THE EMPLOYMENT TRIBUNALS

Claimant **Dr Jamal Al-Tarkait**

Respondent **Kuwait Oil Company (K.S.C.)**

HELD AT: **London Central**

ON: **11-27 September 2017**

EMPLOYMENT JUDGE: **Mr J Tayler** **Members: Mrs J Cameron**
Mr I McLaughlin

Appearances

For Claimant: **Ms V von Wachter**

For Respondent: **Mr M Duggan**

JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The claims of disability discrimination fail and are dismissed.

2. The Claimant was unfairly dismissed. Had a fair procedure been applied the Claimant would inevitably have been dismissed three months after the date of his dismissal. His basic award will be reduced by 80% for contributory conduct.

3. The claim of wrongful dismissal fails and is dismissed.

REASONS

Introduction

1. By a Claim Form submitted to the Employment Tribunal on 6 June 2016 the Claimant brought complaints of disability discrimination, unfair dismissal and wrongful dismissal

2. The matter was considered at a Preliminary Hearing for Case Management before Employment Judge Grewal on 27 July 2016. The issues were identified and the Claimant was ordered to provide additional information in respect of certain elements of his claim. The matter came on for a Final Hearing before a panel chaired by Employment Judge Auerbach on 9 January 2016. A draft List of Issues was produced. The parties agreed to exclude certain items form the List of Issues. The Respondent sought to have other matters struck out. A number of items were struck out. The Claimant stated in his witness statement that the Respondent's attitude to him changed when he became wheelchair user in 2014. It became apparent that he had given an incorrect date that he had become a wheelchair user in 2013. The Respondents sought a postponement of the hearing. It was granted. A Case Management Order was sent to the parties on 13 January 2017 with order to prepare for a new hearing. Reasons for the strike out decision were sent to the parties on 14 February 2017. Costs were reserved.

Issues

3. We were provided with an agreed list of issues for this hearing attached as the Annex. We had decided those issues necessary to decide the case.

Evidence

4. The Claimant gave evidence.

5. The Claimant called: Katie Gardner, Receptionist between February and 16 October 2015

6. The Respondents called:

   6.1 Mr Abdul Khaleq Al-Ali, Manager of the London Office from September 2013 to September 2016

   6.2 Mr Jamal Jaafar, CEO from January 2016

   6.3 Ms Elvira Whitehead, EA to London Manager employed since 2001

   6.4 Mr Saad Al-Azmi, Deputy Chief Executive Officer, Administration and Finance

   6.5 Mr Shehab Abdulla, Adviser to the CEO and head of the Investigation Committee

6.6 Mr Mustafa Zain, Independent consultant and member of the Investigation Committee and HR specialist

7. The witnesses who gave evidence before us did so from written witness statements. They were subject to cross-examination, questioning by the Tribunal and, where appropriate, re-examination.

8. We were provided with an agreed bundle of documents. References to page numbers are to the page number in the agreed bundle of documents.

Findings of fact

9. The Respondent, the Kuwait Oil Company ("KOC"), was established in 1934 by the Anglo-Persian Oil Company (now BP), and the American oil company Gulf Oil Corporation. Following the nationalisation of KOC in 1975 an umbrella company, the Kuwait Petroleum Corporation ("KPC"), was established in 1980. KPC operates through a series of wholly owned subsidiaries, of which KOC is the most important. KOC employs about 10,000 staff in Kuwait. It is headed by a CEO who is supported by nine deputy CEOs ("DCEO"). Each DCEO is responsible for a Directorate of KOC. The Administration and Finance Directorate is headed by the DCEO (A&F) who, before his retirement in September 2016 was Mr Saad Al-Azmi. The level below DCEO is Manager. KOC has approximately 45 managers.

10. The London office of KOC is based at KPC House, 54 Pall Mall. KOC occupies the first and fifth floors of KPC House. The London office currently has approximately 30 employees on permanent or fixed term contracts (excluding, at all material times, the roles of Head and Deputy Head and, subsequently, Manager and Deputy Manager of the London Office who are both employed from Kuwait and assigned to the London office). The core department of KOC's London Office is the Medical Department. In addition, there is an Accounts Department and an Administration Department. The Medical Department accounts for over 75% of the expenditure of the London office and is the largest of the three departments. KOC, through the Ahmadi Hospital in Kuwait, provides medical treatment to the entire oil sector in Kuwait. The Medical Department of KOC in London co-ordinates medical treatment, mainly in the USA, UK and Europe for workers and their dependants in the oil sector in Kuwait who require complex medical treatment outside of Kuwait, where such medical treatment has been approved by the Senior Medical Committee of the Ahmadi Hospital in Kuwait.

11. KPC and KOC are private companies that are wholly owned by the Kuwait State. They operate in a fashion more akin to a government Department. The London office is an important public face of the Respondent. A high degree of integrity is expected of its employees.

12. On 14 September 2003, the Claimant was employed by the Respondent as Planning Co-ordinator (Medical Group) based in Kuwait.

13. Since approximately 1992 the Claimant has had limb girdle muscular dystrophy which principally affects his shoulder and pelvic girdle muscles causing weakness and wasting of the muscles in his arms and legs. The Respondent accepts he is disabled.

14. On 2 January 2007, the Claimant was seconded to the London Office as Medical Advisor.

15. On 27 July 2007 the Respondent sent a contract of employment to the Claimant (CB1/1/7-12). Clause 3 provided[1]:

> "3. This employment contract shall be subject to the following terms:
>
> 3.4 You shall duly comply with all legitimate instructions issued by the company or any authorised person, according to ethics, and do the best you can to serve the interests of the company and not carry out (engage in) any work or business irrespective of the nature of that business for the entire duration of employment with the company"

16. Clause 3.10 provided:

> "The provisions of the Kuwait Labour Law shall apply in respect of any issue not set out in this contract. The Kuwait courts shall exclusively assume jurisdiction over any disputes between the parties relating to this contract"

17. Despite this clause, the Respondent accepted that the Employment Tribunal had jurisdiction to hear this claim and has not asserted that Kuwaiti law applies. However, in dealing with this matter we accept that the managers involved believed that Kuwait law applied.

18. In December 2007, the Claimant made a request for the grant of a patent to the Intellectual Property Office for a bill sharing "app" called Share'n'Go (CB1/5/43-47). The Claimant contended that Share'n'Go was no more than an idea and that should it come to fruition the business would be operated by his childen. We find that the Claimant was significantly involved in this project. He accepted that he spent £200,000 having the software for the app developed in the United States. We consider that this must necessarily have taken a significant amount of management on his part. He was engages in a business activity.

19. On 11 August 2010, the Claimant was appointed as Deputy Head of London Office and Medical Attaché at grade 17by circular appointment (CB1/6/48). Faisal Al-Farah moved from Kuwait and was appointed Head of London Office for 4 years.

20. On 14 June 2010, the Claimant was appointed as a director of the Respondent (CB1/7/50-2).

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[1] This translation was achieved with the aid of the interpreter and was agreed by the parties

21. On 11 March 2011, an application was made to register Al-Terkait Limited with Faisal A-Tertait, the Claimant's brother, as a director (CB1/9/59). The company was involved in the provision of medical services. The Claimant states that he did not know about this company. We have not been provided with any evidence that establishes otherwise, and accept his evidence on this point.

22. From 1 – 3 Nov 2011 the Claimant undertook a trip to Japan. He took one of his subordinates, Mohammed Baklar, with him.

23. In January 2012, the Respondent introduced a Code of Conduct (B1-37). The code was very widely publicised. We consider that the Claimant's contention that he was unaware of it is implausible; and find that he knew about the introduction of the Code of Conduct and that it applied to him as an employee in the London Office. We consider that the Claimant's suggestion in his oral evidence that the Code of Conduct did not apply to the London Office was disingenuous. The Code of Conduct included the following provisions:

    "The Code of Conduct has cited the different types of breaches. The ones that will be handled by the Compliance include:

    3. Ethical Business Conduct

    - Conflict of Interest

      i. Constituting or create the appearance of constituting a conflict of interest with those of company without first having declared your personal interest

      ii. Knowingly holding, or having a relative such a spouse, sibling, parent, child, uncle, aunt, nephew, niece, grandparent, grandchild or parent or sibling in law who holds, a substantial financial interest in any enterprise with which the company has business dealings (e.g., suppliers, contractors, vendors, customers and licensees)

      vi. Using company assets (e.g. stationery, letterhead, funds, facilities, equipment, tools, personnel or job-related know-how) for the benefit of other business or personal interests

    - Outside Employment

      i. Accepting employment outside company without appropriate approval from company"

    Disclosures

    Every employee is responsible to disclose to KOC certain type of information and/or activities in order to remain compliant. Cases that require disclosure includes:

    - Conflict-of-interest: It is the responsibility of every employee to seek guidance from their Senior or the Compliance Officer if a

conflict of interest exists or even the chance of one arising or appearing to arise. Disclosing the possibility of a conflict of interest and abiding by the instructions of the Compliance Officer in that respect releases employee of the risk of losing the trust placed in him to act in KOC's best interest. Employee should discuss any potential conflict of interest with their senior or with the Compliance Officer immediately when a potential conflicting circumstance arises. It is always better to look for any such possibility and disclose the same to the Compliance Officer rather than losing KOC's trust at a later stage

- Outside Employment: If an employee's employment contract with KOC permits outside employment, the employee must obtain written approval as per KOC policy before accepting any supplemental job. Employees must also notify their Senior if their duties in the outside employment change significantly."

