Case No: 2208249/2016

EMPLOYMENT TRIBUNALS

Claimant: Mr S France

Respondent: Spectron Services Ltd

Heard at: London Central **On:** 12, 13, 14, 17, 18, 19, 20 July 2017 and 21 July and 24 August 2017 (in chambers)

Before: Employment Judge H Grewal
Mr D Carter and Mr T Robinson

Representation

Claimant: Mr R Leiper, QC

Respondent: Mr J Laddie, QC

JUDGMENT

The unanimous judgment of the Tribunal is that:

1 The complaint of unfair dismissal under section 98 of the Employment Rights Act 1996 is well-founded;

2 The complaint of unfair dismissal under section 103A of the Employment Rights Act 1996 is not well-founded;

3 The complaints of having been subjected to detriments for having made protected disclosures are not well-founded; and

4 The complaints of disability discrimination are not well-founded.

REASONS

1 In a claim form presented on 17 November 2016 the Claimant complained of disability discrimination, having been subjected to detriments for having made protected disclosures and unfair dismissal.

The Issues

2 It was agreed that the issues that the Tribunal had to determine were as follows.

Protected disclosure detriments

2.1 Whether in a telephone conversation with Mr Elliott on 24 February 2016 and in an email on the same date and in his solicitors' letter of 9 March 2016 the Claimant disclosed information (of an assault by Mr Fenn) which he reasonably believed (a) was in the public interest and (b) tended to show that a criminal offence had been committed, the health and safety of an individual had been or was likely to be endangered and that Mr Fenn and the Respondent were failing to comply with their legal obligations.

2.2 Whether the Respondent subjected the Claimant to the following detriments:

a. Mr Fenn decided not to pay the Claimant a bonus for the fourth quarter of 2015;

b. Mr Fenn made comments to third parties that the Claimant had left the Fuel Desk because of his "work ethic";

c. Failure to pay the Claimant full sick pay once his contractual entitlement to it had been exhausted;

d. Failure to respond to the Claimant's Subject Access Request.

(In the Claimant's particulars of claim the above four detriments were identified as those causing the Claimant specific financial loss, but it was alleged that that the Respondent's treatment between 23 February 2016 and 22 August 2016, as particularised at paragraphs 6 to 20 constituted detrimental treatment by reason of his having made protected disclosures. The treatment included the way in which the Respondent dealt with complaints and grievance about Mr Fenn).

2.3 If the Claimant made protected disclosures and the Respondent subjected him to the above detriments, it did so on the ground that he had made those protected disclosures.

Unfair dismissal

2.4 The Respondent admitted that the Claimant had been constructively dismissed and that his dismissal was unfair under section 98(4) of the Employment Rights Act 1996. The Respondent's case was that the verbal insults and abuse of the Claimant by Mr Fenn amounted to a repudiatory breach of the implied term of trust and confidence (it did not accept that there had been any physical violence).

2.5 The issue that we had to determine was whether the reason or principal reason for the dismissal was the fact that the Claimant had made protected disclosures.

Disability Discrimination

2.6 Whether the Respondent was disabled by reason of post-traumatic stress disorder and severe depression since 23 February 2016.

2.7 If he was, whether the Respondent knew or could reasonably have been expected to know that he was disabled before it received a medical report on 29 June 2016.

Failure to make reasonable adjustments

2.8 Whether the Respondent applied a provision, criterion or practice ("PCP") that:

a. The Claimant could not have a non-statutory companion at his grievance interviews on 29 April and 5 May 2016;

b. It would not continue or reinstate the Claimant's pay from 1 May 2016, thereafter paying him statutory sick pay;

c. It delayed communication of its decision as to whether it would exercise its discretion to pay the Claimant full sick pay until 27 July 2016;

d. It failed to complete its investigation of all the Claimant's grievances.

2.9 If it did, whether the PCPs placed the Claimant at a substantial disadvantage in comparison with persons who were not disabled;

2.10 Whether the Respondent knew or could reasonably have been expected to know that it was likely that the Claimant would be placed at that disadvantage;

2.11 If the duty to make adjustments arose, whether it would have been reasonable for the Respondent to have permitted the Claimant to be accompanied by a non-statutory companion and/or to have continued or reinstated his pay from 1 May 2016.

The Law

3 Section 43B(1) of the Employment Rights Act 1996 ("ERA 1996") provides,

"*In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –*
(a) that a criminal offence has been committed, is being committed or is likely to be committed,
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.
…
(d) that the health or safety of any individual has been, is being or is likely to endangered,
…"

4 In **Babula v Waltham Forest College [2007] ICR 1026** Wall LJ stated, at paragraphs 75 and 82,

> "*Provided his belief (which is inevitably subjective) is held by the tribunal to be objectively reasonable, neither (1) the fact that the belief turns out to be wrong – nor (2) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to a criminal offence – is, in my judgment, sufficient, of itself, to render the belief unreasonable and thus deprive the whistleblower of the protection afforded by the statute.*
> *…*
> *In this context, in my judgment, the word "belief" in section 43B(1) is plainly subjective. It is the particular belief held by the particular worker. Equally, however, the "belief" must be "reasonable". That is an objective test. Furthermore … I find it difficult to see how a worker can reasonably believe that an allegation tends to show that there has been a relevant failure if he knows or believes that the factual basis for the belief is false."*

5 In **Chesterton Global Ltd v Nurmohammed [2017] EWCA Civ 979** Underhill LJ in the Court of Appeal stated that the same principle applied in considering whether the worker reasonably believed that he was making the disclosure in the public interest. Thus the Tribunal has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) if he did, whether that belief was reasonable. However, while a worker must have a genuine and reasonable belief that the disclosure is in the public interest, that does not have to be his predominant purpose in making it. The particular issue that arose in that appeal was whether a disclosure which was in the private interest of the worker making it became in the public interest simply because it served the (private) interests of other workers as well. Underhill LJ stated, at paragraph 37,

> "*In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker…The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case."*

He suggested that it would be useful to take into account the following factors – the numbers in the group whose interests the disclosure served, the nature of the interest affected by the wrongdoing disclosed, the nature of the wrongdoing disclosed and the identity of the alleged wrongdoer.

6 Section 47B(1) ERA 1996 provides,

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

Section 48(2) ERA 1996 provides that on a complaint of having been subjected to a detriment contrary to section 47B(1), it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

7 In **London Borough of Harrow v Knight [2003] IRLR 140** the EAT held that it is necessary in a claim under section 47B to show that the fact that the protected disclosure had been made caused or influenced the employer to act (or not act) in the way complained of: merely to show that 'but for' the disclosure the act or omission would not have occurred is not enough.

8 Section 103A ERA 1996 provides,

> "*An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."*

Section 95(1)(c) ERA 1996 provides that an employee is dismissed by his employer,

> "*the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

In **Meikle v Nottinghamshire County Council {2005] ICR 1** the Court of Appeal held that the proper approach, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of that repudiation. It is enough that that the employee resigns in response, at least in part, to fundamental breaches of contract by the employer.

9 In **Delabole Slate Ltd v Berryman [1985] IRLR 305** the Court of Appeal held that in considering what was the reason or principal reason for the dismissal in a case of constructive dismissal attention has to be focused on the employer's reasons for his conduct which amounted to a repudiatory breach. As was said in that case,

> "*It is the employers' reasons for their conduct not the employee's reaction to that conduct which is important."*

This was reinforced in **Salisbury NHS Foundation Trust v Wyeth EAT/0061/15/JOJ** in which HHJ Eady QC in the EAT said that in a case where the Tribunal has to identify whether a protected disclosure was the reason or principal reason for the dismissal,

> "*… the ET will have identified the fundamental breaches of contract that caused the employee to resign in circumstances in which she was entitled to claim to have been constructively dismissed. Where no reason capable of being fair for section 98 purposes has been established by the employer, that constructive dismissal will be unfair. Where, however, the reason remains in issue because there is a dispute as to whether it was such as to render the dismissal automatically unfair, the ET then has to ask why the Respondent behaved in the way that gave rise to the fundamental breaches of contract?"*

10 Section 6(1) of the Equality Act 2010 ("EA2010") provides,

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

Schedule 1 paragraph 2(1) EA 2010 provides,

"*The effect of an impairment is long-term if –*
(a) It has lasted for at least 12 months,
(b) It is likely to last for at least 12 months, or
(c) It is likely to last for the rest of the life of the person affected."

11 Section 20(3) EA 2010 provides that where a provision, criterion or practice of an employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer is required to take such steps as it is reasonable to have to take to avoid that disadvantage. However, the employer does not have a duty to make reasonable adjustments if he does not know, and could not reasonably be expected to know, that the disabled person has a disability and is likely to be placed at that disadvantage (schedule 8 paragraph 20 EA 2010).

12 In **O'Hanlon v Commissioners for HM Revenue and Customs [2006] IRLR 840** the EAT held that it would be a very rare case where giving higher sick pay than would be payable to a non-disabled person who in general does not suffer the same disability-related absence would be considered necessary as a reasonable adjustment. That would not be an appropriate adjustment, other than in exceptional circumstances, because the tribunal would have to usurp the management function of the employer by deciding whether employers were able to meet the costs of modifying their policies by making these enhanced payments, and because the purpose of the legislation is to integrate the disabled into the workforce rather that simply putting more money into their wage packets, which might sometimes act as a positive disincentive to return to work.

