Case No: 2301278/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT:	**LONDON SOUTH**
BEFORE:	**EMPLOYMENT JUDGE K ANDREWS**
MEMBERS:	**Ms V Blake** **Ms E Thompson**

BETWEEN:

Mr P Schaverien

Claimant

and

(1) Howlett Clarke Solicitors LLP
(2) Ms J Gillespie
(3) Mr W Robertson

Respondents

ON:	**16-20 April 2018** **21 April & 14 May 2018 in chambers**

Appearances:
For the Claimant: **Ms H Platt, Counsel**
For the Respondent: **Mr D Soanes, Solicitor**

JUDGMENT

1. The unanimous decision of the Tribunal is that the claims of discrimination arising from disability and that the respondent breached its duty to make reasonable adjustments both succeed in part.

2. The unanimous decision of the Tribunal is that the claims of direct discrimination, harassment and victimisation do not succeed.

3. The majority decision of the Tribunal is that the claimant was not unfairly constructively dismissed.

4. The issue of remedy will be considered at a hearing commencing at 10am on **13 July 2018** at this Tribunal.

REASONS

1. In this matter the claimant complains that he was unfairly constructively dismissed and subject to disability discrimination. The issues arising in those claims are as set out in the Order of REJ Hildebrand following a preliminary hearing in July 2017. For ease of reference they are appended.

Evidence & Submissions

2. We heard evidence from the claimant and also, pursuant to a witness order, from Ms Ferguson, a former partner of the first respondent, on his behalf. The claimant is blind and was assisted while he gave his evidence by Ms C Stephens, his disability assistant who read documents for him from the bundle and extracts of statements. The parties and the Tribunal are particularly grateful to Ms Stephens for her assistance as she was performing this role on a voluntary basis. The claimant also has a guide-dog; regular and slightly longer than usual breaks were taken as a result.

3. For the respondents we heard from Ms F Connah (partner), Ms Freeman-Brown (HR manager) and the second and third respondents.

4. We also had the benefit of comprehensive and very helpful written submissions from both parties which were supplemented by oral submissions.

Relevant Law

5. <u>Unfair dismissal</u>

6. In order to bring a complaint of unfair dismissal it is first necessary to establish that the claimant has in fact been dismissed.

7. If there is no express dismissal then the claimant needs to establish a constructive dismissal. Section 95(1) of the Employment Rights Act 1996 states than an employee is dismissed by his or her employer for the purposes of claiming unfair dismissal if:

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

8. Case law has established that to succeed in such a claim the employee must establish that
    a. there was a fundamental breach of contract on the part of the employer;
    b. the employee resigned in response; and
    c. the employee did not affirm the contract before resigning.

9. In Western Excavating (ECC) Limited –v-Sharpe [1978] ICR 221, the Court of Appeal confirmed that the correct approach to considering whether there has been a constructive dismissal is as follows:

> "if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct, he is constructively dismissed."

10. Those terms of the contract include not only the express terms set out in writing or orally but also the term of mutual trust and confidence that is implied into every contract of employment and which, if breached, is capable of constituting a fundamental breach.

11. Whether there has been a fundamental breach of that term is a question of fact for the Tribunal. The House of Lords in Malik v BCCI SA (in liquidation) [1997] IRLR 462 (as corrected by Baldwin v Brighton & Hove CC [2007] ICR 680) confirmed that the employee needs to show that the employer has, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between them. This conduct, taken as a whole, is to be objectively assessed by the Tribunal rather than by reference to whether the employer's conduct fell within the band of reasonable responses or the employer's subjective intention. The manner in which a disciplinary or grievance process is undertaken by an employer is certainly capable of amounting to a fundamental breach but whether it does so is a question of fact which will be informed by the ACAS Code of Practice on Disciplinary Procedures. Similarly, any acts of discrimination may amount to a breach but again is fact specific.

12. Furthermore, individual actions taken by an employer which may not in themselves constitute fundamental breaches of any contractual term may have a cumulative effect of undermining trust and confidence thereby entitling the employee to resign and claim constructive dismissal. These sorts of cases are often referred to as last straw cases. The last straw complained of must contribute to the breach even if relatively insignificantly but need not in itself be a breach but nor can it be entirely innocuous. The case of London Borough of Walton Forest v Omilaju [2005] IRLR 35 gives guidance to Tribunals of the correct approach to take in such cases.

13. If an employee has been dismissed, constructively or actually, then it is for the respondent to establish that the reason for the dismissal was a potentially fair one as required by section 98(1) and (2) of the 1996 Act. If the respondent establishes that then it is for the Tribunal to determine whether the dismissal was fair in all the circumstances (including the size and administrative resources of the respondent business) having regard to equity and the substantial merits of the case (section 98(4)). In applying this test the burden of proof is neutral.

14. <u>Disability discrimination</u>

15. The position on burden of proof in claims of discrimination is set out at section 136 of the Equality Act 2010. In summary, if there are facts from which the Court could decide, in the absence of any other explanation, that the claimant has been discriminated against then the Court must find that

that discrimination has happened unless the respondent shows the contrary. It is generally recognised however that it is unusual for there to be clear evidence of discrimination and that the Tribunal should expect to consider matters in accordance with these provisions and the guidance set out in Igen v Wong and others ([2005] IRLR 258) confirmed by the Court of Appeal in Madarassy v Nomura International plc ([2007] IRLR 246). In the latter case it was also confirmed, albeit when applying the pre-2010 Act wording, that a simple difference in protected characteristic and a difference in treatment is not enough in itself to shift the burden of proof; something more is needed. It is important in assessing these matters that the totality of the evidence is considered.

16. Direct discrimination - section 13 of the 2010 Act provides that a person discriminates against another if, because of a protected characteristic, he treats that person less favourably than he treats or would treat others. Disability is a protected characteristic (section 4).

17. Section 23 refers to comparators and says that there must be no material difference between the circumstances relating to each case. The circumstances include a person's abilities if the protected characteristic is disability. Usually the central question in an allegation of direct discrimination is whether the claimant was treated less favourably than others because of his or her protected characteristic.

18. Direct discrimination is rarely blatant. Notwithstanding the burden of proof provisions referred to above, we acknowledge that it is usually not easy for a claimant to establish that discrimination has taken place. It is rare for there to be an overtly discriminatory act which is why we look carefully at all the evidence and are willing to draw inferences where appropriate.

19. Discrimination arising from - section 15 of the 2010 Act states:

> (1) A person (A) discriminates against a disabled person (B) if—
>
> > (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> >
> > (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

20. No comparator is needed.

21. The accompanying EHRC Code of Practice on Employment (2011), a guide to the proper application of the 2010 Act, advises that there must be a connection between whatever led to the unfavourable treatment and the disability. Further that the 'consequences' of disability include anything which is the result, effect or outcome of the disability. It also sets out guidance on the objective justification test.

22. On 15 May 2018, after the Hearing in this matter had been concluded but whilst the Tribunal were still deliberating (our second chambers meeting had concluded but we were still finalising the Judgment by email discussion) the Court of Appeal decision in City of York Council v Grossett was promulgated (2018 EWCA Civ 1105). This deals specifically with the correct approach to section 15 claims and we have taken it in to account.

23. That Judgment confirms that section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) 'something'? and (ii) did that 'something' arise in consequence of B's disability. The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant 'something'. The second issue is an objective matter; whether there is a causal link between B's disability and the relevant 'something'. It also confirmed that there is no requirement that A be aware that the 'something' has occurred in consequence of B's disability.

24. In Risby v LB of Waltham Forest EAT 0318/15, the EAT had previously confirmed that only a loose connection is required between the 'something' and the unfavourable treatment. The meaning of 'unfavourable' was considered in Trustees of Swansea University Pension & Assurance Scheme & anor v Williams (2015 IRLR 885) and described as having 'the sense of placing a hurdle in front of, or creating a particular difficulty … or disadvantaging a person…'.

25. In Grossett, above, the Court also considered the defence available to employers at section 15(1)(b). They confirmed that the test under that provision is an objective one according to which the Tribunal must make its own assessment. It may be therefore that the same set of facts can lead to apparently inconsistent outcomes on claims of unfair dismissal and discrimination.

