Case Numbers: 3200523/2016 &
3200183/2018

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EMPLOYMENT TRIBUNALS

Claimant: **Mr R Cole**

Respondent: **Reuters Ltd**

Heard at: **East London Hearing Centre**

On: **9-11, 15-18 & 21 May; (in chambers) on: 12-13, 15 June & 17-18 September 2018**

Before: **Employment Judge Jones**

Members: **Mrs P Alford**
Ms Conwell-Tillotson

Representation

Claimant: Ms Newton (Counsel)

Respondent: Ms D Masters (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that: -

(1) The Claimant's complaints of disability discrimination fail.
(2) The Claims are dismissed.

REASONS

1 The Claimant brought various complaints of disability discrimination against his employer. All his complaints were resisted. A list of issues was agreed at one of the preliminary hearings in this matter and are referred to in the Judgment section of these Reasons.

2 The Tribunal apologises to the parties for the delay in the promulgation of these Reasons. This was due to pressure of work, difficulty in finding dates for the Tribunal to meet in chambers, delays in typing and the number of issues in the case. The Tribunal regrets any inconvenience or additional stress caused to the Claimant and the

Respondent's witnesses because of the delay in the promulgation of this judgment and reasons. The judgment and reasons were unanimously agreed between the Tribunal in September and it has taken until now before it could be written and promulgated to you. The number of issues in this case meant that detailed findings of fact were required on each one as well as a judgment, which added to the time needed to complete this judgment and reasons.

Evidence

3 The Tribunal heard live evidence from David Hutchinson, former investment banker and Chief Executive of Social Finance where the Claimant has volunteered; and from the Claimant; on his behalf. For the Respondent we heard from John Foley, EMEA Editor for BV from March 2015 and the Claimant's line manager from then onwards; Edward Hadas, contractor, previously Global Economics Editor on BV; Robert Cox, one of the founding editors of BV and Global Editor of BV from 2013 who was based in New York, USA; Keith Wilson, HR Business partner for EMEA; Harvey Leader, senior manager with the Respondent who heard the Claimant's grievance; Cassie Spring, HR support to Harvey Leader in dealing with the Claimant's grievance; Kelly Brooks, HR manager for the Thompson Reuters Group (TR); Dean Kiernan, who heard the Claimant's second grievance; and Liridon Limani, Senior HR Advisor for the TR Group who supported Mr Kiernan with the Claimant's second grievance.

4 The documents in this case filled 5 lever arch files. The Tribunal heard from 11 witnesses. The Tribunal restricted itself to making findings of fact only on the matters relevant to the issues that we had to decide.

Findings of fact

5 The Claimant began working at the Respondent in 2010 as Assistant Editor at the Canary Wharf office of Thomson Reuters on its 'Breaking Views' (BV) financial commentary service. Thomson Reuters is the parent company of the Respondent, Reuters Ltd.

6 Breaking Views (BV), as explained by Mr Foley, is Thomson Reuters' opinion brand and the leading provider of agenda-setting insight to the financial elite. It delivers punchy, considered views through the branded website, across premium Reuters terminals, and via daily columns in publications including the International New York Times. BV is global and has three offices, in Hong Kong, London and New York. BV has professional clients who subscribe to its content. It was always part of its remit to deliver cutting-edge financial commentary at speed and provide valuable and unique insights on the top news stories of the day in a way that would assist its clients to make better business and investment decisions. The Respondent's aim was to provide a service that was first with the news and views, providing insight and analysis on the financial news of the day, swiftly to its subscribers.

7 According to Mr Cox, BV's clients include the world's leading commercial banks, securities firms, investment institutions, hedge funds, legal firms, public relations specialists and corporate executives. They all pay an annual subscription fee that is substantially higher on a per customer basis than that of other similar news organisations such as the Financial Times or the Wall Street Journal. The Respondent

aims to offer its clients analytical and sophisticated views, supplemented with original in-depth reporting on important developments in finance, economics, business and financial markets as they happen. BV delivers 4 emails a day to its clients, as well as information in text form and through articles, videos and podcasts.

8 The Claimant has been a journalist for over 25 years. Over that time, he held various positions in journalism such as the Deputy and Acting Business editor at the Times. He had also been City Correspondent, the chief obituaries writer and assistant home news editor. The Claimant had connections at BV before he started working there as Chris Hughes, had been a former student of his when he taught financial journalism. They were friends. We find that in one of his emails Chris Hughes commented on the Claimant's experience in financial journalism which we find meant that his opinion was that although the Claimant was an experienced financial journalist, he had limited experience in the type of financial analysis and commentary he was expected to produce at BV. The Claimant confirmed that he had written commentary on matters related to personal finance. The Claimant also confirmed in his evidence that in the two-year period before he joined the Respondent he had not being doing financial journalism but had been exploring other roles.

9 The Claimant agreed in evidence that his role as Assistant Editor was an important one within BV. Before he went off sick he earned approximately £125,000 per annum and could earn up to another £50,000 in bonuses. As Assistant Editor he needed to have an in-depth knowledge and understanding of financial information, business, the financial markets and a strong faculty for numbers. In his witness statement, Mr Cox stated that an Assistant Editor would be expected to not only write hard-hitting commentary, but also to commission, edit and oversee the production of content by his colleagues. Writers on BV would look up to the Claimant as one of the more experienced journalists in the business. The Claimant confirmed that a journalist working on BV needed to be comfortable with tight deadlines. It was a high-performance environment which was stressful most of the time. He also confirmed in evidence that as an editor he had to lead by example and that his writing needed to set the bar for the more junior journalists.

10 The Claimant confirmed that the job had always been in a high-pressured environment and that he had managed to work as a journalist for 25 years - including his time at the Respondent since 2010. He agreed that when he was in a low mood, unless he told a colleague, they would not know that he was unwell.

11 In live evidence he confirmed that a very important part of a financial news service was to be able to understand numbers and take credible insight from them and that if the Respondent's subscribers did not get quality analytical depth, they were unlikely to be pleased.

Issues relating to the first claim

12 The Claimant took a pre-employment health assessment before starting work at the Respondent, in which he disclosed that he had a history of depression. He has suffered with depression since 1991. Although there was a follow-up telephone call from the Respondent, there were no further enquiries about his condition from the Respondent.

Chris Hughes' line management of the Claimant

13 In 2012 the Claimant applied for the post of EMEA (Europe, Middle East and Africa) Editor for BV. Mr Cox, the Global Editor considered him for the role but decided that Mr Hughes was best suited for this senior leadership role and he was appointed instead of the Claimant. The Claimant continued to work within the team under Mr Hughes' management.

14 In 2014 the Claimant shared a Reuters Own Journalist of the Year Award with a member of the graphic artists team for an interactive illustration they had done on the 2014 World Cup. The Claimant had applied financial skills to correctly predict that Germany was going to win the soccer World Cup. As part of his job, the Claimant also made appearances on TV.

15 There was a year-end review for 2013 in the bundle of documents completed between the Claimant and his then manager, Chris Hughes. The Respondent's usual procedure for year-end reviews was that the employee would complete parts of the form setting out how they believed that they had accomplished the targets previously set for them and the manager would complete their assessment of the employee on the form and grade their performance. The Claimant was graded as '*Achieved'* for each heading and as an overall performance rating. Mr Hughes also wrote on the form that the investment pieces the Claimant wrote had been rather '*lumpy'*. He suggested that a better use of the Claimant's skills and experience would be *to "focus on corporate coverage, writing and editing pieces on companies, viewed thru an investment prism, where appropriate".* As part of his comments in the section headed '*Talent'* Mr Hughes commented that the Claimant built great teams by motivating people to go above and beyond. He stated that the Claimant showed genuine care and concern for people and took a personal interest in their growth and development and acted as a role model.

16 The Respondent appreciated the work the Claimant did on the 2013 BV 'Predictions' Annual. In an email dated 22 January 2014, John Foley, who at that time was based in Hong Kong, called the Claimant a hero and thanked him for being so brilliant at getting it done.

17 In November 2014, the Claimant wrote flashes – which are highlights for a forthcoming article later in the day - about Marks & Spencer's (M&S) important financial news. The flashes were edited by Quentin Webb. Chris Hughes wrote what the Tribunal considered to be a constructive critique of the article and suggested a way in which it could be improved. In an email to both the Claimant and Quentin Webb he said:

> *"Guys, can we try to get numbers into flashes? These are pun heavy (groan) and number lite – more aspi than asfi. Also 'news that' can always be substituted with the actual news……"*

He then gave an example of what he meant. We find that it was not a personal criticism of the Claimant or Mr Webb but on the piece of work. The Claimant was very upset by the email. After reading it, he left the office and stood outside of the office

building. Mr Hughes came out to speak to him. The Claimant told him that he had depression which had been managed successfully but which was susceptible to stressful situations. He informed Mr Hughes that he was worried about his elderly mother. Mr Hughes' apologised for sending the email as it had upset the Claimant. We did not see any agreement from Mr Hughes that it had contained unwarranted criticism. It is likely that Mr Hughes believed from their conversation that the main trigger to the Claimant's reaction was the stress of worrying over his elderly mother and that is why he reminded the Claimant of the benefits available to staff caring for relatives; which included a helpline. The Claimant did not tell Mr Hughes that his condition was triggered by criticism of his work.

18 The Claimant went off sick that day. While off sick, Robert Cox emailed him to express his concern for his health and asked whether there was anything he could do to help. The Claimant responded to say that he had spoken to Mr Hughes about rethinking his responsibilities and that he was eager that his role was shaped to make the best of his abilities. We find that this indicated an awareness that his present responsibilities may not have been best suited to him.

19 In his follow-up email to Mr Cox, Mr Hughes made it clear that he had not told the Claimant that he would re-think his responsibilities but rather that he had told him that they would talk about making some changes to his role such as relieving him of line management responsibility.

20 One of the Claimant's emails in the chain to Mr Cox gave some further insight into what he thought were the triggers for this bout of illness. He disclosed his disability and informed Mr Cox that he had suffered with a chronic depressive illness for about 25 years. He stated that the discussions held on Tuesday 4 November about cost cutting at BV may have taken their toll, in addition to his concerns about his mother's health and his general tiredness. There was no reference to him being subjected to unreasonable criticism by Mr Hughes or to his disability. In these email exchanges the Claimant did not say to Mr Cox or to Mr Hughes that his condition made him sensitive to unjust criticism or that his condition was exacerbated by any type of criticism.

21 The Respondent did not refer the Claimant to Occupational Health (OH) at this point. The Claimant's evidence was that Mr Hughes managed him quite easily and with minimal fuss. In live evidence he confirmed that the situation had been handled well and he could see now that he was being oversensitive. The Claimant also alleged that this was the start of Mr Cox treating him differently. We find that Mr Cox's only email to the Claimant, already referred to above, was to ask if there was anything that he could do as he heard from Mr Hughes that he had had a rough week. He took no further action at that time.

22 The Claimant reassured his managers that his disability would not interfere with his ability to do his job. He informed the Respondent that he managed his condition with medication and support from family and friends.

23 We find that on 11 November Mr Hughes informed HR that the Claimant was to return to work on the following day. He also indicated that the Claimant was going to be careful and knew to signal if there were any difficulties. They had agreed that the

Claimant would take Mondays off for the next few weeks out of his annual leave. It is likely that this was an adjustment agreed between them to assist the Claimant in adjusting back into work.

24 In the year-end review for 2014, Mr Hughes stated that the Claimant had ably delivered coverage on some major corporate stories, notably the Tesco fiasco and had substantially expanded the Respondent's corporate range. He credited the Claimant with recruiting a replacement on the production desk and setting in motion a promising upgrade to the pdfs. He described the Claimant as a model and strong team player. Mr Hughes graded the Claimant as '*Achieved'* for all categories. We had the Respondent's performance management rating scales and definitions in the bundle. '*Achieved'* meant *'performance consistently achieved the position requirements with full achievement of goals; AND behaviours demonstrated were consistent with the employee's level and role in the organisation'.* There were two grades above *Achieved* which were *Exceeded* and *Far Exceeded* and two grades below, which were *Partially Achieved* and *Did Not Achieve.*

25 In February 2015 it was announced that Chris Hughes was leaving the business. The Claimant considered applying for the role of EMEA Editor for BV again and met with Mr Cox, possibly to get a sounding as to whether such an application would be welcomed. It is likely that Mr Cox reassured him that he was welcome to apply for jobs in the future and that his depression would not be a barrier to him being considered for another role. The Claimant also met with another colleague called Edward Hadas. At the time, Mr Hadas was the Global Economics Editor at BV. The Claimant asked Mr Hadas to support his application for the role of EMEA Editor for BV. Mr Hadas had concerns about the Claimant's ability to fulfil the role. He considered that Mr Hughes had not been managing the Claimant properly and had taken to giving the Claimant tasks that were not part of his role as assistant editor, but which played to his strengths in organisation. This included IT projects, the predictions book and working with the production team. He therefore found it difficult to support the Claimant for the even more senior role of editor of the busy EMEA desk.

26 Mr Hadas emailed Mr Cox on 20 February and gave a lukewarm endorsement of the Claimant. Mr Hadas' live evidence was that having spoken with the Claimant about it he wanted to endorse him but felt unable to fully do so for the role. In the email he stated that the Claimant had *'come a long way here, and could run the group, but would be more of an administrative than an inspirational leader'*. He also informed Mr Cox that the Claimant had said that if he was *'passed up a second time for the big boss job'* he was likely to leave within 6 months to a year.

27 It is unlikely that Mr Cox understood that to mean that the Claimant was considering leaving the Respondent even if he left BV. We make that finding because in an email a few days later to Mr Ingrassia, Managing Editor at the Respondent, Mr Cox indicated that the Claimant may want to seek another role within Reuters if he was not given the EMEA editor role and that he would be open to such a suggestion if it benefitted everyone.

28 The Claimant submitted his written application for the EMEA BV editor role on 24 February 2015.

29 We find that Mr Cox considered the Claimant for the role. He concluded that the Claimant was a good people person. This echoed Mr Hughes' comment in the Claimant's appraisal that he was good with junior staff and that he was supportive and helpful to everyone in the office. He considered that the Claimant was a good colleague and a hard worker. However, he decided that for the EMEA Editor role he wanted someone with new ideas, who was an exemplary journalist, who produced work of the highest standards as well as inspire and motivate people. He did not think that the Claimant's skills in those skills were strong enough for the role of EMEA Editor of BV.

30 Mr Cox decided to offer the role to John Foley who at the time was based in Beijing. His assessment was that Mr Foley had great financial acumen and knowledge and management experience from a previous role in Hong Kong where he had set up the Respondent's first BV Asian Bureau. The Claimant was informed of this decision in March 2015.

31 We find that on March 27 Mr Hughes emailed Mr Cox to advise him to consider devising a plan for helping Mr Foley with the Claimant's long-term health issue. He advised that this should be done carefully and in conjunction with HR. He advised that the Claimant appeared to have taken well the news that he had been unsuccessful in his application for the editor's job but that it may well *'weigh on him'*. He advised that both the Claimant and Mr Foley would need support from the company as they settled into their respective roles. In his reply Mr Cox agreed that this needed to be done. His evidence was that he was expecting Mr Foley to do this by working with HR since he was going to be the Claimant's line manager.

32 In a further email dated 29 March, Chris Hughes informed Mr Cox that the Claimant's mother was seriously unwell, that she was in a care home and the Claimant was the next of kin. There were no other care matters raised for the Claimant which leads us to find that at that time he was well and working. The email also stated that the Claimant would cover the UK corporates. Mr Hughes added that since the end of 2014, he had been editing financial stories along with Mr Hadas, and Mr Hay. We find that the Claimant, as assistant editor, should also have been listed as part of the editing team. It is likely that the Claimant was doing less editing before Mr Hughes left.

33 We had a note in the bundle prepared by Pierre Briancon, who was a senior member of BV staff, who left around the same time as Chris Hughes. In the note he gave his assessment of the state of the BV London office. It was created after Mr Hughes' departure was announced. Mr Briancon considered that the London office had lost its way but that it could be turned around with a strong leader. He stated that the focus of BV London had become *'a bit chaotic'* and that it had '*somehow shrunk back to its narrow City focus'*. He was concerned about the increased provincialisation of the coverage, especially as there were more French or German companies in the Fortune 500. He considered that there were too many editors and that the writing could be better. He also pointed out some of what he saw as the positives on the team – that they were highly competent good people who worked hard and created a good working atmosphere. This note was sent to Mr Foley once he was appointed. Mr Briancon's criticisms were not specifically directed at the Claimant but were of the whole team.

Mr Foley's management of the Claimant

34 Mr Hughes left in April 2015. In the period between him leaving and Mr Foley coming to London, the Claimant assisted in managing the team. Mr Foley was still in Beijing and was not able to perform all the management tasks remotely. Some of the daily management tasks were divided between members of the team. The Claimant took on some administrative line management duties, like approving holiday requests and expenses for more junior members of the team. Once Mr Hughes left, most of the editing duties continued to be shared between Mr Hadas who was still the Global Economics Editor and George Hay who was a more junior assistant editor. The Claimant's name was not mentioned in the email. That may be because at the time, he was taking on more of the administrative side of the management of the office. The period between Mr Hughes' departure and Mr Foley's arrival in London was referred to during the hearing as '*the interregnum'*.