24. From 4 Feb 2013, the Claimant undertook a 10-day trip to USA. Mr Baklar accompanied him (CB423).

25. In May 2013, the Claimant suffered a fall, broke his leg and was advised to use a wheelchair on permanent basis; which he did from this point onwards.

26. In 2013 the Claimant continued to correspond with the Intellectual Property Office to seek to secure the intellectual property in Share'n'Go.

27. In July 2013, the Kuwait Oil Company Personnel Policy was issued (B38-289). It included the following:

"General Rules and Provisions of Unified Violations and Disciplinary Penalties By-Laws

Article (2):

The employee may not be punished because of a violation of which he is accused unless he receives a written notification of such violation. He shall be investigated in writing, his statements heard and allowed to defend himself after being confronted with the violations of which he is accused. The incident shall be proved in a report that shall be attached to his private file. The worker subject to investigation shall be notified with the decision assigning him including the attributed violation having determine the date and time of investigation by his superior.

The employee may not be punished because of an act that he makes outside workplace unless it is related to work.

Article (3)

Violation shall forfeit if not investigated after the lapse of three months from the date when management came to know of or after a year from the date when it occurred, whichever is earlier."

28. Mr Zain explained to us that in Kuwaiti law there is a concept of a continuing violation that is only forfeit at the end of the period for which it continued. He stated a matter such as failing to declare a business interest would be treated as a continuing violation.

29. We accept that the general approach adopted by the Respondent to disciplinary issues is to conduct an investigation during which employees are interviewed. At the end of the investigation a report is produced. The report is then sent to a senior manager to make a decision. After the investigation, the report is not shown to the employee and there is no separate disciplinary hearing.

30. In July 2013, a decision was taken to re-designate Head of London Office as Manager of London Office. The role of Head of London Office was a Team Leader role within the Respondent's structure whereas the role of Manager of the London Office was at a higher grade. As part of this restructure Mr Al-Farah returned to Kuwait a year early and it was decided that Mr Abdul Khaleq Al-Ali would move to London as the Manager at Grade 20.

31. Mr Al-Ali started in the role of Manager of the London Office in September 2013.

32. The Claimant alleges that he was bullied from the start by Mr Al-Ali because he is a wheelchair user. We do not accept this evidence. Mr Al-Ali consistently gave the Claimant excellent appraisals as the Claimant was thought to be good at his core job duties, especially in saving money by negotiating reductions with the providers of medical services that the Respondent used. While we accept the Claimant's point that it might be difficult to give very poor appraisals to someone that was performing well, Mr Al-Ali would have been much less enthusiastic in his support for the Claimant if he was antagonistic towards him as a result of the fact that he was a wheelchair user.

33. On 7 Oct 2013, the Claimant was appointed as Medical Attaché and Deputy Manager (London Office) at grade 18 by Circular, with his pay backdated to March 2013, in recognition of his very good performance (CB1/19/85-86).

34. The Respondent operated a procedure whereby a person would only be eligible to apply for a promotion if they had been in a role for a period of at least a year that was no more than one grade below the role applied for. The Claimant was not eligible for the role of Head of the London Office. Even if he had been given a grade of 18 in March 2013 he would still have been two grades below the new role.

35. On 11 October 2013, the Claimant registered the Trademark in Share 'n' Go. The Claimant had involved one of his subordinates, Mr Mohamed Nasr, in the project. The Claimant had entered into a confidentiality agreement with Mr Nasr on 10 September 2013 (CB1/18/79-84) whereby Mr Nasr agreed to keep information about the project disclosed to him by the Claimant confidential. The information was to be disclosed by the Claimant so that Mr Nasr could decide whether to become involved in the project.

36. From shortly after the time of his arrival, Mr Al-Ali sought permission from Kuwait to undertake a refurbishment of the first-floor offices. On 17 October 2013, a plan for the refurbishment was produced (CB2/77/372).

37. In November 2013, the Claimant travelled to Germany. Mr Baklar accompanied him.

38. On 5 December 2013, Mr Al-Ali sent an email to staff in the London Office, copying in the Claimant, attaching a copy of the Code of Conduct and stating:

> "Below is a link to KOC policy on Code of Conduct. I would appreciate spending some time reading the document carefully and be aware of its details. Awareness of code of conduct helps you and KOC management to have a healthy business relation whereby every party would know his rights and obligations leading to accomplish objectives the right way"

39. The Claimant was copied into the email, as opposed to being an addressee, because he was a member of management. The email must have served to remind him of the importance of complying with the Code of Conduct.

40. In early 2014 Mr Al-Ali decided that the Claimant should be relocated from the fifth floor to the first floor. Mr Al-Ali had some concerns about the Claimant's management style and the way in which he interacted with his subordinates. Mr Al-Ali wanted the Claimant to be on the same floor as him so it would be easier to communicate and so that he could monitor the Claimant's relations with his staff. The Claimant was very reluctant to move but Mr Al-Ali insisted that he do so.

41. There was an evacuation chair on the 5th floor. An employee, Amir Habib, had been responsible to assist the Claimant with the evacuation chair while he was on the fifth floor. There was also an evacuation chair on the first floor. Jameel Lotto and Mr Baklar were assigned to assist the Claimant with the evacuation chair. We accept that these members of staff were trained to use the chair. However, the Claimant refused to use the chair during fire drills.

42. The Claimant alleges that in early 2014 he asked to be relocated to the ground floor. We accept the evidence of Mr Al-Ali that the Claimant did not ask to move to the ground floor. He had stated that he wished to remain on the fifth floor but this had been refused for the reasons set out above. The Claimant asked whether he could move to the basement as there was a toilet that he found convenient as it was larger than the disabled toilet on the first floor. Mr Ali did not agree to a move to the basement as there was limited space and it would not be possible for the Claimant's subordinates to move with him. Mr Al-Ali wished to be on the same floor as the Claimant so that they could easily communicate and so that Mr Al-Ali could keep an eye on how the Claimant dealt with his subordinates. It would have been impracticable for the Claimant to move to the ground floor as it had no offices and was not leased by the Respondent, but by KPC.

43. From 9 Mar 2014, the Claimant undertook a trip to the USA for 10 days. Mr Baklar accompanied him.

44. From 23 May 2014, the Claimant undertook a trip to Germany. Mr Baklar accompanied him.

45. On 18 June 2014 Mr Al-Ali sent an email to Saad Al-Azmi about the purchase of new office furniture (CB1/25/95):

> "I would appreciate obtaining the approval of the CEO to purchase the furniture as we receive many VIP visitors. The current furniture in both my and Dr Jamal's offices are old and don't really give good image of the company."

46. We consider that Mr Al-Ali's focus in seeking new office furniture was the image of the London Office, rather than any needs of the Claimant as a wheelchair user. The Claimant did not state that he had any specific requirements. Mr Al-Ali provided the Claimant with three catalogues from which he could choose furniture. The Claimant did not state that he needed bespoke furniture so that he would have a desk that was suitable for him when using his wheelchair.

47. In September 2014, the Claimant asked Mr Al-Ali about the possibility of the Respondent purchasing a new motorised wheelchair for him. Mr Al-Ali contacted head office in Kuwait and sought permission. Purchasing the wheelchair required the permission of the Senior Medical Committee. Obtaining that approval of proved to be a lengthy process, taking approximately six months.

48. On 17 September 2014, a license was granted to Chronix Solutions (CB1/26/96-106) to import drugs and medical equipment to Kuwait. The Claimant was described as a partner. To obtain the license it was necessary to have a partner who was a medical doctor. The Claimant had a 15% shareholding in the company.

49. On 5 Nov 2014, the Claimant sent an email to Mr Al-Ali (CB1/29/114)

> "My son Mohammad Altarkait – Medical engineer had established a limited company with a capital of £100. This company has no relation, and won't be dealing with anything relevant to Kuwait Oil Company or any other company owned by KOC, neither directly nor indirectly, whether inside or outside Kuwait.
>
> The company name is: Next Generation Solutions
>
> I have entered in a partnership by 15% in Chronic Solution for drugs and medical supplies (under incorporation) with a capital of 20,000 KD. This company has no relation, and won't be dealing with anything relevant to Kuwait Oil company or any other company owned by KOC, neither directly nor indirectly, whether inside or outside Kuwait".

50. Mr Al-Ali replied "Noted and thank you for your openness and transparency". The Claimant declared his interest in Chronic and his sons involvement in Next Generation Solutions. He also mentioned his ideas for apps to Mr Ali from time

to tome but did not explain he was involved in the business of actively developing them.

