EMPLOYMENT TRIBUNALS

Claimant: Mr David Palmer

Respondent: Anova London Limited

Heard at: Watford (In person) **On:** 19-23 June 2023 (In Tribunal) and 21 July 2023 & 21 August 2023 (in Chambers)

Before: Employment Judge Margo, Mrs G Binks and Mr W Dykes

Representation

Claimant: In person

Respondent: Mr P Collins (Senior Litigation Consultant)

RESERVED JUDGMENT

1. The claims of victimisation and harassment are dismissed upon withdrawal.

2. The claims of constructive unfair dismissal, automatically unfair dismissal (s.103A of the Employment Rights Act 1996) and whistleblowing detriments are dismissed.

3. The claims of direct disability discrimination are dismissed save for the claim relating to the comments made by Mr Azouri to Ms Doctorsky in June 2020, which succeeds.

REASONS

Introduction

1. This Judgment and Reasons have taken far longer to produce than they should have. This was due in part to the need for the Tribunal to meet on two separate days in order to complete the deliberations. The Tribunal apologies for the delay.

2. The claimant, David Palmer, was employed by the respondent as a Performance Marketing Manager from 14 August 2018 until he resigned with immediate effect on 17 August 2020.

3. The respondent is or was at the times relevant to this claim, a start-up digital marketing agency.

4. The claimant brings claims of constructive unfair dismissal, automatically unfair dismissal under s.103A of the Employment Rights Act 1996 (the "**ERA 1996**"), whistleblowing detriments under s.47B of ERA 1996 and direct disability discrimination. The disability relied upon by the claimant is depression/anxiety.

5. In the box at the bottom of section 8.1 of the ET1, the claimant also referred to a claim of victimisation. The claimant confirmed at the hearing that no such claim was being pursued and that any victimisation claim was withdrawn.

6. The early conciliation period started on 16 October 2020, the early conciliation certificate was issued on 16 November 2020 and the claim was presented to the Employment Tribunal on 16 December 2020. Accordingly, the claim is in time in respect of any conduct (including conduct extending over a period) which occurred on or after 17 July 2020, unless time is extended, for example in respect of the discrimination claims, on the basis that it is just and equitable to do so.

7. The respondent contested all the claims as well as denying that the claimant was disabled within the meaning of the Equality Act 2010 (the "**EqA 2010**") at the material times.

Procedure, documents and evidence heard

8. A Case Management Preliminary Hearing (the "**PH**") was conducted by EJ Hyams on 4 March 2022. The claimant represented himself, as he has done throughout the proceedings. EJ Hyams identified that the claims were difficult to discern from the narrative pleading provided by the claimant but considered that the respondent had a good understanding of what were the factual elements of the claim.

9. In respect of the constructive dismissal claims, EJ Hyams identified that the claimant relied on an accumulation of conduct rather than relying on any individual act as amounting to a breach of the implied term of trust and confidence.

10. In respect of the disability discrimination claims, EJ Hyams identified in his Case Management Summary the possibility that the claimant was seeking to bring a claim of harassment, a claim of unfavourable treatment contrary to s.15 of EqA 2010, a claim that there had been a failure to make reasonable adjustments and/or a claim of direct disability discrimination.

11. The relevant legal tests in respect of all those claims were set out in the Case Management Summary along with the statement at paragraph 6 of the Case Management Summary that EJ Hyams had: "…*concluded, it would be most proportionate to state the applicable legal tests and then to state the issues by reference to those tests. The claimant could then, if he wished, clarify his claim (including, if he thought it right to do so, by the omission of claims which, on reflection, he could see were weak or not even viable)*."

12. At paragraph 18 of the Case Management Summary, EJ Hyams recorded that in the course of the PH he had informed the claimant that he doubted that claims of direct disability discrimination would succeed.

13. The claimant was ordered to clarify his claims by 29 April 2022. He did so in a document that appeared at pages 156-162 of the Bundle (the "**Further Information**"). The Further Information document contained 21 numbered boxes and all references to "Boxes" below are to the boxes in that document.

14. In text at the start of the Further Information document, the claimant stated that he was withdrawing his harassment claims. He then set out in the boxes a series of allegations that referred back to paragraphs of his original narrative pleading and set out the claim that was being brought in respect of the factual allegations. In respect of various of the claims the claimant identified that he was bringing a claim of direct disability discrimination. No other variety of disability discrimination was identified.

15. On the first day of the hearing the claimant was asked to clarify the claims that arose from the factual allegations. The claimant was provided with the time he needed to consider this request whilst the Tribunal began its reading-in. After having taken that time, the claimant confirmed as follows:

    15.1. In respect of the constructive dismissal claim, the claimant relied upon a combination of the factual allegations set out in all 21 Boxes.

    15.2. The three protected disclosures relied upon were:

        (1) In response to Mr Guy Azouri allegedly describing the respondent's "SEO service" as a scam, the claimant made a verbal disclosure that "*scams are not OK*" and told Mr Azouri that he cannot work for him "*if the company is running a scam*" (Box 3) ("**Disclosure 1**");

        (2) In respect of a marketing brochure produced in March 2020, a verbal disclosure that the marketing brochure was "*dishonest*" and was being put into distribution claiming wrongly that the claimant was Head of Marketing, that the respondent was recruiting top talent from around the World, that global teams developed the strategies of the respondent's clients, that the respondent managed a team of 50+, that the Head of Finance audited client budgets and that the respondent managed client projects using "Scrum" and "agile methodology" (Box 4). ("**Disclosure 2**"); and,

(3) In response to Mr Azouri allegedly disclosing in May 2020 that he was in talks with a client that was a "scammer" and that he was in talks with the client to collaborate with the respondent on a "scam" that the respondent would invest in, the claimant made a verbal disclosure that "*the agency should not be part of a scam*" and that Mr Azouri should "*take due diligence"* (Box 8) ("**Disclosure 3**").

15.3. The detriments relied upon under s.47A of ERA 1996 were the allegations made in Boxes 3,5,7,8 and 10-21. Those detriments taken in combination were relied upon to found the claim of automatic unfair dismissal under s.104A of ERA 1996.

15.4. The disability discrimination claim was one of direct disability discrimination in respect of which the claimant relied upon the allegations set out in Boxes 6,7,9-10,15,18-19 and 20.

16. The relevant legal issues in respect of those claims were set out by EJ Hyams in the Record of the PH.

17. The case was listed for five days for the determination of liability and remedy. The Tribunal was provided with a Bundle that ran to 1,242 pages.

18. In addition to himself, the claimant called Dean Shemie (who was employed by the respondent as a Product Manager from May 2020 until 20 July 2020), Mika Doctorsky (who was employed by the respondent, initially as a Project Manager, from August 2018 until September 2020) and Ortal Shemie (who was employed by the respondent as Chief Financial Officer/Head of Finance from January 2020 until September 2021).

19. In addition, the claimant submitted a witness statement from Ran Bar-Shalom who was employed by the respondent from July 2016 until September 2019 – initially as Marketing Director and latterly as Chief Operations Officer. Mr Bar-Shalom did not attend to give evidence.

20. The respondent's witnesses were Mr Azouri, the majority shareholder, founder, Director and CEO of the respondent and Lisa Azuori, his wife and the Communications Manager at the respondent from July 2018 until December 2018.

21. In addition, the respondent submitted a witness statement from Francisco Figueira, Head of Product at the respondent from November 2017 until July 2022. Mr Figueira did not attend to give evidence.

22. The Bundle contained lengthy transcripts of a series of telephone conversations between Mr Azouri and the claimant towards the end of the claimant's employment with the respondent. The claimant and the respondent had both produced their own versions of the transcript based on recordings made by the claimant. Additionally, on 7 March 2023, the claimant had applied for the audio recordings to be played at the hearing.

23. The parties made brief oral submissions on the question of whether the audio recordings should be played and which transcripts should be relied upon by the Tribunal. In the Tribunal's judgment it was neither practical or proportionate given the tight timetable for the trial to spend what was estimated to be five hours listening to the recordings. Further, the respondent confirmed that it could identify no material differences between its transcripts and those provided by the claimant and so on that basis the Tribunal decided that it would refer exclusively to the claimant's transcripts.

Findings of fact

24. The relevant facts are set out below. Any references to page numbers are to pages of the agreed Bundle of documents unless indicated otherwise.

25. The claimant is a digital marketing specialist with a postgraduate diploma in digital marketing. He was employed by the respondent initially as a Performance Marketing Manager from 14 August 2018 but later took on the role of Head of Marketing in February 2020. He resigned with immediate effect on 17 August 2020.

26. At all times relevant to this claim, the respondent was a small start-up digital marketing company.

27. The respondent was described by the claimant as having six departments at the time that he began his employment. Those departments were comprised of only one employee although given the small size of the respondents employees often worked across the different departments.

28. At the time that the claimant joined the business, he reported to Mr Bar-Shalom (Marketing Director) and to Mr Azouri. Mr Azouri had a specific focus on Google Ads and Search Engine Optimisation ("**SEO**"). Mr Figueira was the graphics designer, Mr Gilad Ariel was responsible for Business Development and was also a Project Manager along with Ms Doctorsky.

29. Mr Azouri was himself heavily personally invested in the success of the respondent both emotionally and financially. He had taken a loan out on his house in order to invest monies into the respondent – a business that he was trying to get off the ground and to grow.

30. We also make the general observation and finding of fact that Mr Azouri and the claimant are very different people with very different personalities. Mr Azouri is the more expressive of the two and tends to externalise his thoughts. He is also more inclined to take bold and potentially risky decisions in order to grow a business and is less focused than the claimant on detail, process and structure.

31. By contrast, the claimant has an eye for detail. He likes structure and to have processes in place that guide his working practices and those of his colleagues.