35 Mr Foley also asked the Claimant to take responsibility for getting the daily email out on time. It should have been done by 9.45am. He asked the Claimant to ensure that it was done by 10am at the latest. This was not a new policy. This was one of the practices at the London BV office that had slipped over the years as the EMEA BV team in London had become used to sending out the daily update emails later than the scheduled deadline. In practice, it had slipped closer to 10.30am. Mr Foley believed that it was important to work to get this back to 9.45am. The Claimant agreed that this was important but was finding it difficult to achieve. He asked Mr Foley to send an email about speed directly to the team as he thought that a message from him would assist in encouraging the team to get the emails out on time. In his email of 17 April, he confirmed that he aimed to get the emails out with a date stamp of 9.59 and then work back to 9.45 by the time Mr Foley moved to London.

36 Mr Foley spoke to Chris Hughes and Rob Cox about the EMEA BV team and its individual members before he took up his new post. Mr Foley had not worked with the Claimant but as stated above, had commented positively on his work on a couple of occasions previously. Mr Hughes informed Mr Foley about the difficulties that he had had in giving the Claimant feedback that was not totally positive. He informed him that when he did so he got a '*bad reaction'*. He told Mr Foley that he should be gentle when giving the Claimant any feedback. Mr Foley did not understand that this was related to his disability. This conversation occurred as part of the handover process with Mr Hughes.

37 Mr Foley was aware of the Claimant's depression and was also aware that this was information of a highly sensitive nature as he himself was suffering from depression at the time. Mr Cox told him that the Claimant had applied for his job and had been unsuccessful and that he may be sensitive to being managed by him. It is likely that he was given information on all members of the team that any manager would need to know before taking up his post.

38 Mr Foley spoke to Mr Cox about the Respondent's concerns that the Claimant's performance was not reaching the level expected of a senior assistant editor. After looking at some examples of the Claimant's work, Mr Foley stated that he was not sure if the quality of work the Claimant produced was affected by time pressure, habit or a lack of ideas. He then said - '*let's see if he can raise his game'*. We find that in making

this statement, Mr Foley indicated that he was prepared to give the Claimant (along with the rest of the team), the time and the opportunity to improve their work once he had settled into the job and they had the benefit of his new ideas (i.e. the EIKON subscription) and new ways of working. We find it likely that this is what was meant by that comment.

39 On 11 April the Claimant met with Mr Foley for lunch. They also spoke on the telephone on 27 April. Mr Foley understood the Claimant to be positive about him joining the team. The Claimant's evidence was that he was genuinely pleased for Mr Foley. They discussed the team and the Claimant's views on some of his colleagues. The Claimant confirmed that there were gaps in the team's knowledge and expertise in financial matters and that there had been issues with stories being published late. The Claimant also informed him that he had had conversations with other people at Reuters about potentially moving to a different team. This was not unusual within the Respondent as it positively encouraged employees to move around the business.

40 The Claimant proposed, during their lunch, that he should be given a new role, which he referred to as "*chief of stuff*". In live evidence, the Claimant confirmed that this was discussed at their lunch meeting. He stated words to the effect *of 'I'm not the greatest writer'.* His idea was that he could take charge of the more management responsibilities i.e. admin, production and personnel issues and that this would leave Mr Foley to concentrate on leading editorial excellence. He imagined a more management role for himself. Mr Foley did not agree to this as it was not up to him. He did say that he would consider it and pass the information on to Mr Cox. This was a clear indication that the Claimant either no longer wanted to do/no longer liked/no longer felt that he could do the job of Assistant Editor within the EMEA BV team. The Claimant's role was Assistant Editor which was to assist Mr Foley in editing, writing and producing the BV product.

41 In their lunch meeting, the Claimant did not talk about his disability to Mr Foley and did not relate his suggestion to be '*chief of stuff'* to his disability.

42 At the time, Mr Foley had no concerns to share with the Claimant. From his statement to Mr Crundwell as part of the investigation into the Claimant's grievance; we find that by this time he already knew about the Claimant's disability as he had seen the email dated 27 March from Mr Hughes to Mr Cox. We find it likely that Mr Foley believed or hoped that because of the way he proposed that the team should work, the Claimant, as an experienced journalist, would be able to meet the needs of the service. We find it likely that he was not expecting the Claimant to fail. The Claimant had also been Assistant Editor in the team for many years. It was Mr Foley's expectation that the Claimant and the rest of the team could do the job if given the right support and tools.

43 On 29 April 2015, Mr Foley emailed Mr Cox to share with him that the Claimant had admitted to him that things were a bit more stressful than he thought they might be. He stated that the Claimant may be having *'a bit of a wake-up'*. The service at EMEA BV in London had slipped from the principles such as speed that the Respondent required and the Claimant had been charged with making sure that this was addressed before Mr Foley took up his post in London. That may well have made

work a bit more stressful than it had been before Mr Hughes' departure. We find that the reference in Mr Foley's email to *"a bit of a wake-up"* was likely to have been a reference to the fact that Mr Foley was insisting on the email going out at 9:45 or as close to it as possible and that it looked like the Claimant, who had been tasked with making that happen, was finding it difficult.

44 Mr Cox commented on another article that Richard Beales had sent to him as '*dreadful'* before he knew that it had been written by the Claimant. We find that this was a comment he made because of the quality of the article. He then asked who had written it. Mr Foley stated, after commenting that the Claimant was wedded to a particular way of writing his articles *'Not sure if its habit, time pressure or lack of ideas. Let's see if he can raise his game'.*

45 Mr Cox responded to the email to say that it was okay to constructively nudge the Claimant a bit both in terms of process and substance. We find it unlikely that this was a reference to the Claimant's disability. The Claimant had been at work consistently since November, had applied for a more responsible position in the business and had not referred to his disability since November 2014 when Mr Hughes was his manager. We find it unlikely that either Mr Cox or Mr Foley were referring to the Claimant's disability in this exchange.

46 We discussed many the Claimant's pieces of work in great detail during the hearing. It is not possible to go through each piece of work in these reasons. However, the Tribunal will now refer to the main pieces of work/matters that are relevant to the issues. We also find that the Claimant wrote and edited many articles that were to the Respondent's standard over the period following Mr Foley's move to London. We now make findings on those matters that gave the Respondent some concern.

47 On 30 April Mr Cox wrote to the Claimant about a piece he edited that had been written by a junior journalist called Swaha, on election markets. We find that Mr Cox made some constructive comments on the editing of the piece. The email was headed '*editing thoughts'* and made some suggestions as to how the piece could have been better written and why it needed specifics – such as the names of the leaders of the two parties contending the UK general election – to lift it to the standard that the Respondent wanted. In his response of the same day, the Claimant appeared to accept the points. However, he ended the email by making what we considered to be the following barbed comment *'Further guidance gratefully received – for I am (Sire) nothing if not your ever obedient servant….. (!)'*

48 We find that the criticism was of the Claimant's editing but clearly also of Swaha's writing.

49 The Respondent's US editor, Jeffrey Goldfarb, wrote to the Claimant on two occasions in June 2015 to comment on two articles that the Claimant had either written or edited. He was critical of the Claimant's work. One comment was on the valuation language in an article which it appeared that the Claimant had got wrong. We find it likely, from his responses, that the Claimant did not accept and appeared not to have understood Mr Goldfarb's comments. At the time he attempted to explain that he had written '14.4 times EV/EBITDA' as in Coke/Pepsi i.e. similar alternatives. In the hearing his evidence was that the slash was a typo. Mr Goldfarb explained in his email

that EV/EBITDA is itself the ratio of 14.4 so it was not 14.4 x EV/EBITDA which would be 14.4 x 14.4. The Claimant forwarded the comments to Mr Hadas and Mr Foley. Mr Goldfarb's other comment was on a flash that the Claimant had done on Vodaphone which he had described as '*woolly'* as it had not given the readers any conclusions. That comment had been sent quite late at night and Mr Foley emailed Mr Cox (as Mr Goldfarb's manager), to point that out. Mr Goldfarb was not involved in the Claimant's line management and we were not told that he knew of the Claimant's disability.

50 Mr Cox wrote to the Global BV journalists on 13 July 2015. This was not just to those in the London office. He reminded them that one of the five value propositions for Reuters BV was to be '*first with the views'*. This chimed with the Respondent's overarching mission of delivering the most important news before anyone else, to clients with the most at stake. By the time Mr Cox wrote this email, the Respondent was aware that Bloomberg were planning to set up its own competitor financial commentary service. He urged everyone not to be complacent and stated that the Respondent needed to not only hold on to its lead but that it needed to go faster. He referred to the practices of holding stories back or of delaying posting flashes until they were close to a deadline - in pursuit of the perfect email. He wanted this to stop. He also wanted the Respondent to widen its lead against the competition. He asked that everyone should redouble their efforts to hit BV's critical value proposition when responding to breaking events i.e. *"get those flashes out sooner and get that view written more quickly".* Mr Cox took the opportunity to restate to the Respondent's original BV core value proposition which was *'agenda – setting financial insight'*. The BV service was to have the following four value attributes: *First with the views, Value for time, Analytical depth and Enjoyable*. BV was created to be neither fast and vacuous or slow and insightful but to ensure that the combination of speed and insight continued to be its unique selling points.

51 Mr Foley arrived in London to take up his post in July 2015. As with any new manager, he had ideas about how he wanted to run the EMEA bureau. Mr Foley's main concern was that it should be producing the best product in an increasingly competitive environment. The Respondent knew Bloomberg had started actively recruiting staff for its new financial commentary service that would directly compete with BV entitled '*Gadfly'*. The equivalent publications from the Wall Street *Journal 'Heard on the Street'* and the Financial Times *'Lex'* were also becoming faster at delivering financial commentary.

52 The Claimant agreed in his live evidence that what was required at BV was speed plus analytical depth and that it was important to provide quality. He referred to a quote from his former manager, Hugo Dixon that numbers should be used in the articles like chilli peppers – one would be very good but too many numbers could spoil the article.

53 We saw emails from Mr Hughes in the bundle to all managers reminding them to '*Be fast, be prompt'* in getting their articles written and ready for editing early so that deadlines could be met. He referred to the team having a *'serious problem with deadlines'*.

54 On 7 September 2015 Mr Foley sent Mr Cox a copy of a presentation that he had given to the staff at EMEA BV office in London. He had discussed Gadfly with them and generally, how the team would deal with the competition. He wanted to re-establish the quality and speed that had been lost over the more recent period.

55 Mr Foley set out his vision for the EMEA BV office. He would ensure that the team had a subscribed to EIKON (EIKON was the Respondent's financial analysis IT programme), which would mean that they would have access to the most up-to-date financial information on which to base their analysis. He planned to organise financial training and other events and to have what he referred to as *'ideas days'*. He explained that everyone in the office would get a scheduled day each month when they were expected to be out *"schmoozing and gathering ideas all day".* He wanted to organise financial training because he was aware that there had been some concern across the business that the general level of knowledge of financial terminology and markets in the EMEA office needed to improve.

56 Mr Foley was intent on getting the service back to the level of quality and speed that it had originally had at the beginning and which the Respondent's core values necessitated. He made it clear that although he wanted higher quality and faster work than the team had been delivering in the recent past and under Mr Hughes' management, it should not mean that they were required to work more or to work longer hours. He was also clear that he wanted the team to go home on time rather than stay late in the office and he ensured that they knew that they could raise any questions or concerns with him, either privately or in discussions that they had as a team. His idea was to front-load the work. By this we find he meant that the team could do research in anticipation of a news story coming out on a matter or company so that when the news broke, they would be ready to write the article. He meant for the team to work smarter rather than longer hours. Mr Foley stated in his evidence that it was likely that they would be able to predict certain stories (although they would not know the details) and could therefore prepare for them. The package of ideas that he introduced was also intended to improve morale within the team as well as performance. He hoped that the team would see the training that he had organised as supportive of them.

57 When Mr Foley took over the office he held individual meetings with members of the team. This was one way to get a sense of what were the burning issues in the office. In his meeting, Mr Hadas told him that he had had to take an increased workload of editing work during the interregnum because his colleagues preferred not to ask the Claimant to edit their work or they did not like the way he approached the editorial process. This also happened because two senior editors - Pierre Brancon and Quentin Webb had also left around that time. In his meeting with Mr Foley, Mr Hadas informed him about what he considered to be issues with the Claimant's editing work as well as other members of the team who he felt were not performing strongly at the time. Mr Foley held similar meetings with the other members of the London team. He decided that he did not want to take any action in relation to any member of staff at this point but to allow them to settle down into the new, improved working environment that he was going to introduce.

58 In September 2015, there was an official announcement about the Bloomberg Gadfly service. There were concerns as to whether the Respondent could withstand the competition and there were emails between the managers discussing its impact on their business. The Claimant was not included in that discussion as it took place at a more senior level. It was in this email exchange that Mr Foley commented that the Respondent needed to be *"fiercer and more pointy"* and ensure that the BV service was smarter and faster. There was a push to increase the speed of the service in response to the competition from Bloomberg's Gadfly service but we were not told that there was a decision to have the email to subscribers go out earlier than 9.45am. The team was being asked to keep to the deadline rather than produce stories late, as they had become accustomed to doing.

59 In September 2015, Mr Foley took over line management responsibility for the Claimant as well as George Hay, Swaha Pattanaik, Neil Unmack, Dominic Elliott and Olaf Storbeck, all of whom had reported to the Claimant. The Claimant had not been their permanent manager but had been looking after those individuals in terms of line management responsibility, in the interregnum. It is likely that this signalled to the Claimant that his request to become '*chief of stuff*' was not going to be granted. In live evidence the Claimant stated that he was disappointed by Mr Foley's decision. He did not say anything about this to Mr Foley.

60 On 9 September 2015, George Hay, one of the Respondent's assistant journalists at BV who was therefore junior to the Claimant, made comments on a piece that the Claimant had written about Heineken and its recent financial news. Mr Hay's comments were detailed, specific and gave examples of what he believed the article should have stated. He commented that article lacked '*financials'* and that it was not posted until 2pm which meant that it was late. He sent his comments to Mr Foley as the Claimant's manager. When he said it lacked financials Mr Foley understood that he meant that the Claimant had not given an analysis of how Heineken was faring compared to its main competitors such as SABMiller or AB InBev. Mr Hay raised the question of what the Respondent's base level standards should be for how much financial information should be in the Respondent's articles.

61 In his live evidence, the Claimant stated that the article had been difficult to write because of the new and challenging environment. Although Mr Foley had talked about the service being faster and smarter, we were not told that the Claimant was given less time than he would have done under Mr Hughes to write the article. The Claimant agreed in live evidence that what had always been required was speed plus analytical depth. The Respondent expected the articles and emails to be sent out on time rather than as late as they had been during Mr Hughes' tenure and afterwards. At this point, the Claimant had not informed Mr Foley or anyone else that the revised working requirements to get articles out on time, was causing him additional stress or anxiety.

62 In relation to this article, the Claimant agreed that it was likely that he had looked at EIKON but decided not to use the information but to take a different slant on the article and write instead about the company's decision to sell beer from other sources rather than its own. He chose not to do a piece comparing it with its competitors. The Claimant's evidence was that he thought the piece was '*decent'*.

63 The Claimant was not informed about the exchange between Mr Hay and Mr Foley about the Heineken article. As the Claimant was more senior than Mr Hay it would not have been appropriate for him to have taken this up directly with him. Mr Foley thanked Mr Hay for his comments and forwarded the article and comments to Mr Cox. Mr Foley told Mr Cox that this was an example of the frustrations building up in the office but that he should not be worried as he was going to *'go all out in ratcheting up our financial prowess and stepping up the workplace harmony'*. We find that this comment was not just about the Claimant. It is likely that Mr Foley considered that the financial training and support he proposed to put in place would address any issues that this raised. He did not think this was a matter that he needed to take up with the Claimant as he was hoping that his new way of running the office would address any issues and it would not need to be mentioned.

64 Mr Cox commented that the piece was flimsy and concluded by stating that the Claimant *'has to be made to do better or move on'*. We find it unlikely that that this was an instruction to dismiss the Claimant or that Mr Foley took it as such or even agreed with it. We find it more likely that it was an instruction to Mr Foley to improve the Claimant's performance.

65 The Claimant's evidence was that he was late filing the story as he had to deal with some production issues that morning. We find it likely that the Respondent considered that he was senior enough within the business to be able to prioritise his work and to decide to either delegate or put aside other work when an article needed to be written and published on time.

66 On the morning on 7 October, Mr Cox sent the Claimant a press release with financial news relating to the beer manufacturer Ab InBev and its bid to purchase SABMiller. The deal would have been worth US$100 billion. This was a big news story. It was Mr Cox's evidence that the possibility of the deal had been widely reported on in the press in the previous weeks so did not come completely out of the blue. Mr Cox gave the article to the Claimant to write as he considered him to be one of the more experienced members of the London team. This was around 7am. The Claimant had written stories about the potential deal previously and the area of business, i.e. beverage companies, was an area that he frequently wrote on. The article needed to be published as soon as possible, not only to beat the competition but also because the Respondent wanted to be '*first with the news and first with the views'* as one of its value propositions. In his email, Mr Cox wrote a suggested '*flash'* for the story which gave some insight into the focus he would have liked to see in the final article and the Claimant acknowledged in the hearing that Mr Cox gave him a helping hand by doing so.