26. Reasonable adjustments - section 20 and schedule 8(20) of the 2010 Act provide for a duty on an employer to make adjustments where it has applied a provision, criterion or practice or has a physical feature which puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled. In that case the employer has a duty to take such steps as is reasonable to avoid the disadvantage. Further, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer has a duty to take such steps as it is reasonable to have to take to provide the auxiliary aid. These duties do not arise if the respondent did not know, and could not reasonably be expected to know, that the claimant was disabled and was likely to be placed at that disadvantage (section 20 of Schedule 8 – confirmed in Wilcox v Birmingham CAB Services Ltd 2011 UKEAT).

27. Section 212(1) states that 'substantial' means more than minor or trivial.

28. The test whether it was reasonable to make a particular adjustment is an

objective question for the Tribunal to answer (Tarbuck v Sainsbury's Supermarkets 2006 UKEAT).

29. In the case of Environment Agency v Rowan (2008 IRLR 20), the Employment Appeal Tribunal held that in a claim of failure to make reasonable adjustments the Tribunal must identify:

    a. the provision, criterion or practice applied by the employer;

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

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

30. Harassment - section 26 of the 2010 Act provides that A harasses B if A engages in unwanted conduct related to a relevant protected characteristic and that conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

31. We have in mind in particular the guidance given by the Court of Appeal in the case of Land Registry v Grant (2011 IRLR 748) where Elias LJ said:

> "Where harassment results from the effect of the conduct, that effect must actually be achieved. However, the question whether conduct has had that adverse effect is an objective one – it must reasonably be considered to have that effect – although the victim's perception of the effect is a relevant factor for the tribunal to consider. In that regard, when assessing the effect of a remark, the context in which it is given is always highly material.
>
> Moreover, tribunals must not cheapen the significance of the words "intimidating, hostile, degrading, humiliating or offensive environment". They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

32. Victimisation - section 27 of the 2010 Act provides that A victimises B if A subjects B to a detriment because B does a protected act or A believes B has done or may do a protected act.

33. Protected acts include bringing proceedings under this Act, giving evidence or information in connection with proceedings under this Act and making an allegation that A or another has contravened this Act.

Findings of Fact

34. Having assessed all the evidence, both oral and written, we find on the balance of probabilities the following to be the relevant facts.

35. The claimant is a solicitor having been admitted to the roll in November 1982 and was the managing partner of the first respondent from 1996 to 2008. He continued as an equity partner until July 2010 when he retired and was employed by the first respondent as a consultant solicitor dealing, broadly, with personal injury and civil litigation and reporting to the head of the litigation department, who by the time of his resignation was Ms Gillespie. The claimant's contract of employment provided for either party to terminate

employment on three months' notice with a reservation of the right to pay salary in lieu of notice by the first respondent. It also provided for restrictive covenants for a period of 12 months following termination of the contract and that disciplinary matters would be dealt with in accordance with the disciplinary procedures set out in the office manual.

36. Given the claimant's visual impairment, adjustments were made to his ways of working and software provided for him and his secretary/assistant to enable him to read documents. In addition, he had the benefit of the services of Ms Stevens as a reader on a part-time basis albeit that that service was not paid for by the first respondent.

37. It is clear that the claimant is an extremely experienced and very well-regarded litigator and mediator. It is also apparent that notwithstanding his disability he was and is able to work to the highest standards as long as the necessary adjustments/software are in place.

38. The first respondent is a limited liability partnership. It has two members, Ms Gillespie and Mr Robertson, the second and third respondents, who are effectively equity partners. Ms Gillespie is also now managing partner. Ms Connah and Ms Ferguson were the only non-member partners at the time of the events in question. Ms Ferguson resigned shortly after the departure of the claimant; she worked her notice period. Ms Connah was working her notice period at the time of this Hearing.

39. The first respondent's disciplinary and dismissal procedure provides that minor issues can often be resolved informally but also sets out under 'Procedure' the steps to be taken 'in all cases of disciplinary action'. The first is 'Investigation' which is stated to be to establish a fair and balanced view of the facts relating to any disciplinary allegations against the employee before deciding whether to proceed with a disciplinary hearing. Investigatory interviews are stated to be solely for the purpose of fact-finding and no decision on disciplinary action will, wherever reasonably practicable, be taken until after a disciplinary hearing has been held.

40. If the firm considers there is a disciplinary case to answer, a disciplinary hearing will be held and the employee - when given notice of that hearing - will also be given copies of any relevant documents and witness statements to be used at the disciplinary hearing. Any disciplinary hearing is to be chaired by an appropriate person and the person who carried out any investigation is also to be present to account for that role after which they are to leave the hearing and take no further part. The hearing may be adjourned if there is the need to carry out any further investigations.

41. The procedure sets out a range of penalties for misconduct and identifies examples of gross misconduct. All disciplinary action is subject to the right to appeal. Any appeal notice shall specify the grounds of appeal.

42. The appeal hearing may, at the discretion of the firm, be a complete rehearing of the matter or it may be a review of the fairness of the original decision. Where possible it will be conducted by a partner not previously

involved nor the person who conducted any investigation and a note taker will also usually be present.

43. The first respondent had moved to new offices in June 2016. The offices were generally open plan although because of the claimant's particular requirements he did have his own office on the third floor. Mr Robertson's office, which was open plan, was on the second floor. There were a number of meeting rooms on the ground floor.

44. In the last few years there has been considerable turnover at the first respondent at partner and solicitor level, which has inevitably caused some difficulty for the management of the firm.

45. Ms Gillespie and the claimant have known each other for a long time. It was the claimant who offered Ms Gillespie work experience in 1998 which led to her becoming a legal secretary and then a trainee solicitor. Until March 2016, it is clear that they enjoyed a close and friendly relationship; their families were also friends. The claimant's daughter had worked for the first respondent on a temporary basis for many years starting when she was at school.

46. In March 2016 the claimant's daughter interviewed, unsuccessfully, for a training contract with the first respondent. This led to a deterioration of the relationship between the parties with the claimant expressing his undoubted disappointment at this outcome. Various proposals were made to offer the claimant's daughter alternative roles culminating in the offer of a training contract or a paralegal role with a view to obtaining a training contract. She accepted but then shortly afterwards resigned as she had received an offer from another firm. Following that there was then a dispute between Ms Gillespie and the claimant as to the nature of a lunch that took place between her and his daughter. There was disagreement between them as to the purpose of and behaviour at the lunch. It is not necessary for us to find as a fact the sequence of events regarding these various offers nor the lunch, but this led to a meeting between the claimant and Mr Robertson on 24 October 2016. On 25 October 2016 Mr Robertson emailed the claimant attaching a letter to him of the same date. In the covering email he said:

> '… It is apparent that this has been rumbling on and off for circa seven months now and we need to move on from it.… The issue has clearly resulted in a difficult situation internally but I am sure we can get beyond that once things settle down…'

47. In the letter he set out what was his and Ms Gillespie's account of their contact with the claimant's daughter and the offers that had and had not made and concluded:

> 'As far as the partners are concerned therefore, this draws a line under the matter.
>
> We continue to see you as an extremely experienced and valued colleague and we fully expect you to remain a committed and diligent member of the firm.'

48. Towards the end of that day the claimant went down to the second floor near Mr Robertson's desk, asked if he was present, someone told him yes

and he then said in a loud voice 'Thanks for nothing Warren' and left. Various staff members were present and witnessed what was clearly not a friendly exchange.

49. The respondents' case is that it was the disagreement regarding the offer, or otherwise, of a training contract for the claimant's daughter that soured the relationship between the parties and led to a withdrawal of support by the claimant for Ms Gillespie as managing partner. The claimant's case is that he put his disappointment on this issue behind him and it was irrelevant when later events took place and was not part of the reason why he subsequently resigned. We find that this issue did lead to a serious deterioration in the relationship between the claimant and Ms Gillespie, his loss of confidence in the first respondent generally and his withdrawal of support for her on a daily basis all of which at least to some extent influenced his reaction to later events.

50. Further on 26 October 2016 the claimant, referring to the reference in the 25 October letter that he was experienced and valued etc, wrote to Ms Gillespie asking that this be reflected in an appropriate salary review. She replied on the same day stating that whilst it was fully agreed that he was an extremely valuable and experienced solicitor and an asset to the firm, they were unable to increase his salary at that time. She noted that his salary was currently the highest in the firm.

