexuality when they did not wish to do so. In his claim, the claimant alleged that Ms Bradley asked him if he was gay when leaving a restaurant following a Christmas event in 2011. He also alleged that she had spoken to him in the kitchen in 2012. He also alleged that she had spoken to others in the office about his sexual orientation (in his earshot) on occasions from 2018. The evidence about what was alleged and what we determined is addressed in the conclusions section of this Judgment.

33. The claimant said that Ms Bradley barged in to the kitchen in January 2012 when the claimant was there and said that a client of the claimant's was on the phone, but when the claimant said he would go and answer it in a moment as he was getting a drink, Ms Bradley said, *"you'll do it now"*. Ms Bradley did not recall the event.

34. A significant event occurred when the claimant was unwell immediately following a birthday party in 2018. The event was Ms Bradley's birthday party for a significant birthday. The claimant's evidence was that it was attended by almost all the respondent's staff. It was not a work event. At the end of the night the claimant became ill. Ms Bradley (and others) perceived that the claimant had been intoxicated. The claimant denied that he was. The claimant was assisted by those at the venue and an ambulance was called. The claimant's evidence was that he woke up in accident and emergency the following morning without knowing what had happened or how he had got there. The claimant's partner at the time believed that the claimant's drinks had been spiked, but the Tribunal heard no evidence about that allegation. The claimant's sense of grievance primarily arose from two things: how he perceived Ms Bradley had treated him at the time; and what he believed Ms Bradley had said to his partner the following day.

35. In the account he provided in his grievance letter to Ms Lomas of 7 September 2020 (221) the claimant recorded what he alleged about the night:

> "*I was told that Lindsay was the last person there and she was told by the venue owners I was still there and needed assistance, she did nothing and went home. The owner rang an ambulance and im told Lindsay told them not rush as it wasn't an emergency so they left me for 3 hours outside until 3 in the morning having a seizure. I woke on my own in Hope hospital not knowing why I was there. I spoke to Lindsay after the incident who again started on me for being gay which I again said was nothing to do with her and she had spoken to my partner in the meantime saying I wasn't a manager at work and basically saying bad things about me"*

36. From his evidence, it wasn't entirely clear what the basis was for the claimant's account about what had happened during the Saturday night, as the claimant's honest evidence was that he could not recall. It appeared that the claimant's source for his account was his partner at the time, Mr Johnson. Mr Johnson was not present at all at the party on the Saturday night and his account appears only to have been based upon a conversation with Ms Bradley on the Sunday. A witness statement was provided from Mr Johnson (who is no longer the claimant's partner but remains someone who provides him with regular support), but he did not attend the Tribunal to give evidence. He recounted in his statement speaking to Ms Lindsay about the claimant being gay, not a manager at work, and questioning why he did not come out. He also stated that Ms Bradley had informed him that the claimant had fallen ill on the night, that an ambulance was called, that she told them not to rush, and that she did not know what hospital he had been taken to. As we did not hear from him and his evidence could not be challenged, we gave little weight to the evidence in Mr Johnson's statement.

37. Ms Bradley's evidence was that the claimant had become unwell at the end of the night. She had tried to wake the claimant. The claimant had been sick. The manager of the club had placed the claimant in the recovery position and had phoned an ambulance. Ms Bradley had left in a taxi with her mother, as the manager had told her to go home as he would wait with the claimant. She had a conversation with Mr Johnson on the Sunday after obtaining his details. She denied the conversation had included the matters the claimant alleged.

38. We have addressed below the conclusions we reached about the events of 30 June and 1 July 2018 as they were relevant to the decisions we needed to reach. However, we would record that there was no evidence to support the allegation that Ms Bradley in some way delayed the ambulance or told it to take its time as alleged, nor did there appear to be any genuine credible basis for that allegation or how it arose. The one piece of medical evidence provided about the claimant's attendance at hospital was a single page (394A) which recorded only that the presenting complaint was a seizure and that the attending person had been advised that there was no spiking. There was no reference to intoxication or alcohol.

39. The Tribunal was also provided with a series of WhatsApp messages between Ms Bradley and others exchanged on 30 June and 1 July (291A). On the night they record Ms Bradley as telling the others "*The club has called an ambulance for Colin M as he's passed out and throwing up*" and later "*Just had the club on the*

phone, they have called an ambulance for Colin M but not sure what time it will arrive". The following morning, Ms Bradley asked if anybody had the claimant's phone number and suggestions were made about how to contact him in other ways. A message was later received in which Ms Collins explained "*Emily got it in FB messenger. X Think it's from Billy his BF x*". Later in the messages Ms Collins said (of the claimant the previous night) "*I said why haven't u brought Billy he said it's a bit Rocky at minute x*". From the messages it appeared that Ms Bradley was endeavouring to contact the claimant out of concern about him as a result of his condition the previous night. It was also clear that the people in the group were aware that the claimant had a boyfriend at the time and who he was (included in the group were Ms Bradley, Ms Collins and Ms Skillen).

40. The claimant was absent from work on ill health grounds and a fit note was provided to the Tribunal dated 28 February 2019 which recorded that the claimant was not fit for work between 20 February and a date in March (562). The reason was *"Chest pain and stress at work*".

41. Mr Doherty was the claimant's line manager. When he was asked about what this involved, he referred to support being provided when requested, but he appeared to have no idea whatsoever about any personal support being part of the role (indeed he referred to that as being what he would expect HR to address). It was his evidence that he did not see fit notes when employees were absent, even though he would then undertake the return-to-work meetings with those employees on their return. The Tribunal was provided with the notes of one return to work interview undertaken by Mr Doherty on 6 May 2019 (570). In it he recorded that the claimant had informed him that the doctor had explained that chest pains and headaches, which had been the reason for the absence, could be work related stress. A later entry referred to high blood pressure and recorded that the Doctor had suggested that it could be work related stress. There was no evidence that Mr Doherty did anything with, or in response to, this information.

42. Ms Wild was the person responsible for HR at the respondent after Mr Richardson and before Ms Lomas. The Tribunal did not hear evidence from her. The Tribunal was provided with an email from her to Ms Lomas copied to the claimant of 27 March 2019 (363) in which she referred to a meeting between the three of them about the stress assessment for the claimant. The email also referred to the claimant's allegation of bullying.

43. It was the claimant's case that in or around October 2019 he poured his heart out to Ms Wild and told her that he had mental health problems including anxiety and depression and that he was on antidepressants. In his evidence to the Tribunal, the claimant was clear that he also explained his OCD to Ms Wild when he met her. The claimant's evidence was that Ms Wild told him to bring the antidepressants to work to prove to her what he was taking. In answers to questions about it, the claimant said that he had no concerns or issues with being asked to bring the antidepressants in. He did express concerns about the fact that he believed Ms Wild had not later done anything in response, having been told about his depression and his medication.

44. On 23 October 2019 Ms Wild emailed Mr Morgan with her account of a meeting of the previous day (361). She emphasised that the note of the outcome had been cut very short and therefore it was clear that the email did not record all that had been discussed. Ms Wild's email recounted the claimant as having told her that he needed a line manager and more support and that a particular colleague was not up to speed. She said in the email:

> "*He said that he is stressed and overworked especially as he has no outside rep to cover the tenders … and so his workload has increased. He says he feels he is being pushed out of the company which I categorically told him was not the case and he couldn't be further from the truth… He has been put on medication from his GP to see if this will help with his anxiety and not sleeping properly"*

45. Mr Morgan responded at length to Ms Wild on the same day primarily about issues regarding the team (360). He also put forward the view that:

> "*Colin is excellent at what he does customers who he deals with love him and are grateful of the knowledge and help he gives them, I think part of Colin's frustration is that we can't always do what his customers want from us … I think he needs to accept this is the way we run our company and if he has got real issues that need addressing let's find out what they are and look at them individually and if we can improve matters we will"*

46. Ms Wild responded (360):

> "*I think he is an eccentric personality with high levels of anxiety who although he is excellent at his job does worry if things go wrong and gets easily frustrated*"

47. A meeting took place with the claimant on 19 December 2019 (578). The document recorded that Ms Wild's advice to the claimant had been, that if matters had not been addressed to the claimant's satisfaction, the claimant needed to lodge a formal grievance. That was consistent with the claimant's own evidence to the Tribunal, which was that the reason he first raised a formal grievance was because it was Ms Wild's advice that he should do so. The documents also recorded that the claimant had been told that he was not expected to work past 5pm and was not expected to answer the phone after 5pm, in response to him raising concerns about workload and asking why he had no back up when he had to work late.

48. On 24 January 2020 the claimant emailed Ms Wild (583) in response to a final stress risk assessment which she had undertaken. He said that he did not know that the respondent had occupational health, but it was referred to in the notes and he asked to be referred to them due to his stress (amongst other things).

49. In the bundle before the Tribunal was a fit note dated 9 March 2020 (552). That recorded that the claimant might be fit for work if he was given half an hour's lunch break each day and allowed to finish on time. The fit note was for depression,

anxiety, and stress. There was no evidence that this fit note was provided to the respondent. It was Ms Lomas' evidence that the fit note was not presented at the time and the claimant continued to work rather than being absent from work during that period. It was only that fit note, of those included in the bundle, which the respondent disputed they had been provided.

50. In the bundle of documents was a page which showed the hours which the claimant had recorded when he took a lunch break and when he finished work between 23 September 2019 and 13 March 2020 (697). The document included some notations which showed odd occasions when the claimant worked particularly late. As a broad overview, the document showed that the claimant rarely took a full hour for his lunch, but generally approximately at least twenty-five minutes was taken. The claimant very rarely finished at 5 pm. The claimant usually finished before 5.30 pm, with a few later exceptions.

51. The Tribunal was provided with a letter which appeared to record the claimant raising a grievance on 21 March 2020 (209). The letter was addressed to Mr Doherty, as it should have been under the policy. Ms Lomas denied any knowledge of the letter. Mr Doherty did not refer to the letter in his witness statement and, when asked about it, denied that he had seen it. The claimant's evidence was that he was asked not to pursue the grievance at the time due to Covid, so did not do so. The Tribunal was not provided with any evidence that anything was done in response to the grievance raised. On this factual issue, we accepted the evidence of the claimant that the letter was sent to Mr Doherty and that it was not pursued at the time due to Covid. It was also the claimant's evidence that he raised the grievance after his conversation with Ms Wild.

52. In the grievance letter, the claimant alleged that he had been bullied and harassed by some members of staff for years. Ms Bradley was stated to be the main culprit. The claimant referred back to the first alleged event in 2011 and also addressed what he said occurred at/after the birthday party in 2018. The claimant alleged that Ms Bradley had made comments about his sexual orientation. The claimant also raised more recent issues which he said had occurred in the office, including with use of the kitchen, and related to the restrictions which had been imposed as a result of the Covid pandemic. He alleged that "*I came in to what looked like a diary page on my desk dated Jan saying I was late in and id been in a meeting upstairs for an hour and a half with Velda and id been the toilet for 10 mins*". He referred to having witnessed many homophobic and racist comments. He also alleged that Ms Bradley was completely incompetent at her job. He said, "*In order to resolve this serious issue she should receive a written warning and disciplinary hearing and I would suggest other staff members are spoken with also*".

53. In the bundle for this hearing, the claimant provided a copy of a document which he alleged was the note he was referring to in that letter, which he said had been left on his desk. The respondents' position was that they had never seen the note before. The respondent also contended that it could not be the note which was described. The document in the bundle (699) was a bank sheet of paper and not a

diary page. In typed text it said, "*Colin was late in work! Colin was away from his desk 15 mins! Colin is gay! Colin has big teeth! Fletch*".

54. The Tribunal was provided with an email from the claimant to Mr Doherty of 5 June 2020 (213). In the email, the claimant raised eighteen points. On 7 June 2020 the claimant sent an email to Mr Doherty raising a formal grievance (215). The content of the grievance was primarily in relation to the fact that the claimant's bonus had been stopped from 1 April and his pay had been reduced by twenty percent, even though he had continued to work throughout the pandemic. The grievance email did not refer to the previous grievance or the fact that it had not been progressed. Towards the end of his grievance, the claimant said:

> "*The whole situation is causing me a lot of stress and I just feel totally disrespected, unwanted and undervalued at work. If these thoughts are correct then I need to resign and seek employment elsewhere where people will appreciate the amount of knowledge and work I am bringing to the business"*

55. Mr Morgan responded by email on 8 June saying he would be happy to have a chat. The claimant responded by asking for a grievance meeting. The Tribunal was provided with a one-page document headed "*Meeting outcome June 2020*" written by the claimant which recorded what he said was discussed in a meeting which he had attended with Mr Doherty and Mr Morgan (220). The Tribunal was also provided with an email that Mr Morgan had sent to Ms Lomas recounting what had occurred at the meeting (366). The Tribunal was not provided with any notes of a grievance meeting or outcome letter prepared by the respondent. There appeared to be no dispute that Mr Morgan accepted the main points raised in the grievance and paid the claimant his full pay for the period when it had been reduced, and commission. The claimant's note recorded the claimant as having explained that he had been signed off sick for a month with workplace stress. Mr Morgan's note did not (although sick leave and pay was referred to). It did say that Mr Doherty had intervened in the meeting to stop a particular line of questioning because he "*didn't want us to end up listening to a slagging off of other co-workers, which Colin generally gets into*".

56. A fit note dated 9 June 2020 signed the claimant as not fit for work due to "*Workplace stress*" (547)

57. The Tribunal was provided with a document dated 6 July (304) in which Mr Morgan addressed some concerns which the claimant had raised regarding health and safety issues and about the temperature of the office.

58. On 4 August 2020 Mr Morgan wrote to the claimant (305). He started the letter by explaining that it had been written because Mr Morgan was increasingly concerned for the claimant and his wellbeing at work. He referred to the matters the claimant had raised about pay in his grievance. He said that the claimant had started raising many issues since returning from ill health absence. He said, "*The downside I am seeing to all this good work is the increasing number of complaints you are making against your working conditions*". In the letter he listed twenty-six concerns

which he said the claimant had recently raised. That list included that the claimant had requested to work from home. The letter did not detail why the claimant had made the request. At the end of the letter Mr Morgan emphasised that he did not wish to lose the claimant, but he felt that the claimant was looking to find fault with almost all that the respondent did.

59. The Tribunal was provided a document which, in part, replied to the list included in the 4 August letter (312). The claimant said, of the request to work from home, that "*it would eliminate me being sat in here in a draft and I'd get more done due to not being disrespected by other people*", followed by some further words which were hard to read. It was the claimant's evidence to the Tribunal that a number of the things on the list were not things which he had raised at all.

60. The claimant emailed Mr Morgan on 6 August (313) and detailed what he described as five recent bullying incidents from Ms Bradley. This included the allegation that Ms Bradley had informed a customer that a particular product used had not been correct, a statement with which the claimant did not agree and described as her "*stirring the pot*" and "*bullying*". The claimant alleged that the bullying had been going on for years, had not been addressed by the respondent, and he asked for it to be addressed. Mr Morgan responded to the claimant (315) and said, "*the reason I wrote to you was really to highlight the sheer number of issues/complaints you are raising against us and how disproportionate they seem as we are not seeing anything like this in any other part of the business*". In his response, Mr Morgan addressed the claimant's complaint that he was too busy and detailed that the claimant had been told to take his breaks on time and to finish at 5pm, with work to be passed to Mr Doherty and Ms Collins if the claimant needed help.

61. It was Ms Lomas' evidence that the claimant did not give any reason for wanting to work from home. The only people who had been allowed to work from home were two people who were temporarily working from home, mainly to answer calls, because one was isolating due to Covid and the other had a medical condition which was being treated at the time.

62. In his allegations, the claimant said that in April/May 2020 Ms Bradley told a client that the claimant had sent the wrong material. The claimant said that Ms Bradley was not correct. Ms Bradley had no memory of what was alleged. That appeared to be a reference to the same event as was referred to in the claimant's email of 6 August.

63. On 7 August the claimant replied to Mr Morgan and said that he thought that this had got blown out of all proportion (318). He then complained about issues such as the office temperature, open windows, and the brightness of lights. He explained that Mr Doherty was constantly on the phone or away from his desk, so work could not passed, as proposed. He said he would be working on tenders for that week and the next. In the Tribunal hearing the claimant emphasised the time required to respond to tenders. The respondent accepted that the claimant had needed to

respond to at least one tender but disputed the amount of time/work required to do so.

