# EMPLOYMENT TRIBUNALS

**Claimant:** Mr G McFarlane

**Respondents:** 1. Assist-Mi Ltd
2. Neil Herron

**Heard at:** Liverpool **On:** 30 and 31 October 2017
1, 2 and 3 November 2017
16, 17 and 18 November 2017
9 and 10 July 2018
11 July 2018
(in Chambers)

**Before:** Employment Judge Horne
Ms H D Price
Mr R Cunningham

**REPRESENTATION:**

**Claimant:** In person assisted by Mr R Milton, Disability Support Worker
**Respondents:** Mr J Searle of Counsel

# RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was not unfairly dismissed.

2. The respondent did not discriminate against the claimant because of disability.

3. The respondent did not discriminate against the claimant arising from disability.

4. The respondent did not breach the duty to make adjustments.

5. The respondent did not harass the claimant.

6. The respondent did not make any unlawful deduction from the claimant's wages.

7. The respondent did not breach the claimant's contract.

# REASONS

## Preliminary

1. The tribunal apologises for the delay in sending the reserved judgment to the parties. The delay was caused by a combination of annual leave and the pressure of hearing other cases.

## Introduction

2. This is a claim brought under the Equality Act 2010 and the Employment Rights Act 1996. What really lies behind it is a dispute between two business partners. Paragraph 2 of the claimant's witness statement sets the scene:

> "This is about two business partners and one of the business partners seems to have decided to plan and engineer and cheat his business partner, me, and my exit out of the company unfairly because he couldn't get me to resign. Neil Herron did not want to allow me the option to take the company in a different direction."

3. Most of paragraphs 38-71 of the claimant's witness statement deal with matters such as unfair prejudice to shareholders, restrictions on competition, intellectual property rights, monies allegedly owed by the claimant to the company, and the legality of directors' actions. In his oral evidence, the claimant often seemed unable to prevent himself from digressing into these matters. The Tribunal cannot adjudicate on them.

## Complaints and Issues

4. It took some time at the start of the hearing to establish exactly how the claimant put his case. Following a discussion of the issues, the Employment Judge prepared a draft list of issues to be determined by the Tribunal. The draft list was circulated to the parties in electronic form. Save for one point of detail, the list was adopted with the consent of all parties. On day 3 of the hearing, the claimant asked for the list to be amended in respect of one of the complaints of harassment. His request led to a contested decision about whether a formal amendment to the claim was required. That dispute was determined in the claimant's favour and the list was amended in inserting words in *italics.* The list was then recorded in a schedule to a Case Management Order sent to the parties on 13 November 2017. Three days later the claimant applied in writing to add eight further allegations that did not appear on the list. That application was heard on 18 December 2017. In respect of two of the allegations in the application, the Tribunal decided that no amendment was needed to the claim and that the list could be amended without substantial disadvantage to the respondents. The remainder of the claimant's application was refused. The two permissible allegations were set out in a further Case Management Order sent to the parties on 19 December 2017. For convenience, they are incorporated into the schedule in <u>underlined</u> text. The consolidated list of issues appears as a schedule to this order.

## Procedure at the Hearing

5. In advance of the hearing and at the hearing itself, the claimant mentioned numerous difficulties that he was facing in trying to conduct the hearing as a person with dyslexia. On some occasions he suggested practical solutions which

he asked the Tribunal to implement by way of reasonable adjustment. At other times, he merely complained. There were many discussions about what steps the respondents and the tribunal ought to take to help the claimant overcome these difficulties. Many adjustments were put in place by consent. Others met with objections from the respondents and were the subject of contested decisions. Some, but not all, of the adjustments that the Tribunal made for the claimant can be seen in the Case Management Orders sent to the parties on 13 November 2017 and 19 December 2017.

6. Unfortunately, the hearing could not be completed within its original five day time allocation. It had to be adjourned part heard for three days in November and December 2017 and then for a further three days in July 2018. In between hearing days, the parties sent numerous emails and letters to the Tribunal requesting orders for disclosure, strike out of the claim and various disputes about additional documents to be placed in the bundle. In response to these applications, the Employment Judge caused six further letters to be sent by the Tribunal.

7. On the final day of the hearing, before the parties had given their closing oral arguments, the claimant returned from the lunch break with a dressing on his chin. He said that he had fallen and would have to go to hospital. The employment judge asked the claimant whether he felt able to carry on or whether we should adjourn. He said that he wished to carry on. Part of his closing argument consisted of reading out loud from a prepared script. We asked him if he would like to e-mail the script to us so that we could read it for ourselves. The claimant agreed and sent the document by e-mail the following day. We read it and took it into account.

**Evidence**

8. The Tribunal considered documents in an agreed bundle marked CR1. A copy of the bundle had been provided to the claimant by the respondents in electronic form. Shortly before the first day of the hearing, the respondents sought to rely on a large number of additions to the bundle collated into a supplemental bundle which we labelled R2. These additional documents initially caused problems for the claimant because he denied ever having received an electronic version of these documents. The respondent's position was that the documents had been provided in PDF format which was capable of being searched by keyword. This issue reared its head a number of times during the course of the hearing, with the claimant complaining that he had not been able to read documents in the supplemental bundle. Each time the respondent reiterated its stance that the claimant had already been provided with the bundle in searchable form. We never got to the bottom of whether the supplemental bundle had been given to him in this format or not. This is because, each time the matter was raised, the claimant indicated that all he needed was sufficient time and support to ensure that he was familiar with the document before either asking or answering questions about it. This was given to him as and when the need arose.

9. At various stages the parties asked to add further documents to the bundle. These were either given page numbers for insertion into CR1 or separate labels, such as C7 and C9.

10. Part-way through the hearing, both parties asked the Tribunal to listen to audio recordings of various telephone conversations and meetings. Their initial expectations of the time that the Tribunal should spend listening to these

recordings was wholly unrealistic. The process had to be carefully case-managed to avoid taking up disproportionate amounts of hearing time. Each party played excerpts that they considered most likely to assist their own case. For each extract they provided a written transcript. The claimant's transcripts were inaccurate. We did our best to amend the transcripts by hand as we listened to the recordings.

11. One notable feature of the audio recordings was that they were characterised by the sounds of the claimant constantly interrupting the other parties to the conversation. Where Mr Milton was also participating, Mr Milton could also be heard frequently interrupting. The claimant would raise his voice to the point of shouting. This behaviour featured not only in the recordings chosen by the respondents but also in those put forward by the claimant.

12. We heard oral evidence from Miss Walsh, Mr Hyams, Mr Raigan Herron, Miss Wingate, Mr Burdus, Ms Fenwick, Mr Taylor and Mr Neil Herron for the respondents. The claimant gave oral evidence on his own behalf and called Mr Milton as a witness. With the exception of Miss Walsh, Mr Hyams and Miss Wingate, all these witnesses confirmed the truth of their witness statements and answered questions. The approach taken to these latter three witnesses was somewhat different. They had not made witness statements. With the claimant's consent, we gave the respondents permission to call them to give oral evidence. Instead of confirming the truth of witness statements, they were taken to pages in the bundle which set out their version of events. They confirmed that those accounts were true and then answered questions in the normal way.

13. This is a convenient opportunity for us to record the impressions which the various witnesses made on us:

    13.1. Miss Walsh, Mr Hyams, Miss Wingate, Mr Raigan Herron and Mr Taylor struck us as straightforward witnesses and we were able to place a considerable amount of reliance on what they said.

    13.2. Mr Burdus gave evidence in a confident and fairly straightforward manner. When evaluating his evidence we had to be careful to remember that he had secretly recorded a meeting with the claimant and the existence of the recording was only disclosed by the respondent very late in the proceedings. We asked ourselves whether that diminished the reliability of his evidence. In the end, we concluded that it did not. The contemporaneous evidence suggested to us that Mr Burdus had good reason to want to make a reliable record of the way in which the claimant behaved during meetings. We were able to accept his evidence.

    13.3. We took a more guarded approach to the evidence of Mr Neil Herron and Ms Fenwick. Both of these witnesses, and Mr Herron in particular, occupied senior positions within the company. Their actions were heavily criticised by the claimant in ways that were central to the claim. They had powerful incentives to say things that would support the respondents' defence. We examined their oral evidence carefully against the contemporaneous emails and other documents to which their evidence related. Having done so, we accepted their general narrative of events as being broadly accurate.

    13.4. Mr Milton's evidence contained many details that were relevant to his own claim against the company and did not appear to have much to do with this claimant's claim. On these points he was not challenged, but we did not

necessarily take the respondent to be agreeing with everything that he said. To the extent that his evidence consisted of his opinion of how the claimant was treated, or his impressions of the actions of others, we thought that an important factor in assessing his reliability would be the extent to which he was able to form such impressions objectively. We thought that his objectivity was undermined partly by his longstanding friendship with the claimant and his appearance of having taken sides with him, and also by comments that he made at meetings with the respondent and in the course of conducting the hearing before the Tribunal. An example of one of the questions he asked in cross examination of Mr Herron was, "You are turning into a weasel, lies, lies".

13.5. The claimant himself spoke passionately, but had difficulty in answering direct questions with a direct answer. He tended to speak at length about the topics that he wished to talk about and needed frequent reminders either to slow down or to concentrate on what he was being asked. As an example, when the claimant was cross-examined about his behaviour towards Mr Hyams, the claimant consistently avoided answering, and instead talked about Mr Hyams' standard of work.

13.6. In deciding what to make of the claimant's evidence, we bore firmly in mind the stress that most people experience when giving evidence, and the effect that stress might well have on the claimant's coping strategies to deal with his dyslexia. We also took into account the many adjustments that had been made to try and prevent the stressful process of giving evidence from having that effect. Having taken all those matters into account, we found the claimant's evidence to be evasive in a way that could not wholly be explained by what we understood to be the effects of his dyslexia.

14. One of the adjustments that was put in place for the claimant was to allow Mr Milton to ask many of the questions in cross examination of the respondents' witnesses on the claimant's behalf. From time to time the claimant asked if he could personally ask questions. We allowed the adjustment because we were concerned that Mr Milton was not a professional representative and may not be able to ask all the questions the claimant might want to put on his own behalf. We did not require all the questions to be asked by the claimant, because we were alive to the possibility that the claimant's dyslexia might be aggravated by the stress of having to ask questions in a Tribunal setting, especially if they related to documents, and that this might impair his ability to text the witnesses' evidence effectively. Unfortunately, the adjustment of allowing both the claimant and Mr Milton to ask questions had an unintended consequence. Cross-examination was often characterised by the claimant and Mr Milton talking over each other as well as interrupting the witness. That tendency did not of itself allow us to draw conclusions about the claimant's behaviour whilst employed by Assist-Mi. It could be explained by the artificial setting of a Tribunal and the impact of stress on the claimant's coping strategies. What was harder to make allowances for was the overtly hostile way in which Mr Milton and the claimant interrupted and made derogatory comments about the respondent's witnesses. We have already mentioned one from Mr Milton. Another was, "I don't want to hear that waffle". Both the claimant and Mr Milton frequently resorted to hollow laughter in the middle of a witness's answer and needed regular reminders from the Employment Judge to behave themselves. Whilst recognising the great care with which Tribunals must tread when drawing conclusions about a person's behaviour in the workplace based on their behaviour in a Tribunal room, we did

think that the behaviour of the claimant and Mr Milton lent some support to the evidence in the respondents' witness statements about the difficulties they encountered when talking to the claimant over the telephone and in meetings.

**Facts**

15. The claimant is, and describes himself as, an inventor. He cares deeply about the rights of disabled people and their opportunities to participate in society. Access to banks, supermarkets, airports and other public amenities are generally taken for granted by most of the population, but they can present real difficulties for people with disabilities. For many years, the claimant's vision has been to harness new technologies, and smartphone apps in particular, to help disabled people overcome these difficulties.

16. The claimant is a disabled person himself. He has arthrogryphosis multiplex congenita which affects his mobility and ability to carry everyday objects. He also has the mental impairment of dyslexia. Not only does dyslexia cause difficulties with writing and spelling, it also affects his ability to process information, and written information in particular. In situations of stress, he finds it difficult to order his thoughts or, in his words, "process spoken or written language". Dyslexia is sometimes described as a "hidden disability". The claimant himself was not diagnosed until he was studying for a Masters degree.

17. Mr Neil Herron also describes himself as an inventor. He is also an investor in, and director of, a number of companies.

18. On 29 July 2010, the claimant and Mr Herron met in Piccadilly Circus, London. Over coffee, they discussed a plan to go into business together. Their mission was to develop and market a software app to help disabled people gain access to public buildings. The claimant, who was living in London at the time, agreed to move to the North East of England where Mr Herron was based. Together they formed a company, at that time called Disabled Access 4 All Limited, with each of them holding a 50% share. The company's main asset was the intellectual property in software.

19. On 28 July 2011, the claimant signed a contract of employment with Disabled Access 4 All Limited. According to the contract, the claimant was employed in the role of Director. Clause 7.1 of the contract provided that the company would reimburse all reasonable expenses wholly, properly and necessarily incurred by the claimant in the course of his appointment, subject to production of receipts or other appropriate evidence of payment.

20. At some point (we were unable to determine precisely when) the claimant obtained a patent on an app called "Assist-Mi". Although we are unsure of the precise mechanism by which this happened, the claimant became employed by a company called "Assist-Mi Limited". (For ease of reference, we will call it the respondent). Whether this state of affairs was brought about by a simple change of name or by a transfer from one company to another, we are not quite sure.

21. Whilst working for the respondent the claimant received the assistance of a support worker to help him overcome his disabilities in carrying out the role. For a number of years the support was provided by Mr Herron. Access to Work funded the claimant to pay for Mr Herron to provide 17 hours' support per week.

22. On or about 2 June 2014, that situation changed. Mr Herron ceased to be the claimant's support worker. This may well have been because Mr Herron continues to be based in the North East, and the claimant had, by that time,

moved to Southport on Merseyside. From that time, day-to-day support for the claimant was provided by the claimant's longstanding friend, Mr Milton. Since approximately 2011, Mr Milton had been employed by the respondent or a predecessor company, as Head of IT. The claimant continued to receive Access to Work funding, which was now paid directly to Mr Milton. The claimant did not tell Mr Herron that he continued to receive this funding. Had Mr Herron thought about it, however, he would have realised that it was unlikely that the claimant would have allowed the funding to dry up altogether.

23. On 29 August 2014 Access to Work awarded the claimant a further grant of £3,236.93 to cover various forms of hardware and software that might assist him in his role. The claimant did not consider that all of this technology was actually necessary. In his opinion, he was able to participate in oral discussions without any problem. He could discuss ideas and get his point across. What he found more difficult was to absorb large quantities of written material within a short space of time.