67 By 11:19 am that morning when Mr Cox emailed to ask whether he could read the article before boarding a plane, he was told that the article was not ready. The Claimant had appreciated that time was of the essence.

68 The Claimant responded to Mr Cox and said that he had been attending to other management duties. We find it likely that, as assistant editor, the Claimant would have had other work to do that day. However, as this was a huge story, the reasonable expectation would be that he would be able to either delegate the other work or prioritise the article. The Claimant produced the final article at 11.38am. He agreed in

evidence that it had been filed late. Mr Foley told the Claimant that the fact that the story had been filed late was a problem for the Respondent. He said, *'we need to up our game on this story'* and invited the Claimant to a meeting to discuss it.

69 Later that day, Mr Foley met with the Claimant to discuss what had happened with this article. He told the Claimant that for breaking stories of that nature, the Respondent needed to ensure that it responded quickly and that it added valuable analysis, in line with the company stated values. He stated that the Claimant's article was '*fine'* but had not added a significant amount of insight beyond what the company itself had reported.

70 In the meeting the Claimant informed Mr Foley about his depressive illness. Mr Foley asked for more details such as whether he was on medication. He also asked the Claimant how he was feeling. The Claimant told him that his condition was under control and that this was something that he had been living with for many years. He informed him that he had taken medication in the past and that with several courses of CBT (Cognitive Behavioural Therapy) and careful management, it did not interfere with his ability to work. He told Mr Foley that he could not go any faster. The Claimant then broke down in tears. Mr Foley told the Claimant again, to take whatever time he needed, whenever he needed it. He informed the Claimant that if he needed to leave the office he would only need to send Mr Foley an email. We find it likely that what he meant was that the Claimant should send him an email telling him that he was leaving the office and why rather than having to go into too much detail. Mr Foley did not tell the Claimant that he already knew about the Claimant's disability. We find it unlikely that Mr Foley stated to the Claimant that he was not aware of his disability. It is more likely that he said nothing about it and allowed the Claimant the opportunity to give him as much information about his disability that he wanted to share. The Claimant complained in his witness statement that Mr Foley spoke to him in this meeting in a matter-of-fact tone which suggested that his mind had been made up. We find it likely that having had the discussion with Mr Hughes referred to above about the Claimant's response to negative feedback, Mr Foley was trying to give the Claimant feedback in a dispassionate, neutral way to avoid upsetting him.

71 We find it likely that at the time, the Claimant's experience of the meeting was that Mr Foley had been supportive. In a follow-up email to Mr Foley later that night he said - *"Thanks for all your help with this, and everything"* which we find was likely to be a reference to events earlier in the day, including the meeting.

72 With a story as big as this merger, the Respondent would usually have done another story later in the day to follow up the first one in the morning. On this occasion, because the Claimant had found the process of doing the first article so stressful, Mr Foley did not ask him to do another one. He emailed Mr Cox to explain how the day had gone and why he had not produced another article.

73 Mr Foley was also aware that in October 2015, the Claimant in an email to him had referred to his "editing *inadequacies*". The Claimant agreed that the comments that Mr Foley made about the article that they were discussing were valid and that it was one of those cases where he allowed the imperative of speed to compromise the quality of delivery. Mr Foley's assessment of the piece was that it was inadequate.

74 Following their meeting, Mr Foley emailed Mr Cox to inform him that the situation with the Claimant was more complicated than he had initially thought. We find Mr Foley was asking Mr Cox, as his line manager, for help with the situation as he may have felt out of his depth.

75 We find that Mr Foley also sought advice from the Respondent's HR representative in September 2015 about managing the Claimant and many other matters in his team. We did not have any notes of the meeting but we find Mr Foley's recollection in his witness statement and his live evidence to us to be reliable. He asked Maria Gajdus, the HR Adviser, for any advice that she could give him on how to sensitively give feedback to employees, especially where mental illness may be involved. He knew that he needed to speak to the Claimant about some aspects of his work but wanted to do so in a way that took account of his disability. He was not clear on the connection between negative feedback and the Claimant's disability but he sought advice on how to give him feedback that was honest and helpful without upsetting him or affecting his condition. Mr Foley's recollection of Ms Gajdus' advice was that as a manager, he had a responsibility both to the Respondent and to the Claimant to provide clear, constructive feedback and that because of the Claimant's illness, he should proceed sensitively but at the same time, not withhold important information from the Claimant that was necessary for the performance of his job.

76 On 30 October, Mr Foley sought to follow that advice. He emailed Mr Cox to ask for some time with him to go through his concerns about the Claimant's performance. Mr Foley specifically stated that he wanted to make sure that he handled the feedback process to the Claimant with due care and respect. Mr Cox reminded him that given the Claimant's disability and his level of seniority, they should bring in HR. He wanted to set clear objectives and expectations for the Claimant, which could be measured and would help him improve.

77 In a series of emails between them, Mr Foley and Mr Cox discussed Mr Foley's assessment of the Claimant's performance to date which was that he had slow turnaround times and that any encouragement to be faster and more analytical provoked a response from the Claimant that he just could not go any faster. Mr Foley acknowledged that there had been improvements in some respects but that he needed to set some clear objectives and expectations that the Respondent could measure against. We find that Mr Foley hoped that the Claimant's writing and editing would improve and he wanted to get advice on how to support him to get there. He was not talking about moving him on. They decided that it would be appropriate to seek some advice from HR in making sure that they were following the right strategy for dealing with the Claimant's performance issues. Mr Foley wanted to get advice from HR to ensure that he was continuing to express his observations about the Claimant's performance, to him in an appropriate and clear manner to enable the Claimant to know what was expected of him in his work and to provide any support and encouragement that he needed to do in order to assist the Claimant.

78 Mr Foley, Ms Cox and Maria Gajdus (HR) met on 5 November 2015. We had Mr Foley's handwritten notes from that meeting, in the bundle of documents. From those notes, we find it likely that they discussed how the Respondent could support and assist the Claimant. The first was what was described as an informal informal process. We find that this was a process outside of the formal performance

management process described below. Mr Wilson also from HR, who became involved later, described the informal informal process to us in the hearing as involving a manager having conversations with the employee about their performance issues and discussing with them how these can be improved.

79 If the issues are not resolved through the informal, informal stage, Ms Gajdus advised that matters could then progress to a contractual informal process which although informal would follow a set structure, would run over a period of four to six weeks and would involve setting the Claimant a plan of work, with objectives to achieve. In the contractual informal process, following an agreement with the National Union of Journalists (NUJ), the employee is told that their performance is being informally reviewed. That would apply to all employees, regardless of whether they are represented by the NUJ.

80 The next stage if things still did not improve would be the imposition of a personal improvement plan. Ms Gajdus described it as a process that would begin with Mr Foley meeting with Ms Gajdus and the Claimant, talking to the Claimant about any performance issues that may exist at that point and then setting targets or markers along the way that would indicate improvement. Mr Foley's notes referred to it as a formal process which would take place over three to six months at the end of which the employer or line manager would conclude that the employee had either passed or failed the process or that an extension was required. In the handwritten notes the word *mentor* was written next to the name '*Richard Beals'*. Mr Beals was the Respondent's global editor and it is likely that part of the discussion included the question of whether the Claimant would benefit from having a mentor such as Mr Beals.

81 At the end of the discussion, Mr Foley indicated that he did not want to consider the second or third option as this would need to be recorded on the Claimant's personnel file and Mr Foley did not want to affect the Claimant's chances of finding other roles in the future whether within the Respondent or elsewhere. He wanted to stay at the informal informal discussion process. From his discussion with Ms Gajdus he believed that this meant that he would continue to have discussions with the Claimant about his performance but that those would not count as a formal or even an informal performance improvement process.

82 Mr Foley's evidence was that around this time there were frequent emails and conversations with other members of the team in which he would comment on their skills and where improvement was needed or where work needed to be done differently. He was not solely focussed on the Claimant. There had been issues with the whole team and that is why he was working with them to try to improve the work that they did.

83 Mr Foley was concerned about the Claimant's reaction to feedback about his work. He felt that the Claimant took any negative feedback about his work to heart - when it was meant as constructive criticism. He appeared to take it more seriously than other employees when faced with the same situation. Mr Foley had no information from the Claimant or any inkling that this was connected to the Claimant's depression.

84 It was also Mr Foley's evidence that he studied advice given by the mental health charities Mind and Rethink about how to support employees with mental health problems and advice on adjustments that can be made, such as allowing time off at short notice. He was also mindful, especially as he was personally experiencing depression, that whenever he gave the Claimant feedback he needed to ensure that he did so in a sensitive and considerate manner.

85 On 11 November, the Claimant spoke to Mr Foley and said that he was under a high degree of stress. Earlier that day, Mr Foley had witnessed the Claimant and a colleague called Olaf Storbeck engaged in a heated argument at work. The Claimant informed Mr Foley that he was under a high degree of stress as he had some family matters that were worrying him. Mr Foley repeated that he should take whatever time he needed, and asked if there was anything that he could do to help.

86 We also find that during this time the Claimant wrote many good articles, attended work daily and actively participated in team discussions. He did not tell the Respondent that his disability affected his ability to carry out his job or that his disability affected his ability to receive feedback. The Claimant could take time away from the office, usually by leaving early, when he needed to do so and sometimes did do so. Mr Foley was flexible in allowing staff to leave early or to take personal time when they needed.

87 At the same time, there were many the Claimant's stories that were "spiked" i.e. scrapped before publication, because according to Mr Foley, they lacked insight. The Claimant would have been aware that the stories he had written or edited had not made it into the final BV publication and would therefore have been conscious that some of his articles had been spiked. We had a draft of an article on William Hill in the bundle which the Claimant confirmed had been spiked and not published.

88 There had been an article that the Claimant wrote on M&S's latest financial news that was submitted at 12.24 on 4 November and which received some criticism from George Hay (who edited it), that it had no real argument, contained multiple repetitions and gave no real sense of the important issues facing M&S at that time. As already stated, Mr Hay was not a manager. These comments were him venting his apparent frustration at the article. The Claimant's evidence on this was that Mr Hay was seeking to promote himself and used the Claimant's work to ingratiate himself to the Respondent. We find that Mr Hay had no line management responsibility for the Claimant and there was no evidence that he knew of the Claimant's disability. He was junior to the Claimant. We find it likely that the critique of the piece was correct and that as analysis from an assistant editor it should have referred to the important issues facing M&S at the time. Also, it was Mr Foley's evidence that Mr Hay gave feedback on other members of the team and not just on the Claimant.

89 On 13 November, the Claimant wrote a piece on Syngenta. The company had rejected a bid takeover. Mr Foley had given the Claimant the article to write an hour later than usual that morning so he did not have it as early as others referred to in these reasons. Mr Hay edited that article and described it as *'really bad'*. When he read it, Mr Cox described it as *'just rubbish*'. The Claimant had misspelt the name of the China National Chemical Corporation that was seeking to takeover Syngenta. He wrote ChinaChem instead of ChemChina. Also, the article should have been published

by mid-day - as a revised deadline because the Claimant had been given the article to write late – but was not published until 1:34pm. Mr Foley decided that he needed to speak to the Claimant about this. Getting the email out to subscribers on time has always been an important matter for the Respondent as well as the accuracy and analytical content of the article.

90 The Claimant met with Mr Foley on his own later that day. Mr Foley prepared for the meeting by thinking about how he was going to pass on his concerns about the article to the Claimant. He reviewed some notes he had about management coaching that he had when he was in Hong Kong. We find it likely that this was something he would have done before meeting any member of staff where he had to give challenging feedback as he wanted to be prepared.

91 Although there were no minutes of this meeting, the Claimant confirmed in live evidence that he broadly agreed with the record of the discussion that Mr Foley made in an email to himself on 16 November. Mr Foley raised with the Claimant his concern that the story had not been ready until 1.5 hours behind the deadline. He informed the Claimant that he wanted to discuss with him how he could plan more effectively so that he could work faster but without having to take on any more work. We find that Mr Foley stated what the problem was and that he wanted to work with the Claimant to find a solution. The Claimant became very upset and tearful during the meeting. He told Mr Foley that he was working from quarter to six in the morning until quarter past nine at night and that he was finding it hard to switch off from work. He told him that he was pushing him too hard and that if he pushed him any harder he would fall over. He also told him that there were other people who were close to falling over. He stated that he would not sacrifice quality for timing and that if he was asked to, he would resign. He stated that the Respondent might as well dismiss him now. He felt that he had done a good job. He said that if he had to work harder it would mean that he would never see his children or his wife. He said that he did not care about the companies he had written about that day, he just did the work to pay the bills and that he believed that the Respondent considered him to be slow and not bright. Mr Foley asked the Claimant what he liked about the job. He indicated that he would keep an eye out for articles for him that he would like to do. He also informed the Claimant that he was too self-deprecating and that no-one was judging him in the way he was judging himself. The Claimant said that that he hated himself and that he had done for years. Mr Foley informed him that they would continue to work on this.

92 It was the Claimant's evidence that he was in the midst of a severe nervous breakdown in this meeting. We find it likely that Mr Foley did say to the Claimant that he wanted to help him with his performance issues. The Claimant confirmed in the hearing that it is likely that this was said.

93 When the Claimant became visibly upset Mr Foley decided to end the meeting. He indicated to the Claimant that they could continue to work together on these issues and that at this stage, they did not need to have any answers as to how to improve his performance. It would have been clear to the Claimant that there were some concerns about his performance as this was the second meeting that he had had with Mr Foley to discuss an issue with articles that he had written or edited; in addition to the emails that we have outlined above.

94 The Claimant's evidence was that this was harsh and ill-judged criticism by Mr Foley. We find that the issue of getting the emails out on time had been an issue for Mr Foley and the Respondent since he was appointed to the post. The Claimant had appreciated this and had asked for his help in writing to the team to reiterate to them how important it was to get the product out on time to the subscribers. The Claimant did not deny that this was a story with which he had some familiarity which should have helped him in writing the article. At the hearing he agreed that the lateness of the piece was an appropriate matter for his manager to take up with him.

95 After that meeting, the Claimant took some days off work. Mr Foley ensured that the time off was not recorded on the Claimant's sickness absence record.

96 On Monday 16 November, Mr Foley met with Ms Gajdus to inform her about the meeting on the 13th. He was clear that he still did not want to start any informal process around the Claimant's performance. He did tell her that the Claimant had become tearful in their meeting. Ms Gajdus advised Mr Foley that he could start a performance improvement plan but Mr Foley stated that he still did not want to do so. She advised Mr Foley that while the Respondent should make reasonable adjustments for staff who are disabled such as being flexible on hours and on workload, that did not mean that it had to accept output of a lower quality. Ms Gajdus advised Mr Foley that he could start an informal performance process with the Claimant which would take 4 – 6 weeks. Mr Foley said he would think about this. They agreed that Mr Foley should focus on what the Claimant's weaknesses were and how the Respondent could assist him in turning them into strengths. After the meeting Mr Foley decided that he still did not want to start even the unofficial informal process.

97 We find it likely that Ms Gajdus spoke to Mr Wilson, another HR Business partner for the Respondent, about the meetings with Mr Foley around this time. Mr Wilson did not advise that Mr Foley should refer the Claimant to Occupational Health (OH) for a report. He considered that the Claimant had been successful in managing his condition on a day-to-day basis and had not taken significant periods of sick leave or begun acting unusually at work. Mr Wilson's evidence was that the Claimant's condition did not appear to be impacting on the Claimant's ability to do his job. His evidence was that HR was not aware that there was a connection between the Claimant's condition and his performance issues. In those circumstances, he considered that if a referral to OH was made now it could be seen as the Respondent being heavy handed and assuming that the Claimant's mental health condition must be the cause or related to his performance.

98 The Respondent's Capability Policy was in the bundle of documents. The procedure was to be used when the Respondent considers that an employee is falling short of the satisfactory work standards required and initial informal discussions have not helped the employee concerned to attain the required standard. Mr Foley had been clear in his meetings with Ms Gajdus and in his emails to Mr Cox that he did not want to start formal processes with the Claimant. He did not want to start the informal process either. We find that he hoped that his feedback to the Claimant in their meetings and any strategies and support that he put in place for him would improve the content and timing of his articles so that no formal action would be required. Although he was advised about these procedures by Ms Gajdus, he did not want to start them.

99 The policy addressed performance related incapacity where an employee's performance has declined to a level which falls short of the performance required of them as defined by their department manager or where the employees are unable, physically or mentally to perform the job because of a medical condition. The informal discussions outlined in part B at page E2 of the bundle relates to the informal stage of the process. It states that performance issues should normally be discussed informally between the employee and his or her line manager as part of day-to-day management. The manager should keep a record of the informal discussion so that in the event of the capability procedure being instigated, they can refer to previous discussions. Informal discussions should be held with a view to identifying areas of concern, clarifying the required standards and in the case of poor performance – establishing likely causes and identifying training needs. If it is a medical related incapacity, then management should establish the medical reasons and identify reasonable adjustments that could be made. Where informal discussions have not resulted in a satisfactory improvement the Respondent would then move on to the formal procedure.

100 The informal informal discussions that Ms Gajdus outlined to Mr Foley at the meeting on 5 November were outside of that procedure.