64. The Tribunal was provided with a further email from the claimant of 16 August 2020 to Mr Morgan when the claimant complained about Ms Lindsay and his allegation that she was bullying him (322). Mr Morgan responded on the same day and said that he did not personally believe that it was the case that the claimant was experiencing bullying in the office.

65. On 7 September 2020 the claimant raised a grievance in a letter addressed to Ms Lomas (221). That letter was alleged to be (or to contain) a protected act for the purposes of the victimisation claim. The letter contained some of the same content as the letter of 5 June 2020. The claimant provided his account of what had happened at Ms Bradley's party. He contended that Ms Bradley was trying to out him at work. He referred to bullying and victimisation, said he was being singled out, and referenced that he was suffering from stress and anxiety. He said that "*Pyramid is vicariously liable for this bullying, harassment and victimisation towards me, it is for me unwanted conduct at work. Quite frankly I have found it intimidating, offensive, humiliating, hostile and embarrassing*". He said bullying was still taking place. He said that he did not want to be discriminated against at work. It was Ms Lomas' evidence that this letter was the first time she became aware of the claimant's sexual orientation.

66. It was Ms Lomas' evidence that she investigated what the claimant had raised by speaking to Ms Bradley about bullying. She did not reference sexual orientation or the allegation that Ms Bradley was trying to out the claimant, because the claimant had not consented to that information being disclosed. It was not therefore clear what exactly it was she had asked or investigated and how the matters raised could have been discussed. No records whatsoever were taken of Ms Lomas' investigation. No report was prepared. Ms Lomas accepted what Ms Bradley told her. It was also Ms Lomas' evidence that she did not undertake any further investigation with Ms Bradley after the claimant consented to those matters being disclosed. That is, in reality, Ms Lomas did not genuinely investigate the claimant's allegations with Ms Bradley in any real and genuine way.

67. The Tribunal was provided with a note prepared by Ms Lomas of an informal meeting with the claimant on 8 September (370). The note recorded that the claimant informed Ms Lomas that what was occurring in the office was because of his sexuality and that Ms Bradley asking him about why he had not come out was bullying. The notes recorded Ms Lomas as telling the claimant that the matters were serious allegations which needed to be addressed as soon as possible and that it should be pursued as a formal grievance. The claimant said that he would pursue a formal grievance. Despite Ms Lomas sensibly telling the claimant that the serious matters which he had raised needed to be addressed as a formal grievance, the formal grievance which the claimant raised was ultimately only addressed by the respondent informally.

68. In an email of 9 September (225) Ms Lomas acknowledged the formal grievance and sought the claimant's permission to speak in the first instance to management about the grievance. The claimant provided his permission, whilst highlighting that what had been said was very sensitive. Mr Morgan emailed the claimant on 15 September inviting him to a meeting to discuss the formal grievance. He ended the invite by saying:

> "*Colin this is an official formal response, I think we do though have the opportunity to discuss this in an informal setting with just 3 of us present yourself Velda and me, where we can try and seek a resolution, without going to a full blown formal meeting"*

69. On 11 September 2020 Ms Lomas referred the claimant for an occupational health assessment to be undertaken by Health Assured (592). In the referral document (595) Ms Lomas said that the claimant had had a period of work-related stress absence and that "*we as his employers are seriously concerned about his health & wellbeing in the workplace. Currently we have had over 123 pieces of correspondence to and from* [the claimant] *during the past 18 months which cover the same subjects [Money{pay}, bullying, health and temperature] these subjects are repeated over this period*". Ms Lomas said that management felt that the concerns had been repeatedly addressed. She said they wanted to ensure his well being "*to avoid any more stress related incidents*" and said, "*This situation is now becoming unsustainable*". The respondent did not tick the box to ask if the claimant had a disability in the referral. The respondent placed some emphasis on the 123 pieces of correspondence and the claimant did not contest the figure, albeit the Tribunal was not shown all 123 pieces of correspondence. As at the date that the occupational health referral was made, the claimant's formal grievance had not been addressed and remained outstanding.

70. It was the claimant's evidence that the occupational health assessment was undertaken over the telephone. He was clearly dissatisfied with it. His evidence was that he answered the specific questions asked of him, but he did not volunteer more information about conditions and symptoms about which he was not directly asked. The occupational health report was provided dated 16 September 2020 (598). Amongst other things, the report said the following:

> "*he told me he has suffered from long-term sleep disturbance and has been prescribed sleeping tablets on occasion in the past. The sleep deprivation results in fatigue which he tells me is constant…*
>
> *I have recommended to Colin, weather permitting, he takes a walk each day during his lunch break after having something to eat…*
>
> *Colin perceives there are still some issues within the workplace causing his stress and exacerbating the symptoms of livedo-reticularis. He tells me he has recently submitted a grievance regarding bullying and is due to attend a meeting next week...*

Colin can perform all his normal daily activities, it is just his sleep pattern which is currently disturbed causing ongoing fatigue…

Colin is currently not taking any medication…

Colin tells me he has requested to work in one of the empty offices or from home so he would have more control over the ambient temperature and reduced noise levels. I believe this would be a helpful adjustment to resolve some of the issues Colin perceives are still outstanding e.g. draughts in the office, perceived bullying and noise distractions, if management are able to accommodate this…

Colin is fit to attend a Management meeting… It may also be helpful if the employee can have someone with them for moral support and additional time is allowed so breaks can be taken during the meeting if necessary"

71. The occupational health report made no mention whatsoever of OCD, anxiety, or depression. There was reference to work-related stress as being the reason for the referral and stress was referred to in the report.

72. A single note was provided (227) which appeared to record what was said on 5, 6 and 8 October 2020. The notes recorded that Mr Morgan started the meeting on 5 October by informing the claimant that he felt the matters could be dealt with informally. The claimant was recorded as saying yes, but said it needed to address all the issues in the letter (the notes followed this with a question mark). Mr Morgan said he did not wish to rake over historic issues which he felt had been dealt with on more than one occasion in the past. The claimant responded by explaining that nobody had resolved his issues. He said that Ms Bradley was a nasty piece of work. Mr Morgan said that the claimant needed to stop raising the issues which he felt had been put to bed. He showed the claimant the new glass partition which was to be constructed in the office to divide it into two parts with a warmer zone and a cooler zone. He said that would separate the claimant from Ms Bradley. The claimant was recorded as saying he was pleased with the solution and if Ms Bradley was sitting away from him and if the partition stopped the draughts, it would be sorted. On 6 October it was recorded that the claimant had spoken to Ms Lomas and had been thinking overnight and he was not happy with how the meeting had ended and he wanted to have a further discussion. Mr Morgan responded to say he was surprised and offered the claimant what was described as garden leave until the problem was resolved. On 8 October it was recorded that the claimant could move into the reps office temporarily and the claimant agreed to come back to work on 12 October 2020.

73. There was no document provided which recorded a grievance outcome or decision being provided to the claimant. There was nothing in writing to the claimant which addressed his grievance. There was which confirmed that it had been addressed informally and why that had been decided. The notes provided, and what was recorded, appeared to be (for the respondent) the end of the grievance process.

74. The respondent's office was divided in two by a partition. The partition meant that the seats occupied by the claimant and Ms Bradley were on entirely different sides of the office. Ms Bradley was initially seated out of the claimant's sight. It was Ms Bradley's evidence that she was sat by a window which was open, and she was cold, so she asked to move. It was agreed that she could move. After moving, the claimant could see Ms Bradley's back across the office, albeit she was still sat some distance away and on the other side of the screen. The Tribunal was helpfully provided with a photograph which showed the view from the desk occupied by the claimant.

75. On 23 October 2020 there was a conversation between the claimant and Mr Doherty. It was the claimant's account that he had tried to find Mr Doherty the night before to discuss matters with him, as it had been agreed that Mr Doherty would be assisting the claimant. He could not find Mr Doherty at the time. On 23 October, the claimant said that Mr Doherty came to find the claimant and shouted at him, saying it was none of the claimant's business where Mr Doherty was and what he was doing. Mr Doherty's evidence was that he had never shouted at any of the staff. Mr Doherty did not provide evidence about the specific conversation. Mr Doherty's evidence was that he did not know about the claimant's mental health issues until he heard the grievance in 2021. A note by Ms Lomas recording what the claimant had said to her at the time about the incident, was included in the bundle (229).

76. The claimant alleged that in a meeting when reducing his workload was discussed, he was shown figures which showed the work undertaken by a specific colleague. The respondent denied that the figures had been specific to the colleague; it was its case that the claimant had been shown the figures for all colleagues as a comparison (391). It was the respondent's case that when it looked at the claimant's workload and orders, his workload was not excessive when compared to others. The claimant contended that the nature of his work and the logistics involved in delivering to a wider geographic area meant that the work he undertook was more demanding than the work undertaken by someone simply accepting a local delivery over the phone. In the bundle was a document which recorded the claimant's workload by courier figures and emails (340). The figures were stated to be for the period 1-30 June 2021. The figures regarding emails were not particularly helpful, as the compiler of the table had deducted deleted emails from the emails received and sent, albeit that we are aware that reading and deleting an email can be as time-consuming in practice as reading one to which a response is required.

77. The claimant said that whenever Ms Bradley transferred calls to the claimant in 2020, she slammed the phone down loudly. Ms Bradley denied that she did. The claimant gave evidence about an occasion in August 2020 when a colleague had parked too close to his car. The claimant had complained about him doing so. This gave the claimant particular difficulty because of his back condition. He alleged that Ms Bradley had in some way instigated or manipulated the incident. Ms Bradley did not recall the incident at all, but described in her evidence that there was little room in the car park. The claimant also gave evidence about the temperature in the kitchen and the alternative facilities offered for employees to eat lunch (as a result of

the requirements of social distancing). It was the claimant's evidence that at least twice a day from January to August 2021, each time the claimant went to the kitchen to make a drink, he said that Ms Bradley jumped up and pushed past him to enter the kitchen first. This meant the claimant had to wait due to the arrangements in place to ensure social distancing. Ms Bradley denied that she did so.

78. When considering the claimant's requests for a reduced workload, some meetings were arranged with the claimant. One such meeting was arranged with another employee. It was the respondent's evidence that the employee had a hospital appointment, which meant that the meeting needed to be cancelled. The claimant would not have been aware of the reason for the cancellation at the time.

79. On 20 August 2021 the claimant raised a formal grievance in an email (236). In the grievance he raised various issues about the working arrangements in the office and the conduct of others. With reference to Ms Bradley, he said "*The absolute audacity of her. I came to see you about Lindsays behaviour and my workload. Lindsay ive reported to you on several other occasions, and she still behaves in the same bullying fashion*". He went on to describe that Ms Collins had told him that the offices were to be moved together again (which was not correct). He mentioned the need for a full lunch break away from his desk, referencing the occupational health report as saying so. He described that as a breach of health and safety. He said, "*stress is a serious mental health issue*". He referred to trying to finish his work at 5pm and said he had been forced to work until 5.25. He asked if the respondent cared about staff welfare? He criticised the smell in the office after some painting work. He raised issues around order-times and said "*im being made ill with stress from over work*". At the end of his email he said the following:

> "*I have spoken to my gp today and they are to call me back over work related stress. I want both Lindsay and Ruth dealt with and failure to deal with them amounts to breach of contract. Why Dennis tells me one thing then Ruth tells me the opposite…please just tell Ruth what we discussed so she stops telling me to work my lunch or after 5pm. Also at 5pm when im supposed to hand over work to Colin he is on the phone every night so I cant speak to him"*

80. There was some dispute between the parties about the final paragraph of the email, what was said in conversations, and exactly what it meant. In her witness statement, Ms Lomas referred to it and said that on leaving work that day the claimant had said he would not return until Ms Bradley and Ms Collins were dismissed. She corrected her statement when giving evidence and replaced the word dismissed with disciplined. Mr Morgan also placed emphasis upon this, he said being an assertion that the claimant had said he would not return to work unless his colleagues were disciplined. The claimant's evidence was that he did not say disciplined but rather he was asking for the issues he was raising to be addressed, something which he said he raised in the context that the previous issues which he had raised had never been addressed with Ms Bradley.

81. Ms Lomas acknowledged the formal grievance in an email of 20 August (239).

82. The claimant was absent from work on ill-health grounds from 20 August 2021. His fit note (536), dated that day, certified him as absent for seven days and recorded the claimant as not fit for work due to stress at work.

83. On 25 August 2021 Ms Lomas wrote a letter to the claimant (173). That was headed "*Your grievance dated 19th August 2021*". The letter began by saying the following:

> "*I have of course already acknowledged this and I have now discussed the issues with management. I regret to inform you that we have now reached the stage at which it is considered that there is an irretrievable breakdown in relations between us which may make your continued employment with the company untenable.*
>
> *For several years and in particular since January 2019, we have undertaken a range of measures and implemented a number of steps to accommodate you and deal with the various complaints and grievances which you have raised.*
>
> *The latest grievance in my view serves to confirm that it may well be impossible to reach a solution which is satisfactory for all and we have to consider other employees and the wider business and the impact your repeated complaints are having.*
>
> *That is not to say that we do not take your complaints seriously and I believe we have always done so and we have attempted to find a solution in all cases. However, it would appear that this is not possible and we are therefore considering whether to convene a formal hearing to decide whether or not to terminate your employment for "some other substantial reason" which is a potentially fair reason for dismissal cited in the Employment Rights Act 1996. This would be that there is an irretrievable breakdown in relations which makes your continued employment untenable"*

84. The letter attached a list of measures which Ms Lomas contended had been made for the claimant (175). The claimant was told to remain away from work pending a decision being reached after his period of sickness absence concluded on 31 August 2021. The letter stated that the claimant was suspended (on full pay) until further notice. It was Ms Lomas' evidence that the suspension was to enable the grievance to be considered and addressed. The letter said that the claimant should stay away from work "*pending a decision being reached*" (without stipulating which decision). The list appended recorded a lengthy list of the steps undertaken for the claimant which included: having dealt with two formal grievances (a third having now been submitted); and having undertaken two return to work risk assessments on return from sickness. The claimant disputed that all of the steps listed had in fact been taken. Of the two previous grievances referred to: one had been upheld; and the other had been addressed informally without any genuine investigation and no formal outcome letter. In her witness statement, Ms Lomas referred to the claimant as having raised six grievances, but only two previous grievances were addressed in the letter of 31 August.

85. The claimant responded to Ms Lomas' letter by email on 31 August (176). He referred to legal advice he had taken. He referred to Ms Bradley and her alleged bullying, harassment, and victimisation of him (including with reference to that being over sexual orientation). The claimant sent a second lengthier email on the same day (177) in which he listed forty-seven points, which included reference to bullying over sexual orientation. Subsequent emails were exchanged between the claimant and Ms Lomas, within which the claimant told Ms Lomas (341) that he was well aware of the time limits for Tribunal claims.

86. The claimant attended a grievance meeting held on 28 September 2021, conducted by Mr Doherty. In advance of the meeting, the claimant sent a written statement by email to Ms Lomas (246). In it he referred to the grievance he had raised on 19 August 2021. He detailed the fact that his lunch break was being interrupted when the occupational heath report had said that breaks away from his desk should be taken for scoliosis and work related stress. He referenced one occasion when he had been trying to complete a large order late in the day. He said "*So my concern here is again why are people ignoring OH reports that clearly stated I need to finish on time plus doctors advice. I have brought up on several occasions that my workload is too great and is causing me work related stress and increased anxiety and effecting my home life and making me ill*". He also said he had concerns about the way the grievance had been handled and referenced that he could not get anyone to accompany him because they were afraid of victimisation if they accompanied him.

87. Handwritten notes of the grievance meeting were provided (248). A letter dated 8 October was sent by Ms Lomas (257) which said that the grievance was not upheld. It was emailed on 11 October. The claimant responded and complained about the timing of it being sent. A note was also sent to the claimant which showed his grievance and the responses to each point (259). It was Mr Doherty's evidence that he made the decision.

88. It was part of the claimant's case before the Tribunal, that in the grievance hearing he requested evidential documents that were not provided. When clarified, this related to tender-related documents which the claimant said he sought to show his workload. Ms Lomas' evidence was that the document requested was one that was not available.