32. One result of these differences in personality and approach was that Mr Azouri was less willing than the claimant to talk issues through in detail and, in his role as CEO and majority shareholder of the respondent, was more inclined to make decisions and to seek to implement them with little or no consultation. Having made such a decision, Mr Azouri was generally disinclined to return to and debate the rights and wrongs of the decision.

33. A further general observation and finding that we make is that in the course of the claimant's employment he and Mr Azouri had formed a close and personal relationship. This can be seen from the numerous and lengthy exchanges between them that appeared in the Bundle, including the transcripts of the telephone conversations that took place in June and July 2020. One further example of this can be seen from an exchange on "Slack" – an instant messaging service used by the respondent – that took place on 2 April 2020 at a time what the claimant's relationship with Mr Azouri was under significant strain:

Mr Azouri:	"*Take some rest, put your mind in ease, we will talk about everything and make it work.* *Mediation has always been my friend."*
The claimant:	"*I know I can talk to you. Even if my last few emails were too personal (which I really regret), even at the time I wrote them, you are/were still one of my favourite people."*
Mr Azouri	"*Thanks David, water under the bridge, totally get it. Always here for you."*
The claimant	"*I appreciate it. Sorry for making your day even harder* *I need to take my mind off things and will be back tomorrow, I hope with new energy."*

<u>Mr Azouri being unreasonable critical and irate / humiliating the claimant (Boxes 1 and 2)</u>

34. The claimant's induction was largely conducted by Mr Bar-Shalom who explained to the claimant the company structure and the responsibilities of the members of staff, as set out above.

35. Mr Azouri himself provided very little in terms of an induction. In evidence, Mr Azouri accepted that as a relatively new and small company there were formal processes that were lacking and that there was certain information that was not available. In short, the claimant expected a conventional and formal handover process including the provision of marketing and sales strategies, guidelines, processes and notes on best practice and he did not get an induction of that sort.

36. Mr Azouri for his part very much expected the claimant to get on with things and work more independently than the claimant was able to do at the start of his employment. He had hoped to be able to rely on the claimant's expertise from the start so that he, Mr Azouri, could focus more on growing the business.

37. In the first weeks and months of the claimant's employment, Mr Azouri expressed his frustration with the claimant in comments that he made to him including comments such as "it's obvious" and questioning whether the claimant was "ready yet" in respect of the claimant's work on a Google Ads campaign. This latter comment was made in an email sent by Mr Azouri to the claimant on 8 September 2018 in respect of the claimant's work on an account for a client called Rhodium Floors. In the email, Mr Azouri asked the claimant "*Are you checking the accounts?*" and concluded by saying: "*Let me know that I can trust that the accounts are being checked. If you feel you are not ready, let me know so I will take the control."* (p.262).

38. In his oral evidence the claimant described the content of the 8 September email as "*hostile and demeaning*". Whilst the email can fairly be described as containing an implied criticism of the claimant's work on the relevant account, we do not consider the claimant's description of the email to be a fair one. In general terms, we find that the claimant was extremely sensitive to criticism such that any criticism, for example a criticism in relation to his work on a particular project, was viewed by him as a general accusation that he was bad at his job or negligent.

39. A month or so after the start of the claimant's employment, Mr Azouri instituted morning meetings whereby each member of staff would provide an update on the work they were doing. The meetings took place roughly from mid/late August until the end of September 2018.

40. Mr Azouri spent more time asking the claimant questions in those meetings than was spent asking questions of other members of staff. We find that this was because of the importance of the claimant's role and his direct contact with clients rather than because Mr Azouri had any desire to humiliate the claimant.

41. In the course of his oral evidence the claimant sought to impersonate the tone of voice Mr Azouri used in those morning meetings. We find that the tone used by Mr Azouri with the claimant in those morning meetings was animated and assertive but he did not shout at the Claimant or tell him he was doing a bad job. We find that any criticisms of the claimant's work were of the sort set out in the 8 September 2018 email and we find, on balance, that those criticisms were not in and of themselves unreasonable.

42. The claimant successfully passed his probation period as reflected in a document at p.1192 of the Bundle which contained only positive comments and feedback as to the claimant's performance over the course of his probation period.

<u>The "SEO service is a scam" allegation (Box 3)</u>

43. In around February 2020, Mr Azouri told the claimant that he was promoting him from the role of Digital Performance Marketing Manager to Head of Marketing and that Ms Doctorsky would take over the claimant's line management responsibilities. The promotion was not accompanied by a pay rise but the fact that Mr Azouri gave the claimant the title of Head of Marketing was an indication of the extent to which Mr Azouri valued the claimant's work and wanted to retain him within the respondent in the long-term.

44. However, despite the claimant's new title, there was no marketing department for him to head-up. No-one was recruited to sit below the claimant in the line-management chain. Mr Azouri explained in his evidence that the claimant and other employees were given titles of this sort as an indication of his aspirations for the respondent. The titles reflected the growth that Mr Azouri hoped to achieve such that at some point in the future there would be a marketing department that in a meaningful sense was headed-up by the claimant.

45. Similarly, Mr Azouri envisaged that he would in the future be able to hand over all the technical sides of the respondent's work to the respondent's employees. In particular, he envisaged that in the future the claimant would be in charge of SEO services.

46. The claimant was excited about his new job title including the prospect of overseeing processes for developing the respondent through, for example, the introduction of "Scrum", a management framework aimed at helping teams work towards a common goal such as the efficient delivery of a particular project. In particular, the claimant hoped to be in the role of "Scrum Master" – the person responsible for facilitating the scrum.

47. Mr Azouri's vision of growing the respondent and enabling the heads of the departments to focus exclusively on their part of the business did not come to pass. We find as a fact that this was not because Mr Azouri actively prevented the claimant from taking charge of SEO services, or from acting in some meaningful sense as the Head of Marketing, but because the respondent was not ultimately able to grow and expand as Mr Azouri had hoped and envisaged. At least part of the reason for that was unforeseen events like the Covid pandemic and the lockdown that followed in March 2020 as well as the deterioration in Mr Azouri's relationship with the claimant in the course of 2020.

48. As a result, the respondent remained at all times material to this case a very small organisation. One consequence of that fact was that Mr Azouri, who had technical skills and had been responsible for SEO services, remained involved in those services and all aspects of the business.

49. We say more with specific reference to the introduction of Scrum below.

50. In or around February 2020, the claimant and Mr Azouri were in a meeting in which Mr Azouri was discussing the SEO services that the respondent was providing to clients. The context for this conversation was that Mr Azouri envisaged that the claimant would take increasing charge of the provision of SEO services.

51. The thrust of what Mr Azouri said in the meeting was that he did not really know how to evaluate the SEO services that the respondent was providing to clients and that the respondent was doing well out of the arrangement in the sense that the respondent was being well paid for the service it was providing. We find as a fact that Mr Azouri did not say that the service the respondent was providing was as a matter of fact a "scam".

52. We accept however that the claimant interpreted Mr Azouri to be saying that the SEO services provided by the respondent were a scam and that the claimant expressed concerns about that fact including saying words to the effect of "scams are not OK" as well as the related comments that he could not be associated with a scam and that he could not work for Mr Azouri if he was running a scam.

Scrum development day and the pitch deck (Box 4)

53. As set out above, the claimant was keen to develop scrum procedures at the respondent and to take on the role of Scrum Master.

54. A day – 13 March 2020 – was set aside for a development day during which the claimant planned to initiate scrum procedures with a view to developing marketing services. The claimant spent around 5 days working on material for the day, including producing material that he circulated to his colleagues.

55. Shortly before the development day was due to take place, Mr Azouri decided that the day should be used instead for the production of a marketing brochure or "pitch deck" for the respondent that was intended for circulation to potential clients. The claimant did not find out about this until the morning of 13 March and was understandably upset that the day had not proceeded as planned.

56. The reason Mr Azouri decided to change the focus of the day was that he had become increasingly worried that too much time was being spent on internal processes rather than upon winning and delivering work for clients. Additionally, he was not convinced that processes such as Scrum were well suited to organisations as small as the respondent.

57. The pitch deck was produced with the assistance of a copywriter and circulated to the team a week or so later for them to comment on it.

58. The claimant and his colleagues had a number of concerns about its content which they felt was exaggerated and dishonest. Mr Azouri accepted in evidence that in a number of respects the pitch deck did not reflect the respondent's business at the time but that it represented his "*dream*" and his "*vision*". Following the criticisms made about the content of the pitch deck Mr Azouri did not circulate it to any potential clients.

59. The claimant was in the office with Mr Azouri at the time that the pitch deck was circulated and he told Mr Azouri that the pitch deck misrepresented the respondent's offering because it said that (a) the claimant as Head of Marketing

was recruiting top talent from around the World (b) global teams were developing develop strategies for the respondent's clients (c) the respondent's employees were managing a team of 50+ (d) that Ms Shemie, as Head of Finance, audited client budgets and (e) the respondent managed client projects using Scrum and other "agile methodologies". None of this was true at the time.

60. Mr Azouri did not welcome those criticisms and said that the pitch deck needed to have been sent out yesterday and he wanted to get on and publish it.

61. As we have found above, Mr Azouri did not ever send out the pitch deck following the criticisms made of it by, in particular, the claimant.

62. In our judgment, Mr Azouri's desire simply to get on with things and publish the pitch deck is and was consistent with his general approach to business and his personality. Further, whilst the claimant had new title of Head of Marketing, as described above, there had not in fact been any expansion in the size of the respondent at this time and so in reality the claimant was not yet the manager of any new team or department. The respondent remained very much Mr Azouri's business at this time.

