EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr S Furey		Emagine Consulting Ltd

Heard at: London Central **On**: 27, 28 and 29 September 2017
2 October 2017
(16 October 2017 in Chambers)

Before: Employment Judge Baty
Mr M Ferry
Dr V Weerasinghe

Representation
For the Claimant: Ms E Sole (Counsel)
For the Respondent: Mr S Margo (Counsel)

RESERVED JUDGMENT

1 The unanimous decision of the Tribunal is that the Claimant's complaint of unfair dismissal succeeds.

2 However, the Tribunal by a majority (Employment Judge Baty and Mr Ferry) also makes findings that the compensatory award for unfair dismissal be reduced by 100% under the principles in Polkey v AE Dayton [1987] IRLR 503 HL and that both the basic and compensatory awards be reduced by 100% due to contributory conduct by the Claimant. (The minority view (Dr Weerasinghe) is that the basic award should be reduced by 15% and the compensatory award by 30%.)

3 The unanimous decision of the Tribunal is that the Claimant's complaints of disability discrimination (direct discrimination and discrimination arising from disability), wrongful dismissal, and breach of contract/unlawful deduction from wages in relation to an alleged commission/bonus payment all fail.

4 The Claimant is requested to reply to the Tribunal's requests in the last three paragraphs of the attached reasons regarding whether a remedies hearing is necessary.

RESERVED REASONS

The Complaints

1. By a claim form presented to the Employment Tribunal on 27 February 2017, the Claimant brought complaints of disability discrimination (direct discrimination and discrimination arising from disability), unfair dismissal, breach of contract in respect of notice pay, unpaid holiday pay, and breach of contract/unlawful deduction from wages in respect of commission/bonus payments. The Respondent defended the complaints.

2. At the start of this hearing, Ms Sole confirmed that the holiday pay complaint was withdrawn and this complaint was dismissed by the Tribunal.

The Issues

3. The parties had liaised in advance to produce a list of issues of the claim, which was substantially agreed. The Tribunal went through parts of the list of issues with the parties to confirm some of the outstanding points.

4. Ms Sole confirmed that, in terms of the issue of knowledge in relation to the Claimant's alleged disabilities, the Claimant was relying only on the knowledge of Mr Visram, Mr Bodin and Mr Bose.

5. Furthermore, Ms Sole confirmed that, in relation to the direct disability discrimination complaint, the Claimant was relying only on the alleged disabilities of Post-Traumatic Stress Disorder ("PTSD") and Hyperarousal and not on the alleged disability of cancer; by contrast, in relation to the discrimination arising from disability complaint, the Claimant was relying on all three of the above alleged disabilities.

6. Having taken instructions, Mr Margo confirmed that the alleged disability of cancer was not admitted. There was some discussion about whether or not the issue had been addressed in previous correspondence but Ms Sole conceded that there had been no prior admission by the Respondent in relation to the alleged disability of cancer.

7. The representatives having taken instructions, some changes were made to the issues of the commission complaint (which were agreed). It was also confirmed by Ms Sole that the commission complaint was an unlawful deduction from wages complaint and a breach of contract complaint and Mr Margo agreed to this.

8. It was also agreed with the Tribunal that, whilst this hearing would deal with issues of liability and would not consider the majority of issues relating to remedy, it would for the purposes of the unfair dismissal complaint consider issues of contributory conduct and reductions under the principles in Polkey v AE Dayton [1987] IRLR 503 HL**,** as the findings of fact on these issues naturally flowed from the evidence on liability.

9. The issues were agreed on this basis. The agreed issues are set out below:

Disability (s.6 Equality Act 2010 ("EA")

1. Was the Claimant a disabled person within the meaning of the s.6 EA at all material times i.e. from 23 March to 23 November 2016[1]?

    a. Did the Claimant suffer from the following impairments:
        i. Cancer;
        ii. Post-traumatic stress disorder ("PTSD"); and
        iii. Hyperarousal

    b. Did the impairment(s) at ii and iii (i being a deemed disability) have an adverse effect on the Claimant's ability to carry out normal day-to-day activities?

    c. Was the adverse effect substantial?

    d. Was it long-term?

Knowledge (schedule 8 EA)

2. If the Claimant was disabled then did the Respondent know, or could it reasonably have been expected to know, that the Claimant had either PTSD and/or Hyperarousal and/or Cancer and if so, from what date?

Direct disability discrimination (s.13 EA)

3. Was the Claimant treated less favourably by the Respondent than:
    a. Jamie Michalle (Partner Manager (Recruiter)) (see paragraph 20 of the Particulars of Claim);
    b. And/or in the alternative a hypothetical comparator where the relevant, similar material characteristics are an employee who:
        i. was a high performing sales person, whom the Respondent had no capability concerns about;
        ii. was alleged to have engaged in misconduct and was the subject of disciplinary proceedings (having not been subject to any formal disciplinary proceedings previously) in which he/she admitted to some of the facts on which the allegations were based and provided an explanation for the same but denied the Respondent's characterisation of the same as gross misconduct.

    in that the Claimant was dismissed and the actual and/or hypothetical comparators were not or would not have been?

4. Were the comparators (Jamie Michalle or the hypothetical comparator identified in 3.b. above) in materially the same circumstances, save for the protected characteristic (disability)?

[1] The earliest potentially relevant date is 23 March 2016, the date of the text messages to Mr. Visram (erroneously referred to as April 2016 at paragraph 12(iii) of the Grounds of Claim). The last date is the EDT.

5. If so, are there primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of Claimant's PTSD/Hyperarousal?

6. If so, what is the Respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Discrimination arising from disability

7. The Respondent admits that the Claimant was dismissed and that this could constitute unfavourable treatment for the purposes of s.15(1)(a) EA.

   Was the Claimant dismissed because of something arising in consequence of the Claimant's disability? The "something arising" as a result of disability, relied on by the Claimant is that he would, on occasion, respond to pressure situations by having severe emotional outbreaks which were characterised by loud venting/ranting, including swearing.

8. If so, was the dismissal a proportionate means of achieving a legitimate aim? The Respondent asserts that:
   a. The legitimate aim was to provide a safe place of work for the Respondent's employees, free from bullying, harassment, aggression, intimidation and obscene language and behaviour;

   b. The dismissal was a proportionate sanction, given:
      i. The severity of the Claimant's misconduct;
      ii. The Claimant's lack of remorse;
      iii. The Claimant's failure to adjust his behaviour in response to earlier warnings.

   c. If the Claimant was disabled then did the Respondent know, or could it reasonably have been expected to know that the Claimant had either PTSD and/or Hyperarousal and/or Cancer and if so, from what date?

Unfair dismissal (Part X Employment Rights Act 1996 ("ERA")

9. What was the reason, or principal reason for the Claimant's dismissal?

   a. The Respondent asserts that the reason was conduct, which is a potentially fair reason pursuant to s.98(2) ERA;

   b. The Claimant asserts that the reason was his disability, or something arising in consequence of his disability and/or was otherwise for an unfair reason.

10. If the reason was conduct:

    a. Did the Respondent believe the Claimant was guilty of the misconduct?

    b. Was that belief based on reasonable grounds?

    c. At the time when the Respondent formed that belief, had they conducted a reasonable investigation?

11. Was the dismissal fair in all the circumstances, within the meaning of s.98(4) ERA? The allegations of unfairness relied upon by the Claimant (as particularised in his Grounds of Claim) are:
    a. The Claimant was not provided with the opportunity to respond to the allegations contained in the Respondent's letter dated 25 October 2016;

    b. The Respondent added additional allegations which were historic and had been resolved;

c. The employees who were interviewed for the disciplinary process:

   i. Were asked loaded and biased questions;
   ii. Did not sign the investigation notes;
   iii. Were not re-interviewed for the purposes of the appeal.

d. The decision was predetermined;

   [The Claimant no longer pursues a separate head of unfairness relating to Nestor's alleged lack of independence.]

e. The Respondent failed to take into account the Claimant's stated mitigating circumstances and a) the dismissal hearing and b) the appeal, namely that he swore and vented frustration because:

   i. He was under stress;
   ii. This behaviour was commonplace within the Respondent's business;
   iii. He suffered from PTSD and hyperarousal.

f. The sanction was inconsistent because:

   i. Another employee was involved in a serious sexual assault incident during a workplace social event and was not dismissed;
   ii. Jamie Michalle was involved in a swearing and bullying incident against another employee but no action was taken.

g. The Respondent did not consider alternatives to dismissal.

h. Dismissal was outside the range of reasonable responses.

Unlawful deductions from wages

12. Was the Q3 bonus for 2016, due in October 2016, properly payable to the Claimant in the sum of £8,000? It is accepted that the Claimant received no monies for the Q3 bonus. The Claimant avers that he was contractually entitled to the same pursuant to his Statement of Main Terms of Employment and reasonably believes that he achieved the required target of £670,623 for 2016 Q3. The Respondent denies that the Claimant was contractually entitled to his Q3 bonus. It is admitted, however, that the Q3 target for the accounts was met.

    The issues to be determined are whether:
    a. the Claimant no longer qualified for his Q3 bonus on the basis of section 8 of the Sales Compensation Plan Emagine 2016? The Claimant avers that section 8 did not disqualify him as he was neither working out his notice pay nor on gardening leave, but was in active employment).
    b. the Claimant was disqualified from receiving his Q3 bonus on the basis that he had stepped down from client management? The Claimant accepts that he moved from account management to Business Development but denies that this disqualified him for his Q3 bonus (there was no variation to the Claimant's contractual entitlement).

Wrongful dismissal claim

13. Was the Claimant's misconduct so serious as to amount to a repudiatory breach of the contract of employment entitling the Respondent to summarily terminate the contract?

Remedy

14. In the event that the Claimant succeeds in his claim(s), what is the just and equitable level of compensation, having regard to:

    a. Whether the Claimant has suffered an injury to feelings;

b. Whether the Claimant has suffered any pecuniary losses, and if so:

   i. Whether the Claimant has taken reasonable steps to mitigate his losses;

   ii. Whether such losses fall to be reduced on ***Polkey*** grounds.

c. Whether the Claimant contributed to his circumstances, such that any award should be reduced.

Claimant's strike-out application

10. At the start of the hearing, after most of the issues regarding the issues had been discussed, Ms Sole made an application to strike out the response on three grounds. She provided a note setting out the bases of her application. The Tribunal adjourned to read that note. In addition, both representatives made oral submissions respectively in support of the application and in opposing the application.

11. The Tribunal adjourned to consider the application and, when the parties returned, gave its decision orally at the hearing.

12. The Tribunal's powers to strike out a claim or response are set out in Rule 37 of the Employment Tribunals Rules of Procedure 2013. Rule 37 states:

> "(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a tribunal may strike out all or part of a claim or response on any of the following grounds -
>
> (a) that it … has no reasonable prospect of success;
>
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
>
> (c) for non-compliance with any of these Rules or with an order of the Tribunal;
>
> …
>
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)".

13. The Tribunal dealt with each of the three strike out grounds in turn.

<u>The Respondent's conduct of the proceedings had been unreasonable in respect of contacting Jamie Bose</u>

14. A witness statement had been produced to the hearing for Mr Jamie Bose, a former employee of the Respondent, who, Ms Sole maintained, was being called by the Claimant as a witness.