24. Over the next couple of years Mr Herron made attempts to attract inward investment. New companies were formed. It has been hard for us to keep track of the corporate structure at different times. By January 2016, it appears that the respondent was entirely owned by a parent company known to us as “Grid”. It is likely, though we are not sure, that the company’s full name was Grid Smarter Cities Limited. Linked companies included Activ8 VPS Limited and Omnia Smart Technology Limited. Whether directly or via these other companies, the largest shareholder in Grid was Mr Herron. Mr David Comyn was the second largest shareholder and the third largest shareholding was held by the claimant.

25. Mr Herron expected the claimant to work in not just the interests of the respondent but also in the interests of the wider Grid group, since Grid was the respondent’s owner. As such, the claimant was required to communicate with and work as a team with direct Grid employees, including a relatively junior employee named Keely Walsh. Employees of the respondent, including Mr Dom Hyams, were also expected to assist in Grid-related projects.

26. By August 2015, the respondent was struggling financially. The claimant was working hard to promote the Assist-Mi product and was driving many thousands of miles per year to attend meetings. Nevertheless, in August 2015 he agreed to accept reduced remuneration from the respondent. One of the issues we have to decide is whether or not the claimant the claimant was subjected to “emotional blackmail” before he agreed to this pay cut. We have heard very little, if any, evidence about anything said or done towards the claimant in the summer of 2015. Whilst it seems likely to us that Mr Herron would have wanted to keep the costs to a minimum, and he would have wanted to impress upon the claimant the financial difficulties that the respondent was facing, the evidence is so thin that we cannot find that Mr Herron was emotionally blackmailing the claimant. We would also regard it as unfair to reach such a finding because that proposition was never put to Mr Herron whilst he was giving his evidence. We also have to decide whether, at the time of the claimant’s pay reduction there was an oral agreement between the claimant and Mr Herron that, in return for not claiming his expenses immediately, the money would be repaid to him at a later date. We heard no evidence about such an agreement, nor was it put to Mr Herron that an agreement of this kind had been reached. We were unable to find that it had happened.

27. In December 2015 a meeting took place at which Mr Herron, Mr Comyn and others attended. One of those others was a shareholder called Helen Dolphin. The claimant was not there. It is alleged that during the course of the meeting Mr Comyn made several disparaging remarks about the claimant. None of those present at the meeting who gave oral evidence to us, nor those who have provided written accounts of what happened, have reported that Mr Comyn's alleged remarks had anything to do with the claimant's dyslexia. Following the meeting, Ms Dolphin told her personal assistant that she did not feel that she wanted to work for an organisation where people did not get on with each other. She told both the claimant and Mr Herron that she did not want to work with them unless they could work together.

28. On 25 January 2016, Mr Comyn sent an email to both the claimant and Mr Herron. The email began:

> "There is a division between you which is harming the company. It is also making individuals unwell. It is unnecessary. No further funding can be anticipated until these differences are fully buried never to be unearthed."

29. The email then set out some practical proposals for how Mr Herron and the claimant might work together to take Grid forward. At the heart of the proposal was that the respondent should work alongside Grid's other businesses, including a parking assistance application called "Kerb".

30. Mr Comyn was not just imaging things. By January 2016 the claimant no longer wanted to work with Mr Herron. He thought that Mr Herron was using the claimant's status as a disabled person to market all the Grid products, including Assist-Mi, for his own ends. It was also the claimant's view that Mr Herron did not know how to run a technology company and did not share his vision for improving the lives of disabled people. He also believed that Mr Herron and Mr Comyn, neither of them disabled, were interfering in the running of Assist-Mi which not only made the claimant feel undermined, but made him fear that the respondent was moving away from being an organisation run by disabled people.

31. A Board meeting took place on 8 March 2016. The two directors present were the claimant and Mr Herron. Also in attendance were Miss Wingate, company secretary, who took the minutes, and Mr Milton who provided support for the claimant. The main purpose of the meeting was to try and secure investment. Outside investors were prepared to inject capital and acquire shares, but the claimant would be unable to match their investment so his shareholding would be diluted. It was agreed that the claimant would continue to attend Board meetings and would have the role of Chief Executive Officer until a suitable person was identified to fill the role. In this context the claimant raised the concern that he was being treated as a token disabled CEO. Mr Herron explained that he had arranged a meeting with Mr David Burdus to discuss a role in building the new company structure.

32. There was some discussion about the level of support that the claimant would continue to need in his role. There is a dispute about exactly what was said. It is the claimant's evidence, and that of Mr Milton, that Mr Milton spoke up on the claimant's behalf and said that specific adjustments were needed to accommodate the claimant's dyslexia. According to the claimant and Mr Milton, the adjustments that were mentioned were for members of staff to use telephone calls or Skype wherever possible and to avoid sending emails to the claimant just before meetings. The respondents contend that these adjustments were not

specifically requested at the meeting. Ultimately, we did not find it necessary to decide exactly what was said. We are satisfied that the context of the meeting was one of the survival of the company. All persons present at the meeting would have thought that the items most worth recording in the minutes would have been those which related to business strategy, governance and investment. If there were comments made about the support that the claimant would need, they were made in passing, and with no request that they be specifically minuted.

33. Following the meeting, Mr Herron met with Mr Burdus. They agreed that Mr Burdus would work for the respondents on a consultancy basis.

34. Mr Burdus is a wheelchair user. He has 31 years' experience in the field of employability for disabled people. He has a considerable reputation as an expert on disability matters and has appeared on national television on a number of occasions to discuss the subject. He has no specific expertise in running technology companies, but has provided employment policy, employee access plans and training for hundreds of companies.

35. On 14 March 2016, the claimant sent a lengthy email to Mr Burdus to brief him about the Assist-Mi project.

36. On 15 March 2016, Mr Herron circulated draft minutes of the Board meeting to the participants, including the claimant. Between them, the claimant and Mr Milton read through the minutes and made proposed alterations in red type. The claimant sent the red amendments to Mr Herron attached to an e-mail stating, "If you're happy with amendments I am happy to sign off". Of the red amendments only proposed alteration that had anything to do with the claimant's disability was to incorporate Mr Milton's comment about the claimant being a "token disabled CEO". The red type made no mention at all of adjustments, dyslexia or difficulties in dealing with last minute emails. Mr Milton in his oral evidence explained to us that the reason why he did not insert these things was because he was afraid of sticking his neck out, having already spoken up at the meeting. We are unable to accept this explanation. If that was Mr Milton's fear, he would hardly want to try to introduce into the minutes a complaint that the claimant was a "token disabled CEO". In our view the far more likely explanation is that neither the claimant nor Mr Milton thought that the subject of adjustments for dyslexia was something that needed to be incorporated into the minutes. It was not what the meeting was about.

37. The draft minutes also reflected a brief discussion about expenses. At no time, either in the meeting itself or in the process of trying to agree the minutes of the meeting, did the claimant or Mr Milton make the point that the claimant was owed thousands of pounds of historic expenses from August 2015.

38. In a subsequent e-mail, Mr Milton pointed out that he had made comments about the claimant's dyslexia and need for adjustments and that these should be incorporated in the minutes. Mr Herron replied that he would discuss them in a telephone call.

39. We now consider the reason why the Board members omitted reference to the claimant's need for adjustments from the minutes of the Board meeting. The phrase "Board members" might mean just the statutory directors or it might also include Miss Wingate. The only statutory director present at the meeting beside the claimant was Mr Herron. We are quite satisfied that neither Mr Herron nor Miss Wingate was influenced in any way by the claimant's dyslexia in deciding whether or not to include references to adjustments in the minutes. This

consideration did not affect them either consciously or subconsciously. The reason why Mr Milton's comments were left out of the minutes was because nobody (including the claimant) thought at the time that there was a significant contribution to the meeting.

40. Both before and after the Board meeting, employees of the respondent and Grid generally made an effort to keep e-mails to the claimant to a minimum. Instead, they used Skype or telephone calls.

41. Mr Burdus started a three-month consultancy with Grid on 1 May 2017. A key part of his brief was to provide a communications and management function and to help the claimant with the Assist-Mi business plan. He and Mr Herron signed a contract on 1 May 2017, but the claimant did not sign until 28 June 2017. For this reason, most of Mr Burdus' work in those first two months was concentrated on Grid's other projects.

42. On 13 June 2016, Mr Burdus asked the claimant whether he would like a further assessment by Access to Work or by an external professional. The claimant declined.

43. Mr Burdus' impression was that the claimant was highly resistant to including Mr Herron in the running of the respondent's business. In particular, the claimant did not want Mr Herron to attend client meetings for Assist-Mi.

44. On 3 July 2016, Mr Burdus sent a long email to Mr Herron and the claimant. Part of the email related to a project to promote Assist-Mi at Newcastle Airport. His email reminded both recipients of the importance of working together. He recommended a short Skype meeting three times per week during the coming month. Mindful of the claimant's dyslexia, Mr Burdus invited the claimant and Mr Milton to discuss the email together and ensure that their understanding was clear. We find that this email contradicts the claimant's contention that Mr Burdus, from 4 July 2016, deliberately allowed a practice to continue of sending multiple email chains to the claimant shortly before meetings. Here, in his email of 3 July 2016, was Mr Burdus suggesting that conversations took place via Skype and going out of his way to ensure the claimant received support to understand the contents of his email.

45. Mr Herron replied to Mr Burdus' email the same day to confirm that he was happy to comply. The claimant's reply was harder to follow. It did not contain any commitment to work alongside Mr Herron. It reminded Mr Burdus of some questions that he had previously raised about remuneration and re-selling. The final sentence of the claimant's email read, "work poor, need sorting or I'll have look externally for capable person". This was a reference to Mr Dom Hyams. Mr Hyams is a wheelchair user. He was employed by the respondent from February 2015 as a Communications Director. He was based in London. His father is dyslexic and he acquired additional understanding of dyslexia through compiling a list of the 100 most powerful disabled people. When Mr Hyams started assisting Mr Herron on projects other than Assist-Mi, the claimant perceived a change of loyalty. He started micromanaging Mr Hyams' performance and singling him out for criticism. Here, in the 3 July 2016 email, the claimant appeared to be threatening to have Mr Hyams removed.

46. One of the allegations made by the claimant is that, despite Mr Milton's comments in the March 2016 Board meeting, Mr Hyams and Miss Walsh deliberately ignored the claimant's calls. Mr Hyams chose to ignore the claimant's calls on about two or three occasions. There is no evidence about

when these ignored telephone calls happened, or whether or not they were in anticipation of a meeting. Even before the March 2016 meeting, Mr Hyams had known for some time that the claimant preferred to communicate using Skype or over the telephone and did not like receiving large quantities of information by email. The reason why, occasionally, Mr Hyams chose not to accept the claimant's calls was that, from summer 2016, the claimant sent emails and spoke on a telephone to him in such a way as to make Mr Hyams feel bullied. There were times, especially late in the evening, when Mr Hyams simply could not face speaking to the claimant. It was not because the claimant had dyslexia. That fact did not, either consciously or subconsciously, motivate Mr Hyams to ignore the claimant's calls. It was the fact that Mr Hyams found the claimant's comments to be demotivating and aggressive.

47. Mr Burdus replied to the claimant's email and specifically addressed the claimant's comments about Mr Hyams. He expressed his view that it was "highly irregular" to threaten to remove an employee on performance grounds in an open email to an external contractor. He explained some basic principles of performance management and reminded the claimant of the ACAS Code of Practice.

48. In the meantime, negotiations continued between the claimant and Mr Herron, facilitated by Mr Burdus, about the claimant's remuneration and a proposed re-seller agreement in relation to the intellectual property in Assist-Mi. On 5 July 2016, an extraordinary Board meeting of Grid took place and was attended by Mr Herron and Mr McFarlane. At this meeting it was agreed that a law firm would look into the options for share exchange and a license agreement for certain territories. Mr Herron agreed to reduce his remuneration from the respondent by £1,000 per month with immediate effect in order to enable the claimant to have a salary increase of £1,000 per month. This arrangement was to last for a period of three months.

49. The claimant and Mr Burdus exchanged emails again on 15 July 2016. Mr Burdus initiated the exchange in an attempt to engage the claimant's help in supporting an initiative called Disability Confident. His idea was that support for the profiling of Disability Confident should be offered by both Grid and Assist-Mi. The claimant replied, "Do not put my name into anything Grid at the moment, please". Mr Burdus considered the claimant's stance to be fundamentally at odds with his brief and made his view clear in his next email. Undeterred, the claimant replied, "I personally do not want my name associated with Grid until I truly understand their destination". Mr Burdus tried to explain to the claimant that cooperation would be in the mutual interests of the respondent and Grid, not to mention the claimant himself. He also pointed out that, as CEO of the respondent, the claimant was responsible for strategic alignment with Grid and as a statutory director, the claimant had a duty to act in the interests of the respondent's only shareholder which, again, was Grid. The claimant's reply was, "Sorry, no. So Grid have sell Assist-Mi. I'll never agree this ever…". A few minutes later Mr Burdus and the claimant spoke on the telephone. The claimant accused Mr Burdus of "taking Grid into Assist-Mi's space". Following the call, Mr Burdus complained strongly to Mr Herron and refused to carry out any further work for the respondent. He complained about the claimant's "telephone rants, character assassinations, accusations of others and prolonged monologues that kill discussion" and objected to his professional integrity being brought into question.

50. A further Board meeting of the respondent took place on 18 July 2016. Mr Herron, Miss Wingate and Mr Burdus were present in the room. The claimant joined in by conference call. Unknown to the others, Mr Burdus secretly audio-recorded the meeting. He did so in order to create an accurate record of challenges that he faced when trying to speak to the claimant over the telephone. The meeting did not go well. Even reading the transcript, it is hard to follow a lot of what the claimant was saying. He expressed his wish to take the respondent in a different direction from Grid. He blamed Mr Herron for having caused his family to be separated from him. He accused Mr J P Taylor, director of Omega (another Grid company), of incompetence. He did not want to travel to London because he would have to sleep in Pentonville, which was "all drug dealers and guns". He mentioned the health of his daughter without any real explanation of why it was relevant. He said that he did not believe in Grid or in Omnia. He said that Mr Burdus was incompetent. He said that he was having "mental breakdowns" because of what Mr Herron had done. When Mr Herron said that he also had health issues, the claimant shouted, "Don't you dare! My dad died ten years younger than you! I don't really care about your health condition. I've got a disability; I've had it all my life. I don't really care, sorry!". Mr Burdus attempted to calm the claimant down, but the claimant terminated the call.

51. Immediately after the meeting, Mr Burdus, Miss Wingate and Mr Herron tried to recover their composure and then discuss the way forward. They reflected upon some of the things the claimant had said and ensured that they were noted down. At one point in the audio-recording, Miss Wingate can be heard to laugh. She did so as Mr Burdus related that the claimant had said that if he did not get £1,000 he would leave the country. Miss Wingate added, "Talk about NHS!". Mr Burdus then noted that the claimant had blamed his daughter's health. (Having listened to the recording over a year later, the claimant has formed the belief that Miss Wingate was laughing about his daughter's health. That is not how we either read the transcript or interpreted the audible conversation). It was resolved by all present that something would have to be done about the claimant.