Mr Azouri raised his voice (Box 5)

63. In the first half of March 2020 there was a team meeting. The claimant was late for the meeting by approximately 5 minutes because he had broken a packet of disinfectant wipes that he was using to wipe his work desk. This was at the start of the Covid pandemic and the claimant very anxious about the pandemic in general. When the claimant arrived at the meeting Mr Azouri asked him, in a raised voice, why he was late. The claimant became upset and left the room. The claimant says, and we accept, that he subsequently had a panic attack.

64. Approximately 20 minutes later Mr Azouri went to find the claimant. He found him at his desk and seeing how upset he was asked him to go downstairs with him for a chat. In the course of that conversation the claimant told Mr Azouri that the main thing on his mind was the escalating situation with the pandemic and the anxiety that was causing the claimant and that Mr Azouri's behaviour had pushed him over the edge. At the end of this conversation Mr Azouri and the claimant hugged.

Mr Azouri took responsibility away from the claimant and gaslighting the claimant by saying his feedback was too personal (Boxes 10-12)

65. At around the time that the claimant had been given the new title of Head of Marketing, he suggested a system of assessing the needs of a client through a process that he called "Triage".

66. On 26 March 2020, Mr Azouri and the claimant discussed a lead with a potential client and the possibility of the claimant producing a "triage report". On 27 March 2020, a Friday, the claimant told Mr Azouri over "Slack", the internal messaging system used by the respondent, that he would prioritise that work for the Monday.

67. On the Monday morning, Mr Azouri messaged the claimant in Slack to say that he had in fact worked on the document over the weekend.

68. Mr Azouri's message began as follows:

> "*Sorry for the delay and change of direction with this, but I thought I would just get it done over the weekend, as I had a direction and it always seems good when I bring a direction and perfect it with your additional input.*
>
> *Therefore, I have created the Triage document, with a clear flow (see comments) of what was done. It is still RAW and need input. Lisa can help us with the copy at the end*…" (p.1181)

69. The claimant responded to Mr Azouri by email that afternoon. The start of the email reads as follows:

> "*I've now commented on this draft triage but I don't know how helpful my comments are.*
>
> *I've found this document complicated to process because it does not fit my vision of what I thought the triage should be. It is not a triage in my eyes as it doesn't point the client to the treatment they need. I do not understand at this point how you want to use this document to help sell our services to the prospective client, other than show them we have had a look at a few technical things and we have opinions on them. It is missing the treatment and the value proposition of this treatment*…" (p.1179)

70. The fact that Mr Azouri decided to work on this document over the weekend and then to seek input on it from the claimant is not, in our judgment, an example of Mr Azouri taking responsibilities away from the claimant (whether relating to Triage or otherwise) in any general sense. Rather, Mr Azouri was seeking to work with the claimant on a plan best suited to making a successful sale to this particular client.

71. On 31 March 2020, following a lengthy telephone call with Mr Azouri, the claimant emailed Mr Azouri and challenged him as to whether the respondent would "*get back on track*" with Scrum or whether it was cancelled (p.450).

72. An email exchange followed which ended with the claimant sending the following email:

> "*Hi Guy,*
>
> *I believe our efficiency, quality of work and job satisfaction will not improve if you continue on this path. This is not in my interest, your interest or the agency's interest. The way you seem to spin the narratives*

and dismiss my concerns with dynamic reasoning, and to tell me you're disappointed in me, really doesn't fill me with hope.

You know well that we spoke for 80 minutes across a range of topics, including how on reflection that Scrum has attributes that you don't think are right for anova. Why aren't I allowed to talk about just one topic without talking about another? Out of the topics discussed, how we conduct development at anova ranks highest for me on an importance/urgency matrix which is why I am pursuing it first.

Something please needs to change.

David" (p.449)

73. Mr Azouri and the claimant then had a lengthy exchange over Slack and a telephone call. On that call Mr Azouri told the claimant that his feedback in the email set out above was too personal. Following the telephone call, that we find as a fact was a civil and constructive call, the claimant acknowledged the fact that he had been too personal in his email to Mr Azouri, as set out in the Slack exchange quoted at paragraph 33 above. In addition, slightly earlier in the Slack conversation, the claimant said to Mr Azouri : "*Broken people are my favourite people, normal is boring. Let's be broken together*". This comment, taken with the exchange over Slack as a whole, demonstrates the closeness of the relationship that the claimant had formed with Mr Azouri over the course of his employment with the respondent.

74. Given the claimant's acceptance that his feedback (i.e. the email set out above) was too personal, we find as a fact that Mr Azouri telling the claimant that it was too personal cannot be described as "gaslighting" the claimant.

<u>Mr Azouri dismissing the claimant's comments and calling him "negative" (Boxes 7)</u>

75. Following the national lockdown on 23 March 2020, Mr Azouri re-introduced the morning meetings that had been discontinued in autumn 2018.

76. In April 2020, in one such meeting, Mr Azouri gave a presentation about changing the way the respondent used a tool called "Trello" that was used to organise operations. The claimant was very critical of Mr Azouri's proposal saying that it was unreasonably bureaucratic and had serious operational implications for the way he, the claimant, was working. Mr Azouri said the claimant was being negative and closed down the conversation.

77. Similarly, in a morning meeting in May 2020, Mr Azouri told the team that he had sold a new website to one of their new clients, Memory Box. The claimant questioned whether this was the case and asked Mr Azouri if he had signed anything. Mr Azouri told the claimant that the sale had been made, that there were "*things you don't know*" as well as telling the claimant he was "*being negative*". In summary, Mr Azouri was not interested in spending time discussed with the claimant whether the deal with Memory Box was real or not. Given that Mr Azouri was the CEO and the claimant's direct line manager, we find as a

fact that Mr Azouri was entitled to decide that he did not want to debate or otherwise the correctness of what he has said about the deal with Memory Box.

The UV cleaning robots "scam" (Boxes 8 & 9)

78. In May 2020 there was a team meeting in which Mr Azouri told the team that he was in talks with a company that was importing UV cleaning robots from China. Mr Azouri described the product as being aimed at making money out of the pandemic by marketing it as a way to protect against the Covid-19 virus. Mr Azouri did not say that any of the respondent's own money was going to be invested in the company nor did he use the word "scam" when describing the company's proposition to sell such robots. The plan was for the respondent to work with the company to help the company market the robots.

79. Although Mr Azouri did not himself describe the company's operation as a "scam", the claimant viewed it as such. The claimant told Mr Azouri that "*the agency should not be part of a scam*" and that he should "*take due diligence*". Mr Azouri told the Claimant "*not to worry*" and said the claimant was "*being negative*". He said these things because he did not think the claimant's criticisms were accurate or fair.

The claimant being left out of conversations and the advert on Upwork (Boxes 13 and 14)

80. In or around June 2020, Mr Azouri decided that he wanted to hire a freelancer to assist the respondent in developing their operational processes. The plan was to use an online platform called "UpWork" to hire freelancers. This plan was not a new one – it had been floated by Mr Azouri with the team at least as far back at October 2019 (p.1163). Further, in early June 2020, Mr Azouri discussed with the claimant over Slack the hiring of a freelancer with experience of working on Facebook and Google ads.

81. Mr Azouri subsequently discussed with Mr Shemie and Mrs Shemie his plan of hiring a freelancer to assist with the respondent's operational processes. We find a fact that at this time Mr Azouri was wary of having this discussion with the claimant and was concerned, in particular, that it would reopen their discussions about Scrum that had ended with the clamant sending an email that her subsequently told Mr Azouri that he regretted sending as it was "*too personal*".

82. Mr Azouri proceeded with his plan of hiring a freelancer by posting an advert on UpWork without the text having first been shared with the team. The advert included the following statement from Mr Azouri:

> "*I like to get my team to manage the work, not to execute it. It's a catch-22 situation as they can't step out of this comfort zone*." (p.730)

83. The advert also set out the operations that Mr Azouri was looking to develop that included operations that fell within the broad ambit of "marketing".

84. In our judgment, the act of posting the advert did not amount to a demotion of the claimant. The reality was, as explained above, that at that time there was no marketing department for the claimant to be the head of or to lead. The development of a marketing department was aspirational. Further, we re-iterate that we regard it as relevant context that Mr Azouri was a part-owner of the respondent and had invested a significant amount of money in its success. Accordingly, we consider that it reasonable and understandable for him to take the view that it was up to him who he recruited and how to take the business forward. We also find that whilst aspects of the role being advertised fell within the broad ambit of developing marketing processes, the advert was in no sense targeted at the claimant, nor was it an advert for someone to replace the claimant in the embryonic role of Head of Marketing.

85. Further, whilst it was in our judgment ill-advised of Mr Azouri to post an advert in the terms that he did, and it was understandable that the claimant and the wider team were unhappy about it, the advert itself was in no sense targeted at any one member of the team and was not an act of bullying.

Mr Azouri gossiped about the claimant's mental health (Boxes 6 & 15)

86. We pause here to note that in early December 2019 the claimant had been diagnosed with anxiety and depression. The claimant produced his GP's notes from a telephone consultation on 6 December 2019 in which the claimant is recorded as saying that he had been suffering with depression and anxiety for a long time but had "*taken time to come to terms with it"* (p.1011).

87. On 11 December 2019, the claimant was prescribed anti-depressant medication that he continues to take to the present day. The claimant's symptoms escalate at times of stress. There was a period in 2016 when the claimant stopped getting out of bed until late in the day and stayed dressed in pyjamas. During these "low" times, the claimant struggles to sleep and becomes distracted during the day due to tiredness with the result that everyday tasks take longer to complete. The claimant also becomes impatient, prone to overreactions and succumbs to emotional outbursts. The claimant can sometimes take hours to gather his thoughts and finds it very difficult to manage when plans change at short notice.