51. On 11 November 2016 Mr Robertson sent an email to 'All Staff' with the subject 'Billing'. The key message in the email was a request for those who were in a position to bill and/or interim bill on matters to do so promptly. The claimant replied on the following day to Mr Robertson also copying in all staff and said:

> 'Without being able to access pro claim let alone anyone understand it, without assistance from accounts, the proposition for regular billing is not possible!'

52. Also in November 2016 the first respondent sponsored the University of Sussex annual mooting competition. They had done this for circa 15 years and the claimant had previously effectively taken responsibility for this and had made all the necessary arrangements including marketing. There was some disagreement between the claimant and the respondents as to the value of continuing this involvement. It was agreed between the claimant and Ms Gillespie that the 2016 competition would be 'a last chance' and that she would take over responsibility for the event.

53. On the day of the moot itself and just before the claimant left to attend it, it became clear that all the necessary arrangements had not been put in place and, in Ms Gillespie's own words, the claimant 'came to the rescue'. Ms Gillespie accepted that the failings on the night were entirely her fault.

54. On 22 November 2016, the day after the moot, the claimant sent a memorandum to Ms Swaffer, marketing manager, expressing his disappointment that no marketing initiatives appeared to have been undertaken in relation to the moot, that he was particularly upset for the

firm's paralegals, trainees and newly qualifieds who had attended, that there were no banners or marketing material on behalf of the firm and that prizes had to be purchased at the last minute. He attached a fairly lengthy exchange of emails between himself, Ms Swaffer and Ms Gillespie together with emails to the University. The email concluded:

'I should be interested to hear in response, or more particularly that you would now propose sending to those who made time for the event and attended. You will see the email from Zoe Swann today and to which no doubt you would wish to respond on behalf of the firm unless Jackie intends to do so'

55. The claimant's email was clearly critical in its tone but was not rude, aggressive or unprofessional. Given that the claimant knew, however, that responsibility for the event lay with Ms Gillespie, we agree with her evidence to us that it would have been more appropriate for his criticisms to be levelled at her rather than Ms Swaffer.

56. Also on 22 November 2016 a trainee who had attended the moot, Mr Nelms, had emailed the claimant thanking him for organising the moot which he described as interesting and good fun. The claimant replied saying he did nothing, relying upon the marketing team who he thought 'let us all down!'. Mr Nelms replied:

'Perhaps next year we can rely on some/any support!?'

to which the claimant replied:

'Possibly? … I think it is for the young up and coming members of the firm to give their views to the management team!'

57. Ms Swaffer was clearly upset by the terms of the claimant's memo to her and brought it to the attention of Ms Freeman-Brown who referred it by email to Mr Robertson and Ms Gillespie. Ms Freeman-Brown's reaction was in strong terms. In her view it could not be ignored, was a 'colossal waste of time' and had to be dealt with. She believed the claimant was scoring points on a completely imagined problem. She stated:

'If it is ignored it sends the signal yet again that he can do whatever he pleases with absolutely no repercussions...it is certainly not professional… the majority of that memo is lies, made to make himself look better and like he has not been actively obstructing the marketing team and Jackie at every turn.

Jackie I know you don't want a fight with Richard, but if there is no pushback here either from yourself or Warren I don't see a way you can come off the back foot.'

58. Ms Gillespie's evidence was that it was the strong terms of this email that 'woke her up' to her responsibility to put the interests of the firm before her friendship with the claimant and the effort she had been making to try to keep that friendship.

59. In fact it was Mr Robertson who addressed the issue with the claimant as he was line manager for the marketing team. He emailed him on 23 November 2016. The thrust of that email was that the memo to Ms Swaffer was not appropriate both in content and being sent in the first place. He

said that he had reviewed the relevant paperwork and that in his view the marketing team did what was expected and the event had worked well. He also referred to the email sent by the claimant to Mr Nelms blaming the marketing team and how he may want to make their views known to management. Mr Robertson said that he did not think he even needed to comment on the inappropriateness of that. His email concluded as follows:

'I know things have been rather strained of late and I appreciate your continued passion and keenness to get involved in marketing etc but we need a joined up united approach and to try and put personalities aside. We have a great team of people in this firm now and you remain a key member of that team going forwards.

Am more than happy to have a chat as opposed to just email if that would help. Would be nice to put any issues behind us and get on with the future.'

60. The claimant replied:

'Yet again I disagree and should be more than glad to discuss with you and those who attended, i.e. paralegals, trainees and newly qualifieds.'

61. On 24 November 2016 Mr Robertson copied the claimant's exchange with Mr Nelms to Ms Gillespie and Ms Freeman-Brown (as well as his employment lawyer) and said:

'Think you can tell … Richard had clearly been badmouthing at least the marketing ladies if not us as well to the youngsters.'

62. On 5 December 2016 Ms Gillespie emailed the claimant inviting him to attend a meeting on 7 December 2016 in room 2, a general meeting room on the ground floor in which the claimant had attended many client and other meetings over the years. She stated that the purpose of the meeting was to discuss his conduct concerning that year's sponsorship of the moot. He was asked to confirm his attendance. The claimant replied asking for more information and the purpose of the meeting before contemplating attending what would appear to be a disciplinary issue and that he may want to take legal advice in advance. Ms Gillespie replied stating that the meeting was purely an investigatory meeting to discuss his conduct, more specifically his criticisms of the manner in which the partnership managed the moot. She referred to the exchange of emails with Mr Nelms, the memo to Ms Swaffer and his email to Mr Robertson of 24 November. She expressly stated:

'For the avoidance of doubt the meeting does not form part of a formal disciplinary process, as we have yet to decide if this would be appropriate, and wish at this stage, to manage this informally if at all possible.'

63. The claimant left the office unwell at lunchtime on 5 December 2016. The following day he submitted a sickness self-certification form for the absence. The reason he gave was:

'Stress-related, high blood pressure, migraine-style headache with subsequent sleep disruption.'

64. The investigatory meeting originally planned for 7 December 2016 in fact took place in room 2 on 16 December 2016 with the claimant, Ms Gillespie,

Mr Robertson and Ms Stephens present. At no point prior to or during this investigatory meeting did the claimant raise any issue with any of the respondents about the location of the meeting causing him any disadvantage.

65. Ms Gillespie put the respondent's concerns to the claimant. Ms Stephens read out a prepared statement on behalf of the claimant. The final paragraph of that statement said that the claimant had found the ordeal of being invited to a meeting to discuss his conduct to be very stressful and referred to his absence on 5 December with stress, high blood pressure and a headache. He also said that he had slept very little due to worrying about the meeting. After some further discussion Ms Gillespie said that she and Mr Robertson would decide whether they needed to take the matter any further and would let the claimant know of their decision.

66. That decision was communicated to the claimant by email from Ms Gillespie on 23 December 2016, the last working day before the Christmas break. She said that she and Mr Robertson proposed to draw a line under the matter and move forward and take no further action at that time. She concluded by saying:

> 'We will continue to develop the firm's processes and procedures so all members of staff are aware of the need to support the management of the firm.'

67. We find that this process did constitute disciplinary action against the claimant. The meeting on 16 December 2017 was convened in accordance with paragraph 9 of the first respondent's disciplinary process.

68. On 3 January 2017, the next working day, the claimant faced a particularly busy day with urgent matters to deal with. Coincidently his assistant Ms Smith had been off sick before the Christmas break and therefore a backlog of work had also built up. Mr Robertson was in the office that day and he also faced a busy day with a number of conveyancing matters that needed his urgent attention. Ms Gillespie was not in the office.

69. Early in the day Ms Smith encountered problems with her computer. We heard extensive evidence from the witnesses as to the nature of this problem and the impact it had upon both her and the claimant's ability to work. None of this evidence was conclusive and we are not able to find as a fact what was technically wrong. What we do find however was that whatever the problem was, it clearly had an impact on the claimant's ability, whether directly or indirectly through Ms Smith, to complete the urgent work that he needed to do that today.