101 The Respondent had a 'Managing Stress' policy which we also had in the bundle of documents. It states that at all times employees and their managers are encouraged to raise issues and concerns at an early stage to enable appropriate support to be given. Managers and HR will work with employees to explore all options of support that may be available. The policy referred to the Employee Assistance Programme (EAP) which was a confidential support service, managed by an external organisation. The EAP offered face-to-face counselling as well as a 24/7 telephone service to support employees. The policy also stated that where stress is affecting an employee's ability to do their job, a referral to Occupational Health (OH) can be made by the manager via HR which enables assessment and support to be given to employees and their managers. The policy advised managers to be aware that staff may be dealing with personal issues that are stressful as well as work related stress and to have regard for all factors when deciding how to manage them.

102 Lastly, the Respondent had an Equal Opportunity and Diversity Policy which was in the bundle. The policy made a business case for diversity and inclusion. It stated that as part of the company's commitments to diversity and inclusion it would take all reasonable steps to promote awareness and training for employees and managers; create a working environment that is sensitive to the needs of employees of different cultures, religion and belief and lastly, make reasonable adjustments to enable all employees with disabilities to function effectively and to their full potential.

103 Mr Foley confirmed in his evidence that he did not think it appropriate to refer the Claimant to OH at this point. He had not been advised by HR to do so. The Claimant had made it clear when he told him about his disability that it did not stop him from performing his duties to what he considered to be a high level and that it was under control. Mr Foley did not want to raise the issue of a referral to OH in respect of the difficulty the Claimant had accepting negative feedback as it would have looked as though he had made a link between that and the Claimant's condition when he had not been told that there was such a link and he did not want to be faulted for making assumptions.

104 Mr Foley recognised that the Claimant was stressed and hoped that by providing clear, specific feedback in a sensitive way, organising training and monitoring his performance; the Claimant would be able to take on board what was being said and improve, without the Respondent having to go through any formal processes. Mr Foley believed that going through a formal process would have made the situation even more stressful for him. Mr Foley's evidence was that he did not do an action plan or make any kind of formal plan or target setting as it would have worried the Claimant that he was now in a formal monitoring process. He considered that putting together an action plan would have exacerbated the Claimants stress and he did not want to do that.

105 On or around 4 November 2015, Mr Foley organised for someone called Miranda to attend the office to offer financial training for the Claimant's team. Edward Hadas came in from his sick leave to attend the training along with the Claimant and other colleagues. Mr Hadas gave feedback on the training to Mr Foley in an email. He fed back that the trainer had been excellent but that the Claimant had been appalling. He was appalled that in the training the Claimant asked the trainer a question which clearly showed that he had a lack of knowledge of the meaning of the financial term '*present value'* which he considered to be a basic finance and accounting concept.

106 In live evidence the Claimant explained that he was asking basic questions of the trainer to assist a junior colleague who was too embarrassed to ask those questions. We found that to be unlikely. It is likely that as the trainer was hired to assist the whole team to become familiar with and understand financial terms, if a junior member of staff did not understand a term, it is likely that she or he would have asked the trainer directly and not depended on the Claimant to do so for him/her. We find that the Claimant and his colleagues are journalists and that an important part of their job is to ask questions. We find it highly unlikely that a journalist would be too shy to ask a question in a training session organised for the purpose of giving them that information. Instead, we find it likely that the Claimant was asking because he did not understand the terms that were being discussed.

107 It was likely that Mr Hadas was surprised at the Claimant's apparent lack of understanding of the term '*present value'*, which was why he referred to it in the email to Mr Foley. The purpose of the email had been to provide feedback on the trainer.

108 The Respondent also had many emails from George Hay being critical of the Claimant's work and his knowledge. He made specific criticisms on pieces of work from the Claimant that he either had to edit or had seen produced by the Claimant. The other junior journalists also spoke to Mr Foley about the Claimant's writing/editing.

109 On 17 December, the Claimant had a conversation with Mr Foley in which he informed him that he was finding things tough. Mr Foley asked him whether he wanted any help, and he said that he did. Mr Foley informed the Claimant that he should just send him an email whenever he wanted to leave or inform him that he needed space and there would be no further questions asked. Mr Foley's intention, was again, to give the Claimant an indication that in those circumstances, he would not need to articulate his feelings in the open-plan office but could let Mr Foley know that he was leaving the office early, if that was what he needed to do.

110 It is likely that the Claimant did not understand what Mr Foley meant as in his witness statement his evidence was that he thought Mr Foley was asking him to put his feelings and his need for assistance in an email and he did not feel safe to do so. He stated that he felt such an email could be used against him. The Claimant continued to attend work.

Facts relevant to the second claim

111 Around 7am on 7 January 2016, M&S announced that its CEO, Mark Bolland was leaving to be replaced by the Executive Director of General Merchandise. On his way to work, the Claimant dialled into the M&S media call with journalists where the company explained that Mr Bolland was leaving. When the Claimant arrived at work, the story was discussed in the daily morning meeting and Mr Foley's recollection of the discussion was that it was agreed that the story ought to be published as close as possible to 10am.

112 It was also agreed that the piece would discuss how the outgoing Chief Executive had failed and where the company should focus its efforts now and in the future. The Claimant was assigned the job of writing the flash and the final article. In doing so, the Claimant confirmed in his evidence that although financial results for Marks & Spence had been expected that day, the departure of the CEO had not been expected, which meant that this was the only surprising factor.

113 The Claimant is likely to have had the Reuters' news story which was published at 8:44am. He also would have had information gleaned from the company's conference call that morning. Mr Foley was certain that there was information on the EIKON software that he could have downloaded which would have assisted him in writing the report. The Respondent would have been under pressure to produce a good article as it was a big story and it was likely that their competitors were also working on it.

114 Mr Foley had a variety of criticisms of the first draft of the article and the flash – both of which had been written by the Claimant. Those criticisms were in his witness statement and which could be summarised by saying that the Claimant made statements in the article which he had not justified or explained, which were therefore unsubstantiated. He claimed that the *'nuts and bolts of M&S's food business had improved'* and that the '*profit margin news was good'* but failed to explain what the profit margin news was. Mr Foley's investigations revealed that the gross margins of the company's food business had not changed and had fallen over the previous quarter so the draft was inaccurate. The Claimant had not said what the company ought to do to improve. Mr Foley delivered some verbal feedback to the Claimant that morning and the Claimant's evidence was that this was done in the open office which caused him additional stress. They had a tense discussion. He felt that Mr Foley made disparaging comments about the article and spoke to him harshly. Mr Foley told him that the piece lacked insight.

115 Mr Foley's recollection was that he asked the Claimant some questions to help him to think critically about the piece but that the Claimant pushed back. They both agreed in evidence that the Claimant response to Mr Foley questions was to tell him that he had been writing about finance for 25 years. Mr Foley decided not to continue

the discussion especially as it was in the open plan office but to focus on getting the article out and leave any further discussion to the appraisal meeting that had been scheduled for later that day.

116 The story was published just after 10:20am. Mr Foley made minimal changes to the article as the Claimant confirmed in his witness statement but we find it likely that this was because he did not want to argue anymore with the Claimant about it and because they were losing time. The Respondent was not happy with the quality of the analysis and the amount of information contained in the article.

117 One of the other criticisms of the article was that it did not mention the name of the CEO successor who was going to lead M&S from then on. That would appear to be a significant omission as investors would need to know that the business was in safe hands when making investment decisions. The Respondent's business was to provide its subscribers with this sort of information.

118 In the hearing, the Claimant did not agree that the criticisms of his draft article were justified. He disagreed with the Respondent's assessment that the Bloomberg article on the same matter was better and felt that he had said the same thing with different words.

119 In an email to Mr Cox, Mr Foley reported on the conversation with the Claimant which took place in the office. He informed him that the quality of the article the Claimant produced on the changes in M&S was even more disappointing because he had done some good work the previous day and pushed himself out of his comfort zone with some financial analysis in another article. The Claimant had needed assistance with parts of it, but Mr Foley still considered that it was good work from him. Mr Foley took responsibility for an error crept in to the article from the previous day, as he was doing many other things at the same time. The emails in the bundle about the error confirmed that Mr Foley took full responsibility for it.

120 Mr Foley was clear that he did not want to head down the formal process route with the Claimant. He was aware that he needed to give the Claimant clear feedback about his performance in his annual appraisal. Mr Foley believed that he could improve the Claimant's performance through extra training and giving him feedback. Although he had become upset in their last two meetings, Mr Foley was not aware that the Claimant's performance was being affected by his mental impairment.

121 The Respondent normally carries out its annual performance review process in January. Appraisal meetings take place between managers and their staff in January and appraisal forms are completed by February. Targets for the coming year are set in March or April. This appraisal meeting had been set up since December 2015. Mr Foley did give some thought to whether it would be helpful to the Claimant if there was someone from HR present in the meeting. He discussed this with Maria Gajdus of HR who said that doing so may cause the Claimant some anxiety and would not therefore be helpful to him. Mr Foley also believed that it would look odd if he had someone from HR in the Claimant's appraisal meeting as it was not the usual practice. It might cause him some concern. He admitted in his witness statement that he was aware that it was likely that the Claimant would probably react badly when receiving feedback as by now he appreciated that the Claimant was sensitive to it but as he

knew that it was not a formal performance management process he did not want to set up anything that looked like one as it could have upset the Claimant and caused him some alarm.

122 We find it likely that Mr Foley prepared for the meeting, including reading the Respondent's guidelines on giving feedback, its policy on Manager Performance Check-In Conversation Guide and the document on Performance Management Conversations also in the bundle of documents before us. From all his preparation, Mr Foley concluded that what he needed to do was to give the Claimant feedback that was clear, delivered with context, not overly focused on performance in the recent past but overall.

123 The Guide to conducting year end performance review conversations asked managers to ensure that they evaluate employees against future business goals rather than on the past. It directed Respondent's managers to address performance concerns or areas needing improvement. Managers were to check in with how the employee felt about the discussion, make sure topics of importance or interest were covered and how to set up opportunities for more regular feedback. Mr Foley considered what objectives he would be appraising the Claimant on.

124 In March 2015, the Claimant had suggested some objectives to Mr Hughes but those had not been agreed before Mr Hughes left. In an email dated 27 April, the Claimant wrote to Mr Cox and Mr Foley to confirm that Mr Hughes had not agreed objectives with him but that he thought that the objectives could be rolled over until Mr Foley took up the reigns of the office. As far as Mr Foley was concerned, the real-world priority for the year for all editors at the London BV office, had been to maintain the smooth running of the team during the interim period between Mr Hughes departing and his arrival.

125 On 7 January, before the meeting, Mr Foley emailed Mr Cox to let him know what had happened that morning. He referred to the performance review meeting scheduled for that afternoon and said that it would be *"test of my management skills".* We find that it is likely that he anticipated that it was going to be a difficult meeting as he had what he considered to be some hard truths that he wanted to convey to the Claimant and he was aware from previous conversations that the Claimant found it difficult to receive negative feedback. It is likely that once again, he was seeking Mr Cox's support in holding the meeting.

126 Before he went into the meeting, Mr Foley was aware that the Claimant had said to him that although he was suffering from depression, he had been so for many years and had strategies for successfully managing it. Mr Foley recalled the Claimant telling him that he had taken up yoga and was climbing the office stairs every morning to improve his health.

7 January appraisal meeting

127 At the start of the meeting, we find it likely that the Claimant expressed his opinion that he thought he had done a good job in writing the article on the Ab InBev/SAB Miller deal and taking the lead role in preparing that article. Also, he was justifiably proud of the fact that he had kept the place running during the period of the

interregnum and done a professional job. Mr Foley praised the Claimant for doing so and confirmed that generally, the daily emails had been sent out on time. He advised the Claimant that he considered that the Claimant had done a good job keeping the wheels running and that he had achieved this target. He confirmed his belief that this was the most important objective for 2015 and that the Claimant had achieved it.

128 We find that Mr Foley did spend some time in the appraisal meeting acknowledging the Claimant's achievements in some of the articles that he had written and his good work in assisting to run the office in the interregnum.

129 Mr Foley asked the Claimant how he thought 2015 had gone and the Claimant said that he was broadly pleased with his performance over the year.

130 The Claimant's recollection was that he acknowledged Mr Foley's reservations about the speed and quality of some of his work. He recalled some of the conversations they had had about pieces of work over the more recent period. The Claimant said that he thought he had a good productive year.

131 We find that Mr Foley gave the Claimant positive comments in relation to keeping the office running in 2015 and that he had confirmed that the Claimant had obtained an *Achieved* rating for 2015.

132 Mr Foley did not then go on to judge the Claimant against 2016s objectives. However, he did express his concern that had the normal targets been in place in 2015, it would have been hard to give the Claimant an achieved rating because of the quality of some of his pieces. In a sense what he was doing was addressing performance concerns or areas needing improvement, as advised by the Respondent's Guide to conducting year end performance review conversations. We find that the Claimant was not appraised on the following year's targets.

133 The Claimant had not taken any notes of this meeting and in the Tribunal hearing, confirmed that it is likely that his recollection was hazy as he was experiencing a mental breakdown during that meeting. Mr Foley took notes of the meeting and we find that they are generally accurate, as agreed by the Claimant in the hearing.

134 We find that Mr Foley did tell the Claimant that it is likely that the Respondent would go back to more traditional targets for 2016, now that the office had permanent leadership again. Mr Foley said that "*we*" should think about how the Claimant could achieve his targets for the following year. He indicated that had the targets been set, it is likely that they would have included producing articles quickly and on time and in line with the Respondent's core values. Mr Foley wanted the Claimant to feel that they were going to work on this together. His attempts to reassure the Claimant failed and the Claimant became very upset and stated that Mr Foley was treating him like a child. He was said that Mr Foley thought that he was not achieving his targets although Mr Foley reiterated that he had met his target for 2015. Mr Foley's point was that he wanted the Claimant to know that he would have support to help him meet the more traditional targets during 2016. The Claimant accused Mr Foley on focusing on the negatives and stated that he wanted Mr Foley to talk more about his strengths rather than his weaknesses.

135 The Claimant stated that he felt that 99% of what he did was very good and that Mr Foley was focusing on the 1% that he did not do well and that this was not a balanced appraisal. He referred to a compliment that he had received from Swaha Pattanaik who was a junior member of the team who told him that he was the glue that held the team together. Mr Foley agreed with that comment and gave him full credit for his effort and support to help the team keep running before he took over. However, he was surprised at the Claimant's comment that 99% of what he did was very good. Mr Foley realised that he had not been successful in getting across to the Claimant the problems with some of the articles that he had written.

136 The Claimant referred to his mother's health and that he was worried every time the phone rang that it may be someone notifying him that she had died. He also stated that he had been in a down phase in his depression for the past six months and mentioned that the job made him very unhappy. Mr Foley stated that the Claimant should not do a job that made him unhappy and that he would help him to find something that did make him happy. Mr Foley told him that he needed to do what made him happy.

137 We find it likely that as the appraisal conversation continued, Mr Foley became frustrated that the Claimant was not accepting that there were any problems with his work or that those problems were more than 1% of his work. Mr Foley felt that he needed to let him know that the issues with his performance related to more than that. He told the Claimant that he seemed to lack baseline skills. Mr Foley told staff on the team as far back as September that he considered financial fluency to be one of the basic skills that he expected them all to have. That was why the trainer was arranged. It is likely that this was a reference to the Respondent's assessment from reading his articles, that the Claimant lacked knowledge of financial markets and corporate finance concepts.

138 Unsurprisingly, the Claimant found this part of the conversation difficult and it is likely that he got upset. We find it likely that he felt that Mr Foley's statement that he seemed to lack baseline skills was an insult to his professional competence and his experience of many years. It would have been difficult for him to hear. He told the Claimant that he was going to reflect back to him what he was seeing in an attempt to lower the temperature in the meeting. He told the Claimant that he was being aggressive and defensive. Mr Foley told the Claimant that he was unwilling to learn which we find is likely to be a reference to the Claimant finding it difficult to accept the comments that were being made in the meeting or the criticisms about his work.

139 In his witness statement, Mr Foley states that this was also reference to the Claimant's attitude at training sessions and to other conversations such as the one they had had in the office earlier that day when the Claimant's response to being questioned about his article was to say that he had been doing this work for 25 years.

140 Mr Foley did not recall saying to the Claimant that he was resistant to change. He believed that the Claimant was aware that changes needed to be made to increase the standard of BV but at the same time, he was reluctant to change the way he worked or the style of the work he produced.

141 We find that Mr Foley ended the meeting by saying to the Claimant that it would be good if they kept communicating with each other and that the Claimant could come and talk to him anytime he liked. It is likely that the Claimant made a comment to the effect that although Mr Foley was a nice man, they were not similar, did not communicate well, especially about work which made him sad. The meeting ended at this point.

142 The Claimant described Mr Foley as being stiff, detached, cold and unaccommodating in that meeting. Having observed Mr Foley in the witness box at the hearing and seeing the notes of meetings he produced we find it more likely that he was calm in the meeting and likely to have been measured in his speech to the Claimant. It is unlikely that he was cold, stiff and detached as alleged. They had had two previous meetings, both of which had been difficult and during which the Claimant had become upset and it is likely that Mr Foley wanted to avoid this happening again.