51. On 13 Nov 2014, the Claimant travelled to Berlin. Mr Baklar accompanied him.

52. The Claimant alleges that in early 2015 he made verbal requests to the Respondent to replace his desk. The Claimant bought desk risers which raised the height of his desk that made it easier to fit his wheelchair under it. We accept the evidence of Mr Al-Ali and Ms Whitehead that they did not know that the risers had been fitted until after the Claimant's dismissal when his desk was removed. We do not accept that he requested a new desk that would facilitate the use of his wheelchair at this time. We do not accept that the risers caused the desk to topple. If that had been the case the Claimant would have complained.

53. In early 2015 Mr Baklar approached the Claimant and stated that he wished to obtain documentation to use in support of an application for a mortgage. The Claimant arranged for Mr Baklar to be provided with a contract by his son's company, Next Generation Solutions, in which it was stated that Mr Baklar would work as a consultant and be remunerated at £1000 per month. The contract was sent by email to Mr Baklar on 22 January 2015, with the Claimant copied in. We find that the Claimant knew that there was no intention that Mr Baklar would carry out any significant work and the document was produced to falsely represent additional salary that would assist Mr Baklar in obtaining a mortgage. When asked about this in a subsequent investigation the Claimant stated (B2/5/398):

> "Yes, this was only for this employee to increases creditability nothing more than to be able to open his bank account, so he asked him to do so as a favour"

54. After the investigation meeting the Claimant sent an email in which he stated that he had recommended that his son assist Mr Baklar but:

> "emphasising that he should not be employed on permanent or temporary basis, the company signed services and consultancy contract with Mr Mohammed Baklar (as a contractor/not employee), to assist him in establishing additional income for the bank …"

55. On 19 February 2015 Katie Gardner joined the Respondent as a receptionist on a temporary basis. We did not find her evidence reliable. At the end of her witness statement she stated that there was "a lot of discrimination and racism within the office". When asked by a member of the tribunal about this she was only able to state that some staff members often spoke to each other in Arabic, which is not particularly surprising as that was their first language, although we appreciate that it can be uncomfortable when colleagues are speaking in a different language. She also stated that she felt that she had not been made a permanent member of staff whereas Kuwaiti nationals had. She suggested that Mr Al-Ali made disparaging remarks about the Claimant's disability on a daily basis saying things such as "at least you get to sit down all day" and "it must be great being in that chair" whereas she also stated that Mr Al-Ali and the Claimant nearly always spoke to each other in Arabic. The

Claimant did not allege that these comments were made. Ms Gardner stated that there was an occasion during a fire drill when the Claimant had not come out of his office and Mr Al-Ali referred to him being upstairs in his cage. It is possible that some comment was made by Mr Al-Ali about the fact that the Claimant was still upstairs in his office, but we consider that this was because the Claimant was refusing to participate in fire drills and would not come out from his office. Ms Gardner also referred to the Claimant being placed at the back of the room during a dinner at the Savoy hotel where people kept bumping into him, whereas, in fact, Mr Al-Ali had arranged for the Claimant have a place at the front of the room but the Claimant decided that he wished to be at the back of the room. Ms Gardner stated that the Claimant was very unhappy during the dinner, whereas we were shown a photograph in which he appeared to be in very good cheer. The Claimant was generous to Ms Gardner and paid approximately £900 for a part she needed to repair her car. We consider that she may have an excessively positive view of the Claimant resulting from his generosity to her and an unduly negative view of Mr Al-Ali because she felt that he would not make her a permanent employee and often spoke Arabic in her presence. Overall, we do not accept her evidence that Mr Al-Ali was antagonistic towards the Claimant because he was a wheelchair user. Ms Gardner left the Respondent on 19 October 2015.

56. In March 2015, the Respondent introduced the Executive Procedures Manual for Overseas Offices (B2/3/290-317). It included at Chapter VII Article 2:

> "Employees of Overseas Offices must not themselves or through others do the following:
>
> 4. Carry out for a third party paid or unpaid work or to combine his work and another work unless obtaining the approval of the Deputy Chief Executive Officer (Administration & Finance) or his authorised representative, other than what is assigned to him under court judgements subject to notifying the office in writing.
>
> Administrative Investigation with Employees and Disciplinary Code/Penalties
>
> Article (4)
>
> It is not permissible to punish any employee in the Overseas Office for any violation attributed to him except after conducting a written investigation with him and hearing his sayings and verifying his defence after confronting him with violation attributed to him."

57. The manual made provision for various types of violation including at 15 "abuse of position by obtaining or trying to obtain bribes or personal benefits from the company's staff or third parties"; 16 "committing gross mistake causing damages to the company/office" and 17 "negligence of job duties".

58. In March 2015, a new motorised wheelchair was ordered for the Claimant. It was delivered in June 2015.

59. In the summer of 2015 refurbishments were carried out to the first floor of the office. The refurbishments made it easier for the Claimant to move around the office. A pushbutton was fitted so that the door to the disabled toilet could be opened automatically. The suggestion for the pushbutton had come from Ms Whitehead who had seen one in a hospital. The Claimant enthusiastically agreed with the suggestion. However, we do not accept that he suggested that pushbuttons should be fitted to all the office doors, or to the doors to the lobby from which the lifts could be accessed. The office doors are glass. Generally, the doors were kept open, unless a member of staff was in a meeting or on a telephone call. When closed, people can see through them and would assist the Claimant if he needed to get through a door.

60. In about July 2015 the Claimant had lunch meeting with Dr Aref Alabassi, Dr Emad Awad and Mr Al-Ali at Mandaloun restaurant. The Claimant asserts that he was told 'to think about Plan B' when discussing his future at the Respondent. Mr Al-Ali denied that such a comment was made. In any event, we do not consider that if the Claimant was told that he should think about Plan B this suggests that the Respondent was intending to "get rid" of him. It is always sensible to have a fall-back plan. What is more this lunch occurred before the incident that the Claimant contends resulted in a decision being taken to have him removed from the business.

61. In August 2015 Mr Nizar Al-Adsani, CEO of KPC, visited the London office. The Claimant asserts that he "stared at him and gave him looks of disgust, making him feel like an outcast". In the Claimant's evidence to the tribunal this became the key incident. He contended that Mr Al-Adsani instructed Mr Hashem, then CEO of the Respondent, that they must get rid of the Claimant. The Claimant's contention was that this was because the Respondent was not prepared to countenance the possibility of a man in a wheelchair being the public face of the London Office. He contended that this is why he was investigated and that the investigation team, and Mr Jaafar the eventuall decision maker, had all been instructed that they must get rid of him.

62. On 21 October 2015, the Claimant registered a domain name for an app called LaVoice. He also registered it at the Intellectual Property Office for trade mark (CB/1/37/161-169). The Claimant was recorded as owner on both documents. This was a further business interest rather than a mere "idea" as suggested by the Claimant.

63. On 23 October 2015, the pushbutton for the disabled toilet was installed. The Claimant stated that he did not ask for pushbuttons on any of the other doors after this date. The Respondent denied that he had asked for such buttons at any stage.

64. On 25 Oct 2015, the CEO Mr Hashem decided to form a temporary committee with scope to "review, update and develop the Executive Procedure Manual for the operation of Foreign Offices of the Company" CB2/41/184. The Claimant accepted in evidence that it is a normal procedure for such reviews to be undertaken.

65. The Claimant alleges that in early November 2015 Saad Al Azmi spoke to him by telephone to inform him about the arrival of the investigative committee and warned him that they had a hidden agenda, to be careful and that it could result in his dismissal. We do not accept the Claimant's evidence. We consider that if, as the Claimant alleges, the investigation was concocted in order to ensure that he was dismissed, it is inherently implausible that Mr Al Azmi would tell him so. We find that Mr Al Azmi did no more than inform the Claimant that the investigation would be taking place. It was at that stage no more than a routine investigation into the procedures of the London Office.

66. On 8 Nov 2015, the members of the Review Committee travelled to London. They conducted their review from 9 to 30 November 2015. The review focused on the implementation of the procedures in the London Office and was conducted in a wide-ranging manner whereby staff were able to raise any concerns that they had. During this process staff raised serious concerns about the way the office was being run and failures to comply with the procedures, suggesting possible misconduct by the managers of the London Office.

67. On 8 December 2015, the Review Committee published draft initial report. The Chairman of the Review Committee Shehab Abdulla suggested investigating performance and compliance issues in the London Office and the parties responsible before issuing its final recommendations.

68. The Claimant alleged that in December 2015 Yousef Abdul Kareem met him in coffee shop in Kuwait. The Claimant alleges that Mr Kareem informed him that the committee were instructed to "fish for" errors and mistakes so that "someone in the office could be punished". We find it implausible that a member of the Review Committee would make such a comment. We accept the evidence in Mr Kareem's witness statement that he told the Claimant that he could not discuss the work of the Investigation Committee. This conversation took place before the remit of the Committee had been expanded and therefore Mr Kareem was not aware of what further investigations there might be.

69. The Claimant asserts that in December 2015 Mr Abdullah relayed messages to him via his brother in law, Mr Ahmad, that 'it would be better for you to resign or the committee will make your life hell and you will be punished/ they will use their influence to have you jailed/ instructions are coming from higher management". This was denied by Mr Abdullah and, again, we consider it is inherently implausible that he would make such a statement to the Claimant through his brother-in-law. We reject the Claimant's evidence in this regard.