70. During the morning Ms Smith was in contact with the first respondent's IT provider to arrange for them to carry out a fix. It seems that during the morning she was able to work at least to some degree and she asked them to apply the fix during her lunch break which they did. On her return from lunch, however, it seemed that the problem had become worse and at that point she had very little ability to work, if at all. Ms Smith went to see Mr Robertson at about 3:10 and explained the problem. They had a discussion

and it was agreed that she would use another computer which would enable her to work but it would not be available until 3:30, 20 minutes or so later.

71. Ms Smith relayed this to the claimant who tried to contact Mr Robertson by telephone. The claimant felt that as the most senior partner present Mr Robertson could telephone the IT provider and put pressure on them to resolve the problem promptly. The claimant was unable to reach Mr Robertson. He tried on several occasions but Mr Robertson had put his phone on 'do not disturb'.

72. Ms Smith and the claimant then went to Mr Robertson's desk in the open plan area. The claimant asked if Mr Robertson was present and somebody told him that he was. The claimant then stood near Mr Robertson's desk and an altercation ensued between them. They were both under pressure and frustrated and tempers were frayed. There was conflicting evidence in statements later obtained by the first respondent and also in the evidence we heard, as to exactly what was said, how and when. It is clear however that the claimant was very angry with Mr Robertson and expressed that anger forcibly and that at some point Mr Robertson shouted words to the effect of 'I'm busy, don't waste my time, go away'. The claimant says that this was during the altercation whereas Mr Robertson says it was said at the very end and was the only time he raised his voice. What is beyond doubt is that this all happened in an open plan area in the presence of junior colleagues.

73. The claimant and Ms Smith returned to the third floor. The note written by Ms Smith on the same day indicates that she was too upset to do any work on the computer that had, by then, become available to her.

74. At 16:19 Ms Smith sent an email, by drafting it and sending it first to the claimant who forwarded it to Ms Gillespie (thus indicating that between them the claimant and Ms Smith were able to produce some work), informing her about the problem and asking for her help when she returned the following morning in getting the situation resolved with the IT provider. That is exactly what happened and it appears that shortly after 9:30 the following morning the claimant and Ms Smith were able to work normally.

75. On 5 January 2017 Ms Gillespie emailed the claimant stating that she and Mr Robertson would like to invite him to disciplinary investigation meeting in accordance with the disciplinary procedure on 10 January 2017 in room 2. The purpose of the meeting was to discuss his behaviour towards Mr Robertson on 3 January 2017. She stated that they had no objection to him bringing Ms Stephens to be an independent notetaker.

76. The claimant was absent from work on 6 January 2017 for one day. He submitted a self-certificate on 9 January 2017 which gave the reason for the absence as:

> 'Nauseous, palpitations, high blood pressure with visual impairment, headaches and stress, and inability to concentrate'

77. Also on 9 January 2017 the claimant acknowledged Ms Gillespie's invite to the investigatory meeting. He requested a change of date so that his independent notetaker would be available and he also stated:

> 'It would of course be more convenient for the meeting to take place in my room, please.'

His evidence to us was that he used these words on the advice of his solicitor.

78. Ms Gillespie replied the following day agreeing to the change of date (to 13 January 2017) but said it would be impractical to use the claimant's office as opposed to a meeting room as his room was too small to accommodate four people comfortably and inadequate for notetaking purposes. In reply to that the claimant simply said:

> 'Thank you. Duly noted.'

79. The claimant was again absent from work for a day and a half on 10 and 11 January 2017. In the self-certificate he submitted on 12 January he gave the reason for his absence as anxiety.

80. On 11 January 2017 Ms Gillespie wrote to the claimant at home by letter (which of course the claimant could not read without assistance) asking for his consent to approach his GP or consultant to obtain a written report on his fitness to work and to participate in the proposed disciplinary investigation process. She also said:

> 'We need the report as a result of the sickness absences, which appear to be stress related. The firm is required to consider the effect of your stress related condition on your day to day activities, to assist us with planning the workload within the department and in order that the firm may consider any requirements for reasonable adjustments in relation to these matters and to the forthcoming disciplinary investigation hearing.
>
> We are seeking the report in order to obtain the necessary information regarding your stress and associated conditions so that any action or decisions taken subsequently regarding your employment, working conditions, internal procedures or environment are taken in the light of up-to-date medical information and opinion. Following receipt of the report… we will invite you to a meeting to discuss its contents.'

81. The meeting proceeded on 13 January 2017. A note was prepared by the first respondent's notetaker. The claimant also recorded it and a transcript was therefore also available to us. The transcript shows that at the beginning of the meeting Ms Gillespie said that she would be taking notes and that Mr Robertson would be taking the meeting. Mr Robertson then confirmed that the meeting was to discuss the claimant's behaviour on 3 January and proceeded to give his account of what happened on that day. The claimant also gave his account of events on the day. Shortly after he commenced doing so Mr Robertson interrupted to disagree with his account. This led to an angry exchange between the claimant and Mr Robertson as to the accuracy of the claimant's account. The claimant then continued and the notetaker read out a statement on his behalf. In that statement the claimant said (about Mr Robertson):

'Such inappropriate responses such as, *"No, I'm busy, go away, don't waste my time"*, coupled with silence, highlights WR's lack of awareness for my disability and thus made it impossible for me to know whether he was listening or what.'

and later:

'Even if this investigatory meeting has failed to take into account my blindness.'

82. Having heard the claimant's account and statement, both Ms Gillespie and Mr Robertson separately indicated that they would not respond to or go into the 'ins and outs' of the situation. Ms Gillespie also made it very clear that she believed the claimant's behaviour on that day to be inappropriate. Neither Ms Gillespie nor Mr Robertson acknowledged or reacted at all to the claimant's statement about his blindness. Ms Gillespie accepted in cross examination that she should have asked the claimant what he had meant. At the end of the meeting Ms Gillespie confirmed that she and Mr Robertson would discuss what action to take next.

83. Ms Gillespie prepared a summary of the findings of the investigation in which she recorded that in the 'investigatory disciplinary meeting' both Mr Robertson and the claimant gave their versions of events and that there appeared to be a dispute as to what had happened. Therefore she had conducted an investigation and spoken with and obtained witness statements from Ms Walsh and Ms Swaffer both of whom were present. She then recorded her findings which, in summary, were that the claimant had displayed behaviour that was inappropriate and unacceptable in any workplace and was a deliberate attempt to publicly undermine Mr Robertson in front of colleagues. She recorded that she considered the claimant should be given a written warning that such behaviour is inappropriate and unacceptable and would not be tolerated going forward.

84. Ms Gillespie then wrote to the claimant on 23 January 2017 requiring him to attend a disciplinary hearing on 6 February 2017 in room 2. The purpose of the hearing was to consider an allegation of inappropriate and unacceptable behaviour on 3 January 2017. She enclosed a copy of the disciplinary procedure, notes of the investigation meeting on 13 January 2017, copy witness statements of Ms Walsh and Ms Swaffer and her summary of findings. The latter confirmed that if he was found guilty of misconduct the first respondent may decide to issue him with a written warning or a final written warning and that the hearing will be conducted by Ms Connah with Ms Gillespie also present and a notetaker. The letter concluded by asking the claimant to contact her if he had any specific needs at the hearing as a result of a disability.

85. Also on 23 January 2017 Ms Gillespie wrote to the claimant chasing him for a reply to the request for consent to approach his GP. He replied on 28 January stating that he considered the request wholly inappropriate and that he had not seen his GP that year.

86. Also on 28 January 2017 the claimant wrote to Ms Gillespie confirming receipt of the invite to the disciplinary hearing and that he would attend. He also said in that letter:

'However, it would be more convenient for the hearing to commence no later than 2:30pm and for it to take place in room on the third floor. Kindly confirm.'

87. Ms Gillespie replied to those two letters by her own two letters both on 31 January 2017. In the first she confirmed that the request for consent to approach his GP was a consequence of his self-reported anxiety and stress but that if he did not want to give consent asked him to confirm that there were no steps he would like taken to manage the stress and anxiety. In the second she said:

'I would be grateful if you would confirm the reason why you are requesting that the meeting be held in your room. Are there any specific reasons why you would like this to be the case.