143 The Claimant had not asked for an HR representative to accompany him to the meeting or a colleague. The Claimant had known beforehand that his performance was going to be discussed on 7 January. Despite the content of their discussions that morning and in November, the Claimant went to the appraisal meeting with no expectation that Mr Foley may have things to say that he may find difficult about his work.

144 On the following day, at around 7.30am, the Claimant went in to see Mr Foley and asked if they could have a conversation. They went to a private meeting room and Mr Foley took some notes of the meeting which we had in the bundle of documents. The Claimant asked for a representation or mediation process. He said that the problem was the way that they communicated with each other and Mr Foley's expectations of what was reasonable in terms of work produced. The Claimant stated that he felt that the appraisal had been a personal attack against him and that he wanted his personal problems to be taken into account. He said that he felt that Mr Cox had no confidence in him. He indicated that he hoped that the matter could be resolved "*within these four walls*". Mr Foley suggested that HR could be invited to the meeting, if the Claimant wished to have their support.

145 This was the first time that the Claimant had linked his performance to his disability or what he referred to as his personal problems.

146 The Claimant indicated that he felt that he was being constructively dismissed. He stated that he wanted a process to start and either Richard or Swaha could represent him in mediation. The Claimant also said that if Mr Foley wanted him to leave, then he needed to make a decision.

147 He informed Mr Foley that he had suicidal thoughts after the appraisal meeting and that he was a *"decent man who deserved to be treated decently".* Mr Foley was taken aback at what the Claimant said to him in that meeting as he thought that he had been fair to the Claimant at the appraisal meeting, that he had expressed a desire to assist the Claimant to improve his performance and had made it clear to the Claimant that he did not want him to leave unless he thought that would make him happier.

148 Mr Foley informed the Claimant that because of the seriousness of what he had said at this meeting, he wanted to share his notes of the meeting with Mr Cox and with HR. The Claimant's response was that Mr Foley should do with the information what he felt was correct.

149 The Claimant informed Mr Foley that he felt that he needed to go home which Mr Foley agreed with. The Claimant left the meeting room and then left the office.

150 We find it likely that Mr Foley mostly listened to the Claimant in that meeting. As the Claimant had asked to speak to him, he wanted to hear what the Claimant wanted to say. It is correct to say that Mr Foley did not retract the appraisal or change his mind about what he had said the previous day and in that way, he did not indicate a willingness to review what had already been said. We find it unlikely that Mr Foley was cold or robust or that he demonstrated a closed viewpoint in the meeting. He listened to the Claimant. He believed that his assessment of the Claimant's performance was accurate. However, we find it unlikely that he would have been able to conduct a discussion at that meeting with the Claimant as the Claimant was quite upset. Also, as the Claimant had asked for a mediation process, Mr Foley decided to defer any further conversations about the appraisal meeting to that process. The Claimant also mentioned constructive dismissal.

151 Taking all that had been said together, Mr Foley believed that he needed to let HR and his manager know about what had happened in both meetings and ask for assistance. Mr Foley was surprised at what the Claimant said in this meeting as he thought that they ended the meeting the previous day on a positive note and that the Claimant was going to work with him to improve his writing and editing to the level that the Respondent required. He had not appreciated how upset the Claimant had been. He was also concerned for the Claimant's health. The Claimant confirmed in his evidence that one of the things Mr Foley did say in this meeting was that the Claimant should seek professional medical help about how he was feeling.

152 After the Claimant left, Mr Foley emailed Ms Gajdus and asked to see her urgently. He told her about the meetings with the Claimant on 7 and 8 January and sought her advice on what he had done and what she would advise the next steps to be.

153 Mr Gajdus advised Mr Foley that, based on his account, he had conducted the meeting on 7 January appropriately. She did not advise the Respondent to refer the Claimant to Occupational Health (OH).

154 Later that day, Mr Foley sent an email to Mr Cox. He told him that they should talk about the Claimant's review and that before they did so, Mr Cox should prepare himself a strong coffee. We find that Mr Foley assumed that Mr Cox would be surprised to hear about what had happened at the appraisal meeting and the meeting on the morning of 8 January and this was Mr Foley's way of telling him to prepare himself to hear about it. He also told Mr Cox that the Claimant wanted a mediation process and that he was having suicidal thoughts. All of those were serious matters and therefore he was forewarning Mr Cox that what he had to discuss with him was likely to be sobering for him.

155 We find it likely that Mr Cox, Mr Foley and Ms Gajdus spoke about the Claimant on a telephone conference call on 8 January. Mr Foley reported to Mr Cox what had happened during the appraisal meeting and his meeting with the Claimant that morning. We find it unlikely that any decision was reached or anything else happened on that call. Mr Cox expressed concern about the Claimant's health but joined Ms Gajdus in telling Mr Foley that it was likely that he had not done anything wrong.

156 Later that day, Mr Foley emailed Ms Gajdus to suggest that given the Claimant's disability and the issues that had arisen in the recent meetings with him, he felt that she should escalate the concerns to more senior members of the HR department. We find it likely that she had already spoken to Mr Wilson after her conversation with Mr Foley in November, but had otherwise been supporting him on her own. He also stated that he considered that it might be useful for the Claimant to have someone from HR present when he next met with him.

157 Around 10 January, we find that Mr Foley started to organise his correspondence, including his emails. He emailed himself a chain of emails dated 13 November in which himself and Mr Cox were discussing the Claimant's article on Syngenta. He emailed it to himself with the heading "*Get it done*". We find that this was not a note to remind himself to push through the Claimant's dismissal, as the Claimant alleged in his witness statement. There was no indication of dismissal being on his or anyone else's mind at the time. Mr Foley appeared to us to be a very organised person and as he was managing many people and conducting many reviews on 7 January, it was likely that he was organising his paperwork as would be expected of a good manager. He was also in the habit of sending notes to himself by email entitled '*Get it done'*. We find that he sent a similar note to himself entitled '*Get it done'* on 27 November which was essentially a 'to do' list.

158 On or around 28 January 2016, Mr Foley completed the Claimant's year end performance document. We had that year end performance review in the bundle of documents before us.

159 Mr Foley did not put any comments in the appraisal document apart from his judgment that the Claimant had '*Achieved'* his targets. He did not want to only include positive comments in the appraisal as in his opinion, he would also have to put negative comments about the Claimant's performance if this was to be a balanced appraisal form. Mr Foley was concerned this may upset the Claimant and he decided not to put any comments in the document apart from confirming that the Claimant's performance rating for 2015 was '*Achieved'*. It was his intention that when the Claimant returned to work from his sick leave, they would be able to discuss a way forward with HR present so that the appraisal could be completed in more substantive detail and objectives for the new performance year could be set. As the Claimant had disputed Mr Foley's comments and his concerns, he felt that it would be more appropriate for him to write those on the form after they had a meeting with HR or at the end of the mediation process which the Claimant had requested.

160 In the comments section of the form, the Claimant wrote that as he was on sick leave at that time, he was not certain of the appropriate steps to take in the circumstances. He also acknowledged that there had been a conversation with Mr Foley on 7 January 2016.

161 The Claimant's case was that he suffered from low self-esteem as well as anxiety and depression. We find that the Respondent was aware that the Claimant was suffering from anxiety and depression, described as a chronic depressive illness, since before he came to work for it. The Respondent's witnesses confirmed that they knew that he sometimes suffered from low self-esteem but that at other times, such as when he put forward his application for the EMEA editor job at the London office or when he was asked a question about his work in the office, he would display lots of self-confidence in himself and his abilities. The Respondent had no medical reports that dealt with this until much later.

162 The year-end performance review form was never completed. The process was halted while the Claimant was off sick.

163 On 11 January, the Claimant wrote to Mr Foley to inform him that following a consultation with his GP that day, he had been advised to take some time out. He had been issued with a fit note for the period up to 24 January. The GP advised him that it was likely that he suffered a trauma on 7 January. This was not written on the fit note. The GP increased the dosage of his antidepressant medication and referred him to the local therapy service for advice. The certificate from the GP noted that the Claimant was suffering from acute stress and depression.

164 Also, in his email, the Claimant informed Mr Foley about some matters that he was working on which would need to be picked up by his colleagues. Mr Foley forwarded the Claimant's note on to Mr Cox, his manager, to keep him updated with what was happening in the EMEA office in London. He also sent it to Ms Gajdus. He told the Claimant that he was sharing this information with Mr Cox and Ms Gajdus.

165 Mr Foley told the Claimant that he was glad that he was taking some time out, that he should take it easy and write him to let him know how things were, when he could. He wrote another email to him to advise that he should feel free to contact Ms Gajdus or anyone else in HR for advice and so they could advise on resource and people to talk to. Mr Foley wanted the Claimant to know that there were support systems that the Respondent had which he could access as an employee who was unwell.

166 Mr Foley also emailed all staff in the London BV office on the same day advising them that the Claimant was going to be out of the office for a while and that they should contact him if there was anything they were working on with him for which they needed an editor.

167 On or around 14 January, the Claimant contacted Keith Wilson, one of the Respondent's HR business partners, and informed him that he was signed off and asked if they could talk about his current circumstances as he considered Mr Wilson to be someone with whom he felt familiar and comfortable. He did not ask Mr Wilson to keep the matter confidential but assumed that it would be. After they had spoken, Mr Wilson emailed Mr Foley informing him that the Claimant had been in contact. Before speaking to the Claimant, Mr Wilson had a general understanding that there had been performance issues with the Claimant as Ms Gajdus had informed him of at least one conversation with Mr Foley about the Claimant's performance but it was not

something that he had been asked to advise on. Prior to Mr Foley's appointment, Mr Wilson had been told by Mr Hughes that the Claimant had depression and had been made aware that the Claimant had taken some time off work after a difficult episode at work. This is likely to be a reference to the incident in November 2014 when the Claimant got upset over Mr Hughes' comments about the article on M&S. Mr Hughes had not sought advice from HR in relation to the Claimant's performance.

168 The Claimant indicated that he wished to supply his sick notes and communications with the Respondent through HR rather than to Mr Foley.

169 The Claimant met with Mr Wilson on 15 January. At the meeting, the Claimant informed Mr Wilson about his illness and the appraisal meeting on 7 January. The Claimant considered that it had been a traumatic appraisal meeting. He informed Mr Wilson that he thought that the Respondent had an agenda to get rid of him. Mr Wilson informed him that there was no formal or informal performance management process in train at that time and there was no reason for him to fear for his job. In his live evidence, Mr Wilson remembered the Claimant telling him at this meeting that he felt that he was damaged and that it was unlikely that he would ever work again.

170 In their meeting on 15 January 2016, Mr Wilson suggested to the Claimant that he should contact the medical services available through the company's health insurance. He asked the Claimant to keep in touch and advised him that he should focus on his health. He advised the Claimant that the Respondent's company sickness policy would initially provide six months cover on full pay, as long as he was continuing to send the Respondent his sick certificates from his doctor.

171 The Claimant asked Mr Wilson whether he should seek the advice of a lawyer. It was not clear to the Tribunal why the Claimant felt at this stage that he needed to seek the advice of a lawyer. Mr Wilson reassured him that he did not need to do so but that instead, he should focus on getting well. This was reiterated in an email which Mr Wilson sent to the Claimant later that day summarising their meeting. He again reassured him that no formal or informal process had been started regarding his performance or any other aspect of his employment.

172 Mr Wilson attached copies of the Respondent's sickness policy and provided the Claimant with a link to the counselling service in the Respondent's absence management policy. He provided the Claimant with the contact details for CIGNA so that the Claimant could enquire whether they offered any more long-term support/counselling, in case the NHS was unable to give him help as quickly as he needed it. Mr Wilson expressed concern about the Claimant's health and well-being.

173 Before meeting with the Claimant, Mr Wilson met with Mr Foley to discuss what had happened at the appraisal meeting and the meeting on 8 January. We find it appropriate that he wanted to check the Respondent's explanation of what had happened at the meeting so that he could put what the Claimant told him in context and also to be able to reassure the Claimant about what was going on. We find it likely that this was why he could reassure the Claimant at the meeting that no formal or informal performance management process had been instigated against him by the Respondent's management. It was also because of his prior discussion with Mr Foley that Mr Wilson could reassure the Claimant that there was no plan to dismiss him.

174 We find it likely that the Claimant contacted the confidential care advice line and CIGNA.

175 On 21 January, the Claimant submitted a further sick certificate detailing acute stress and depression as his condition and that he was signed off until 29 February (2016 was a leap year).

176 When Mr Foley received that email, he forwarded it to Mr Cox whose response was *"Oh man".* It was likely that Mr Cox was expressing his disappointment that the Claimant was not going to be back to work for a further period. We find it unlikely that the comment expressed irritation but more disappointment that the Claimant was not well enough to return to work.

177 The Claimant met with Dr Amy Iversen, Consultant Psychiatrist, on 1 February 2016. Dr Iversen recommended that the Claimant should see Dr Sarah-Jane Khalid, a psychologist specialising in cognitive behavioural therapy. The Claimant had nine one-to-one sessions with Dr Khalid for a period concluding on 28 April 2016.

178 Also at the beginning of February, the Respondent had further correspondence from Edward Hadas who was still off with stress. On 16 February, Mr Foley emailed Mr Cox to ask if they could discuss the EMEA editing team. He was concerned for the members of the team who were still at work given that both the Claimant and Mr Hadas, as senior editors, was off sick. Mr Hadas was a senior writer and had also done a lot of editing. He was very unwell and unlikely to return to work until at least April/May 2016. He said "*if Edward is gone for at least 6 months, and not coming back at all in his former capacity – and it's probably not unrealistic to assume something similar for Robert – we should be planning to add another editor. We're currently running with two, and it's not sustainable. Edges are beginning to fray."* We find it likely that Mr Foley simply wanted to discuss how to manage the work while these senior members of staff were off, with the awareness that this was a busy office with daily deadlines to meet. He did not suggest a permanent replacement for the Claimant but instead suggested adding another editor.

179 The Claimant occasionally sent medical certificates and emails giving updates on his health to Mr Wilson.

180 Between 13 and 20 February 2016, the Claimant and his family went on a skiing holiday. This holiday had been booked for some months previously.

181 On or around 16 February, Mr Cox sent Mr Foley a copy of a photo that the Claimant had posted on Facebook showing him and his family on the skiing trip. The Claimant was Facebook friends with some of his work colleagues. Mr Cox's comment on the photo was: "*this sort of pisses me off*". In another email he speculated that there were rules against this sort of thing and stated that it made him *"feel a bit taken advantage of"*. The comments were about the Claimant and not anyone else in the photo.

182 In his evidence, Mr Cox stated that his comments in the email was a little ungenerous and that he ought to have forwarded the email to Mr Foley without comment. He admitted to speaking bluntly. It was not a considered view but we find that it showed that his initial reaction was that he was not pleased that these photos were on Facebook. He was concerned about how these photos looked to the Claimant's colleagues – especially when he had been fielding questions from staff about the Claimant's ill-health and when he was going to return to work. He considered it tactless of the Claimant to put his skiing holiday photos on Facebook.

183 Mr Cox's evidence was that he did not consider that the Claimant was malingering or that he was exaggerating his illness. However, the office continued to be busy and the Respondent had two senior members of staff out of the office on ill-health and this was his immediate reaction to seeing the photo. Mr Foley spoke to Mr Wilson, once they had both seen the photo and they were both of the opinion that a holiday can be helpful in the context of stress and depression. This was also a pre-booked holiday and not been taken on a whim while the Claimant was off sick. They agreed that it was not unusual for a doctor to prescribe a holiday to help a patient with mental issues. No action was taken by the Respondent on the Claimant's post on Facebook or on his holiday trip which he was entitled to take when off sick.

184 We find it likely also that as the Claimant was Facebook friends with many of his colleagues, the Respondent had a genuine concern that the Claimant's colleagues, who were also his Facebook friends, could see his photos about his holiday and may ask questions about his continuing absence. It is likely, that if anyone did do so, Mr Foley would have told them that the Claimant was on holiday and that he was still absent due to his ill-health. Mr Foley's comment on the photos to Mr Cox was that they did not look great. He also stated that he supposed that if one is depressed, having a holiday is a legitimate thing to do. He agreed that it raised questions about fitness to come to work. Whether Mr Cox and Mr Foley had thoughts about the Claimant not being as sick as the medical certificates made out, after the conversation with Mr Wilson, they took no further action on this matter and made no comment to the Claimant on it.

185 On 26 February, Mr Foley emailed Mr Wilson to suggest that they should speak about the Claimant's continued absence and that the Respondent needed to think about how it could bring this to the least painful outcome. Mr Foley's explanation of that statement in his witness statement was that he meant that it was appropriate for both parties to start considering whether the Claimant would prefer to leave the business in an amicable arrangement with a severance package instead of remaining employed. He thought that the Claimant may be interested in this because he had said in their last meeting on 8 January, that he did not feel he could work with Mr Foley. Also, in their meeting on 13 November he stated that he did not like his job and only did it for the money.

186 The Claimant remained unwell after his holiday. In consultation with Dr Iversen, on 22 February, she recorded that the Claimant was despondent and hopeless and his mood did not seem to have improved with the new regime but that this may be because he had not been taking the medication as regularly as planned. The Claimant was signed off sick by his GP from 25 February to 4 April.