15. Witness statements in the case had been exchanged at a very late stage, only the week before the hearing. The fact that Mr Bose appeared to have been called by the Claimant came as a surprise to the Respondent. On

22 September 2016, Mr Alex Visram, the Managing Director of the Respondent, had sought to contact Mr Bose on four occasions. Two were by email, one by text and he also left a short voicemail for him, the contents of which we were not told. The emails simply asked Mr Bose if he was around and the text message simply stated:

> "Bose Visram here. Free for a call. Just want to know if you are aware that SF is calling you as a witness. If you get a min give me a shout please. Hope all good in the Bose household. Hope to speak soon".

16. Ms Sole informed the Tribunal that Mr Bose had subsequently chosen not to attend to give evidence as a result of Mr Visram seeking to contact him. She considered that this was unreasonable conduct and requested the Tribunal to strike out the response on that basis.

17. However, the Tribunal chose not to do so, for the following reasons.

18. There was nothing in the text or the emails to suggest that Mr Visram was intimidating Mr Bose. The emails/text were consistent with the Respondent's position that Mr Visram was simply notifying Mr Bose that he had been informed, to his surprise, that the Claimant was calling Mr Bose as a witness and to check whether Mr Bose was aware of this. There was nothing threatening or intimidating in them. In addition, at the stage that they were written, the witness statements had not been exchanged so the Respondent was not even aware that a witness statement in any form had been produced in relation to Mr Bose.

19. The Tribunal considered that, in retrospect, it may have been unwise for Mr Visram to have contacted Mr Bose (particularly in the light of the strike out application which followed) but that he was not prohibited from contacting him and that it was not unreasonable for him to do so. Mr Bose was a former employee of the Respondent.

20. Furthermore, the Tribunal did not know why Mr Bose did not want to come. He was not even a current employee of the Respondent so there appeared to be no reason before the Tribunal as to what sort of hold Mr Visram might have over him anyway in terms of threatening him. In addition, Mr Bose was not here to tell us why he was not attending the Tribunal. It is far from certain to the Tribunal that Mr Bose's non-attendance was because of the emails/text.

21. Furthermore, as discussed with Ms Sole, the Claimant could have applied for a witness order to compel Mr Bose to attend. The Tribunal indicated that, even at this late stage, it would be prepared to make such an order as, on the face of Mr Bose's witness statement, his evidence appeared relevant, and it would be quite possible for the Claimant to serve that order on Mr Bose in time for him to attend at this hearing.

22. In short, we did not think that there was unreasonable conduct on the part of the Respondent. Even if the conduct had been unreasonable, it would

have been completely disproportionate to strike out the response or, as Ms Sole submitted in the alternative, to prevent Mr Visram from giving evidence.

The Respondent had no reasonable prospect of successfully defending the unfair dismissal claim or the disability discrimination claim in the absence of evidence from the disciplinary decision maker

23. The second basis for the strike-out application was that the Respondent had chosen not to call Mr Mathew Harvey-Jenner, who was a former employee of Nestor Business Consulting ("Nestor"), an independent HR Consultancy which the Respondent instructed in relation to carrying out the investigation and disciplinary and appeal hearings in relation to the Claimant, and who, specifically, had chaired the hearing which resulted in the Claimant's dismissal.

24. However, we considered that it was up to the Respondent to call whichever witnesses it wanted to call. If there was going to be any prejudice in Mr Harvey-Jenner not being present, that prejudice would be to the Respondent and not the Claimant. The Respondent had not called Mr Harvey-Jenner largely because he had left Nestor and it considered that Mr Visram could give the relevant evidence relating to the Claimant's dismissal; furthermore the Respondent did not consider that Mr Harvey-Jenner was relevant to the discrimination claim. In addition we did not accept that, even if Mr Harvey-Jenner was the individual taking the decision to dismiss (and at that stage it was not clear whether he was the decision-maker or whether Mr Visram was the man who made the decision), it necessarily followed that, because Mr Harvey-Jenner was not there, the Respondent had no reasonable prospect of defending any of these complaints. The Judge noted that, in his experience, there had been occasions when a Respondent was able successfully to defend an unfair dismissal complaint even when the dismissing officer was (unusually) not there (as a result of the other evidence before the Tribunal).

25. Therefore, as it could not be said that there was no reasonable prospect of defending these complaints (which was the basis on which this part of the application was made), there were no grounds for strike out and this part of the application was refused.

The Respondent has failed to comply with disclosure orders of the Tribunal

26. The final part of the strike out application related to issues of disclosure. The Respondent had disclosed some additional documentation late, on the afternoon prior to the start of the hearing. The explanation for this was that the late disclosed documents were found on one of the Claimant's laptops which had been reinstated only the day before the hearing by the Respondent. The Respondent had looked at this laptop specifically as a result of the information contained in the Jamie Bose witness statement which, because of the late exchange of witness statements, had only been recently sent to the Respondent.

27. The Tribunal considered that the Respondent should ideally have looked at the laptop earlier on as part of its general duty of disclosure to check whether there was anything relevant on it. However, it accepted that the

Respondent did so in response to the Jamie Bose statement, which it only received recently. Thereafter, having discovered the documentation and considering it relevant, the Respondent had a duty to disclose. We do not, therefore, consider that, even though the Respondent should have looked earlier, its behaviour amounted to unreasonable behaviour.

28. Furthermore, the new documents were not enormous in number by any means, the Claimant was represented, and, given that the Tribunal was to be spending the rest of the first day reading, there was plenty of time for the Claimant's counsel to take instructions in relation to these documents. We therefore did not accept the submission that a fair trial was no longer possible as a result of this late disclosure of documentation.

29. For these reasons, we did not allow the strike out application in relation to the late disclosure.

30. We also note that, whilst it is never ideal, it is not uncommon in Employment Tribunal litigation, for things which perhaps should have been discovered earlier to come to light at a late stage of the proceedings.

31. Following our decision, the Tribunal specifically asked Ms Sole whether the Claimant wanted a witness order in relation to Mr Bose. The hearing adjourned for Ms Sole to take instructions on this. When it reconvened, Ms Sole confirmed that the Claimant did not want to apply for a witness order in respect of Mr Bose. She acknowledged that, therefore, in relation to Mr Bose's written statement, whilst the Tribunal had indicated that it would read it, less weight could be given to it because of Mr Bose's non-attendance and the fact that he is not here to be cross-examined.

32. Furthermore, following the decisions made by the Tribunal, it was agreed that any items of late disclosure could be added to the bundle. Indeed, there was further late disclosure during the case from both parties, and, in relation to that late disclosure, it was agreed between the parties and the Tribunal that the relevant documents could be added to the bundle.

The Evidence

33. Witness evidence was heard from the following:

For the Claimant:

The Claimant himself

For the Respondent:

Mr Jean-Francois Bodin, the CEO of Emagine Group, the French sister company of the Respondent;

Mr Alex Visram, the Managing Director of the Respondent; and

Mr Mark Burley, a Director of Nestor Business Consulting ("Nestor") who chaired the Claimant's appeal against dismissal.

As already noted, a statement was provided to the Tribunal in relation to Mr Jamie Bose. In view of the fact that Mr Bose did not attend the Tribunal, and particularly in light of the fact that the Tribunal was prepared to grant a witness order in respect of him but, despite this offer, the Claimant indicated that he did not want the Tribunal to make such an order, we do not feel that we can place any reliance on the contents of the statement said to be from Mr Bose, and we do not, therefore, give it any weight.

34. An agreed bundle of documents was provided to the Tribunal in two volumes, numbered, eventually after the late disclosure had been added, pages 1-720.

35. In addition, Mr Margo produced a brief opening note with a chronology and cast list attached.

36. The Tribunal read in advance the witness statements and any documents in the bundle to which they referred.

37. A timetable for cross-examination and submissions was agreed between the Tribunal and the representatives at the start of the hearing and was broadly adhered to. However, it was acknowledged from the start that the four day listing was not long enough, in the light of this timetable, to enable the Tribunal to deliberate and come to a decision and therefore the decision would have to be reserved.

38. The conduct of the hearing was for the most part straightforward. However, during the Claimant's evidence the Judge had to intervene on numerous occasions to ask the Claimant to answer the questions directly.

39. Both representatives produced written submissions and then added to them in oral submissions.

The Law

Disability Discrimination

Direct Disability Discrimination

40. Under section 13(1) of the Equality Act 2010 ("the Act"), a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. This is commonly referred to as direct discrimination. Disability is a protected characteristic in relation to direct discrimination.

41. For the purposes of the comparison required in relation to direct discrimination between B and an actual or hypothetical comparator, there must

be no material difference between the circumstances relating to B and the comparator.

Discrimination arising from disability

42. Section 15 of the Act provides that a person (A) discriminates against a disabled person (B) if: (a) A treats B unfavourably because of something arising in consequence of B's disability; and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

43. However, A does not discriminate if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

44. In relation to the above provisions, the burden of proof rests initially on the employee to prove on the balance of probabilities facts from which we could decide, in the absence of any other explanation, that the employer discriminated against the employee. If the employee does so, the burden of proof shifts to the employer to show that on the balance of probabilities it did not so discriminate against the employee. If the employer is unable to do so, we must hold that the discrimination did occur.

Unfair Dismissal

45. The tribunal has to decide whether the employer had a reason for the dismissal which was one of the potentially fair reasons for dismissal within s 98(1) and (2) of the Employment Rights Act 1996 ("ERA") and whether it had a genuine belief in that reason. The burden of proof here rests on the employer who must persuade the tribunal that it had a genuine belief that the employee committed the relevant misconduct and that belief was the reason for dismissal.

46. The Tribunal then has to decide whether it is satisfied, in all the circumstances (including the size and administrative resources of the employer), that the employer acted reasonably in treating it as a sufficient reason to dismiss the employee. The tribunal refers itself here to a 98(4) of the ERA and directs itself that the burden of proof in respect of this matter is neutral and that it must determine it in accordance with equity and the substantial merits of the case. It is useful to regard this matter as consisting of two separate issues, namely:

46.1. Whether the employer adopted a fair procedure This will include a reasonable investigation with, almost invariably, a hearing at which the employee, knowing in advance (so as to be able to come suitably prepared) the charges or problems which are to be dealt with, has the opportunity to put their case and to answer the evidence obtained by the employer; and

46.2. Whether dismissal was a reasonable sanction in the circumstances of the case. That is, whether the employer acted within the band of reasonable responses in imposing it. The tribunal is aware of the need to avoid substituting its own opinion as to how a business should be run for that of the employer. However, it sits as an industrial jury to provide, partly from its own knowledge, an objective consideration of what is or is not reasonable

in the circumstances, that is, what a reasonable employer could reasonably have done. This is likely to include having regard to matters from the employee's point of view: on the facts of the case, has the employee objectively suffered an injustice? It is trite law that a reasonable employer will bear in mind, when making a decision, factors such as the employee's length of service, previous disciplinary record, declared intentions in respect of reform and so on.

47. In relation to the above, the Tribunal must be satisfied that the respondent entertained a reasonable suspicion amounting to a belief that the claimant is guilty of the alleged misconduct. The following test must be applied (see British Home Stores Ltd v Burchell [1980] ICR 303:

47.1. Did the respondent believe that the claimant was guilty of the misconduct alleged?

47.2. Did the respondent have in mind reasonable grounds upon which to sustain that belief?

47.3. At the time the belief was formed, had as much investigation as was reasonable in the circumstances of the case been carried out?.

48. Fairness should be judged at the time of dismissal. However, when considering whether an employer acted reasonably in dismissing an employee, the whole process including any appeal should be considered: see Taylor v OCS Group Ltd [2006] ICR 1602.