70. On 27 December 2015, an internal memo was sent from the Mr Hashem to Mr Abdullah "Re Amendment of the Resolution on the Formation of the Committee for the Development and Update of the Regulations & Rules of the London Office". The scope of work for the Review committee was amended to "investigate all matters with a view to identifying the violations and perpetrators and recommending suitable disciplinary action" (CB1/40/177-179).

71. The Claimant alleges that in January 2016 that Mustafa Zain, legal advisor to the committee, told him that he was unsure why the investigation was being undertaken but it seemed he had upset someone in higher management and they had to show a legitimate reason to get rid of him. Mr Zain denied making this comment. We accept his evidence. He took a careful and conscientious role as a member of the committee we see no reason why he would have made such comment to the Claimant.

72. On 24 January 2016, Mr Jaafar, who has taken over as CEO, sent a document to the Chairman of the Investigation Committee Advisor headed "Amendment of the Resolution on the Formation of the Committee for the Development and Update of the Regulations & Rules of the London Office" (CB2/41/180-185). It made no material amendment to the terms of reference and required that all staff support the committee.

73. On 25 and 26 January 2016 Mohammed Baklar made statements to the committee in which he alleged, amongst other things, that he was being taken advantage of by the Claimant who made his assist him with personal chores, including when he travelled with the Claimant, and that the Claimant was seeking to involve him in his outside business interests.

74. On 26 January 2016 and 28 January 2016 Ahmed Hussein sent letters to the committee in which he complained that the Claimant had taken advantage of him by getting him to help with personal chores and had sought to involve him in his business activities.

75. The Claimant was suspended for 5 days from 1 February 2017. This was because employees had raised concerns that the Claimant was telling them not to co-operate fully with the committee. It appears that on 1 February 2017 the Claimant was removed as director of the Respondent. We consider that the likelihood is that this resulted from the level of concerns that were being raised about the Claimant.

76. On 2 February 2016 Mr Baklar and Mr Hussein provided further information to the committee. On 10 February 2016 Mr Al-Ali interviewed. On 11 February 2016, the Claimant was interviewed.

77. On 16 February 2016, the Claimant was told that he was required to travel to Kuwait for a further interview. The Claimant travelled overnight on 17 February 2016. The Claimant was interviewed on 18 February 2016. The Claimant arrived at the office at 11am. The Claimant met socially with a number of colleagues. The interview started and 1pm and lasted to 6pm. The Claimant was told that he could have break whenever he wanted.

78. The Claimant was interviewed again on Sunday, 21 February 2016 between 11am and 8pm. The Claimant was told that he could have break whenever he wanted. The Claimant was offered lunch which he refused. After the main interviews, there were two further short interviews, the second of which finished at 9:30pm, about matters it was thought could be particularly embarrassing to the Claimant, which did not form any part of the subsequent determination, and have not been relied upon by the Respondent in these proceedings.

79. During the investigation meetings with the Claimant written notes were produced and the Claimant was asked to sign each page. We do not accept his evidence that he was forced to sign the notes. The Claimant gave inconsistent evidence. First, he stated that Mr Zain swore that the minutes were a true record, that he believed him, and so signed the notes; but subsequently said that he did not believe the minutes were accurate, but signed them because he was told that if he did not he would be sent to prison. We consider that the Claimant signed the minutes as he accepted that they were a reasonably accurate record of the interviews.

80. At the end of the second main interview it is recorded that the accusations against the Claimant were put to him as follows:

> “You are accused of the violation of misuse of the job by seeking or accepting bribe or personal benefits from employees of the Company or third parties; committing gross error that causes harm to the Company; negligence and omission in the job duties and breach of the employment contract because you accepted benefits by seeking assistance of the employees Asem, Jameel, Ahmed, Mohammed and Marwan as stated in detail in your statements, to accompany you on private and personal assignments while you are their supervisor, and by accepting benefit from the employee Marwan by virtue of your position in the London Office by instructing him to participate in and prepare the application in the [Sherandjo] project then selling it, and by accepting from him various services as set out in detail in your admission in the investigations. You also accepted benefits from the employee Mohammed Bakler as stated in the investigations by providing employment for him against consideration in your son's company to provide consultancy services, and committing gross error that caused harm to the Company by your failure to exercise your duties as the Deputy Manager of the London Office and the Medical Attaché and in that capacity you committed several errors during continuous, not interrupted, periods of time concerning working hours and the [differences] as stated in the investigations and overtime work and the method of calculation of the same, which resulted in improper payments to the employees without any basis in the Procedures Manual without obtaining the necessary approvals for the same; default in creating the ideal employee award and the health, safety and environment contest without obtaining the necessary approvals and in violation of the regulations and procedures; committing financial violations concerning signing letters of guarantee while you are on leave and signing the letters of guarantee by the employee working under your supervision, with your knowledge, without having valid authorization to do so; signing individually on direct payments on contracts and applying for issuance of a debit card by writing directly to the bank, which constitutes a violation; payment of Kuwait Airlines invoice as stated in the investigations without taking proper action for remedy or investigation of the financial violation; lack of clear system and mechanism concerning discounts and failure to object officially to the outstanding invoices; inaccuracy in preparing the accruals and establishing a company with a purpose without notifying Kuwait Oil Company; establishing a company carrying on a medical activity in Kuwait which constitutes a violation of the terms of the

> employment contract which prohibit this; participation with one of the employees of the Office, called Marwan, in the project of a mobile telephone application and establishing a project of your own (LaVoice) and using the Company's telephone number in the details of this project; providing an employment contract to the employee Mohammed Bakler with your son's company which constitutes conflict of interests and exposing the Company's information to risk and disclosure by sending the results of the survey concerning treatment abroad to the personal email of an employee of the Office, the employee Marwan; giving inaccurate statement to an official authority in London for receiving compensation; issuance of letter of guarantee for two patients who were not present on the date of issuance of the letters as stated in detail in the investigations, signed by the employee working under your supervision, and; issuance of two letters of guarantee by you in favour of the employee Marwan for a consultant opinion concerning his case without any need for the same and without taking the proper procedures in that, what is your defence against the said accusation?"

81. The Claimant replied:

> "I deny the accusations addressed to me including any violations and insist on all my statements in these investigations concerning these points and consider these statements my defence and response to all the accusations addressed to me as I responded in detail to each point separately in my defence and request to consider that my defence be submitted to the Investigation Committee."

82. The Claimant alleges that there was a failure to take into account his needs as a disabled person in the interviews in Kuwait. He contends that the duration of the interviews was excessive. We do not accept that is the case. The Claimant could have stated if he was too tired to continue with the interviews. The Claimant alleges that there were insufficient breaks. We accept that the Claimant was told that he could have a break whenever he wished. The Claimant contends that there were inadequate toilet facilities. In particular, he alleges that Mr Abdullah mocked his toileting needs by holding a water bottle and asking the Claimant whether he "wanted a bottle to piss in" in front of all members of the committee and suggested that the Claimant might need two bottles. We do not accept the Claimant's evidence in this regard. We accept that when Mr Abdullah took the Claimant to the toilet facilities in private he asked the Claimant whether he wished to have a medical bottle to urinate in. He did this to ensure that the Claimant's needs were met. The Claimant alleges that inadequate provision was made for sleeping arrangements. In fact, the Claimant had arranged a hotel where he stayed with his uncle.

83. After the interviews the Claimant sent a number of emails providing some further information about the matters that he had been questioned about.

84. On 28 February 2016, the Investigation Report was produced. It set out 47 violations that the Claimant was said to be guilty of. The Investigation Report recommended that the Claimant be dismissed. A copy of the Investigation Report was not provided to the Claimant.

85. The Investigation Report also dealt with the allegations made against Mr Al-Ali and set out 38 violations that he was said to be guilty of. We accept that the violations found in respect of Mr Al Ali were generally in relation to procedural matters and were not as serious as the violations found against the Claimant that were in addition to those that had been established against Mr Al-Ali. The Investigation Report recommended that Mr Al Ali be given a second warning; i.e. a final written warning. The allegations againsr Mr Al-Ali were not of a nature to constitute gross misconduct.

86. On 3 March 2016, a circular was issued by Mr Jaafar concluding the Claimant's appointment as Deputy Manager and Medical Attaché of the London Office and re-designating him as a Senior Specialist in Kuwait. The Respondent was empowered to do this at any time.

87. On 10 March 2016, a written warning was issued to Mr Al-Ali. Mr Jaafar decided to downgrade the final written warning to a written warning (CB2/64/317-9).

88. On 10 March 2016, Mr Jaafar decided that the Claimant should be dismissed. He annotated the investigation report to this effect.

89. On 14 March 2016 a letter was sent to the Claimant dismissing him (CB2/69/338):

> "Greetings:
>
> 1. We would like to inform you that, a decision has been taken to terminate your employment effective the 10th of March 2016, according to Article 16 from our company disciplinary policy, without any warning, notification nor bonus."