187 Mr Foley emailed Mr Wilson to get an update on the Claimant's situation and when he would be back at work. During correspondence between Mr Foley, Mr Wilson and Mr Cox; Mr Cox made the comment*: "assuming he is back from his ski vacation"*. This was on 25 February. The comment was inappropriate. The Claimant was ill and had a short ski holiday with his family, which had been pre-booked some time before. However, Mr Cox's explanation that it was a poor attempt at humour is likely to be true. Mr Cox did not actually mean that the Claimant could still be skiing and it is unlikely that he was suggesting that the Claimant was malingering or was exaggerating his illness. If he had thought that to be a possibility it is likely that he would have started some type of investigation into the Claimant's illness and that did not happen. He did not expect the Claimant to see the email. It is likely that he wrote what he considered to be joke while in the email discussion with Mr Foley.

188 Mr Wilson wrote to the Claimant to ask for an update on his health. We find that on the following day, 26 February, Mr Wilson received an email from the Claimant in which he said that he would need more time off work. He proposed getting in touch in two weeks' time with a further update. The Claimant was a senior employee and an important part of the London office. Mr Wilson forwarded the email to Mr Cox and Mr Foley. They were disappointed that there was no suggestion as to when the Claimant would be returning to work and no suggestion of what they could do to help him to do so.

189 Mr Foley wrote an email stating *'I think we need to think about how we can bring this to the least painful outcome*'. Mr Cox responded by saying *'Time for Britain to exit the EU?*'

190 We find that they were both raising the possibility of the Claimant leaving the Respondent on agreed terms. In the beginning of 2016 it was widely thought if the Leave campaign was successful at the forthcoming referendum, Britain would be able to negotiate its way out of the EU and that is why we find that the comment is about a negotiated settlement rather than the start of capability procedures or of dismissal, otherwise the comparison would not work. Similarly, we find that Mr Foley's comment about how '*we'* can bring this to the least painful outcome is also a reference to a settlement negotiated between the Respondent and the Claimant, the outcome of which would be the Claimant's departure from the business on agreed terms. Lastly, we find that around this time Mr Foley was himself undergoing treatment for depression. He did not see this as an instruction and was unlikely to agree to terminate an employee in similar circumstances where there has been no investigation by the employer.

191 However, the Claimant had previously made comments about leaving the business as far back as his most recent application for the job of EMEA editor. As we found above, he told Mr Hadas that if he did not get the job he would look to go elsewhere and the Respondent was aware of that. In his appraisal meeting and in the meeting on 8 January he had said to Mr Foley that he would look for another job and that he did not enjoy this job. We find that Mr Foley and Mr Cox were raising the possibility of this being an attractive option for both parties.

192 The Claimant's contact with the business during his sick leave was with Mr Wilson. He sent him sick certificates and emailed him periodically to inform him that the sick leave was continuing. He was unable to say when it was likely that he would return to work or what the Respondent could do to get him back to work. The Claimant was too ill to start to think about that. Apart from his initial email, the Claimant did not contact Mr Foley or Mr Cox.

193 Mr Foley wrote to the Claimant to confirm his annual salary increase of 2% and a bonus based on 90% individual achievement of his target bonus as well as a business achievement of 92%. This reflects the fact that the Claimant had been appraised positively for 2015.

194 On 8 March the Claimant wrote to Mr Wilson to inform him that his recovery had taken a setback and, he had acquired some complications that necessitated a 5-hour visit to A&E the previous evening. When Mr Foley saw that email, he expressed concern that the Claimant may be getting stressed by receiving group emails and asked Mr Wilson whether it would be better to remove him from those so that he would get fewer work emails. He stated that he did not want the Claimant to feel side-lined. He also stated that he hoped the Claimant was doing ok.

195 The Respondent arranged for an OH adviser to have a consultation with the Claimant and prepare a report. The Respondent does this as a matter of course when an employee is off on sick leave for more than a month. Martine Lewis, the OH adviser, spoke to the Claimant on the telephone on 14 and 16 March 2016. She then prepared a written report in which she stated that the Claimant had described to her a recent period of decreased psychological resilience and hypervigilance which he attributed to significant work-related concerns. He had informed her of his medical history of depression and anxiety over 25 years which he considered were usually well-managed and had, historically not impacted his attendance at work. The present issues related to the Claimant's perception of the issues he was having with his manager pertaining to communication and feedback. She could give no definitive answer as to when the Claimant was likely to return to work.

196 It was her professional opinion that the Claimant had developed psychological symptoms in response to his perceptions of the significant issues within his employment. She confirmed that he had a long-term history of psychological ill-health which made him more vulnerable to anxiety and depression, but that at the time he was displaying a response to significant situations that had put him under strain. She referred to issues with his manager pertaining to communication and feedback. She confirmed that it was the Claimant's perceptions of the situation that were preventing him from returning to work.

197 Ms Lewis recommended that there should be a dialogue between the Claimant and the Respondent to work out a solution acceptable to both parties, although that should not start for two months as the Claimant was too unwell at that time. In her report she stated that the Claimant may need some psychological input to bolster his capacity to cope with the situation whilst a resolution is sought. She advised that in order to alleviate the anxiety that the Claimant has about returning to work, the Respondent should arrange for him to come into the workplace to be able to re-acquaint himself with the work environment and discuss his return to work in detail.

She recommended that there should be a comprehensive Stress Risk Assessment undertaken using a suitable tool such as the 'Management Standards' to ensure that the Respondent had a good awareness of the specific ways the Claimant's role could cause him to feel stressed and what management interventions the Respondent might be able to do to support him. Lastly, Ms Lewis confirmed that the Claimant was fit to carry out his role and that it was likely that his symptoms would begin to improve if those matters were addressed and medical support was put in place. Conversely, she stated that if those issues were not resolved and remained ongoing for a prolonged period he may be likely to incur additional absences into the future and it may act as a barrier regarding his capacity to carry out his job role effectively. She recommended that if a return to work was agreed, it should be on a phased basis and that the Respondent may want to consider flexibility around the Claimant's need to have time out of the office to attend psychiatric and GP appointments. Ms Lewis confirmed that the Claimant was likely to be covered under the Equality Act 2010 as a disabled person.

198 We find that in an email to a colleague on 16 March, Mr Wilson stated that the reason the Claimant was off sick was because the Respondent had started an informal capability process. In the hearing he denied that this was the case. In his witness statement he said that he had used loose language in an email between colleagues and that what he meant was that the Claimant had been spoken to about his performance.

199 We find that a couple of days after the OH appointment, on 18 March, the Claimant emailed Mr Wilson to acknowledge that the parties needed to start a dialogue but that he was too ill to do so at that time. He was unable to attend a meeting that they had arranged for that day and had been advised by his doctors that meeting with the Respondent now would be likely to exacerbate his symptoms.

200 Later, in an email to Mr Wilson of 31 March 2016 the Claimant indicated that he wanted to raise a grievance.

201 Mr Wilson responded to advise that the Claimant should consider trying to resolve matters informally first. Mr Wilson advised him that the Respondent's grievance procedure recommended that this should be tried first and only if it was not possible to resolve things informally then he could pursue a formal grievance. In his witness statement the Claimant stated that the 8 January meeting had been the Respondent's opportunity to resolve matters informally although we find it unlikely that Mr Foley understood that meeting to be an attempt to resolve any dispute between them. At the time, the Claimant did not refer to the 8 January meeting but submitted his written grievance on 2 June and indicated that he would also be bringing a claim in the employment tribunal.

202 In early April, in a set of email exchanges between Rob Cox, Richard Baum, the Respondent's General Manager and Keith Wilson/Jennifer Dukharan, HR managers; the Respondent discussed the situation at the London BV office and how to manage with the absence of two of the more experienced staff on sick leave and with the workload that had to be completed.

203 Mr Foley was trying to manage with two of his three editors (Mr Hadas and Claimant), out of the office. Mr Foley and Mr Hay were doing all the editing and according to Mr Cox, Mr Foley was at '*breaking point'*. The Respondent was concerned about burnout for those staff and/or the BV quality being compromised. It was from this perspective that Mr Cox got his HR manager in the US, Laura Nagy, to ask Mr Wilson when was it legal and/or appropriate to replace the Claimant. Also in that email he asked whether someone called Edward Harthsworth was still on long leave and what needed to be done about that. We were not told that Mr Harthsworth was disabled.

204 Mr Cox also asked the same question about the Claimant in another email the following day. He stated - '*Can we terminate Cole?*'. This email upset the Claimant greatly when he read it much later when it was disclosed to him as part of these proceedings. It was a stark statement that Mr Cox did not intend the Claimant to see. In his evidence he stated that he was asking HR for guidance and was not giving them an instruction. He did not think it was appropriate to take anything off the table.

205 We find that in an email on the following day Mr Cox asked when Mr Hadas' support would *'run out'* and when the Respondent could seek a replacement for him.

206 Mr Wilson advised the Respondent that it could not terminate the Claimant but could second someone to cover his post or use freelancers. Mr Wilson also gave Mr Cox the impression that there had been a few times that he had arranged to speak to the Claimant when the Claimant has not been able to meet as not well enough. He stated that due to the Claimant's illness he had not pushed that any further with him. We were only told of one occasion when this happened. But the impression that Mr Wilson gave annoyed Mr Cox who stated in his reply that he felt that the Claimant was *playing* the Respondent by not agreeing to engage. He instructed Mr Wilson to prepare a severance offer as the Respondent needed another full-time editor. He also wanted to telephone the Claimant and find out if there was a reasonable prospect of him coming back. In his evidence Mr Cox stated that he thought the Claimant was trying to extract higher settlement sum to leave. That was unlikely to be true because as far as we were told, no discussions had taken place between the parties about the Claimant leaving his employment. We find it likely that Mr Wilson advised him that it was not clear whether the Claimant was '*playing'* the Respondent but that he could not be permanently replaced as he could return to work. It is likely that Mr Wilson also told him that he should continue to be the main contact with the Claimant.

207 Mr Cox did send the Claimant an email on 14 April enquiring after his health.

208 Mr Cox had not seen the OH report from Ms Lewis before he spoke to Mr Wilson and had not been aware of how ill the Claimant was. All he knew was that the Claimant's doctor had advised him not to contact the Respondent. As Mr Wilson had been direct contact with the Claimant and saw the report, he was able to let Mr Cox know more details in the telephone conversation. He did discuss with Mr Cox that the Respondent could discuss mutual termination with the Claimant which would not be like a severance.

209 Mr Wilson also spoke to Ms Nagy, his HR counterpart in the US.

210 We take judicial notice of the fact that employment law and employment rights are completely different in the USA compared to the UK and that it is likely that employees have less rights in the USA and that this is what Mr Cox was used to. It is likely that Mr Wilson enlightened Ms Nagy and Mr Cox on the differences in these calls.

211 Mr Cox met with Richard Baum, the Respondent's General Manager for Global Operations and they discussed the London BV office and resources generally. Mr Baum later sent an email confirming that Mr Cox had authorisation to bring in some freelance help for Mr Foley from May.

212 On 18 April Dr Arkell, the Claimant's Consultant Psychiatrist, wrote to the Respondent to confirm that he had adjusted the Claimant's medication and that he had been profoundly agitated and depressed in their consultation that day. He informed the Respondent that he had advised the Claimant that he was not currently in a fit state to cope with conversations about his employment but should focus over the next few weeks on his recovery and the therapy group programme to which he belonged.

213 The Claimant also sent in a sick certificate which confirmed that he was signed off with anxiety with depression until 13 June 2016. Mr Wilson forwarded these documents to the Claimant's managers and informed them that '*our hands are tied on this until he is in a fit state to talk to us*'. We find it likely that he meant that no further action – including holding meetings, telephone calls, or anything else could happen until the Claimant's Consultant advised that he was fit to engage.

214 On 19 May the Claimant's condition deteriorated considerably and he was hospitalised in the Nightingale Psychiatric Hospital. He had already been undertaking a course of intensive day care involving CBT and IPT (inter-personal therapy) there. He was kept under 15-minute suicide watch.

215 On 23 May the Claimant was referred by Dr Arkell, his consultant psychiatrist, Monica Cain for individual psychotherapy. The doctor advised that he should have a further 3 months sick leave so that he could recover fully before returning to work. The Claimant had spoken positively about the possibility to returning to work in their session, albeit to a different part of Reuters.

216 Once the Respondent received the Claimant's detailed grievance on 2 June, Mr Wilson informed Mr Cox that he had received it and that he would meet with Mr Foley to go through it. Although Mr Baum made an off-the-cuff comment about the grievance after he read it, we find that the task of addressing the Claimant's grievance was given to David Crundwell, a manager from Corporate Communications. Mr Baum did not investigate or decide the Claimant's grievance or contribute to the grievance process.

217 Mr Cox also commented after an initial read of the Claimant's grievance. He said that he felt for the Claimant but did not see how the Respondent could be held responsible for the Claimant's present state of health. His comments were shared with Mr Baum and Mr Wilson. We did not have evidence that either Mr Baum's or Mr Cox's comments were shared with Mr Crundwell.

218 Mr Wilson planned to meet with Mr Foley to go through the grievance. We find that he wanted to explain the Respondent's grievance process to Mr Foley and to tell him to expect the hearing manager to be in touch to discuss the issues raised in the grievance with him. Mr Wilson did reassure Mr Foley that from what he had heard about his relationship with the Claimant, he did not think that he done anything wrong. This was Mr Wilson's opinion. We find that he did not tell Mr Crundwell what should be the outcome of the grievance.

219 The Respondent wrote to the Claimant on 9 June to inform him that David Crundwell was going to hear his grievance. The Respondent wanted to meet with the Claimant to discuss his grievance. They offered to speak to him on telephone or arrange to meet outside of the office, if it would help. The Claimant felt too ill to do so and in accordance with the medical advice from Dr Arkell and his GP - Dr Sobolewski, he declined to meet with the respondent. A letter from Dr Arkell of 13 June advised that the Claimant's mental state remained very fragile and that engaging in a telephone call or receiving emails from Respondent could be overwhelming for him.

220 The Claimant and his solicitors asked the Respondent to communicate directly with them rather than continuing to write directly to him because of the state of his health. The Claimant was prepared to answer any questions in writing from the person conducting the grievance.

221 The Respondent sought clarification on the Claimant's desired outcome from his grievance and continued to write directly to him about this even though Mr Tsitsirides of HR was asked to communicate with him through his solicitors. This upset the Claimant. He indicated that he did not know precisely what his desired outcome was and this would depend on the Respondent's findings and the proposed remedial actions.

222 Mr Crundwell interviewed Mr Foley as part of his investigation grievance on 16 June 2016. He was asked to talk about his relationship with the Claimant and about the work done in the BV office as well as how it had changed over the years. He confirmed that in the beginning, the focus had been on being financially sharp and been able to do maths but that changed in 2010 and that the focus was less concerned about financial literacy. He stated that within the last year, the focus had brought back to the importance of financial knowledge and analysis. However, he confirmed that the 3 main competencies were speed, analysis, and having a view. Those competencies had not changed.

223 Mr Foley confirmed that the goals of every journalist on BV was to write agenda-setting pieces with financial insight and to set the agenda on finance and markets with reference to their chosen topic. That had always been the official purpose of BV, which had not changed. He confirmed that there had been a lot of frustration in the team when he joined and that most had been feeling a bit directionless. Some like the Claimant, had no formal objectives set for them.

224 He confirmed that he had known about the Claimant's disability from 30 March 2015 and that he listened when the Claimant told about his condition at a meeting sometime later. The Claimant told him that he was on medication.

225 From the minutes of the interview we find that they discussed the M&S article, the appraisal meeting on 7 January and Mr Foley's management of the Claimant. Mr Foley confirmed in the meeting that the Claimant did have some baseline skills but that he lacked others and that he did say that to him in the appraisal meeting. The evidence he gave to Mr Crundwell was like the evidence he gave on those matters to the Tribunal in the hearing. Mr Foley confirmed that he also found the 7 January meeting to be traumatic as the Claimant had got upset.

226 Mr Foley's last comment to Mr Crundwell was that the Respondent should have a more organised way of managers getting information that they need when they must deal with direct reports who possibly have needs that are similar to the Claimant's.

227 Mr Crundwell wrote to the Claimant on 15 July to inform him of the outcome of the grievance. He found that although Mr Foley discussed what his 2016 goals might look like and that they were likely to be different to that of 2015; he found that Mr Foley did also say that they would need to work together to set new goals and make sure that they were achievable for him.

228 He did not agree that the Claimant was appraised on 2016 objectives as at that point, they had not been formally set. He did not agree that Mr Foley had deviated from the Respondent's performance assessment system or that he failed to follow the company's own policies, guidance or standards on performance assessment. He concluded that Mr Foley had been fair and balanced in the way he assessed the Claimant's performance and had been supportive, constructive and open-minded in meetings with the Claimant.

229 Mr Crundwell concluded that the statements about being aggressive and defensive and willing to learn were said in response to comments that the Claimant made in the appraisal meeting rather than as a judgment of his performance in 2015.