89. The claimant appealed against the grievance outcome in an email of 13 October (269). The claimant exchanged emails with Ms Lomas about the arrangements for the appeal hearing and being accompanied. On 15 October the claimant said (266) "*I have just spoken a workplace representation service and there is a cost involved*".

90. At around this time, the respondent was purchased by a third party. Those who had previously been directors of the business, stepped down as directors. That included Mr Doherty and Mr Edwards. Arrangements were made for Mr Edwards to hear the grievance appeal. By the time that he heard the grievance appeal, he was no longer a director, when Mr Doherty had been a director at the time when he heard

the grievance. Mr Edwards was the branch manager of a different branch. The claimant complained that Mr Edwards spoke to other managers in the office when he attended to conduct the grievance appeal. We did not hear evidence from Mr Edwards.

91. The grievance appeal meeting took place on 20 October 2021. Notes were taken at the grievance appeal meeting (273). At the time, the claimant did not object to Mr Edwards hearing the grievance appeal. The claimant was provided with an outcome letter sent from Ms Lomas and dated 27 October 2021 (291). The appeal was not upheld. A document outlining the response to the appeal was also provided (284).

92. On 29 October 2021 Ms Lomas wrote a further letter to the claimant (180). That was headed "*Your employment*". The first paragraph referred to the claimant's grievance and appeal, and the outcome of that appeal. The letter went on to say the following:

> "*It is now believed that matters have reached the stage at which it is considered that there is an irretrievable breakdown in relations which may make your continued employment with the company untenable.*
>
> *Since January 2019, we have undertaken a range of measures and implemented a number of steps to accommodate you and deal with the various complaints and grievances which you have raised.*
>
> *The latest grievance and your response to the initial findings and persistence with your challenges following the appeal as evidenced by your email yesterday merely serves to confirm that it is proving impossible to reach a solution which is satisfactory to you and as an employer, we have to consider other employees and the wider business and the impact which your repeated complaints are having.*
>
> *We believe that we have taken your complaints seriously and have always done so and have attempted to find a solution in all cases. However, it would appear that this is not possible and we have therefore decided to convene a formal hearing to decide whether or not to terminate your employment for "some other substantial reason" which is a potentially fair reason for dismissal cited in the Employment Rights Act 1996.This would be that there is* ***an irretrievable breakdown in relations*** *which makes your continued employment untenable"*

93. The letter invited the claimant to attend a formal hearing on 2 November 2021 to be conducted by Mr Doherty. The claimant was notified of the right to be accompanied. He was told that at the hearing "*we will consider all points raised by you before a decision is reached as to whether or not your employment with the company should now be terminated*".

94. Subsequent emails were exchanged with the claimant in which he highlighted the lack of time and the difficulty he was having in arranging someone to accompany him. On 1 November the claimant said (188), "*I would ask that we rearrange for later in the week to give me time to prepare and find someone hopefully to attend. Workplace representation will attend with notice but they charge £200.00 plus vat so can you suggest someone from Pyramid who is willing to attend as I have asked for several people now who have declined*". The meeting was rearranged to 3 November. Ms Lomas informed the claimant that she had been unable to find someone to accompany the claimant to the hearing, but she declined to inform the claimant who it was she had asked. She did not explicitly address the cost quoted by the claimant for workplace representation.

95. On 2 November 2021 the claimant provided a written statement for the meeting by email (190). He referred to work causing him stress and increased anxiety. He said that the grievance and appeal had not been conducted properly. He referred to his data protection subject access request. He referred to the fact that he felt nothing had been done to resolve his grievance and ease his stress, anxiety, and workload upon his return to work.

96. The formal hearing took place on 3 November 2021. It was conducted by Mr Doherty. The claimant attended and was not accompanied. Ms Lomas attended and took notes, which were provided to the Tribunal (192). From the notes, it would appear that the meeting was somewhat unstructured. It included discussion about the grievance process. The claimant commenced the meeting by asserting that it was retaliation for raising a data protection subject access request and written statement. When asked about the meeting, Mr Doherty said that the structure had been to go through and over the notes of the previous meetings and the outcome of them. It did not appear from the notes that Mr Doherty put to the claimant that it was proposed he was being dismissed and why, nor was the claimant given the specific opportunity to explain why he should not be dismissed. The claimant believed that the meeting was ended by the attendees all being told to leave the office building they were using because it was closing for the day. Mr Doherty agreed that was what happened, but his evidence was that the meeting had finished in any event.

97. The decision to dismiss the claimant was included in a letter sent from Mr Doherty on 4 November 2021 (198). The letter stated that it was confirming the outcome of the hearing the previous day, albeit no outcome had previously been provided.

98. Within the letter, Mr Doherty made reference to the claimant being unable to persuade a companion to accompany him at the hearing. He also said, "*You have, it seems, alienated yourself not only from management but also your colleagues and I think it is pertinent to comment that you were unable to find any colleague who was prepared to act as your companion. This in itself must be exceptional*". When asked about whether he had in part dismissed the claimant because he could not find someone to accompany him at the hearing, Mr Doherty stated that it was no part of his decision that there was no colleague there. The Tribunal was provided with no

evidence from any of the claimant's colleagues about why they would not accompany him.

99. In the letter, there was reference to the claimant's written statement, which was stated to be no more than a further attempt to appeal the findings of the grievance appeal. It went on to say:

> "*I have had to consider whether your employment with the company should be terminated for "some other substantial reason" which I am advised is a permissible reason under the Employment Rights Act 1996. This can arise where there is an* ***irreparable or irretrievable breakdown in relations*** *between the parties which makes the continued employment untenable. It is also sometimes described as a breakdown in trust and confidence.*
>
> *I have considered your representations at the hearing and I have read again your personnel file over the last (18 months). Your grievance of 19th August and your response to the initial findings and persistence with your appeal including your latest email seeking in effect a further appeal, leads me to the inevitable conclusion that it is impossible to reach a solution. I also have to consider the wider business and the disruption which your continued complaints and emails are having on the business and the employees concerned.*
>
> *You appeared unrepentant about your conduct and attitude and there was no sign from you that this was likely to change and I take the view that this is destructive and destabilising. The time which we have spent upon your various grievances and complaints is frankly unprecedented within the company and in my view wholly disproportionate.*
>
> *It is therefore with some regret that after careful deliberation that I have decided that you employment with the company should be terminated. We simply cannot allow the situation to continue where valuable company time and resources is taken up by one employee to the detriment of others and the business overall"*

100. The letter informed the claimant that his employment was terminated with effect from 5 November 2021 and that he would be paid in lieu of notice (with the amounts set out). The letter went on to say that, exceptionally, it had been decided not to afford the claimant a right of appeal. Reference was made to a recent EAT decision that upheld a dismissal in similar circumstances despite the employer not following any procedure (without naming the case – nobody gave explicit evidence about this during the Tribunal hearing). The letter concluded that no judgement call was being made about where the blame lay, but it was said that the claimant had clearly lost confidence in the respondent as the employer. It was said that a further meeting by way of appeal would be "*tantamount to requiring the parties to go through a meaningless charade simply for the sake of it*".

101. The evidence heard from the respondent's witnesses about who made the decision to dismiss was inconsistent. Ms Lomas wrote the letter suspending the claimant. Mr Doherty wrote the letter which dismissed him. In his witness statement, Mr Morgan explained why the claimant had been dismissed. When we initially asked Mr Morgan about the decision to dismiss and who had made it, he explained that the decision had been made by himself and Mr Alf Murphy, explaining that between the two of them they controlled seventy percent of the shareholding in the company. When Mr Morgan was then asked about the fact that the dismissal decision letter had been written by Mr Doherty, Mr Morgan stated that the decision that he had made with Mr Murphy had been to start the process as they could not just end the claimant's employment, and he then referred to it being a group decision with Mr Doherty, explaining that Mr Doherty and Mr Murphy each had an eleven and a half percent shareholding. He then answered a question, in which clarity was sought about whether Mr Doherty had made the decision with Mr Morgan, by saying that no Mr Morgan had not made that decision, he had let the process take its course. In her witness statement, Ms Lomas did not refer to being a party to the decision. When asked whether she had been, she denied that she was. In his answers to questions from the Tribunal, Mr Doherty said that there were others involved in the decision to dismiss the claimant. He confirmed that the others were Ms Lomas, Mr Morgan, and Mr Murphy. He explained that Mr Morgan and Mr Murphy were both on holiday at the time and had been contacted and spoken to after the November meeting and before the decision. He said the decision was made based upon a discussion with Mr Murphy and Mr Morgan. He also referred to Ms Lomas having spoken to Mr Morgan and Mr Murphy. None of the witness statements included any reference to the discussions and decision-making process. The discussions and decision-making were not documented. The decision letter did not inform the claimant about the way the decision had been made or by whom.

102. In his evidence, Mr Morgan was adamant that the claimant's absence was not a factor in the decision to terminate the claimant's employment. During his answers to questions, Mr Morgan frequently explained his view of the claimant's health by referring to the fact that did not seem poorly. He said that the respondent was aware that Colin had sleeping issues but not that he had a full-blown mental disorder. He also said that if the respondent had understood that the claimant had mental health issues, allowing him to work from home would have been the last thing which the respondent would have considered doing.

103. When Ms Bradley was asked at the end of re-examination about her working relationship with the claimant at the end of his employment, she described it as a normal working relationship, and she said that she had no qualms with him whatsoever. During his cross-examination, the claimant expressed his view of Ms Bradley by stating that "*she was just a horrible vicious nasty person*". Of working at the respondent generally, the claimant said (in cross-examination) that there was "*no management*" and it was "*just a horrible horrible office to work in, horrible*".

104. As part of the list of issues, there was reliance placed on the claimant having to work on over one hundred accounts. That number of accounts was not evidenced.

The respondent contested the figure. The claimant placed some reliance upon the multiple sites of a single client.

105. The claimant accepted in cross-examination (saying that he took the respondent's representative's word for it) that from 2019 until the end of his employment he made one hundred and fifty different complaints to the respondent, including the one hundred and twenty-three that the respondent referred to in the occupational health referral (593).

106. In the course of proceedings, the claimant produced a disability impact statement (612). That was prepared on 21 August 2022. The bundle also included the claimant's medical records. A letter of 22 January 2016 addressed the claimant's OCD (426). A letter of 17 February 2022 (606) (partially redacted) confirmed that the claimant suffered from depression and OCD which had been ongoing since 2014. It said there was a reported ten-year history of OCD. Medication taken in January 2015, October 2019, 2020, and in 2022, was detailed in that letter. It stated that the claimant's low mood was (at the time) having a significant impact on his daily life. A report of 1 April 2022 (which had been partially redacted) (604) recorded the claimant as having problems identified of OCD, depression, and stress. A report of 17 May 2023 (614) detailed the claimant's struggle with OCD as well as depression for many years. Further reports were provided dated 17 May 2023 and 28 December 2023. The latter reported the claimant's diagnosis as being OCD and depression and detailed that the claimant's OCD and associated problems greatly affected the claimant's mood. It also detailed that the claimant struggled with sleep and generally managed only three or four hours per night, and he then struggled to get out of bed in the morning. The claimant's full GP notes were also provided and included: a diagnosis of depression with loss of motivations and sleep poor on 21 January 2015; a consultation for stress at work on 20 February 2019; a consultation in which the claimant was described as not sleeping on 23 March 2020; a consultation in which the claimant felt the need to change the anti-depressants as they were not working as they should be on 27 April 2020; a consultation for work-related stress on 8 June 2020; a consultation which addressed stress at work and sleeping difficulties on 20 August 2021; and further consultations on 7 and 13 September 2021.

107. The claimant entered four claims at the Employment Tribunal. The first claim was entered on 4 November 2021 after ACAS Early Conciliation between 31 October and 2 November. It was Ms Lomas' evidence that she spoke to ACAS about the early conciliation. Mr Doherty's evidence was that he was unaware of it. The claim form was only received by the respondent some weeks after it was entered.

108. The fourth claim was entered at the Tribunal on 3 March 2022. In that claim the claimant alleged victimisation. The claimant's complaint was that two clients had been told that the claimant was ill, mentally ill. He alleged that they had been told by the respondent that he was unwell and had mental health issues. That was attributed to Mr Doherty and Mr Hartley, based upon what the claimant said he was told by the clients. Mr Doherty and Mr Hartley denied the conversations. Mr Hartley denied that he was aware of the claimant's grievances or his Tribunal claim (or potential claim). The claimant posted on his own social media issues relating to mental health,

something which he said he now regretted. The respondent attributed the clients' knowledge to what was said on the claimant's own social media (720).

The Law

109. Both parties made submissions both in writing and verbally. Not all of the law referred to or the issues raised are explicitly referred to in this Judgment, albeit that all of the submissions made were considered.

Unfair dismissal

110. In the unfair dismissal claim, brought under Part X of the Employment Rights Act 1996, the respondent relied upon the potential fair reason set out at section 98(1)(b) "*some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held".* The respondent bears the burden of proving, on the balance of probabilities, that the dismissal was for some other substantial reason. If the respondent fails to persuade us that it dismissed him for that reason, the dismissal will be unfair. The employer is only required to establish that the reason for the dismissal is a potentially fair one, the Tribunal is then required to decide whether the dismissal was fair applying section 98(4).

111. One type of some other substantial reason (SOSR) dismissal is where the trust and confidence between employer and employee has broken down, and that can be a fair reason for dismissal (**Ezsias v North Glamorgan NHS Trust** [2011] IRLR 550). It has been stated it would be more helpful to focus upon the employee's specific conduct relied upon, rather than the label of trust and confidence.

112. Where an employee refuses to effectively work with another employee, and that caused an impasse, that can potentially be a fair dismissal on the grounds of SOSR. The respondent's representative, in her submissions, referred to the case of **Perkin v St Georges Healthcare NHS Trust** [2005] EWCA Civ 1174, and stated that the Court of Appeal had held that dismissing an employee because of his difficult personality cannot of itself amount to SOSR, although the ways in which the employee's personality manifested itself through his behaviour with other employees, clients, customers and colleagues, could do so (as it had in that case).

113. If the respondent does persuade the tribunal that it held the genuine belief and that it did dismiss the claimant for that reason, the dismissal is only potentially fair. We must then go on and consider the general reasonableness of the dismissal under section 98(4) Employment Rights Act 1996. That section provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the claimant. That is to be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral. It will depend upon all the circumstances in the case.

114. In approaching that question, we are required to consider whether the employer in treating the reason for dismissal as sufficient to dismiss, fell within the band of reasonable responses. That is the band of reasonable responses which a reasonable employer could reach. That band is not of infinite width. The question of fairness is not to be judged by reference to what we would or might have done had we been in the employer's position, but it is to be judged by reference to what the employer actually did.

115. In a dismissal because of a breakdown in the working relationship, a highly relevant factor in determining the reasonableness of the dismissal is the consequence of the conduct. Other factors will include the nature of the breakdown, the prospects of repairing the relationship, and the alternatives to dismissal (although this is not an exhaustive list, all relevant circumstances must be considered).

116. There is some conflict in the case law about whether or not the ACAS code of practice on disciplinary and grievance procedures is to be taken into account for a SOSR dismissal. The code says that it applies to disciplinary issues relating to misconduct and poor performance. It is the substance of the reason which decides whether or not the code applies, and not the label given to it. It has been held both that the code should apply to a SOSR dismissal and that it would not be right to apply the uplift for non-compliance to such a dismissal.

117. During submissions, we highlighted the case of **Gallagher v Abellio Scotrail Ltd** UKEATS 0027/19. It was not a case referred to by the parties, but we considered it because we had assumed that it was the case referred to in the decision letter by the respondent as justifying the absence of an appeal in this case (as an SOSR dismissal). That was a case in which the Employment Appeal Tribunal held that the particular dismissal for a breakdown in working relations between the claimant and her manager was a rare case where the Tribunal was entitled to reach the conclusion that a dismissal procedure (including an absence of a right of appeal) could be dispensed with because it was reasonably considered by the employer in that case to be futile in all the circumstances. That was an appeal which determined that it was an outcome the Tribunal in that case was entitled to reach, it was not a decision which held that an SOSR dismissal would always be fair where there was no dismissal procedure or appeal. What the Employment Appeal Tribunal said was that dismissals, without following any procedures, would always be subject to extra caution on the part of the Tribunal before being considered to fall within the band of reasonable responses. It said that the fact that no procedure was followed prior to dismissal would, in many cases, give rise to the conclusion that the dismissal was outside the band of reasonable responses and unfair and "*Such procedures, including giving the employee an opportunity to make representations before dismissal and to appeal against any dismissal, are fundamental notions of natural justice and fairness and it would be an unusual and rare case where an employee would be acting within the band of reasonable responses in dispensing with such procedures altogether*".