49. Guidance on the relevance of comparators and allegations of a disparity of treatment meted out by the employer, was provided by the Court of Appeal in Paul v East Surrey District Health Authority [1995] IRLR 305. Beldam LJ stated as follows at paragraphs 34 – 36:

> *"I consider that all industrial tribunals would be wise to heed the warning of Waterhouse J, giving the judgment of the Employment Appeal Tribunal in Hadjioannou v Coral Casinos Ltd [1981] IRLR 352 where, in paragraph 25, he said:*
>
> > *'"We accept that analysis by counsel for the respondents of the potential relevance of arguments based on disparity. We should add, however, as counsel has urged upon us, that industrial tribunals would be wise to scrutinise arguments based upon disparity with particular care. It is only in the limited circumstances that we have indicated that the argument is likely to be relevant, and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for the argument. The danger of the argument is that a tribunal may be led away from a proper consideration of the issues raised by [s 98(4) of the ERA]. The emphasis in that section is upon the particular circumstances of the individual employee's case. It*

> *would be most regrettable if tribunals or employers were to be encouraged to adopt rules of thumb, or codes, for dealing with industrial relations problems and, in particular, issues arising when dismissal is being considered. It is of the highest importance that flexibility should be retained, and we hope that nothing that we say in the course of our judgment will encourage employers or tribunals to think that a tariff approach to industrial misconduct is appropriate. One has only to consider for a moment the dangers of the tariff approach in other spheres of the law to realise how inappropriate it would be to import it into this particular legislation".'*
>
> *I would endorse the guidance that ultimately the question for the employer is whether in the particular case dismissal is a reasonable response to the misconduct proved. If the employer has an established policy applied for similar misconduct, it would not be fair to change the policy without warning. If the employer has no established policy but has on other occasions dealt differently with misconduct properly regarded as similar, fairness demands that he should consider whether in all the circumstances, including the degree of misconduct proved, more serious disciplinary action is justified.*
>
> *An employer is entitled to take into account not only the nature of the conduct and the surrounding facts but also any mitigating personal circumstances affecting the employee concerned. The attitude of the employee to his conduct may be a relevant factor in deciding whether a repetition is likely.* ***Thus an employee who admits that conduct proved is unacceptable and accepts advice and help to avoid a repetition may be regarded differently from one who refuses to accept responsibility for his actions, argues with management or makes unfounded suggestions that his fellow employees have conspired to accuse him falsely****…."* (emphasis added)

50. In a case concerning a dismissal for gross misconduct, the relevance of warnings lies not in whether they are written or verbal, formal or informal, but in whether the employee had been told that the consequence of further misconduct would be his potential dismissal: see JJ Food Service Ltd v Kefil [2013] IRLR 850 at paragraphs 22 – 23.

51. Under s.122(2) and s.123(6) of the ERA, the Tribunal has a discretion to reduce the basic award and the compensatory award by such amount as is "just and equitable", if the claimant's conduct to any extent caused or contributed to the dismissal.

52. In order for a deduction to be made for contributory fault, the employee's conduct must be culpable or blameworthy: see Nelson v British Broadcasting Corp (No 2**)** [1980] ICR 110.

53. Where the Tribunal finds that there was contributory fault on the part of the claimant it must reduce the compensatory award by such proportion as it considers just and equitable: see Optikinetis Ltd v Whooley [1999] ICR 98.

54. The tribunal must be satisfied on the balance of probabilities that the employee did commit the act of misconduct relied upon by the employer. Thereafter issues as to the percentage of such contribution must be determined.

55. If there has been some procedural or substantive failing by the employer, the Tribunal can make a "Polkey reduction" (Polkey v AE Dayton [1987] IRLR 503 HL) to any compensation to take account of the chances that the claimant would have been fairly dismissed in any event meaning that the failing made no difference to the outcome. The EAT provided guidance on the application of this principle in the case of Software 2000 Ltd v Andrews [2007] ICR 825:

> "*The question is not whether the Tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice*" (at paragraph 53)

Wrongful dismissal/breach of contract

56. As to the wrongful dismissal/breach of contract complaint, where the respondent claims that it was entitled to terminate the contract without notice, it is for the respondent to prove on the balance of probabilities that the circumstances existed, for example gross misconduct on the part of the claimant, which entitled it to do so.

Breach of contract/unlawful deduction from wages/interpretation of contracts

57. In the case of Investors Compensation Scheme Ltd v West Bromwich Building Society [1997] UKHL 28 Lord Hoffmann gave the following well known guidance on the interpretation of contracts:

> *"The principles may be summarised as follows:*
> *(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
> *(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*

> *(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*
> *(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (see Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd [1997] 2 WLR 945*
> *(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents…."*

58. As regards the unlawful deduction from wages complaint, the wages claimed must be "properly payable". To determine whether the commission/bonus provisions were properly payable will require an assessment of the terms of the contract and so the principles above will apply.

Findings of Fact

59. We make the following findings of fact. In doing so, we do not repeat all of the evidence, even where it is disputed, but confine our findings to those necessary to determine any agreed issues.

60. In 2007, the Claimant was treated for a condition in relation to which there was a possibility that it was cancer.

61. We have seen a medical record dated 1 June 2007 in relation to the Claimant which states:

> "Diagnosis: Papillary carcinoma of the thyroid
>
> I recently reviewed Simon in the Head and Neck Clinic. His repeat fine needle aspiration has confirmed papillary carcinoma of the thyroid in a nodule measuring 4 cms. Ultrasound examination of the rest of the neck shows only some small lymph nodes in the anterior cervical chains. I have explained to Simon and his wife the diagnosis and explained that he needs to have a total thyroidectomy and level VI nodal dissection followed by radioiodine and Thyroxine suppression. I have given him a date for the 25th June to have this done. …"

The Claimant duly had the operation.

62. A later letter dated 20 August 2007 from Cyril Fisher MA, MD, DSc, FRCPath, Professor of Tumour Pathology, at the Royal Marsden NHS Foundation Trust, in relation to the Claimant's condition, states:

> "… as you summarise in your letter, this patient had an FNA showing papillary carcinoma but no tumour was found with complete sampling of the excised lesion. While this cannot be proved, it is conceivable that the FNA sampled a very small primary tumour, residue of which are not seen in the histological sections. In the absence of evidence, however, I do not think that this can be stated conclusively. As you know, the cytology was reviewed in the MDT and this seems definite and might be a sufficient diagnosis for insurance purposes even though its source has not been located in the excised specimen. …."

63. We have also seen a letter dated 29 August 2017 (after the termination of the Claimant's employment with the Respondent) from a Dulce Merritt BPC, FPC, TIMP, Psychodynamic Psychotherapist and Couple Psychoanalytic Psychotherapist. Ms Merritt is a Psychotherapist and not a clinician. The letter relates to an earlier period when the Claimant was Ms Merritt's patient. It states:

> "Mr Furey was my patient during four and a half years from 13/11/2007 to 16/7/2012. He was seen in once-weekly psychodynamic psychotherapy.
>
> Mr Furey was referred to therapy in November 2007 following a traumatic sequence of events, which included a diagnosis of thyroid cancer in March, the death of a close friend in June, also from cancer, and an operation to remove his thyroid in July, in which he suffered a near-death experience on the operating table, requiring a emergency intervention including intubation.
>
> Mr Furey presented with severe depressive anxiety and experiencing flash backs, panic attacks, and sudden severe emotional outbreaks consistent with Post Traumatic Stress Disorder, in which the victim can be left with hyper arousal and can experience overwhelmingly emotional reactions to newly traumatic events".

This was not a clinical diagnosis. Mr Furey did not have any further therapy from 2012 onwards, including during the entirety of his employment with the Respondent, but he has returned to therapy with Ms Merritt recently in 2017.

64. The Respondent is the UK arm of an international company, which provides consulting and implementation expertise to companies across a range of sectors. The Respondent specialises in providing IT expertise to companies in the financial services sector, with a particular emphasis on risk and regulation.

65. It is headquartered in the City of London in Gracechurch Street. The Respondent employees 16 core staff.

66. The Managing Director of the Respondent is Mr Alex Visram. He reports to Mr Jean-Francois Bodin, who is the CEO of the Emagine Group. Mr Bodin is French and is based in Paris.

67. The Respondent does not have its own HR Department. It has an outsourced agreement with Nestor, which provides HR support when the Respondent requests it.

68. On 12 June 2013, the Respondent advertised for the recruitment of a Senior Account Manager/New Business Development position. The Claimant applied for this position. He was interviewed by Mr Visram on 5 September 2013. During the interview, Mr Visram was concerned that the Claimant's previous role lasted a short period of time and asked him about this. The Claimant told Mr Visram that his prior employer had sacked him for having cancer. He said that he had been diagnosed with cancer and that he had recovered.

69. A second interview with Mr Visram and Mr Bodin was arranged, which took place on 10 September 2013. There was no discussion of cancer at this interview.

70. Subsequent to the interview, the Claimant was offered the job, which he commenced on 1 October 2013.

71. The Claimant has maintained at this Tribunal that he did inform Mr Visram and Mr Bodin at these interviews that he suffered from PTSD. He also said variously that he told them about his PTSD/mental health issues on other occasions during his employment. However, his evidence on what he said and the extent to which he went into details about his PTSD/mental health issues varied considerably in his cross-examination. Furthermore, there is no contemporaneous documentary evidence to support the assertion that he told Mr Visram, Mr Bodin or anyone else at the Respondent about PTSD/mental health issues either at the interviews or thereafter during his employment and there are no medical records dating from this period in relation to PTSD or other mental health issues. By contrast, Mr Visram and Mr Bodin were clear in their witness statements and during their oral evidence that the Claimant had not mentioned either PTSD or other mental health issues to them either during either of the interviews or thereafter during his employment. It is noticeable that the first documented mention of PTSD by the Claimant was not until after the end of his employment, during his appeal against dismissal. For these reasons, we prefer the evidence of Mr Visram and Mr Bodin and find on the balance of probabilities that the Claimant did not mention PTSD or other mental health issues either during these interviews or thereafter during his employment (until his appeal against dismissal).

72. The Claimant was a very senior individual within the Respondent. He was on a salary which, by 1 April 2016, had risen to £80,000, and was also paid commission and benefits. Whilst the Claimant was a senior employee, by July 2016 he did not have any management responsibility for managing staff.

73. The Claimant was a high performing sales person (and indeed his salary was increased over the years to reflect this). He hit his targets and he had innovative and valuable ideas for generating new business.

74. The Claimant had a tendency to use swearing and foul language in the workplace, both orally and by email.

75. On 6 February 2015, for example, the Claimant emailed Mr Visram about his mobile phone. The email contained swear words, in particular liberal use of the F-word.

76. The Claimant had a poor relationship with a fellow employee, Marc Jeffrey, who found the Claimant's aggressive use of foul language offensive and upsetting. On 21 April 2015, Mr Jeffrey copied Mr Visram into an email he wrote to the Claimant. In that email, Mr Jeffrey wrote that he had chased the Claimant to send an email to which the Claimant responded "I don't give a flying fuck if we don't win that project as its only five days". Mr Jeffrey did not specifically complain about the language in this email, although he was drawing it to Mr Visram's attention. No action was taken.

77. On 2 June 2015, at the point when the Respondent changed offices, Mr Visram sent an email around to the staff which contained an attachment to a BBC2 Comedy Programme. The title in the link to the sketch includes the words "no wanking in the office".

78. This email was included in a late tranche of disclosure from the Claimant which was added to the bundle. Those documents also include lewd and disgusting emails and pictures of the most offensive kind. However, those emails and pictures were all sent amongst a small number of employees at the Respondent, including the Claimant, and were never copied into Mr Visram, who was unaware of them until they were disclosed for the purposes of this hearing. Although the Claimant is copied in on these emails, for the most part they tend to have been sent not by him but by a small number of his work colleagues.