230 Mr Crundwell decided that the appraisal meeting had been prearranged and was a standard appraisal meeting. There had been no need for the Claimant to have a representative or colleague presently him in appraisal meetings in the past and there was no indication that the Claimant needed such assistance on this occasion. The Claimant had not asked to be accompanied or to have HR present. As he said in his grievance letter, the Claimant's condition had been managed, with medical advice, medication and support from family and friends, in a way that has not impeded his ability to do his work. Even when Claimant was unwell in November 2014, Mr Crundwell found in the records that the Claimant had reassured the Respondent that his condition was managed as a private matter and did not need to impede his ability to do job.

231 Mr Crundwell did not uphold the Claimant's grievance. However, his decision confirmed that the Respondent was aware that the Claimant's condition had worsened in recent months and undertook to do what it reasonably could do to support the Claimant regarding his return to work, when he is deemed fit to do so. Mr Crundwell declined to propose any remedial actions by the Respondent, especially as the grievance had not been upheld. However, he acknowledged that many of the issues in the grievance may have arisen from misunderstandings in the communications between the Claimant and Mr Foley and he recommended that they should both enter

a mediation process conducted by a trained mediator as soon as the Claimant was deemed fit to participate in the same. He confirmed that Mr Foley was keen to enter into a mediation process with the Claimant to help to draw a line under the matter; and to address any issues and reconcile any differences so that they could continue to work effectively together in a friendly and supportive environment.

232 While the grievance progressed, the Claimant's paid sick leave came to an end. In anticipation of this, the Claimant's solicitors wrote to the Respondent on 5 July to ask for the Claimant to be considered for the Respondent's permanent health insurance or Long-Term Sickness (LTS) scheme. The Respondent asked Dr Arkell in emails whether it was okay for it to write directly to the Claimant to confirm the end of his contractual sick pay, before writing to him. in an email dated 24 May Dr Arkell confirmed that it was okay and the letter from HR was sent to the Claimant on 25 May.

233 The permanent health insurance scheme (LTS) was a company-funded scheme. It was understood that it would pay 70% of an employee's salary if they are unable to attend work due to medical capacity and have had continuous absence from work for more than 26 weeks.

234 The Claimant did not accept the results of the grievance and appealed on 22 July 2016. Another manager called Kate Toumazi heard the grievance appeal. She interviewed Mr Foley on 31 August 2016. In his interview, Mr Foley outlined how the BV London service was when he took over the EMEA editor post and that he had received feedback that the quality and timeliness of the service was not being maintained. He informed staff that things had not been running as tight as they could have been and that it would be an adjustment for them to bring it back to the level it should be but that in turn, he would make sure that they got good readers and were recognised for their brilliance. He insisted on staff not continuing to work late as they had gotten in the habit of doing but wanted them to rise to the challenge of getting back to good quality writing and producing a timeous product.

235 Ms Toumazi had interviewed a few of the Claimant's colleagues before she saw Mr Foley. We saw statements in the bundle from Swaha and George Hay.

236 Ms Toumazi did not uphold the Claimant's grievance appeal. She set out her findings on the points of the Claimant's appeal in her decision letter of 27 September 2016. She acknowledged that as the Claimant took serious issue with Mr Crundwell's suggestion of a mediation process, it was difficult to formulate a solution. She informed him that this was the end of the grievance process. Also, that as he was still off sick, the Respondent would continue to do all that it reasonably could to try and facilitate his return to work, either as an Editor within BV or in an available suitable alternative position that the he would happier in. She invited the Claimant to indicate whether he was interested in exploring ways in which they can work together to make this happen.

237 By the time of the grievance appeal the Respondent was corresponding with the Claimant's solicitors. The Respondent agreed to do this in July but had occasionally corresponded with Slater & Gordon solicitors on the Claimant's behalf before that as well as Mrs Cole.

238 We find that the Claimant issued his 1st Employment Tribunal claim on 3 June 2016. On 18 July, the Respondent released copies of emails, letters and other documents following the Claimant's Subject Access Request. Many of the documents the Claimant received from the Respondent have formed the basis of his second claim.

239 In the middle of July there was correspondence between the Claimant's solicitors and the Respondent's HR Manager, Stephen Morgan about the process to get the Claimant on to the Long-Term Sickness or PHI scheme. The Respondent needed to have another OH report done specifically for the consideration of his entitlement to payments under the scheme.

240 On 19 July, Dr Arkell wrote to the Claimant's solicitor confirming the details of his ill-health to enable the Claimant to pursue his application for payments under the LTS scheme. The doctor confirmed the Claimant's diagnosis of a severe current episode of recurrent depressive disorder. He stated that in his last meeting with the Claimant he remained agitated and with suicidal thoughts and was therefore unfit to return to work. It was his professional opinion that even when better, the Claimant was least likely to be able to return to the department where he was last working as this was the place where he descended into severe depression and he did not believe that this had been recognised. He anticipated that the Claimant may well be able to return to work in the future somewhere else in the organisation.

241 The Claimant was referred to occupational health for a further review in relation to his claim for payments under the Long-Term Sickness scheme. In the interim, the Claimant was entitled to SSP. The Respondent wrote to Health Management Ltd, the Respondent's OH provider, to ask it to assess the Claimant and provide a report that addressed the Claimant's his underlying health issues as well as assessing him in relation to his application to be considered under the company's LTS scheme.

242 The Claimant met Dr Mark Harvey of Health Management Ltd on 19 August 2016. Dr Harvey's report was produced on the same day. He confirmed that the Claimant had ongoing severe symptoms of depression that are leading to profound levels of functional impairment on a day-to-day basis. His medical opinion was that the Claimant remained unfit for his role and that because of the severity of his condition there were no adjustments that could be recommended at this time that would enable him to return to work.

243 He confirmed that although he had had some episodes, the Claimant had not indicated to him that he was aware of any specific triggers over the years. Dr Harvey's observation was that in relation to the most recent episode, it was likely that the perceived criticisms of the Claimant's work, (work to which he had been deeply committed), at the January appraisal meeting, led a catastrophic reaction.

244 Mr Harvey did not expect Claimant to recover's his well-being or be able to return to work in the short term. His opinion was that any recovery would be in the long term. He did not feel able to offer any advice on adjustments that would be likely to support a return to work but did say that if the Claimant was to return to work it should be on a phased-return basis, over a period of 2 to 3 months. In the meantime, his assessment was that the Claimant's recovery was likely to follow a slow trajectory.

245 Mr Harvey confirmed that he had obtained the Claimant's consent before sharing the report with the Respondent and that he had given the Claimant a copy.

246 The Claimant was accepted onto the Respondent's LTS scheme and was informed of this in a letter dated 9 September 2016. We find that the letter set out the terms under which the Claimant was accepted on to the LTS scheme. It informed him that he may be required to attend medical review every 3 months - counting from the start of his entry into the scheme, as appropriately determined by the Respondent. It stated that the review would normally be with an Occupational Health Adviser, physician or other medical practitioner nominated by the Respondent. Importantly, it stated that at each review the Respondent will consider his continued eligibility to participate in the scheme and/or whether any steps can be taken to facilitate his return to work, if appropriate.

247 The letter also stated that if the Claimant's health improved, the Respondent would consider the possibility of him returning to his current role as Assistant Editor or if that was not reasonably practicable, to an alternative vacancy. The Claimant was also given a copy of the scheme rules.

248 The Claimant signed this letter to agree to the terms and conditions of the LTS scheme on 12 September 2016.

249 We had a copy of the respondent's absence and sickness policy in the bundle of documents which set out details of the LTS scheme. At page 177 it stated that this was a discretionary scheme, which provides for certain benefits to be paid to employees unable to work due to medical capacity and who have continuous absence from more than 26 weeks. Consideration for acceptance of the scheme will be due to an employee being unable to perform the principle duties of their usual role or occupation to a substantial extent; or unable to perform the principle duties of any other role or occupation that the company considers would be suitable for them, considering their skills and experience. In the form the Claimant signed the accept the terms and conditions of the LTS scheme, he agreed to regular medical reviews whenever deemed appropriate by the Respondent, to ensure that he remained eligible to receive benefits under the scheme.

250 The Claimant has been in receipt of payments of 70% of his basic annual salary since September 2016 but backdated to July 2016. The Claimant is not entitled to bonus payments while on this scheme.

251 On 28 June, Mr Foley emailed Mr Wilson and Mr Cox and referred to some postings that the Claimant had done on Facebook commenting on the national vote on whether to leave the European Union or *Brexit* as it is known. He did not send it to anyone else. Mr Foley was quite frustrated to discover these posts as his understanding was that the Claimant was too "*distressed to communicate*". Mr Foley ended the email by asking for an update on the situation. He was particularly frustrated as if the Claimant had been at work, a commentary on *Brexit* was the sort of thing that he would have been asked to write as part of his job. The Respondent had not been aware that the Claimant was well enough to engage in this form of activity.

252 Mr Foley considered that it was appropriate to send copies of the Facebook commentaries to his manager, Mr Cox and to Mr Wilson who was handling communications with the Claimant while he was off sick. He was also aware and mentioned in the email to them that the Claimant's commentaries could be seen by his colleagues who were his friends on Facebook. That gave him additional cause of concern as the Claimant's colleagues had been asking questions and wanted to know where he was and what was wrong with him. Although Mr Foley had not divulged anything to them, it is likely that he was finding it difficult fielding their questions.

253 We do not find that Mr Foley was suggesting that the Claimant was acting tactically or behaving in a contrived manner regarding his sickness absence. Mr Foley was not in communication with the Claimant during his sickness absence and was not managing that process. Mr Foley had not been involved in referring the Claimant to OH or in processing his application for payments under the LTS scheme. Mr Foley had not seen the first OH report until he read it in the bundle of documents in preparation for the Tribunal hearing. It was not clear when he saw the OH report obtained for the assessment of the Claimant's eligibility for the LTS scheme. Mr Wilson had kept him informed of the Claimant's health and progress and it was to him that he sent the email about the Claimant's *Brexit* commentaries on Facebook. He was therefore not aware of the up-to-date situation with the Claimant's health and would not have been in a position to question it.

254 Mr Foley denied that the statement in paragraph 13 of the Respondent's Response was an accurate reflection of what he believed at the time. He stressed the word '*might'* in paragraph 13 and was adamant that he was not suggesting that the Claimant was malingering or exaggerating his illness but was expressing his frustration with the situation.

255 There was no communication from the Respondent to the Claimant questioning querying or questioning his writing about *Brexit* or any other matter on Facebook. The matter had been the subject of comment by Mr Foley but went no further.

256 In December 2016, the Respondent wrote to the Claimant to inform him that as part of the LTS scheme, the time had come for him to be seen by the Respondent's nominated health practitioner for an up-to-date medical report. It had been 3 months since he had been accepted onto the Scheme. The Respondent informed him that it would arrange for the Claimant to see a psychiatrist who would give an up-to-date report on his condition.

257 The Claimant confirmed in an email dated 14 December to Ms Brooks that he consented to undergo a medical examination by a psychiatrist nominated by the Respondent and for that doctor to disclose to the Respondent a report arising from the same.

258 On or around 13 January, the Claimant attended an appointment with Dr Arkell, his consultant psychiatrist. Dr Arkell noted in a letter to the Claimant's GP that the Claimant had been quite agitated and distressed, which had become worse after receiving communications from the Respondent. He advised that the Claimant should not have any contact with the Respondent as it created a tense and dangerous situation on every occasion. He suggested that the Claimant's contact should be the via OH, with Dr Mark Harvey.

259 Mrs Cole wrote to the Respondent on 19 January reiterating Dr Arkell's advice that OH, and in particular Dr Harvey, should be the Claimant's contact with the Respondent as he did not want to share his personal medical records with staff at the Respondent or with the Respondent's solicitors. Mrs Cole stated Dr Arkell had advised that the Claimant should avoid direct contact with the Respondent and keep his contact through the OH professionals. Mrs Cole indicated that she was happy to deal with matters that were purely mechanical such as the request for a P60 but that more substantial stuff should go through Dr Harvey who could act as a 'buffer' between the parties.

260 Ms Brooks and Mr Wilson discussed the Claimant's request and thought that it would be impractical for the Respondent to communicate with the Claimant via external OH as they are medical professionals and not appointed to act as intermediaries or a 'buffer' between an employer and its employees. In addition, an OH provider would not be familiar with the Respondent's policies and procedures. Ms Brooks considered that it was important for the Respondent to be able to communicate directly with the Claimant or with his solicitor or family, as he had requested.

261 The Respondent replied on 25 January to say that it was not possible for Dr Harvey to be the point of communication between it and the Claimant, who was its employee. At that time, Dr Harvey was no longer involved in the Claimant's case. Ms Brooks wrote in similar terms to the claim escorts ant solicitor. She stated that it was important that the Respondent had the ability to communicate with the Claimant about his employment and the LTS scheme as he continued to be its employee.

262 The Respondent was content to communicate with Mrs Cole in relation to the OH appointments, LTS scheme and GP notes and send all other communications to the Claimant's solicitor, in accordance with his earlier instructions. The Respondent also agreed to amend the medical records consent form so that the Claimant was the consenting to his GP and medical specialists forwarding their medical records directly to Dr Isaacs. We had copies of the consent forms in the bundle of documents which showed that the Claimant was authorising his GP and other medical professionals to send copies of his medical records in their possession to Dr Isaacs.

263 The Claimant continued to be unhappy about this response and insisted that the only adjustment that would be appropriate and acceptable to him was for the Respondent to use the OH professional as an interface between him and the Respondent on matters regarding his health. The Claimant considered that the Respondent was being obstructive, inconsiderate and unhelpful.

264 On 12 January 2017, the Claimant's solicitors wrote the Respondent to inform them that he had received medical advice that his recovery would be assisted by keeping familiar with the world of work. The Claimant asked the Respondent for permission to do unpaid voluntary work unpaid for a not-for-profit social investment intermediary called Social Finance, for 6 hours a week.

265 Ms Brooks, the HR adviser who the Claimant wrote to was not able to authorise this on her own so she replied to confirm that she had received the letter and that the acknowledgement should not be taken as acceptance of the request.

266 We find that the Respondent made an appointment was made for the Claimant to see Dr Geoff Isaacs, Consultant Psychiatrist on 23 March 2017. The Respondent did not send the Claimant a copy of the letter of instruction it had sent to Dr Isaacs dated 14 February 2016.

267 In a letter dated 14 February, the Claimant's solicitors gave the Respondent more information on the Claimant's present state of health and what it was proposed that he should do with Social Finance. It had been recommended by his medical practitioners as a way to reacclimatise him to commuting and the social interactions that come with an office environment. It was expected that he would attend some meetings – with no obligation to contribute – and do some reading at home. If this was successful, it was proposed that he should get involved in editing some of Social Finance's materials. No specific period was agreed for the volunteer arrangement but it was agreed that he would spend 2 hours in the office on Tuesday and do the reading beforehand over 4 hours on a Monday.

268 In a letter dated 23 February, Kelly Brooks of HR confirmed that the Claimant was authorised to carry out the voluntary work with Social Finance. He was to notify the Respondent if he was ever aware of a conflict between his voluntary work and his work for the Respondent. The Respondent stipulated that if the Claimant wanted to do more work with Social Finance he would need to let it know.

269 We had evidence from Mr David Hutchinson, the CEO of Social Finance who confirmed that the Claimant had volunteered with the organisation and that the Claimant had a broad knowledge of the financial sector which he brought to the organisation. Although he has known the Claimant for over 20 years and considered him a friend, it was only in 2016 that he became aware that the Claimant had mental health issues. During his time as a volunteer the Claimant created a spreadsheet to calculate – using a discounted cashflow methodology - the value of the Respondent's LTS scheme. Mr Hutchinson was impressed with this work.

Dr Isaacs report

270 We find that the Claimant met Dr Isaacs on 23 March 2017 for a review his health as part of the LTS scheme. Dr Isaacs also obtained a summary of the sessions that the Claimant had with Monica Cain, his psychotherapist, as well as information from his GP and other medical professionals who treated him.

271 Mrs Cole accompanied the Claimant to the meeting with Dr Isaacs. She wrote to the Respondent later that day to let the Respondent know how incensed the Claimant was about his meeting with Dr Isaacs and that he believed that he had been asked to go to the meeting under false pretences. The Claimant was unhappy about being asked questions about his employment position and his plans for the future. He initially refused to answer those questions but did answer some and Mrs Cole stated that he now wanted to retract the answers that he had given.

272 She made it clear that the Claimant did not consent for any material gathered or discussed at the meeting with Dr Isaacs to be shared with anyone. The Claimant felt completely unprepared for the questions he was asked at the meeting.

273 On 24 March, the Respondent's HR wrote to Dr Isaacs secretary to say that the Claimant could not be allowed to make any changes to the report before the Respondent saw it. The Respondent also did not want the report changed based on the Claimant's suggestions. The Respondent was happy for the Claimant to see the report and make comments but was clear that no change should be made to report before it was sent to the Respondent. In her response email, Dr Isaacs' secretary confirmed that she was aware of this and that no changes would be made.

274 We find that the Respondent wanted to have the doctor's opinion on the Claimant's health, prognosis and treatment without the Claimant's subjective opinion/thoughts being added to it.

275 The Claimant received a copy of Dr Isaacs draft report on 4 April 2017.

276 On 20 April, Mrs Cole wrote to Dr Isaacs to say that the Claimant wanted to put some of the things he had said in their meeting into context or comment where he believed that some things had been misinterpreted. The Claimant set out points that he wanted to make on the content of the report. Mrs Cox also stated that the Claimant did not agree to the report being sent to the Respondent in its current form and asked the doctor to confirm that he had not yet sent it on to the Respondent.