52. Following the meeting, Mr Burdus continued to work with Mr Herron in promoting Assist-Mi at Newcastle Airport. To this end they enlisted the services of Eryka Harrison, Director of Debonair Consulting Limited. Ms Harrison made proposals to take the project forward and set them out in an email dated 21 July 2016. Mr Burdus replied the same day. Thanking Ms Harrison, he expressed particular interest in the availability of a charitable grant from a well-known entrepreneur. The claimant replied the following day. In his words, "We are not a charity and I do not ever want that culture, please". He continued, "If you read my email I now been talking to…United Nations this relationship I already established". Both the claimant and Mr Burdus understood this last sentence to relate to the briefing email that the claimant had sent to Mr Burdus on 14 March 2016. The claimant's 22 July 2016 email was copied to Ms Harrison.

53. In reply, Mr Burdus emailed, "This is going well so please don't make me look dim in front of Eryka". He then explained why he had quoted his previous email in the way he had.

54. One of the issues in this claim is the reason why Mr Burdus accused the claimant of making him look "dim" in front of Ms Harrison. The claimant contends that Mr Burdus made this accusation for two reasons. The first is that the working environment was not "inclusive". We are satisfied that at least in one sense this was part of the underlying reason. The claimant was refusing to cooperate with

Mr Herron. To the extent that Mr Burdus was trying to assist Mr Herron to grow Grid, the claimant was refusing to cooperate with Mr Burdus either. This almost impossible working environment made it more likely that Mr Burdus' frustrations would spill out into an email. This state of affairs, however, did not arise in consequence of the claimant's disability. It came about because of the claimant's deep mistrust of Mr Herron.

55. The second alleged reason for Mr Burdus' email was that Mr Burdus had misunderstood the claimant's email to which he was replying. His misunderstanding, so the claimant says, was caused by the claimant being dyslexic and not having correctly chosen his words when composing his email to Mr Burdus. We do not think that this was a significant reason behind Mr Burdus' reply. What Mr Burdus was chiefly concerned about was having been criticised in an email that had been circulated to a third party. The sting of the criticism was an accusation that Mr Burdus was being unprofessional: he not read the claimant's briefing email of 14 March 2016, and in consequence was taking the wrong approach towards the Newcastle Airport project. Listening to the claimant's oral evidence, we understood that this was precisely the message that the claimant intended to convey. Any difficulty that the claimant might generally experience in putting his thoughts into words had no bearing on Mr Burdus' understanding of the claimant's email, or Mr Burdus' reply.

56. On 29 July 2016, Mr Burdus sent an email to the claimant, Mr Herron, Mr Hyams, Miss Walsh, Mr Milton and Mr Raigan Herron. Under the heading, "Cutting down on emails", Mr Burdus listed 14 punchy suggestions aimed at minimising email traffic. His suggestions included speaking on the telephone as an alternative to email conversations, keeping emails short, and generally trying hard to keep emails to a minimum. With these suggestions, Mr Burdus was doing the opposite of what the claimant accuses him of having done. Far from having "deliberately allowed a practice to continue of sending multiple email chains to the claimant shortly before meetings", Mr Burdus was actively trying to bring this practice to a halt. His instruction was a step which went some way to reducing the disadvantageous effect on a person with dyslexia of sending information by email shortly before meetings. Unfortunately the claimant did not see it that way. By email dated 30 July 2016, he replied, "Please never send a undermining email like this with staff again".

57. We now rewind the clock slightly to examine the claimant's working relationship with Miss Walsh. During the months leading up to the summer of 2016, she had telephone conversations with him that gave her cause for concern. In one of them, the claimant said that he would "bring in external people to do marketing" because he was unhappy with Mr Hyams. Miss Walsh felt uncomfortable being brought into discussions over the future of a colleague's employment. In another telephone call, the claimant said something like "tell JP [Taylor], David Comyn and Nail Herron I don't want to work with them, they are a bunch of amateur blaggers". Discussing a client, the claimant said, "This is pissing me off now, do we want this client or do want to piss around". In a three way telephone call between the claimant, Miss Walsh and Mr Hyams, the claimant said to Mr Hyams something like, "Do you know I brought you into this company and since I did you've made my workload harder". One telephone call concerned work that Miss Walsh was doing to support the promotion of Assist-Mi. The claimant told Miss Walsh that he found it difficult to understand the work that Miss Walsh was producing and therefore she did not understand his dyslexia. She was upset about being accused of discriminating against the claimant.

58. The evidence did not enable us to make findings about which calls had happened at which times. We are satisfied, however, that, in the summer of 2016, one such call took place and Miss Walsh found it particularly upsetting. Afterwards she spoke about it to Mr Herron. Seeing how distressed she was, Mr Herron told Miss Walsh to take an hour or so off to relax and gather her thoughts. Miss Walsh, fearing for her mental health, sought Mr Herron's approval to start ignoring the claimant's calls. Mr Herron agreed. From that time onwards, if Miss Walsh needed to communicate with the claimant she would generally send him the information by email. We do not know precisely when this happened. There is no evidence about whether it was shortly before any meeting. At any rate, the claimant found the lack of telephone contact frustrating.

59. We have to consider the reason why Miss Walsh started ignoring the claimant's telephone calls. Was it because the claimant had dyslexia? We are satisfied that this was neither a conscious nor a subconscious motivation on Miss Walsh's part. She just could not stand the way in which the claimant was talking to her on the telephone. She found it aggressive and rude and felt uncomfortable at being drawn into the claimant's criticisms of Mr Hyams' performance. We also have to consider whether Mr Herron was motivated either consciously or subconsciously by the fact that he claimant had dyslexia when he permitted Miss Walsh to stop speaking to the claimant over the telephone. Again, we are persuaded that this was not a factor in Mr Herron's thinking. The reason why he gave permission was because he was concerned for Miss Walsh's welfare.

60. By September 2016, Mr Herron had formulated a plan of action to try and resolve the dysfunctional working relationship between himself and the claimant. He asked a consultant, Mr Huckle, who was carrying out some work for Grid, to recommend a Human Resources professional who could investigate the working relationships between the claimant and others within the Group of Companies, and make appropriate recommendations. Mr Huckle recommended Miss Linda Fenwick and approached her on or around 14 September 2016. Prior to that date, Miss Fenwick had never heard of Assist-Mi or Grid and had never met the claimant or Mr Herron.

61. On 15 September 2016, Miss Fenwick met with Mr Herron. They agreed that Miss Fenwick should speak to all parties to the dispute and affected employees. The investigation would be called a "leadership review" in an effort to encourage a neutral response from staff. Seeing the investigation as an opportunity to make contacts and secure paid consultancy work, Miss Fenwick agreed to offer her services free of charge.

62. On 21 September 2016, Mr Herron introduced the claimant and Miss Fenwick to each other. They exchanged emails cordially and arranged to meet. The claimant and Mr Herron agreed the text of an email to be sent to all staff to announce the purpose of Miss Fenwick's enquiries.

63. Miss Fenwick then set about speaking to all the employees of the respondent. In conversations on or around 6 October 2016, she asked them open questions about their opinions of the claimant and of Mr Herron. With the exception of Mr Milton, all employees gave broadly consistent replies. They spoke warmly about Mr Herron and gave positive examples of his supportive behaviour. When asked what they would like Mr Herron to do, they unanimously replied that they would like him to "do something about" the claimant. They told Miss Fenwick about the traumatic effect that the claimant's behaviour was having on them. In particular, "their hearts sank" when they saw an email coming through from the claimant and

they were distressed by the claimant's manner during telephone calls. Miss Wingate told Miss Fenwick that she would regularly have to terminate telephone calls with the claimant and leave the building for a walk along the riverbank so that she could cry. Miss Fenwick advised Miss Wingate that if she wanted a formal investigation to be carried out she should raise a formal grievance. Mr Hyams' account was more florid. He told Miss Fenwick that his "soul was being crushed" and that when he went to the Paralympic Games in Rio de Janeiro with Channel 4, he nearly did not come back.

64. Mr Milton gave Miss Fenwick a different picture. He spoke about a bullying culture within Grid against the claimant. Miss Fenwick asked Mr Milton to provide further details but, in Miss Fenwick's opinion, Mr Milton was unable to do so.

65. On 10 October 2016, Miss Wingate wrote a grievance letter addressed to Mr Herron. Her letter complained about the claimant's behaviour and in particular:

    65.1. "Passive aggressive emails demanding expenses in breach of policy",

    65.2. "Making me feel guilty if I do not act immediate", and

    65.3. Mentioning "his personal situation in relationship to his partner's living conditions".

    65.4. Criticising Miss Wingate's alleged non-payment or late payment of expenses in an email copied to others, including more junior colleagues. The claimant's email was on 2 October 2016.

    65.5. Emailing Miss Wingate about an expected increase in salary which was not within Miss Wingate's gift, but putting unjustified pressure on her by imposing timescales and adding "I have lawyers waiting to be paid in Asia".

    65.6. A series of emails on the subject of an attachment of earnings order in which the court required the respondent to make deductions from the claimant's salary and pay them in satisfaction of a judgment debt. Miss Wingate's essential criticism was that the claimant was putting unfair pressure on her by mentioning his personal family details (the latest occasion being 4 October 2016) when Miss Wingate was powerless to halt the operation of the attachment of earnings order.

    65.7. Requesting a replacement laptop and at the same time insisting that the broken laptop had always belonged to him and not the respondent.

66. Miss Fenwick met with Miss Wingate on 10 October 2016 to discuss her grievance. Notes of the meeting record Miss Wingate giving further detail of the pressure to which the claimant was subjecting her to pay expenses. He would demand, "I want them now" and "in advance". Miss Wingate told Miss Fenwick that advance payment of expenses was contrary to the respondent's policy, but that she felt forced into paying them because the claimant's emails were very demanding and the claimant was a director. She gave Miss Fenwick an email trail in which the claimant mentioned his mother and missing his children, which Miss Fenwick described as "emotional blackmail".

67. On 12 October 2016, Miss Fenwick met with Mr Raigan Herron. He described the claimant as being disruptive and controlling. It was Mr Raigan Herron's opinion that the claimant interfered unnecessarily with his creative work. He specifically mentioned an example of the claimant attempting to remove the Grid logo from a presentation that he had been asked to prepare for a pitch at Brent Cross Shopping Centre. Another of Mr Raigan Herron's criticisms of the claimant was

that he did not give clear briefs for his design work. Whilst articulating that criticism, Mr Raigan Herron made a remark that now forms one of the allegations of harassment in this claim. He said, "I think he uses dyslexia as an excuse for not giving us clear instructions, but we are not asking him to write out full instructions, we just need clearer briefs". Pausing there, we are satisfied that Mr Raigan Herron did not say this for the purpose of violating the claimant's dignity or creating an unpleasant environment for him. He was referring to a genuine difficulty in communication as he saw it. Raigan Herron knew that from time to time in conversations, the claimant would mention his disability when it was not obvious from the context how his disability was relevant. He knew, for example, that on 18 July 2016 at the Board meeting the claimant had been shouting "I've got a disability" just after Mr Herron had been trying to explain the effect of the stressful situation on his own health. When speaking to Miss Fenwick, Raigan Herron gave the specific example of the claimant's failure to provide a clear brief. The problem was not any difficulty that the claimant had had in putting the brief into words, it was that the claimant had missed a pre-arranged call to discuss the brief.

68. During the course of his meeting with Miss Fenwick, Mr Raigan Herron also gave an example of the claimant "slagging people off" in emails copied widely to others. He gave an example of the claimant blaming Mr Hyams for missed opportunities in connection with a Wilson James meeting.

69. Also on 12 October 2016, Miss Fenwick met with Mr Hyams. During their meeting, Mr Hyams made generalised criticisms of the claimant micromanaging him, patronising him, making unnecessary demands and making undermining comments. He provided some examples. One related to a scoping document that the claimant had asked him to provide. According to Mr Hyams, the claimant had asked for it to include items that in Mr Hyams' opinion were not what the company needed. When the claimant received the scoping document from Mr Hyams, he responded by "slamming it" in an email which he copied widely. As an example of an undermining comment, Mr Hyams said that the claimant would say, "You don't know sales, I know sales" and a similar comment about information technology. Mr Hyams later provided Miss Fenwick with some emails to illustrate the points that he made.

70. Once Miss Fenwick had typed up the notes of her interviews and collated some of the supporting documents, she passed them top Mr Herron, who decided that there was sufficient evidence of misconduct to justify suspending the claimant. On 13 October 2016, Mr Herron invited the claimant to a meeting to take place the following day. His email indicated that he had arranged for Mr Milton to accompany the claimant. At the meeting on 14 October 2016, Mr Herron informed the claimant that he was being suspended. He gave the claimant a letter confirming his suspension.

71. Mr Herron's email the day before had mentioned "issues that have arisen from Linda's recent review", but it did not warn the claimant that he was about to be suspended.

72. At the start of the meeting, Miss Fenwick asked for the claimant's consent for the meeting to be audio recorded. The claimant refused to consent. Throughout this claim the claimant has contended that Miss Fenwick did in fact continue to record the meeting against his wishes. Our finding is that she did not do so.

73. Following the meeting, the claimant raised a written grievance by letter dated 18 October 2016. The letter was headed "Disability Discrimination". Much of the letter was devoted to generalised statements of the law relating to the duty to make adjustments and discrimination arising from disability. As an example of discrimination arising from disability, the claimant mentioned "a tendency to make spelling mistakes arising from dyslexia". He did not give any other examples. As to the conduct of which the claimant was complaining, the claimant made sweeping allegations of "bullying, victimisation and harassment", "ridiculing and/or demeaning me", "picking on me and setting me up to fail", "unfair treatment", "undermining my authority as CEO", "overbearing supervision or misuse of power or position", "coercive behaviour" and making "impossible demands". There was only one detailed example. That was the omission of the claimant's dyslexia from the minutes of the Board meeting in March 2016 and placing the onus on the claimant to write a disability reasonable adjustments policy. There was no mention in this letter of any failure to make adjustments at the suspension meeting four days earlier; nor did the claimant point out any particular difficulty that he had faced in having to read emails shortly before meetings or any need to use skype as an alternative to email conversations.

74. We have to consider whether, at the suspension meeting, Mr Herron or Miss Fenwick deliberately took advantage of the claimant because of his dyslexia. We find that they did the opposite. Audio recording the meeting would have been a very sensible way of enabling the claimant to have an accurate record of the meeting without having to worry about taking accurate notes. A specific arrangement was made to invite Mr Milton. Ordinarily the claimant would have had no right to be accompanied at a meeting purely for the purpose of suspending him. The obvious inference is that Mr Herron arranged for Mr Milton's presence as a supportive measure. The fact that the claimant was not given advance warning of his suspension does not suggest to us in any way that Mr Herron or Miss Fenwick were motivated, consciously or subconsciously, by the claimant's dyslexia. It is quite normal for employers to suspend employees without advance warning. Indeed, a tip-off may defeat the purpose of suspension, especially where the allegation is one of bullying colleagues.