The Evidence

13 The Claimant and his wife, Emma France, gave evidence in support of the Claimant. The following witnesses gave evidence on behalf of the Respondent – Stephen Sparke (Chief Operating Officer), Jeremy Elliott (Joint Head of Energy), Yvonne Poole (Group Head of HR), Daniel Fenn (Head, Fuel Oil Desk), Michael Palmieri, Daniel Stepney, Steve Merrick, Mark Lilley, Sam Pinching, Nicholas Pegg (Fuel Oil Brokers) and Peter Sinclair (Operations Support, Fuel Oil Desk). We listened to a recording of the altercation between the Claimant and Mr Fenn on 23 February 2016. We had regard to the medical report of Dr Watts dated 28 March 2017. Having considered all the oral and documentary evidence the Tribunal made the following findings of fact.

Findings of Fact

14 The Respondent is an inter-dealer broker specialising in the broking of physically and financially settled commodity trades and financial derivatives. Brokers act as intermediaries between traders. They help to create the market by finding counterparties to buy or sell products that their clients wish to trade. The Respondent

earns commission on each trade. The aim is to execute as many trades as possible each day. The Respondent operates in a number of markets and in order to provide specialist expertise in relation to different markets, the brokers work in teams known as "desks".

15 The Claimant, who is 46 years old now, has worked in brokerage since 1991 and as a fuel oil broker since 2002. In 2010 he was approached by the Respondent to join its Fuel Oil desk. The Claimant wished to join the Respondent and in December 2010 he and his wife engaged in discussions with the Respondent about the restrictive covenants in his contract with his then employer which would prevent him joining a competitor until August 2011. Mrs France made it clear in an email that her husband needed to start to work for the Respondent as soon as possible and suggested ways in which they might be able to get out of the restrictive covenants, including the threat of a constructive dismissal.

16 The Claimant signed an employment agreement with the Respondent on 1 Feb 2011 and his employment commenced on 22 May 2011. The agreement provided that his employment was for a minimum term of three years with the option for the Respondent to extend that minimum term by one year. The employment could be terminated by either party on six months' notice, such notice not to expire before the end of the minimum term or, if the minimum term was extended, not before the end of such extended term. The Claimant received a sign-on bonus of £90,000 gross and was paid a basic salary of £150,000 per annum. In addition, he was entitled, at the discretion of the Respondent, to participate in its discretionary incentive bonus scheme.

17 In June 2014 the Claimant's employment was extended for a further two years until 30 June 2016. His basic annual salary was reduced to £100,000 per annum with effect from 1 September 2014. The Claimant agreed to the variation of his salary. All the other terms and conditions of his employment remained unchanged.

18 The discretionary bonuses were paid quarterly. The Claimant received a total of £417,000 in 2012, £480,000 in 2013 and £270,000 in 2014. The bonus awards were decided by Danny Fenn, Head of the Fuel Oil desk, and then approved by Jeremy Elliott, Head of Energy, and the CEO. Mr Elliott and the CEO did not closely scrutinise the amount being awarded to each broker and consider whether it was justified, but looked at the awards generally to ensure there was consistency. If anything particularly struck them as being anomalous they would discuss it with the head of the desk.

19 There were about twelve brokers working on the Fuel Oil desk. About five of them had worked previously with Mr Fenn at another firm, where he had been the head of the Fuel Oil desk, and they had all moved to the Respondent together in September 2010 to establish the Fuel Oil desk there. They worked long hours (11-12 hours a day) in a highly competitive, fast-paced and pressurised environment. Shouting and swearing were not uncommon. Mr Fenn had an aggressive management style and he frequently swore at and showered insults and abuse on those whom he felt were not performing to the level that he expected. He was volatile and prone to lose his temper.

20 From around 2012 Mr Fenn regularly referred to the Claimant as "*butters"* (meaning ugly), "*posh twat", "fat"* and *"cunt".* He wrote "*butters*" on the Claimant's

pay slip in July 2013 and *"posh twat"* on his bonus letter in November 2013. From about 2015 Mr Fenn formed the view that the Claimant was not working as effectively as he could be and he became increasingly rude and abusive towards him.

21 On 5 March 2015 Mr Fenn started abusing the Claimant because he had failed to secure a trade. The Claimant tried to defuse the situation by walking out of the room. Mr Fenn rushed at him and tried to grab hold of his shirt to prevent him leaving. There was a physical altercation between them, in the course of which the Claimant's shirt got ripped near the collar. They were separated by two of their colleagues on the desk. Later Mr Fenn wrote in a Yahoo instant messenger conversation with one of his colleagues, "*seb shirt when he gets up, I keep laughing."*

22 In the first quarter of 2015 the Claimant generated less than 60% of his revenue target and was awarded a bonus of £45,000. That was a lower bonus than he had received in any previous quarter since he started employment with the Respondent.

23 In mid-May 2015 the Claimant had a severe Urinary Tract Infection and was absent sick from work for three weeks. Mr Fenn and the Claimant's colleagues on the Desk were sceptical about the nature and severity of his illness. It was unusual for the brokers on the Fuel Oil desk to have long absences for sickness. In the second quarter of 2015 the Claimant generated 42% of his revenue target and received a bonus of £20,000.

24 In the third quarter of 2015 the Claimant generated nearly 63% of his revenue target and received a bonus of £40,000. His revenue generation figures for 2015 and his bonus awards were significantly lower than in the previous years. In the course of conversations about his team with Mr Elliott in September/October 2015, Mr Fenn expressed disappointment with the Claimant's performance which he felt was attributable to him not making sufficient effort.

25 In about September/October the Claimant began to look for work elsewhere because he thought that it was unlikely that his contract would be renewed when it expired in June the following year and because he was unhappy with the work environment on the Fuel Oil desk. At about that time he began surreptitiously recording Mr Fenn when he was rude and abusive towards him. The purpose of doing that was to ensure that he had the evidence in case he needed to threaten or pursue legal proceedings against the Respondent. Mr Fenn and some of the others on the Fuel Oil Desk suspected that the Claimant was looking to move and had conversations about it on the Yahoo instant messenger service. In one conversation Mark Lilley said to Mr Fenn,

> "*mate to be honest best if he goes before you smack him one"*

In another conversation, when Mr Fenn said that he might try and make the Claimant work through his notice period, Michael Palmieri suggested that if he did that the Claimant might try to "record stuff" or "be slippery somehow." Mr Fenn responded,

> "*ill chin the vcunt"* [sic]

26 The Claimant produced three short recordings of Mr Fenn swearing and being abusive to him between October and December 2015. On one occasion the majority of his abuse was directed at another employee.

27 In the final quarter of 2015 the Claimant achieved 56.19% of his revenue target.

28 We did not find the evidence that the Claimant was thinking of suicide on Boxing Day and that his wife was aware of it to be credible for a number of reasons. There was nothing in the Claimant's medical records to show that he saw any health professional about that or any mental health issues before or after that date. The Claimant did not consult his GP at all between 25 March 2015 and 24 February 2016. We think it inconceivable that if the Claimant's wife had had any awareness of suicidal thoughts on the part of her husband that she would not have sought help or insisted that the Claimant consult medical professionals about it. More importantly, on 26 February 2016 the Claimant told his doctor that he had not had any suicidal ideation or desire to self harm for 5 years.

29 On 11 January 2016 Daniel Fenn fractured his left hand and had to wear a plaster cast on his hand to protect it.

30 On 12 and 14 January 2016 Mr Fenn berated the Claimant in front of the whole Desk for not generating revenue. Every second word in his rant was "fuck". He told the Claimant that if he thought that he was going to give him notice and let him stay at home he was mistaken. He said,

> "*so you can sit here and be miserable for 5 months or why don't you sit here for 5 months and make money, why don't you do that, you get paid … you bring in. I don't know why you wouldn't fucking want to make money.*"

He said that the Claimant was the only one on the Desk who did not "*give a fuck"* and asked him why, if he did not want to be on the Desk, he did not do the decent thing and leave.

31 On 28 January Mr Fenn sent an email to the brokers on his desk in which he advised them of their revised monthly targets. The Claimant's monthly target was US$150,000, which was lower than his previous quarterly target of $600,000. He told them,

> "*This is a very important number cause if this is not reached on a QUARTERLY basis you are entitled to ZERO bonus."*

32 Later that morning the Claimant asked Jeremy Elliott if he could have a private word with him and they met the following day. The Claimant told him that he had heard from one of his clients that the Respondent was looking for someone for the Liquid Petroleum Gas ("LPG") desk in London and that he was interested as he thought that his time on the Fuel Oil desk was coming to an end. Mark Mayo, the only broker working on the LPG desk in London, had told Mr Elliott that he needed an experienced broker to join him. Mr Elliott confirmed that they were looking for someone for the LPG desk in London but told him that as the desk was at an early stage of development the likely bonus (based on commission) would not initially compare to the bonus paid on the Fuel Oil desk. The Claimant acknowledged that but was still interested. They discussed whether any of his existing clients would support him and the Claimant said that he felt that some who "traded across the barrel" (traded across a number of different oil products) would. Mr Elliott suggested

that the Claimant discuss that with his customers and that he meet with members of the LPG team who would be in London in the second week of February. The Claimant asked Mr Elliott not to tell Mr Fenn about their conversation.

33 The Claimant had two further discussions with Mr Elliott about the move to the LPG desk in first two weeks of February. He said that he had spoken to some of his clients who had said that they would support him if he moved to the LPG desk. He also met with the LPG brokers from the US and Singapore. Mr Elliott told him that his relationship with Mr Mayo would be crucial to the success of the new LPG desk in London and asked him to spend some time with Mr Mayo to make sure that they could work together.

34 At the beginning of February Mr Fenn decided on the bonus awards for the members of his desk for the last quarter of 2015. Although the Claimant had achieved 56.19% of his revenue target, he decided to award him a bonus of £50,000. Jeremy Elliott and the CEO approved his decision on 12 February 2016.

35 By 23 February the Claimant had generated revenue of $44,976.18. Mr Fenn sent an email to all the brokers on the desk telling them that only two of them had met their targets. He said that the rest of them needed to pull their finger out as laziness would not be tolerated.