88. Since late 2019 these symptoms have been managed by medication.

89. The claimant told Mr Azouri about his diagnosis shortly after he received it in December 2019.

90. On or around 15 June 2020, the claimant reported a Facebook pixel issue on a client's website (p.479). By this time, Mr Shemie had been hired and given the title Head of Development.

91. Mr Azouri had been responsible for web development issues up to the time that Mr Shemie had been recruited and over the course of the following days he decided to try to fix the Facebook pixel problem himself. Mr Azouri reported his

actions on Trello (the collaboration platform that the team were using at the time).

92. Mr Shemie and the claimant were unhappy about both the fact of Mr Azouri's intervention and because they did not believe he had fixed the problem. This can be seen from the exchanges on Trello at pp.1210-1212 and on Slack at pp.843-844 and 985.

93. In our judgment, whilst the claimant and Mr Shemie were working on the Facebook pixel issue together, the task of fixing the issue was not one that had specifically been assigned to or given to either the claimant or Mr Shemie. Mr Azouri had been responsible for technical issues with websites before Mr Shemie had been recruited and he decided to fix the problem himself. Given that the claimant's role was not on the technical side of website development, this was not, in our judgment, an act that could be described as bullying or gaslighting nor was it an act that could be said to have demoted the claimant from his then role of Head of Marketing.

94. Shortly after this incident Mr Azouri called Ms Doctorsky to discuss the exchange Mr Azouri had had with the claimant over Trello. During that conversation, Ms Doktoisky reminded Mr Azouri of the claimant's mental health issues and Mr Azouri responded by saying that the claimant did not need pills and that he knows how to heal him. We find as a fact that Mr Azouri made that comment because he was in some sense sceptical about the nature of the claimant's mental health problems and the extent to which it was a medical issue that should be treated through anti-depressant medication.

95. Ms Doctorsky reported these comments back to the claimant shortly after they were made to her.

<u>Mr Azouri told the claimant that he would take disciplinary action against him (Box 16)</u>

96. As set out a paragraphs 90-92 above, the claimant (and Mr Shemie) were unhappy with Mr Azouri's actions in respect of Facebook pixel issue. In general terms, the exchange over Slack and Trello proceeded with Mr Azouri telling the claimant that the fix he had introduced had not gone live and the claimant effectively telling Mr Azouri "*don't do this*". What comes across from the exchange is that the claimant was extremely upset and annoyed with Mr Azouri who he felt did not understand the impact of his intervention in attempting to fix the Facebook pixel issue on the client's website. The claimant repeatedly told Mr Azouri that his analysis of what had happened was not correct and/or implied that Mr Azouri was confused and that Mr Azouri should speak to Mr Shemie.

97. Towards the end of the exchange Mr Azouri said they (he and the claimant) needed to have a call. The claimant responded as follows:

> "*I don't have anything more to add, I have explained everything more than once already, it is your choice if you do not want to listen but any more discussion on the topic will not achieve anything. speaking down*

to me like I'm one of your children will also not help communication." (p.844)

98. At 16:55 on 18 June 2020, Mr Azouri sent the claimant and invite to join a call at lunchtime the next day to discuss the above events (p.504). The claimant responded by asking if Mr Shemie would be on the call. Mr Azouri responded in turn saying that the call was not about the Facebook pixel issue but was about "*communication and responsibilities"*. The claimant said he required "arbitration" but, as he explained in evidence, he had meant "mediation".

99. The email exchange continued with Mr Azouri asking the claimant to attend a call scheduled for call 12pm – 1pm the next day and the claimant saying he was not willing to attend on that day or for that length of time. The claimant proposed a 15 minute call at a different time to which Mr Azouri responded by telling the claimant that he was failing to comply with a reasonable management instruction and he was "*looking to see this as disciplinary action*". The claimant asked for a copy of the grievance policy (pp.493-505). In the end the call did take place on 19 June. The transcript of that call is in the Bundle at pp.507-527.

100. Mr Azouri did not begin the call by telling the claimant he was taking disciplinary action against him. Mr Azouri told the claimant that he wanted to have the call "*before my next action"* and that "*I will still like to have this call and I would like to still hear you and see what happened*". We interpret Mr Azouri to have been saying that he wanted to hear the claimant's version of events before deciding what to do next and we find as a fact that this was the main purpose of the call.

101. It was a long call. In the following exchange the claimant acknowledged that the call had helped him:

The claimant:	"*So-so honestly, um, I probably, if-if you-- if we hadn't had this conversation, which by the way has helped me even, um, if things do escalate, the conversation here has helped me if we hadn't had this conversation, I probably would anyway, have taken next week off for sick leave. So, um, based on my anxiety while I know you're not responsible for my anxiety. Um, uh, my dose of, uh, medication's just been, um, increased, and that's not supposed to be an excuse for anything because I can still control myself. But, um, maybe that explains to you some of, uh, the wellbeing side of me*."
Mr Azouri:	"*Okay. I-I-I truly understand. And like I said, you know, don't try to defend-- don't try to be, you know, defensive of-of your-your, you know-- we all have issues, David. It's- it's fine. It's okay. We all have issues. Everybody has issues, you know, you're not the only vulnerable person and it's fine to be like that. It's fine. It's okay. Just you you-you know, talk to me, you know, it's okay*."

102. Later on in the call the claimant said: "*By-by the way, if-if-if this does escalate and-and it does end badly, I still am a guy fan [chuckles]. So like, you've, uh, helped me a lot. Um, and you know, so already you've made a big positive impact for me…*'

103. The call ended with Mr Azouri confirming that any issues relating to the claimant's behaviour was "*water under the bridge".*

Mr Azouri implied he was monitoring the claimant's behaviour (Box 17)

104. From late June and into July 2020, the claimant took time off due to his anxiety condition. During this time Mr Azouri would at times ask the claimant's colleagues how the claimant was doing. We find that he did this out of a genuine concern for the claimant's wellbeing as well as a concern about what his absence meant for the business. The fact that Mr Azouri had a genuine concern for the claimant's wellbeing and had formed a genuinely close relationship with him is supported by the content of the long telephone conversations that they had over this period – including on 19 June 2020 as set out above.

105. Mr Azouri had a conversation with Ms Doctorsky around this time in which she told him that the claimant was changing his broadband on a particular date. When the claimant returned to work, Mr Azouri mentioned that fact in a morning meeting that took place on or around 10 July 2020. We find that this was small talk on the part of Mr Azouri as opposed to any attempt to send a message to the claimant that the claimant could not trust his colleagues and/or that they were leaking information to him.

Mr Azouri bullied the claimant and refused a follow-up call and coerced the claimant into replying to messages over Slack (Boxes 18 & 19)

106. On Monday 20 July 2020, Mr Shemie resigned. Mr Azouri phoned the claimant on 21 July 2020 primarily because he wanted to tell the claimant that Mr Shemie was leaving and to begin a conversation about whether and to what extent the claimant was committed to the respondent going forward. The call lasted for over an hour and included a wide-ranging discussion about past events. The call ended with the following exchange:

The claimant:	"*Okay. Um, I'll-I'll reflect on what we've said and, um, let you know as well if I have any reflections I wanna follow-up with you, okay?i"*
Mr Azouri	"*Sure, sure, let me know. It'd be great, uh, if we can do a follow-up maybe tomorrow or the end, of-- I dunno, whatever time you need. Let me know whenever whatever is comfortable for you*."

107. The next day the claimant sent Mr Azouri and invite for a call on 23 July 2020. Mr Azouri acknowledged the invite over Slack and asked the claimant if there was a reason why he had set it for Thursday. The exchange on Slack then proceeded as follows:

The clamant	"*to clarify, you said i can follow up in my own time. have you changed your mind?"*
Mr Azouri	"*to clarify, i said on your on today or tomorrow but if that wasn't enough time it would have been okay to say so*"
The claimant	"*if you can't make it, let me know*"
Mr Azouri	"*which is why I am asking if there was any particular reason is there any particular reason why you have set it to thursday*? *I would prefer to do it today or tomorrow* *we need to make decisions and it helps to get your input* *if for some reason you really need the extra day, its all i am asking"*

108. The claimant responded to Mr Azouri with the following verbatim quotation from the call on 20 July which had, without Mr Azouri's knowledge, been recorded by the claimant: "*It would be great if we can have a follow up, maybe tomorrow? Or I don't know... Whatever time you need. Let me know whenever. Whatever's comfortable for you*".

109. We pause there to note that whilst Mr Azouri had incorrectly remembered what he had said at the end of the call on 20 July 2020, it was, we find, perfectly reasonable of him to ask if there was a reason why the call could not take place on 21 July. The claimant refused to answer that question, in the end saying to Mr Azouri: "*normally i don't need to provide my full reasoning of my meeting schedules, why do i now*?".

110. Mr Azouri responded by saying there was no need to have a call but followed that up 6 minutes later with a message saying "*i can't do this over chat, its not perceived well i can explain it over a call*".

111. We find as a fact that nothing that Mr Azouri said in the course of this exchange amounted to aggressive conduct, bullying, gaslighting or micromanagement.

112. On the same day, Mr Azouri sent the claimant the following email at 17:04 (pp.598-599):

> "*Hi David,*
>
> *I am reaching out to you, and writing this to you as I would like to share a dilemma I am having, and I am hoping to find a solution to help improve the communications between us.*

Currently, there are many external opportunities for the agency to grow, as there are a number of potential clients that are looking for the ultimate digital solution to grow their business and for us to grow with them.

From an operational standpoint I feel I can trust you, and when you take over a responsibility, you are committed to the goal.

However, I feel that due to our communication issues, I am not able to discuss with you some matters, whether they are ideas or opportunities that are currently not offered by us.