90. The letter provided no further detail about the reason for the Claimant's dismissal and he was still not provided with a copy of the Investigation Report. Mr Jaafar decided to dismiss as result of the more serious matters raised in the investigation report.

91. On 14 March 2016, the Claimant wrote to Mr Jaafar stating (CB2/68/332-4):

> "I request you reconsider your decision and pay me end of service gratuity and all the amounts relating to the same, given my very difficult family and health condition…"

92. The Claimant contends that this was a letter of appeal. Insofar as it was a letter of appeal, it was only in respect of sanction. Mr Jaafar did not reply to the letter.

The Law

Unfair Dismissal

93. Pursuant to s.94 of the Employment Rights Act 1996 ("ERA") an employee has the right not to be unfairly dismissed. It is for the Respondent to establish one of a limited number of potentially fair reasons for dismissal. These include, pursuant to s.98(2)(b) ERA, a reason which relates to the conduct of the employee.

94. Where the employer establishes a potentially fair reason for dismissal the Tribunal will go on to consider, on a neutral burden of proof, whether the dismissal was fair or unfair having regard to the reason shown by the employer. This depends on whether in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. This is to be determined in accordance with equity and the substantial merits of the case.

95. In considering dismissal for misconduct the Tribunal is guided by the principles set out in **British Home Stores v Burchell** [1978] IRLR 379, taking into account the neutral burden of proof in considering the fairness of the dismissal. The Tribunal considers whether at the time of the dismissal the Respondent had a genuine belief in the misconduct alleged, whether the Respondent had reasonable grounds for believing the Claimant was guilty of that misconduct and, at the time it held the belief, whether the Respondent had carried out as much investigation as was reasonable in all the circumstances.

96. The Tribunal will go on to consider whether the dismissal fell within the band of reasonable responses: **Iceland Frozen Foods v Jones** [1982] IRLR 439.

97. It is not for the Tribunal to re-try the facts that were considered by the employer or to substitute its decision for that of the employer: **Foley v Post Office, Midland Bank plc v Madden** [2000] IRLR 827.

98. The band of reasonable responses test applies to the decision to dismiss and the investigation that took place: **Sainsbury's Supermarket Ltd v Hitt** [2003] IRLR 23.

99. The Tribunal must consider whether the investigation was reasonable, not whether it itself would have chosen some alternative reasonable methodology to that adopted by the Respondent. When considering reasonableness of the investigation the Tribunal should have regard to the investigation as a whole.

100. The more serious the allegations and more far reaching the effect on the employee of dismissal, the more rigour will be expected of the employer: **A v B** [2003] IRLR 405. It is particularly important that employers take their responsibility seriously where dismissal is likely to have a serious effect on the employee's reputation or ability to work in his or her chosen field: **Crawford & another v Suffolk Mental Health Partnership NHS Trust** [2012] IRLR 402.

101. When considering fairness of procedures, the Tribunal considers the overall process including any appeal: **Taylor v OCS Group Ltd** [2006] ICR 1602.

102. The Tribunal may have regard to the Respondent's procedures in determining whether the dismissal was fair, although not every breach of a procedure, even if contractual, will render a dismissal unfair.

103. The ACAS Code on Disciplinary and Grievance Procedures is of assistance. It is an admirably succinct document that is, perhaps, insufficiently perused by parties and Tribunals alike. Section 207 of the Trade Union and Labour Relations Consolidation Act 1992 provides that a breach of the Code shall not of itself render the Respondent liable in any proceedings. Pursuant to s.207(2) it is admissible and any provisions which appear relevant in the proceedings shall be taken into account by the Tribunal. Paragraph 4 requires that employers should carry out any necessary investigations to establish the facts of the case. Paragraph 12 of the ACAS Code requires the employer to explain the complaint against the employee and go through the evidence that has been gathered. The ACAS code provides for investigation, followed by charge, and then a disciplinary hearing with a right of appeal.

104. Section 122(2) ERA provides for a reduction of the basic award where the Tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce it.

105. There are two stages at which the Tribunal has regard to justice and equity in considering the compensatory award. Pursuant to Section 123(1) ERA the Tribunal should award compensation of such an amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal, insofar as the loss is attributable to the action taken by the employer. Section 123(6) ERA provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion that it considers just and equitable having regard to that finding.

106. The law dealing with the approach to be taken to reductions on just and equitable grounds dates back to a time when there was no basic award. The matter was considered by the House of Lords in **Devis v Atkins** [1976] ICR 196 when the applicable provisions, in terms not dissimilar to Section 123(1) and 123(6) ERA, provided for consider of justice and equity in awarding compensation or deciding whether there should be a reduction when the dismissal was caused or contributed to by action on the part of the Claimant. In **Devis** the House of Lords considered whether after established conduct could lead to a reduction in the compensatory award, even though it could not have caused or contributed to the dismissal. Viscount Dillon held that it cannot be just and equitable to awarded compensation when the employee suffered no injustice by being dismissed. In such circumstances the award can be reduced under Section 123(1) ERA.

107. The equivalent provision to Section 123(1) ERA also founded what is referred to as a **Polkey**[2] reduction where it is decided that there is a chance that had a fair procedure been operated the employee would have been dismissed in any event. Again, that cannot have affected the dismissal but may still result in it being appropriate to reduce compensation because the loss has not been sustained by the employee entirely by reason of the action of the employer, because dismissal might have occurred in any event. At page 364H Lord Keith held that if taking the appropriate steps which the employer failed to take before dismissing the employee would not have affected the outcome this will often lead to the result that the employee, though unfairly dismissed, will recover no compensation.

108. In a case where the conduct of the employee occurred prior to the dismissal and was causally connected to the dismissal the compensatory award may be reduced under Section 123(6). If the unfairness had a causal effect on the dismissal a finding of 100% contribution may not be made. The causal connection between the conduct and the dismissal is not required under Section 122(2) or 123(1).

109. It has been observed in the Employment Appeal Tribunal that 100% reductions in compensation are rare, although permissible, and that, therefore, they require justification by evidence and must be supported by reasons: **Moreland v David Newton (T/A) Aden Castings** (22nd July 1994): EAT/435/92 and **Lemonious v Church Commissioners** UKEAT/0253/12/KN.

110. In considering **Polkey**, contribution and just and equitable compensation the Tribunal has to make its own factual findings about what would have happened had a fair procedure been applied and/or whether the misconduct did in fact take place. That is a very different approach to that in determining whether the dismissal was fair or unfair which turns on the question of whether the respondent's decision on the evidence that it considered was one that was open to a reasonable employer.

111. Where a **Polkey** reduction has been made on the basis that the Claimant would or might have been dismissed as a result of his misconduct this may be taken into account in deciding upon any reduction of the compensatory award for contributory conduct to avoid there being an excessive further reduction in the compensatory award for the same conduct: **Roa v Civil Aviation Authority** [1995] ICR 495. The same reasoning does not apply to the Basic Award as the **Polkey** reduction does not apply to it: **Grantchester Construction (Eastern) Limited v Attrill** EAT 0327/12.

Wrongful Dismissal

112. Dismissal of an employee without giving notice is unlawful unless the employee is guilty of a fundamental breach of contract which permits the employer to dismiss immediately because it goes to the root of the contract and shows that the employee no longer considers himself to be bound to comply with the terms of the contract.

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[2] **Polkey v AE Dayton Services** [1987] IRLR

Disability Discrimination

113. Disability is a protected characteristic for the purposes of the Equality Act 2010 ("EQA")

114. The Employment Appeal Tribunal in the **Law Society v Bahl** [2003] IRLR 640, made this simple point, at paragraph 91:

> "It is trite but true that the starting point of all tribunals is that they must remember that they are concerned with the rooting out certain forms of discriminatory treatment. If they forget that fundamental fact, then they are likely to slip into error".

115. The provisions that we are dealing are to combat discrimination. In that context, it is important to note that it is not possible to infer unlawful discrimination merely from the fact that an employer has acted unreasonably: see **Glasgow City Council v Zafar** [1998] ICR 120. Tribunals should not reach findings of discrimination as a form of punishment because they consider that the employer's procedures or practices are unsatisfactory; or that their commitment to equality is poor; see **Seldon v Clarkson, Wright & Jakes** [2009] IRLR 267.

116. Direct discrimination is defined by Section 13 EQA:

> **13 Direct discrimination**
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

117. Section 23 EQA provides that a comparison for the purposes of Section 13 must be such that there are no material differences between the circumstances in each case. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 Lord Scott noted that this means, in most cases, the Tribunal should consider how the Claimant would have been treated if she had not had the protected characteristic. This is often referred to as relying upon a hypothetical comparator.

118. Since exact comparators within the meaning of section 23 EQA are rare, it is may be appropriate for a Tribunal to draw inferences from the actual treatment of a near-comparator to decide how an employer would have treated a hypothetical comparator: see **CP Regents Park Two Ltd v Ilyas** [2015] All ER (D) 196 (Jul).