36 That morning was fraught as the market was very busy but the Fuel Oil desk was missing more trades than it was getting. Mr Fenn became increasingly frustrated and angry. He shouted and swore at his team in order to try and motivate them to do better. At about 2.30 that afternoon Mr Fenn noticed that one of the trades that the Respondent had missed had involved one of the Claimant's main customers, but the customer had used a competing broker to make the deal rather than the Claimant. He had also noticed that although the other brokers were on the phone and appeared to be trying to get trades, the Claimant appeared to be playing with his mobile phone. Mr Fenn told him not to "*take the piss"* but the Claimant ignored him and continued using his mobile phone. That made Mr Fenn even angrier and he embarked on a tirade of abuse. The Claimant began recording it about a couple of minutes after the abuse began.

37 The Claimant's evidence to us was that prior to him starting the recording Mr Fenn made threats to his wife and children and threatened to slit his throat. We did not find that evidence to be credible. The Claimant made no reference to any threats to his family in his conversations with Mr Elliott on 23 and 24 February, in his grievance of 9 March 2016, in any of his solicitors' letters to the Respondent between 9 March and 22 August 2016, in his complaint to the police, in his claim form to the Tribunal or to his GP or Dr Watts. The first time that he mentioned the threats was in his witness statement prepared for the hearing and even then he was not able to give any details of the threats. We accept that the Claimant made reference to the threat to slit his throat to Mr Elliott on 24 February and thereafter. However, it is not consistent with the kind of things that Mr Fenn said to the Claimant in the recording. Furthermore, Mr Fenn has a tendency to repeat himself and if he had said it in the course of that tirade we would have expected it to have been repeated several times.

38 After the Claimant began recording Mr Fenn told the Claimant to "*fuck off home"* a couple of times, said that they did not need "*fat lumps"* like him around the place and repeatedly called him a "*fucking wuss*" and a "*fucking arsehole"*. The Claimant's

responses (he accepted that he was whatever Mr Fenn called him) and the way he was holding his mobile phone made Mr Fenn think that the Claimant was recording him. He said to him.

> "*you're the type of bloke will fucking sit there and tape someone, I don't give a fuck don't give a fuck. I tell you this now, you will never get a penny off me and you will never get a penny out of the company, you know that I don't give a fuck what evidence you got."*

He said repeatedly that he did not understand why the Claimant wanted to work in that room and told him to go home. In the Fuel Oil room there were two rows of desks facing and adjoining each other and three desks at either end of the rows of desks. Mr Fenn sat on one of the desks facing the Claimant to the left of the Claimant. At that stage in the conversation he got up and ran around the desks to where the Claimant was sitting.

39 His left hand was still in plaster at that time. He leant over the Claimant and snatched his phone with his right hand and turned away from the Claimant and faced the other way while he tried to see whether the Claimant was recording him. The Claimant got up. He was behind Mr Fenn and he put his arms over Mr Fenn's shoulders and tried to get his phone back. There was a struggle between the two men. The Claimant is much taller and bigger than Mr Fenn. In the course of leaning over Mr Fenn from behind the Claimant scuffed the side of Mr Fenn's head. As Mr Fenn knew that the Claimant was recording what was going on, he exaggerated what had happened and is heard saying many times on the tape that the Claimant had punched him on the side of the head. Mr Fenn then turned around and the Claimant was still trying to recover his phone. In the course of the struggle Mr Fenn's arms were flailing and one accidentally hit the Claimant's face in the chin area. He threw the phone on the desk and told the Claimant to "*fuck off home go on home don't come back"*. The struggle lasted about 15 seconds.

40 The Claimant's evidence to us was that he had stood up to take his phone back and that Mr Fenn had turned around, looked him in the eye and had deliberately punched him with his right hand and that it had been "*a proper swinging punch."* We did not find that evidence to be credible for a number of reasons. There was inconsistency between the accounts that the Claimant gave in his witness statement and in cross examination, his demeanour on the tape recording was not that of a man who had been punched in the way that he described, he did not say anything to Mr Elliott about having been punched when he saw him shortly after the incident and there was no credible explanation of his failure to do so and the nature of his injury (a small, barely visible mark) was inconsistent with what he described.

41 Equally we did not accept that Mr Fenn made no contact with the Claimant's face during the brief struggle. The Claimant clearly had a mark, albeit a small and barely visible mark, on his face which his doctor saw a week after the incident. On the recording, when the Claimant said to Mr Fenn "*you just punched me*" Mr Fenn did not deny it but responded "*I retaliated".* Mr Fenn's evidence that that referred to his having shoulder barged past the Claimant after he returned his phone to him was not credible. In the circumstances in which we have found that one of Mr Fenn's arms accidentally hit the Claimant in the face, it is not surprising that that was not seen by the other brokers in the room. The struggle lasted a matter of seconds and the

Claimant and Mr Fenn were very close to each other and, as Mr Palmieri said, "*There were arms flying around everywhere."*

42 Mr Fenn then returned to his desk and the Claimant picked up his bag and left.

43 The Claimant went to see Jeremy Elliott immediately after the incident. He was shaking because he felt that what had happened (his being caught recording and the physical altercation with Mr Fenn in which Mr Fenn was alleging that the Claimant had punched him) could lead to him losing his job. He told Mr Elliott that Mr Fenn had just "*had a go at"* him and he did not know why or where it had come from. He said that Mr Fenn had told him to go home and stay home for the rest of the week. He said that he had recorded the argument. He asked whether they could continue to explore the possibility of his joining the LPG desk. Mr Elliott said that they could and said that he would chase up with Mr Mayo to arrange for the two of them to spend some time together. The Claimant did not say anything to Mr Elliott about Mr Fenn having assaulted him and he did not have any injury that Mr Elliott noticed

44 After the incident Mr Fenn told Emily Gray in HR that he had decided not to pay the Claimant any bonus and that he wanted to stop the payment of the bonus that had been approved. He said that there had been an argument and the Claimant had left the room. The bonus was to be paid with that month's salary, which was due to be processed that day. Ms Gray said that she would contact Ms Poole to see whether that was possible. Ms Gray and Ms Poole both discussed the matter with Mr Elliott, whose view was that the Claimant should be paid the bonus that had been approved. He said that the Claimant's revenue generation was acceptable and not the lowest on the desk, the Claimant had recorded whatever had been said and the Respondent was a bit vulnerable because there was talk outside the company about the way in which Mr Fenn behaved. It was finally agreed that everybody else's pay would be processed that day and that Mr Elliott would speak to Mr Fenn about the Claimant's bonus and the Claimant's pay could be processed later.

45 Later that day Mr Elliott spoke with Mr Fenn and asked him what had happened between him and the Claimant earlier that afternoon. Mr Fenn said that they had been missing deals and he had seen the Claimant playing on his phone instead of working. He had gotten into an argument with him and called him lazy. Something had made him think that the Claimant was recording him on his mobile phone, and he had gone to the Claimant's side of the desk to try and grab the mobile phone. There had been a bit of pushing around and he had grabbed the phone. He had then returned the phone and told the Claimant to leave and not come back. He said that he thought the Claimant should resign because he was sitting back and letting the others on the desk do all the work. Mr Elliott then told him that he had previously been speaking to the Claimant about moving him to the LPG desk and that he would now progress that. Mr Fenn said that he was happy with that but was adamant that he was not going to pay the Claimant any bonus. Mr Elliott made it clear that his view was that the Claimant should be paid his bonus but he accepted that it was ultimately Mr Fenn's decision as Head of the Desk.

46 The following morning Mr Elliott informed Ian Lowitt, the CEO, of what had happened the previous day and of the plans to move the Claimant to the LPG desk. He also told him of Mr Fenn's decision to stop the Claimant's bonus and Mr Lowitt supported that decision.

47 Mr Fenn asked Mr Elliott on instant messenger what they should tell the Claimant's clients. Mr Elliott said that for the moment they should say that he was sick and by the end of the week they would know whether the Claimant was going to move to LPG or not. Mr Fenn also went to see Mr Elliott and said that he had lost his temper with the Claimant the previous day and the Claimant could return to the Fuel Oil desk but he did not think that the Claimant wanted to work there anymore.

48 On the morning of 24 February the Claimant saw his doctor about a skin infection on his stomach. He did not say anything to him about an assault and did not show him any injuries from any assault. He also saw a solicitor and took some legal advice.

49 The Claimant then left messages for Mr Elliott and Mr Elliott called him back at about 3 pm. The Claimant said that he had taken legal advice and that it was a "without prejudice" discussion with regard to potential bullying and harassment. He said that Mr Fenn had hit him the previous day and had threatened to slit his throat. He said that he had been told that that was actual bodily harm and harassment and that he should go the police but that he wanted to talk to Mr Elliott. Mr Elliott said that he would notify HR of what the Claimant had said and that HR would contact him to discuss that. He asked him in the meantime whether he wanted to continue with the move to the LPG desk or to return to the Fuel Oil desk. The Claimant said that he did not think that the latter would work but that he wanted to continue working for the Respondent and wanted to pursue the move to the LPG desk. Mr Elliott said that he would progress that and the Claimant would not have to return to the Fuel Oil desk in the meantime.

50 Mr Elliott spoke to Emily Gray in HR and Hunter Baldwin, the Joint Head of Energy, about his conversation with the Claimant. They were all clearly concerned because they believed that the Claimant had a tape recording which supported his allegations of Mr Fenn threatening to slit his throat and assaulting him. Mr Baldwin's view was that the Claimant would be more likely not to pursue matters if he was offered the LPG role and paid his bonus.