I do feel that the COVID19 situation helped improve our work in various ways but on another level it has caused some problems.

We all have different minds, that's true, and the challenge is to be able to work with one another. While I am running ideas in my head, and they are not more than ideas at that point, I would still want to be able to discuss them with you, without having a negative effect on this.

I don't want us to miss those opportunities, due to our communication issues, it would be a shame as we won't be able to grow as we wanted, and that's something that is not contributing to our own development.

Before we move on, I feel that we need to talk about our problems, and find a better way to communicate so we can deal with stuff that matters. I am sure you would want to feel that we can communicate better.

Let's put it in top priority as it is an issue I am not able to ignore.

I suggest that we have a conversation about it, and if we need to make several conversions, do that as well. I understand that you need to take your time and go through the points.

Happy to elaborate on anything on my email if it's not clear over the call.

Thanks,

Guy"

113. We find as a fact that this email reflected Mr Azouri's genuine desire to improve the communication between himself and the claimant and to find a constructive way forward.

114. An email exchange followed that culminated in the claimant saying he felt bullied and asking about the procedure for dealing with that.

115. A conversation then took place over Slack in which Mr Azouri was asking for a call to discuss things and the claimant said he would have a call but only at a mutually convenient time and that Mr Azouri would need to book it with him. This exchange over Slack was tetchy on both sides and the relationship

between Mr Azouri and the claimant was very strained at this point. Further, there was a disagreement between them as to whether a call should take place and if so how that should be organised, but we find as a fact that Mr Azouri was not trying to "coerce" the claimant into a call.

Mr Azouri bullied the claimant on a call on 23 July 2020, tried to silence him from pursuing a grievance and gave him a deadline of 28 July 2020 to pursue it (Boxes 20 and 21)

116. In the end the claimant and Mr Azouri did speak on Thursday 23 July 2020 – the call lasted nearly two and a half hours (pp.615-670).

117. The claimant and Mr Azouri spoke extensively about their relationship and issues that had arisen during the claimant's employment. In the course of that conversation Mr Azouri said that the claimant had a right to complain about bullying and that if he did complain there would be "*a follow up on this with-with a resolution, of course*".

118. In the course of the conversation Mr Azouri told the claimant that he found it hard to speak freely with him. He said as follows: "*I-I am afraid to speak with you, David, um, honestly. I'm afraid to say to you something that will completely come as, uh, as the opposite of what-what I, you know, said to you, and it will take it to the right- the wrong place*." (p.643).

119. The claimant responded by saying: "…*Um, and you, uh, and-and I sus- I suspect that you are worried that I'm going to give you negative feedback to something you have said to me. Is there a problem with me giving negative feedback?*" (p.644).

120. In his response to this Mr Azouri alluded to the time the claimant had been late for the morning meeting because he was trying to clean his desk with disinfectant wipes. The exchange proceeded as follows:

Mr Azouri	"*No. It's not about negative feedbacks. It's about- it's about the negative reaction that goes- that not happen once, but many times where you-you become self, uh, uh, you know, you self isolate, and you now thinks of the worst of me being what I said to you, when you analyse it. That's my-my fear. You know, things that happened in the office where we had this-this-this, uh, issue where, you know, at the time where with the- with this cleaning thing, you know, when-when you said*."
…	
The claimant	"*That's- so I had a big- I had a big burden on my shoulders that day and, um, I-- So-so, uh, yeah, I left the room to just try and pull myself together and I was feeling low, but I-and-and then, um, you came and you spoke with me and we-we solved it in like five minutes because- [crosstalk]*"

Mr Azouri "*Exactly. We, uh, we talked*."

The claimant "*I explained to you that it wasn't you*."

Mr Azouri *"Because we talked."*

121. In our judgment, Mr Azouri's reference to the cleaning incident was not given as an explanation for removing the claimant from conversations but as an example how the claimant had reacted in the past to Mr Azoiuri. We find that in the course of what was a very long conversation this was simply an example of a communication issue that had arisen between the claimant and Mr Azouri that had been resolved through a constructive discussion between the two of them.

122. As the conversation progressed, the claimant expressed his view that they needed to understand and analyse what had happened in the past in order to avoid it happening again in the future. Mr Azouri did not want to do so and said as follows towards the end of the meeting:

> "*So, I'm dismissing this option to really analyse now and find the faults. I know that we have a fault. It's no question. And we need to work on this fault. We just need to work on tools that can help us overcome our faults or a lack of communication but that's it. We're not going back now to analyse things. I'm sorry. We are going to now decide what we do now, what we do tomorrow, that's all we're going to do. And like I said, I've got my kids to go to. Let's agree. Let's tell me whatever you want. You can make a decision if you have a decision, it's not you I know that you probably have to take your time. Tell me now.*
>
> *So, here, I'm trying to already, you know, use the tools that we maybe need to do. Maybe it's not all the tools. Then we can look into this one. We are if we are deciding that we wanna do things better. I'm saying to you, I need to know by Tuesday, how we move forward because right now there is- there is a breakage. There's a big breakage in our communication and it's not going right. It's not going well, David. Not for us, not for the company, not for our personal being and we have to take decisions, okay?"* (p.668)

123. We find as a fact that what the above statement from Mr Azouri reflected his view that he and the claimant had got bogged down in rehashing issues from the past and he wanted to know if the claimant was willing to look forward rather than back, which included working on the communication between the claimant and Mr Azouri. In particular, Mr Azouri wanted to know if the claimant wanted to continue as a part of the business.

124. In our judgment Mr Azouri was not referring here to the question of whether the claimant could bring a grievance or not, he had already told the claimant at the start of the meeting that he could do so. Accordingly, Mr Azouri did not give the

claimant a deadline of 28 July 2020 to pursue the grievance or, in the alternative, to resign.

125. More generally, we find that nothing in the call of 23 July amounted to Mr Azouri bullying the claimant. The call represented a desperate attempt by Mr Azouri to try and resolve his issues with the claimant and retain him in the business rather than revisiting historic issues.

126. The conclusion that, at the end of the call on 23 July, Mr Azouri did not give the claimant a deadline of 28 July to submit a grievance, is reinforced by the fact that Mr Azouri emailed the claimant on Monday 27 July 2020 and said as follows:

> "*Just wanted to follow up on your question regarding the procedure of a complaint.*
>
> *You may raise a formal grievance addressed to me, and it would be within my obligation to deal with it in an appropriate manner.*
>
> *If you wish to do so, please forward it to me. If you are not interested in raising the grievance I would kindly appreciate if you could let me know. In any case, please forward it to the end of the week (Friday).*
>
> *In any case, I am looking forward to hearing from you regarding our conversation yesterday, my original email below and your decision. As you have not suggested time, I would appreciate if you could let me know by the morning, as I do have several events scheduled for tomorrow.*
>
> *In the meantime if there is anything else I can do or help, please do not hesitate to contact me*." (pp.717-718)

127. The request for the grievance to be submitted by Friday 31 July 2020 was not an absolutely hard and fast deadline. The claimant in fact raised a grievance after that time that was investigated, but not upheld. Further, whilst the respondent's grievance policy does not set a date by which a grievance should be raised, once the claimant had intimidated that he did wish to raise a grievance, it was not unreasonable of Mr Azouri to suggest a date by which the claimant should decide one way or another if he was going to do so given, in particular, that many of the events that the claimant was unhappy about were already fairly histotic by this time.

<u>Resignation</u>

128. The claimant was signed off work with anxiety for two weeks from 4-18 August 2020. The claimant did not return to work and instead resigned with immediate effect on 17 August 2020. In the grievance letter the claimant referred to arbitrary deadlines for submitting his grievance and in a follow-up email the next day he said that those deadlines had been the final straw after many months of bullying.

129. Mr Azouri wrote to the claimant on 9 September 2020 and told him it would be appropriate to treat what the claimant had said as a formal grievance. The claimant participated in the grievance process that resulted in a report dated 23 September 2020 that did not uphold the claimant's complaints.

130. Thereafter, the claimant contacted Acas on 16 October 2020, received an early conciliation certificate on 16 November 2020 and presented his claim on 16 December 2020.

The Law

131. The relevant legal principles are set out below and include in places the principles as set out by EJ Hyams in the Record of the PH.

Constructive dismissal

132. A termination of the contract by the employee will constitute a dismissal within section 95(1)(c) of the ERA 1996 if he or she is entitled to terminate it because of the employer's conduct. That is a constructive dismissal.

133. For the employee to be able to claim constructive dismissal, the employee must establish that the following four conditions are met:

    133.1. There must be a breach of contract by the employer.
    133.2. That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving.
    133.3. The employee must leave in response to the breach and not for some other, unconnected reason.
    133.4. The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise he or she may be deemed to have waived the breach and agreed to the variation of the contract or affirmed it.

134. A repudiatory breach of contract is a significant breach, going to the root of the contract: see *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221. That is to be decided objectively by considering its impact on the contractual relationship of the parties: see *Millbrook Furnishing Industries Ltd v McIntosh* [1981] IRLR 309. The fact that the employer may genuinely believe that the breach is not repudiatory is irrelevant.

135. The employee must resign in response, at least in part, to the repudiatory breach. If there is more than one reason why the employee has resigned, the correct approach is to examine whether any one of them is a response to the breach rather than to examine which amongst them is the effective cause of the resignation: see *Meikle v Nottinghamshire County Council* [2005] ICR 1, per Keane LJ and *Wright v North Ayrshire Council* UKEAT/0017/13/BI per Langstaff P.

136. It also follows that there will be no breach simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach, then the employee's claim will fail: see *Omilaju v Waltham Forest London Borough Council* [2005] IRLR 35.