Disability

118. Section 6 of the Equality Act 2010 provides that:

> *"A person (P) has a disability if:*
>
> *(a) P has a physical or mental impairment, and*
>
> *(b) The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."*

119. Section 212 of the Equality Act 2010 provides that "*substantial*" means more than minor or trivial.

120. Schedule 1 Part 1 of the Equality Act 2010 includes further provisions regarding determination of disability. Paragraph 2 provides that:

> *"The effect of an impairment is long-term if:*
>
> *(a) It has lasted for at least 12 months;*
>
> *(b) It is likely to last for at least 12 months; or*
>
> *(c) It is likely to last for the rest of the life of the person affected.*
>
> *If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur"*

121. Schedule 1 Part 1 of the Equality Act 2010 also includes provisions which relate to the effect of medical treatment and to progressive conditions.

122. The guidance on matters to be taken into account in determining questions relating to the definition of disability, issued by the Secretary of State, confirms that "*likely*" should be interpreted as meaning that it could well happen. That guidance also addresses: substantial; the effects of behaviour; the meaning of adverse effects on the ability to carry out normal day-to-day activities; and day to day activities.

123. The onus is on the claimant to prove that the relevant condition was a disability at the relevant time.

124. Section 6(3) of the Equality Act 2010 provides, in relation to disability, that:

> *"a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability; a reference to persons who share a protected characteristic is a reference to persons who have the same disability"*.

125. On the respondent's knowledge, in his submissions the claimant placed reliance upon **Gallop v Newport City Council** [2014] IRLR 211. He emphasised

that an employer cannot rely on a bald statement from occupational health that a worker is not disabled, where there are certain indications otherwise and where the employer has not asked for key information from occupational health which keys into the wording of the definition. He referred to the similarities he perceived between that case and his own. When considering knowledge, we considered the issue separately as it applied to each of the different types of discrimination alleged.

Discrimination arising from disability

126. Section 15 of the Equality Act 2010 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.*

127. For unfavourable treatment there is no need for a comparison, as there would be for direct discrimination. However, the treatment must be unfavourable, that is there must be something intrinsically disadvantageous to it.

128. **Pnaiser v NHS England** [2016] IRLR 170 (a case relied upon by the respondent's representative) outlined the correct approach to be taken:

> *"From these authorities, the proper approach can be summarised as follows:*
>
> *(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*
>
> *(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.*

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises….

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) … the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(h) Moreover, the statutory language of s.15(2) makes clear … that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so…

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed."

129. Section 15(1)(b) provides that unfavourable treatment can be justified where it is a proportionate means of achieving a legitimate aim. That requires: identification of the aim; determination of whether it is a legitimate aim; and a decision about whether the treatment was a proportionate means of achieving that aim.

130. In his submissions on proportionality, the claimant emphasised the decision of the Employment Appeal Tribunal in the case of **Department for Work and Pensions v Boyers** [2022] IRLR 741. That was a case in which the respondent's failure to evaluate a trial the claimant had undergone in a different role in a different location, which (if properly evaluated) might have avoided dismissal, meant that the respondent had not shown that dismissal was a proportionate means of achieving

their aim in that case. The claimant also emphasised the decision of the Court of Appeal in **City of York Council v Grosset** [2018] IRLR 746**.** The claimant submitted that in that case the employer was liable for discrimination arising from disability even though the employer did not know of the causal link between the disability and the reason for the unfavourable treatment. The Court of Appeal said that in that case:

> *"the test under s 15(1)(b) EqA is an objective one according to which the ET must make its own assessment"*

131. In his submissions, the claimant also made reference to the legislative history of section 15 and the fact that it was intended to restore protection which had been limited by **Malcolm v Lewisham London Borough Council** [2008] IRLR 700.

132. The Tribunal has taken into account the Guidance in relation to objective justification contained in the EHRC Code of Practice on Employment. The claimant emphasised some parts of this in his submissions (5.12, 5.14, 5.15, 5.17, 5.18, 6.23 and 6.24). It is for the respondent to justify the practice and it is up to the respondent to produce evidence to support its assertion that it is justified. The Tribunal must ask itself whether the aim is legal, non-discriminatory, and one that represents a real, objective consideration? The Tribunal must then ask itself whether the means of achieving the aim is proportionate? Treatment will be proportionate if it is 'an appropriate and necessary' means of achieving a legitimate aim. Necessary does not mean that it is the only possible way of achieving the legitimate aim, it will be sufficient that the same aim could not be achieved by less discriminatory means.

133. The parts of the code emphasised by the claimant also addressed knowledge, emphasising that that it was not enough for an employer to show that it did know that the person had the disability, it must also show that it could not reasonably have been expected to know about it. He emphasised that: employers should consider whether a worker has a disability even where one has not formally been disclosed; and an employer must do all they can reasonably be expected to do to find out if a worker has a disability. Section 5.15 of the code goes on to say that what is reasonable will depend on the circumstances and, when making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

134. The Guidance also says (in paras 5.8 and 5.9) that something that arises in consequence of the disability means that there must be a connection between whatever led to the unfavourable treatment and the disability. The consequences of a disability include anything which is the result, effect or outcome of a disability. Some consequences may not be obvious.

The duty to make reasonable adjustments

135. Section 20 of the Equality Act 2010 imposes a duty to make reasonable adjustments on an employer. Section 20(3) provides that the duty comprises the

requirement, where a provision, criterion or practice of the employer's puts a person with a disability at a substantial disadvantage in relation to a relevant matter in comparison with people who do not have a disability, to take such steps as it is reasonable to have to take to avoid the disadvantage. That requires not only the existence of a disability, but also: identification of a PCP; and knowledge (actual or constructive) on the part of the employer.

136. Section 21 of the Equality Act 2010 provides that a failure to comply with the requirement set out in section 20 is a failure to comply with a duty to make reasonable adjustments. Schedule 8 of the same Act also contains provisions regarding reasonable adjustments at work.

137. **Environment Agency v Rowan** [2008] IRLR 20 is authority that the matters a Tribunal must identify in relation to a claim of discrimination on the grounds of failure to make reasonable adjustments are:

a. the provision, criterion or practice applied by or on behalf of an employer;

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

c. the nature and extent of the substantial disadvantage suffered by the claimant.

138. The requirement can involve treating disabled people more favourably than those who are not disabled. Whether something is a provision, criterion or practice should not be approached too restrictively or technically, it is intended that phrase should be construed widely. A one-off act can be a PCP but it is not necessarily the case that it is.

139. In her submissions, the respondent's representative emphasised that we should be concerned with outcomes and not process. We must consider whether there had been a failure to make a reasonable adjustment, not whether to obtain particular advice about it (relying upon **Tarbuck v Sainsbury's Supermarket Ltd** [2006] IRLR 664 and two other authorities).

140. In terms of knowledge of disability and reasonable adjustments, the duty only applies if the respondent: knew or could reasonably be expected to know that the claimant had the disability; and knew or could reasonably be expected to know that the claimant was likely to be placed at a substantial disadvantage compared with persons who are not disabled (that is aware of the disadvantage caused by the application of the PCP). The question of whether the respondent could reasonably be expected to know of the disability and/or the substantial disadvantage is a question of fact for us to decide. The focus is on the impact of the impairment and whether it satisfies the statutory test and not the label given to any impairment (**Jennings v Barts and The London NHS Trust** UKEAT/0056/12).

141. When considering reasonable adjustments, we took into account the EHRC Code of Practice on Employment.

Harassment

142. Section 26 of the Equality Act 2010 says:

> *"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."*
>
> *"In deciding whether conduct has the purpose or 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."*

143. The Employment Appeal Tribunal in **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336, stated that harassment is defined in a way that focuses on three elements: (a) unwanted conduct; (b) having the purpose or effect of either: (i) violating the claimant's dignity; or (ii) creating an adverse environment for him; (c) on the prohibited grounds. Although many cases will involve considerable overlap between the three elements, the EAT held that it would normally be a 'healthy discipline' for Tribunals to address each factor separately and ensure that factual findings are made on each of them.

144. We must consider separately: purpose; and effect. A respondent can be liable for effects, even if they were not its purpose (and vice versa). If the conduct had the relevant purpose (and was related to the relevant protected characteristic), unlawful harassment is established without anything more being required. If the conduct has had the proscribed effect, it must also be reasonable that it did so. The test in this regard has both subjective and objective elements to it. The assessment requires us to consider the effect of the conduct from the claimant's point of view, the subjective element (taking account of the perception of the claimant). We must also ask, however, whether it was reasonable of the claimant to consider that conduct had that requisite effect, the objective element.

145. In her submissions the respondent's representative referred to two authorities on harassment: **Pemberton v Inwood** [2018] IRLR 542; and **Ahmed v Cardinal Hume Academies** UKEAT/0196/18.

146. The last element of the questions on harassment, but an important part, is whether the conduct related to one of the prohibited grounds? The term related to, is wider and more flexible than the test applied to direct discrimination (because of). Conduct can be found to be related to the protected characteristic where it was done because or it (and usually will be), but that is not the requirement. There must be some feature or features of the factual matrix which properly lead to a conclusion that the conduct in question is related to the protected characteristic relied upon.

When considering whether facts have been proved from which a Tribunal could conclude that harassment was related to a protected characteristic, it is always relevant to take into account the context of the conduct which is alleged to have been perpetrated. That context may in fact point strongly towards or against a conclusion that it was related to any protected characteristic.

Victimisation

147. Section 27 of the Equality Act 2010 says:

> *"(1) A person (A) victimises another person (B) if A subjects B to a detriment because – (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.*
>
> *(2) Each of the following is a protected act – (a) bringing proceedings under this Act; (b) giving evidence or information in connection with proceedings under this Act; (c) doing any other thing for the purposes of or in connection with this Act…"*

148. The first question is whether the claimant did a protected act. If the claimant has done the protected act, the next question is whether the respondent subjected the claimant to a detriment because of that protected act, in the sense that the protected act had a material or significant influence on subsequent detrimental treatment. That exercise has to be approached in accordance with the burden of proof.

149. If we conclude that the protected act played no part in the treatment of the claimant, the victimisation complaint fails even if that treatment was otherwise unreasonable, harsh or inappropriate. Unreasonable behaviour itself does not necessarily give rise to any inference that there has been discriminatory treatment.

150. The word detriment in section 27 is to be interpreted widely. The key test is for us to ask ourselves: is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance would not pass this test, but the test is framed by reference to a reasonable worker, so it would be enough if a reasonable worker would or might take such a view.

151. In her submissions, the respondent's representative highlighted that the claimant must be able to prove a causal nexus between the fact of doing something by reference to the Act and the decision of the employer to impose less favourable treatment. She contrasted treatment because of the individual's methods, with the fact that they were doing a protected act. She relied upon **Aziz v Trinity Street Taxis Ltd** [1988] IRLR 204 and **Chief Constable of West Yorkshire Police v Khan** [2001] IRKR 830. She also said that there were cases where the protected act was part of the background but not the reason for the protected act (**Martin v Devonshires Solicitors** [2011] ICR 352).

152. In his submissions, the claimant placed reliance upon the case of **Woodhouse v North West Homes Leeds Ltd** [2013] IRLR 773. He drew comparisons between his own case and that one. In that case the EAT emphasised that complaints which were demonstrated to be false were still protected (if they were complaints of discrimination) unless they were found to be in bad faith.

The burden of proof

153. Section 136 of the Equality Act 2010 sets out the way in which the burden of proof operates in a discrimination, harassment or victimisation case and provides 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 sub-section (2) does not apply if A shows that A did not contravene the provision".*

154. At the first stage, we must consider whether the claimant has proved facts on a balance of probabilities from which we could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This is sometimes known as the prima facie case. It is not enough for the claimant to show merely that less favourable or unfavourable treatment has occurred and there was a difference of a protected characteristic between them. In general terms "*something more*" than that would be required before the respondent is required to provide a non-discriminatory explanation. At this stage we do not have to reach a definitive determination that such facts would lead us to the conclusion that there was an act of unlawful discrimination, the question is whether we could do so.

155. If the first stage has resulted in the prima facie case being made, there is also a second stage. There is a reversal of the burden of proof as it shifts to the respondent. We must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. To discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

156. In most cases there is a need to consider the mental processes, whether conscious or unconscious, which led the alleged discriminator to do the act. Determining this can sometimes not be an easy enquiry, but we must draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). We need to be mindful of the fact that direct evidence of discrimination is rare, and that Tribunals frequently have to infer discrimination from all the material facts. The protected characteristic does not have to be the only reason for the conduct, provided that it is an effective cause or a significant influence for the treatment. The explanation for the less favourable treatment does not have to

be a reasonable one. Unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment. The way in which the burden of proof should be considered has been explained in many authorities.

Time limits/jurisdiction (in discrimination, harassment, and victimisation claims)

157. Section 123 of the Equality Act 2010 provides that proceedings must be brought within the period of three months starting with the date of the act to which the complaint relates (and subject to the extension for ACAS Early Conciliation), or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period. A failure to do something is to be treated as occurring when the person in question decided on it.

158. The key date is when the act of discrimination occurred. We also need to determine whether the discrimination alleged is a continuing act, and, if so, when the continuing act ceased. The question is whether a respondent's decision can be categorised as a one-off act of discrimination or a continuing scheme. The focus of inquiry must be on whether there was an ongoing situation or continuing state of affairs for which the respondent was responsible in which the claimant was treated less favourably. Tribunals should look at the substance of the complaints in question as opposed to the existence of a policy or regime and determine whether they can be said to be part of one continuing act by the employer. One relevant factor is whether the same or different individuals were involved in the incidents, however this is not a conclusive factor.

159. If out of time, we need to decide whether it is just and equitable to extend time. Section 123(1)(b) of the Equality Act 2010 states that proceedings may be brought in, *"such other period as the Employment Tribunal thinks just and equitable"*. The most important part of the exercise of the just and equitable discretion is to balance the respective prejudice to the parties. The factors which are usually considered are contained in section 33 of the Limitation Act 1980 as explained in the case of **British Coal Corporation v Keeble** [1997] IRLR 336. Those factors are: the length of, and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the relevant respondent has cooperated with any request for information; the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action. Subsequent case law has said that those are factors which illuminate the task of reaching a decision, but their relevance depends upon the facts of the particular case, and it is wrong to put a gloss on the words of the Equality Act to interpret it as containing such a list or to rigidly adhere to it as a checklist. In **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23 it was emphasised that the best approach for a Tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time and that factors which are almost always relevant to consider when exercising any discretion whether to extend time are: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for

example, by preventing or inhibiting it from investigating the claim while matters were fresh). The respondent's representative emphasised what was said in **Robertson v Bexley Community Centre t/a Leisure Link** [2003] IRLR 434 which confirmed that the exercise of a discretion should be the exception rather than the rule and that time limits should be exercised strictly in employment cases. She also quoted from the decision in **Concentrix CVG Intelligent Contact Ltd v Obi** [2022] EAT 149, a case in which the Employment Appeal Tribunal explained the correct approach to be taken.

Conclusions – applying the Law to the Facts

160. The list of issues included, as the first issue, jurisdiction. That was whether the discrimination, harassment, and victimisation claims, had been entered at the Tribunal within the time required. We decided not to determine that issue first. We left the issue to be determined later once we had considered the other issues.

Unfair dismissal – issue two

161. The second issue was unfair dismissal. That was set out as three issues within the list of issues, with the second such issue having five questions asked within it. Those issues addressed the usual questions in an unfair dismissal claim.

162. The first issue (for unfair dismissal) was whether the respondent dismissed the claimant for a potentially fair reason pursuant to section 98 of the Employment Rights Act 1996? In this case the respondent relied upon some other substantial reason as set out in section 98(1)(b). The particular reason was stated to be an irretrievable breakdown in relations between the parties.