51 At 9.35 pm on 24 February the Claimant sent Mr Elliott an email which was headed "without prejudice" and said,

> "*Thank you for the conversation today it has put my mind at rest somewhat that we may be able to resolve things informally. As you suggest I will talk to Mark as soon as possible (just waiting to hear from him) with a view to moving internally.*
>
> *I really wouldn't want to go to the police at this stage to report the assault or criminal harassment or institute a formal grievance procedure while we think we can deal with this internally and I can be redeployed to LPG. It would be great to sit down as soon as possible and reach an agreement in principle."*

Mr Elliott forwarded that email to Yvonne Poole and Hunter Baldwin. The following day Ms Poole forwarded the email to Steve Sparke and expressed her view which was that Mr Elliott was creating his own Frankenstein and that it could be a problem later. Mr Sparke responded,

> *"Did you get this (and specifically this email) in front of Ian?*
> *In my humble opinion this bloke should not be staying here."*

52 Ms Poole and Mr Elliott met on the morning of 25 February and they agreed that Ms Poole should meet with the Claimant and make it clear to him that the move to LPG and his allegations of assault were unconnected and the that the former was not a reward for keeping quiet about the latter. It was also agreed that Ms Poole would deal with the allegations while Mr Elliott would progress the move to LPG. Ms Poole invited the Claimant to a meeting later that day.

53 They met at about 4pm. Ms Poole told the Claimant that she had been forwarded his email of 24 February and that the meeting was to discuss the incident on the Fuel Oil desk and the intracompany move. She said that she understood from Mr Elliott that the two matters were unconnected and that the Claimant had been in discussions with Mr Elliott for a few weeks about the move. The Claimant told her about his meetings with members of the LPG desk and expressed his desire to move to LPG. The Claimant said that although he was unhappy on the Fuel Oil desk he liked working for the Respondent and wanted to remain in the company. In respect of the incident on the Fuel Oil desk, Ms Poole reminded the Claimant of his right to raise a formal grievance about it. The Claimant confirmed that he did not want to raise a formal grievance but wanted to make a clean start on a new desk

54 The Claimant said that he had been unhappy in Fuel Oil for a couple of years. It was a high pressure environment and the revenue he generated had decreased after he had lost a client for which he blamed Mr Fenn. He also expressed unhappiness that his base salary had been reduced from £150,000 per annum to £100,000. Ms Poole asked him what had happened on 23 February. The Claimant said that he had been sitting at his desk and Mr Fenn had berated him for being lazy. He had used bad language and had said that if the Claimant did not want to be on the Desk, he should go elsewhere. When he had realised that the Claimant was recording the exchange he had run around the desk to grab his mobile. They had fought over the mobile and Mr Fenn had hit him. The Claimant confirmed that he had surreptitiously recorded Mr Fenn and claimed that he had done so to protect himself. When Ms Poole asked him what he meant by that, he responded that he had received advice some time ago and had been told to make recordings.

55 Ms Poole then suggested that if the Claimant was going to continue working for the company it might be a good idea to bring Mr Fenn into the meeting and for the two of them to "*clear the air"*. The Claimant was very reluctant to meet with Mr Fenn and said that he wanted to take advice. Ms Poole insisted that it would be a good idea as the Claimant was likely to come across him even if he moved to a different desk. As the Claimant did not want to do anything to jeopardise the move to LPG he reluctantly agreed. Mr Fenn was brought into the meeting. Ms Poole said that she wanted to give each of them the opportunity to express their views "*to clear the air"*. Mr Fenn told the Claimant that he had not been working hard enough and had sat back and watched while the others in the team were "*breaking their necks to do business"*. He said that he had tried to motivate the Claimant and had looked after him at bonus time but it had made no difference and it had been very frustrating. The Claimant said that he understood why Mr Fenn had been angry but he had been too aggressive. He said, "*I admit I have taken my foot off the accelerator and didn't make enough effort".* They agreed that they wished each other well and that things had got out of hand in the heat of the moment. They both shook hands and Mr Fenn left.

56 The Claimant asked Ms Poole whether he was going to receive his bonus as he had expected it to have been in his account that morning but nothing had been paid. She said that she would make inquiries about it but asked him to bear in mind that he had not reached his targets. They agreed to meet on 26 February for her to answer his query about his bonus.

57 The Claimant met Mark Mayo from the LPG desk that evening and the meeting went well. He sent a text message to Mr Elliott that he had met with Mark and Yvonne and was happy to come in for a chat with him the following day. Mr Mayo also told Mr Elliott that he had liked the Claimant. The Claimant met with Mr Elliott at 2.30 pm the following day. The Claimant said that he had met Mr Mayo and they had gotten on well and he thought that they could work well together. It was, therefore, agreed that the Claimant could move to the LPG desk. He asked for some time off before starting the LPG role as he had a pre-booked holiday. Mr Elliott agreed to that.

58 Ms Poole met with Mr Fenn on the morning of 26 February to discuss the Claimant's bonus. Mr Fenn was adamant that he did not want to pay the Claimant any bonus and justified it by saying that he had not met his targets. Ms Poole pointed out that he had paid the Claimant a bonus before even though he had not met his targets and that that created expectations. Mr Fenn said that he had done so in order to motivate the Claimant and give him an incentive to work harder, but if he was moving to another Desk he did not want to pay him a share of the Fuel Oil desk's bonus to motivate him to work on another Desk. Ms Poole persuaded him pay the Claimant a bonus of £10,000 as a goodwill gesture and to wish him well. Ms Poole was confident that the payment of that bonus and the move to LPG would lead to the Claimant not pursuing his complaints. She sent an email to Messrs Lowitt and Baldwin that she would meet with the Claimant after Mr Elliott had offered him a role in LPG to "*arrange a retraction of any complaint."*

59 The Claimant met Ms Poole after his meeting with Mr Elliott. The Claimant was very enthusiastic about the move to the LPG desk. Ms Poole told him that although he had not met his targets Mr Fenn had agreed to pay him £10,000 as a goodwill gesture. The Claimant was shocked and upset with the bonus being offered; he had been expecting to receive something in the region of £45,000. He felt insulted by the sum being offered to him. He made it clear to Ms Poole that he was very unhappy with the bonus. Ms Poole asked him whether he was happy to accept the offer from the LPG desk and he said that he wanted to think about it and discuss it with his wife. Ms Poole suggested that they met again after the weekend.

60 Later that day the Claimant called his doctor and said that he had been assaulted by a work colleague and was having trouble sleeping and was feeling very anxious. He said that his mood was "not too bad" and that his appetite was affected. He said that he had not had any suicidal ideation or desire to harm himself for five years. The doctor's comment in her notes was "*MSE STABLE with RISK to self LOW.*"

70 The Claimant met with Ms Poole again on 29 February. He said that he remained unhappy with the proposed payment of £10,000 and said that he expected a bonus in line with his previous bonuses. Ms Poole asked him why he thought he deserved a bonus. His revenue numbers were under target and he had admitted that he had not made sufficient effort. The Claimant asked whether the £10,000 was negotiable and Ms Poole responded that it would not change. She asked him whether he was still interested in the LPG role. The Claimant said that he needed to think about it and to

talk to his wife. Ms Poole suggested that they meet the following day between10.30 and 11.30 a.m. by which stage she expected the Claimant to have decided. The Respondent had already drawn up a contract for the Claimant in his new role.

71 The Claimant did not attend the meeting with Ms Poole the following morning. Instead he consulted lawyers and then went to see his doctor. He told the doctor that he was still deeply upset and tearful about recent events and showed him a mark on his chin where he said that he had been punched by his boss. The doctor gave him a medical certificate that he was unfit to work until 15 March because of "*stress at work".* The Claimant sent the medical certificate to Ms Poole and Mr Elliott shortly before 5 p.m. that day. He said that due to ill health he was not in a position to respond to the Company's without prejudice offer (the Respondent had not made any "without prejudice" offer). He also said that he was taking legal advice regarding the bullying and harassment he had suffered at work culminating in a work place assault on 23 February 2016.

72 On 7 March Ms Poole sent the Claimant an email asking him whether he was still interested in the transfer to the LPG Desk.

73 On 9 March 2016 solicitors acting for the Claimant sent the Respondent a letter comprising nine pages. In that letter they referred to the "*criminal assault perpetrated on our client in the workplace when he was punched in the face by his line manager, Danny Fenn, on 23 February 2016."* They said that they had advised the Claimant that he had twelve actionable claims against the Respondent, including a claim for potential constructive unfair dismissal. They then set out in a chronology going back to the start of the Claimant's employment in 2011 49 numbered complaints, one of which was the alleged assault. It was described in the following terms "*Mr Fenn turned around and Mr France stood up and leant across to take his mobile phone from Mr Fenn's hands. Mr Fenn then turned around, made eye contact with Mr France and, deliberately and without provocation, punched him on the left chin."* They asked for the letter to be treated as a formal grievance and identified fourteen employees who should be interviewed. They said that in light of the complaints made about the Head of HR she should not be involved in the investigation of the grievance. The solicitors also said that the Claimant had a pre-booked holiday in South Africa from 20 March to 8 April 2016 and that his GP had confirmed that taking a holiday would assist with his recovery. They said that that absence should be documented as sick leave. They asked the Respondent to communicate with them rather than directly with the Claimant. They said that the Claimant was not in a position to respond as to whether he wanted to move to the LPG desk and his ability to accept another role with the Respondent would depend on whether the proper procedures were followed to resolve his grievance and the outcome of the grievance. They indicated that the Claimant proposed to make a complaint to the police regarding the assault on him.

74 On 11 March the Claimant's solicitors wrote to the Respondent to make a Data Subject Access Request under the Data Protection Act 1998.