75. Immediately following the suspension meeting, Mr Milton took a period of annual leave.

76. On 23 October 2016, Miss Fenwick interviewed Mr Herron about the claimant's grievance and his allegation of a "bullying culture". In response, Mr Herron expressed his belief that the claimant felt excluded by the London office. He gave further details of his difficulties in working alongside the claimant. Mr Herron supplied Miss Fenwick with some emails that the claimant had sent. One of these was dated 28 September 2016. In the email, the claimant had threatened to remove work from the Grid Team and give it to contacts of his own. The apparent reason for that threat was that Mr Raigan Herron had refused to remove the Grid logo from a presentation designed to promote the Assist-Mi product.

77. As well as eliciting Mr Herron's version of events, Miss Fenwick also discussed procedural arrangements for the handling of the grievance. In view of the claimant's outstanding grievance, it would be appropriate to keep contact between Mr Herron and the claimant to a minimum and for the grievance to be investigated by Miss Fenwick.

78. Miss Fenwick attempted to make arrangements to meet with the claimant to discuss both his grievance and the disciplinary matters over which he had been suspended. Because Miss Fenwick was based in the North East, and the claimant lived in Southport, Miss Fenwick asked that the meetings be arranged "back to back" on the same day. The two meetings were re-scheduled twice at the claimant's request, following which Miss Fenwick proposed that they should take place on 2 November 2016.

79. On 27 October 2016, the claimant e-mailed Miss Fenwick to request an adjustment for his dyslexia. He asked,

> "As dyslexia is one [of] my disabilities I need more time to digest the information so when we meet I [will] be more aware to be ready to answer my alleged charges."
>
> He asked for the information to be provided a "couple days" before the meeting.

80. This request was reiterated by e-mail on 31 October 2016. He asked for "all questions and information that is going to be presented to me in any meeting 48 hours in advance before the meeting start time". His e-mail also asked for the meeting to be further rescheduled to 8 November 2016. In an e-mail sent later the same day, he asked for the two meetings to be separated, with the investigation into "the grievance that has been raised against me" to proceed first, and the meeting to discuss his own grievance against Mr Herron to take place at a later date. The claimant asked for the meetings to be audio-recorded, having taken legal advice.

81. Miss Fenwick replied by e-mail on 31 October 2016 and again on 1 November 2016. Miss Fenwick agreed to the audio-recording of meetings. She confirmed that the first of the meetings would be to discuss the claimant's own grievance. Her 2nd e-mail set out the intended procedure: she would ask questions for clarification or to seek further information to make sure that she understood the nature of the claimant's grievance; she would ask the claimant for examples to illustrate different points of his grievance and any supporting evidence. In Miss Fenwick's opinion, the claimant would not need additional time to prepare as he would surely already have examples and evidence in mind. As for the second of the two meetings, Miss Fenwick's expressed view was, "You have been made aware of the general nature of the allegations against you. The meeting on Wednesday is an investigative meeting for me to ask questions about the allegations. It is not a hearing." She was not prepared to re-schedule the meetings for a third time and insisted on the meetings proceeding on 2 November 2016.

82. Meanwhile, Miss Fenwick continued speaking to other employees. On 31 October 2016, Miss Fenwick re-interviewed Miss Wingate in order to elicit further detail about her allegation that the claimant had shouted at her. Miss Wingate told Miss Fenwick that she had telephoned the claimant to try and arrange a meeting at a location halfway between where the claimant and Mr Herron were based, so that they could sign a cheque. The claimant had shouted angrily and aggressively that he had a 5-year-old son and could not be driving halfway across the country. She said that the claimant had threatened to resign and she had retorted with a verbal resignation of her own, which Mr Herron subsequently allowed her to retract.

83. On 1 November 2016, Miss Fenwick had a follow-up conversation with Miss Walsh on the telephone. During that call, Miss Walsh gave broadly the same account of the claimant's behaviour that we have described above. Miss Fenwick noted Miss Walsh's comments.

84. On 2 November 2016 Miss Fenwick travelled to Southport to meet with the claimant. She was accompanied by a minute taker and the claimant's companion was Mr Milton. After initial introductions Miss Fenwick reminded the claimant that the purpose of the first meeting was to discuss the claimant's grievance and that there would be a break before any meeting to discuss allegations against the claimant. The claimant began by reading from a prepared written statement. The essential points of the statement were:

    84.1. That it was a breach of disability discrimination legislation for the respondent to fail to provide the claimant with advance information about the "accusations against me". He did not suggest that he needed advance information in order to provide further details about his own grievance.

    84.2. For a number of reasons the claimant believed that Miss Fenwick's investigation would not be independent.

    84.3. Once the claimant had finished reading, Miss Fenwick asked the claimant if he was prepared to discuss his own grievance or not. The claimant did not answer directly, but accused Miss Fenwick of having failed to make reasonable adjustments by providing questions 48 hours in advance. Miss Fenwick tried to explain again that she wanted to work through the claimant's grievance: the claimant frequently interrupted and reiterated his assertion that he required advance questions in order "to defend myself". Miss Fenwick made a further attempt to establish whether or not the claimant was prepared to participate in the meeting. On this occasion, the claimant interrupted three times, he and Mr Milton started talking over each other, neither of them answered the question and instead the claimant asked Miss Fenwick "do you understand what dyslexia is?".

    84.4. The claimant and Mr Milton became increasingly loud and aggressive. Miss Fenwick made another attempt at explaining that she needed the claimant to expand on his grievance and to provide some further evidence about it. She later added, "I don't have any questions other than to say, 'please can you give me an example of this?'." The claimant replied, "Do you have them written down?". The claimant did not explain how his dyslexia would put him at a disadvantage in providing examples about his own grievance. Rather, he started challenging Miss Fenwick's independence and questioning her knowledge about disability and the Equality Act. After about 30 minutes of dysfunctional conversation, Miss Fenwick decided that she was not going to be able to elicit further detail about the claimant's grievance. She therefore brought the meeting to a close. The claimant then left. There was no attempt by either Miss Fenwick or the claimant to discuss the investigation into the matters alleged against the claimant.

85. The following day, the claimant emailed Miss Fenwick to make yet another request for advance written questions. Once again, the questions he was asking for related to the "accusations against me". He did not explain what assistance he needed in order to enable him to clarify his own grievance. Emails passed to and fro,

culminating in an exchange of ten emails on 8 November 2016. They demonstrated increasingly entrenched positions. Miss Fenwick could not understand why the claimant needed advance information in order to provide evidence about his own grievance. The claimant was not prepared to participate in a meeting unless he had written questions in advance.

86. Pausing there, we think that, whilst it was unrealistic for the claimant to expect a complete list of all the questions he would be asked, it is unfortunate that Miss Fenwick did not provide the claimant with more advance information about the allegations that he faced and the general topics about which he might be questioned. That said, the claimant was never put into the position of having to answer those questions. The meeting never got past the discussion of the claimant's own grievance. As to that part of the meeting, there was no need for the claimant to be given questions in advance. It was explained to the claimant, in case any explanation were needed, that, when it came to discussing the claimant's own grievance, he would be asked to explain what his grievance was about and to provide some examples. We are satisfied that Miss Fenwick was not trying to take advantage of the claimant's dyslexia.

87. On 14 November 2016, the claimant submitted a second grievance against Mr Herron and Mr Comyn. Essentially the grievance accused both individuals of overbearing supervision and misuse of power, undermining the claimant to cheat him out of his intellectual property rights in the Assist-Mi software.

88. On 18 November 2016, Miss Fenwick asked Mr Milton for a short statement in relation to the claimant's grievance. Mr Milton's initial stance was to challenge Miss Fenwick's independence as an investigator. After further email exchanges on the same day, Mr Milton did provide a statement in relation to the December 2015 Board meeting. Independently, the claimant provided Miss Fenwick with the statement of Miss Dolphin in relation to the same meeting.

89. On 20 November 2016 Miss Fenwick delivered her report into the grievance raised by Miss Wingate and the allegations levelled by Mr Hyams, Mr Raigan Herron, Miss Walsh and Mr Herron against the claimant. In her report, Miss Fenwick analysed the various statements that these individuals had made about the claimant during the course of her interviews with them. She also took into account emails supplied by Neil Herron, including the email of 28 September 2016. In conclusion, Miss Fenwick recommended that the allegations be taken forward to a formal disciplinary hearing at which the respondent should consider the possibility of dismissing the claimant.

90. Miss Fenwick's report was passed to Mr Taylor (Managing Director of Omnia) with the supporting evidence. Mr Taylor has "an element of dyslexia" although he did not consider himself to be disabled. Having read the report, Mr Taylor decided to adopt its recommendation. By a letter dated 28 November 2016, Mr Taylor invited the claimant to a disciplinary meeting. The supporting evidence was posted to the claimant and made available to be inspected electronically. This was done on 28 November 2016. The claimant replied relating to the independence of Mr Taylor. He pointed out that Mr Taylor was married to Mr Comyn's niece who was also a shareholder in Grid. Emails continued to pass to and fro between the claimant and Miss Fenwick. It is hard to follow the precise conversations because we do not have all the emails in the bundle. It is clear that the claimant made a number of sweeping

allegations of disability discrimination against Miss Fenwick, and continued to complain about her alleged failure to make adjustments. So far as we are able to tell, the accusation related to the lack of advance questions for the meeting on 2 November 2016.

91. Following a number of postponements, the disciplinary meeting was scheduled for 19 December 2016.

92. On 9 December 2016, the claimant submitted a third formal grievance, this time against Miss Fenwick and also against Mr Herron for having appointed her. The grievance made further generalised allegations of discrimination arising from disability and failure to make adjustments, but did not indicate in substance what Miss Fenwick was alleged to have done. The claimant sent an email along similar lines to Miss Fenwick on 15 December 2016. This email, sent at 6.50am, was the first of eight emails sent by the claimant to Miss Fenwick that day. It is possible that Miss Fenwick may have replied in between some of these emails. It is clear, however, that some of these emails were sent in succession without giving Miss Fenwick the opportunity to reply. For example, the second of the emails was timed at 6.51am and ran to four pages. The claimant could not possibly have had the opportunity to digest the reply from Miss Fenwick to his 6.50am email before sending the second email.

93. The claimant's second email of 15 December 2016, beside making many general allegations against Miss Fenwick, sought a postponement of the disciplinary meeting until 23 December 2016.

94. Many of the claimant's emails of 15 December 2016 were about the forthcoming disciplinary meeting. He repeatedly stated that he would not attend and instead proposed to join the meeting by Skype. His reasons for preferring Skype to a face to face meeting changed as the day went on. His initial reason was that Miss Fenwick was continuing to discriminate against him. In the next two emails he essentially repeated the same reason. At 1.40pm, the claimant for the first time stated, "I can't, my back, make adjustment please on health [disability] grounds please". What the claimant meant by this sentence was that he would be unable to attend the meeting because he had a painful back. This meaning was slightly clouded by his continuing in the same email to say, "I cannot meet you on Monday, technology, nothing worth sitting in room, it's stitch up anyway". Two emails later, the claimant expanded upon the reason based on his back condition. He supplied general information about arthrogryposis multiplex congenita and stated that he could not travel in a bumpy car.

95. In reply, Miss Fenwick made various offers to assist the claimant in overcoming this problem. As it was, the venue for the meeting was only two miles away from the claimant's home. Miss Fenwick offered to send a taxi, to meet with him at his home address, or for the claimant to suggest a venue even closer to his home. The claimant rejected all of these options, insisting on a Skype meeting. He stated that even sitting in a moving car would be too painful for him.

96. On 16 December 2016 the claimant sent to Miss Fenwick copies of her notes of interviews with all of the principal witnesses against him, with extensive comments that the claimant had added. He also sent a long e-mail with a more substantive response to the disciplinary allegations.

97. The claimant provided this information in a series of emails to Miss Fenwick. We have not seen any emails from Miss Fenwick in reply, although it appears likely that she must have sent at least some. Without seeing the full email conversation, it is hard to put all the claimant's emails into their precise context. Even without context, however, some of them appear to have been unhelpful. One of them simply asked, “Linda, do you have dyslexia?”.

98. Miss Fenwick was not prepared to take the claimant's assertions about his back condition at face value. She instructed a private investigator to observe the claimant during the afternoon of 16 December 2016. The investigator took photographs of the claimant leaving his house during that afternoon, getting into his car, driving away and coming back later to unload his car. The claimant was with his school-age son for some of the time when he was observed, but the photographs did not include any images of his son.

99. At 7.29pm on 16 December 2016, the claimant emailed again to insist that the forthcoming disciplinary meeting should take place by Skype. Miss Fenwick replied on Sunday 18 December 2016, confirming that the meeting would be proceeding at the Ramada Hotel, a short distance from the claimant's home. At 8.59pm, the claimant emailed Miss Fenwick saying that he was “too ill” and that she should “embrace technology”. It was at this point that Miss Fenwick decided to confront the claimant with the photographic evidence that had been obtained from the investigator. She expressed her view that the claimant had exaggerated his symptoms and had been demonstrated to be well enough to get in his car, drive away and come back later to unload his car. If he was well enough to do those things, she believed that he would be well enough to attend a meeting at the Ramada Hotel.

100. The claimant replied just before midnight. He was disgusted at Miss Fenwick having spied on him. He was still not prepared to attend the meeting. This time, his reason was not that he was unable to drive, but rather that it would be uncomfortable to have to sit on a chair and that he would need to keep moving so that he did not get stiff because of his physical disability. The conversation continued at 5:51 the next morning. Miss Fenwick sought to assure the claimant that if he needed to get up and move around during the meeting he could of course do so. The claimant threatened to “go public” and report Miss Fenwick to the police. Eventually, following a further exchange of emails, the claimant agreed to attend the meeting.

101. We have analysed the emails sent by Miss Fenwick to the claimant shortly before the disciplinary meeting. Such of these emails as are set out in the bundle were short and to the point. Looking at the claimant's responses, we did not see any sign of the claimant having been put at a disadvantage by having to deal with them. Indeed most of the emails were responses to points raised proactively by the claimant. It had been the claimant who had chosen e-mail as the means by which to raise those points.