137. Employment contracts contain an implied term of mutual trust and confidence. The parties to the contract will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust which should exist between employer and employee: see *Malik v BBCI SA (in liq)* [1998] AC 20.

138. It is not simply about unreasonableness or unfairness. The question is whether the conduct complained of was likely to destroy or seriously damage the relationship of trust and confidence. The unvarnished test in *Malik* should be applied: see the decision of the Court of Appeal in *Buckland v Bournemouth University Higher Education Corporation* [2010] IRLR 445.

139. It is not necessary in each case to show a subjective intention on the part of the employer to destroy or damage the relationship, a point reaffirmed by the EAT in *Leeds Dental Team Ltd v Rose* [2014] IRLR 8, EAT. As HHJ Burke put it:

> *"The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…*"

140. The Court of Appeal in *Lewis v Motorworld Garages Ltd* [1986] ICR 157 held that a course of conduct can cumulatively amount to a fundamental breach of contract entitling the employee to resign and claim constructive dismissal following a “last straw” incident, even though that incident by itself does not amount to a breach of contract. In *Omilaju v Waltham Forest London Borough Council* [2005] ICR 481,CA, it was stated that the last straw does not have to be of the same character as the earlier acts in the series, but it must contribute something to the breach of trust and confidence.

141. An employee who is the victim of a continuing, cumulative breach of contract is entitled to rely on the totality of the employer’s acts, notwithstanding a prior affirmation: see *Kaur v Leeds Teaching Hospitals NHS Trust*, [2019] ICR 1, CA In that case the following guidance was given as to the questions Tribunals should ask themselves:

    141.1. What is the most recent act (or omission) triggering resignation?
    141.2. Has he or she affirmed the contract since that date?
    141.3. If not, was that act or omission itself a repudiatory breach of contract?
    141.4. If not, was it part of a course of conduct which viewed cumulatively amounts to a repudiatory breach of trust and confidence?

141.5. Did the employee resign in response – or partly so – to that breach?

142. If the most recent conduct relied upon by a claimant as forming part of a cumulative breach is not capable of contributing something to a breach of the implied term of trust and confidence, then the tribunal may need to go on to consider whether the earlier conduct itself entailed such a breach, has not since been affirmed, and contributed to the decision to resign. As long as there has been conduct which amounts to a fundamental breach, the right to resign in response to it has not been lost, and if the employee does resign at least partly in response to it, constructive dismissal is made out. That is so even if other more recent conduct has also contributed to the decision to resign: see *Williams v Governing Body of Alderman Davies Church in Wales Primary School* [2020] IRLR 589 per Auerbach HHJ.

143. The general principles of contract law applicable to a repudiation of contract are that if one party commits a repudiatory breach of the contract, the other party can choose either to affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses: if he once affirms the contract, his right to accept the repudiation is at an end, but the election to affirm is not required within any specific period.

144. Delaying too long or, by conduct, indicating acceptance of the change, can point to affirmation. It is not simply a matter of time, in isolation. In *WE Cox Toner (International) Ltd v Crook*, [1981] IRLR 443, it is established that mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation.

145. In *Cantor Fitzgerald International v Bird and others* [2002] IRLR 867, QBD, McCombe J described affirmation as, "*essentially the legal embodiment of the everyday concept of letting bygones be bygones*".

Whistleblowing

146. Parts IVA and V of the ERA 1996 gives workers the right not to suffer a detriment from their employer or its staff on the grounds that they have made a "protected disclosure".

147. A disclosure will (under s43A) be protected if it is a "qualifying disclosure" (as governed by s43B of the Act) which is made to the right recipient in the right way (as governed by ss43C-43H).

148. For a worker to have made a qualified disclosure, the disclosure must tend to show one or more of the matters falling within s.43B(1)(a)-(f).

149. Following *Babula v Waltham Forest College* [2007] EWCA Civ 174, [2007] ICR 1026 at paragraphs 74-82, reasonable belief (whether in the tendency to show one of the matters set out in s.43B(1)(a)-(f) or in the public interest of the disclosure) requires the Tribunal:

149.1. to consider whether the worker genuinely held the belief in question; and,

149.2. if so, to assess whether it was reasonable for them to have done so.

150. The assessment of belief is subjective. As such, the worker's belief may be genuine even if, in fact, they are mistaken (*Darnton v University of Surrey* [2003] ICR 615 EAT at paragraph 32).

151. The belief must, however, have arisen at the time of making the disclosure rather later: see *Kilraine v LB Wandsworth* [2018] EWCA (Civ) 1436 at paragraph 46.

152. The assessment of reasonableness is objective – albeit that it should be assessed from the point of view of the particular worker (*Babula* at paragraph 82).

153. Where a worker has made several disclosures, each must be considered separately in order to establish whether it is a "qualifying disclosure": *Fincham v HM Prison Service* UKEAT/0925/01/RN at paragraph 6; *Barton v Royal Borough of Greenwich* UKEAT/0041/14/DXA at paragraphs 80 and 92.

154. The protection for workers who have made protected disclosures is set out in s.47B(1) of the ERA 1996.

> "*A worker has the right not to be subject to any detriment by any act or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure*."

155. A "detriment" occurs when a reasonable worker would or might take the view that he had been disadvantaged: *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, per Lord Hope at paragraph 34.

156. An unjustified sense of grievance cannot amount to "detriment", but it is not necessary to demonstrate some physical or economic consequence: *Shamoon* at paragraph 35.

157. Whether a detriment is "on the ground" that the worker has made a protected disclosure involves an analysis of the mental processes (conscious or unconscious) of the employer acting as it did. This point was reiterated by the EAT in *Chatterjee v Newcastle Upon Tyne Hospitals NHS Trust* UKEAT/0047/19/BA. It is not sufficient to demonstrate that, "but for" the disclosure, the employer's act or omission would not have taken place. The test is similar to that used in direct discrimination cases, except that there is no statutory requirement for a comparator.

158. Section 47B of the ERA 1996 is infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's

treatment of the whistleblower: *Fecitt v NHS Manchester* [2012] ICR 372, per Elias LJ at paragraph 45.

159. The claimant must prove that she has been subject to detrimental treatment in line with the general proposition that it for a claimant to prove their case on the balance of probabilities.

160. Section 103A of ERA 1996 applies only to a claim where the reason, or if not the reason then the principal reason, for the dismissal was a protected disclosure. Where, as here, the employee resigns and claims that he or she has been dismissed "constructively", i.e. within the meaning of section 95(1)(c) of the ERA 1996, then further difficulties arise. That is not least because the employee will (as here) usually be relying on an alleged breach of the implied term of trust and confidence.In that regard, there is the following helpful discussion in paragraph 6.41 of volume 14 of the IDS Employment Law Handbooks:

> "*Constructive dismissal claims are often brought on the basis of an accumulation of minor grievances which, cumulatively, amount to a breach of the implied term of trust and confidence. The individual grievances do not need to breach the contract of employment on their own for the claim to be established: the employee can resign in response to a 'last straw' and base his or her claim on the totality of the employer's conduct — Kaur v Leeds Teaching Hospitals NHS Trust 2019 ICR 1, CA. The problem for a claimant seeking to establish a constructive dismissal claim under S.103A is that, where the claim is based on multiple minor incidents, each of which is different in nature, it will be difficult to establish that the protected disclosure motivated enough of them such that the disclosure can be deemed to be the reason or principal reason for dismissal. In Pye v Community Integrated Care ET Case No.2401872/16, for example, P claimed to have been constructively dismissed by reason of a protected disclosure after she raised her concern that CIC was delaying making payments to her pension provider, leading to a shortfall. The employment tribunal found that P was constructively dismissed because of the manner in which CIC dealt with the pension disclosure its response to her grievance, the manner in which it conducted an internal audit investigation and its handling of P's subsequent sickness absence collectively amounted to a fundamental breach of contract, and the last straw was a failure to communicate with P over the timing of her grievance appeal against a background of delays in procedure. However, the tribunal went on to find that the reason or principal reason for the cumulative breach was not P's protected disclosure in relation to the pension payments. On its findings, only two of CIC's failings that contributed to the constructive dismissal were arguably motivated by the protected disclosure and the final straw was not one of them*."

161. Thus, in order to succeed in showing that an employee's "constructive" dismissal was in breach of section 103A of the ERA 1996, the employee will need to show that he or she resigned in response to conduct on the part of the

respondent which constituted a breach of the implied term of trust and confidence, and the conduct constituting that breach (which could include an accumulation of conduct) was at least principally detrimental treatment within the meaning of s.47B of the ERA 1996.

162. The time limit for bringing a complaint for detriment is set out at s.48(3) ERA 1996:

> "*(3) An employment tribunal shall not consider a complaint under this section unless it is presented—*
>
> *(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or*
>
> *(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.*
>
> *(4) For the purposes of subsection (3)—*
>
> *(a) where an act extends over a period, the "date of the act" means the last day of that period, and*
>
> *(b) a deliberate failure to act shall be treated as done when it was decided on*;…"

163. The time limit relates not to when the detriment was suffered but when the act, or deliberate failure to act, which gave rise to the detriment occurred: *Warrior Square Recoveries Limited v Flynn* (2012) UKEAT/0154/12/KN at paragraph 4.

164. As to the reasonably practicable extension, the onus is on the Claimant to show that presentation in time was not reasonably practicable: *Porter v Bandridge Ltd* [1978] ICR 943 at 948.

165. "Reasonably practicable" means something in-between "reasonable" and "physically possible" – perhaps more like "reasonably feasible": *Palmer v Southend-on-Sea Borough Council* [1984] WLR 1129 at 1141. It is a question of fact for the tribunal to decide.