79. On 26 August 2015, Mr Jamie Bose, an employee of the Respondent at the time, sent around a rude joke which contained the F-word. He sent it to the whole office.

80. Mr Visram replied to the whole office:

> "Please note this email is inappropriate and we need to cease this type of email. I do not feel I need to explain why as it is obvious.
>
> I do not expect this going forward.
>
> I trust we are all clear on this. I have also discussed directly with Jamie Bose."

81. On 29 February 2016, Mr Visram was copied into an email from Mr Jeffrey to the Claimant. Mr Jeffrey was upset because of the Claimant's swearing and wrote that:

> "I can't even raise a single work related topic without receiving an avalanche of abuse and expletives and it doesn't exactly do much for morale. …
>
> Do I have to ask you not to be abusive, swear and bitch about the team or I every time I want to discuss an account related topic with you because you cannot handle stress? …

> You called the lady in Procurement a 'fucking bitch' for everyone to hear and wanted to know 'why the fuck are you telling me'. It was so bad that when you left people in the office asked if I was ok and commented that you were way out of line.
>
> I have never worked in an environment where someone is allowed to get away with such foul and abusive language …"

82. By an email of 2 March 2016 to Mr Visram, the Claimant was highly critical of Mr Jeffrey and stated: "I don't trust him. I see him as a threat." In that email, the Claimant recognised:

> "I swear, I sometimes shout, I can be aggressive. We both know that whilst this is true the office recognise my passion, drive, enthusiasm, total support and care for every last one of them".

83. On 9 March 2016, Mr Visram sent a general email around the whole office about office ettiquette. He addressed a number of points. These include:

> "(2) Swearing – I want this to stop irrespective of whether I am in earshot or not. No one likes it and it is unnecessary and does not promote a healthy working environment. For the avoidance of doubt, I swear occasionally (we all do) but it is rather to be the exception rather than the norm and it is not treated as acceptable in any professional environment.
>
> (3) Shouting at people – this is not acceptable under any circumstances …"

84. On 23 March 2016, there was an exchange of text messages between Mr Visram and the Claimant. There had been an incident in the office which the Claimant had had to deal with because Mr Visram was out of the office at the time. He had texted Mr Visram about it and Mr Visram had replied to the effect that they had to work with what they had and that he had too much on his plate at the moment. Following this, the Claimant stated "Fuck You" in a text to Mr Visram. Mr Visram then asked the Claimant whether this was intended and the Claimant confirmed in a further text that it was. Mr Visram then texted him further, stating that:

> "You telling me to fuck off is totally unacceptable. On a personal note, I particularly find it disgusting as I have done nothing wrong to you and always treated you with respect."

85. Later on in the text message exchange there is an apology from the Claimant. However it is a text at time considerably later than the previous text (the following day) and following another string of texts and it is not entirely clear from the sequence of text what it is that the Claimant is apologising for and whether it was the "fuck you" comment or not.

86. On 30 March 2016, Mr Visram sent another email to the whole office, this time entitled "Language". It states:

> "I will NOT accept swearing in the office and it has no place in any professional environment. This is not just about me but people, including myself, don't like it and find it offensive. If you cannot control yourself, walk out and compose yourself."

87. On 6 April 2016, Mr Visram sent a further email to the office regarding "Office behaviour". It states:

> "I have now had discussions with you all about swearing and generally poor office behaviour. I appreciate your support on this topic which I think is important for all people in our company. Thank you for your understanding and support in creating a healthy environment.
>
> If you hear other people swear, it is not your duty to comment so I would rather you should choose to ignore them. If people do not have the ability to articulate themselves without swearing then clearly it reflects poorly on them as individuals along with their inability for communication and need for attention. You are each responsible for administering yourself.
>
> I have been vocal on this topic to all, sat down with you all and all of you appear to understand and agree for the need to apply this to have a professional working environment in which you all play a part.
>
> I trust this is clear to all."

88. On 14 April 2016, Mr Visram met the Claimant along with Mr Bodin for a meeting. It was a lengthy meeting concerning his behaviour. At that meeting, Mr Visram provided a "letter of concern" dated the same date, relating to the text messages and to the Claimant's swearing and aggressive behaviour. The letter states:

> "I refer to our discussion, and following emails sent to yourself and all staff relating to conduct in the office when we discussed my concern regarding unprofessional conduct displayed in swearing in the office and swearing at staff either directly or through direct written communication. I have also communicated the reasonable expectations I have of how we work with each other and communicate with each other. Notwithstanding my continued communication on this topic both written and oral, I have witnessed this continued aggressive behaviour, including a high volume of swearing and lack of respect for your colleagues and your manager. For the avoidance of doubt, there is no justification for this under any circumstances.
>
> Having considered this further, I have decided to take no formal action on this occasion however, you need to be aware that should there be any reoccurrence of such circumstances, I will adopt a formal approach to this matter, including the probability of disciplinary proceedings and dismissal. I sincerely hope that this will not be the case and we can rather focus on how we move forward.
>
> You should not hesitate to seek guidance from me at any time should the need arise but will not tolerate abusive behaviour from you either written or verbal.
>
> Both myself and Jean Francois wish you to be a part of emagine, and to be successful long term in your role, but it is important to us, and emagine, that you are compliant with our expectations on these topics".

89. The Claimant's swearing and general behaviour did improve during the following months.

90. Up until July 2016, there were two aspects to the Claimant's role, namely as a Senior Account Manager and as a New Business Developer. The Claimant wanted to divest himself of his account manager role and to concentrate on business development. The Respondent considered that business development

was the area to which the Claimant's talents were best suited and agreed to this. Therefore, from the beginning of July 2016, the Claimant no longer had an account manager role.

91. The Claimant's contract provides for commission/bonus scheme. These are normally agreed with Mr Visram on a yearly basis.

92. The commission and bonus scheme for the Claimant for 2016 provided for an element of commission and an element of bonus. The commission was in respect of placements which the Claimant might make. The bonus element is set out in the commission/bonus document as being an "account director target".

93. (It is the Respondent's case at this Tribunal that, when the Claimant ceased to be an account director, that account director target and the bonus linked to it lapsed as he was no longer an account director; by contrast, the Claimant maintains at this Tribunal that it continued).

94. One of the reasons why the Claimant dispensed with his account director duties and stuck to the business development role was that he thought that if he focused on placements only and not management, he could make more placements a month, which was logical as the divestment of the account director role freed up 50% of his time. In the end, the Claimant went from an average of 2.6 placements per month to four placements per month as a result and was paid for all of these under the commission element of his scheme.

95. At the Tribunal, Mr Visram gave evidence that there was, in addition, as part of the conversation regarding the change of role in July 2016, discussion between him and the Claimant where it was specifically agreed that the account director targets would fall away with the change of role and the Claimant would no longer therefore be entitled to that bonus. The Claimant denies that such a conversation took place. There is no contemporaneous record of such a conversation. In addition, such a conversation is not referenced in Mr Visram's witness statement. For these reasons, we find that, on the balance of probabilities, the Respondent has not proven that this conversation did take place.

96. By email of 27 September 2016, Mr Bodin emailed a selection of invitees to the Emagine Group's 2016 management meeting, which was due to take place on 8 December 2016 in Paris. This was an important strategic meeting about development of the group going forward. Of the list of invitees, other then Mr Visram, the only other invitee from the Respondent was the Claimant. He was invited at Mr Visram's suggestion. This is an indication that the Claimant was not only someone who had the sort of ideas that would be useful in such a strategy and development meeting but that Mr Visram considered him an important employee of the Respondent who was very much part of the Respondent's business plans going forward.

97. The Respondent's evidence is that Mr Visram had to give the Claimant a further verbal warning on 19 October 2016 for swearing and that the Claimant apologised. The Claimant denies that there was a verbal warning. However,

whilst there is no directly contemporaneous note and the verbal warning was not committed to writing, we have seen contemporaneous documentation evidencing the giving of such a warning on 19 October 2016, in particular the notes of Mr Visram's interview as part of the investigation which took place on 11 November 2016, less than a month after the incident. We therefore consider that, on the balance of probabilities, Mr Visram did speak to the Claimant on 19 October 2016 about swearing at work and that he apologised.

98. Mr Visram was approached, either on Friday 21 or Monday 24 October 2016, by two separate employees of the Respondent, Kevin Hayden and Michelle Page, about the conduct of the Claimant on 21 October 2016. This concerned two separate incidents on that date. Mr Visram had face-to-face conversations with Mr Hayden and Ms Page and asked them to set out their concerns in emails to him.

99. Ms Page's email, of 24 October 2016, included the following:

> "As discussed, SF behaviour on Friday 21 October was once again unacceptable.
>
> Within moments of Kevin sending out the Christmas lunch invitation, Simon threw, what I can only describe as a tantrum!
>
> "What kind of f**king Christmas Party is limited to three f**king drinks vouchers? After all the work we do throughout the year I can't f**king believe that we're only getting three f**king drinks paid for, its supposed to be a f**king Christmas party. After the f**king shit Christmas event last year, where we walked around the f**king City for endless hours and I had a f**king bad back, I thought this year would be different, I'm not f**king attending"
>
> As Kevin was out of the room at time and I do not sit within the main office, I do not know who this was directed at (if anyone) however it was positively aggressive behaviour.
>
> Emma did say: "this is a positive event, it is exciting, it will be fun" which he instantly dismissed with more or less the same wording as before.
>
> To be honest up until the last couple of weeks, he had made a noticeable effort. However, I have seen a decline in his behaviour again with swearing being re-introduced into his daily vocabulary and his tone and general behaviour edging towards aggression (frustration) again. …."

100. Mr Hayden's email of 24 October 2016 is as follows:

> "On Friday 21st October I and the Office were subject to several rounds of aggressive behaviour and gratuitous swearing by Simon Furey.
>
> The first instance was in relationship to the failed payment of his outstanding expenses due to the fact that Alex overturned a decision to fast track his expenses payments and Nora in accounts sending the payment by BACS and not CHAPS which delayed it even further. I heard a similar statement being made at least three times in the office which went something like.
>
> "I had a f**king agreement with Alex that my f**king expenses would be paid early. How the f**k can he renege on our deal when he f**king knows I have no money to survive. I am going to tell him that I will shift my f**king priorities and that I won't be able to entertain clients until I get paid. Doesn't he f**king understand that it impact me and the

> business". That was repeated twice in the office and at lunch in front of other team members.
>
> The second instance I missed the first iteration of his rant but when he came back from a cigarette break he made sure he regurgitated it for my benefit and it went similar to this:
>
> "What is this shit, after last year when we had to f**king walk around in the rain, with little to eat or f**king drink it was a nightmare especially with my bad back I couldn't f**king walk. Now all we get is three f**king drinks to last the whole day, I expect Emagine to fund the whole f**king day, I am not about to spend my own f**king money and if I do go I will be f**king miserable all day and spoil it for everyone else. I'm sorry Kevin I'm not going.
>
> That is about as accurate as I heard it but that was the gist of it.
>
> After he said this and left the room, 3 staff members said to me "they were happy he wasn't going as they felt he would have brought down the mood of the afternoon and evening.
>
> I hope this helps".

101. In relation to the expenses referred to above, Mr Visram had allowed these expenses (even though they were submitted late) and had not reneged on any deal. The delay was an administrative one due to the method of payment.

102. Mr Visram decided that this matter needed to be investigated and decided to use Nestor to investigate the allegations.

103. The Claimant was suspended on 25 October 2016. There were announcements to the staff about the Claimant working from home.