75 On 15 March the Claimant saw his doctor. He said that he was not ready to go back to work and was about to go on holiday to South Africa with his family. He said that he was taking legal action and seeing a therapist. The Claimant was prescribed low dosage anti-depressants (10 mg Citalopram). The doctor gave him a medical certificate that he was unfit to work until 1 May 2016 because of "*stress at work".*

76 On 24 March Ms Poole again wrote to the Claimant's solicitors seeking confirmation of whether or not the Claimant was interested in the LPG role, and if he was not, an explanation for his change of heart. The solicitors responded on 29 March that the Claimant was unprepared to proceed with the transfer because the Respondent had failed to investigate his complaints about, or take any disciplinary action, against Mr Fenn, the Respondent had stopped his bonus after he complained of the assault by Mr Fenn and had offered him the derisory sum of £10,000 and it had refused to compensate him for the historical losses that he had suffered as a result of the bullying and harassment by Mr Fenn and the future losses that he would suffer as a result of the move to LPG. They said that as a result of such actions the Claimant had become "*convinced that he had no realistic long term career at the company."*

77 On receipt of that letter Ms Poole realised that it was not going to be possible to resolve the Claimant's grievance informally and she needed to instruct someone to formally investigate it. The Respondent has a small number of senior managers – Mr Lowitt (the CEO), Mr Sparke (the COO) and the Heads of Energy (Messrs Elliott and Baldwin). Mr Sparke had some experience in conducting investigations and hearings and was the person that Ms Poole normally asked to deal with such matters. She, therefore, asked Mr Sparke to investigate the grievance. The email exchange that they had had on 24 February was not uppermost in either of their minds at the time and it did not occur to either of them that that might preclude Mr Sparke from carrying out the investigation because of any actual or perceived bias on his part.

78 On 11 April Mr Sparke wrote to the Claimant's solicitors advising them that he would be investigating and determining the Claimant's grievance. He invited the Claimant to a meeting on 25 April to discuss his grievance and advised him of his right to be accompanied by a trade union representative or a work colleague. He asked the Claimant to deliver any evidence, in particular, the photograph of his injury and the recordings to which his solicitors had referred in their letter, in advance of the hearing. He said that ordinarily he would not be prepared to communicate with solicitors about internal employment related matters but accepted that there might be health related circumstances which required a different approach in the Claimant's case.

79 On 19 April 2016 the Respondent's solicitors responded to the Claimant's Data Subject Access Request. They refused the request on the grounds that it had not been made for a purpose which conformed with the purposes of the Data Protection Act 1998. They set out in detail the legal propositions on which they based their belief.

80 The Claimant made a report of assault to the police on 20 April 2016.

81 On 20 April the Claimant's solicitors (hereinafter referred to a "CB" as short form for Collyer Bristow) wrote to the Respondent that as the Claimant remained unfit to work and was on medication for depression and anxiety, they wanted certain reasonable adjustments to be made to support him to attend the hearing. These were that the meeting should not take place at the Respondent's office but at a neutral venue, the Claimant be permitted to be accompanied by a friend or his wife as he did not have a union representative and had been unbale to identify a work colleague who could accompany him, the meeting start at 10 a.m. rather than the proposed

time of 4 p.m., regular breaks and a confirmation that no one else would be present at the meeting other than Mr Sparke and Ms Bowers from HR. The solicitors also noted that the Claimant was entitled to contractual pay for two months. They contended that as the ill health had been caused by stress/criminal assault at work and the employer's actions, the Respondent should exercise its discretion to continue to pay the Claimant full pay while his grievance was being heard. They informed the Respondent that the Claimant was seeing police officers that day to report the assault.

82 The Respondent's solicitors (hereinafter referred to a "MC" as short form for Memery Crystal) responded on 22 April that the hearing would take place at their offices, would commence at 10 a.m., would be limited to two hours (with a follow up meeting if necessary), that the Claimant could take breaks as and when needed and that no one else would be present other than Mr Sparke and Ms Bowers. They said that the Claimant could attend with his wife or a friend but neither of them would be allowed to attend the hearing. A breakout room would be made available for the companion and that the Claimant could take breaks whenever he wanted to consult with his companion in privacy. In the alternative, the Respondent could suggest a Company employee, who had no connection with the matter, to accompany the Claimant.

83 On 26 April CB wrote that in light of the Claimant's "*disability status*" he had a right to be accompanied by his wife or friend under the Respondent's duty to consider reasonable adjustments under the Equality Act 2010. They did not provide any details or evidence in support of their assertion that he was disabled. They put forward arguments as to why the course proposed by the Respondent was not acceptable.

84 In a response on the same day MC wrote that they noted that CB stated that the Claimant was disabled. They said that the Claimant had, up to that point, suffered a relatively short illness and that it was not obvious that he was disabled. If the Claimant wished to provide information or medical evidence explaining the nature of his disability they would consider it. In the meantime, they considered that their proposals for the Claimant's companion were entirely reasonable. They accepted that the Respondent had a discretion to continue to pay an employee full sick pay once the contractual entitlement to sick pay had been exhausted. In the Claimant's case it would expire on 1 May. In order for it to exercise its discretion in the Claimant's case, it would need to have him medically examined so that a medical report could be obtained. They asked CB to confirm when the Claimant would be able to attend such a medical examination.

85 The Claimant saw his GP on 26 April, who noted that he was "*still anxious"* and on 20mg citalopram. He provided a further medical certificate that the Claimant was unfit to work because of "*stress at work"* for one month.

86 The grievance hearing took place on 29 April 2016. The Claimant attended with his wife who had to remain in an adjacent meeting room. Ms Sparke told the Claimant that he could take a break whenever he wished if he needed to take a break or to consult with her. Mr Sparke then went chronologically through each of the matters in the grievance letter and focused more on the matters where there were specific allegations rather than broad, generalised allegations. Ms Sparke asked the Claimant in respect of one of the earlier allegations why he had not raised them

before with anyone else. After a few questions on this issue the Claimant said that he was not comfortable about being asked "why" constantly during the process. Mr Sparke said that the question arose in respect of a number of allegations but he had the Claimant's answer and would not repeat the questions. The Claimant was visibly stressed at certain points, such as when he dealt with the complaints about Mr Fenn's conduct at the time of his wife's miscarriages, but was generally engaged and articulate and able to answer all questions. He took breaks at 10.45 (10 Minutes) and at 11.30 (15 minutes). After the break the Claimant indicated that he could go on a little longer than the two hours that had been agreed but not for much longer. The meeting stopped at 12.10. By that stage they had got to point number 32 in the Claimant's grievance. It was agreed that another meeting would be arranged to go through the rest of it.

87 The meeting reconvened on 5 May 2016 at 11.30 a.m. The Claimant attended again with his wife who had to remain in the adjacent meeting room. Mr Sparke picked up from where he had left off in the previous meeting and they continued to go through the Claimant's grievance. The Claimant took one short break. He was able to answer all the questions that were put to him.

88 On 5 May 16 the Respondent wrote to the Claimant that as from 1 May 2016 he would be paid Statutory Sick Pay.

89 On 13 May 2016 Mr Sparke sent the Claimant a seventeen page letter setting out his preliminary response to the Claimant's grievance. Six of the matters raised in the grievance related to three allegations of assault against Mr Fenn (ripping his shirt on 5 March 2015, throwing a bottle of water at him on 16 December 2015 and punching him and threatening his family on 23 February 2016). Mr Sparke was aware from a letter from CB that the Claimant had reported assaults by Mr Fenn to the police but not of the details of the complaint to the police. Mr Sparke had not encountered this situation before and took advice from the Respondent's solicitors. In reaching his decision he took into account and balanced a number of factors, which he set out in some detail in his letter. Having done so, he concluded that running a parallel internal investigation could prejudice the police investigation and any subsequent proceedings and he, therefore, decided to adjourn any internal investigations pending the conclusion of the police investigation.

90 In respect of some of the grievances he concluded that no further action was necessary because the Claimant had confirmed at the hearing that they were there to set the context rather than specific complaints or they were a generalised summary of matter which later appeared as specific complaints. This applied in the case of complaint numbers 1, 2, 3, 4, 9, 34, 40 and 45.

91 In respect of some of the grievances Mr Sparke had been able to reach a decision, to dismiss or uphold them, on the basis of what the Claimant had said at the hearing or the evidence that he had provided. He dismissed numbers 6, 7, 8 16, part of 17, 36, 48 and part of 49 and upheld numbers 20, 33 and 35. Where he dismissed grievances he gave reasons why he had done so. For examples, numbers 6, 7 and 8 related to the Claimant's wife miscarrying and having other medical issues in August 2012. His complaint was about one remark made by Mr Fenn and the Claimant feeling that he could not take time off for ante-natal appointments and to be in hospital with his wife. The Claimant's account was that Mr Fenn did not know that his wife had miscarried or that she had the other medical issues. The Claimant had not suggested that he had asked for time off and that it had been refused. The

complaint related to something that had happened four years earlier. Mr Sparke dismissed some of the grievances pending receipt of further information or evidence from the Claimant. This applied in the case of numbers 5, 11, and 21.

92 He upheld the following grievances:

a. Mr Fenn had referred to the Claimant's main contact at one of his biggest clients as "*Dappy"* and that it was inappropriate to do so.
b. On 14 October 2015 Mr Fenn told the Claimant that there would be no loss to the Desk if he left and that he should go to BGC.
c. On 20 October 2015 Mr Fenn told the Claimant that he clearly did not want him there "*as I don't respect the way you work"* and suggested that he should leave if he did not want to be there.

93 The remaining grievances (about half of the original 50) were to be investigated. Mr Sparke set out in respect of each of them the investigation that would take place. That involved interviewing Mr Fenn, Ms Poole, Mark Lilley, David Weatherstone, Fawad Bhatti and Jeremy Elliott, the Claimant providing further information, Mr Sparke checking HR records, Octopus and certain recordings.