166. In *Wall's Meat Co. Ltd v Khan* [1979] ICR 52 Brandon LJ gave the following guidance regarding factors that are relevant to the question of reasonable practicability:

> "…*the performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits such performance. The impediment may be physical, for instance illness of the complainant or postal strike; or the impediment may be mental,*

> *namely the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within three months if the ignorance on the one hand or the mistaken belief on the other, is itself reasonable."*

Direct discrimination within the meaning of section 13 of the EqA 2010

167. A claim of direct discrimination within the meaning of s.13 of the EqA 2010 is of less favourable treatment, because of a protected characteristic, than would have occurred if the claimant had not had that protected characteristic. This is a claim of an unlawful motivation, the motivation being the fact that the claimant had the protected characteristic in question. Proving a person's motivation is usually difficult, for obvious reasons. That is why s.136 of the EqA 2010 was enacted. It provides:

> "(*1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision*."

168. When applying s.136, it is possible, when considering whether or not there are facts from which it would be possible to draw the inference that the respondent did what is alleged to have been less favourable treatment because of a protected characteristic, to take into account the respondent's evidence about, but not its explanation for, the treatment. That is clear from paragraphs 19-47 of the judgment of Leggatt JSC (with which Lord Hodge, Lord Briggs, Lady Arden and Lord Hamblin agreed) in the Supreme Court in *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] ICR 1263.

169. However, as the House of Lords said in *Shamoon*, in some cases the best way to approach the question whether or not there has been direct discrimination within the meaning of s.13 of the EqA 2010 is by asking what was the reason why the conduct or omission in question occurred.

170. If there is no evidence from which the inference could be drawn that a claimant's treatment was to any extent because of a protected characteristic, then the claim of direct discrimination is likely, if not very likely, to fail. The claimant here will need to rely on a comparison either with the circumstances of another employee who did not have the disability of anxiety/depression, or on a hypothetical comparator.

<u>Time limits for discrimination claims</u>

171. The burden of persuading the Tribunal to exercise its discretion to extend time is on the claimant: Chief Constable of *Lincolnshire Police v Natasha Caston* [2009] EWCA Civ 1298. The granting of an extension is the exception rather than the rule. Auld LJ said as follows in *Robertson v Bexley Community College* [2003] IRLR 434, CA at paragraph 25:

> "*It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule*."

172. In *British Coal Corporation v Keeble* [1995] UKEAT 413/94/0607 the EAT considered the meaning of "just and equitable" (in the context of the Sex Discrimination Act 1975) and made clear that the Tribunal's discretion is as wide as that of the civil courts under s33 of the Limitation Act 1980. Holland J concluded (at paragraph 10):

> "*We add these observations with respect to the discretion that is yet to be exercised. Such requires findings of fact which must be based on evidence. The task of the Tribunal may be illuminated by perusal of Section 33 Limitation Act 1980 wherein a check list is provided (specifically not exclusive) for the exercise of a not dissimilar discretion by common law courts which stars by inviting consideration of all the circumstances including the length of, and the reasons for the delay. Here is, we suggest, a prompt as to the crucial findings of fact upon which the discretion is exercised*."

173. Section 33(3) of the Limitation Act 1980 provides (as is relevant) that the court "shall have regard to all the circumstances of the case" and, in particular to:

> " *a.* *the length of, and the reasons for, the delay on the part of the claimant;*
> *b.* *the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the claimant or the defendant is or is likely to be less cogent than if the action had been brought within the normal time limit;*
> *c.* *the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the claimant for information or inspection for the purpose of ascertaining facts which were or might be relevant to the claimant's cause of action against the defendant;*
> *d.* *the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;*
> *e.* *the extent to which the claimant acted promptly and reasonably once he knew whether or not [the Respondent's conduct]…might be capable…of giving rise to an action for damages;*

f. the steps, if any, taken by the claimant to obtain…legal or other expert advice and the nature of any such advice he may have received."

174. However, the Court of Appeal in *DCA v Jones* [2008] IRLR 128, CA said that the relevance of such factors depends on the facts of the particular case. The factors which have to be taken into account depend on the facts, and the self-directions which need to be given must be tailored to the facts of the case as found.

175. In *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, the Court of Appeal further cautioned against tribunals rigidly adhering to the checklist of potentially relevant factors in section 33 of the Limitation Act 1980, and advised against the adoption of a mechanistic approach.

The question whether someone was disabled for the purposes of a claim of disability discrimination

176. The question whether an employee was disabled at any material time must be decided by reference to section 6 of, and Schedule 1 to, the EqA 2010, together with such guidance as might be applicable in the Secretary of State's guidance issued under section 6(5) of that Act and relevant case law.

177. Section 6(1) provides:

> *"(1) 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*."

178. Paragraph 2 of Schedule 1 provides:

> "*(1) 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.*
>
> *(2) 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*."

179. The word "substantial" in section 6(1)(b) means, according to section 212(1) of the EqA 2010, "more than minor or trivial".

180. The question whether a person had a disability at any particular time (which will be when the claimed breach of a relevant provision of the EqA 2010 is said to have occurred) is to be determined by reference to the evidence in existence at that time: it is not to be determined by reference to evidence which arises later than that time: *All Answers Ltd v W* [2021] EWCA Civ 606, [2021] IRLR 612.

181. Where it is claimed that stress in the workplace has led a claimant to suffer an impairment within the meaning of section 6(1) of the EqA 2010, then the question will arise whether or not the impairment was long-term. In deciding that question, the following four questions will need to be asked and answered (they were stated by Morison J in *Goodwin v Patent Office* [1999] ICR 302, at 308):

> *"(1) The impairment condition. Does the [claimant] have an impairment which is either mental or physical?*
>
> *(2) The adverse effect condition. Does the impairment affect the [claimant's] ability to carry out normal day-to-day activities in one of the respects set out in paragraph 4(1) of Schedule 1 to the Act [i.e. the Disability Discrimination Act 1995], and does it have an adverse effect?*
>
> *(3) The substantial condition. Is the adverse effect (upon the [claimant's] ability) substantial?*
>
> *(4) The long-term condition. Is the adverse effect (upon the [claimant's] ability) long-term?*"

182. In paragraphs 41 and 42 of the judgment of the Employment Appeal Tribunal ("EAT") in J v DLA Piper UK LLP [2010] ICR 1052, this was said by Underhill J (as he then was).

> "*(2) 'Clinical Depression'*
>
> *41. The facts of the present case make it necessary to make two general points about depression as an impairment. We do so with some caution since the medical evidence before the Tribunal did not contain any general discussion of depression. We have to rely primarily on the inferences that can be drawn from such medical evidence as there is, together with the Guidance and the case-law and the general knowledge acquired from our own experience of depressive illness in the field of employment law and practice. However, we have considered it legitimate to consider also the Report of the Joint Committee on the Disability Discrimination Bill (i.e. what became the 2005 Act). Mr Laddie sent us paras. 71-79 of the Report following the hearing (see n. 6 below); but the whole of paras. 65-99, and some of the materials referred to in it (in particular the introductory section of the draft NICE guideline on depression), which are available online, seemed to us to be useful. We should make it clear that we have referred to these materials as background only and have not relied on them in deciding any disputed matter on this appeal.*

> *42 The first point concerns the legitimacy in principle of the kind of distinction made by the Tribunal, as summarised at para. 33 (3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs ["clinical depression"] is a mental illness – or, if you prefer, a mental condition – which is conveniently referred to as "clinical depression" and is unquestionably an impairment within the meaning of the Act. The second [" as Dr Brener puts it, Sunday night syndrome, or as Dr Gill puts it, a possible medicalisation of employment problems"] is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or – if the jargon may be forgiven – "adverse life events". [Endnote 5: But NB that "clinical" depression may also be triggered by adverse circumstances or events, so that the distinction can not be neatly characterised as being between cases where the symptoms can be shown to be caused/triggered by adverse circumstances or events and cases where they cannot.] We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most lay people, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common sense observation that such reactions are not normally long-lived."*

Conclusions

Constructive unfair dismissal and automatically unfair dismissal

183. The most recent act of the respondent that the claimant relies on as the cause of his resignation was what the claimant regarded as the imposition of an unreasonable deadline of 28 July 2020 to submit his grievance. As set out above, we have found that no such deadline was in fact set. For that reason, we find that there was no last straw capable of contributing towards a breach of trust and confidence.

184. Further, the conduct of the respondent when taken cumulatively did not, in our judgment, result in a breach of the implied term of trust and confidence.

185. By July 2020 the relationship between Mr Azouri and the claimant had broken down but we find this was not due to conduct on the part of the respondent

that amounted to a breach of the implied term of trust and confidence. The reality was that the claimant and Mr Azouri formed a very close working relationship but were ultimately very different people with very ways of working. In short, their ways of working clashed and those clashes lead to conflict.

186. A further important consideration is the fact that the respondent was at all times relevant to this claim a small business, that for long periods of time was struggling financially and into which the respondent had invested a lot of his own money – including mortgaging his house to support the business.

187. In large part because the respondent struggled financially, Mr Azouri did not manage provide the claimant with the development opportunities that the claimant wanted or indeed that Mr Azoiri hoped in due course to provide him with – such as a chance to develop Scrum procedures. The claimant's frustration at not being able to move forward with those projects, or indeed the chance to develop a Marketing Department under the claimant's control was understandable but, again, the breakdown in the relationship between Mr Azouri and the claimant was not due to the combined acts of the respondent as set out and relied upon by the claimant in Boxes 1-21.

188. Further, as set out in detail in our findings of fact, the claimant's interpretation of events as set out in Boxes 1-21 and as elaborated upon in his evidence was, in the majority of cases, not one that in our judgment was objectively fair one. We have not found Mr Azouri to have bullied the claimant on any of the occasions relied upon nor that Mr Azouri shouted at the claimant, sought to belittle him or sought to demote him.