119. The Courts have long been aware of the difficulties that face Claimants in bringing discrimination claims and of the importance of drawing inferences: **King v The Great Britain-China Centre** [1992] ICR 516. Statutory provision for the reversal of the burden of proof is now made by Section 136 EQA:

> 136 Burden of proof
>
> > (1) This section applies to any proceedings relating to a contravention of this Act.
> > (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> > (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

120. Guidance on the reversal of the burden of proof was given in **Igen v Wong** [2005] IRLR 258. It has repeatedly been approved thereafter: see **Madarassy v Nomura International Plc** [2007] ICR 867. However, the focus should be on the facts established at the conclusion of the hearing rather than on thos "proved" by the Claimant. Taking that into account the guidance may be summarised in two stages: (a) there must be established from the totality of the evidence, on the balance of probabilities, facts from which the Tribunal 'could conclude in the absence of an adequate explanation' that the Respondent had discriminated against her. This means that there must be a 'prima facie case' of discrimination including less favourable treatment than a comparator (actual or hypothetical) with circumstances materially the same as the Claimant's, and facts from which the Tribunal could infer that this less favourable treatment was because of the protected characteristic; (b) if this is established, the Respondent must prove that the less favourable treatment was in no sense whatever on the grounds of race or gender.

121. To establish discrimination, the discriminatory reason for the conduct need not be the sole or even the principal reason for the discrimination; it is enough that it is a contributing cause in the sense of a significant influence: see Lord Nicholls in **Nagarajan v London Regional Transport** [1999] IRLR 572 at 576.

122. There may be circumstances in which it is possible to make clear determinations as to the reason for treatment so that there is no need to rely on the section: see **Amnesty International v Ahmed** [2009] ICR 1450 and **Martin v Devonshires Solicitors** [2011] ICR 352 as approved in **Hewage v Grampian Health Board** [2012] ICR 1054. However, if this approach is adopted it is important that the Tribunal does not fall into the error of looking only for the principal reason for the treatment but properly analyses whether discrimination was to any extent an effective cause of the reason for the treatment.

123. In **Shamoon** it was stated that, particularly when dealing with a hypothetical comparator, it may be appropriate to consider the reason why question first. To take account of section 136 EQA the Tribunal must be satisfied that the treatment was, in no sense whatsoever, because of the protected characteristic.

124. Discrimination because of something arising in consequence of disability is defined by section 15 EQA:

> 15 (1) A person (A) discriminates against a disabled person (B) if—
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

125. Section 20(3) and (4) EQA provide:

> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

126. The approach to PCP cases was considered in **Royal Bank of Scotland v Ashton** 2011 ICR 362 and **Environment Agency v Rowan** 2008 IRLR 20. The tribunal should consider the PCP relied upon, the identity of the non-disabled comparators, the nature and extent of the substantial disadvantage asserted to be suffered by the Claimant in comparison with the comparators and the practical result of the reasonable steps the employer can take to ameliorate the disadvantage.

Discrimination time limits

127. The time limit in which complaints of discrimination should be brought is set out in Section 123 of the EqA:

> "(1) … proceedings on a complaint … may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
> (b) such other period as the employment tribunal thinks just and equitable.
>
> …
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
> (b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.”

128. The time limit is adjusted to take account of pre-claim conciliation.

129. There is a case law that is not entirely consistent on the approach to be taken to time limits in reasonable adjustment cases. In **Humphries v Chevler Packaging Ltd** UKEAT/0224/06, a case brought under the Disability Discrimination Act, it was held that a failure to make a reasonable adjustment is an omission and, therefore, could not be a continuing act.

130. In **Matuszowicz v Kingston-upon-Hull City Council** [2009] ICR 1170 the Court of Appeal followed Humphries, accepting that a failure to make a reasonable adjustment is an omission rather than an act. Lord Justice Sedley concluded that if there is a failure to make an adjustment there must come a time when the employee concludes that were the adjustment to be made it should have been made by that point, from which point the time limit will run. This prevents a situation of neglect from dragging on indefinitely.

131. **Matuszowicz** was followed by the EAT in **Mears Group plc v Mr R Vassall** UKEAT/0101/13/LA. However, in a more recent decision of Mr Justice Langstaff, **Secretary of State for Work and Pensions** (Job Centre Plus) v Jamil UKEAT/0097/13/BA, the EAT considered that a failure to make an adjustment was conduct extending over a period for the purpose of the EQA time limit. Subsequently, Mr Justice Langstaff appeared to follow **Matuszowicz** in **Viridor Waste v Edge** UKEAT/0393/14/DM, although he suggested the possibility that the change to term “conduct extending over a period” in the EqA might be apt to include the possibility of a failure to make an adjustment being conduct extending over a period.

132. On balance, we conclude that a failure to make an adjustment should be regarded as an omission in accordance with the decision of the Court of Appeal in **Matuszowicz** and that the change of wording in the EqA does not affect the position: otherwise there would not be a requirement in Sub Section 4 of Section 123 to define the stage at which an omission is treated as having been decided upon.

133. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. Extension of time should be the exception, although the Tribunal has a broad discretion to extend time when there is a good reason for so doing: **Robertson v Bexley Community Centre (t/a Leisure Link)** [2003] IRLR 434

Analysis

134. We deal first with the claims of disability discrimination. The Claimant contended that we should draw an inference from the fact that the Respondent's very detailed personnel manual made no reference to disability, as was the case for all other policies. The staff in the London office had no training in disability issues. Mr Al-Ali adopted the approach that if the Claimant wanted anything to assist with his disability he should ask and then a request would be made to Kuwait head office. There was no attempt to ask the Claimant about his needs and anticipate what reasonable adjustments might be required. We have taken this into account when considering the disability discrimination complaints, but consider that we need to focus on the specific complaints made and the extent to which the poor procedures of the Respondent might properly lead to the drawing of an inference in relation to them. A finding of discrimination should not be made merely to show disapproval of poor practices and procedures.

135. The Claimant also sought to rely on a comment made by Mr Abdullah in cross examination that the Respondent was concerned about subordinated travelling with the Claimant and that the Claimant needed assistance as he is disabled. We accept that he was not criticising the fact that the Claimant needed assistance as a result of his disability but was concerned that the Claimant was requiring his staff to provide personal assistance to him in circumstances in which they felt they had no alternative but to agree to his requests.

136. The Claimant's contention is that the direct and/or disability related discrimination he has suffered arose from the fact that the Respondent did not want a person in a wheelchair as the face of the London Office. The allegation has been put in the alternative under section 13 or 15 EQA. The choice of the appropriate section appears to us to depend on whether one analyses the allegation as being one in which the Respondent was acting to prevent the Claimant becoming Head of the London Office because of his use of a wheelchair or because the use of his wheelchair was a manifestation of the extent of his disability, in that the underlying disability was the causative factor, rather than the use of the wheelchair itself. We consider the focus of the Claimant's argument was on the latter rather than the former. In any event, we have focused on extent to which, if any, the evidence supports the contention that the Respondent did not wish the Claimant to become head of the London Office because of his wheelchair use/disability. This is a case in which it is of assistance to consider the reason why question, with a focus on whether there is evidence to suggest that the Claimant's wheelchair use/disability was to any extent a material factor in the decisions that were made.

137. The Claimant first alleges that he was not considered as a candidate for Manager of the London Office when a vacancy arose 2013. This is at the time that Mr Al-Farah return to Kuwait and Mr Al-Ali became the Manager of the London Office. We accept that there was a genuine decision to change the management structure of the London office which resulted in a higher-grade post of Manager of the London Office; as opposed to the former post held by Mr Al-Farah of Head of the London Office. At the time that Mr Al-Ali arrived the Claimant was at grade 17. He was subsequently promoted to grade 18 with the grade being backdated to March 2013 as a recognition of his very

good performance. At the time that Mr Al-Ali arrived the Claimant was not eligible to be considered for the post of Manager of the London Office as he was three grades below that post. He needed to have been in a post at a grade of no more than one below the new post for at least a year to be eligible to apply. Even if his backdated grade was taken into account, he still would not have been eligible as he would still have been two grades below the new role. The Claimant was not considered for the new post because he was not eligible, which had nothing whatsoever to do with his disability or use of a wheelchair.

138. The Claimant next alleges that he was not considered for the role of Manager of the London Office in 2016. Mr Al-Ali returned to Kuwait in September 2016. The Claimant was dismissed in March 2016 and so could not be considered for the role of Manager of the London Office. Furthermore, at the time of his dismissal the Claimant was grade 18; more than one grade below the new role and so ineligible to be considered. The Claimant suggested that after a period of three years in a role there was a possibility of gaining an additional personal grade which meant that he would have moved to grade 19 in March 2016. The Respondent accepted that it is possible to gain a personal grade, subject to certain eligibility criteria. But even if this was the case, the Claimant would still not have been at grade 19 for at least a year at the time that the vacancy for Manager of the London office became available and so would not have been eligible to apply. We do not consider that the fact that the Claimant was not considered for the role of Manager of the London Office in 2016 had anything to do with the fact that he is disabled or a wheelchair user.