94 On 19 May 2016 CB wrote to MC to complain about Mr Sparke's decision to adjourn investigation of the assault allegations and Mr Sparke having determined some of the grievances without having determined the other allegations and the complaint of a sustained campaign of bullying and harassment over a number of years. They pointed out that the police investigation could take months to conclude and said that the Respondent's decision not to investigate and determine the assault allegations was solely an unreasonable delaying tactic. They said that any reasonable employer would suspend Mr Fenn and fully investigate the serious allegations in view of the employer's duty of care to its staff. They added further grievances, namely the response to the Claimant's DSAR request, the failure to pay him full sick pay after 1 May 2016 and the inappropriate manner of delivering the letter notifying the Claimant of the cessation of his full sick pay.

95 At about the same time the police informed the Claimant that no one on the Fuel Oil desk had corroborated his complaint of the assault. On 20 May the Claimant went to see his GP. The doctor noted "*Really not coping at all and panic attacks and tears+++ Barely able to function .. police been to interview the Boss who denies everything and claims Sebastian assaulted him."* His GP referred him to a doctor at the Priory.

96 The Claimant first saw Dr Watts, Consultant Psychiatrist, at the Priory on 24 May 2016. On 6 June he was admitted as an inpatient and was discharged on 17 June 2016. In a report dated 29 June 2016 Dr Watts wrote that he had treated the Claimant for anxiety and depression and that in his opinion the Claimant also had an underlying post-traumatic stress disorder. He said that the Claimant's depression had developed gradually and increased in severity over a period of time and that as a result it was difficult to state when it commenced. He said that the Claimant had had biological symptoms such as sleep disturbance for over a year. It was difficult to be precise about the onset of the anxiety symptoms but they had been occurring for several months. He also said that he believed that the Claimant's mental health had deteriorated and he had developed a psychiatric illness as a result of the work based stress which he had experienced "*principally coming from one person at work."*

97 Mr Sparke interviewed Daniel Fenn (on 23 May and 2 June 2016), Yvonne Poole (on 23 May 2016), Mark Lilley (on 24 May and 2 June 2016), Jeremy Elliott and David Weatherstone (on 24 May 2016) and Fawad Bhatti (on 27 May 2016). Caroline Bowers took notes of the interviews. Assisted by a colleague in the Respondent's Legal and Compliance team Mr Sparke reviewed a variety of documents such as financial information, HR records, HR notes, instant messenger chat logs and text messages.

98 On 27 May CB wrote to MC that the Claimant's health had significantly and rapidly deteriorated and that he was, therefore, unable to provide the further information that had been requested by Mr Sparke. They said that the Claimant had been referred to a consultant psychiatrist at the Priory Hospital who had diagnosed him as suffering from post-traumatic stress disorder and severe depression caused by bullying, harassment and assaults in the workplace. On 1 June the Claimant's doctor certified him as unfit to work from 17 May to 29 June because of *"depression and PTSD work related stress".*

99 As Mr Sparke did not know when the Claimant would be well enough to provide the further information, he decided that he would reach a decision on the material that he had rather than delay the outcome of the grievance indefinitely. On 3 June he sent to CB his decision on the remaining grievances that he had said that he was going to investigate. He enclosed documents that he referred to in his decision.

100 In addition to the grievances that Mr Sparke upheld on 13 May, he upheld the following grievances:

a. Mr Fenn wrote "*posh twat"* on the Claimant's bonus letter on 18 November 2013 and his pay slip on 25 November 2013 and "*butters"* on his pay slip on 25 July 2013. He concluded that it was not appropriate conduct but that it had not been intended to be malicious and was part of the general "banter" on the Desk.
b. As a result of the Claimant making inquiries of HR in June 2015 Mr Fenn said to the Claimant, "*Have you been minging to HR? You are a minge".* He found that those words were unprofessional but not degrading or malicious.
c. He partially upheld the grievance that in almost 5 years of employment the Claimant had only taken 34 days of annual leave. He partially upheld it because the Desk did not properly record annual leave taken. It was, therefore, very difficult for him to determine the precise annual leave taken by the Claimant.

He concluded that he had found that Mr Fenn had used explicit and/or inappropriate language on a number of occasions and had admitted to heated exchanges with members of his team. He said that he would refer the matter to HR to consider disciplinary action against Mr Fenn.

101 He dismissed the remaining 23 grievances. In each case he gave reasons why he dismissed them. Some of these related to events that occurred many years before, there were no documents to support what the Claimant had said and Mr Sparke had not found his account to be credible.

102 On 10 June 16 the Information Commissioner's Office wrote to CB that it had decided that the Respondent had not complied with the Data Protection Act and that it would write to the Respondent to provide a full response and any data they held in respect of the Claimant by 27 June 2016.

103 On 29 June CB sent MC Dr Watts' report of the same date and said that in light of that report the Claimant was clearly disabled within the meaning of the Equality Act 2010 and the Respondent had a duty to make reasonable adjustments. In light of that report they asked that the Respondent reconsider its decision not to pay the Claimant full pay after 1 May 2016. They also informed MC that the police had concluded its investigation and were not going to prosecute Mr Fenn. They said that in those circumstances Mr Sparke should now investigate the assault allegations. They did not consider that a further grievance hearing with the Claimant was necessary as he was not fit to attend such a hearing and might not be for some time and there had already been a delay of almost four months.

104 On 1 July 16 MC sent to CB all the documents that it had been able to find in response to the Claimant's DSAR request. The exercise had involved an extensive search of the emails and Instant Messenger records of some twenty employees over a two year period.

105 On 27 July MC responded to CB's letter of 29 June. They said that the Respondent had taken into account Dr Watts' report and had decided against exercising its discretion to pay the Claimant any enhanced sick pay beyond his contractual entitlement. They set out in detail the factors that it had taken into account in reaching that decision. These included the fact that the Claimant's contract provided for full sick pay for twice as long as was given to other employees, the serious nature of the Claimant's illness, Dr Watts' opinion that his current psychiatric illness stemmed principally from his perception of his interaction with Mr Fenn, some of the Claimant's grievances against Mr Fenn had been upheld while others had not, the police had decided not to prosecute Mr Fenn and that while payment of enhanced sick pay would lessen the financial impact on the Claimant of his sickness absence it would decrease the financial incentive for him to return to work. They said that Mr Sparke would investigate the assault allegations if the Claimant still wished to pursue those grievances. In order to commence the investigation, he would need to see the police interviews of all involved and to interview the Claimant. They suggested that the Claimant obtain copies of his interview with the police and said that they would ask the employees who had been interviewed to do the same.

106 On 10 August CB wrote to MC. They said that the Claimant remained extremely vulnerable – he had attempted to commit suicide twice, at the beginning of July and again on 3 August and had been admitted to the Priory as an inpatient between 7 and 15 July. They said that his treatment was likely to come to an end on or around 18 August when the available cover under the medical insurance policy was exhausted. They confirmed that the Claimant still wished to pursue his grievance about the assaults by Mr Fenn and that his wife would request a copy of his statement from the police.

107 MC responded on 16 August that Mr Sparke would investigate those matters but that the first step would be to interview the Claimant, when he was well enough to

participate in such an interview, as he had not previously discussed those allegations with him.

108 On 22 August CB wrote to MC that the Claimant considered that the Respondent's conduct had wholly undermined his trust and confidence in the Respondent. The Respondent had been in repudiatory breach which the Claimant accepted with immediate effect and that he considered himself to be constructively dismissed. They continued,

> "*His treatment by his line manager, Danny Fenn, has been nothing short of outrageous. When our client complained about that treatment, the company immediately sought to quell his complaint, rather than to take it seriously. The handling of his grievance has been unfathomable, all the more so when he discovered (once able to review the documents provided through the subject access request) that, having seen our client's initial written complaint, Mr Sparke himself had expressed his "humble opinion this bloke should not be staying here." He had expressed this view to the Head of Group Human Resources. Shortly after this, he was appointed to consider our client's grievance."*

109 Mr Fenn was given a verbal warning by Ms Poole for the inappropriate and unprofessional language that Mr Sparke had found that he had used.

Conclusions

Protected disclosures

110 In considering whether the Claimant made "qualifying disclosures" in his communications with Mr Elliott on 24 February 2016 and in his solicitors' letter of 9 March 2016, the first issue that we had to determine was whether the Claimant had believed that the information that he disclosed tended to show that a criminal offence had been committed, the health or safety of any person had been endangered or failure to comply with a legal obligation. If the information which the Claimant gave, namely that he had been punched by Mr Fenn, was false he could not have believed that there had been wrongdoing of the kind that he alleges if he knew that the factual basis for it was untrue.

111 We have found that Mr Fenn did not punch the Claimant as alleged by the Claimant in his evidence to us or in his solicitors' letter of 9 March. Any allegations by the Claimant to that effect were untrue and he must have known that they were untrue. We have found that in the course of that brief struggle, with arms flying around everywhere, Mr Fenn accidentally struck the Claimant on the chin. That, however, was not the information which the Claimant gave to the Respondent. We concluded that the Claimant exaggerated what occurred and embellished his account to support his allegation that there had been an assault because he believed that what had happened probably did not amount to an assault. The Claimant did not subjectively believe that the information that he gave tended to show the kind of wrongdoing alleged by him because he knew that the factual basis of that was untrue.