102. Whilst Miss Fenwick was attempting to manage the disciplinary process, both the respondent and Grid had to pay close attention to their cash flow. Their main monitoring tool was a weekly cashflow forecast circulated by Miss Wingate. The forecast modelled three different scenarios, labelled “base case” (or “business as usual”), “mid case” and “stretch case”. On 16 December 2016, Miss Wingate

forwarded to Mr Huckle and Mr Herron a spreadsheet containing the three scenarios. In the "mid case" scenario the claimant's salary was listed amongst the respondent's outgoings, but with the comment, "removed from Jan 2017". In the "base case" scenario the claimant's salary remained unaffected. The claimant did not discover this email or the attachments until some time later. When he saw it, he concluded that Mr Herron must have predetermined the decision to remove the claimant from his role as Chief Executive. That is not, however, what the email shows. All it shows is that the respondent had anticipated the dismissal of the claimant as one of the possibilities. If dismissal were inevitable, the claimant's salary would also have been removed from the "base case" scenario.

103. The meeting on 19 December 2016 was chaired by Mr Taylor. The claimant was accompanied by Mr Milton and Mr Taylor was supported by Miss Fenwick. By the consent of all persons present, the meeting was audio recorded. Like the meetings that had gone before, the disciplinary meeting was characterised by the claimant and Mr Milton interrupting each other and both of them interrupting Miss Fenwick. It started with a heated discussion about whether the respondent had the right to send an investigator to the claimant's house. Eventually they turned to the disciplinary allegations themselves. With regard to his alleged bullying of Miss Wingate, the claimant's explanation was substantially the same as his email of the previous Friday. He accepted that he may have "overstepped the mark" on a few occasions and said that sometimes people did have overheated conversations in business. Most of his explanation, however, was based on his perception of mistreatment at the hands of Mr Herron and Mr Comyn. Broadly speaking, it was his case that Mr Herron had agreed to pay his expanses in advance, and when Mr Herron was late in making expenses payments he would become frustrated. He expressed his view that Mr Herron and Mr Comyn had "deliberately plunged me into poverty".

104. The conversation turned to Mr Hyams. The claimant provided a number of examples of Mr Hyams' work to support his view that Mr Hyams' performance was satisfactory. The claimant blamed Mr Herron for diverting Mr Hyams' attention away from Assist-Mi and towards other Grid projects.

105. Dealing with the allegations concerning Miss Walsh, the claimant pointed out that Miss Walsh and Mr Hyams were friends so her account was unlikely to have been objective. The claimant asked Mr Taylor to discount Mr Raigan Herron's evidence in its entirety because of his comment that the claimant had used his dyslexia as an excuse. The overall impression that Mr Taylor gained from the meeting was that the claimant had no empathy towards employees of the respondent or Grid in general and was trying to downplay what had happened. He also believed that the claimant as struggling to focus on the allegations made against him and was intent on discussing his own grievances against Mr Herron and Mr Comyn.

106. At no point in the meeting did Miss Fenwick or Mr Taylor deliberately take advantage of the claimant's dyslexia.

107. Following the meeting, Mr Taylor set about reaching his decision. Here is how he reasoned:

107.1. In his view, the claimant had behaved in an unacceptable and bullying manner towards Miss Wingate: He had, in Mr Taylor's opinion, attempted to coerce Miss Wingate on multiple occasions into compliance with his demands, sometimes by getting angry and aggressive with her and sometimes by seeking to deploy emotional blackmail in relation to the claimant's and his family's financial circumstances. Mr Taylor believed that Miss Wingate had been reduced to tears, and felt under such pressure that she had considered giving money to the claimant personally herself, and had written to Mr Herron offering to resign. Mr Taylor's conclusions were based not only on Miss Wingate's assertions in interview to Miss Fenwick, but also by contemporaneous emails and the statements of other people interviewed in the investigation.

107.2. Mr Taylor also believed that the claimant had bullied Mr Hyams. To Mr Taylor's mind, the actual quality of Mr Hyams' work was beside the point; it was the way that the claimant was seeking to manage it that was the problem. There was no justification in Mr Taylor's mind for the claimant threatening to dismiss Mr Hyams without any proper process being followed.

107.3. Mr Taylor also thought that the claimant had been openly critical of Mr Hyams in emails which had been copied widely. He believed Mr Hyams' account that the claimant had not provided helpful feedback and had micromanaged him with overbearing supervision. These conclusions were reached not just on the basis of what Mr Hyams told Miss Fenwick, but also on the basis of contemporaneous emails and the supporting evidence of Miss Walsh.

107.4. When it came to the allegations made by Miss Walsh, Mr Taylor reached substantially the same conclusion. The claimant had, in Mr Taylor's opinion, criticised Miss Walsh's work in widely circulated emails and had been overcontrolling of her work in relation to limiting her contact with clients. He noted the effect that this had had on Miss Walsh. In Mr Taylor's view, the claimant had abused his position as director.

107.5. Mr Taylor declined to ignore Mr Raigan Herron's evidence. Mr Raigan Herron "corroborated" the accounts given by Mr Hyams and Miss Walsh about the claimant being openly critical of others and the evidence given by Miss Wingate of the claimant becoming angry and aggressive on the telephone when he was short of cash and talking about the impact on the claimant's own family.

107.6. In conclusion, Mr Taylor believed that the cumulative effect of the claimant's behaviour amounted to gross misconduct. He was satisfied that the claimant had demonstrated a clear and consistent pattern of "bullying behaviours" which had put the respondent at risk of legal action and had significantly affected the wellbeing of numerous employees.

107.7. When Mr Taylor considered the appropriate sanction, he took into account evidence from Mr Burdus and Mr Herron that they had warned the claimant previously that his behaviour had been unacceptable. In Mr Taylor's view the claimant had not heeded those warnings. He did not think, therefore, that a disciplinary warning would prevent the claimant's behaviour from recurring. In his view the only option was dismissal without notice. If the

claimant continued to disrupt the business, there was a real risk of it no longer being viable. There was only a small number of employees, most of whom were trying to avoid contact with the claimant.

108. By email on 22 December 2016, with a lengthy attached outcome letter, Mr Taylor informed the claimant that his employment was being terminated. The claimant was notified of his right to appeal.

109. One of the questions that arises in this claim is this: who really made the decision to dismiss the claimant? We are satisfied that it was Mr Taylor's decision. Doubtless by this time it was a decision welcomed by Mr Herron. We are also aware that Mr Herron would have been in a position of considerable influence over Mr Taylor because of Mr Herron's shareholding in Omnia. We are satisfied that Mr Taylor did his best to reach the decision on the evidence available to him.

110. The claimant appealed against his dismissal. His grounds of appeal, as set out in an email on 28 December 2016, were that Miss Fenwick had failed to make adjustments, that she had breached section 15 of the Equality Act 2010 (without saying how she had allegedly done this), that evidence was "selected" without correctly investigating and relevant evidence had been withheld. Accompanying the grounds of appeal was a recitation of the claimant's personal grievance against Mr Herron and Mr Comyn. His email accused the various recipients of having "stabbed me in back and then stabbed in front".

111. His appeal was acknowledged and in due course the claimant was invited to an appeal meeting. Before the arrangements for an appeal could be made, however, Miss Wingate emailed the claimant to demand return of various items of company property. The claimant alleges that this email is evidence that the appeal was already a foregone conclusion. We disagree. It is quite common for employers to demand return of company property from dismissed employees before the appeal process has concluded.

112. By email on 30 January 2017, the claimant was invited to an appeal meeting on 8 February 2017. In a later email Miss Fenwick clarified that Mr Burdus would be chairing the appeal meeting, but would not make the final decision, which would be up to Mr Herron. Miss Fenwick acknowledged that the process was "not ideal" but it was the best that the respondent, as a small business, could manage. By the time of sending this email, Miss Fenwick had already asked shareholders of the respondent whether they would be prepared to conduct the appeal and they had replied "no". She had also asked a Mr Nick Patchett, whom the claimant would have preferred, but Mr Patchett informed her that he was unable to become involved.

113. The claimant confirmed his attendance by email on 1 February 2017. In another email the same day, the claimant provided a detailed commentary on the outcome letter that he had received from Mr Taylor. He also made an allegation of conspiracy between Miss Wingate and Mr Herron. This was an oblique reference to the cashflow forecast that Miss Wingate had circulated on 16 December 2016. He asked for Miss Wingate to be present at the appeal as a witness. Miss Fenwick replies that Miss Wingate had requested that she not be called as a witness because she found the allegations of impropriety against her to be upsetting. Miss Fenwick asked the claimant to provide evidence in support

of his allegations in advance of the appeal meeting. She proposed that the meeting be chaired by Mr Burdus. The claimant objected to this proposal too. His position was that Mr Burdus was not "my senior" and did not therefore have the level of seniority required by the ACAS Code. Miss Fenwick's position, outlined on 3 February 2017, was that it would be difficult for the claimant and Mr Herron to try to have a meeting to discuss the appeal.

114. By this time, Mr Milton had raised allegations of his own against Miss Wingate and Mr Herron. He emailed Miss Fenwick to ask why Mr Herron had not been suspended.

115. Over the next few days the claimant sent numerous emails to Miss Fenwick about the arrangements for the appeal meeting. Again, we have not seen the full email conversation. It is clear, however, from the claimant's own emails that he was taking the initiative in sending them. He was not reacting to emails sent by Miss Fenwick; indeed, he was complaining that she was not answering his questions. These emails demonstrate to us that the claimant was quite happy to send and receive multiple emails very shortly before an upcoming meeting.

116. The appeal meeting took place on 8 February 2017. Once again, the claimant was accompanied by Mr Milton. Mr Burdus chaired the meeting with assistance from Miss Fenwick. It was not a productive discussion. The transcript of the audio recording shows barely a complete sentence being uttered without either the claimant or Mr Milton interrupting it. The claimant called Miss Fenwick a "damn right liar". He accused Mr Burdus and Miss Fenwick of being "co-conspirators" with Miss Wingate and Mr Herron. From time to time, Mr Burdus tried to restore order. The claimant made numerous references to evidence in his possession which he claimed was "gold dust" (this being the cashflow forecasts from the previous December), without explaining in detail what the evidence was or providing a copy for Mr Burdus to inspect. Listening to part of the audio recording for ourselves, we heard the claimant shouting and constant overtalking. The claimant told Mr Burdus that Miss Fenwick wanted to "dismiss me and then worry about it later". After about two hours, the claimant announced that he needed to leave the meeting in order to collect his child from school.

117. Following the meeting, Miss Fenwick emailed the claimant to ask for a copy of the "gold dust" evidence. The claimant replied with a copy of the spreadsheet. Email correspondence then ensued as to what conclusions could properly be drawn from it and how the claimant had managed to obtain it in the first place.

118. The claimant's new evidence, along with all the preceding paperwork for the disciplinary investigation and recordings of the meetings, together with the claimant's detailed emails in support of his appeal, were all passed to Mr Herron to make the final decision. He engaged with the claimant's marked up response to the disciplinary outcome letter and provided a point by point response. He explained why the cashflow forecast did not mean that the dismissal decision had been predetermined. Having done so, he considered whether the original decision to dismiss the claimant was justified. In Mr Herron's conclusion, it was. His reasoning was similar to that of Mr Taylor. In a detailed outcome letter dated 17 February 2017, the claimant was informed that his appeal was unsuccessful.

<u>Direct discrimination</u>

119. Section 13(1) of EqA provides:

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

120. Section 23(1) of EqA provides:

(1) On a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to each case.

121. Employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it because of the protected characteristic? That will call for an examination of all the facts of the case. Or was it for some other reason? If it was the latter, the claim fails. These words are taken from paragraph 11 of the opinion of Lord Nicholls in *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, updated to reflect the language of EqA.

122. Less favourable treatment is "because" of the protected characteristic if either it is inherently discriminatory (the classic example being the facts of *James v. Eastleigh Borough Council,* where free swimming was offered for women over the age of 60) or if the characteristic significantly influenced the mental processes of the decision-maker. It does not have to be the sole or principal reason. Nor does it have to have been consciously in the decision-maker's mind: *Nagarajan v London Regional Transport* [1999] IRLR 572.

123. Tribunals dealing with complaints of direct discrimination must be careful to identify the person or persons ("the decision-makers") who decided upon the less favourable treatment. If another person influenced the decision by supplying information to the decision-makers with improper motivation, the decision itself will not be held to be discriminatory if the decision-makers were innocent. If the claimant wishes to allege that that other person supplied the information for a discriminatory reason, the claimant must make a separate allegation against the person who provided the information: *CLFIS (UK) Ltd v. Reynolds* [2015] EWCA Civ 439.

<u>Harassment</u>

124. Section 26 of EqA relevantly provides:

(1) A person (A) harasses another (B) if—

(*a*) A engages in unwanted conduct related to a relevant protected characteristic, and

(*b*) the conduct has the … effect of—

(*i*) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(*b*), each of the following must be taken into account—

(*a*) the perception of B;

(*b*) the other circumstances of the case;

(*c*) whether it is reasonable for the conduct to have that effect.

125. Subsection (5) names disability among the relevant protected characteristics.

126. In deciding whether conduct had the proscribed effect, tribunals should consider the context, including whether or not the perpetrator intended to cause offence. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct related to other protected characteristics), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase: *Richmond Pharmacology Ltd v. Dhaliwal* [2009] IRLR 336.

Duty to make adjustments

127. By section 20 of EqA, the duty to make adjustments comprises three requirements.

128. The first requirement, by section 20(3), incorporating the relevant provisions of Schedule 8, is a requirement, where a provision, criterion or practice (PCP) of the employer's puts a disabled person at a substantial disadvantage in relation to the employer's employment in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

129. Section 20(3) defines the third requirement. Where, but for an auxiliary aid, the employee would be at a substantial disadvantage compared to persons who are not disabled, the employer is required to take such steps as it is reasonable to have to take to provide that auxiliary aid.

130. A disadvantage is substantial if it is more than minor or trivial: section 212(1) of EqA.

131. Paragraph 6.28 of the Equality and Human Rights Commission's *Code of Practice on Employment* lists some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

131.1. Whether taking any particular steps would be effective in preventing the substantial disadvantage;

131.2. The practicability of the step;

131.3. The financial and other costs of making the adjustment and the extent of any disruption caused;

131.4. The extent of the employer's financial and other resources;

131.5. The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

131.6. The type and size of employer.

132. Before a respondent is required to disprove a failure to make adjustments, there must be sufficient facts from which the tribunal could conclude not just that there was a duty to make adjustments, but also that the duty has been breached. By the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made: *Project Management Institute v. Latif* UKEAT 0028/07.

Discrimination arising from disability

133. Section 15(1) of EqA provides:

> (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.

134. Langstaff P in *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14 (19 May 2015, unreported) explained (with emphasis added):

> "The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" – and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages."