If there is no specific reason, then the hearing will take place… in Room 2…'

88. In reply to that, the claimant said, by letter on 3 February 2017, that the request for the meeting to take place in his room was for 'any necessary accessibility'. In reply to that, on the same day, Ms Gillespie said:

'Unfortunately, I genuinely do not understand your request to have the meeting in your room. The meeting rooms are used by you regularly for meetings with clients, and indeed departmental meetings. I am also concerned that privacy will not be maintained if the meeting is held in your room. If you need assistance then please confirm what you require and this will be arranged.'

89. The claimant did not reply to this prior to the meeting taking place.

90. The disciplinary hearing, chaired by Ms Connah, took place on 6 February 2017. Again a transcript of this hearing was available to us. The claimant was accompanied by Mr Hollyhomes. Ms Connah established that Mr Hollyhomes was present as a disability aid and that he would read things out for the claimant and anything else he might want noted. She then asked if there was anything else needed for the meeting because of the claimant's disability or anything else. Mr Hollyhomes said that he thought they were okay and the claimant confirmed that. Mr Hollyhomes read out a prepared statement. Ms Connah asked the claimant a series of questions but he declined to substantially add to his statement.

91. Ms Connah wrote to the claimant on 9 February 2017 with the outcome of the hearing. She made a number of findings of fact and that none of the context justified his behaviour. Overall she concluded that in all the circumstances a written warning was appropriate and enclosed that warning. We find that Ms Connah properly considered all the circumstances and the claimant's submissions. Although she was clearly aware of the previous summary of findings prepared by Ms Gillespie, we find that Ms Connah properly made her own decision and would have been willing and able, if she considered it appropriate, to disagree with Ms Gillespie.

92. The claimant submitted a notice of appeal on 11 February 2017. The grounds of his appeal were stated to be as follows:

'Breach of the rules of natural justice;
Process entirely prejudicial;

Pre-determined outcome;
Failing to comply with ACAS guidelines properly or at all;
Failing to carry out investigations properly;
Failing to interview any witnesses and/or call witnesses to the alleged incident;
Failing to follow the Firm's Disciplinary and Dismissal Procedure properly;
Failure to establish a balanced view of the facts throughout the process; and
Failure to treat me fairly and consistently with all other employees.'

93. On 14 February 2017 solicitors acting for the claimant wrote to the first respondent alleging, inter alia that he had claimed unlawful discrimination under the 2010 Act. The respondent accepts that that letter was a protected act.

94. On 16 February 2017 Ms Gillespie wrote to the claimant confirming that the appeal would be held on 23 February 2017 at 2.30pm in room 2 by Ms Ferguson. She also stated:

'Please confirm if you require your computer and any other equipment you need to be placed in Room 2 in readiness for the appeal hearing, or if there is any other way the firm can assist you in preparing for and attending the hearing.'

95. The claimant replied on 18 February 2017 firstly objecting to the presence of Ms Gillespie at the appeal hearing and secondly stating:

'Whilst belatedly I am grateful for your suggestion of making my computer equipment available in Room 2, you must know that this is wholly impracticable. You know doubt recall the many months, if not longer, when the latest specialist software required for my accessibility and work, could not be installed nor connected to the Firm's network… the appeal could be conducted in my room on the third floor with Deanne Ferguson and Eloise Freeman-Brown, as I would not then need a companion and would have full access to my computer.'

96. Ms Gillespie's reply, on 20 February 2017, advised that she would attend the appeal as the investigatory officer in accordance with the disciplinary procedure and as far as the issue of the computer/equipment was concerned simply stated:

'I note that you do not wish your computer or any further equipment to be placed in the interview room and in order to preserve your confidentiality, the meeting will be conducted in Interview Room 2…

If you would like assistance with reading out any statements, documents or similar Eloise Freeman-Brown would be happy to do so.'

97. The claimant replied to that on the following day stating:

'With respect, I think you have misunderstood my letter of the 18th February 2017, as I would very much like on this occasion to have full access to my computer and related equipment. I am more than happy for the meeting to take place in my room, as previously stated, and have no concerns as to confidentiality. Moreover, I would not then require a companion to be present. However, if the meeting is to take place in room 2… I would very much like for you to arrange for my computer and related equipment to be available to me. I would also then need my companion, Ian, to be present.'

98. Ms Gillespie confirmed in writing the following day to the claimant that although concerns about confidentiality still stood, they agreed to hold the appeal hearing in his office as requested.

99. That appeal hearing proceeded on 23 February 2017 in the claimant's office. In fact Ms Stephens also attended so he had the benefit of her presence as well as his computer. He did not have the full benefit of his computer however as, given the late agreement to the meeting being held in his room, he did not have enough time to scan in to it all the documents that he would otherwise have done. It is clear from the transcript of the meeting that he did use the computer to some extent but it is also clear that he felt at a great disadvantage in the process.

100. It became apparent towards the start of the hearing that Ms Ferguson had with her an account by Mr Robertson of what had happened on 3 January 2017. The claimant informed Ms Ferguson that he had not received a copy of that having only received copies of the statements of Ms Walsh and Ms Swaffer. He also asked if any of the other witnesses on the day had made statements and said that it was wholly inappropriate for Ms Smith not to have been asked to make one.

101. The hearing continued with a consideration of events on 3 January 2017 and the claimant's concerns about the procedure adopted by the first respondent in the disciplinary process including their failure to give him access to a computer until that day about which he said:

> '… even then it doesn't work for me now, to appreciate the dialogue of access to the previous meetings that have taken place, which have all been required to be in Room 2 until today, which meant I had no access to a computer, and meant I have to rely entirely upon Candy or Ian to pre-prepare everything as I'm not in a position to cross-refer to things as you would be and it is not analogous to seeing a client… This is my employment on the line not a client who's coming for a solution to a problem which I prepared for in advance and know what I'm dealing with, etc, etc,. Again I felt at a considerable disadvantage, I still do today.'

102. The claimant also raised his concerns about having been asked for access to his medical records and compared himself to other employees with a similar sickness record. Ms Ferguson asked him why he believed he had received the request to which he said that was not for him to answer. Later in the exchange he said he thought it was prejudicial and pre-determined.

103. Almost at the very end of the hearing Ms Ferguson referred to the claimant's solicitor's letter and asked the claimant if he thought the failure to treat him fairly and consistently was a general thing or connected to his disability or both. The claimant said that he would pass on answering that question as he was not sure he could clarify anything else other than what he had already clarified that day and in previous meetings.

104. On 27 February 2017, which according to the disciplinary procedure was the date the appeal outcome was due, Ms Ferguson drafted an outcome

letter which revoked the formal written warning. She provided a copy of that draft to Ms Gillespie.

105. On 28 February 2017 the claimant resigned by letter to Ms Gillespie. He said:

> 'I have found the last three months to be thoroughly demoralising and the disciplinary "meetings" intolerable. As such, I can no longer endure the working environment you and Warren have created for me. It is quite apparent you have lost of confidence in me as an employee and no longer trust me as a colleague, albeit without justification…
>
> I have refrained from resigning without notice as I am a professional and will continue to act as a professional throughout my notice period, ensuring my clients are properly cared for, and appropriate handover is conducted.
>
> I write this letter with an extremely heavy heart and after 35 years of practice as the, the majority of which with the Firm.'

106. After she had received that letter, Ms Gillespie emailed Ms Ferguson asking her, on advice from her employment lawyer, to make some findings of facts about the allegation of discrimination made in the solicitor's letter.

107. In response to that Ms Ferguson prepared a second draft of the outcome letter. This draft, as well as revoking the formal written warning, referred to the solicitor's letter but said that she felt she did not have all the facts nor the knowledge or expertise to form an opinion one way or another on his allegations of unlawful discrimination.

108. There then followed exchanges between Ms Gillespie and Ms Ferguson in which it is clear that Ms Ferguson felt Ms Gillespie was trying to influence her decision, which Ms Gillespie denied. In an email to Ms Ferguson on 1 March 2017, Ms Gillespie said that they respected her decision to revoke the warning but that she also needed to decide whether the proceedings were discriminatory or not. Ms Ferguson declined to do that and on 7 March 2017 sent to the claimant an outcome letter in the same terms as her first draft.