189. In light of the fact that we have found that there was no breach of the implied term of trust and confidence, it follows that the claim of automatically unfair dismissal under s.103A of the ERA 1996 also fails. In any event, we find that none of the conduct that the claimant complained of was done because the claimant had made any protected disclosure (the question of whether the claimant in fact made any protected disclosures is dealt with below under 'Whistleblowing detriments'). In short, in line with the findings of fact made above, none of Mr Azouri's acts were motivated by the fact of any protected disclosure. Mr Azouri very much wanted the claimant to remain a part of the respondent despite the difficulties in their relationship and his focus, successful or otherwise, was on running and growing the respondent and trying to make it profitable as well as seeking to improve and move forward in his relationship with the claimant. Mr Azouri was at times unwilling to accept criticisms of his decisions that were made by the claimant (and others) but that unwillingness was due to Mr Azouri's desire to run the business his way rather than due to the fact of the claimant having made any protected disclosure.

<u>Whistleblowing detriments</u>

190. The first question is whether the claimant made any protected disclosures.

191. The first disclosure relied upon by the claimant is set out in Box 3. We have found that the claimant did say that "*Scams are not OK*" as well as the related comments that he could not be associated with a scam and that he could not work for Mr Azouri if he was running a scam. However, statements of that sort cannot in our judgment amount to a "*disclosure of information, which in the reasonable belief of the worker tends to show…*" that a criminal offence has been committed or indeed that it could tend to show any of the matters set out in s.43B(1)(a)-(f) of ERA 1996.

192. Essentially, there is nothing in the statement that scams are not OK or that the claimant cannot work in an organisation that carries out scams that itself contains information that tends to show that a scam has in fact taken place or is likely to take place.

193. Further, and given the factual findings we have made about what Mr Azouri in fact said, we do not think it was reasonable for the claimant to have believed that the information that he, the claimant, disclosed tended to show that a criminal offence (i.e. fraud) had been or was likely to be committed or that there had been or was likely to be a failure to comply with a legal obligatoin

194. The second disclosure relied upon by the claimant were his statements to the effect that the content of the pitch deck was fraudulent. The factual matters that the claimant identified as being misrepresented in the pitch dec, did, in our judgment, amount to relevant information within the meaning of s.43B of ERA 1996. Further, whilst we express no view on whether it would in fact be criminal or fraudulent for a pitch deck that misrepresented the respondent's offering to be sent out to client, we do conclude that it was reasonable for the claimant to think that it was and that the claimant thought it was in the public interest to raise these matters with Mr Azouri. Accordingly we find that the disclosure in relation to the pitch deck was a protected disclosure.

195. The final disclosure relied upon was in relation to the respondent working with the company that was selling UV cleaning robots. Here again, the statements that "*the agency should not be part of a scam*" and that Mr Azouri should take "*due diligence*" are not disclosures of information within the meaning of s.43B of ERA 1996, for the same reason that no relevant disclosure was made in respect of the "SEO services scam". There is no information in those statements that tends to show any of the matters set out in ss43B(1)(a)-(f) of the ERA 1996.

196. In terms of claims flowing from the alleged detriments, the only ones that have been brought in time are those relating to the alleged detriments set out in boxes 18-21 (all of which took place on or after 17 July 2020). The claims in respect of the remainder of the detriments could be in time but only if they formed part of series of same or similar acts that are themselves in time.

197. In our judgment there is no such series of acts for the following reasons:

    197.1. First, as set out in our findings of fact, we have not accepted the claimant's case on the detriments that he relies upon in Boxes 18-

21. Accordingly, the detriments as relied upon by the claimant did not occur.

197.2. Secondly, the respondent's conduct on the relevant occasions – i.e. in the calls on 21 and 23 July 2020 – had nothing to do with the claimant's disclosure in relation to the pitch deck that took place in mid/late March 2020.

197.3. Finally, because we have found that the only in-time whistleblowing detriment claims have failed, it follows that none of the other claims can form part of a series of acts with those alleged detriments.

198. Accordingly, the question arises as to whether an extension of time should be granted on the basis that it was not reasonably practicable for the claimant to have brought the remainder of the detriment claims in time.

199. Whilst the claimant was suffering with anxiety and depression in the relevant period, the evidence does not suggest that the severity was such that the claimant was in any sense not able or not reasonably able to present a claim. We note, in particular, that the claimant did participate in the grievance process in the period prior to the claim being submit.

200. Therefore, we find that the claims relating to detriments that took place before 17 July 2020 have been brought out of time and it was reasonably practicable for the claims to have been brought in time. As a result, the Tribunal does not have jurisdiction to consider those claims.

201. Further, even if the claims had been brought in time, the claims would fail on the basis both that we have not found the detriments as relied upon by the claimant to have occurred and, in any event, none of Mr Azouri's acts were motivated in any way by the protected disclosure. We repeat the conclusions set out towards the end of paragraph 189 above.

Direct Disability discrimination

Was the claimant disabled within the meaning of s.6 of the EqA 2010?

202. We find that at all material times the claimant did have a mental health impairment (i.e. anxiety or depression) that had a more than minor impact on his ability to carry out normal day-to-day activities. In particular, we have accepted the claimant's account of periods of time when he struggled to get out of bed, to get dressed and to carry out every-day tasks. Further, although the claimant was only diagnosed in December 2019, we accept that these symptoms had been present in his life for a long time before then and certainly longer than 12 months. It follows that the effect of the impairment was long-term and that the claimant satisfied the definition of being a disabled person at all times relevant to his claim.

Did Mr Azouri treat the claimant less favourably, because of his disability, than he would have treated someone without the claimant's disability?

203. The claimant relies on the matters set out in Boxes 6-7, 9-10, 15 and 18-20.

204. First, we have found that the majority of acts complained of by the claimant did not occur, or cannot reasonably be characterised in the way they have been by the claimant i.e. they were not acts of bullying, demotion, belittling etc. This applies to the conduct relied upon in respect of Boxes 10, 15 and 18-20.

205. Secondly, none of the conduct relied upon in Boxes 10, 15 and 18-20, or indeed the conduct that we have found to have occurred, was conduct that could be said to have been conduct in respect of which the claimant has been treated less favourably, because of his disability, than an actual of hypothetical comparator. An actual or hypothetical comparator would be an individual who was in the same material characteristics as the claimant but did not suffer from anxiety or depression. Those material characteristics would include, for example, any vulnerability to criticism, any tendency towards negatively or any desire to avoid meetings that the claimant displayed as a result his disability. The claimant has not proved any facts from which the Tribunal could conclude that the acts of Mr Azouri that we have found to have occurred in relation to the allegations in Boxes 10, 15 and 18-20, was because of the claimant's disability.

206. In respect of Boxes 7 and 9, we have found that Mr Azouri did call the claimant "negative" and did tell the claimant "*not to worry*" (see the findings of fact for Boxes 7 and 9). However, the claimant has not proved any facts from which we could conclude that Mr Azouri would have have said exactly the same thing to a hypothetical comparator (there not being an actual comparator in this case that had the same material characteristics as the claimant). Mr Azouri told the claimant he was being negative and not to worry not because the claimant was disabled but because Mr Azouri did not accept the claimant's criticisms and did not want to discuss the claimant's point of view any further at that time.

207. The position is different however in respect of the conduct the claimant complains of in Box 6. Here we have found that Mr Azouri told Ms Doctorsky that the claimant did not need pills and that he knows how to heal him. Further, we found as a fact that Mr Azouri made that comment because he was in some sense sceptical about the nature of the claimant's mental health problems and the extent to which it was a medical issue that should be treated through anti-depressant medication.

208. In our judgment, because Mr Azouri was sceptical about how the claimant's mental health condition should be treated he would not have said the same things about someone who had not been diagnosed with anxiety or depression. In other words, in our judgment, Mr Azouri was expressing views that were related to the claimant's specific mental health condition.

209. Given that these comments served to diminish the significance of the claimant's condition through the suggestion that the claimant did not need medication, and were made to a colleague of the claimant, we find that the these comments did amount to detriments and to less favourable treatment.

210. The final issue is whether the Tribunal has jurisdiction to consider the claim in relation to these comments given the fact that the acts complained of occurred on around 18 June 2020 with a result that for a claim to be in time it needed to have been issued by 17 September 2020.

211. In evidence, the claimant said that the reason why he delayed bringing the claim was because of his anxiety (in respect of which he had time off work around this time in June 2020 and then again in August 2020) and because he did not want to make a claim until he was in what he regarded as the inevitable position of having to resign. Thereafter, he pursued the grievance which was resolved on 23 September 2020. There was then a further period of around three weeks before the claimant contacted Acas.

212. Whilst in our judgment the claimant's anxiety did not prevent him from reasonably being able to bring a claim, it does provide a cogent explanation for why he was reluctant to pursue litigation both during his employment and promptly after his resignation. Further, the claimant reasonably needed some time to consider his options after the grievance process had been completed and the three weeks he took to contact Acas constitutes, in the circumstances, a relatively minor delay.

213. Taking all those factors in the round it is in our judgment just and equitable to extend time such that the Tribunal has jurisdiction to consider the direct disability discrimination claim set out in Box 6.

214. Further, and for the same reasons, the Tribunal grants an extension of time in respect of the other disability discrimination claims, but those claims fail for the substantive reasons set out above.

215. It follows that the claimant's claim of disability discrimination succeeds solely in respect of solely in respect of the comments made by Mr Azouri to Ms Doctorsky in June 2020.

216. All of the remainder of the claimant's claims are dismissed.

Employment Judge Margo

Date: 25 September 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON
27 September 2023

FOR THE TRIBUNALS