104. Charlotte Bloom of Nestor carried out an investigation. A letter of 25 October 2016 was sent to the Claimant setting out the allegations that would be investigated.

105. Ms Bloom conducted interviews with the following individuals: Lauren Simpson; Kevin Hayden; Emma Walker; James Tucker; Michelle Page; and Mr Visram.

106. An investigation meeting was also conducted with the Claimant on 28 October 2016. The Claimant asked to adjourn the meeting. Subsequently he asked that all of the evidence of the investigation so far be disclosed to him and other things. When his request was turned down, he decided not to attend a further investigation meeting.

107. The witness statements taken in the investigation corroborated the evidence in the emails quoted above in relation to the two incidents on 21 October 2016. Mr Hayden described the Claimant's behaviour as "very loud very aggressive, swearing constantly". He said that he thought that the Claimant personally insulted him. He said that this sort of thing was a regular occurrence, that it was not just swearing but that it was bullying especially to younger members of staff.

108. Ms Walker's statement also corroborates the incident regarding the Christmas party on 21 October 2016. She added that:

> "Sometimes really nice and influencing, leader type personality. When he wants to use these skills for bad. Personal life, health, stress, he has had some surgery in January. Loads of factors. I have worked with him for 18 months, I had a really good relationship with him before this year but I no longer report into him and became a manager".

The reference to surgery in January is to some separate spinal surgery which the Claimant had had in 2016.

In addition, Ms Walker stated that, when she and a colleague, Lauren Simpson, were having drinks a few months ago, the Claimant had said to them "that he would slaughter us" if they were to spend more time working on another employee's client rather than the Claimant's. She also stated that:

> "I think it is a difficult thing with Simon, hard to treat it as an isolated incidence, he is a really talented person. I think that these need to be controlled. As a result of this stress I have had people in my team go off."

109. In Lauren Simpson's investigation statement of 26 October 2016 she corroborated the "Christmas Party outburst" incident. She said that he did not insult anyone and ranted within himself but that "Kevin worked really hard on the event so that made the situation uncomfortable but I don't think Simon realised how rude that came across". She added in relation to the Claimant "I don't think he is a bad person, I think he is a passionate person, I think his bark is worse than his bite, I think he lacks emotional intelligence, but he does not have a malicious manner". When asked how it made her feel, she said "When I first started it was a wee bit surprising, I thought he would be a bit more professional. Generally speaking he doesn't mean it, but it can come across as a bit intimidating". She confirmed that he had acted in this way before. When asked if she wanted to add anything, she said "Not really, I don't think so. I don't think he should be fired, I think he has flown off the handle a little bit. He adds a lot in terms of knowledge, just needs to sort professionalism".

110. In the Claimant's investigation interview, he admitted that he was swearing. However he also suggested that swearing in the office was normal and that (barring a couple of employees at the Respondent) "everyone else swears".

111. In his investigation interview, Mr Visram was asked about whether people swore around the office. He replied that he had a zero tolerance to swearing and that if he heard swearing he pulled people up on it but that he sat in an office and therefore did not hear it all the time. He said that he did not believe that there was a problem with swearing but he did believe that there was a problem caused by the Claimant. When asked if the Claimant's behaviour was normal, Mr Visram said:

> "The issue is that no one tells me, no one complains I think they are scared. He tipped the level of acceptability. April letter from the consequences of an email that was because I had sight of it. It is not acceptable and not normal for someone to act this way. His behaviour on the recent days I was here were exceptionally outstanding poor.

> I have now since SF has been suspended had employees come to me talking about his language over email."

112. A further investigation interview was convened with Ms Simpson so that Ms Bloom could ask her about the issue raised by Ms Walker about the "slaughter you" comments. Ms Bloom did not actually put the comment as spoken by Ms Walker to Ms Simpson but simply explained that Ms Walker had said that a few months ago the Claimant had said some rather threatening words to her in a bar after work and she asked her to confirm whether this was true. Ms Simpson confirmed the story, stating that the Claimant:

> "got quite irate. He asked if we were both working on his to which we responded "no" he then responded saying "If I find out that you are spending more time on the other client I will f**king slaughter you both."
>
> It was really aggressive, not in a joking way and spoilt the atmosphere. I felt immediately uncomfortable, didn't really know what to do. I know that he wouldn't actually do anything.
>
> I don't think he is a bad person but I can't even recount all the times that he has been aggressive towards me. I am scared to go and tell him bad news as I don't know how he is going to react. We are in an open plan office and he will go on and on, swearing and criticising it is just humiliating. Sometimes within the office he will go overboard with swearing/aggression saying 'you stupid women', "are you f**king kidding me" or "f**king joking", but this is not directed at anyone in the office.
>
> I would just like to reiterate, that he is not always like this and seems to have anger problems induced by stress, I often went out for a few drinks with Simon or had training with him and he adds value to the business by being here, he just needs to resolve issues with stress".

113. The last paragraph above is something that was added by Ms Simpson at a later stage following the Claimant's dismissal and prior to the appeal outcome, along with some other minor changes to the two statements which she made then. What we have quoted above is as per the final version.

114. Ms Page's investigation interview, dated 26 October 2016, corroborates the "Christmas Party outburst" incident. Ms Page stated that this was not directed at her and that she thought he was just letting off steam and that he threw tantrums right left and centre, that he had been pulled up before and she had lost count of how many times she had asked him not to swear, that for a small while had improved but the last few weeks it had become aggressive and worse again, not directed at her ever but that she had witnessed it. She said she considered the Claimant's behaviour was unacceptable and unprofessional and that he was a very frustrated, aggressive, personality. She added that, with the slightest thing, he will come in, in the morning and within seconds he will be slamming his mouse, keyboard any email that comes through he will be quite vocal. She said that she sits around the corner from him and can still hear him f-ing and blinding.

115. By letter of 11 November 2016, Mr Mathew Harvey-Jenner, a separate employee of Nestor, invited the Claimant to a disciplinary hearing. The charges were:

> - "Your use of profanities and swearing while communicating with colleagues even after having a previous warning and regular 'all staff' emails regarding office etiquette and professionalism at work.
>
> - Your aggressive manner while at work.
>
> - You openly complaining and swearing while talking about a decision made by the MD, Alex Visram.
>
> - Intimidating and bullying behaviour towards more junior members within Emagine.
>
> - Sending aggressive and inappropriate text messages to the MD which could be perceived as intimidating behaviour.
>
> The above is being considered within the framework of gross misconduct and more specifically under the harassment policy, which lists the following as examples of harassment.
>
> - Bullying of colleagues, especially junior colleagues by intimidating behaviour.
> - Unfavourable conduct at work, whether verbal or non-verbal, towards someone based on his/her disability which could affect his/her dignity at work; or
>
> - Any other calls of conduct which is intended to amount to harassment or occurs in circumstances when it would appear to a reasonable person that it would amount to harassment."

116. The letter attached all of the notes of the investigation interviews and the emails from Mr Hayden and Ms Page, together with other relevant emails including the communications about office etiquette. It advised the Claimant that he should be aware that one potential outcome may be the Respondent summarily dismissing him on the grounds of gross misconduct. It also enclosed the harassment policy and the disciplinary policy of the Respondent.

117. The disciplinary hearing took place, before Mr Harvey-Jenner, on 17 November 2016. The notes of the hearing are extensive and the Claimant was given a very full opportunity to say what he wanted to say.

118. The Claimant admitted to swearing and ranting. However he stated that he did not think that the witnesses had a clear recollection of what was said. He did not acknowledge that he was at fault. His main line of argument was his contention that "everybody swears within our office".

119. As regards the "slaughter" comment, the Claimant said that he could not recollect saying it in fact but could only assume the context. He then went on to say that he did not recollect the conversation at all.

120. Mr Harvey-Jenner put together an outcome letter (dated 23 November 2016) setting out his conclusions from the disciplinary hearing. The letter is a

long letter and goes into a considerable amount of detail. However, in summary, he concluded:

(1) The allegations relating to the expenses payment of 21 October 2016 were proven. The outburst was aggressive and critical of both internal company processes and of individuals within it.

(2) The allegations relating to the Christmas party on 21 October 2016 were proven. The Claimant's colleagues found his behaviour to be an aggressive and intimidating response.

(3) The threat to slaughter Ms Simpson and Ms Walker was proven. Ms Simpson and Ms Walker gave consistent accounts of the conversation. This was unacceptable behaviour, aggressive and intimidating.

(4) The text messages referred to between Mr Visram and the Claimant did not form part of the outcome directly, although they showed a sustained pattern of behaviour which was aggressive and inappropriate.

(5) The threat to slaughter Ms Simpson and Ms Walker was the most serious allegation and this alone amounted to gross misconduct. This was because the conduct amounted to bullying and harassment.

(6) The other allegations would individually have attracted a final warning. The combined affect of the incidents, however, constituted gross misconduct.

(7) Concerns which the Claimant had raised about the investigation process were unfounded, with the exception that Mr Tucker's investigation notes were disregarded from Mr Harvey-Jenner's consideration because Mr Tucker was not present during the incidents.

(8) The appropriate sanction for the gross misconduct was summary dismissal.

121. Nobody at Nestor would have authority to dismiss an employee of the Respondent and only Mr Visram at the Respondent had the authority to dismiss the Claimant. After Mr Harvey-Jenner had produced his draft outcome letter, Mr Visram talked through the contents of that letter with him over the phone. Mr Visram decided to dismiss the Claimant for the reasons set out in Mr Harvey-Jenner's letter and that letter, dated 23 November 2016, was duly issued to the Claimant. The Claimant's employment therefore terminated on 23 November 2016. In evidence before this Tribunal, Mr Visram confirmed that, for him, the most important and serious allegation was the "slaughter" allegation.

122. At no stage during the disciplinary process did the Claimant raise the issue of PTSD or hypertension, whether as a reason for his behaviour or otherwise.

123. The Claimant notified his intention to appeal against his dismissal. Mr Mark Burley of Nestor was due to hear the appeal and, by email of 28 November 2016, asked the Claimant if he could let him have his grounds of appeal.

124. He suggested a date of 2 December 2016 for the appeal. By email of 30 November 2016 to Mr Burley, the Claimant declined 2 December 2016 as a date for the appeal on the grounds that he had not been able to engage a lawyer yet and that his companion could not make it. He also added:

> "I've been greatly affected by the events of the last few weeks, in particular my suspension, your process (which I have found extremely adversarial) and my subsequent dismissal. I have not been sleeping and have been prescribed sleeping tablets as well as been referred to CBT by my GP. I believe I'm having recurrent symptoms of the PTSD I had following my cancer. In truth this has been a factor all year. …. It has left me feeling out of control and frustrated".

He did not in this email specifically suggest that his alleged PTSD was the reason for the behaviour which led to his dismissal.

125. By email of 1 December 2016, the Claimant submitted to Mr Burley grounds for appeal, in the form of nine bullet points. There was no reference to stress or PTSD amongst these nine bullet points.

126. The appeal took place on 13 December 2016.

127. The Claimant brought a hard copy of a conversation which he had had with Ms Simpson on LinkedIn. In the last part of that conversation, Ms Simpson states:

> "I didn't speak to HR out of my own volition trust me! I enjoyed working with you too – please don't worry, as I said to them you can have a bark at times but you never bite, you're by no means an intimidating bully, you just care! I'd love to stay in touch :)".