163. As we have addressed in the factual part of this Judgment, it was not entirely clear from the evidence heard exactly when and who had made the decision to dismiss the claimant. It was the claimant's case that his dismissal was pre-determined, certainly from the date upon which he was informed he was (or would be) suspended on 25 August 2021. The respondent's case was that the decision to dismiss was made by Mr Doherty following the hearing on 3 November 2021, as explained/stated in his letter of 4 November 2021 (198). To decide the reason for dismissal it was necessary for us first to decide who dismissed the claimant and when.

164. The claimant was suspended on 25 August 2021 (or at least he was informed that he would be suspended from 31 August, nothing material turned upon that distinction). The letter which Ms Lomas sent (173) explained that the company had reached the stage at which it considered that there was an irretrievable breakdown in relations between the parties, which (it was said) may make the claimant's continued employment untenable. We noted that the claimant's mobile phone was stopped on that date. He was suspended. We accepted, based upon the evidence of Mr Doherty, that the decision to dismiss had not been absolutely and finally made at that date, but we found that it was clear that the process by which the claimant would be dismissed was certainly in progress by that date.

165. It was Mr Doherty's evidence that he made the final decision to dismiss the claimant after the meeting on 3 November. Whilst the evidence was somewhat confused, we found that he spoke to Mr Morgan and Mr Murphy before he made his final decision, and he might have also spoken to Ms Lomas. We accepted Mr Doherty's evidence that it was his decision, albeit it was clear that he made it after consultation with others.

166. We also accepted that the reason why Mr Doherty dismissed the claimant was as he evidenced and as was set out in his letter of 4 November. He dismissed the claimant because of his complaints, the disruption that it was perceived that those complaints caused, the time required to address the complaints, and the view taken by the respondent's management that they could not continue to allow the situation to continue where company time and resources were taken up by the one employee. We accepted that the management of the respondent and, in particular, Mr Doherty, took the view that the relationship had broken down. We found that the reason why the claimant was dismissed was accordingly the one pleaded and relied upon by the respondent.

167. Having decided that the dismissal was for a potentially fair reason, what we then needed to do was determine the general reasonableness of the dismissal (applying section 98(4) of the Employment Rights Act 1996) and determine whether the respondent acted reasonably in treating that as sufficient reason to dismiss the claimant. As explained in the section on the law, section 98(4) provides that the determination of the question depends upon the circumstances (including the respondent's size and administrative resources) and is to be determined in accordance with equity and the substantial merits of the case. There are usually two components to that decision (albeit what we must do is apply section 98(4)): whether the procedure followed was fair and fell within the band of responses of a reasonable employer (effectively what was addressed at issue 2 in the list of issues for unfair dismissal); and whether the decision to treat that reason as a reason to dismiss fell within the band of reasonable responses. We were conscious that the decision which we needed to reach was not whether we would have followed that procedure or dismissed the claimant ourselves (had we been in Mr Doherty's shoes). However, we also noted that the band of reasonable responses is not of infinite width.

168. We did not find the process followed to be one which a reasonable employer would reasonably have adopted. The procedure was unfair. We also found that, irrespective of the procedure followed, the decision made to dismiss the claimant for the matters upon which Mr Doherty in fact relied, was not one which a reasonable employer would or could have reached within the range of reasonable responses. We found that the respondent did not act reasonably in treating the reason found as sufficient to dismiss the claimant. The dismissal was unfair.

169. There were a number of factors which we took into account in reaching our decision. Those factors were as follows (in no particular order of weight):

a. Whilst we have accepted that the decision was not entirely and irreversibly pre-determined on 25 August, nonetheless it was clear that

the decision that the claimant was likely to be dismissed had been made when Ms Lomas' letter was sent and, to a significant extent, we found that the process followed thereafter was undertaken with the aim or intention of dismissing the claimant (even though Mr Doherty ultimately made the final decision at the end of it);

b. The hearing of 3 November 2021 was not a fair hearing at which the claimant was genuinely given the opportunity to have his say and to address the reasons why it was proposed he would be dismissed. We reached that decision having considered the notes of the hearing (192) and the letter outlining the decision to dismiss (198) and note the absence of any such question or opportunity being given to the claimant;

c. Mr Doherty as the decision-maker, discussed his decision with Mr Morgan and Mr Murphy before it was made. Those two directors had not attended the hearing;

d. We did not find that Mr Doherty genuinely considered any alternatives to dismissal. He did not, for example, look at the claimant working from an alternative location, and that was neither discussed with, nor explored with, the claimant;

e. The claimant was not given a right of appeal against Mr Doherty's decision. The refusal to give such a right of appeal demonstrated the respondent's closed mind. Where the Branch Manager made the decision to dismiss and there remained the Managing Director (or former Managing Director) able to hear an appeal, we could not understand any genuine or fair reason why an appeal hearing heard by the more senior director/manager was not possible. We have addressed below the particular issues relating to the applicability of the ACAS code of practice and the implications of the **Gallagher** judgment (which we assumed to be the decision referred to in Mr Doherty's letter as explaining the lack of appeal process/hearing), but in any event in the circumstances of this case and considering the specific reason for which the claimant was dismissed, we found that the absence of a right of appeal or appeal hearing was a significant factor which (allied to the other factors), rendered this dismissal unfair;

f. Whilst we accepted that the claimant raised a number of issues with the respondent and would have been a difficult person to manage, we found that part of the reason for the number of occasions upon which the claimant raised issues (including re-raising what were perceived to be historic issues), was the fact that the respondent had failed to appropriately and properly address the grievances which he had raised. The allegations of bullying and sexual orientation harassment which the claimant made about Ms Bradley were never fully and appropriately investigated. There was no letter or decision providing a genuine outcome reached following an investigation (or, arguably, at all). There was nothing

which recorded a decision-reached and the reasons for it. Whilst a formal grievance outcome was provided in 2021, that process refused to address the historic issues, which had themselves never been appropriately addressed. They had only been addressed informally and had not been fully investigated and concluded in 2020. In addition, some of the complaints raised by the claimant had merit or were upheld. His first grievance in 2020, arising from the reduction in his pay during the early stages of the Covid pandemic, was upheld and resolved by the claimant being paid the money which he sought;

g. In the decision letter providing the reason for dismissal, Mr Doherty in part placed reliance upon the fact that the claimant had appealed the grievance outcome. An employee is able to appeal the outcome of a grievance process in accordance with a fair process and the ACAS code;

h. We did not find that what the claimant said to Ms Lomas or stated in his email of 20 August 2021 (237) did amount to a demand that Ms Bradley and Ms Collins had to be dismissed, as it was not what the email said. Had that been the only outcome acceptable to the claimant (at the time), he could (and we have no doubt would) have said so. Asking that other employees have issues dealt with where they have been raised, was not unreasonable and was in part a reflection of the fact that the respondent had not reached an outcome in many of the previous issues raised. In any event, the appropriate response from an employer who considered that such action was not merited or required, was to say so (and such a request did not of itself mean that the duty of trust and confidence had broken down);

i. In her evidence when asked in re-examination, Ms Bradley was clear that she believed that she had a normal working relationship with the claimant, and she said she had no qualms with him whatsoever. In those circumstances, the relationship between the claimant and Ms Bradley was not such as to render the dismissal of the claimant as fair; it was not consistent with those cases where a SOSR dismissal has been found to be fair because a claimant's colleagues would not work with them. Had reliance been placed on the absence of an accompanier in some way showing a breakdown of relationships with colleagues, that would have been unfair, but we accepted Mr Doherty's evidence that he did not do so. There was an absence of any evidence that the claimant's dismissal was genuinely required as a result of breakdown in relations with colleagues; and

j. We did not find that the number of grievances raised by the claimant in and of themselves rendered dismissal to be within the range of reasonable responses. An employee is and should be able to raise grievances. The number of grievances in this case were not excessive, one was only addressed informally, and another was upheld.

170. We found that in the circumstances of this case, the issue being addressed was in practice one which fell within the broad definition of conduct as referred to in the ACAS code of practice on disciplinary and grievance procedures. We found that the code applied to the dismissal even though the reason relied upon was SOSR. The respondent did not comply with that procedure as it did not provide the claimant with an opportunity to appeal. It should have done so. We noted that a breach of the ACAS code was not, of itself, sufficient to render the dismissal unfair, but nonetheless it was a factor which we could take into account and, as explained above and when considered alongside the other matters referred to, we found that it was a relevant factor which was one (of a number) which led us to find that the dismissal was unfair. We would add that we did not find that anything about the respondent's approach to, or response to, the claimant's requests to be accompanied, was in breach of the ACAS code (or of the obligation to allow an employee to be accompanied), as the respondent was not obliged to actively facilitate an accompanier, nor was it required to pay for an individual to be accompanied by someone who they would like to accompany them but who requires payment.

171. In issue two of the unfair dismissal part of the list of issues, there were listed five things which we were specifically asked to consider when determining the fairness of the dismissal (2.1-2.5).

172. Issue 2.1 asked whether the claimant's dismissal was in part a retaliation due to raising a grievance which cited discrimination? We found that the claimant was in part dismissed because of the grievance which he raised on 20 August 2021 (236). We found that to be the case based upon the timing of the suspension decision. The grievance was dated 20 August. The claimant was absent on ill health grounds. The claimant was suspended (or informed that he would be suspended) on 25 August. The claimant was clearly suspended, in part, as a result of that grievance. As we have already explained, the process to dismiss the claimant was in progress from the suspension. That process was in part a response to the 20 August 2021 grievance. However, issue 2.1 in the list of issues stated that the grievance cited discrimination. We did not find that the grievance of 20 August did so. It referred to alleged bullying. It stated that stress was a serious mental health issue. It raised issues regarding workload. It suggested that the claimant's reputation in the industry was at risk. It did not cite or allege discrimination. Our findings on issue 2.1 were part of the circumstances we considered in determining whether or not the respondent acted reasonably in treating the reason found as sufficient to dismiss the claimant, but it was not a significant factor in that decision.

173. Issue 2.2 asked whether the claimant was dismissed due to (what is described in the list of issues as) mental illness and sickness absence? We did not find that the reason why the claimant was dismissed was because of his mental ill-health or because of his absence. The absence which followed the suspension was not a material factor in the decision Mr Doherty reached (and post-dated the suspension decision when the process commenced). As we have already recorded, we found that the dismissal was because of the managers' perception of the claimant and the time required to address his complaints. Issues 2.3 and 2.4 raised

whether the respondent carried out all reasonable checks into the claimant's ill health and whether they considered all options before dismissal? We have already recorded our finding on the lack of consideration of other options to dismissal. Where relevant, we have also addressed those issues in relation to the disability discrimination claims below. We did not agree with the claimant's argument that the respondent was under a duty to seek more detailed advice on the claimant's ill health in the circumstances, particularly where an occupational health report had been obtained (whatever the shortcomings and limitations in that report and the fact that the consultation occurred over the phone). We have already addressed issue 2.5 regarding the timing of the decision.

174. As a result, and for the reasons given, we did not find that the respondent's decision to dismiss the claimant for SOSR (the breakdown in relationships) was fair in all the circumstances of the case. A fair procedure was not followed (issue 2). The decision to dismiss was not within the band of reasonable responses open to a reasonable employer (issue 3). We found the dismissal to be unfair.

175. We have not addressed any of the issues set out at issue 3 regarding remedy for unfair dismissal. Those issues will need to be addressed at a remedy hearing.

Disability – issue four

176. The respondent accepted that the claimant had two disabilities at the relevant time: stress; and OCD. We needed to determine whether or not the claimant had a disability at the relevant time as a result of the other three impairments relied upon: depression; insomnia; and anxiety.

177. Our starting point in considering the issue was the disability impact statement prepared by the claimant (612). In that statement the claimant stated that he had been diagnosed with anxiety and depression in January 2015. In his impact statement the claimant did not distinguish between each of the impairments, when describing the impact which his mental health conditions had upon him and therefore, whilst the statement did describe day to day activities and how they were adversely impacted, it did not assist us in identifying which of the activities described were affected by which of the impairments. The statement did explain that the claimant was regularly late for work due to lack of sleep, being something which the claimant also explained repeatedly during his evidence to the Tribunal.

178. We considered the medical evidence provided. We noted that the redacted medical report of 17 February 2022 (606) confirmed that the claimant had suffered from depression which had been ongoing since 2014. That report also detailed the impact that condition (together with the OCD) had on the claimant. The report of 17 May 2023 (614) focussed upon OCD, but also detailed that the claimant had had depression for many years, commencing with treatment in 2014 and explained the enduring impact of that condition (and OCD) over the previous eight years, explaining that it was highly likely that it would remain with him for some degree for the rest of his life. The up-to-date medical report which the claimant provided during the hearing dated 28 December 2023, also confirmed a diagnosis of depression and

detailed the impact of the claimant's OCD and associated problems. That report detailed the claimant's difficulties with sleeping and struggling to get out of bed in the morning as a result. Whilst those reports post-date the relevant time, they provided confirmation from medical practitioners about the conditions at the relevant time. The latter reports description of the issues the claimant had with sleeping, were consistent with the evidence which the claimant gave at the Tribunal hearing, about his insomnia at the relevant time.

179. We also considered the GP records which we were provided. An entry from 27 April 2020 (457) (during the relevant time) recorded the claimant as needing a bigger dose of the anti-depressants or changing the anti-depressants. An entry from 20 August 2021 (449) (also during the relevant time) recorded sleeping difficulties (in the context of an entry focussed upon stress).

180. In her submissions, the respondent's representative listed ten reasons why she submitted that the claimant had not had the disabilities relied upon at the relevant time. We will not re-produce those arguments in this Judgment but would note that some of the arguments related to the respondent's knowledge rather than whether in fact the claimant had the disabilities relied upon. She emphasised the absence of evidence that the claimant was taking medication at the relevant time and, in particular, at the time when the claimant spoke to the respondent's occupational health advisor. She contended that the claimant's alleged disabilities were a reaction to adverse life events as opposed to a clinical disability.

181. When the claimant was asked during his submissions about the different conditions, he explained the difficulty in distinguishing between them and the effects of each condition. He emphasised that he was not a doctor. He honestly confirmed the difficulty in distinguishing between different conditions and the impacts of those conditions, where he suffers from a number of conditions.

182. As we have emphasised, the medical reports provided confirm that the claimant suffered from depression from 2014 and confirmed a diagnosis of depression. The reports evidenced a condition which existed at the relevant time, even though the reports were prepared afterwards. We find that the claimant's depression did have a substantial adverse effect on his ability to carry out day-to-day activities based upon what the claimant described in his impact statement (even though the claimant did not distinguish between the impacts of OCD, stress and depression, as we accept from his answers in submissions that, in practice, he was not able to do so). The reports also detail that the claimant's depression was long-term having started in 2014 and therefore having lasted at least twelve months by the relevant time. We found that the claimant had a disability as a result of his depression (at the relevant time).

183. For the insomnia, it was to some extent difficult to identify whether that was a separate condition, or a symptom of the impairments already conceded and/or found. However, the definition of disability focuses on the day-to-day activities adversely affected and not the primary medical causes of them. Based upon the claimant's own evidence during the hearing about his insomnia and the impact which

it had upon him and, in particular, his ability to function in the morning and arrive at work on-time, we found that the claimant had proved that his insomnia was a disability at the relevant time. It was clear that the impact had been long-term. The insomnia was referenced in the medical reports provided.

184. We found that the position was different for anxiety. The Tribunal was shown medical records which recorded anxiety after the relevant time. However, unlike for depression, we were not shown records which were identified which recorded anxiety having been diagnosed prior to or at the relevant time or which showed that such a condition had a long-term adverse effect on the claimant's ability to carry our normal day to day activities at the relevant time (save for the general statement made in the claimant's impact statement). It is for the claimant to prove that he had a disability at the relevant time. For anxiety, we did not find that the claimant had done so.

185. Accordingly, we found that the claimant had the following disabilities at the relevant time: depression; and insomnia. The respondent conceded that the claimant had the following disabilities at the relevant time: stress; and OCD. Whilst we did not find that the claimant had proved that he also had a disability at the relevant time as a result of anxiety, when we went on to consider the claims which the claimant brought it was not clear that anything material arose from that finding or from any differentiation between stress, depression, and/or anxiety, of the claimant's mental ill health conditions.