109. In the meantime, Ms Gillespie had acknowledged the claimant's resignation in a letter dated 2 March 2017 confirming that his leaving date would be 27 May 2017. She also said that as she was sure he would anticipate and understand, in accordance with his contract of employment, he would not be required to attend work for the duration of that notice period and his last day in the office would be 10 March 2017. This decision was made by her together with Mr Robertson. Ms Gillespie's evidence, which we accept, was that the claimant himself had previously advised that departing employees should be put on garden leave for obvious commercial reasons. In this case he was not just an employee but a former equity and managing partner with a client-following.

110. The evidence before us as to the respondent's previous practice regarding placing former partners/employees on garden leave upon their resignation was incomplete. It is clear however that at least one former

partner (Mr Rowe) who had been employed as a consultant solicitor had been put on garden leave when he resigned in September 2016.

111. On 10 March 2017, the claimant's last day in the office, there was there was an exchange of emails between him and Ms Gillespie regarding a possible leaving event. The claimant said there was a last minute, loose arrangement of drinks that night and left it with Ms Gillespie and Mr Robertson as to whether any other leaving event should be organised. Ms Gillespie then offered, if he wished, to organise something but left it with him. We find that she did this as a belated attempt to recognise the claimant's long service and contribution to the first respondent. The claimant did not reply and no further event was organised.

112. On the same day a thank you card from Ms Gillespie and Mr Robertson which enclosed a gift experience voucher was given to the claimant. He sent a note back thanking them for the card and gift which he said was totally unexpected and he signed the note 'kind regards'. He subsequently received details of the voucher, including its value, and wrote to them again on 5 April 2017 repeating that the gift was totally unexpected but that on further reflection he found the offer of such a gift 'somewhat surreal if not offensive' and returned it to them.

113. On 14 March 2017 one of the claimant's clients wrote to Ms Gillespie on behalf of three large taxi firms in Brighton, expressing concerns over the claimant's 'shock departure'. He requested that they could continue to obtain advice direct from the claimant and to pay the firm as usual for his services. Ms Gillespie declined that request saying that arrangements had been made for an alternative solicitor to take over the claimant's caseload. She did this with the, perhaps optimistic, intention of trying to keep the client and protect the first respondent's commercial interests. In the event the client ultimately left the first respondent and engaged the claimant directly.

Conclusions

Discrimination claims

114. In respect of all the claims of discrimination we conclude that the burden of proof does pass to the first and third respondents. This is because of a comment Mr Robertson admitted making about standing still and silent in the presence of the claimant so that the claimant would not know he was there. This was described to us as 'juvenile' and 'silly' by the respondents but we find it to be grossly offensive and clearly at least calls into question the reason(s) for other treatment of the claimant by Mr Robertson and the first respondent, for whom Mr Robertson was half of the senior management.

115. We do not conclude however that the burden of proof passes to the second respondent in respect of any personal liability. Her relationship with the claimant was a longstanding one based on genuine friendship, trust and respect. We have found no facts from which, in the absence of any other

explanation, we could find that she personally contravened any relevant provision of the 2010 Act.

116. Our conclusions in respect of each of the specific claims against the first and third respondents are as follows:

117. Direct disability discrimination and discrimination arising from disability:

118. Issues 7a & 9a

119. We have found that disciplinary action was taken against the claimant in December 2016. This was capable of being less favourable treatment for the claims of direct discrimination and was unfavourable treatment for the arising from claims.

120. This action was not taken by the respondents, however, because the claimant is disabled and therefore does not amount to direct discrimination. The reason for the investigation was his behaviour, namely his memo to Ms Swaffer and his email exchange with Mr Nelms both in the context of his behaviour generally up to that point.

121. Further, the action was not because of something arising in consequence of the claimant's disability. It was because of the claimant's behaviour in November 2016 which arose in consequence of his disappointment with the organisation of the moot and his email exchange with Mr Nelms rather than his disability. Further in respect of the general context, namely the claimant's general behaviour and the deterioration of his relationship with Ms Gillespie, this arose in consequence of her earlier refusal to give his daughter a training contract and what he believed had happened at the lunch rather than his disability. Accordingly this did not amount to discrimination arising from disability.

122. Issues 7b & 9b

123. Mr Robertson did refuse to contact the IT provider on 3 January 2017 and thereby assist the claimant. This was capable of being less favourable and was, from the claimant's perspective, unfavourable treatment.

124. Given our findings above regarding the offensive comment made by Mr Robertson on another occasion, we have carefully considered whether we should draw an inference as to the reason for this behaviour. However we find that the reason for his refusal was not that the claimant was disabled but was because Mr Robertson had by then assisted Ms Smith in agreeing she would use an alternative computer in the knowledge that she had herself already been in contact with the provider and because he was himself was very busy and believed a solution had already been agreed upon. Accordingly the refusal did not amount to direct discrimination.

125. The claimant asked for specific action that he believed would help him and it was refused by Mr Robertson in a heated way. The refusal was not, however, when looked at objectively something arising in consequence of

the claimant's disability. Clearly his disability was part of the context, namely the reason why he had the particular IT needs, but Mr Robertson's refusal to assist was a consequence of having been being told that IT was already working on the issue and that a work around had been found. Accordingly it was not discrimination arising from disability.

126. Issues 7c & 9c

127. Being invited to a disciplinary investigation meeting is capable of being less favourable and was unfavourable treatment.

128. The reason for the claimant being invited to the meeting on 5 January 2017, however, was as stated in the invite itself - to discuss his behaviour towards Mr Robertson on 3 January 2017. It was not because of his disability and accordingly did not amount to direct discrimination.

129. It did however, in all the circumstances, amount to unfavourable treatment because of something (his behaviour) that, when looked at objectively, arose in consequence of his disability. However, in all the circumstances and looked at objectively, inviting the claimant to a disciplinary investigation meeting in accordance with the disciplinary policy was a proportionate means of achieving the respondent's legitimate aim of a reasonable desire to stop the claimant from publicly undermining the partners of the first respondent or having public confrontations with them. Accordingly it was not discrimination arising from disability.

130. Issues 7c & 9c

131. There were aspects of the manner in which the meeting was conducted on 13 January 2017 that were capable of being less favourable and were unfavourable treatment.

132. We conclude that the presence of Mr Robertson in itself was not less or unfavourable but the way his input was managed was. It is clear that Ms Gillespie and Mr Robertson took the meeting together. Mr Robertson was not, for example, asked by Ms Gillespie to put his version of events and the claimant then asked to put his. Mr Robertson inappropriately interrupted the claimant more than once – which given the claimant's disability had a particular adverse effect. The claimant not being asked what he meant when he said the meeting was failing to take into account his blindness was certainly unfavourable treatment as was Ms Gillespie admonishing the claimant.

133. We have also carefully considered the failure by Ms Gillespie to take any evidence from Ms Smith and the failure to copy the statement of Ms Holland to the claimant. We regard both as significant failures (although we do not conclude it was active suppression of evidence) that amount to less or un-favourable treatment.

134. We conclude however that none of this treatment was because of the claimant's disability but was a result of Ms Gillespie's inexperience in

conducting a disciplinary investigation notwithstanding the advice she was receiving from HR and her external legal adviser. Further, Ms Gillespie had clearly already formed a view – as demonstrated by her comments in the investigatory meeting itself – that the claimant was at fault on 3 January 2017. Her failure to obtain and share all the relevant evidence was at least in part due to her, perhaps unconscious, bias towards the view she had already formed but that view was not because of disability.

135. As to whether this treatment amounted to discrimination arising from the claimant's disability, again the reason for the treatment (save for the admonishments and failure to ask about the claimant's blindness comment) was a lack of knowledge/experience.

136. The reason for the admonishments was the claimant's behaviour on 3 January 2017 and, although the claimant accepted in cross examination that that type of behaviour was inappropriate, we conclude that that behaviour arose in consequence of his disability. In this context, we do not conclude that the respondents' treatment can be justified as this was an investigatory meeting and any conclusion as to misconduct should not be made until the investigation was complete. Accordingly this claim of discrimination arising from disability succeeds.