128. The Claimant also brought a prepared written statement in support of his appeal, which he read out, and left a hard copy of this with Mr Burley. The grounds set out in the statement include the following:

(1) The Claimant maintained that he was under immense stress and pressure in his role and was unable to handle it effectively. He went on to state:

> "I have had a real issue with managing my stress and life pressures following my bout of cancer and a close friend dying which resulted in a diagnosis of Post Traumatic Stress Disorder (PTSD). As a result I suffer from Hyperarousal (feeling on edge) which results in me becoming irritable and having angry outbursts.

> At the time I received therapy and treatment to deal with my PTSD, and thought I had managed the symptoms better however during stressful periods I suffer more from Hyperarousal.
>
> I understand that the company is aware of my condition and that my condition constitutes a disability under the Equality Act 2010 and am afforded protection from suffering any form of detriment, which includes but is not limited to dismissal.
>
> As a consequence I will be is seeking more specialist help to treat and manage my Hyperarousal with the aim of minimising its impact on my daily life.
>
> I would like the company to consider my disability and stressful working environment when considering my alleged conduct".

(2) He referred to inconsistent treatment for several reasons being –

(a) he reiterated his assertion that there was a culture of swearing at the Respondent,

(b) He gave an example of Jamie Michalle telling Shaun Sloan to "f*** off and I'm not working your f***ing jobs" where a fight nearly ensued and that, he said, when he reported this to Mr Visram, no action was taken, and

(c) More recently he suggested there was a serious incident during drinks involving an employee sexually abusing/assaulting a female employee including taking explicit photographs of the female employee and that no action was taken.

(3) He suggested no alternatives to dismissal were considered and noted that Mr Harvey-Jenner, in his outcome letter, did not set out any of the following in isolation or together: sanction short of dismissal, for example warnings; demotion; training to improve the Claimant's people/management skills; undertaking counselling/therapy.

129. The appeal hearing lasted roughly 1½ hours and the Claimant was given every opportunity to put forward whatever points he wanted. There was considerable discussion of various issues. Mr Burley did not ask the Claimant anything further about his alleged disability or ask for medical evidence and there was no further discussion of the alleged PTSD beyond what the Claimant read out from his pre-prepared statement at the beginning of the hearing. The Claimant did not come back to this issue either.

130. One of the criticisms in the appeal was that the witness statements of the various witnesses to the investigation were not signed. After the appeal, Mr Burley therefore went and asked for signatures from all the witnesses. With the exception of Ms Simpson (as noted earlier), all of the witnesses signed

their statements as they were. Ms Simpson made the amendments which we referred to earlier and then signed her statement.

131. Mr Burley considered most of the grounds of appeal which arose in either the appeal letter or at the hearing. He put together an outcome letter containing his findings. He organised that letter around the nine appeal bullet points set out in the grounds of appeal submitted by the Claimant on 1 December 2016 (as opposed, for example, to around the document which the Claimant handed in and read out at the start of the appeal hearing itself). He answered all the bullet points set out in the grounds of appeal of 1 December 2016.

132. Some of the points which he addressed included the allegation of inconsistent treatment regarding what was alleged to have been said by Jamie Michalle. He noted that both Mr Michalle and Mr Sloan (the individual whom the Claimant said Mr Michalle had sworn at) had left the organisation and that (as opposed to the case with the Claimant) no complaint had been raised about that alleged conduct. He therefore found that the accusation of lack of consistent treatment was unfounded.

133. He noted that the incident which the Claimant had raised which the Claimant maintained involved sexual abuse/assaulting a female employee would be investigated. (It duly was and it turned out to be innocuous and nothing which amounted to sexual abuse/assaulting a female employee.)

134. Whilst he had noted the allegation about people consistently swearing in the office and not being disciplined, he did not specifically respond to it in his draft outcome letter and we have seen no evidence of a further investigation into whether or not this was correct (barring there being Mr Visram's interview from the original investigation which stated that he did not tolerate swearing). However, the allegation of people simply swearing misses the point; the Claimant was being disciplined for his aggressive and intimidating behaviour, which included swearing and the manner of his swearing, rather than for swearing per se.

135. In relation to the allegation that Mr Harvey-Jenner did not consider alternatives to dismissal, Mr Burley spoke to Mr Harvey-Jenner who confirmed to him that he had considered alternatives to dismissal, including further warnings, counselling/training/therapy and the potential impact of the Claimant remaining within the office. Mr Burley himself noted that the Claimant had been the subject of previous warnings, which to date had been ineffective and that, as regards the possibility of counselling/therapy, at no stage had the Claimant apologised for his behaviour or indicated contrition. He noted that, as regards potential management training, in his view the behaviour in question does not equate to a management skill but that, rather, it was a question of professionalism. He noted he was also mindful of the impact of the Claimant's behaviour within a relatively small office. Therefore, having considered all these points and potential mitigating factors, he felt that the Claimant's actions amounted to gross misconduct and that dismissal was the only realistic option open to the company.

136. In relation to the further evidence which the Claimant had produced (including the Lauren Simpson Linked In correspondence, and her previous assertion that she did not think he should lose his job, he noted nonetheless that, in relation to the threat to "slaughter" them, both Ms Walker and Ms Simpson were intimidated and the conduct was inappropriate. He noted that Ms Simpson's evidence was consistent with other accounts of the Claimant's behaviour and in particular his pattern of aggressive and humiliating conduct. Whilst Ms Simpson appeared to be willing to take a magnanimous approach to the Claimant, it was clear from their statements that both she and Ms Walker recorded feeling intimidated. Ms Simpson's view did not, therefore, change the reasonableness of the decision to dismiss the Claimant.

137. The draft outcome letter did not, however, contain any reference to the assertion made in the statement which the Claimant read out in the hearing that he suffered stress and had real issues with managing stress and life pressures in connection with PTSD etc. Mr Burley did not check with the company as to whether, as the Claimant maintained in that statement, the Respondent was aware of this condition and that the condition, as he alleged, constituted a disability under the Equality Act 2010 and we have seen no evidence in that draft letter to suggest that Mr Burley considered this alleged disability and the alleged stressful working environment when considering the Claimant's conduct. There is a brief paragraph at the end of Mr Burley's witness statement for this hearing in which he states that he concluded that he had no basis to find that the Claimant had a genuine disability. However, if he had given it some serious thought, we would expect it to have been at least referenced in the very detained outcome letter which he produced. There is no such reference and we therefore find that, on the balance of probabilities, the issue of the alleged disability is something which Mr Burley did not address.

138. Mr Burley provided his draft outcome letter to Mr Bodin. He took Mr Bodin through it over the phone and they discussed it. Mr Bodin accepted the reasoning in that letter and decided not to uphold the Claimant's appeal on the basis set out in the letter. The letter was then issued to the Claimant, dated 22 December 2016.

139. Dr Weerasinghe also asked that it be recorded that, in their respective evidence before this hearing, Mr Visram stated that the Claimant often apologised after one of his outbursts and that the Claimant stated that he considered that his behaviour got worse after he had had a spinal injury in February 2016.

Conclusions on the issues

140. We make the following conclusions, applying the law to the facts found in relation to the agreed issues.

Disability

141. The Claimant accepted in evidence that Hyperarousal was a symptom of PTSD. There were, therefore, only two disabilities relied on, namely cancer and

PTSD. As noted, the burden of proof is on the Claimant to show on the balance of probabilities that he has satisfied at the relevant time the statutory definition of disability.

142. Cancer is automatically a disability for the purposes of the Act. Therefore, if the Claimant can prove that he had cancer, he would be a disabled person for the purposes of the Act for that reason, without having regard to the rest of the statutory test.

143. The majority decision (Employment Judge Baty and Mr Ferry) on this issue is set out in this paragraph. The first medical document referred to in our findings of fact above, dated 1 June 2007, appears to indicate a diagnosis of cancer. However, we accept Mr Margo's submission that the final word on whether or not the Claimant did in fact have cancer was set out in the subsequent and later medical letter of 20 August 2007. The conclusion there was that, "no tumour was found with complete sampling of the excised lesion". It went on to say "While this cannot be proved, it is conceivable that the FNA sampled a very small primary tumour" but that, in the absence of evidence, Professor Fisher did not think that this could be stated conclusively. It added that it might be "a sufficient diagnosis for insurance purposes". We accept, however, given that Professor Fisher stated that it cannot be proved, this is insufficient to support the conclusion that, on the balance of probabilities, the Claimant had cancer (however distressing the process which the Claimant went through in 2007 was for him). The Claimant has not therefore proved that he had cancer and any disability discrimination claims founded on the alleged disability of cancer must fail.

144. The minority decision on this issue (Dr Weerasinghe) is set out in this paragraph and is in italics, as all minority decisions in this judgment are for ease of reference: The June 2007 medical document states: "His repeat fine needle aspiration has confirmed papillary carcinoma of the thyroid in a nodule measuring 4 cms". This is a definitive diagnosis particularly because the FNA had been repeated. Professor Fischer does not disprove this finding nor does he say it might have been a mistake. He merely says the source of the cancer was not found in the cytology of the excised lesion. Then he goes on to say that this was confirmed when the cytology was reviewed by the Multidisciplinary Team (MDT) and that might be sufficient for insurance purposes viz. that it might not have an impact on the Claimant's insurance policies. Then he continues to say: " …. even though its source has not been located in the excised specimen. …." The word 'its' refers to the cancer. He does not say there was no cancer but what he says is that its source could not be located. Whereas he was able to say that this might be sufficient for insurance purposes, but more importantly, he was unable to reassure the Claimant that he did not have cancer. Therefore, the original definitive FNA diagnosis must stand. However, although the Claimant informed Mr Visram that he had cancer when he was interviewed for the job, there is no evidence that it was mentioned at any other time during his employment. Therefore, it can be concluded that foremost in the Respondent's mind was the misconduct issue and not the cancer issue in relation to the dismissal. Furthermore, in oral evidence, Mr Visram said that his mother died of cancer and

for that reason he would never discriminate by reason of cancer; this statement did come across as convincing.

145. In relation to PTSD, the Claimant's own solicitor had acknowledged in correspondence that Ms Merritt had "not provided a diagnosis as she is a therapist and not qualified to make a clinical diagnosis" (in an email to the Tribunal of 1 September 2017). That is correct: Ms Merritt is a psychotherapist and not a clinician and there is no diagnosis that the Claimant suffered from PTSD, notwithstanding what is written in Ms Merritt's letter of 29 August 2017. In addition, at the time that Ms Merritt wrote the letter, she had not treated the Claimant since 2012, and as such, she expressed no view as to whether the Claimant suffered from PTSD during the course of his employment with the Respondent, which commenced in 2013 and ended in 2016 (with the allegations of discrimination being the dismissal in late 2016). There is, therefore, no evidence even from her as to whether the Claimant suffered from PTSD at the relevant time.

146. The only other evidence is the Claimant's own impact statement prepared for the purposes of this Tribunal. That however was written in the context of the Claimant's claims, in the course of supporting them before this Tribunal, and we do not therefore consider that the assertions made in it alone, without further evidence, amount to sufficient evidence which proves either that he had PTSD at the relevant time or that it had an impact on his behaviour in the workplace.

147. Therefore, the Claimant has not proven that he was disabled for the purposes of the Act by reason of PTSD either. Therefore, all disability discrimination complaints relying on PTSD as the disability also fail.

148. Technically, therefore, it is not necessary for us to go on and address the other issues in relation to the disability discrimination complaints, but we do so for completeness sake.

Knowledge

149. As we have found in our findings of fact, the Claimant did mention his alleged cancer to Mr Visram during his first interview and, therefore, had he proved that he did have cancer, Mr Visram would have knowledge of it.