Discrimination arising from disability – issue five

186. Issue 1.5.1 was whether the respondent treated the claimant unfavourably by sending the claimant a letter in April 2021 threatening him with disciplinary proceedings if he did not leave the workplace on time. This allegation arose from the letter that was sent to the claimant on 15 April 2021 by Ms Lomas (331) in which he was given the clear instruction that he must have vacated the building by 5pm each day. The instruction went on to say that he may face disciplinary action for not following management's instructions given to safeguard his health and wellbeing if he did not do so. No disciplinary action was ever taken.

187. We did not find that what was said in the letter sent to the claimant was unfavourable treatment. The letter was sent in an attempt to address the concerns of the claimant, by telling him to leave the workplace at the appropriate time. Doing so was not unfavourable treatment for him. No action was subsequently taken when he did not do so. Any action would have been unfavourable. However, we did not find that the instruction to the claimant to leave on time was unfavourable. During the hearing the claimant explained why he felt the arrangements put in place for him to pass work to others at (or before) 5pm were unsatisfactory. However, any such arrangements were irrelevant to whether the basic instruction was unfavourable. It was also clear to us that the claimant had considerable difficulty in passing his work to others and did not feel others (or, at least, some others) undertook the work well. That also does not mean that the instruction was unfavourable. It was not unfavourable for the claimant to be told to ensure that he left by 5pm.

188. Issue 1.5.2 related to the claimant's dismissal. Clearly, being dismissed was unfavourable treatment. However, what was alleged at 1.5.2 was that the claimant was dismissed because of absences which arose out of his mental health disabilities. We did not find that the claimant was dismissed because of his absences. The process to dismiss the claimant was started only shortly after the claimant had started the more recent period of absence. We did not find that the claimant's absence was a material factor in Mr Doherty's decision to dismiss the claimant (we have already explained why we found that he made the decision to dismiss).

189. In issue 1.6 there were two things relied upon as arising in consequence of the claimant's disabilities. His sickness absence did arise from his disabilities, but as already recorded that was not the reason we found why the claimant was dismissed (nor was it the reason for the instruction in the letter of 15 April 2021). The other thing relied upon was said to be the claimant's slow pace. The Tribunal heard no evidence that the claimant's work was undertaken at a slow pace. The respondent was not concerned about the claimant's work performance at all. The evidence was that the claimant was considered a valued employee for the work that he did. The claimant was not dismissed because he was slow paced, he was dismissed because of his complaints and his relationship with management. The letter of instruction to the claimant to leave on time was not sent because the claimant was slow paced (or was perceived to be slow paced).

190. For the reasons explained, the claims for discrimination arising from disability were not found. As a result, we did not need to go on and determine whether the treatment was a proportionate means of achieving a legitimate aim (issue 1.9). We would however add that we felt that it was entirely appropriate for an employer to send a letter to an employee telling them that they must finish work on time and leave the premises (in the circumstances of this case and where the individual had expressed health concerns relate to working later). That appeared to us to be an entirely proportionate means of achieving the legitimate aim of safeguarding the claimant's health and wellbeing. It was also not necessary for us to determine the issue of knowledge (1.4) in the light of the findings we have made.

The duty to make reasonable adjustments – issue six

191. The claimant relied upon two matters which he said amounted to a provision, criterion or practice (PCP) which he said the respondent applied. The first of those was set out at issue 6.1.1 and was that he contended that the respondent had a heavy workload and required the claimant to work on over one hundred accounts. The Tribunal was not shown any evidence which showed that the claimant was required to work on over one hundred accounts. We accepted the claimant's evidence that one of the accounts upon which he worked had multiple elements or locations and was a demanding account. However, even accepting that evidence, the claimant did not evidence that he worked on (or was required to work on) over one hundred accounts. We also did not find that there was a PCP applied by the respondent of requiring a heavy workload, based upon the evidence we heard. When the claimant raised his workload, the respondent agreed to look into it and to

monitor it. We accepted that the claimant was busy. It was clear that he took considerable pride in the work for which he was responsible, and he was not satisfied with the support provided or the other employees who were available to assist. The claimant also was clearly committed to providing a very high quality of service. Nonetheless, we did not find that the respondent imposed on the claimant a heavy workload based upon the evidence which we heard. We also did not find that the claimant's own bespoke workload was a PCP as required for the purposes of a claim for breach of the duty to make reasonable adjustments, a PCP is usually something which applies more broadly and based upon which it is possible to make a comparison of the impact which it has on someone with the claimant's disabilities and others (without those disabilities). That is not the nature of one single person's identified workload.

192. Issue 6.1.2 set out the second PCP upon which the claimant relied. That was the requirement to work in the office. That was a PCP which the respondent did apply. At the time it did not allow employees to work from home (save for in exceptional and temporary circumstances, such as when unable to attend the office due to Covid or shielding).

193. In issue 6.2 we were asked whether the PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who do not share the Claimant's disability? We found that somebody with OCD was placed at a disadvantage by being required to attend and work in the office, because where they were able to work from home, they had their own control of their environment and space. However, for the claimant's other disabilities relied upon, we did not find that there was any such disadvantage. Someone with stress, depression, or insomnia, was not placed at any substantial disadvantage by being required to work in the office rather than from home, or at least no such disadvantage was evidenced by or shown by the claimant. We did agree with Mr Morgan's observation that it may be disadvantageous for someone with stress to work entirely from home, without colleagues around them (although that may depend upon the individual, their condition, and the circumstances).

194. Issue 6.3 was whether the respondent knew or could be expected to know that the claimant was placed at a substantial disadvantage? In his evidence, the claimant explained how he poured his heart out to Ms Wild about his mental illnesses on 22 October 2019. The conversation, although not all that was said by the claimant, was confirmed by Ms Wild's email to Mr Morgan of the following day (361). Whilst the email did not refer to OCD, we accepted the claimant's evidence that he told Ms Wild about his OCD in that conversation. The respondent was aware of this disability from that date.

195. In terms of the disadvantage suffered by being required to work in the office, the evidence we heard was that the claimant first raised a request to work from home in mid-2020, as it is recorded in Mr Morgan's letter of 4 August 2020 (306) as one of the things which the claimant had asked for. That would appear to have been around the time when two others were allowed to work from home temporarily due to Covid-related issues. It was Mr Morgan's evidence that at no stage did the claimant

request to work from home due to his disabilities. The respondent was made aware in the occupational health report dated 16 September 2020 that working from home was considered by the advisor to be a helpful adjustment (601). Importantly, however, the advice referred to it as resolving the issues the claimant perceived to be outstanding such as draughts, bullying and distractions (that is, because the office was cold and noisy). None of those reasons meant that the respondent was made aware that the claimant was placed at a disadvantage by being required to work in the office in comparison with someone who did not have OCD. In her submissions, the respondent's representative contended that the claimant's requests to work from home at the time were unconnected to the conditions which the claimant now sought to advance at the Tribunal. We agreed and found that at the time the claimant did not explain to the respondent that he suffered a substantial disadvantage in being required to work in the office when compared to someone without OCD. There were other reasons provided for his request and why it would be beneficial (temperature and nose) that meant the respondent would also not have been reasonably have been expected to have known that the claimant was placed at a substantial disadvantage in comparison with someone without OCD.

196. As a result of our findings, we did not need to go on and determine issue 6.4. However, had we needed to do have done so, based upon the evidence which we heard about the respondent's equipment and technical capabilities at the time, we would not have found that it was a reasonable adjustment for the claimant to have allowed the claimant to have worked entirely from home. We accepted the respondent's evidence (and Mr Morgan's evidence in particular) that at the time the respondent did not have the technical infrastructure for that to have happened. The fact that Mr Davies and Ms Collins were allowed to work from home in their roles and were able to undertake some (but not all) duties whilst exceptionally and temporarily working from home for Covid-related reasons, did not impact upon our finding that it was not a reasonable adjustment for this respondent at that time to have allowed the claimant to have worked from home.

Harassment – issues seven to ten

197. When determining each of the allegations listed in the list of issues as issues 7.1.1-7.1.32 we considered all of the questions as they applied to each issue as set out at issues 7-10. In the explanation of our decision below we have also put some of the allegations together where the reasons for our decision were materially the same for those allegations and have also summarised some of our findings collectively. When we reached our decision, we considered each and every allegation in order and separately.

198. For a number of the allegations, there was a conflict between the evidence of Ms Bradley (who denied what was alleged) and the claimant (who asserted that the things alleged had occurred). We had no reason to disbelieve the evidence of Ms Bradley. On balance and based upon hearing evidence from both witnesses, we preferred the evidence of Ms Bradley to that of the claimant. Ms Bradley in her evidence provided a strong and persuasive reason which explained why she would not have outed the claimant and said many of the things alleged. We accepted that

evidence. We did not find that the claimant deliberately lied to us, and we accepted that when he gave evidence to us, he genuinely believed the account that he gave. The claimant has clearly been unwell, and his illness may have impacted upon his recollection of events. Some of the evidence given by the claimant, particularly in relation to the events of the party in June 2018, was far-fetched and not supported by evidence. When we compared his recollections of events with the accounts of others, on the balance of probabilities, we did not find the claimant's account to have been as credible as that of other witnesses, including Ms Bradley.

199. For all of allegations 7.1.1 to 7.1.17 and 7.1.20 to 7.1.27 there was no evidence that what was said was related to the claimant's disability. Those allegations have been considered as alleged harassment related to sexual orientation.

200. In issue 7.1.1 the claimant alleged that when leaving a restaurant together after a Christmas event in December 2011, Ms Bradley had asked the claimant "*are you gay, Colin, I want to know, people are asking"*. When asked about it, the claimant's evidence was that only Ms Bradley and the claimant took part in the conversation. Ms Bradley denied that she said what was alleged. For the reasons already explained, we accepted her evidence and found that she did not say what was alleged. In any event, had we found that what was alleged had been said and had we been determining whether it was reasonable for the comment to have had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, taking into account the perception of the claimant, the other circumstances of the case and whether it was reasonable for the conduct to have that effect (we will refer to this as the requisite effect), we would not have found that it was reasonable for the question asked of the claimant in a one-to-one conversation to have had the requisite effect (without more), albeit clearly such a question was related to sexual orientation.

201. Issue 7.1.2 was the allegation that Ms Bradley barged in to the kitchen in January 2012 when the claimant was there and said that a client of the claimant's was on the phone, but when the claimant said he would go and answer it in a moment as he was getting a drink, Ms Bradley said, *"you'll do it now"*. Ms Bradley did not recall this event. Irrespective of whether or not it occurred as alleged, we did not find that what was alleged was related to either sexual orientation or disability. There was no evidence of any link to those protected characteristics whatsoever.

202. For the reasons already explained, we preferred Ms Bradley's evidence to the claimant's and found that the comments alleged were not made by Ms Bradley for issues 7.1.3 (Ms Bradley describing the claimant as gay to Amy in May 2018), 7.1.4 (Ms Bradley asking Amy if she knew the claimant was gay in May 2018), 7.1.7 (Ms Bradley telling Emily towards the end of 2019 that the claimant was gay) and 7.1.20 (Ms Bradley following the claimant into the kitchen and commenting on the claimant being gay).

203. It was Mr Doherty's evidence that he never gave any thought to the claimant's sexuality and did not become aware of it until 2021. We accepted that evidence.

There was nothing to contradict it (save for the claimant's conflicting evidence). The claimant's assertion in cross-examination that Mr Doherty had made discriminatory comments about sexual orientation was inconsistent with the evidence and, had he done so, the claimant would have raised the matters earlier than during his own cross-examination (and, in any event, that was not put to Mr Doherty). The claimant would also not have addressed his grievance of March 2020 to Mr Doherty in those circumstances or, at least would not have done so in the way that he did. We did not find that Mr Doherty did so. We did find Mr Doherty to be a manager who appeared to have little understanding of how to effectively people manage the claimant, but we found the evidence which Mr Doherty gave to be genuine and credible. We did not find that the claimant reported the matters to Mr Doherty as alleged (or that Mr Doherty responded as alleged) in May 2018 (issue 7.1.5), at the end of 2019 (issue 7.1.8), in January 2020 (issue 7.1.10) or in February 2020 (issue 7.1.12).

204. The Tribunal heard evidence about the events of 26 June 2018 at (and shortly after) Ms Doherty's birthday party. What he perceived occurred was clearly an important issue for the claimant. The one allegation which we needed to determine arising from those events was harassment allegation 7.1.6. The allegation was that Ms Bradley contacted the claimant's then partner (Mr Johnson) and told him the claimant was gay, was not a manager, no position of business development manager existed, and asked why he had not come out at work.

205. The document provided to the Tribunal recorded that the claimant had a seizure that night (394A) and not that he was intoxicated. We accepted the claimant's evidence that he was not intoxicated, albeit that those present would not have known the reason for his incapacity when it occurred. It was the claimant's own evidence that he woke up in the accident and emergency department on Sunday morning following the party with no recollection of what had occurred and how he had got there. On that basis, we entirely accept Ms Bradley's evidence about what occurred following the party (save for the reason which she gave as being the cause of the claimant's ill-health).

206. What is alleged to have been the harassment of the claimant, arose entirely from a conversation which Ms Bradley had with Mr Johnson on the Sunday following the party. In terms of what was said there was a dispute between the evidence of Ms Bradley (who confirmed that a conversation had taken place but not that she had said what was alleged) and Mr Johnson. Mr Johnson's evidence was provided only in a written statement. He did not attend the hearing and his evidence was not able to be tested in cross-examination. We preferred Ms Bradley's evidence to that of Mr Johnson as we heard from her and found her to be a genuine and credible witness. We did have the benefit of the WhatsApp messages from a group including Ms Bradley from the night of the party and the following morning (291A) which provided a contemporaneous record of what was said at the time. In broad terms those supported Ms Bradley's evidence. We did not find that Ms Bradley made the comments alleged as part of allegation 7.1.6.

207. We noted that the messages were consistent with Ms Doherty being concerned about the claimant on 1 July and trying to find contact details to check

whether he was alright. Within those messages (which included Ms Collins and Amy Skillen) when referring to messages received, Ms Collins referred to a message having been received from Billy who she described as the claimant's BF (which we took to be a reference to him being his boyfriend). Accordingly, it was clear that, whatever the claimant's concerns about others being aware of his sexual orientation, Ms Collins and Ms Skillen were aware that the claimant had a boyfriend (and who he was) on 1 July 2018. We have already recorded our finding on what was alleged as harassment at issue 7.1.7, but also observed that what was alleged appeared inconsistent with those messages.

208. In allegations 7.1.9, 7.1.11 and 7.1.14, what was alleged was that comments were made or recorded that went beyond raising questions about the claimant's sexual orientation, but it had also been said he was ugly and had big teeth. For the reasons already explained, we preferred Ms Bradley's evidence to the claimant's, for allegations 7.1.9 and 7.1.14. We also did not find that what was alleged occurred, as, had it done so, we had no doubt that the claimant would have raised those matters and included them in the complaints and grievances which he raised with the respondent, when he referred to other matters but not the offensive remarks which it is now alleged were made. Even in his evidence to the Tribunal, there was a paucity of evidence about these allegations. For allegation 7.1.14 what was alleged to have been said was not related to sexual orientation (or disability).

209. In relation to the diary entry (issue 7.1.11), that was something referred to in the document dated 21 March 2020 which the claimant evidenced that he had sent as a grievance to Mr Doherty (210). In that document, the claimant described finding a "*diary page*" and recounted that the page said that the claimant was late and had been away from his desk. The document upon which the claimant relied as being the note (699) was not a diary page. It referred to lateness and being away from his desk, but it also contained the more serious content that the claimant was gay and had big teeth. The letter of 21 March did not refer to the more serious content of the note, which we are sure the claimant would have done had he received the note as alleged. Accordingly, we did not find that the letter tallied with the account given or the note produced. We did not find that allegation 7.1.11 occurred, as the claimant has not proved that it did, for the reasons we have given.

210. Allegation 7.1.13 was that, whenever Ms Bradley was transferring calls to the claimant on unspecified dates in 2020, she slammed the phone down loudly. Ms Bradley denied this allegation. For the reasons already explained, we accepted her evidence and found that this did not occur as alleged. There was no genuine evidence that demonstrated that she did so (and the claimant did not cross-examine Ms Bradley on the issue). In any event, what was alleged was not related to sexual orientation (or disability).