135. As with direct discrimination, the focus must be on the conscious or subconscious motivation of the person or persons who decided on the unfavourable treatment: *IPC Media Ltd v Millar [2013] IRLR 707.*

136. These principles have been affirmed in *Pnaiser v. NHS England* [2016] IRLR 174.

Time limits

137. Section 123 of EqA provides, so far as is relevant:

> (1)… proceedings on a complaint [of discrimination or harassment in the field of work] may not be brought after the end of—
>
> > (a) the period of 3 months starting with the date of the act to which the complaint relates, or
> >
> > (b) such other period as the employment tribunal thinks just and equitable.
>
> …
>
> (3) For the purposes of this section—
>
> > (a) conduct extending over a period is to be treated as done at the end of the period;
> >
> > (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> > (a) when P does an act inconsistent with doing it, or
> >
> > (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

138. In *Commissioner of Police of the Metropolis v Hendricks* [2002] EWCA Civ 1686; [2003] ICR 530, a police officer alleged racial and sexual discrimination Mummery LJ, with whom May LJ and Judge LJ agreed, gave guidance on the correct approach to "an act of extending over a period". I shall read out the

> 48. [the claimant] is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of an 'act extending over a period'…
>
> 52. ... The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would be given to run from the date when each specific act was committed"

139. A one-off act with continuing consequences is not the same as an act extending over a period: *Sougrin v Haringey Health Authority* [1992] IRLR 416, [1992] ICR 650*, CA.*

140. The "just and equitable" extension of time involves the exercise of discretion by the tribunal. It is for the claimant to persuade the tribunal to exercise its discretion in his favour: *Robertson v. Bexley Community Centre* [2003] EWCA Civ 576. There is, however, no rule of law as to how generously or sparingly that discretion should be exercised: *Chief Constable of Lincolnshire Police v. Caston* [2009] EWCA Civ 1298. The discretion to extend time is "broad and unfettered": *Abertawe Bro Morgannwg University v. Morgan* [2018] EWCA Civ 640.

141. Tribunals considering an extension of the time limit may find it helpful to refer to the factors set out in section 33 of the Limitation Act 1980 (extension of the limitation period in personal injury cases): *British Coal Corpn v. Keeble* [1997] IRLR 336. These factors include:

141.1. the length of and reasons for the delay;

141.2. the effect of the delay on the cogency of the evidence;

141.3. the steps which the claimant took to obtain legal advice;

141.4. how promptly the claimant acted once he knew of the facts giving rise to the claim; and

141.5. the extent to which the respondent has complied with requests for further information.

<u>Burden of proof</u>

142. Section 136 of EqA applies to any proceedings relating to a contravention of EqA. By section 136(2) and (3), if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

143. In *Igen v. Wong* [2005] EWCA Civ 142, the Court of Appeal issued guidance to tribunals as to the approach to be followed to the burden of proof provisions in legislation preceding EqA. They warned that the guidance was no substitute for the statutory language:

(1) … it is for the claimant who complains of … discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination ... These are referred to below as "such facts".

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of … discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw …from an evasive or equivocal reply to a [statutory questionnaire].

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts…This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

> (13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

144. The initial burden of proof is on the claimant: *Ayodele v. Citylink Ltd* [2017] EWCA 1913

145. It is good practice to follow the two-stage approach to the burden of proof, in accordance with the guidance in *Igen v. Wong,* but a tribunal will not fall into error if, in an appropriate case, it proceeds directly to the second stage. Tribunals proceeding in this manner must be careful not to overlook the possibility of subconscious motivation: *Geller v. Yeshrun Hebrew Congregation* [2016] UKEAT 0190/15.

146. We are reminded by the Supreme Court in *Hewage v. Grampian Health Board* [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Unfair dismissal

147. Section 98 of ERA provides, so far as is relevant:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal and
>
> (b) that is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it…(b) relates to the conduct of the employee…
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

148. The reason for dismissal is the set of facts known to the employer, or the set of beliefs held by him, that causes him to dismiss the employee: *Abernethy v, Mott, Hay and Anderson* [1974] ICR 323, CA.

149. Where the reason for dismissal is the employee's misconduct, it is helpful to ask whether the employer had a genuine belief in misconduct, whether that belief was based on reasonable grounds, whether the employer carried out a

reasonable investigation and whether the sanction of dismissal was within the range of reasonable responses: *British Home Stores Ltd v. Burchell* [1978] IRLR 379, *Iceland Frozen Foods Ltd v. Jones* [1983] ICR 17.

150. In applying the test of reasonableness, the tribunal must not substitute its own view for that of the employer. It is only where the employer's decision is so unreasonable as to fall outside the range of reasonable responses that the tribunal can interfere. This proposition is just as true when it comes to examining the employer's investigation as it is for the assessment of the decision itself: *J Sainsbury plc v. Hitt* [2003] ICR 111.

151. The tribunal must consider the fairness of the whole procedure in the round, including the appeal: *Taylor v. OCS Ltd* [2006] IRLR 613.

Gross misconduct and notice of termination

152. Where notice is required to terminate a contract of employment, the employer may nevertheless terminate the contract without notice if the employee repudiates the contract by committing gross misconduct.

153. "Gross misconduct" for the purposes of a claim of wrongful dismissal, has been defined in the report of Lord Jauncey in *Neary v. Dean of Westminster* [1999] IRLR 288. For conduct to come within the definition, it must so undermine the relationship of trust and confidence that the employer can no longer be expected to keep the employee in employment.

Variation of contract and "emotional blackmail"

154. A contract of employment may be varied with the agreement of the parties.

155. A party who has agreed to vary a contract may in some circumstances be able to avoid the variation, or, in other words, to insist on performance of the original contract. This may be the case if the variation was agreed on the basis of a misrepresentation made by the other party to the contract. It will also be the case where the contract was varied as the result of duress (see, generally, *Chitty on Contracts,* paragraph 7-003). The law recognises a number of different forms of duress as being capable of making a contract voidable. One of these categories is known as "economic duress". There may be duress where "economic pressure may be characterised as illegitimate and has constituted a significant cause inducing the [claimant] to enter into the relevant contract": *Dimskal Shipping Co SA v ITWF* [1992] AC 152, 165. On the other hand, a truthful statement of the inevitable is not a threat such as to amount to economic duress (see paragraph 7-040 of *Chitty*).

156. So far as we are aware, there is no concept of "emotional blackmail" as a distinct ground for avoiding a contractual variation.

Tribunals' approach to parties with dyslexia

157. In *Rackham v. NHS Professionals Limited* UKEAT 0110/15, Langstaff J confirmed that tribunals were under a duty to make adjustments for disabled parties. His judgment included the following guidance, underpinned by the *Equal Treatment Bench Book*:

> "there might in an appropriate case be a preliminary consideration of the procedure that the Tribunal should adopt in order best to establish the rights of the parties before it. It may for instance consider the ground rules that it is appropriate to lay down for the hearing and the adjustments that it might be necessary to make."

158. The *Equal Treatment Bench Book* itself helps to raise awareness of difficulties encountered by people with dyslexia:

> "Difficulties include associated with Specific Learning Difficulties ('SpLD') including Dyslexia include:
>
> • A weak short-term memory.
> • Mistakes with routine information, eg giving the names of their children.
> • Difficulty remembering what they have just said.
>
> A poor working memory - this shows itself as the inability to: o Retain information without notes.
>
> o Hold on to several pieces of information at the same time.
>
> o Listen and take notes.
>
> o Cope with compound questions.
>
> o Difficulty carrying out three instructions in sequence.
>
> • Inefficient processing of information which could relate to written texts, oral responses or listening skills – there may be a delay between hearing something, then understanding it, and then responding to it.
> • Difficulty presenting information in a logical sequential way.
> • Difficulty writing letters and reports.
> • Difficulty distinguishing important information from unimportant details.
> • Word-finding problems, lack of precision in speech, misunderstandings and misinterpretations.
> • Difficulty with unfamiliar words and technical terminology.
> • Lateness in acquiring reading and writing skills – even though these may become adequate there are residual problems, such as the struggle to extract the sense from written material and an inability to scan or skim through text.
> • Problems retaining sequences of numbers or letters and muddling left and right.
> • Poor time management with particular difficulties estimating the passage of time or how long a task will take.
> • Chronic disorganisation; frequently losing things.
> • Heightened sensitivity to noise or visual stimuli and difficulty screening out background noise or visual stimuli.
> • Overloud speech or murmuring.
> • Difficulty finding the way to and then navigating around an unfamiliar building.
> Some people with SpLDs have come to rely so heavily on technology for many aspects of their daily lives that they feel quite disabled when they are not allowed to use it, for example in court.
> Others report that they experience mental overload and are unable to recall what has transpired or the outcome of the hearing so they may need, yet cannot always obtain or afford, a transcript.
>
> **Impact of SpLDs in a court setting**
> The following problem areas are reported by people with SpLDs who have experience of court or tribunal proceedings:
> • A build up of stress, due to long delays at the hearing.
> • Impossibility of following the cut and thrust of court exchanges.
> • Difficulty coping with oblique, implied and compound questions.
> • Failure to grasp nuances, allusions and metaphorical language.

- Difficulties giving accurate answers relating to dates, times or place names.
- Problems providing consistent information on sequences of actions.
- Inability to find the place in a mass of documentation, as directed.
- Impossibility of assimilating any new documentation at short notice.

…

- Maintaining concentration and focus, mental overload.
- Feelings of panic, resulting in the urge to provide any answer in order to get the proceedings over with as quickly as possible.
- Anxiety that use of inappropriate tone may create a misleading impression.
- An experience of sensory overload from the lights, bustle and distractions.

People with SpLDs will be concerned about how their behaviour might be perceived: inconsistencies could imply untruthfulness. Failure to grasp the point of a question could come across as evasive. Lack of eye contact could be misinterpreted as being 'shifty' and an over-loud voice might be regarded as aggressive. The overriding worry is that a loss of credibility occurs when they do not 'perform' as expected.
Communication skills are often poor in people with SpLDs. They may miss the point, go off on a tangent, appear garrulous and imprecise or find that words fail them altogether so that they are unable to proceed. Despite their efforts they may only respond to the last part of a question or may unintentionally mislead the court through incorrect word usage.

**Reasonable adjustments**

*Prior to the hearing*

- Where case management directions are given orally at a case management preliminary hearing, following up immediately with all instructions clearly in writing.
- Putting any written instructions in plain English.
- Staggering instructions and Orders.
- Not expecting the individual to formulate complex further particulars, schedules of loss, Scott schedules etc. Asking for information in bite sizes.
- Clear formatting on correspondence: font size at least 12, clear typeface, greater spacing, sometimes coloured paper (often yellow, but the particular colour might matter). Beware loss of formatting on emails. A trial bundle for the hearing might also need to be copied onto coloured paper or sometimes a tinted cellulose sheet can be used as an overlay.
- Electronic communication helps those who rely on speech recognition software.
- Reminders of time-limits and dates of preliminary hearings.

…

*During the hearing*

Adjustments during the hearing may entail:

- Regular short breaks to help sustain concentration.

- Explanations and instructions given slowly and clearly.
    - Providing a ruler on the witness stand, as an aid to focused reading.

    …
- Patience – accepting the individual will provide unimportant detail together with important points; waiting for the person to process a question and respond.
    - Adjustments to cross-examination style including:
        - Questions asked singly.
    - Thinking time allowed to assimilate information and produce a considered response.
    - Not asking the person to read through large parts of a document and comment on it.
    - Providing questions in advance of the hearing.

    - If 'mental overload' has been reached and the individual is unable to participate in the process, he or she will need to be given sufficient time to recover.

    It is of paramount importance that adults with SpLDs are reassured that:

- They may seek clarification at any stage by asking for a question to be repeated or re-phrasing it to check understanding.
- They can take their time when considering responses and can inform the judge when they are no longer able to maintain concentration.

Where appropriate, adjustments prior to the hearing may entail:

- Misunderstandings on their part will not be treated as evasiveness and inconsistencies will not be regarded as indications of untruthfulness.
- They are not expected to rely on their memory alone for details of dates, times locations and sequences of events.
- They will not be expected to skim through and absorb new documentation or locate specific pieces of information in the court bundle."

## Conclusions

Direct Discrimination

159. We deal with each of the allegations of direct discrimination in turn:

*7.1 Omission of request for adjustments from Board meeting minutes*

160. We have recorded at paragraph 39 the reason why there was no reference to Mr Milton's request for adjustments in the minutes of the 8 March 2018 Board meeting. The respondents were not motivated in any way by the fact that the claimant had dyslexia.

*7.2 Mr Burdus' email chains*

161. As we have explained at paragraphs 43 and 55 Mr Burdus did not treat the claimant in the manner alleged. He sought to avoid multiplicity of emails. To the extent that Mr Burdus himself sent emails to the claimant, we are quite satisfied that Mr Burdus was not seeking to take advantage of the claimant's dyslexia. He was seeking to do the opposite. Mr Burdus' emails were not "because of" the claimant's dyslexia in any way.

*7.3 Ignoring the claimant's telephone calls*

162. As can be seen from our findings at paragraphs 45 and 58, the claimant was treated less favourably than others in that his telephone calls were sometimes deliberately ignored with the knowledge of Mr Herron. Ignoring the claimant's calls was, however, not motivated in any way by the fact that the claimant had dyslexia. It was because of the claimant's behaviour during the telephone calls and the effect that it had on Miss Walsh and Mr Hyams. A person without dyslexia who spoke to them in the same way over the telephone would have been treated just the same.

*7.4 Taking advantage of the claimant's dyslexia during the suspension and disciplinary meetings*

163. Our finding of fact at paragraphs 74, 86 and 106 makes clear that the alleged less favourable treatment simply did not happen.

Discrimination arising from disability

164. For the reasons we have given at paragraphs 54 and 55, Mr Burdus' email ("don't make me look dim in front of Eryka") does not have the connection to the claimant's disability that the claimant alleges that it has. To the extent that the reason for the email was the lack of an inclusive working environment, that reason did not arise in consequence of the claimant's disability. It was overwhelmingly caused by the claimant's mistrust of Mr Herron and their refusal to work together. As for the other alleged reasons (the claimant's difficulty in putting his thoughts into words), we have found that this was not the reason for Mr Burdus' email. The claimant's email had correctly conveyed the meaning that the claimant intended it to convey. Another way of looking at it is that there was nothing in the claimant's email that had arisen in consequence of his disability that influenced Mr Burdus' use of the impugned phrase in his reply.

Duty to make adjustments

165. We accept in general terms that, on occasion, employees of the respondent sent the claimant multiple emails shortly before meetings. We also accept in general that this practice, when it occurred, put the claimant at a disadvantage that as more than minor or trivial compared to people who did not have dyslexia. It was more difficult for him that for others to absorb written information from multiple sources in a short timeframe. That said, the disadvantage was not particularly severe. The claimant from time to time chose multiple e-mail chains as his preferred method of communication shortly before meetings. Against this background we look at the various occasions on which it is alleged that there was a failure to make reasonable adjustments.