150. By contrast, we have accepted the Respondent's evidence that the Claimant did not at any stage prior to his dismissal inform the Respondent that he had PTSD (as alleged) or that he had symptoms linked to PTSD (as alleged). Therefore, for this reason also, any disability discrimination complaints based on the alleged disability of PTSD would also fail.

Direct disability discrimination

151. As already noted, this complaint fails because the Claimant has not proved that he was a disabled person.

152. The Claimant alleged that Mr Jamie Michalle was an appropriate comparator for the purposes of this direct discrimination complaint. However, he was not. Mr Michalle was someone whom the Claimant claimed had sworn in the office in relation to a particular incident. However, the alleged actions of Mr Michalle are not comparable to those of the Claimant, which involved a succession of aggressive and intimidating outbursts. Furthermore, complaints were raised about the Claimant by numerous other employees; by contrast we have seen no complaint raised about Mr Michalle at the time (the reference in the chain of texts to the Claimant having to sort out an incident himself does not, in our opinion, amount to a complaint about Mr Michalle).

153. Finally, in terms of the merits of any direct discrimination complaint, we have seen no evidence to suggest that the reason Mr Visram dismissed the Claimant was because of alleged cancer or PTSD. The reason was clearly the Claimant's conduct (which we shall to in more detail in relation to the unfair dismissal complaint). The direct discrimination complaint would fail for this reason too.

Discrimination arising from disability

154. Again, this complaint fails because the Claimant was not disabled. Furthermore, it would also fail because the Respondent had no knowledge of the PTSD at the time of the decision to dismiss (and this complaint relies just on the alleged PTSD rather than on the alleged cancer).

155. Furthermore, the Claimant's allegation is on the basis that his outbursts were something arising from his PTSD. However, as indicated earlier, in the absence of medical evidence and relying only on the impact statement provided by the Claimant for the purposes of this Tribunal claim, we do not find that the Claimant has proved that, even if he did have PTSD, his outbursts in the office were "something arising" out of that PTSD. He would not, therefore, have established that the dismissal, whilst unquestionably being unfavourable treatment, was because of something arising from his alleged disability of PTSD and the complaint would have failed for that reason too.

156. Furthermore, had the Respondent been required to prove the justification defence, we would have found that the treatment was nonetheless justified. The Respondent's aim of providing a safe place at work for the Respondent's employees, free from bullying, harassment, aggression, intimidation and obscene language and behaviour was unquestionably a legitimate aim. Furthemore, in the light of the severity of the Claimant's misconduct, his lack of remorse, and his failure to adjust his behaviour in response to earlier warnings, we consider that dismissal was a proportionate sanction.

Unfair dismissal

157. As already indicated, we find, for the reasons set out below, that the reason for the Claimant's dismissal was conduct.

158. We accept Mr Margo's submission that, as Mr Visram and Mr Bodin explained in evidence, only they had the authority to dismiss the Claimant (or determine an appeal) and as such the final decision was theirs to take and that therefore it is the reason for their actions that is the issue. However, in the light of the fact they authorised/ratified Nestor's reasoning, that reasoning is accepted to the extent that it was accepted and adopted by Mr Visram and Mr Bodin.

159. That their reason for dismissing the Claimant was conduct is clear from the chronology of events, and in particular the letter of 14 April 2016 which highlighted in no uncertain terms that the Claimant's conduct was a serious concern. On the Claimant's own evidence, he had two outbursts of swearing on 21 October 2016 in relation to his expenses and the Christmas party and, in the course of the investigation, Ms Walker and Ms Simpson gave corroborating evidence that the Claimant had told them that he would "slaughter" them.

160. Furthermore, it is clear that there was no ulterior motive for dismissing the Claimant, notwithstanding their numerous allegations that the dismissal was pre-determined which were made by the Claimant during the internal proceedings and by Ms Sole at these proceeding. Mr Visram clearly valued the Claimant for his contribution to the business as he was the only person in the UK office that had been invited to the important strategy meeting that was due to take place in December 2016 in Paris. Furthermore, the Claimant was an extremely high performing sales person and was an asset to the business in terms of his job performance, so there was no reason for seeking to dismiss him other than his own conduct. Indeed, Mr Visram did not take disciplinary action on earlier occasions when such action would have been justified, for example in particular when the Claimant told him "fuck you" in the text exchange on 23 March 2016. That, we accept, is inconsistent with someone who was looking for an excuse to dismiss the Claimant.

161. In addition, Mr Visram did not have to engage an external consultancy to conduct the process. If he was out to dismiss the Claimant, he would have been perfectly within his rights to conduct the disciplinary process himself in his capacity as the Managing Director in charge of an office of 16 people and that would have been a far simpler way to engineer a dismissal of the Claimant, had he wanted to.

162. Furthermore, Mr Visram was clear in his oral evidence that he found the Claimant's conduct unacceptable, in particular in relation to the "slaughter you" incident, which he said formed the main reason for him deciding that the Claimant should be dismissed.

163. Conduct was therefore the reason for dismissal and Mr Visram and Mr Bodin genuinely believed that the Claimant's misconduct had taken place (in the light of the evidence provided to them by the investigation). Furthermore, that belief was based on reasonable grounds. A thorough investigation had taken place in which numerous witnesses corroborated the allegations of aggressive outbursts by the Claimant. The Claimant himself admitted to having an outburst in relation to the 21 October 2016 incidents. Furthermore, this sort of behaviour was consistent with previous behaviour of his, as set out in our findings of fact

above. There was corroborative witness evidence in relation to the "slaughter you" incident from two witnesses and the Claimant did not deny that this occurred but merely said he couldn't recollect it. There was plainly a reasonable basis upon which to conclude that the misconduct occurred.

164. Furthermore, a reasonable investigation had taken place before this belief was formed. Ms Bloom interviewed the relevant witnesses, including Ms Page and Mr Hayden, who made the initial complaints and wrote the initial emails accordingly. The investigation, as is sometimes the case, also unearthed further instances of potential misconduct, in this case the "slaughter you" incident and, quite properly, Ms Bloom went where the investigation took her and investigated that allegation too.

165. In terms of issues of general fairness, we consider the individual allegations at paragraph 11 of the list of issues in due course but first of all consider some other issues which arose.

166. Firstly, we accept that the fact that there was no prior formal warning (as opposed to the letter of concern of 14 April 2016) does not in this case render the dismissal unfair. This was a case where the conduct in question amounted to gross misconduct. As was made clear in the JJ Food Service case, what matters in this sort of case is whether the Claimant was told that a consequence of further misconduct was possible dismissal (rather than the type of warning, informal or otherwise, that the Claimant may have been given). In fact, the letter of 14 April 2016 was absolutely unequivocal in its terms that, if he continued with his "aggressive behaviour, including a high volume of swearing and lack of respect for your colleagues and your manager", a "formal approach" would be adopted "including the probability of disciplinary proceedings and dismissal". In addition, the Claimant accepted in cross-examination that the letter said that he would probably be disciplined and dismissed if the behaviour was repeated and that he understood that at the time and that he understood that this was a letter from the two top people in the company following a meeting with them and that that was the message.

167. Secondly, we accept Mr Margo's submission that it is not open to the Claimant to contend that he was sent mixed messages about what was acceptable and what was not, as he suggested in his witness statement. Firstly, the 14 April 2016 letter was unequivocal. Secondly, there is a clear and obvious distinction between the occasional swear word in the office and the aggressive behaviour for which the Claimant was dismissed. In any event, the evidence we have seen supports the conclusion that Mr Visram was trying to reduce swearing in the office and he sent several clear communications on the topic in March and April 2016. Thirdly, there is a difference between offensive images and aggressive behaviour. As noted, the Claimant disclosed, at a late stage, a tranche of emails which contained highly offensive content and pictures. Firstly, whilst they are offensive, the Claimant was not dismissed for sending emails but was dismissed for his aggressive and intimidating behaviour in front of colleagues. Secondly, those emails disclosed by the Claimant were not sent to Mr Visram with one exception and the one email that he did receive, which contained a rude joke, he responded to say it was "inappropriate" and needed to

cease. Furthermore, the fact that Mr Visram sent round a link to a BBC comedy sketch, even if the title did contain an inappropriate word, is completely different from the behaviour displayed by the Claimant which led to his dismissal; there is no comparison. Furthermore, Mr Visram accepted in evidence that he occasionally swore. It was not, however, put to him that he was ever aggressive or that his conduct had been anything like the same category of the Claimant and there is no evidence to support the conclusion that aggressive behaviour was common place in the Respondent's office or was treated as acceptable by the Respondent. In addition, the Claimant accepted that he was lucky not to have been disciplined as a result of 23 March 2016 text exchange, that the outbursts of 21 October 2016 were completely unacceptable in the light of the warning he was given and that what he was alleged to have said to Ms Walker and Ms Simpson was "terrible" and fell within the aggressive behaviour referred to in the 14 April 2016 letter. The Claimant was not, therefore, sent mixed messages about what was acceptable and what was not. He knew exactly what was not acceptable.

168. Turning to the allegations set out in paragraph 11 of the list of issues, firstly the Claimant was clearly provided with the opportunity to respond to the allegations contained in the letter dated 25 October 2016. That opportunity came at the disciplinary hearing and, in advance of that, he was provided with all relevant information, including the witness statements taken. Not providing this information at the investigation stage was not unreasonable. Furthermore, the Claimant was given the opportunity at an investigation meeting (28 October 2016) to discuss the allegations. The fact that he adjourned that meeting and then refused to come to a further investigation meeting was his decision; given that the further investigation meeting did not happen because of his decision, it was not because of unreasonable behaviour by the Respondent.

169. In relation to 11(b), the additional allegation which is described as "historic and had been resolved" presumably is intended to be a reference to the text messages between the Claimant and Mr Visram in March. However, it was not unreasonable for this to be an allegation at the initial stage and, indeed, when following the investigation and disciplinary hearing, it was acknowledged that the matter had been dealt with in March/April 2016, it was not upheld as a disciplinary charge. If the reference is supposed to be to the "slaughter" incident had happened a few months prior to the investigation, that was something that had not been resolved. It was something that came up during the investigation and the Respondent quite reasonably investigated it and, when it was discovered that it was a potentially very serious matter, the Respondent quite reasonably had it added as an additional allegation for the disciplinary hearing. The fact that it had happened a few months previously does not alter this analysis.

170. As to issue 11(c), we do not find that the employees who were interviewed for the disciplinary process were asked loaded and biased questions. On looking through the interviews, the questions asked by Ms Bloom appear balanced and open. One example is that, rather than quoting the precise "slaughter" comment that Ms Walker had told her about previously to Ms Simpson in her interview, Ms Bloom referred to an incident and openly asked Ms Simpson for her view as to what happened; it so happened that what Ms Simpson said was to corroborate

almost exactly the comment which Ms Walker had described. However she was not prompted to do so.

171. The investigation notes were not signed by the relevant interviewees at the point of the investigation and it would have been better if they had been. However, this was entirely remedied on appeal when Mr Burley went back to get the interviewees to sign those notes. All bar one of them signed them without any changes. Ms Simpson had some changes to make, which she subsequently signed up to, but these changes were not material to the decision made.

172. It is alleged that it was flaw that the interviewees were not re-interviewed for the purposes of the appeal. However, this was not necessary as they simply confirmed the statements they had already given during the investigation. There was no need to re-interview them and not doing so was not unreasonable.

173. In relation to issue 11(d), as we have already found, the decision was not pre-determined. We simply refer back to our earlier reasons for this conclusion.

174. At issue 11(e) are three particular allegations that the Respondent failed to take into account the Claimant's stated mitigating circumstances as to why he "swore and vented frustration".