211. For allegation 7.1.15 we did not find that the claimant reported what was alleged to Mr Doherty in March 2020. Our reason for preferring Mr Doherty's evidence to the claimant's generally has already been explained. In any event, for what was alleged in that allegation, it was not related to sexual orientation (or disability).

212. Allegation 7.1.16 was that in April/May 2020 Ms Bradley told a client that the claimant had sent the wrong material. The claimant said that Ms Bradley was not correct. Ms Bradley had no memory of what was alleged. There was no evidence at all that anything which might have been said about material and work issues was related to sexual orientation (or disability). Allegation 7.1.17 related to the same issue but was the contention that when the claimant reported his allegation to Mr Doherty and Mr Morgan in April/May 2020 they took no further action and Mr Morgan made the comment alleged. As with allegation 7.1.16, it was not related to sexual orientation (or disability). In addition, we would not have found that the comment alleged, or any inaction to a complaint from Mr Doherty or Mr Morgan, had the requisite purpose to amount to harassment or that it would have been reasonable for it to have had the requisite effect.

213. Allegation 7.1.18 arose from an occasion when the claimant believed that a colleague had parked too close to him in the work car park in August 2020. It was alleged that Ms Bradley instigated this incident and manipulated it. Ms Bradley did not recall the incident. She described how there was little room in the car park. We accepted her evidence and found that she did not instigate the incident or manipulate it as alleged. In his evidence, the claimant explained that his difficulty in parking and exiting his vehicle arose from a back condition, which is not one of the disabilities (or alleged disabilities) relied upon in this claim. A colleague parking too close to the claimant's vehicle was not related to the disabilities found in this claim. It was not related to sexual orientation and had nothing to do with that protected characteristic.

214. Allegation 7.1.19 was that Mr Doherty stormed into the claimant's office and shouted at the claimant about why he had been trying to find Mr Doherty, in September 2020. This allegation arose because the claimant had been trying to contact Mr Doherty because arrangements had been made for Mr Doherty to undertake or assist with his work. We accept that there was a disagreement at the time, although not necessarily that it occurred as recorded in the list of issues (we accepted Mr Doherty's evidence that he had never shouted at staff). We accepted there was some form of discussion. It was clear from his evidence that the claimant considered that his part of the respondent's business should take priority and that he attached particular importance to it. He expected Mr Doherty to do the same. There was a lack of appreciation from the claimant of Mr Doherty's broader responsibilities and priorities and why he might not be available when the claimant wanted him to be. In any event and whatever occurred, this was a disagreement about work prioritisation and Mr Doherty's availability, it was not related to, and had nothing to do with, either the disabilities found or sexual orientation.

215. Allegation 7.1.21 was an allegation about the climate in the kitchen in October 2020 to May 2021 and complaints made to Mr Doherty and Ms Lomas. The issue arose from, and was linked to, the temperature in the kitchen. The claimant did not tell the respondent when he raised the issue that his view of the temperature was related to his OCD, nor was their any evidence that it was. The respondent did make arrangements for other places to be available for lunch, particularly in the context of Covid and the need for social distancing. The options included an alternative office

with which the claimant was not satisfied because of what was in it, and an alternative room with which he was not satisfied due to the lack of opportunity to wash his hands and plates within it. Whilst the claimant's dissatisfaction with the alternative options made available was clearly contributed to by his OCD, nonetheless the respondent's response to the issues raised by the claimant about the kitchen and the temperature in the kitchen were not themselves related to the claimant's disability. We also did not find that they were related to sexual orientation, and we did not find (for the reasons we have already explained) that Ms Bradley's actions or her approach to temperature was related to his sexual orientation.

216. Allegation 7.1.22 arose from an alleged "off the record" conversation the claimant had with Ms Lomas and Mr Morgan in September or October 2020. Mr Morgan denied that there was such an off the record conversation but did recall a conversation about the decision to install a glass partition in the office. He denied that the conversation was to do with sexual orientation. He believed it would hopefully resolve issues between the two. Ms Lomas' evidence was that there was an informal meeting between the three people on 5 October 2022 and the issue was to do with the temperature of the office. We accepted the evidence of Ms Lomas and Mr Morgan and did not find that anything said or decided was related to sexual orientation or disability (including any conversation or issue about the claimant's perception of Ms Bradley as expressed at the time).

217. After the partition was erected and Ms Bradley sat on the other side of the partition, Ms Bradley relocated her position to an alternative position (still on the other side of the partition). This relocation was the basis of allegation 7.1.23. The Tribunal was shown a photograph showing the desk to which Ms Bradley moved in relation to the claimant's desk (719A). That desk was some distance away from the claimant and Ms Bradley had her back to the claimant. They were well separated. It was Ms Bradley's evidenced that she relocated because she was cold and a colleague near to her previous seat had the window open in winter. We accepted Ms Bradley's evidence and therefore did not find that the relocation was related to sexual orientation. It was not part of a campaign of bullying as alleged. In any event, Ms Bradley relocating to the desk identified was not done with the requisite purpose for harassment nor would it have been reasonable for her relocation to that desk to have had the requisite effect.

218. Allegation 7.1.24 was that, at least twice a day from January to August 2021, when the claimant went to the kitchen to make a drink, he said Ms Bradley jumped up and pushed past the claimant and entered the kitchen first, causing the claimant to have to stand and wait while she used the kettle and made her drink. The claimant alleged that she did not speak to him, and she did not do this to anyone else and he contended that it was done to humiliate him by making him stand and wait. From the photograph and the claimant's evidence about the lay-out of the office, it was identified that Ms Bradley sat further away from the kitchen than the claimant and the kitchen was on the claimant's side of the partition. We accepted that during the Pandemic it would have been necessary for someone to wait to use the kitchen whilst observing social distancing, as occurred in many offices. Ms Bradley denied that she did what was alleged or in the manner that was alleged. We accepted her

evidence and find that it did not occur (at least as alleged). In any event, even had we found that Ms Bradley did what was alleged, there was no evidence that this was related to sexual orientation (or disability).

219. Allegation 7.1.25 was about Mr Doherty's response when the claimant reported allegation 7.1.24 to him around January to August 2021. There was no evidence that Mr Doherty's response to any of the complaints raised by the claimant was related to sexual orientation (or disability). Similarly, allegation 7.1.26 arose from what the claimant alleged had been Mr Morgan's responses when the claimant had alleged that he was bullied by Ms Bradley. His responses were not related to the claimant's sexual orientation or disability; if they occurred, they arose from his perception of the claimant's complaints. We also would not have found that the purpose of the responses of either Mr Doherty or Mr Morgan to the claimant's complaints in 2021 about Ms Bradley were those required for unlawful harassment, nor would we have found it reasonable for the responses given to have had the requisite effect to amount to unlawful harassment.

220. Allegation 7.1.27 was that the claimant said he prepared an email report to Mr Doherty in May 2021 in which he asked Mr Doherty to have a word with Ms Bradley because she kept slamming the phone down. The claimant said that Mr Doherty failed to respond to the email and did nothing. In his allegation, as he did in the Tribunal hearing, the claimant explained the issues he was raising as being bullying and he asserted the bullying was because of sexual orientation. That was the connection which the claimant made based upon the previous events he asserted had happened, but it was not a connection which followed from the things about which he complained at the time, which did not appear to be related to sexual orientation. Whilst the Tribunal was shown many complaints raised by the claimant, we were not taken to an email to Mr Doherty sent in May 2021 which said what was alleged in this particular allegation. Mr Doherty could not recall it. We did not find that the what was alleged had occurred as the claimant had not proved that it did, we found that what was alleged was not related to sexual orientation, and we would not have found Mr Doherty's response to have amounted to unlawful harassment of the claimant in any event for the same reasons we have explained for allegations 7.1.25 and 7.1.26.

221. Allegation 7.1.28 related to a conversation which occurred much earlier in the chronology of events. The allegation was that Ms Wild, in around October 2019, after the claimant had poured his heart out to her and told her that he had mental health problems of anxiety and depression such that he was on antidepressants, she told him to bring the antidepressants to work to prove to her what he was taking. We heard the claimant's evidence that his conversation with Ms Wild occurred as he described in this allegation. We did not hear evidence from Ms Wild. As a result, we found that the conversation occurred as alleged and that Ms Wild told the claimant to bring in the antidepressants to prove what he was taking. That was related to the claimant's disability (of depression). However, as was highlighted in the respondent's representative's submissions, when he was being cross-examined about this allegation, the claimant conceded that he was not upset or offended by the request and that it would have been reasonable to make the request to see what support

could be offered to the claimant. As a result, we did not find that what occurred was unwanted treatment. It did not in fact have the requisite effect for the claimant. There was no evidence that the request had the purpose required for unlawful harassment. We also found that the request was not related to sexual orientation.

222. Allegations 7.1.29 and 7.1.30 both related to the claimant being spoken to about other employees' work when his request to work from home or have a reduced workload was discussed with Mr Morgan and Ms Lomas in May 2021. There was a dispute between the parties about whether the information shown to the claimant about another employee's work was specific to Jenny (as the claimant alleged) or covered everyone (as was the respondent's position). We were shown a document which detailed the emails sent and received. The respondent provided a document which compared all employees and not just the claimant and Jenny. The reason why the claimant was shown the work comparison was because the respondent did not believe that the claimant was overworked, and it believed that the work comparison demonstrated that was the case. The claimant had some perfectly sensible criticism of the basis for the comparison made in the email document. Nonetheless, the fact that a comparison was made to assess the claimant's workload was not related to the claimant's sexual orientation or disability. Similarly, the complaint raised in allegation 7.1.31, that the respondent waited two months for a meeting to discuss his requests for a reduced workload or to work from home and the complaint that Mr Morgan allegedly cancelled a meeting at short notice, also were not related to sexual orientation or disability at all. We also found that in all of those allegations what was alleged did not have the requisite purpose for unlawful harassment and it would not have been reasonable for it to have had the requisite effect.

223. Allegation 7.1.32 was that when the claimant pressed again for a meeting to discuss those matters in August 2021, he was given a spurious reason for the later cancellation of the meeting. The evidence we heard was that the meeting was cancelled because the person with whom it had been proposed the claimant would be meeting had a hospital appointment. In cross-examination, the claimant agreed that it would be reasonable to cancel a meeting due to a hospital appointment. The reason given was not spurious. The cancellation was not related to sexual orientation or disability. The cancellation had neither the requisite purpose nor would it have been reasonable for it to have had the requisite effect.

Victimisation – issues eight to eleven

224. The claimant's claim for victimisation relied upon two alleged protected acts as set out at issue 8.1. The first was stated at (i) to have been the claimant lodging a written grievance on 7 September 2020. During cross-examination, the claimant endeavoured to rely upon the grievance raised in 2021 as being a protected act instead of the grievance recorded in the list of issues. He asserted that the date was a typographical error. We did not accept that at that late stage, near the end of the hearing, the claimant was able to change the protected acts relied upon. The list of issues had been produced following the previous preliminary hearing and had been agreed by the parties at the start of the hearing. The claimant was not able to point to a place in the pleadings where the 2021 grievance had been explicitly relied upon

as a protected act. The respondent had presented their case based upon the list of issues. The date was clearly not simply a typographical error (it was a reference to a different grievance entirely). The case we needed to determine was the case set out in the list of issues and confirmed at the start of the hearing, and that case was the that the protected act relied upon was the grievance of 7 September 2020 and not the grievance raised in 2021.

225. We have set out in the section of the Judgment on the facts what the claimant alleged in his grievance of 7 September 2020 (221). He referred to bullying and harassment, alleged that he was being singled out, and referred to both his disability and to sexual orientation. He referred to discrimination. We found that what the claimant said in his grievance of the 7 September 2020 did, clearly, amount to a protected act.

226. The second protected act was the claimant bringing the first of the claims which he entered at the Tribunal and which we were determining. That was also clearly a protected act.

227. Issue 8.3 was whether either of the protected acts found were the reason for any of the detriments relied upon? As explained in the legal section of this Judgment, that would be satisfied if any protected act had a material or significant influence on the detrimental treatment.

228. The detriment relied upon at issue 8.3.1 was that Mr Doherty and Mr Hartley told two of the respondent's clients that the claimant was mentally ill in November 2021. It was the evidence of Mr Hartley that he had no knowledge of the protected acts. Accordingly, whatever he may have said to the respondent's clients, the protected acts could not have had a material influence on what was said, as he knew nothing about them. Mr Doherty knew about the grievance of 7 September 2020. It was his evidence that he had no knowledge of the process of ACAS Early Conciliation undertaken by the claimant (the claim itself not having been sent to the respondent as at the date of the alleged detriment). We had no reason to doubt Mr Doherty's evidence and we found him to be an honest and genuine witness (albeit not necessarily an effective manager). Accordingly, the second protected act relied upon (the claim to the Tribunal) could not have had a material influence on whatever Mr Doherty said to clients as he did not know that the claimant had carried out that protected act, nor was there any assertion that he believed the claimant might do so, That left us to decide whether the grievance written by the claimant the year before his dismissal and the protected acts contained within it, had a material influence on something Mr Doherty might have said to a client in November 2021? We did not find that it did, taking account of the time since that grievance, and also in the light of all the events that had occurred since. As a result, the claim for victimisation based upon this alleged detriment failed and we did not need to determine exactly what may have been said. We accepted the contention that clients would have been told that the claimant was unwell. We also noted that the claimant himself publicised his own mental health issues on social media (something for which he expressed regret). It was accordingly not entirely clear what the source would have been of a client's knowledge of the claimant's mental health. However, even if Mr Hartley or Mr

Doherty said something along the lines of that alleged, we found that they did not do so because of the protected acts relied upon (that is they were not materially influenced by them).

229. The second detriment relied upon (8.3.2) was the suspension of the claimant on 25 August 2021 (or the notification on that date that he was to be suspended). We did not find that the reason for the suspension was the grievance which the claimant had raised on 7 September 2020, or the protected acts made within it. The reason for the suspension was the process commenced by the respondent to dismiss the claimant because it was believed that the relationship with the claimant had broken down as a result of the many issues which the claimant had raised in 2021. The September 2020 grievance did not have a material or significant influence on that detrimental treatment (albeit that it may have been an earlier grievance which was part of the pattern of complaints from the claimant). The reason for the suspension could not have been due to the Tribunal claim or the possibility of such a claim, as that was not something which had been considered at the time.

230. The third detriment alleged (8.3.3) was that the claimant alleged that he requested evidential documents at the grievance hearing that he said the respondent failed to provide. During the hearing, the claimant clarified that the documents to which this related were the provision of a particular tender document which he asked to be provided. That was a document which he sought to emphasise or evidence the workload he was undertaking. Ms Lomas' evidence was that she did not provide the tender document because the respondent had not got the document requested. In any event, the documents requested were ones which only had limited relevance to the decision being made. We accepted the respondent's case that the claimant's grievance of September 2020 had no material influence upon whether the documents were provided during the 2021 grievance process. The second protected act had not occurred at the date when the alleged detriment occurred.

Jurisdiction – issue one

231. As we determined the discrimination, harassment and victimisation issues on their merits, it was not necessary for us to determine the jurisdiction issues. As we found none of the allegations, it was also not possible for us to decide which of the out-of-date allegations might have been found to have been part of a continuing series of events with those which might have been in time, had they been found. Nonetheless, we would observe that had we been asked to decide whether it would have been just and equitable to extend time for those matters alleged to have occurred in 2011, 2012, 2018, 2019 and/or 2020, it is highly unlikely that we would have found it to have been just and equitable to extend time. The claimant had access to legal advice (at least latterly). He was an intelligent individual who would have been able to investigate Tribunal time limits. He became aware of Tribunal time limits when he looked into them. The delay reduced the respondent's witnesses' ability to recall the events. Tribunal time limits are there for a good reason. We would of course have needed to have balanced the prejudice to the claimant of time not being extended, but it is unlikely that we would have extended time for those more historic matters.