*17.1 After the meeting on 8 March 2016*

166. There has been no evidence of any occasion between March and July 2016 in which the claimant was sent multiple emails shortly before any meeting. We have accepted (see paragraph 40) the respondent's broad evidence that after 8 March 2016 employees used Skype or telephone calls wherever possible as a means of communicating information to the claimant. During this period, the PCP of which the claimant complains was not in operation and there was nothing to put the claimant at a disadvantage. The duty to make adjustments therefore did not arise. Another way of looking at the same issue is to say that if there was a duty to make adjustments it was not breached because the required adjustment was in fact made.

167. The only exception to this general conclusion is the fact that, in the summer of 2016, Mr Hyams and Miss Walsh started ignoring the claimant's telephone calls on occasion. There was no evidence that this happened shortly before meetings. The telephone calls were therefore not at a time when they could have reduced the disadvantageous effect of the PCP. If we have misunderstood the evidence, and one or more of these telephone calls was shortly before a meeting, we would have to consider whether it was reasonable for the respondent to have to make the adjustment of ensuring that Mr Hyams and Miss Walsh spoke on the telephone to the claimant when he called. If this question arose for consideration, we would unhesitatingly conclude that it was not reasonable to require this adjustment to be made. Whatever benefits there may have been from presenting information to the claimant in more accessible form, they would have been clearly outweighed by the disruptive effect of forcing Mr Hyams and Miss Walsh to listen to the claimant's bullying behaviour over the telephone.

*17.2 After an email sent by Mr Burdus on 4 July 2016*

168. It is not entirely clear which occasion the claimant is referring to here. We have found that there was an exchange of emails between the claimant and Mr Burdus on 15 July 2016, shortly before a Board meeting on 18 July 2016. The information being provided by Mr Burdus did not appear to relate to the Board meeting. It is hard to see, therefore, how the PCP put the claimant at a disadvantage on this occasion. In any event Mr Burdus, according to our findings at paragraph 49, did speak to the claimant on the telephone. The required adjustment was therefore made. To the extent that the claimant may argue that there should have been further telephone contact, we would find that it was not reasonable to expect the respondent to have to make that adjustment. The telephone conversation between the claimant and Mr Burdus was unproductive.

*17.3 At the time of the email chains culminating on 22 July 2016*

169. There was a further exchange of emails between Mr Burdus and the claimant on 21 and 22 July 2016. It is unclear whether this chain of emails was shortly before a meeting or not. If it is alleged by the claimant that adjustments should have been made at the time of this email conversation, we would not regard it as reasonable for the respondent to have to make them. The claimant's conduct during the conference call Board meeting on 18 July 2016 would not have given Mr Burdus any confidence in this medium as an effective way of communicating information to the claimant.

*17.4(1) Suspension meeting*

170. The claimant was not provided with any significant amount of information in email form prior to the suspension meeting. The PCP complained of was not applied to the claimant at that time. It was not the claimant's difficulty in absorbing written information that put him at any disadvantage in preparing for the suspension meeting; it was the lack of any information whatsoever. There was therefore no duty to make adjustments. If we are wrong in that conclusion, and it is held that the lack of advance warning of the suspension meeting was an instance of the alleged PCP putting the claimant at a disadvantage, we would find that it was not reasonable for the respondent to have to make any adjustment of letting the claimant know the purpose of the meeting in advance by way of a telephone call or other voice based technology. Employees are not usually informed in advance of suspension meetings that they are about to be suspended. Tipping off an employee can often defeat the whole purpose of suspension.

*17.4(2) 2 November 2016 meeting*

171. We do not fully understand the basis of the claimant's complaint in this regard. His very clear bone of contention at the time of the meeting itself was that he was not provided with written information in advance of the meeting. This contention is precisely the opposite of the way in which the claimant now formulates his case. He now complains that sending him information by email shortly before a meeting put him at a disadvantage. Be that as it may, we have done our best to analyse the substance of the claimant's complaint. So far as this is a complaint about the number of emails that Miss Fenwick was sending to the claimant, we do not think that it would have been reasonable for her to have to telephone the claimant or use Skype instead of sending them. The email conversations were largely initiated by the claimant himself. Miss Fenwick was on the back foot, having to respond to repeated accusations of discrimination and failure to make adjustments. If the claimant did not want to receive so many emails, he could quite easily have sent fewer emails himself. The claimant had demonstrated such a lack of trust in the process and in Miss Fenwick that it was important for her to be transparent in all her communications with the claimant in case any dispute later arose as to what had been said. Email was a simple and convenient means of ensuring such transparency. The claimant did not ask to speak to Miss Fenwick on the telephone as an alternative.

172. We now turn to the specific complaint that the claimant as not provided with an advance list of questions before the 2 November 2016 meeting. This was not an operation of the PCP. As we have observed, it is a complaint about failure to send written information rather than a complaint about its having been sent. If we are wrong in our analysis and the claimant was put at a disadvantage on this occasion by the alleged PCP, we would consider that it was not reasonable to have to make the alleged adjustment of providing a written list of questions or by communicating that information using voice based technology. The first part of the meeting was discussion of the claimant's own grievance. He was informed in advance that he would be asked to provide examples and evidence of the generalised allegations that he was making. He did not need a detailed list of questions in order to be able to come up with examples of his own. The claimant was not put at a disadvantage by any lack of written questions in relation to the allegations against him, because that part of the meeting was never reached. In addition, reminding ourselves of the adjustment that the claimant actually says should have been made, we do not think that it would have been practicable or sensible for Miss Fenwick to try and explain

over the telephone what questions she was going to be asking at the forthcoming meeting. Far better simply to ask them at the meeting itself. As the claimant himself told us in his oral evidence, “I’m ok orally”.

*17.4(3) Disciplinary meeting*

173. As we have recorded, Miss Fenwick did send a large number of emails to the claimant during the days prior to the disciplinary meeting. Most of these were replies to the claimant's own emails. The easiest way of reducing any disadvantage to the claimant would have been for the claimant to send fewer emails himself. It would not have been reasonable for Miss Fenwick to have made the adjustment of telephoning the claimant. The level of personal animosity that the claimant was displaying towards Miss Fenwick by this time was such that Miss Fenwick would not reasonably have been expected to speak to him on the telephone. The need for transparent communication was by now more important than ever. The claimant had received the written information that he needed in order to deal with the substance of the allegations three weeks prior to the meeting taking place.

174. In conclusion, the respondents did not fail in their duty to make adjustments.

Harassment

175. As deal with each allegation of harassment as it appears in the schedule.

*19.1 December 2015 meeting*

176. Though the evidence is vague, we assume for the purpose of this allegation that Mr Comyn did make a comment of some sort which would have been unwanted by the claimant. Assuming this to be the case, there is no evidence from which we could conclude that Mr Comyn’s comment was anything to do with the claimant's disability. There is no evidence that what he said implied that the claimant was incapable of producing a document. There is nothing to suggest that the unwanted conduct was connected to the claimant's protected characteristic. In the absence of such a connection this complaint of harassment must fail.

*19.2 Ignoring the claimant's telephone calls*

177. The conduct of Miss Walsh and Mr Hyams in ignoring the claimant's telephone calls on occasion was unwanted. The only apparent connection to the claimant's disability was that talking to the claimant on the telephone was an adjustment which had been agreed to be made where the alternative would be sending the claimant multiple emails before meetings. Since there is no evidence that the ignored telephone calls were shortly before meetings, the connection between the unwanted conduct and the claimant's disability seems to us to be too remote. We have, however, considered whether the remainder of the section 26 definition is satisfied in case our conclusion is wrong about whether the conduct was related to the claimant's disability. We are quite satisfied that neither Mr Hyams nor Miss Walsh nor Mr Herron acted for the purpose of violating the claimant's dignity or creating the relevant adverse environment for the claimant. We accept that the claimant was genuinely outraged when he found out that Miss Walsh and Mr Hyams had been ignoring his calls. He did genuinely perceive their actions as creating a hostile environment for him. We do not, however, think that it was reasonable for him to perceive their conduct in that way. Looking at the situation objectively, it would

take only a moment's thought to realise that Miss Walsh and Mr Hyams were not demonstrating hostility or withdrawing adjustments for its own sake, but were responding to the claimant's own unacceptable behaviour over the telephone. Their conduct did not have the adverse effect described in section 26 of the Equality Act 2010 and therefore did not amount to harassment.

*19.3 Mr Raigan Herron's statement*

178. Mr Raigan Herron subjected the claimant to unwanted conduct by telling Miss Fenwick that he thought the claimant used dyslexia as an excuse for not giving clear instructions. There is no doubt that this conduct related to the claimant's disability. We have found that Mr Raigan Herron did not say these words for the prohibited purpose (paragraph 67). What we must now do is assess whether it had the effect of violating the claimant's dignity or creating the relevant adverse environment. Our conclusion is that it did not. The claimant perceived the remark to be offensive when he read about it in the disciplinary pack. It would not, however, have been reasonable for him to have seen it in that way. Context is everything here. Any objective reader would have known that Mr Raigan Herron was not making gratuitous comments about the claimant but was responding to focused questions as part of an investigation. Whilst we can readily see some circumstances in which it would be highly offensive to a disabled person to be accused of using their disability as an excuse, it cannot be reasonable to regard that comment as always being offensive no matter what the context. Sometimes, though uncomfortable to hear, the comment may be true. Mr Milton, whilst cross examining Miss Wingate on the claimant's behalf, clearly recognised this point. When Miss Wingate told us she sometimes lost her memory because she suffered with epilepsy, Mr Milton told us that, "she has given it as an excuse for not remembering". The claimant did nothing to disassociate himself from Mr Milton's remark. To our minds, what matters is whether it would be reasonable to view Mr Raigan Herron's comment as insulting. If any reasonable person would think of it as an accurate observation of the claimant's behaviour, albeit an observation that would be uncomfortable for the claimant to hear, it is unlikely that it would be reasonable for the claimant to treat it as an insult. We have decided that Raigan Herron's remark fell into the latter category. There were times when the claimant used his disability as an excuse, in the sense that he would mention his disability as an explanation, when his disability had no apparent relevance to the thing he was explaining. The claimant's comments during the Board meeting on 18 July 2016 are an example. The claimant shouted down an attempt by Mr Herron to talk about his own health issues, shouting, "I don't really care about your health condition. I've got a disability". Another example is the claimant's repeated attempts to rely on his physical disability as a reason for not attending the disciplinary meeting in person when observational evidence clearly showed that the claimant was exaggerating the effects of his condition on his ability to drive or be driven to the venue. This brings us to the precise context of Raigan Herron's statement. He was saying he believed that the claimant would rely upon his dyslexia, but it was in fact no excuse for the lack of clarity of his brief, because the problem was that the claimant had missed the call where that brief was meant to be discussed. It was not reasonable for the claimant to perceive Raigan Herron's comment as having the effect described in section 26.

*19.4 18 December 2016 Private Detective*

179. We have reached largely the same conclusion in relation to Miss Fenwick's use of a private detective on 18 December 2016. The claimant did not want it. He found the intrusion into his private life offensive and intimidating. There was a connection to his disability in that the purpose of sending the detective to the claimant's home was to investigate the truth of the claimant's assertion that he was physically unable to attend the meeting. It was, however, wholly unreasonable of the claimant to believe that his dignity was being violated or that the presence of the investigator was creating the relevant adverse environment. If he stood back and compared what he was telling Miss Fenwick about the effects of his back condition with what he was actually able to do, he would instantly have realised that it was perfectly reasonable to send an investigator to observe him. Much of the claimant's outrage, we suspect, was at having been found out in his attempt to exaggerate his symptoms in an effort to avoid attending the meeting. He had given multiple reasons for insisting on Skype over a face to face meeting, and each time the reason changed it became less believable. Another element of his anger was over what he believed to be the inclusion of his young son in the photographs. This was unfounded.

180. Taking into account the claimant's perception and whether it would be reasonable for him to perceive it in that way, we have concluded that Miss Fenwick's conduct in sending the private investigator to the claimant's home did not have the effect of violating the claimant's dignity or creating the prohibited environment.

Time Limits

181. We have additional reasons for rejecting the complaints under the Equality Act 2010 in respect of events that are alleged to have taken place prior to 10 September 2016. We have concluded that there was no act of discrimination that took place after that date. If an act was done prior to 10 September 2016, it cannot be said to have been part of a continuing state of affairs that included events occurring after that time. We must therefore consider whether it would be just and equitable to extend the time limit.

*Direct discrimination – allegation 7.1 (Board meeting minutes 8 March 2016)*

182. Whilst this allegation is some ten months out of time, we did not regard the passage of time to have caused particular disadvantage to either side because of our ability to make clear findings based on contemporaneous documents. Our reason for refusing to extend time is simply that we find the claim to be unfounded on its merits.

*Other allegations prior to July 2016*

183. We have viewed the situation rather differently in relation to the conduct that is alleged to have taken place over the summer of 2016. This includes ignoring the claimant's telephone calls and the alleged continuing practice of sending multiple email chains to the claimant after 8 March 2016 and 4 July 2016. Here, the fact-finding process was made more difficult by the absence of contemporaneous evidence and the vague nature of the oral evidence that was given to us. We find that the delay is a significant factor in the deterioration of the evidence. It appeared to us that memories had faded. We have heard no evidence about the claimant's reason for the delay. By 31 October 2016 he had taken legal advice. Whilst our principal reason for refusing to extend time is the fact that we were ultimately able to

make findings in favour of the respondents so there would be no disadvantage to the claimant in refusing the extension, we would in any event have refused to extend the time limit because of the effect of the delay on the quality of the evidence.

184. As for the alleged remarks by Mr Comyn in December 2015, the evidence is so thin that the claim fails on its merits in any event. If we are wrong in our assessment of the evidence, we would nonetheless conclude that it would not be just and equitable to extend the time limit because of the lack of reason for the delay, the fact that the claim was presented over a year after the event complained of and the effect of the delay upon the cogency of the evidence.

Unfair Dismissal

185. We are satisfied that the reason for the claimant's dismissal was the belief held by Mr Taylor and Mr Herron that he claimant had used coercive and bullying behaviour towards employees. This was a reason that related to the claimant's conduct. We must therefore consider whether the respondent acted reasonably or unreasonably in treating that reason as sufficient to dismiss the claimant.

186. In our view, the respondent had reasonable grounds for its belief. Numerous employees painted a consistent picture of the claimant adopting an aggressive manner over the telephone, being openly critical of junior colleagues in the presence of others or in emails widely circulated, making threats to have an employee removed without any procedure, and putting highly emotional pressure towards a subordinate employee to make unauthorised payments towards him. The emails that the claimant had sent were undeniable. The only counternarrative came from the claimant himself and from Mr Milton. It was reasonably open to Mr Taylor and Mr Herron to regard Mr Milton as being partisan in favour of the claimant and to prefer the version of events of the other witnesses. In any event, the claimant had acknowledged that on occasion he had “overstepped the mark”.