137. The failure to ask what the claimant meant by his failing to take into account his blindness comment was caused by a failure of Ms Gillespie and Mr Robertson to listen to and properly engage with what the claimant was saying. They had become so used to the claimant being able to do everything that a sighted solicitor could do, they became complacent about their responsibilities – as an employer – in this regard. This failure was summed up by Ms Gillespie in cross examination when she said (in the context of the request for access to his GP) 'He's not Richard the blind man, he's just Richard' and 'I don't think about his blindness'. This was not malicious on her part at all but was a result of their previously very strong friendship and successful working relationship. We conclude however that this failure clearly arose in consequence of the claimant's disability and cannot be justified. Accordingly this claim of discrimination arising from disability also succeeds.

138. <u>Issues 7d & 9d</u>

139. Conducting a disciplinary meeting is clearly capable of being less favourable and was unfavourable treatment. The reason for it however was not the claimant's disability but his behaviour on 3 January 2018. Accordingly it was not direct discrimination.

140. As to whether it amounted to discrimination arising from the claimant's disability, again the reason for the meeting was the claimant's behaviour and for the same reason as set out above there was a sufficient link between those behaviours and his disability to say it was something arising in consequence of that disability. It can however again be justified by the respondent as a proportionate means of achieving the legitimate aim as above.

141. Issues 7e & 9e

142. A written warning is clearly capable of being less favourable and was unfavourable treatment. We have carefully considered the fact that Ms Gillespie, the managing partner, had already set out her conclusion and recommendation of a written warning before passing the matter to Ms Connah. Undoubtedly this did put some pressure or expectation on Ms Connah but having heard from her – and particularly as she was working out her notice – we are satisfied that she issued the written warning based on her own conclusions and what she felt was appropriate. Those conclusions were clearly set out in her letter to the claimant dated 9 February 2017. The warning was not issued because of the claimant's disability. Accordingly it was not direct discrimination.

143. As to whether the warning amounted to discrimination arising from the claimant's disability, for the same reasons as set out above there was a sufficient link between it and the claimant's behaviours to be something in consequence. However it can be justified by the respondent also as set out above and further it was entirely proportionate to put on record that his behaviour was unacceptable. The first respondent had tried to deal with it informally but the claimant had refused to engage and acknowledge any wrongdoing.

144. Issues 7 f & 9f

145. This failure to provide information in advance of the appeal hearing is capable of being less favourable and was unfavourable treatment. Even though Mr Robertson's notes were an aide memoire he had prepared for himself rather than a formal statement, the content had been referred to at the meeting on 6 February which had been recorded for the claimant and Ms Connah did not have the notes, Ms Ferguson did have them before the appeal and therefore they should have been sent to the claimant. Neither providing them to him afterwards or the fact that his appeal succeeded removes that unfairness (albeit it does limit its impact). Likewise, the failure to provide a copy to the claimant of notes of the disciplinary meeting was also unfavourable even though Ms Ferguson did not have them either.

146. The reason for these failures, however, was not the claimant's disability but, again, the respondents' lack of experience and knowledge as to how to run a process of this nature as well as a lack of attention to detail. Accordingly it was not direct discrimination.

147. Neither did it amount to discrimination arising from the claimant's disability. The failures and lack of experience/attention to detail had no connection to his disability.

148. Issues 7g & 9g

149. Being put on garden leave is capable of being less favourable and was clearly regarded as unfavourable treatment by the claimant.

150. The reason for it however was to protect the firm's commercial interests and in accordance with the contractual position. It was not because of the claimant's disability. Accordingly it was not direct discrimination.

151. There was no connection between the decision to put the claimant on garden leave and his disability and accordingly it did not amount to discrimination arising from his disability.

152. Reasonable adjustments

153. Issues 17(a) & (b)

154. The first respondent's handling of disciplinary action in accordance with its disciplinary process was clearly a 'practice' as was the approach taken specifically to the claimant on disciplinary matters from December 2016 through to the conclusion of his appeal.

155. Assessing that approach objectively, we conclude in respect of issue 17(a) that there was no breach of the duty to make reasonable adjustments on 9 January 2017 but there was on 28 & 31 January 2017. On 5 January the claimant was invited to an investigatory meeting in the same way and in the same place as the investigatory meeting he had attended in December 2016 in respect of which no complaint had been made or issue raised. In those circumstances, objectively assessed no duty on the respondent arose at that point nor on 9 January 2017 when the claimant simply said that holding the meeting in his room would be 'more convenient'.

156. However, during the meeting on 13 January when the claimant expressly said that the meeting had failed to take into account his blindness, a duty arose at that point - at the very least - to seek clarification as to what he meant. This was not done and in fact there was no reaction from the respondents. Against that background when the claimant later again said that it would be 'more convenient' to hold meetings in his room, the first respondent could and should have made the adjustment that the claimant was seeking, namely to hold the meeting in his room. Even though the claimant was not being very cooperative or fulsome in his replies to Ms Gillespie's enquires, at this stage the onus was on the first respondent to make adjustments that, objectively assessed, were required. It failed to do so. The respondent has argued that they did not know and could not be expected to know that the claimant was placed at a substantial disadvantage because he had held client and other meetings in room 2. We do not accept that argument. Client meetings etc are of a very different nature to disciplinary meetings potentially requiring very different preparation and interaction.

157. That duty having been engaged, although the appeal meeting was moved to the claimant's room he was told about this so late that the adjustment was not fully effective as he was not given time to prepare the way he wanted to prepare. Again, even though he did not seek a postponement and he did have Ms Stephens with him, it is the respondent's

conduct that is in question not his. Accordingly the first respondent breached its duty to make reasonable adjustments.

158. Issue 17(c)

159. As stated above, there was a failure to disclose documents in advance of the appeal hearing when they should have been. This was a one-off event and did not constitute a 'practice'. The duty in respect of reasonable adjustments was not therefore engaged.

160. Harassment

161. Issue 19(a)

162. The reason Ms Gillespie requested access to the claimant's GP was because of the reasons for his absence which he had declared on his self-certificates which included stress, anxiety and high blood pressure. Although this was unwanted conduct on the part of the claimant it was not related to his disability. In any event, even if it was related it was not done for the purpose of violating his dignity etc and could not reasonably have had that effect on him. Accordingly it did not amount to harassment.

163. Issues 19(b) & (c)

164. Neither the offer to organise a leaving event (albeit clumsily done) nor the refusal to allow the claimant to advise his clients, although clearly unwanted by him, were related to his disability. Accordingly they also did not amount to harassment.

165. Victimisation

166. There was no causal link between any of the alleged detriments and the protected act. The reason for alleged detriments (a) and (c) was to protect the commercial interests of the first respondent. The reason for alleged detriment (b) was a belated effort to recognise the claimant's long service. The claims of victimisation fail.

Unfair constructive dismissal

167. We first considered each of the alleged breaches as follows and have unanimously concluded that none of them individually amounted to a breach of the implied term of mutual trust and confidence.

(a) The disciplinary action in December 2016 was a reasonable and proportionate response by the first respondent and in accordance with their contractual rights and policies.

(b) Mr Robertson's refusal to assist on 3 January 2017 was in all the circumstances understandable but his reaction could and should have been more understanding and professional. He displayed behaviours that are not to be expected of a senior partner even if provoked. In all the circumstances, however, especially given the claimant's behaviour and his

own very lengthy experience and previous position on the firm, this did not amount to a breach.

(c) Inviting the claimant to the meeting was again a reasonable and proportionate response by the first respondent in accordance with their contractual rights and policies. We are critical of some aspects of the way the meeting was handled which were undoubtedly unreasonable but again in all the circumstances conclude that this did not amount to a breach.

(d) Ms Gillespie's approach to the claimant in respect of access to his GP was done for the right reasons albeit perhaps a little clumsy. An informal approach would have been better but it was perfectly reasonable for the first respondent to react in the way it did to what the claimant had self-certified.

(e) & (h) For the reasons set out above in respect of reasonable adjustments, we conclude there was no breach in respect of 9 January 2018. We have found that there was a breach of that duty in respect of 28 & 31 January and 23 February 2017 but that exercise involves an objective assessment of the first respondent's actions. When assessing if there has been a fundamental breach of the term of mutual trust and confidence, we assess both the claimant's and first respondent's behaviour. In that context the claimant's lack of cooperation and his other less than fulsome replies to Ms Gillespie are relevant. Having assessed all the relevant circumstances, we conclude that there was no breach of the implied term. Mutuality requires cooperation and openness from both parties whereas the claimant answered in a guarded way having taken legal advice. Indeed the final word was Ms Gillespie's when she asked on 3 February 2017 for confirmation of what he required and said that 'this will be arranged'. The claimant did not reply.