112 The second issue that we had to consider was whether the Claimant reasonably believed that the disclosure of that information was in the public interest even if that

was not his predominant purpose in making it. That involved us asking (a) whether the Claimant believed, at the time that he made the disclosure, that it was in the public interest and (b) if he did, whether that belief was reasonable. In considering the first of those questions, we took into account the circumstances in which the Claimant was hit on the chin and how, when and in what terms he first raised the matter. The Claimant was caught covertly recording Mr Fenn and was accidentally struck on the chin while he was struggling with Mr Fenn to recover his mobile phone. He was extremely concerned that what had occurred could jeopardise his move to LPG. The Claimant made no allegation of assault to Mr Elliott on 23 February. He first made the allegation the following day in "without prejudice" discussions after he had taken legal advice. He made no reference to the struggle between him and Mr Fenn, but simply asserted that Mr Fenn had hit and assaulted him. The gist of what he said was absolutely clear – if the Respondent agreed to redeploy him to LPG, he would not report the matter to the police or institute a formal grievance. The purpose of having "without prejudice" discussions, after the Claimant had sought legal advice, was to try to reach some kind of settlement to protect the Claimant's position (to prevent his dismissal and procure his move to LPG) and to preclude the Respondent from relying upon them in any later legal proceedings.

113 Having taken those matters into account, we concluded that when the Claimant first made the allegation of assault he did so because he believed it to be in his personal interest to do so to secure his employment and his redeployment to LPG. Had the Claimant been concerned about reporting a crime or preventing Mr Fenn being physically violent towards the other members of the team, he would have reported the matter immediately to Mr Elliott, he would not have reported the matter as part of "without prejudice" discussions, he would not have agreed to bury it if he got what he wanted and he would not have waited two months to report the matter to the police. The Claimant could not have raised it in the way that he did if he had believed that it was in the public interest to raise the matter.

114 We concluded that the same applied to repeating that allegation in the Claimant's grievance of 9 March 2016. On that occasion, the Claimant's solicitors gave an account of the assault which was not true. The purpose of raising it as part of the grievance was to obtain a satisfactory resolution of matters for the Claimant. The Claimant did not report the assault to the police until some six weeks after the grievance was raised. The Claimant's grievance was in essence about how Mr Fenn had treated him over a number of years. He raised those matters because it was in his private interest to do so. He was not concerned or thinking about others when he raised all those matters in the grievance.

115 We, therefore, concluded that the Claimant did not make "qualifying disclosures" because the factual basis of what he disclosed was untrue (to the extent that the reality had been embellished and exaggerated) and at the time that he made the disclosures he did not believe that it was in the public interest to do so. In case, we are wrong in that conclusion, we went on to consider whether the Claimant was subjected to any detriments and/or dismissed because he had made the allegations of assault.

Protected Disclosure Detriments

116 The first alleged detriment was the failure to pay the Claimant a bonus for the fourth quarter of 2015. The parties had agreed that the issue to be determined in

respect of this detriment was whether Mr Fenn's decision not to pay the Claimant a bonus for that period was on the ground of the Claimant's allegations of assault on 24 February 2016 or because of the Claimant's conduct of 23 February 2016. It is clear from our findings of fact that the decision not to pay the Claimant any bonus was made by Mr Fenn on 23 February because of what had happened that afternoon and before the Claimant made any allegation of assault. Mr Elliott tried to persuade Mr Fenn that the Claimant should be paid the bonus that had been agreed but Mr Fenn was adamant that he did not want to pay the Claimant that bonus and Mr Elliott recognised that it was ultimately his decision. Mr Fenn's decision was approved by Ian Lowitt, the CEO, the following morning, again before the Claimant made any allegation of assault.

117 The thinking (certainly of Hunter Baldwin and Yvonne Poole) after the Claimant made the allegations of assault was that the Claimant should be paid a bonus because that would probably deter him from pursuing the matter further. Ms Poole managed to persuade Mr Fenn to agree to pay the Claimant a bonus of £10,000 on 26 February.

118 It was clear to us that the decision not to pay the Claimant a bonus was made by Mr Fenn on 23 February before the Claimant made the alleged protected disclosure and because Mr Fenn was angry with the Claimant because of the way that he had behaved that day. We, therefore, concluded that the Claimant had not been subjected to this detriment because he had made allegations of assault on 24 February and 9 March 2016.

119 We have not found that Mr Fenn made comments to third parties in the market that the Claimant had left the Fuel Oil desk because of his "work ethic."

120 The third alleged detriment was the Respondent's failure to pay the Claimant full pay during his sickness absence after he had exhausted his entitlement to contractual sick pay. It was not in dispute that the Respondent had not paid the Claimant full pay after he had exhausted his contractual entitlement to two months' full sick pay. In doing so, the Respondent did not treat the Claimant any differently or any worse than anyone else in the company. The Claimant was paid that to which he was contractually entitled, which was twice the entitlement of his colleagues. His complaint is really that the Respondent did not treat him more favourably than others by exercising its discretion to continue to pay him full pay. It is questionable whether the failure to confer some benefit that is not conferred upon others can be construed as a "detriment".

121 If it did amount to a detriment, we considered whether the Respondent had shown the ground on which it exercised its discretion not to extend full sick pay. It did not exercise its discretion prior to 29 June 2016 because it did not have a medical report which it required in order to consider the matter. It reconsidered the matter upon receipt of Dr Watts' report on 29 June but was not persuaded that there was a good reason to exercise its discretion. The Respondent's solicitors' letter of 27 July 2017 set out the factors that were taken into account in reaching that decision. We were satisfied that those were the reasons for not extending the Claimant's sick pay. There was nothing in the evidence before us to indicate that had the Claimant not made the allegations of assault the Respondent would have exercised its discretion any differently.

122 The Claimant's Subject Access Request was refused on 19 April 2016 because the legal advice was that the Respondent did not have to comply with it because it had been made for a purpose which did not conform with the purposes of the Data Protection Act 1998. It was an extensive request and the Respondent was not prepared to embark on it in circumstances where their lawyers advised them that they did not have to. Once the ICO ruled that the Respondent had to comply with the request, it carried out the extensive search that was required and fully complied with the request on 1 July 2016. There was no evidence before us to indicate that the Respondent's initial refusal to comply with the request had anything to do with the fact that the Claimant had made allegations of assault against Mr Fenn.

123 We then considered whether the Respondent's handling of the Claimant's initial complaint of assault and his subsequent grievance amounted to a detriment and, if it did, whether it was on the ground that he had made a protected disclosure, i.e. had told the Respondent that Mr Fenn had assaulted him.

124 It is correct that the Respondent did not start a formal investigation as soon as the Claimant alleged that he had been assaulted by Mr Fenn. The reason for that was the way in which the Claimant approached the matter. He made the allegation in the course of "without prejudice" discussions. He made it clear that he did not want to make raise a formal grievance but wanted to resolve things informally. It was not the Respondent who decided that the Claimant had to move to LPG because of the allegation. The Respondent was happy for him to return to the Fuel Oil Desk if that was what he wanted. It was the Claimant who wanted to move to LPG. It was not the Respondent who linked the move to LPG to the Claimant not pursuing his allegations. It was at pains to make it clear that the two were not connected. It was the Claimant who first made that link by stating in his email of 24 February that he would not report the assault to the police or raise a formal grievance if he could be redeployed to LPG. The Respondent was naturally concerned about the allegation and wanted to accommodate the Claimant as much as it could if that would prevent him taking matters further. That led to his bonus being increased from nil to £10,000. We do not consider that the Respondent subjected the Claimant to a detriment by responding to his complaint initially in the way that it did. Its reaction was largely dictated by how the Claimant approached it.

125 The Claimant also makes a number of complaints about the grievance process. The first is that Mr Sparke was an inappropriate person to determine the grievance because when he had first been made aware of the Claimant's allegation of assault his reaction had been that the Claimant *"should not be staying here."* It was submitted on behalf of the Claimant that that was the very reason that he had been appointed. We do not accept that that was Mr Sparke's reaction to the Claimant complaining about an assault. It was his reaction to the Claimant threatening to report an assault to the police and to raise a formal grievance if he was not given the internal move that he wanted. We have found that Mr Sparke was appointed to investigate the grievance because Ms Poole thought that, in light of his experience and seniority, he was the best person to investigate it. He was appointed, not because of the views that he had expressed, but because over six weeks later neither of them had those views uppermost in their mind and did not consider that it precluded Mr Sparke from investigating the grievance. We accept that ideally someone else should have investigated the grievance because even if there was no actual bias there would be a perception of bias.

126 The second is that Mr Sparke did not investigate any of the Claimant's complaints of assault or the verbal abuse that took place at the same time as those assaults in his grievance. The Claimant contends that that was because the Respondent never had any intention of dealing with his complaints of assault. By the time that Mr Sparke came to investigate the Claimant's grievance, he was aware that the Claimant had reported assaults by Mr Fenn to the police but was not aware of the details of the matters that had been reported. It was a novel situation for him. He sought legal advice. He took into account and balanced a number of factors and came to the conclusion that running a parallel internal investigation could prejudice the police investigation and any subsequent proceedings. Whether he was right to come to that conclusion or could have approached matters differently is not the issue. We are satisfied that that was the reason he did not investigate the assault allegations and the surrounding circumstances, and it was not because the Claimant had made allegations of assault. It would have been artificial to separate the surrounding circumstances (the verbal abuse on those occasions) from the alleged assaults and to investigate them but not the assaults. Once the police investigation had been concluded, Mr Sparke was prepared to investigate the assault allegations but he felt that he needed to interview the Claimant in respect of them and to obtain the police interviews.