187. We have examined the quality of the respondent’s investigation. Our starting point is that this was a small business. It was faced with a difficult situation, in that the employee who was accused of misconduct was the Chief Executive. There was only a limited number of people who would have the authority to investigate and take appropriate disciplinary action. Engaging the services of an outside consultant was the best that the respondent could do. It did not have the resources to pay for the extraordinary amount of time and effort that it took to coordinate the investigation and disciplinary process. This meant, in practice, that the respondent had to rely on somebody who would be prepared to invest a large amount of goodwill in the respondent and necessarily have a vested interest in achieving an outcome satisfactory to the respondent’s shareholder. The claimant makes the point that this compromised Miss Fenwick’s independence, but if that is true, the respondent had little other option. In an ideal world, the disciplinary meeting would have been chaired by somebody who was completely divorced from the dispute between the claimant and Mr Herron and Mr Comyn. In practice, such a solution would have been virtually impossible.

188. There was a careful investigation by Miss Fenwick, at which the claimant was given the opportunity to be interviewed. The fact that the meeting never got round to that topic was as a result of the stand-off between the claimant and Miss Fenwick over the provision of written questions in advance. That stand-off might have been avoided by Miss Fenwick providing advance information about the allegations

against the claimant. It is more likely, however, that the claimant would have continued to take an unreasonable stance in relation to advance questions for the part of the meeting which was intended to discuss the claimant's own grievance. Following 2 November 2016 it is not surprising that Miss Fenwick did not attempt to reconvene any further meetings with the claimant before passing the file on to Mr Taylor. There was a lengthy disciplinary meeting at which the claimant had the opportunity to present his side of the story. He had ample time to consider the written material in front of him, and this is even making allowances for the difficulties that the claimant suffered because of his dyslexia. The decision to dismiss the claimant had not been finally taken by the time of the disciplinary meeting. The cashflow forecasts do not show that the dismissal was predetermined. Following the disciplinary meeting there was a lengthy appeal meeting where the claimant had a further opportunity to put forward his version of events. That is not to say that much additional information was in fact gathered. In our view it is not the respondent's fault that the meeting was so unproductive. Overall, we cannot say that the procedure was so unreasonable as to fall outside the range of reasonable procedures that a small employer could adopt.

189. Finally, we have considered whether the sanction of dismissal fell within the range of reasonable responses. We have no hesitation in concluding that the sanction was a reasonable one. A company is entitled to expect its Chief Executive not to bully subordinate employees. It can, and should, refuse to tolerate its Chief Executive putting pressure on junior employees to account for expenses wrongfully or to make unauthorised payments. This employer in particular could not ignore the effect of the claimant's disruptive behaviour on the small team of employees that were essential for the running of the business. All but one of them was expressing their clear difficulty in continuing to work with the claimant. Added to the mix was the claimant's apparent refusal to acknowledge the seriousness of what he had done and to attempt wherever possible to deflect criticism of his own behaviour by rehearsing his longstanding grievance with Mr Herron. It is difficult to see what else the respondent could have done but to dismiss the claimant.

Breach of contract (1) – failure to give notice

190. As the Schedule makes clear, this complaint stands or falls on the respondent's assertion that the claimant committed gross misconduct. In order to determine that question we must first record some further findings of fact.

191. It is our finding that the claimant did in fact treat Miss Wingate in the ways set out in paragraphs 64, 65 and 81. He belittled and threatened Mr Hyams as set out in paragraphs 44, 56, 66 and 68. He also spoke to Miss Walsh as paragraph 56 records. Our discussion of the evidence explains how we have reached these findings. We found the versions of these three witnesses to be consistent with what we heard on the audio-recordings.

192. In his oral evidence, the claimant accepted that it was "serious misconduct" for a Chief Executive to do the things that were alleged against him. We agree, but would go further and say that it was gross misconduct. The claimant shouted at a more junior employee and used intensely emotive language to obtain advance payment of expenses to which he was not entitled under his contract. He threatened belittled a more junior employee in e-mails to outside parties and threatened to have him unfairly dismissed. His actions reduced his colleagues to tears. In the

claimant's words, he was in a "dark place" because of his ongoing dispute with Mr Herron, but as Chief Executive, that was not an excuse. We also think that his actions were, at times, fundamentally at odds with his duty to Grid, who was the respondent's only shareholder. His communications with Mr Burdus and Raigan Herron show his unwillingness to cooperate with Grid. In our view, the claimant's actions so undermined the relationship of trust and confidence that the respondent could no longer be expected to employ him.

Breach of contract (2)/unlawful deduction of wages

193. In our view the claimant was bound by his agreement to vary his salary in August 2015. The variation to his contract was not a result of any misrepresentation. To the extent that the claimant agreed in reliance on any statements by Mr Herron about respondent's finances, we cannot find those statements to have been untruthful. Reminding a party to the contract, truthfully, of difficult financial circumstances does not amount to economic duress sufficient to make a contract variation voidable. We were unable to find any "emotional blackmail" and in any event do not recognise that as a ground for avoiding the binding terms of a contract.

Breach of contract (3) - expenses

194. As we have found, the parties did not reach the alleged oral agreement on which the claimant now relies.

**Disposal**

195. It follows that the entire claim fails and must be dismissed.

_____

Employment Judge Horne

Date: 23 October 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

31 October 2018

FOR THE TRIBUNAL OFFICE

# SCHEDULE

## ***Consolidated*** **list of complaints and issues**

Complaints

1. By a claim form presented on 9 January 2017, the claimant raised the following complaints:

   1.1 Unfair dismissal, contrary to sections 94 and 98 of the Employment Rights Act 1996 ("ERA");

   1.2 Direct discrimination because of disability, contrary to sections 13 and 39 of the Equality Act 2010 ("EqA");

   1.3 Discrimination arising from disability, contrary to sections 15 and 39 of EqA;

   1.4 Failure to make adjustments, contrary to sections 20, 21 and 39 of EqA;

   1.5 Harassment related to disability, contrary to sections 26 and 40 of EqA;

   1.6 Unlawful deduction of wages, contrary to section 13 of ERA; and

   1.7 A claim for damages for breach of contract.

2. The complaints of unfair dismissal, unlawful deduction from wages and breach of contract are brought against Assist-Mi Ltd ("Assist-Mi"). The complaints under EqA are brought against Assist-Mi and, where they arise out of the conduct of Mr Herron, they are also brought against him.

Unfair dismissal

3. It is common ground that the claimant was dismissed. The issues for the tribunal to determine are:

   3.1 Whether Assist-Mi can prove that the sole or main reason for dismissing the claimant was its belief that the claimant had committed the misconduct alleged in the response.

   3.2 If so, whether Assist-Mi acted reasonably or unreasonably in treating that belief as a sufficient reason to dismiss the claimant. This issue includes the question of whether Assist-Mi predetermined the decision to dismiss the claimant before completing disciplinary procedures.

4. Further issues would arise if the dismissal were found to be unfair. The parties agreed that these issues should be determined at the same time as the fairness of the dismissal. The issues are:

   4.1 "The Polkey issue" – that is, whether any compensatory award should be reduced on the ground that, had Assist-Mi acted fairly, the claimant would or might have been dismissed in any event.

   4.2 Contributory fault – whether it would be just and equitable to reduce the claimant's compensation on the ground that the claimant caused or contributed to his own dismissal by his own culpable or blameworthy conduct.

Disability

5. It is common ground that the claimant is disabled with dyslexia. He also has a physical disability, but, *with the exception of the fourth harassment allegation,* his claim is based on his dyslexia only.

Direct discrimination

6. There is a common theme running through the claimant's allegations of direct discrimination. It is his case that fellow shareholders in Assist-Mi wanted to take control of the company and appropriate the claimant's intellectual property rights. They could have sought an amicable transition or brought about the claimant's departure by legitimate means. They chose not to pursue those avenues because of the claimant's dyslexia. Assist-Mi and Mr Herron deliberately took advantage of the claimant's dyslexia to rid themselves of him, either by making his life so intolerable that he would resign, or by making him appear incompetent so they could dismiss him.

7. Here is a complete list of the ways in which the claimant alleges he was treated less favourably because of his dyslexia:

    7.1 Following a board meeting on 8 March 2016, at which Mr Milton suggested that adjustments be made for the claimant's dyslexia, the board members deliberately omitted reference to those adjustments from the meeting minutes.

    7.2 From 4 July 2016, Mr Burdus deliberately allowed a practice to continue of sending multiple e-mail chains to the claimant shortly before meetings.

    7.3 Ms Keeley Walsh and Mr Dom Hyams ignored the claimant's telephone calls. Mr Herron knowingly allowed them to do so.

    7.4 Taking advantage of the claimant's dyslexia during the suspension and disciplinary meetings.

8. In the case of each allegation, the tribunal must decide:

    8.1 Whether the alleged treatment occurred;

    8.2 If so, what was the reason why the claimant was treated in that way? Was it because the claimant had dyslexia? Or was it some other reason?

Discrimination arising from disability

9. There is one allegation of discrimination arising from disability. It arises out of an e-mail sent by the claimant to Mr Burdus on 22 July 2016. In the e-mail the claimant had posed a question relating to a piece of work involving a colleague called Eryka. Following that e-mail, Mr Burdus sent the claimant a text message including the phrase, "Don't make me look dim in front of Eryka".

10. It is the claimant's case that Mr Burdus' use of that phrase was because he had misunderstood the claimant's e-mail. That misunderstanding arose in consequence of the claimant's dyslexia in two ways:

    10.1 The first was that the practice of sending multiple e-mail chains at short notice made it more difficult for the claimant to process the information,

and meant that the working environment was not "inclusive". That led the claimant to raise the query in his 22 July 2016 e-mail.

10.2 The other cause was that the claimant's dyslexia made it more difficult for him to choose the right words when composing an e-mail.

11. The issues for the tribunal to decide are:

11.1 Whether Mr Burdus' text message was unfavourable treatment;

11.2 Whether Mr Burdus sent it because of the claimant's e-mail of 22 July 2016; and

11.3 Whether that reason arose in consequence of the claimant's dyslexia in the ways alleged.

12. Assist-Mi does not seek to argue that the text message was a proportionate means of achieving a legitimate aim.

Duty to make adjustments

13. The claimant relies on the first and third requirements mentioned in section 20 of EqA.

14. His case in relation to the first requirement is as follows. The respondent had a provision, criterion or practice (PCP) of sending the claimant e-mails, sometimes multiple e-mails, shortly before a meeting. That PCP put the claimant at a substantial disadvantage in comparison with employees without dyslexia, because he found it difficult to process written information at short notice.

15. By way of adjustment, the respondent should have provided the information to the claimant using voice-based technology such as telephone conference, Skype, WhatsApp, Viber, Facebook Messenger or Facetime. Where that was not practicable, the respondent should have provided the written information at least one working day before the meeting. In particular, the claimant contends that, at a meeting on 2 November 2016, he should have been provided with written questions in advance of the meeting.

16. In relation to the third requirement, there appears to be no dispute that, without the auxiliary aid of voice-based technology as detailed above, he would be at a substantial disadvantage compared to employees without dyslexia. The adjustments contended for are the provision of that voice-based technology as an alternative to e-mail.

17. It is the claimant's case that this failure to make adjustments happened throughout his employment. The duty to make the adjustments was triggered, in particular, on the following occasions:

17.1 After the meeting on 8 March 2016;

17.2 After an e-mail sent by Mr Burdus on 4 July 2016;

17.3 At the time of the e-mail chains culminating on 22 July 2016;

17.4 During his suspension and disciplinary hearings, including the meeting on 2 November 2016.

18. The issues for the tribunal to decide are:

18.1 Whether it was reasonable for the respondent to have to make the adjustments for which the claimant contends [the original order mistakenly stated, "for which the tribunal contends"]; and

18.2 Whether the adjustment was in fact made.

Harassment

19. Here is a complete list of the unwanted conduct to which Assist-Mi allegedly subjected the claimant:

19.1 At a meeting in December 2015, attended by Ms Helen Dolphin (but not by the claimant), Mr Comyn, shareholder, made a disparaging comment implying that the claimant was incapable of producing a document. The claimant cannot say what precise words were allegedly used.

19.2 Miss Walsh and Mr Hyams deliberately ignored the claimant's telephone calls. Mr Herron allowed them to do so.

19.3 Mr Raigan Herron (Mr Herron's son) made a statement that the claimant used his dyslexia as an excuse.

19.4 On 18 December 2016, Ms Fenwick sent a private detective to the claimant's home.

20. The issues for the tribunal to determine are:

20.1 Whether the unwanted conduct occurred;

20.2 Whether it was related to his *dyslexia (or, in the case of the fourth allegation, his physical disability)*; and

20.3 Whether it had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

21. There is an additional issue in relation to the remark allegedly made by Mr Comyn. If the comment amounted to harassment, is Assist-Mi vicariously liable for it? The dispute here is about whether Mr Comyn was the agent of Assist-Mi at the time of the meeting. He was a shareholder but not a director. The claimant's case is that Mr Comyn was acting as a director, even if he had not been formally appointed as such.

Time limits for Equality Act complaints

22. The time limit for the claimant's EqA complaints is three months from when the alleged contravention occurred.

23. The claimant commenced early conciliation through ACAS with the two respondents on 4 November 2016. His certificate is dated 4 December 2016. The period between those two dates is not to be counted in working out when the statutory time limit expired.

24. Where the contravention occurred on or after 10 September 2016, the claim was presented within the time limit. For breaches of EqA occurring before that date, the claimant would need an extension of time.

25. In respect of those earlier incidents, the tribunal must therefore determine the following additional issues:

25.1 Whether the incident was part of an act extending over a period ending on or after 10 September 2016; and

25.2 If not, whether it would be just and equitable to extend the time limit.

Breach of contract (1) – failure to give notice

26. It is undisputed that Assist-Mi dismissed the claimant without notice. What the tribunal must decide is whether the claimant repudiated the contract by committing an act of gross misconduct. If he did, Assist-Mi would not be required to give notice, but could instead terminate the contract immediately.

Breach of contract (2)/unlawful deduction from wages – salary cut

27. In August 2015, the claimant signed a document purporting to vary his contract by reducing his salary. From that time until the termination of his employment, he was paid substantially less in salary than he had previously been paid. It is his case that the variation of his contract was not binding because he was subjected to "emotional blackmail" before signing it. The previous – higher – salary remained, therefore, properly payable. By paying him at the lower rate, the respondent made a series of deductions and/or breached his contract.

28. The tribunal will have to decide whether the alleged "emotional blackmail" prevented the contractual variation from being binding.

Breach of contract (3) - expenses

29. Prior to 2015, the claimant incurred some £8,000.00 of business expenses. It is his case that he reached an agreement with Mr Herron on behalf of Assist-Mi that, if the claimant agreed not to claim the expenses immediately, the money would be repaid at a later date. The claimant could not say whether that agreement was reached orally or by e-mail.

30. The issue for the tribunal is whether or not the claimant and Mr Herron reached that agreement.