We have found that the respondents' actions did not give the claimant the opportunity to prepare for the appeal the way he wanted but he did attend the appeal with Ms Stephens and had access to his computer onto which he had been able to load at least some documents.

(f) This was a reasonable and proportionate response by the first respondent and in accordance with their contractual rights and policies.

(g) This was Ms Connah's decision which was made fairly and independently having heard from the claimant, considered the evidence and made up her own mind.

(i) We have found that there was a failure to provide Mr Robertson's notes to the claimant and this was a flaw in the process, but the substance of those notes had been both heard by him at the investigatory meeting and supplied to him in the notes of that meeting. Accordingly there was insufficient disadvantage to the claimant to amount to a breach.

168. We have also considered whether these individual matters when looked at cumulatively amount to a breach of the implied term. Having discounted those that are very clearly not breaches, we are left with considering Mr

Robertson's behaviour on 3 January 2017 and the flaws in dealing with the process thereafter which when looked at overall amounted to inept handling of the situation notwithstanding the efforts made at various points to draw a line under events and move on.

169. The majority decision is that even when looked at cumulatively this did not amount to a breach of contract and therefore the claimant's resignation could not amount to a constructive unfair dismissal.

170. The minority of the Tribunal (Ms Thompson) disagrees. She concludes that although none of the individual alleged breaches were fundamental, where there are criticisms of the respondents' behaviour and those matters are looked at cumulatively against the background of the claimant's seniority, long service and history with the first respondent, they amounted to a fundamental breach of the implied term of mutual trust and confidence and that the claimant resigned in response.

171. **Remedy Hearing**

172. A remedy hearing is therefore required in respect of the claimant's successful claims of discrimination arising from disability and breach of the duty to make reasonable adjustments. This will be held on **13 July 2018** commencing at **10am** listed for 1 day. The claimant is ordered to send an updated schedule of loss to the respondent on or before **29 June 2018** together with copies of any supporting statement and all supporting documents including any he relies upon as evidence of his attempts to mitigate his losses. The parties will not receive a separate notice of remedy hearing. If in the meantime the parties reach agreement regarding remedy they are asked to notify the Tribunal as soon as possible.

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Employment Judge K Andrews
Date: 8 June 2018

Appendix – List of Issues

Constructive unfair dismissal

1. Did the Claimant resign because of an act or omission or series of acts or omissions by the Respondents:
   a. Taking disciplinary action in December 2016 [ET1-9];
   b. R2 refusing to assist C on 3/1/2017 [ET1-10-12];
   c. Inviting C to disciplinary investigation meeting and the manner in which the meeting was conducted on 5/1/2017 and 13/1/2017 [ET1-14, 20-21, 24-25];
   d. Approaching C for access to his GP on 11/1/2017, 23/1/2017 and 31/1/2017 [ET117-19];
   e. Asking C if he required adjustments and then refusing his request on 9/1/2017, 28/1/2017 and 31/1/2017 [ET1-15-16, 22-23];
   f. Conducting a disciplinary meeting on 6/2/2017 [ET1-24];
   g. Imposing a written warning on 9/2/2017 [ET1-25];
   h. Eventually agreeing to the appeal meeting taking place in his office on 23/2/2017 so shortly before the hearing so that the adjustment was ineffective [ET1-26]; and
   i. Failing to provide information to C in advance of the appeal hearing on 23/2/2017 [ET1-28].

2. If so, did that conduct by the Respondents amount to a fundamental breach of contract?

3. Did the Claimant affirm the breach?

4. Did the Claimant resign, at least in part, in response to that breach?

5. Was there a dismissal, in that the Claimant terminated the contract under which he was employed in circumstances in which he was entitled to terminate it with notice, by reason of the Respondents conduct pursuant to section 95 (1) (c) of the Employment Rights Act 1996?

6. Was there a breach of the ACAS Code on Disciplinary and Grievance procedures as per paragraphs 9, 14, 15, 16, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 30 of the ET1?

Unlawful Discrimination

Protected characteristic – disability s.6 EqA

Direct Discrimination

7. Was the Claimant treated less favourably by the Respondents because of his disability contrary to section 13(1) of the EqA:
   a. Taking disciplinary action in December 2016 [ET1-9];
   b. R2 refusing to assist C on 3/1/2017 [ET1-10-12];
   c. Inviting C to disciplinary investigation meeting and the manner in which the meeting was conducted on 5/1/2017 and 13/1/2017 [ET1-14, 20-21, 24-25];
   d. Conducting a disciplinary meeting on 6/2/2017 [ET1-24];
   e. Imposing a written warning on 9/2/2017 [ET1-25];

f. Failing to provide information to C in advance of the appeal hearing on 23/2/2017 [ET1-28]; and
g. Placing C on garden leave on 10/3/2017 [ET1-31].

8. Has the Claimant been treated less favourably than a real or hypothetical comparator whose circumstances are not materially different to his (section 23(1) EqA)?

Discrimination arising from disability

9. Was the Claimant treated unfavourably because of something (the Claimant's behaviour) arising in consequence of his disability:
   a. Taking disciplinary action in December 2016 [ET1-9];
   b. R2 refusing to assist C on 3/1/2017 [ET1-10-12];
   c. Inviting C to disciplinary investigation meeting and the manner in which the meeting was conducted on 5/1/2017 and 13/1/2017 [ET1-14, 20-21, 24-25];
   d. Conducting a disciplinary meeting on 6/2/2017 [ET1-24];
   e. Imposing a written warning on 9/2/2017 [ET1-25];
   f. Failing to provide information to C in advance of the appeal hearing on 23/2/2017 [ET1-28]; and
   g. Placing C on garden leave on 10/3/2017 [ET1-31].

10. Can the Respondents show that the treatment was a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments

11. Was a provision, criterion or practice of the Respondents which put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

12. Was a physical feature which put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

13. Was the Claimant, but for the provision of an auxiliary aid, put at a disadvantage in relation to a relevant matter in comparison with person who is not disabled?

14. Did the Respondents know, or ought reasonably to have known, that the Claimant was placed at a substantial disadvantage by this provision, criterion or practice, or this physical feature or this lack of an auxiliary aid?

15. [Note the Claimant does not accept this is a correct 'defence' to a s.21 EqA claim, nor that it has been pleaded by the Respondents.]

16. Was there a failure by the Respondents to comply with the duty to make reasonable adjustments?

17. As per:
   a. Asking C if he required adjustments and then refusing his request on 9/1/2017, 28/1/2017 and 31/1/2017 [ET1-15-16, 22-23];
   b. Eventually agreeing to the appeal meeting taking place in his office on 23/2/2017 so shortly before the hearing so that the adjustment was ineffective [ET1-26]; and

c. Failing to provide information to C in advance of the appeal hearing on 23/2/2017 [ET1-28].

Harassment

18. Did the Respondents' conduct, contrary to section 26 EqA, have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

19. Was it reasonable, in all the circumstances, for the conduct to have that effect?
    a. Approaching C for access to his GP on 11/1/2017, 23/1/2017 and 31/1/2017 [ET1-17-19;
    b. Offering to organise a leaving event on 10/3/2017 [ET1-31]; and
    c. Refusing to allow C to continue to advise Taxi clients [ET1-32].

Victimisation

20. Have the Respondents subjected the Claimant to a detriment because he has done a protected act (making an allegation that the Respondents' have contravened the EqA?
    a. Placing C on garden leave on 10/3/2017 [ET1-31];
    b. Offering to organise a leaving event on 10/3/2017; and
    c. Refusing to allow C to continue to advise Taxi clients.

Burden of proof under the Equality Act 2010 (s.136 EqA)

21. Are there facts from which an employment tribunal could decide in the absence of any other explanation, that the Respondents contravened the provision concerned?

22. If so, have the Respondents shown that they did not contravene that provision?

Quantum

23. What, if any, compensation is the Claimant entitled to?

24. If compensation is awarded to the Claimant, should this be uplifted by up to 25% for the failure to follow the Acas Code of Practice on Disciplinary and Grievance procedures?