139. At paragraph 19 of the List of Issues allegations against managers are set out which it was suggested should be taken into account in determining whether there had been a failure to make reasonable adjustments. The Claimant alleges that on numerous occasions between September 2013 and March 2015 Mr Al-Ali referred to the Claimant as a "nuisance" and "someone who just gets in the way" and made remarks that "people are wasting precious time by having to help him constantly". We do not accept that Mr Ali made these comments. If he had done so the Claimant would have complained about them at the time. The Claimant alleges that Mr Abdullah mocked the Claimant's toileting needs in Kuwait on 18 February 2016 by asking him whether he wanted to "piss in a bottle" and joking that he would need two bottles. We do not accept that these comments were made. In any event, we are not clear how any of these comments, which would be harassment, would assist us in determining the reasonable adjustments complaint.

140. The first complaint of failure to make reasonable adjustments relates to the glass doors on the first-floor offices and doors to the lift lobby. They did not have pushbuttons that would allow them to be opened automatically. We accept the Respondent's evidence that the doors were generally open, but that office doors would be closed when a meeting or private phone call was taking place. The Claimant generally relied on his colleagues to open doors for him on the occasion when they were closed. We do not accept that he made requests for pushbuttons on these doors. However, we do accept that this was a feature of the Respondent's premises that placed him at a substantial disadvantage, in the sense of it being more than minor or trivial, as he could not pass as freely as other members of staff around the office. However, by

the time the pushbuttons to the disabled toilet on the first floor was installed, on 23 October 2015, as part of the refurbishments, it was clear that no further pushbuttons were to be installed. It was apparent to the Claimant that no further adjustment in this respect would not be made. The Claimant accepted that thereafter he did not ask for any more pushbuttons. The Respondent had acted in a way that was inconsistent with making the adjustment and so is to be treated as having decided on the omission, and so time runs. We do not consider that the Claimant has put forward any reason why it would be just and equitable to apply a time limit in excess of three months in respect of this claim, particularly in circumstances where he did not ask for the adjustment to be made or make any complaint about the issue. If this claim had been in time, would have gone on to consider whether it would be reasonable to expect the Respondent to install pushbuttons to every office door and to the doors to the lift lobby in circumstances where this was not requested by the Claimant, the doors were generally open and staff were available to assist the Claimant on the limited occasions when the doors were closed.

141. The Claimant next alleges that there was a failure to make a reasonable adjustment in respect door to the disabled toilet on the first floor. This adjustment was made on 23 October 2015. The complaint in respect of the period before the adjustment was made is substantially out of time and we see no reason why time should be extended to bring this complaint within time.

142. The Claimant next alleges he was placed at a substantial disadvantage by being located in an office on the first floor with the consequence that an evacuation chair would be required in the event of an emergency. The Claimant contends that in or about early 2014 he asked to be moved to the ground floor and that a reasonable adjustment should have been made by doing so or by providing arrangements to evacuate him safely from the first floor in the event of an emergency. We do not accept that the Claimant was placed at a substantial disadvantage by being located in an office on the first floor. There were lifts for access and an evacuation chair was available should there be an emergency. What is more we do not consider that it would have been a reasonable adjustment for the Claimant to be moved to the ground floor as there were no offices on the ground floor and it was not leased by the Respondent. It was clear from about early 2014 that the Claimant would not be moved to the ground floor. This allegation is substantially out of time and we do not consider there is a good reason why it would be just and equitable to extend time beyond a three-month time limit, particularly in circumstances where the Claimant made no request for the move to be made.

143. The Claimant next alleges that he was placed at a substantial disadvantage by having a desk that was not sufficiently raised to allow him to get his wheelchair under it and by the layout of his office which was difficult to move around. We do not accept that that was the case. The Claimant did not complain about his desk or the layout of his office. If he had been dissatisfied with his office he would have done so. The Claimant did obtain risers to increase the height of his desk slightly which allowed him to use it with his wheelchair. We do not accept the Claimant's evidence that the desk was unstable when he used the risers. If this had been the case, he would have complained and asked for a new raised desk. When the possibility of new office furniture was brought up this was to improve the image of the office rather than because the Claimant

was suggesting that the use of his wheelchair required any special office furniture. Had he been having any difficulty with his desk he could have asked that a special new desk was provided. We consider the fact that he did not make any complaints indicates that he was not placed at any substantial disadvantage because of the desk he was provided with or because of the layout of his office.

144. The Claimant next suggests that he was placed at a substantial disadvantage during questioning Kuwait on and 21 February 2016 because of the length of the interviews, inadequate breaks, inadequate toileting facilities and inadequate sleeping arrangements/assistance. We do not accept that this was the case. We do not consider that the length of the interviews was excessive. The Claimant could have asked for a break at any stage or ask for the interview to be terminated if he were too tired to proceed. The Claimant was told that he could have such breaks as he wished. He was provided with suitable lavatory facilities. A medical bottle was offered if that was what he required. The Claimant told us that he does use a bottle. We do not accept that the Claimant was placed at a substantial disadvantage in respect of sleeping arrangements. He had himself booked a hotel where he stayed with his uncle which provided adequate sleeping arrangements for him.

145. The Claimant's case in respect of dismissal is that when Mr Al-Adsani visited the London Office in August 2015 he showed that he was disgusted by the Claimant and it was he that gave an instruction that the Claimant should be "got rid of" as he did not wish the Claimant to become the manager of the London Office. Mr Al-Adsani was not called to give evidence. The Claimant's contention was that Mr Al-Adsani gave an instruction to Mr Hashem that the Claimant was to be dismissed. Mr Hashem set up the investigation committee all the members of which were instructed that they were to decide that the Claimant should be dismissed. The Claimant alleges that the committee then made a recommendation to Mr Jaafar who agreed with their recommendation and decided to dismiss the Claimant because he had been instructed to do so by Mr Al-Adsani. It was not put to Mr Jaffar that he had been instructed to dismiss the Claimant by Mr Al-Adsani. We do not accept that the Claimant established a proper evidential basis to suggest that Mr Hashem and all the members of the investigation team had been instructed that the Claimant was to be "got rid of". Having considered the totality of the evidence we conclude that the Claimant was not about to become eligible to be the Manager of the London Office. Even had that been the case, the Respondent could recall him to Kuwait without having to give a reason at any time if they did not want him to be "the face" of the London Office. There was no reason for them to undertake a costly and lengthy investigation to prevent the Claimant becoming Manager of the London office. We do not accept there is any evidence from which we could conclude that the decision to commence the investigation, undertake the investigation and dismissed the Claimant had anything to do with his disability, or the fact that he is a wheelchair user.

146. We accept that there was a genuine initial investigation to consider the policies and procedures in the London Office. During the course of the initial investigation concerns were raised about the Claimant which resulted in the scope of the investigation being widened. A detailed investigation report was produced that recommended the Claimant's dismissal. Mr Jaafar agreed with

the recommendation. The fact that, as we will set out below, we consider that there were procedural shortcomings in that process, does not alter the fact that we do not consider that it was concocted as alleged by the Claimant. While we consider that there were shortcomings in the procedure adopted by the Respondent we accept that the individuals involved considered that what they were doing was in accordance with the Respondent's normal procedures and that it complied with Kuwaiti law, which they believed to be applicable to the Claimant. We do not consider that the unfairness is unexplained, or that it is a basis for drawing any inference of discrimination.

147. We next go on to consider reason for the Claimant's dismissal. We accept that the Claimant was dismissed for reasons related to his conduct; being the most serious matters found against him in the investigation report. We next went on to consider the fairness of the dismissal. We agree with the submission made by Ms von Wachter for the Claimant at paragraph 1(d)i of her closing submission that "the investigation carried out by the Respondent was comprehensive so far as it went and would have been a good starting point for a properly conducted disciplinary process". We accept that there was a detailed investigation. However, this did not result in charges being properly put to the Claimant. An amalgam the key allegations against him were put all in one statement at the end of the last investigation meeting and he was given a brief opportunity to either admit or deny the charges. The process that the Claimant was able to participate in ended with the investigation, without there being a disciplinary hearing at which the Claimant would have a fair opportunity to put forward his case once the allegations had been put to him clearly. The Claimant was not provided with a copy of the investigation report before his dismissal. The letter dismissing him was brief and did not set out the factual determinations that had been made against him. Consequently, there was no real opportunity to appeal the findings against the Claimant as he did not know any detail of the findings that had been made against him. In the circumstances, we have no hesitation in finding that the dismissal of the Claimant was unfair.

148. In considering any reduction to compensation for unfair dismissal we have had particular regard to whether the Respondent would or may have dismissed the Claimant had a fair procedure been applied. We have also considered whether the evidence before us established contributory conduct. We stressed to the Respondent that they must be clear what specific allegations were being made against Claimant and that those allegations must be supported with evidence. Of those allegations that might justify dismissal, many were somewhat vaguely put in the investigation report and we were provided with no further direct evidence about them. However, there are a number of key allegations in respect of which we had sufficient evidence to reach a conclusion. Firstly, we consider the Claimant was an active participant in a scheme that was designed to mislead a bank into offering a mortgage to Mr Baklar on a false representation that he was in receipt of income that would not be paid to him. He arranged for his son to provide a contract to Mr Baklar which would make it appear that he had an additional income of £1,000 per month. His participation was dishonest and would full justify summary dismissal. We also consider that in respect of the apps SharNGo and LaVoice the Claimant was engaged in a business activity, rather than merely having had an idea, in clear breach of his employment contract. That also would justify summary dismissal.