127 The third is that Mr Sparke did not approach matters in a fair and open-minded way. We do not accept that that is a valid criticism. Mr Sparke was dealing with a grievance spanning nearly five years of the Claimant's employment with the Respondent and comprising forty-nine complaints, to which three additional complaints were added on 19 May 2016. Mr Sparke dealt with each of those complaints. He conducted two interviews with the Claimant and interviews with six employees including Mr Fenn. Notes were taken of those interviews. He looked at other documents (or had others inspect them for him). He gave reasons for the conclusions he reached on each of the Claimant's complaints. It is possible that Mr Sparke could have conducted a more thorough and in-depth investigation of some of the matters, but his task was not helped by the fact that many matters had been raised for the first time several years after the alleged acts took place, the Claimant was not able to give specific dates and there was no documentary evidence available in respect of them. Although Mr Sparke upheld some of the Claimant's allegations about what Mr Fenn had called him or said to him, and considered that his conduct had been unprofessional and inappropriate, he concluded that he had not been degrading or malicious. We found that the Respondent knew that there were problems with Mr Fenn's management style but that its criticisms of him were muted and tempered because he ran a successful desk that generated a lot of revenue and it did not want to lose him.

128 Having considered the matter carefully, we concluded that the Respondent did not subject the Claimant to a detriment in the way that it handed his complaint and grievance. More importantly, whatever flaws there were in the grievance process, they were not attributable to the fact that the Claimant had made allegation of assault against Mr Fenn.

129 We, therefore, concluded that if the Claimant did make protected disclosures on 24 February and 9 March 2016, the Respondent did not subject him to any detriments because he made those protected disclosures.

Unfair dismissal

130 The Respondent conceded unfair dismissal on the basis that Mr Fenn's abusive and insulting conduct amounted to a repudiatory breach of the Claimant's contract of employment and that the Claimant accepted that repudiatory breach by resigning on 22 August 2016. The issues for us to determine were (a) what caused the Claimant to resign (b) whether those matters, on their own or with other matters, amounted to a repudiatory breach and (c) if they did, why the Respondent had behaved in that way (in particular, whether it had done so because the Claimant had made protected disclosures).

131 We concluded that there were two acts that led to the Claimant resigning - the abusive conduct of Mr Fenn and the Respondent's decision to pay the Claimant a bonus of £10,000 for the fourth quarter of 2015, which was communicated to the Claimant on 26 February. Prior to that the Claimant had made it clear that he wished to continue working for the Respondent as long as he could move to LPG. After the communication of that information, the Claimant no longer wanted to pursue the move to LPG or to continue working for the Respondent. It was clear that the reason for the change in attitude was the decision to pay him a bonus of £10,000. After that information was conveyed to him on 26 February he told his doctor for the first time about the assault and the impact that it was having upon his health, began a long period of sickness absence on 1 March and on 29 March his solicitors informed the Respondent that he was convinced that he had no realistic long term career at the company. The reasons given for that included the "*derisory"* bonus of £10,000 and the failure to compensate him for his historical losses due to the bullying and harassment of Mr Fenn and his future losses which would result from the move to the LPG. It was clear from that that what the Claimant wanted to achieve from the grievance was a higher bonus and a sum of money to compensate him for losses past and present. He was never going to be satisfied with the outcome of the grievance unless it included those financial elements. The grievance was pursued to achieve the financial settlement that the Claimant was seeking.

132 It was arguable that the decision to pay the Claimant a bonus of £10,000, in circumstances where the figure of £50,000 had been decided upon as being the appropriate figure by Mr Fenn and had been approved by senior managers, just because Mr Fenn was piqued by the Claimant recording his inappropriate behaviour, amounted to a repudiatory breach. That, however, does not assist the Claimant because we have found that the decision to reduce the bonus was made before alleged protected disclosure and not because of it.

133 We did not find that any other conduct of the Respondent amounted to a repudiatory breach.

134 In the absence of the Claimant having resigned in response to conduct by the Respondent, which amounted to a repudiatory breach and which had been caused by the Claimant having made a protected disclosure, there was no basis for concluding that the principal reason for the dismissal was that the Claimant had made protected disclosures.

Disability Discrimination

135 It was not in dispute that the Claimant is now disabled by reason of post-traumatic stress disorder, severe depression and anxiety. The first issue for us was when he became disabled. The first contemporaneous medical evidence of the Claimant having any mental health issues was his call to his doctor on 26 February 2016 when he told him that he was feeling very anxious, was having trouble sleeping and his appetite was affected. On 29 February he told his doctor that he was deeply upset and tearful about recent events at work and was certified as unfit to work for two weeks for "*stress at work".* On 15 March he was prescribed a low dosage of anti-depressant medication and certified as unfit to work for a further six weeks for the same reason as before. Between 20 March and 8 April 2016 he was on holiday with his family in South Africa. On 26 April the Claimant told his doctor that he was still anxious and he was certified as unfit to work for a further one month for "*stress at work".* On 20 May 2016 the Claimant's mental health deteriorated rapidly and significantly when he realised that it was unlikely that the police would prosecute Mr Fenn for assault. In his report dated 29 June Dr Watts diagnosed the Claimant as suffering from post-traumatic stress disorder, depression and anxiety. He said that the depression had developed gradually and increased in severity over a period of time. He said that the anxiety symptoms had been occurring for several months. Dr Watts' reports of 29 June 2016 and 28 March 2017 were written without his having had access to the Claimant's GP records.

136 It is difficult from that medical evidence to reach a conclusion about the precise date when the Claimant first suffered from depression and anxiety and when he became disabled as a result of it. It appeared to us from the evidence that the Claimant's depression and anxiety began at about the end of February 2016 and that it began to have a substantial and adverse impact on his normal day to day activities sometime after that. It is clear that by 20 May 2016 he was not able to function at all. We concluded that the Claimant became disabled at some stage between the end of February and 20 May 2016 but we cannot give a more precise date as to when the disability commenced.

137 We then considered whether the Respondent knew or could reasonably have been expected to know that the Claimant was disabled before 29 June 2016 and, if so, by when. Prior to receipt of Dr Watts' medical report on 29 June 2016 the only medical evidence that the Respondent about the Claimant was that he was unfit to work because of stress at work. The Claimant's sickness absence form work had commenced on 29 February. It was the first time that he had had any sickness absence for mental health reasons and the periods for which the certificates were given had varied from two to six weeks. The Respondent knew that the Claimant had gone on holiday to South Africa from 20 March to 8 April.

138 We did not consider that the Claimant's solicitors' letter of 20 or 27 April 2017 would have given the Respondent actual or constructive knowledge of the Claimant's disability. By that stage the Claimant had been absent sick from work for less than two months and had had the holiday in South Africa. Although the solicitors referred to the Claimant being on medication for depression and anxiety, no medical evidence was provided to support that he suffered from those conditions and their impact upon him. We concluded, however, the Respondent could reasonably have been expected to know by the Claimant's solicitors' letter of 27 May 2016 and the Claimant's medical certificate of 1 June that he was disabled. By the time that certificate expired the

Claimant would have been off work sick for four months. The Claimant had been referred to a Consultant Psychiatrist who had diagnosed him as suffering from post-traumatic stress disorder and depression.

139 It was not in dispute that the Respondent applied a provision, criterion or practice that the Claimant could not have a non-statutory companion at his grievance interviews on 29 April and 5 May 2016. At the time that it did so, it did not know and could not reasonably have been expected to know that the Claimant was disabled. Hence, the Respondent did not have a duty to make reasonable adjustments. In any event, the Respondent did make some adjustments in connection with that PCP – the Claimant was permitted to be accompanied by his wife, she was in a room adjacent to the one where the interview took place and the Claimant was permitted to have access to her whenever he wanted. We were not satisfied that those arrangements put the Claimant at a substantial disadvantage in comparison with persons who did not have his disability.

140 It is not in dispute that the Respondent's normal practice was to pay full pay for sickness absence for the period for which the employee was contractually entitled to it but that it would, in appropriate circumstances, exercise its discretion to pay it for a longer period. That practice did not put the Claimant at a substantial disadvantage in comparison with persons who were not disabled. Nor did the Respondent's failure to exercise its discretion to continue to pay the Claimant full sick pay place him at a substantial disadvantage in comparison with persons who were not disabled but were absent sick for long periods and had a mental health impairment. Most employees would find a drop in their monthly income stressful and difficult. It is difficult to see why it would be reasonable to pay someone who was disabled by reason of a mental impairment higher sick pay than someone who had a mental impairment but was not disabled or someone who was disabled by reason of a physical impairment. We, therefore, concluded that the Respondent's practice in respect of sick pay did not place the Claimant at a substantial disadvantage in comparison with persons who were not disabled.

141 The Claimant's solicitors' first request for the Claimant to be paid full sick pay in excess of his contractual entitlement was made on 20 April 2016 on the basis that his ill health had been caused by stress or criminal assault at work. At that stage the Respondent had no actual or constructive knowledge of disability. Its response was that it would need a medical report in order to consider the request. That request was repeated on 29 June 2016 when the Claimant's solicitors disclosed Dr Watts' report. The Respondent reconsidered the issue in light of that report and responded on 27 July 2016. There is no basis for concluding that any delay between 29 June and 27 July 2016 placed the Claimant at a substantial disadvantage in comparison with person who were not disabled.

142 The Respondent investigated all the Claimant's grievances other than the ones that it believed related to matters that he had reported to the police. The Claimant was given the final outcome on all those matters by 3 June 2016, nearly three months after the grievance was first raised. It might have been possible to have concluded it a little quicker but in light of the number of grievances and the period of time they covered, three months was not wholly unreasonable. The Respondent's decision to postpone the investigation of the assault related matters until the conclusion of the police investigation was understandable and not unreasonable. It was prepared to investigate those matters after the conclusion of the police

investigation. We were not satisfied that the decision to postpone the investigation of the assault-related matters until after the conclusion of the police investigation placed the Claimant at a substantial disadvantage in comparison with person who were not disabled.

Employment Judge Grewal
26 October 2017