175. The first of these was because the Claimant was alleged to have been "under stress". There are references in some of the investigatory statements to stress and the Claimant referred to his being under stress in the document which he read out for the purposes of his appeal. However, whilst Mr Burley's outcome letter does not indicate that the issue of "stress" per se was looked at in a great deal of detail, ordinary stress (as opposed to the effects of any PTSD, which we come to shortly) is not enough to excuse the extreme aggressive and intimidating behaviour displayed repeatedly by the Claimant. We do not, therefore, consider that any failure to dwell on the issue of stress per se in the appeal outcome letter renders the dismissal unfair.

176. The second allegation is that the behaviour was commonplace within the Respondent's business. As we have already found, there is conflation here between swearing per se and the aggressive intimidating behaviour for which the Claimant was dismissed. In terms of investigating the issue of "everyone swears in the office", we note that Mr Visram was asked about it in the investigation and said that he did not tolerate it but that a wider investigation asking other members of the office was not carried out. However, the suggestion that everybody swore misses the point. The Claimant was not dismissed for swearing in itself but for intimidating and aggressive behaviour which happened to include an excessive amount of swearing. The fact that no further investigation into the extent of any swearing in the office did not take place does not render the dismissal unfair. In any event, we have not seen any evidence, beyond the Claimant's assertion, that swearing was commonplace in the office (albeit it is acknowledged by the Respondent that people swear from time to time) and, more to the point, we have

certainly seen no evidence of the kind of aggressive and intimidating behaviour which the Claimant carried out being carried out by anyone else.

177. The third point under 11(e) relates to the Claimant's allegation that he suffered from PTSD and that this impacted on his behaviour and that the Respondent knew about this and knew it was a disability. We appreciate that this was not any part of the Claimant's case prior to his dismissal and that it was only raised for the first time at the appeal hearing in the document which he gave in at the appeal hearing and read out at the start of the appeal hearing. In addition, that document is a lengthy one and the section referring to PTSD is only one section within it. Furthermore, the issue was not raised again during the extensive appeal hearing by either the Claimant or Mr Burley. We also appreciate that a considerably greater amount of emphasis has been placed on the issue of PTSD in these Employment Tribunal proceedings than was ever placed on it during the internal proceedings, even in the appeal itself. However, it was a submission that the Claimant's behaviour was explicable because of a medical reason and one which, the Claimant maintained, was something which the Respondent knew about. To that extent we consider that it was an issue raised which was of such potential significance that it was incumbent upon Mr Burley to investigate it further. Although the Claimant did not provide any medical evidence at the hearing, Mr Burley acknowledged (at this Tribunal) that in retrospect, he wished that he had asked the Claimant if he could supply some medical evidence. Furthermore, given the suggestion that the Respondent knew about it, he should have at least asked Mr Visram whether or not this was true. As it represented something which, if the Claimant was right, could potentially explain his behaviour, we consider that the failure to investigate this further was something of sufficient importance that it, and it alone, renders the dismissal unfair.

178. The contents of this paragraph are the majority decision (Employment Judge Baty and Mr Ferry) on this issue: Having said that, had Mr Burley investigated it further, we find that two things would certainly have happened: firstly, Mr Visram and the Respondent would have confirmed (as they did at this Tribunal) that they did not know about the Claimant's alleged PTSD and that there had been no acknowledgement by the Respondent either that the Claimant had PTSD or that it was a disability for the purposes of the Act. Secondly, particularly in light of the fact that, despite several requests from the Respondent leading up to this Tribunal hearing, the only evidence in relation to PTSD produced to this Tribunal was not enough to prove that the Claimant had the disability of PTSD, the Claimant similarly would not have provided such evidence to Mr Burley or the Respondent in relation to the internal proceedings. Therefore, having investigated it, it would have made no difference whatsoever to the appeal outcome. Therefore, we make a 100% reduction of the compensatory award under the principles set out in Polkey.

179. The minority decision on this issue (Dr Weerasinghe) is set out in this paragraph and is in italics: The Claimant was not asked for medical evidence at the appeal hearing. In oral evidence, Mr Burley said: "I wish I had asked for evidence". During the course of an investigation, had the Respondent made a management referral to an Occupational Health Physcian (OHP), or had the

Claimant consulted an OHP on his own and had all of the characteristics of the Claimant's behaviour disclosed to the OHP, my view is that the OHP would have concluded the Claimant had PTSD throughout his employment with the Respondent. My assessment of this outcome is a 85% chance; please see below the basis for my assessment. Therefore, the Polkey reduction should be 15% because a reasonable accommodation will have to be made to allow the Claimant to manage his PTSD through medication and psychotherapy instead of dismissal. On the same basis, the contributory fault should be 15% too because a person with a mental illness cannot be held blameworthy for his actions stemming from his illness. The basis for my assessment of an 85% chance is drawn from evidence that was available at the time as listed below:

- *The written diagnosis of Ms Meritt: Although this was not a clinical diagnosis, this cannot be totally disregarded because as a practicing psychotherapist, she would have recognised the symptoms of PTSD*
- *The identification of the causal traumatic events by the Claimant*
- *The distinctive aggressive nature of the Claimant's outbursts and Mr Visram's own view that it was not "normal"; a statement he made during the investigation.*
- *Mr Visram's statement that after an outburst often the Claimant would come an apologise. This indicates the Claimant was not in control of his actions which points to a mental illness.*
- *Each outburst appears to have been triggered by an 'event' which points to hyperarousal, which was accepted by the parties a symptom of PTSD.*
- *There was a time when the Claimant was better but it got worse after his second surgery, again indicating hyperarousal.*
- *Ms Simpson's reference to: "…anger problems induced by stress", a statement she made during the investigation.*

At the tribunal, the Claimant did produce a list of prescribed medications and during cross examination the Claimant identified a specific medication he was taking which was for PTSD. The Respondent did not contest what was said. Although it was not a contemporaneous prescription, it was evident that at some point in time, the Claimant was suffering from PTSD. As mentioned above, a proper analysis by an OHP would very likely establish that the Claimant was suffering from PTSD throughout his employment.
The Claimant relied on Ms Meritt's diagnosis believing that it was a valid diagnosis. It was only during the Tribunal proceedings that it was established Ms Meritt was not a clinician and hence was not qualified to do a clinical diagnosis. Had this come to light during the internal proceedings, the Claimant would have had time to consult an OHP and provide an expert opinion as outlined above.
It is agreed that had there been an investigation, Mr Visram and the Respondent would have confirmed (as they did at this Tribunal) that they did not know about the Claimant's alleged PTSD.

180. Turning back to the list of issues, in terms of issue 11(f), we do not find that the sanction of dismissal was inconsistent for either of the reasons suggested. Firstly, the allegation of another employee being involved in a

serious sexual assault turned out to be innocuous and not even remotely comparable to the Claimant's situation. Furthermore, as we have already found, to the extent that Mr Michalle was involved in a "swearing and bullying incident", this was in significantly different circumstances to the reasons why the Claimant was dismissed and no complaint was made about Mr Michalle.

181. In relation to issue 11(g), the Respondent did consider alternatives to dismissal. Whilst Mr Harvey-Jenner was not at the Tribunal, Mr Burley confirmed, both in the contemporaneous documents and this at this Tribunal, that he spoke to Mr Harvey-Jenner and that Mr Harvey-Jenner did consider alternatives. In any event, Mr Burley considered alternatives at the appeal and, for the reasons already given, quite reasonably considered that dismissal was the appropriate sanction. So, to the extent that there was any failure at the disciplinary stage, that was remedied on appeal.

182. Finally, in relation to issue 11(h), but for the issue above concerning investigating the Claimant's assertion that his behaviour was due to his PTSD, the decision to dismiss was unquestionably well within the reasonable range of responses in the light of, in particular, the severity of the Claimant's misconduct, the Claimant's lack of remorse and the Claimant's failure to adjust his behaviour in response to the Respondent's clear communications and his earlier warnings.

Contribution/Polkey

183. We have already addressed the issue of Polkey in relation to our decision that the dismissal was unfair on the sole ground of the failure to investigate the Claimant's allegation that his behaviour was due to alleged PTSD. As noted, the majority (Employment Judge Baty and Mr Ferry) make a 100% reduction in the compensatory award for unfair dismissal *(whereas the minority view (Dr Weerasinghe) is that the reduction should be 15%)*.

184. In relation to contributory conduct, the majority view (Employment Judge Baty and Mr Ferry) is set out in this paragraph: We find that, for the reasons set out above, the Claimant's behaviour in relation to the incidents of 21 October 2016 and the "slaughter" incident is proven and that that behaviour contributed 100% to his dismissal. We therefore make a 100% reduction to both the basic and compensatory awards for unfair dismissal.

185. The minority (Dr Weerasinghe) makes a reduction of 30% applied to the compensatory award and 15% to the basic award.

Wrongful dismissal

186. Similarly, we find that the Claimant's misconduct referred to above is proven and, given it seriousness, amounts to a repudiatory breach of his contract entitling the Respondent to summarily terminate the contract. The wrongful dismissal/breach of contract in respect of notice pay complaint therefore fails.

Bonus

187. In relation to the allegation that the Claimant was in October 2016 due a Q3 bonus for 2016, we refer back to the principles set out in our summary of the law in the Investors Compensation Scheme case. We need, in interpreting the contractual provisions, to ascertain the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

188. The bonus/commission document clearly has two different incentive schemes, one involving placements and the other which is clearly delineated as an "account director target". It is accepted that the Claimant ceased to be an account director from the beginning of Q3 2016. He wanted to cease being an account director to concentrate on other things as a business developer which, correspondingly, caused him to increase the number of placements which he made as a business developer and for which he was paid commission under the other part of the compensation scheme set out in that document. In the light of the background knowledge which would reasonably have been available to the parties, and the clear delineation of the bonus which is the subject of this complaint as "account director target", we find on the balance of probabilities that what the clause means is that, when one puts aside account director responsibilities, one ceases to be entitled to the account director bonus and that that was what the parties understood. This is regardless of whether or not anything was said verbally between the Claimant and Mr Visram at the point when the Claimant divested himself of his account director responsibilities and regardless of the fact that there is nothing in writing confirming that no further account director bonus payments will be payable. No bonus payments were therefore due to the Claimant in relation to any period from Q3 onwards.

189. There has, therefore, been no breach of contract by the Respondent in not paying the Q3 bonus and the breach of contract complaint in this respect therefore fails. Similarly, the Q3 bonus was not "properly payable" to the Claimant for the purposes of the unlawful deduction from wages provisions, and the unlawful deduction from wages complaint also fails.

Remedy

190. The Claimant is requested, within 14 days of the date this judgment is sent to the parties, to inform the Tribunal of whether any remedies hearing will be necessary in relation to his successful unfair dismissal complaint.

191. The Tribunal notes in this respect that, in the light of its findings on Polkey and contributory conduct, no award of compensation could be made at such a hearing and that, in his claim form, the Tribunal ticked the "compensation only" box and did not tick either box in relation to seeking an order for reinstatement or re-engagement. Whilst the Claimant is not precluded from seeking such orders if he wishes to do so, he should note the provisions in the ERA in relation to the circumstances under which such orders may be made, and in particular the requirement that the Tribunal take into account not only whether it is practicable

for an employer to comply with such an order but also, in circumstances where the Claimant contributed to his dismissal (as we have found was 100% the case here), whether it will be just to make such an order.

192. If the Tribunal does not hear back from the Claimant within 14 days of the date this judgment is sent to the parties, it will take the view that no remedies hearing is required and that the case is closed.

Employment Judge Baty on 13 February 2018