149. We consider that had a disciplinary process had been pursued at the conclusion of the investigation the Claimant inevitably would have been dismissed and that such a dismissal would have been justified by the above-mentioned gross misconduct, irrespective of whether other allegations would have been more fully investigated and added further acts of gross misconduct. While Mr Baklar has not been disciplined in respect of the contract falsifying his income, the Respondent would have legitimately applied a higher standard to the Claimant, who was a much more senior employee. In the case of the Claimant there was also gross misconduct though active involvement in the business activities of ShareNGo and LaVoice. We consider that such a fair process would have taken three months. In fixing on this duration, we have had regard to the fact that, although the Respondent is a private company, it operates much more like a government Department; its procedural wheels turn at a slow pace.

150. We have gone on to consider whether there should be any reduction the compensatory and/or basic award because of contributory conduct. In the case of the compensatory award we do not make a further reduction as we do not consider it would be just and equitable in circumstances in which we have found that the Claimant would inevitably have been dismissed three months later. The loss of earning for that period results entirely from the default by the Respondent in failing to operate a fair disciplinary process. The Claimant's blameworthiness has been fully accounted for by the decision that he would inevitably have been dismissed. The same point does not apply to the basic award, in respect of which we make a reduction for contributory conduct of 80% to reflect what we consider was the very serious wrongdoing by the Claimant, particularly in seeking to arrange that a contract be provided for one of his subordinates to falsely represent a significant income to persuade a lender to provide him with a mortgage.

151. We also consider that the Claimant's conduct in respect of arranging that contract and engaging in outside business interests was such as to fundamentally breach his contract of employment. That conduct entitled the Respondent to dismiss the Claimant without notice. The claim of wrongful dismissal fails.

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Employment Judge Tayler
27 September 2017

Annex

Unfair Dismissal

Reason for dismissal

1. What was the reason for C's dismissal?

  a) Are either of the two reasons for dismissal cited in para 12.1 and 12.2 of the ET3, the genuine reasons for C's dismissal?

  b) Was misconduct merely a pre-text for C's dismissal?

Fairness in the circumstances

2. Was C warned by the following individuals and in the following circumstances that the investigation was targeting him?

  a) In July 2015 when discussing his career progression at KOC told to think about 'a Plan B' by Dr Aref Alabassi and Dr Emad Awad at a lunch where Abdul Khaleq Al-Ali was present

  b) In late October 2015 during a telephone call with Saad Al-Azmi warned "*to be careful of the investigation team", "that they may have a hidden agenda"* and *"looks like you have been upsetting someone in management"*

  c) In December 2015 at a coffee meeting with Yousef Abdul Karim being told that *"the team had received instructions from management to fish for errors and mistakes so that someone in the office could be punished"*

  d) In January 2016 at the London Office being told by Mustafa Zain "*you have upset someone in Kuwait…it looks bad…investigation team are only following orders"*

3. If any of the facts in paragraph 2 are proven what is the relevance of such facts to the fairness of the dismissal?

4. Was dismissal for misconduct fair in all the circumstances?

  a) Was the dismissal for a fair reason
  b) Did dismissal for that reason fall within range of reasonable responses?
  c) Did R carry out a fair and reasonable investigation into C as part of the dismissal process?
  d) Did R follow its own procedures when investigating C
  e) When dismissing C did R follow its own procedures?
  f) When dismissing C did R follow a fair procedure?
  g) Did C have a right of appeal against the outcome of the investigation and decision to dismiss him, did he seek to exercise it and what was the response?

Direct discrimination pursuant to s13 Equality Act 2010 (EqA)

5. Was C not considered as a candidate for Head of London Office when the vacancy arose in 2013 and 2016 because of his disability?

6. In (a) investigating (b) suspending and (c) dismissing him, (being acts to which section 39 applies) did R treat C less favourably than it treated:

(a) Mr Al-Ali (London Office Manager)

(b) Alternatively, a non-disabled hypothetical comparator in similar circumstances to C

7. If any of the facts in paragraph 2 are proven what is the relevance of such facts to the direct discrimination claim?

Disability-arising discrimination pursuant to s15 EqA

8. Was C not considered as a candidate for Head of London Office when the vacancy arose in 2013 and 2016 because of something arising out of his disability, namely being in a wheelchair?

9. In (a) suspending (b) investigating and dismissing him, (being acts to which s39 EqA applies) was C treated unfavourably because of something arising out of his disability, namely his being confined to a wheelchair?

10. If any of the facts in paragraph 2 are proven what is the relevance of such facts to the section 15 claim?

Burden of Proof relating to the discrimination claim generally

11. Has the burden of proof shifted to the Respondent to prove that C's dismissal was not because of his disability/ because he was in a wheelchair?

12. If so, does R prove that the decision to dismiss was not because of the Claimant's disability?

Reasonable Adjustment discrimination

13. Did R comply with its statutory duty pursuant to s20 EqA to make reasonable adjustments in respect of C's disability?

14. If these adjustments were made were they made within a reasonable time frame?

15. Under Mr Al-Ali's management was there a pattern of delay, inaction and obstruction in dealing with C's alleged requests, as set out in 14, for reasonable adjustments?

16. Did C make the following requests for adjustments in respect of his disability and if so what?

a) Verbally to Mr Al-Ali from mid-2014 onwards for automatic doors to be installed on the first floor including the toilets

b) Verbally to Mr Al-Ali from mid-2014 onwards to move his office to the ground floor

c) Verbally to Mr Al-Ali in or about July 2014 for a more suitable desk and office furniture

d) Verbally to Mr Al-Ali in or about September 2014 for a more suitable wheelchair

17. If it is held that C did not make the abovementioned requests, did that remove R's obligation to make reasonable adjustments in respect of C's disability?

18. Were reasonable adjustments in place during questioning in Kuwait on 18 and 21 February 2016 for C's needs as a disabled person in relation to duration of interview, breaks, toileting facilities, sleeping arrangements and assistance? If not, did this place C at a disadvantage?

19. Was there a pattern of behaviour of members of R's senior management making negative/ derogatory and disability-related remarks about C during his employment?

a. On various occasions between September 2013 and March 2015, Mr Ali referring to C as a '*nuisance*' and someone '*that just gets in the way*'?
b. On various occasions between 2013 and March 2016 upon witnessing others helping C with tasks that he could not do for himself, Mr Ali making remarks such as *"people are wasting precious time by having to help him constantly"*
c. Shehab Abdulla (Adviser to the CEO) during questioning in Kuwait on 18 February 2016 mock C's toileting needs by asking C if he wanted a bottle to piss in and joking about whether he would need two bottles?

Physical features

20. Per section 20(4) (10) EA 2010, did the following physical features of the building where C worked place C at a substantial disadvantage in comparison with persons who are not disabled?

a) The internal glass doors in and around the office on the first floor

b) The male toilet door on first floor (pre-June 2015)

c) Being located on the first floor and the means of evacuating C in the event of an emergency

d) The furniture in C's office and its layout

Glass doors

21. Was C at a disadvantage because the internal glass doors on the 1st floor were required to be opened and closed manually and the Claimant was unable to use them without assistance thus leading to mobility problems moving around the office.

Male toilet door

22. Was C at a disadvantage pre-June 2015 because the male toilet door on the first floor were required to be opened and closed manually and the Claimant was unable to use them without assistance thus leading to mobility problems moving in and out of and using the toilet.

Being located on the first floor

23. Was C disadvantaged in that:

a) This was a potential hazard to him in the event of a fire evacuation, and/or

b) The arrangements in place to evacuate Claimant from the first floor safely were inadequate.

The furniture in C's office

24. Was C at a disadvantage in that the desk provided was too low to fit his wheelchair underneath and unstable when heightened by desk raisers.

25. Was C at a disadvantage because the furniture in his office and its layout did not enable C to move easily around his office given the size of his wheelchair.

Adjustments

26. Pursuant to s20(9) EqA 2010 would it have been reasonable to avoid the alleged disadvantages by:

a) Installing automatic doors on the office floor on which the C was located

b) Installing an automatic door in the male toilets on the first floor prior to late 2015

c) Re-locating the Claimant to the ground floor

d) Making arrangements to evacuate C safely from the first floor.

e) Providing him with a wheelchair friendly desk

f) Providing him with suitable office furniture and a suitable office layout

Polkey and contribution (the Tribunal may wish to have in mind at the same time as deciding liability)

27. If the dismissal was unfair on grounds other than discrimination should there be a Polkey reduction and, if so, on what basis?

28. If the dismissal was unfair on grounds other than discrimination should there be a reduction in compensation for unfair dismissal on the basis that the Claimant caused or contributed to his dismissal?

Wrongful Dismissal

29. Did C commit acts of gross misconduct such that R was entitled to dismiss him without notice?