Summary

232. For the reasons explained above, we have found that the claimant was unfairly dismissed. We did not find that the claimant was unlawfully discriminated against by the respondent in any of the ways alleged. We did not find that he was unlawfully harassed or subjected to victimisation. A remedy hearing will be required to determine the remedy in the unfair dismissal claim. During the hearing, the claimant asked us questions about remedy and medical evidence. As a result, a further preliminary hearing (case management) will be arranged for two hours by CVP to discuss the issues to be determined and the case management required leading up to a remedy hearing. At least seven days before that hearing takes place, the claimant must prepare a revised schedule of loss reflecting only what he can recover from his successful unfair dismissal claim and he should provide that schedule to the respondent and the Tribunal.

Employment Judge Phil Allen

19 January 2024

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

23 January 2024

FOR THE TRIBUNAL OFFICE

AGREED LIST OF ISSUES

1. Jurisdiction

1. Has the Claimant presented his claims in respect of the acts up to and including May 2021, as numbered 1-40 (inclusive) in his table of claims and/or the Amended Response outside the statutory time limit?

2. If so, do any of those alleged acts form part of a continuing act under section 123(3)(a) of the Equality Act 2010 ("EqA") to enable the Tribunal to consider them?

3. Are there just and equitable grounds for an extension of time for any of those acts under section 123(1) of EqA?

4. Does the Tribunal have jurisdiction to consider any of the Claimant's complaints prior to May 2021?

2. Unfair Dismissal

1. Was the dismissal for a potentially fair reason pursuant to section 98 of the Employment Rights Act 1996 ("ERA 1996")? The Respondent asserts that the reason was Some Other Substantial Reason, namely, an irretrievable breakdown in relations between the parties.

2 If so, did the Respondent follow a fair procedure taking into account all of the circumstances of the case including:

2.1 Was the Claimant's dismissal in part a retaliation due to raising a grievance which cited discrimination?

2.2 Was the Claimant's dismissal due to mental illness and sickness absence?

2.3 Did the Respondent make all reasonable checks into the Claimant's mental illness including if he might be disabled under the Act?

2.4 Did the Respondent consider all options before them including mediation, occupational health referral and medical records before dismissal?

2.5 Had a decision already been made about the Claimant's employment before hearing any grievance?

3 Was the decision to dismiss for that reason within the band of reasonable responses open to a reasonable employer?

3 Remedy for unfair dismissal

1.1 What basic award is payable to the claimant, if any?

1.2 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

1.3 If there is a compensatory award, how much should it be? The Tribunal will decide:

1.3.1 What financial losses has the dismissal caused the claimant?

1.3.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

1.3.3 If not, for what period of loss should the claimant be compensated?

1.3.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

1.3.5 If so, should the claimant's compensation be reduced? By how much?

1.3.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

1.3.7 Did the respondent or the claimant unreasonably fail to comply with it by [specify alleged breach]?

1.3.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

1.3.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?

1.3.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

1.3.11 Does the statutory cap of fifty-two weeks' pay or [£86,444] apply?

4 Disability Status section 6 of the EqA

4.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about [*specify the relevant period]*? The Tribunal will decide:

1.1.1 Did he have a physical or mental impairment: anxiety, depression and insomnia during the relevant period January 2015 to 5 November 2021. The respondent conceded the claimant was disabled with OCD and stress, but knowledge remains in issue in respect of all medical conditions relied on.

1.1.2 Did it have a substantial adverse effect on his/her ability to carry out day-to-day activities?

1.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

1.1.4 If so. would the impairment have had a substantial adverse effect on his/her ability to carry out day-to-day activities without the treatment or other measures?

1.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

1.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

1.1.5.2 if not, were they likely to recur?

5 Discrimination arising from disability (section 15 EqA)

1.4 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

1.5 If so, did the respondent treat the claimant unfavourably in any of the following alleged respects:

1.5.1 sending the C a letter in April 2021 threatening him with disciplinary proceedings if he did not leave the workplace on time; and

1.5.2 On 4 November 2021 the C was dismissed because of absences which arose out of his disability of his mental health.

1.6 Did the following things arise in consequence of the claimant's disability:

1.6.1 his slow pace; and

1.6.2 the claimant's sickness absence?

1.7 Has the claimant proven facts from which the Tribunal could conclude that the unfavourable treatment was because of any of those things? / *Did the respondent dismiss the claimant because of that slow pace and/or sickness absence*?

1.8 If so, can the respondent show that there was no unfavourable treatment because of something arising in consequence of disability?

1.9 If not, was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

1.9.1 To safeguard the claimant's health and wellbeing; and
1.9.2 To ensure that no further company time and resources were taken up by one employee to the detriment of others and the business overall.

[In the amended list of issues which the respondent presented at the start of the hearing, the following was said regarding the aims relied upon:

To safeguard the claimant's health and wellbeing as a responsible employer;

To avoid a foreseeable risk that C, a key part of the sales function, were to unexpectedly become unavailable;

The need to maintain mutual trust and confidence with the employees under R's employment, and to take action where the relationship appears to have broken down irretrievably;

To prevent/ abuse of R's grievance process and procedures;

to ensure the proportionate deployment of R's limited resources with respect to HR and wider company time in the context of C's disproportionate use of that time.]

1.10 The Tribunal will decide in particular:

1.10.1 was the treatment an appropriate and reasonably necessary way to achieve those aims within the meaning of section 15(1)(b) EqA?

1.10.2 could something less discriminatory have been done instead;

1.10.3 how should the needs of the claimant and the respondent be balanced?

6 Failure to make reasonable adjustments (section 20/21 EqA)

6.1 Did the Respondent apply a provision, criterion or practice (PCP) to the Claimant which it would also apply to employees who do not share the Claimant's disability? The PCP's relied upon are:

6.1.1 The Respondent having a heavy workload and requiring C to work on over 100 accounts;

6.1.2 The requirement to work in the office;

6.2 If the Respondent did apply such PCP's, did the PCP's put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who do not share the Claimant's disability?

6.3 If so, did the Respondent know or could they reasonably be expected to know that the Claimant would be placed at a substantial disadvantage?

6.4 Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCP would have been reasonable:

6.4.1 A reduction in his workload; The C met with DM in 2019 when there was a discussion about the C's mental health and his request for his workload to be reduced. The C made specific suggestions as to how much work should be taken from him and, in particular, which accounts. DM did not agree to take about 10 accounts off the C. On his return from 2 weeks' sickness absence in August 2020 the C was asked to work on a significant tender which increased his workload so he asked DM to take the tender off him. DM refused to remove the tender from him but agreed that CD could cover the C's work for the week;

6.4.2 Working from home. In the summer of 2019 the C made a request to work from home both verbally and by email to DM; in the summer of 2020 the C made a request to work from home both verbally and by email to DM because of his mental health; In May 2021 the C made a verbal and email request to work from home because of his mental health; In May 2021 the C again requested a reduction in workload from DM because of his mental state, he asked for reduced hours and he asked to work from home; In August 2021 the C again pressed for a meeting to discuss reduction in workload, reduced hours and working from home.

7 Was it reasonable and proportionate for the Respondent to have made those adjustments?

6.5 By what date should the respondent reasonably have taken those steps?

6.6 Did the Respondent breach its duty of care towards the Claimant?

Along with the protected characteristic of disability under section 6 EqA, the Claimant also relies on the protected characteristic of sexual orientation pursuant to section 12 EqA in connection with his discrimination claims below.

7 Harassment (section 26 EqA)

7.1 Did the Respondent act as alleged in:

7.1.1 LB, at a Christmas night out at the Pacifica Chinese Restaurant, in December 2011, asking C, "*are you gay, Colin, I want to know, people are asking".*

7.1.2 LB barging in to the kitchen in January 2012 when C was there and saying that a client of C's was on the phone but when C said he would go and answer it in a moment as he was getting a drink, LB said, *"you'll do it now".*

7.1.3 C hearing LB describe him in May 2018 as gay to Amy who sat next to LB in the office;

7.1.4 C hearing LB asking Amy in May 2018, *"do you know Colin is gay? I don't know why he doesn't just tell everybody".*

7.1.5 C reporting verbally to CD in the kitchen meeting room in May 2018 what LB had said about him, he overheard the conversation and LB describing him as being gay and speculating as to why he didn't just tell everyone but CD never got back to him;

7.1.6 LB & sales staff at a party at the Irlam Conservative Club on 26 June 2018 when the C was taken ill, contacting his then partner, Billy Johnson, and told him that the C was gay, that he was not a manager, that no such position as Business Development Manager exists and asked him why the C had not come out at work;

7.1.7 The C overhearing LB telling Emily towards the end of 2019, *"Colin is gay and we don't know why he doesn't come out".*

7.1.8 The C reporting the above incident with Emily to CD verbally in the kitchen meeting room at the end of 2019 and CD failed to respond to the C's complaint;

7.1.9 The C overhearing LB telling Fletcher around January 2020 that the C is gay, *"he's ugly, he's got big teeth, you know and I don't know why he doesn't just tell people he's gay";*

7.1.10 The C reporting to CD in the kitchen meeting room in January 2020 what LB had said to Fletcher, having previously reported similar incidents in relation to Emily & Amy but CD replied that he had not witnessed this himself, there was nothing he could do about it and told the C that LB was showing Fetcher what to do. CD failed to respond to C's reports;

7.1.11 Fletcher inserting a piece of paper in C's daybook in February 2020 written by Fletcher which said, "*Colin is late into work. Colin has got big teeth. Colin is gay"* and other unpleasant things and was signed by Fletcher;

7.1.12 The C reporting to CD in February 2020 the above incident about Fletcher and the daybook, the C showing CD the piece of paper having taken CD aside to discuss it in the kitchen and CD telling the C to bin it, in this way the R failed to deal with the C being harassed;

7.1.13 Whenever LB was transferring calls to C on unspecified dates in 2020 she slammed the phone down loudly. As she did not do this with anyone else and it was done dramatically, C perceives this to be part of the campaign of bullying and harassment by LB;

7.1.14 LB saying in March 2020 in front of Ruth Collins when C was sat at his desk and LB was sat next to him that C had big teeth and that he is ugly;

7.1.15 The C reporting to CD by email in March 2020 what LB had said to him about him having big teeth and being ugly but C heard nothing back from him;

7.1.16 LB telling a client (CC) in April/May 2020 that the C had sent the wrong material when he had not;

7.1.17 The C reporting to DM & CD in April/May 2020 during a meeting in the Board Room that LB had wrongly reported him to the client, CC. DM

replied, *"I don't know why she's doing it, she shouldn't be doing it"* but took no further action to prevent LB from bullying and harassing the C;

7.1.18 Malcolm blocking C's car in by narrowly parking too close to him in the work car park in August 2020 which C believes was instigated and manipulated by LB because the day before she had asked C to move his car because he had parked leaving himself access space;

7.1.19 The C going to ask V where CD was when DM was there in September 2020. It had been agreed that Colin was supposed to be covering some of the C's work but the C could not find him. DM then phoned CD and following this, CD stormed into the C's office and asked him why he had been trying to find him. CD was shouting at the C;

7.1.20 LB following the C into the kitchen in around October 2020 to May 2021 (possibly 7 September 2020) and saying, *"Look, Colin, we all know you're gay".* The C said, *"it's none of your business".* Following this the C did not go into the kitchen to eat when the warehouse staff were in there. This act of LB triggered him having nowhere to eat lunch or take his break away from her;

7.1.21 The C complaining in around October 2020 to May 2021 that he had nowhere to eat his lunch because of the climate in the kitchen instigated by LB. He complained to CD and to V. CD and V together had a conversation in the office with the C which he thinks took place in around the end of November 2020 and told him that he could eat his lunch in the spare office. The office was unhygienic and full of junk. The C ended up eating at his desk. He says the allocation was done because of his sexual orientation;

7.1.22 DM and V having an "off record" conversation with the C in the Board Room in around September or October 2020 (it may have been 8 September 2020) in which he reported bullying by LB. DM and V told the C that they were not telling anyone else what he had reported about the bullying by LB but would say that she was being moved because of temperature issues in the office. The C told DM and V that what was happening to him was because LB perceived him to be gay;

7.1.23 Having put up a glass partition in the workplace and LB had been told to move to the other end of the screen, in December 2020 she had moved herself back tin a position close to the C so that she was diagonally across from him but sitting with her back to him. The C perceives her moving

position of her own volition was part of her campaign of bullying him because of his sexual orientation;

7.1.24 At least twice a day from January to August 2021 when the C went to the kitchen to make a drink, LB jumping up and pushing past the C and entering the kitchen first, causing the C to have to stand and wait while she used the kettle and made her drink. She did not speak to the C and she did not do this to anyone else. It was done to humiliate him by making him stand and wait;

7.1.25 The C reporting LB's behaviour (in pushing past him to get to the kitchen) to CD around January to August 2021, CD reporting back to the C that he must be imagining it. The C said he was not and that Dave Brown had witnessed it;

7.1.26 The C reporting on at least 3 occasions to DM (the MD) around January to August 2021 that he was being bullied by LB and recounting incidents of things that she had said and of her pushing past him every time he wanted to go to the kitchen. DM saying, *"speak to Colin, he's the Office Manager".* DM failing to deal with the C's verbal grievances;

7.1.27 The C preparing an email report to CD in May 2021 in which he asks that CD have a word with LB because she keeps slamming the phone down. CD failing to respond to the email and doing nothing to address the mounting evidence of bullying because of sexual orientation;

7.1.28 Amanda Wilde in around October 2019 after the C poured his heart out to her and told her that he had mental health problems of anxiety and depression such that he was on antidepressants, telling him to bring the antidepressants to work to prove to her what he was taking;

7.1.29 The C having made a verbal and email request to work from home in May 2021 and DM calling the C into a meeting to show him Jenny's work and said as the C was not performing as well as Jenny, he would not consider any requests for the C to work from home;

7.1.30 The C having again requested a reduction in workload from DM in May 2021 because of his mental health, for reduced hours and to work from home, DM and V responding in a meeting with him by presenting him with a table of Jenny's work and telling him that as she did more work than him, they were not making any adjustments for him;

7.1.31 The C had waited over 2 months for a meeting to discuss his request for reduced hours and to work from home, DM cancelling the meeting at short

notice in July 2021 and there was no workload reduction, no reduced hours and no working from home agreed;

7.1.32 The C had again pressed for a meeting to discuss a reduction in workload, reduced hours and working from home but in August 2021 was given a spurious reason for the late cancellation of the meeting, the reason being Dominic's absence from work.

8 If so, did any of the above alleged treatment amount to the Respondent engaging in unwanted conduct?

9 If so, did any such conduct relate to:

9.1.1 The Claimant's disability (section 6 EqA); and/or
9.1.2 The Claimant's sexual orientation (section 12 EqA)?

10 Did this conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, taking into account the perception of the Claimant, the other circumstances of the case and whether it was reasonable for the conduct to have that effect?

8 Victimisation (section 27 EqA)

8.1 Did the following amount to protected acts:

i. The C lodging a written grievance on 7 September 2020 about bullying and harassment based on sexual orientation by LB.

ii. The C submitting an Employment Tribunal claim alleging discrimination on the grounds of disability and/or sexual orientation.

8.2 Did the Respondent believe that the Claimant had carried out a protected act (or might do)?

8.3 Was the Claimant subjected to a detriment by the Respondent? The Claimant relies on the following alleged detriments:

8.3.1 In November 2021 Colin Doherty and Mick Hartley told two of C's clients that he is mentally ill in November;

8.3.2 Did the Respondent unfairly suspend the Claimant from 25 August 2021 until 4 November 2021, the termination date?

8.3.3 The claimant requested evidential documents at the grievance hearing that the respondent failed to provide.

9 If the Respondent acted as described above, did it amount to a detriment?

10 If so, has the claimant proven facts from which the Tribunal could conclude that it was because the claimant did a protected act or because the respondent believed the claimant had done, or might do, a protected act?

11 If so, has the respondent shown that there was no contravention of section 27?

9 **Remedy for discrimination or victimisation**

1.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

1.2 What financial losses has the discrimination caused the claimant?

1.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

1.4 If not, for what period of loss should the claimant be compensated?

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

1.6 Personal injuries: Did the Respondent's dismissal (of him) and denial of the reports of bullying and harassment cause the Claimant's mental illness?

1.7 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

1.8 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

1.9 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

1.10 Did the respondent or the claimant unreasonably fail to comply with it by [*specify breach*]?

1.11 If so is it just and equitable to increase or decrease any award payable to the claimant?

1.12 By what proportion, up to 25%?

1.13 Should interest be awarded? How much?