277 On 21 April Dr Isaacs secretary wrote to Mrs Cole. She wrote that Dr Isaacs believed that the Claimant would let him know of any typographical letters which he would correct but otherwise, his other appropriate comments would be contained in a letter which would be sent with the report to the Respondent.

278 The Claimant's solicitors then took over correspondence with Dr Isaacs about the report. In a letter dated 26 April, they reminded Dr Isaacs that any opinion he included in the report should be balanced and that if a patient asked for errors of fact to be corrected that should be done as well as any opinion based on those errors. The Claimant's solicitors quoted extensively from the GMC guidelines in the letter.

279 Dr Isaacs perceived this as a threat to report him to the GMC if he sent the report in its present form to the Respondent. He wrote to Mrs Cole on 26 April to confirm that as the Claimant had not given his consent to the report being sent to the Respondent in its present form he would let the Respondent know that he was unable to provide a report.

280 On 2 May, Dr Isaacs spoke to the Respondent's solicitors about his report. An attendance note was in the bundle of documents. We find that the Respondent's solicitors were adamant that Dr Isaacs did not have a patient/doctor relationship with the Claimant and that he should release the report without making the changes that the Claimant sought.

281 Dr Isaacs wanted to put the Claimant's comments on the report as an appendix but the Claimant did not consent to that way of proceeding. This was what the Respondent wanted and what had been set out in the letter of 23 May 2017 from Ms Brooks to the Claimant's solicitor. The Claimant's solicitors did not reply disagreeing or confirming that it would be done in this way and the Respondent considered that it was agreed.

282 In their witness statements Ms Brooks and Mr Wilson both refer to a telephone conversation with Mr Daniels, the Claimant's solicitor, on 12 May 2017 in which Mr Wilson made it clear that the Respondent expected the report to be published with only the OH doctor's recommendations and comments. The Respondent was clear that it wanted the Claimant comments included in an appendix to the report as was its usual practice with commissioning OH reports.

283 In the end, after seeking further advice from the medical defence union, Dr Isaacs incorporated the Claimant's comments into his report. The copy we had in the bundle had the additions underlined and coloured so we could identify them. But it is likely that the report sent to the Respondent did not. The report did say that it incorporated the Claimant's comments after he had seen the draft report.

284 Most of the additions were comments about the Claimant's relationship with the Respondent, the possibility of him returning to work and 11 suggested adjustments that he believed would be necessary in order to enable him to return to work. There were statements in it that could only have come from the Claimant. Statements such as *"thoughts expressed by Messrs Foley, Cox and Wilson about his 'underperformance' remain wholly unsubstantiated, unjustified and unfair…"* which Dr Isaacs would not have been able to comment on from his medical knowledge as he was not in the workplace. It is likely that this was one of the suggested additions that the Claimant made and was not a correction to a typographical error.

285 The revised report was sent to the Respondent on 12 June 2017. The Respondent was not happy with the report and objected strongly to the way in which the Claimant's comments had been incorporated into it. The Respondent's solicitor spoke to Dr Isaacs in a telephone conversation on the evening of 20 June. Dr Isaacs referred to this as an unpleasant conversation. He said that he was told by the solicitor that he did not know what he was doing and that he would not be paid for the work he had done so far. The solicitor ended the conversation by stating that the Respondent would not pay Dr Isaacs' fees as he had not fulfilled his brief or complied with the original instructions. The solicitor was adamant that the medical defence union had misunderstood Dr Isaacs role as a professional instructed by the Respondent to produce a report.

286 This was repeated in its letter of 3 July 2017. The Respondent wanted the Claimant's comments to be appended to the report so that they could be clearly identified as his comments rather than putting them in the report which should only have had his expert medical opinion. On another occasion he was told that he should ignore the advice of his professional indemnity organisation.

287 In the 3 July letter the Respondent objected to Dr Isaacs putting in the report the Claimant's perception of what had happened between them up to that point. For example, he made a statement in the report as fact that the Claimant had difficult interactions with his employer in that his grievance was not accepted and the appeal failed. In making that statement Dr Isaacs did not say that the grievance should have been accepted. It is a statement that it failed and that this was difficult for the Claimant. Similarly, his statement that the Claimant would be unlikely to work successfully again with Mr Foley and Mr Cox would appear to be his professional

opinion based on what the Claimant told him. Even if he knew the background it was unlikely to make a difference to that opinion.

288 The Respondent ended its letter by stating that Dr Isaacs had failed to follow its instructions and the role of OH specialist. Dr Isaacs replied to say that he considered that he had been spoken to in a rather rude and unpleasant manner by the Respondent's solicitor and that he had consulted with his medical indemnity organisation before finishing the report. He had been advised by their senior lawyers that the Claimant had become his patient and that he had a duty of confidentiality towards the him which meant that without the Claimants consent – he could not release anything.

289 The issue of whether Dr Isaacs could release the medical report to the Respondent without the Claimant consent was not aired before us. However, there was a difference of opinion between the Respondent's lawyers and the medical defence union lawyers about it. The Respondent's solicitors strongly indicated to Dr Isaacs that he should accept their opinion on the matter rather than that of his own defence union because they were paying him. They also called into question his expertise. Both of which appeared to us to be unnecessary between professionals and to put him under professional and financial pressure.

290 The Claimant's position was that he was seeking to amend inaccuracies in the report and properly reflect his discussion with Dr Isaacs. It was not clear to us why that could not have been done by putting his comments and suggested adjustments in an appendix. Also, his comments which were eventually incorporated into the report did more that correct inaccuracies and instead added lots more information. By refusing to give his consent to the report being released until it was written in the way that he agreed with, he was also trying to get Dr Isaacs to do what he wanted him to do.

291 Dr Isaacs was put in an impossible position by the stance taken by both parties and we find it likely that he found the whole experience to be extremely difficult.

292 We find that apart from the suggested list of adjustments to enable the Claimant to return to work, most of the other matters the Claimant raised with Dr Isaacs were already addressed in the report albeit in Dr Isaacs words. For example, in his original report, Dr Isaacs said under the title '*conclusions'* that the Claimant's condition had never remitted or recovered enough for him to consider going back to work. Also, over the page, he stated that at present, the Claimant's abilities are severely impaired by his depression and he could not carry out the principle duties of his role. His comments about the Claimant returning to work were couched in many '*ifs'* and he made clear that the effect of the statement in Mr Cox's email - *'Can we terminate Cole'* on him meant that he was unlikely to ever be able to work with Mr Cox again.

293 It was his professional opinion that the Claimant was unlikely ever to go back to work in the same environment or to the same job. The Claimant was unhappy with those statements and believed that they suggested that the only barrier to him returning to work was the department of return. We find that that statement did not reflect the totality of the report.

294 We find it likely from the documents in the bundle that Dr Isaacs was one of the first medical professionals to state that in his opinion, *"it is very clear that the trigger to this depression was feeling undervalued and criticised by his employers. The events of the appraisal on 7 January 2016 were the final straw for Mr Cole."*

295 Dr Harvey in his report dated 19 August 2016 also stated tentatively suggested that although the Claimant *'did not indicate that he was aware of any specific triggers over the years. My observation of the more recent period, however, is that perceived criticism of his work, to which it was readily apparent that he has been deeply committed, would tend to lead to a catastrophic reaction, and this, I think, explains much of the severity that he has experienced since the appraisal meeting in January.'*

296 We find that Dr Isaacs carefully responded to the questions he was asked by the Respondent in the letter of instruction dated 6 September; questions which he said that he had discussed with the Claimant on the day of their appointment.

297 Once the Claimant and his solicitors insisted quite strongly that the Claimant's comments about the likelihood of him returning to work and possible/necessary adjustments should be inserted in the report; Dr Isaacs considered them and agreed to do so. At paragraph 6 of his section entitled 'Statement to the court' he wrote *"I have not included anything in this report which has been suggested to me by anyone, including the lawyers instructing me, without forming my own independent view of the matter".* We find it likely that, in the end, Dr Isaacs considered the Claimant's comments and did not object to them and that is why he added them to the report.

298 The Respondent did not receive a copy of the original report produced on 28 March until the Tribunal ordered it to be produced, as part of these proceedings. The Respondent received a copy of the draft report on 19 January 2018.

Edinburgh

299 We find that in July, Mr Foley was told by a member of the London BV team that the Claimant was going to do a 20-night run of shows at the Edinburgh Fringe Festival. The Claimant had written a book of poetry and intended to perform poetry and music with his son, on stage, over 20 nights at the annual Edinburgh fringe arts festival. The member of staff asked to Foley whether the Claimant was still employed by the Respondent as he was confused about how he could be performing if he was off sick.

300 Mr Foley confirmed that he was still off sick and said no more. Mr Foley emailed Mr Wilson to inform him of this and CC'd Mr Cox. In the email he said that he was happy that the Claimant had found something that he loved but expressed his confusion about the Claimant being able to perform on stage while being unable to work or communicate with the Respondent. In his evidence he stated that he felt that performing at Edinburgh would not be consistent with what he understood were the parts of the job that brought the Claimant unacceptable levels of stress. On stage he was also likely to be subject to criticism and was likely to have to write and learn material and perform it. Mr Foley was not aware of the Claimant's current interactions with the Respondent but thought that HR should know this in case it proved relevant. The Claimant had not informed the Respondent that he was planning to perform at the Edinburgh Fringe Festival.

301 In the end, the Respondent did not raise the matter of his Edinburgh run with the Claimant. Those emails were part of the documents disclosed to the Claimant as part of the disclosure process in relation to the Claimant's first employment tribunal claim.

2nd grievance

302 On 1 September 2017, the Claimant's solicitors wrote to the Respondent to raise a 2nd grievance on the Claimant's behalf on the contents of Kelly Brooks' letter dated 11 August 2017. In the letter, Ms Brooks wrote that it was important that the report reflected Dr Isaacs' medical opinion *and is not tampered with* in any way simply to reflect what the Claimant would like to see the report. She also alleged that the Claimant and/Mrs Cole and the legal adviser attempted *to put pressure* on Dr Isaacs. The Claimant was very upset when he saw the contents of this letter. He believed that his professional standards as a journalist were being called into question.

303 The Claimant made it clear in the letter that he wanted to grieve against what he described as very surprising and serious accusations made in Ms Brooks' letter with no factual or other basis. It was the Claimant's view that he had acted entirely properly in his dealings with Dr Isaacs over the report and that he fully complied with the spirit and letter of the law at all times. In the hearing the Claimant continued to be particularly upset about the use of the word '*tampering'* in Ms Brooks' letter.

304 In the written grievance, the Claimant threatened to bring further proceedings in the employment tribunal if the grievance was not brought to a satisfactory conclusion. In this way, the Claimant referred to his existing employment tribunal claim in his grievance letter. The Claimant's solicitor asked for the grievance to be conducted in writing as the Claimant's ill-health meant that he was not fit enough to attend meetings with the Respondent.

305 On 11 September Ms Brooks wrote a general email to all the Respondent's managers to ask whether anyone knew of a strong hearing manager and one who had experience of giving evidence for the Respondent in an employment tribunal. The Claimant had already issued a claim against the Respondent in this tribunal so it was appropriate for the Respondent to consider the possibility that he might issue further tribunal proceedings if he was unhappy with the outcome of this grievance, especially as he had threatened to do so. We find it unlikely that this was a predetermination of the outcome of the grievance. Ms Brooks was concerned that whoever did this grievance would more than likely, given that the Claimant had threatened to bring a second claim, have to attend a Tribunal hearing and the Respondent needed someone who would have availability. It is the job of an HR person to think of all eventual outcomes of processes so that they can plan their work and advise the Respondent on how to proceed. After Harvey Leader was identified as a potential grievance hearing manager, Ms Brooks wrote to him on 15 September to give him some background and ask whether he was interested in being the hearing manager. She advised him that he was likely to only need to interview one person and therefore conducting the grievance should not take up too much of his time. She eventually told him that she was likely to be the only interviewee for the grievance hearing because she had been handling all contact with the Claimant and that she was therefore unable to support him any further in dealing with the grievance. In the beginning Mr Leader did not know that Ms Brooks

had been the subject of the grievance. It was her manager, Sharon Alexander who asked Don Limani to take up the role of supporting Mr Leader in dealing with the grievance. Ms Brooks wrote to Mr Leader and advised him to liaise with Don Limani, Senior HR advisor and that there may also be a possibility to meet with Keith Wilson, another HR business partner.

306 Ms Brooks wrote to Mr Limani on 14 September to send him the grievance. She sent him an excerpt of the grievance letter rather than the whole letter. We find it unlikely that she did this in an attempt to thwart the Claimant's grievance. She emailed him what she wrongly thought was the essence of the grievance. She cut the part of the letter headed up '*Grievance'.*

307 We had evidence from Mr Leader and Mr Limani at the hearing. Mr Leader held the post of Director of Business Analysis, enterprise business systems, at the time that he heard this grievance. He was also an experienced hearing manager. He had not worked with the Claimant before. He was clear that his role was to understand the situation, analyse the evidence and make a decision. Even though in subsequent emails Mr Leader was told about the ET case and a suggestion was made that the investigation should not take long, Mr Leader's evidence was that once he agreed to take on the grievance he was going to decide how to conduct it himself and would not have taken Ms Brooks' emails as instructions.

308 Mr Leader spent some time in correspondence with Mr Limani seeking to clarify the precise matters that the Claimant wished to grieve on. As he had been sent an excerpt of the Claimant's solicitors' letter it did not make sense to him and he did not understand the grievance. He met with Mr Limani on 2 October 2017 when he was given a copy of the complete letter which set out Claimant's grievance. This was the first time that the Claimant's name had been mentioned to Mr Leader. He confirmed that he did not know the Claimant, which meant that there was no conflict with him hearing a grievance raised by him. Once he read the full letter he became fully appraised of the matters forming the grievance as set out above.

309 The Respondent informed the Claimant's solicitor that Mr Leader had been appointed as the independent hearing manager of the grievance and that Mr Limani from HR would be supporting him in the investigation. Another letter to the Claimant's solicitors informed him that the grievance would be conducted in writing in accordance with the Claimant's request.

310 Mr Limani and Ms Brooks worked in the same HR department but had not worked supporting the same business area together. There was no evidence that they were friends or had talked about the grievance beforehand. When the Claimant was told who the grievance hearing manager and his HR support were, he did not object.

311 Mr Leader met with Ms Brooks on 5 October to begin the investigation into the grievance. We had the notes from that meeting in the bundle. It was a short meeting. They discussed the process by which the Claimant came to be on the LTS scheme and how it was always due to be reviewed on a regular basis. The Respondent would need to be sure that the recipient continues to be unlikely to be able to return to work for the foreseeable future. Ms Brooks' experience had been dealing with recipients with physical rather than mental conditions but she had worked with it before. She told him

that the Claimant had signed to agree to be subject to regular medical reviews. The Respondent had decided that because the Claimant had a mental impairment it was more appropriate for him to be seen by an independent psychiatrist who had experience in assessing mental health conditions like the Claimant's. This meant that they had to go outside of the Health Management Ltd for this particular expertise. Ms Brooks stated that in her opinion it was usual for the employee to be able to correct factual inaccuracies in a report but not for them to be able to challenge the doctor's opinion. The employee would be allowed to comment independently on the claims made by the doctor and that would usually be appended to the report rather than incorporated into it.

312 She also informed him that the Respondent thought it had an agreement with the Claimant solicitors that his comments on the OH report should be written in a separate document and appended to the report.

313 On 20 October 2017, Mr Leader wrote to the Claimant's solicitors to confirm his understanding of the grievance and to ask two questions. He asked why the Claimant would not consent to Dr Isaacs' report being sent to the Respondent in accordance with the consent he had already provided and why was it important that Dr Isaacs' report should include the Claimant's comments within it rather than as an appendix.

314 The Claimant's solicitors responded by letter dated 25 October 2017 and stated that the Claimant wanted Dr Isaacs' report to be accurate and that his amendments sought only to correct inaccuracies. Mr Daniels stated that Dr Isaacs had readily made revisions and additions and therefore he must have agreed with the Claimant's comments. He stated that to say that the Claimant had put undue pressure on Dr Isaacs was wholly untrue and without foundation. The Claimant considered that the information requested by the Respondent from Dr Isaacs about the details of his interactions with the Claimant amounted to a breach of confidentiality. The Claimant did not recollect giving any earlier consent apart from the consent he gave on 9 June 2017.

315 The Claimant's solicitors indicated that he wanted a full, clear and categoric retraction of the allegations plus an appropriate apology. He also sought reassurance that the accusations in the Ms Brooks' letter had not been and would not be shared with anyone who had not already been a recipient of the correspondence.

316 Mr Leader considered all the relevant documents, including the letter dated 11 August, the grievance letter, the Respondent's grievance procedure, the OH report sent to the Respondent on 12 June 2017, the rules of the LTS scheme, the 9 September 2016 letter to the Claimant from Ms Brooks; the letter of instruction to Dr Isaacs dated 14 February 2017 from Ms Brooks, further correspondence between Dr Isaacs and Ms Brooks and two anonymised OH reports about other members of staff so that he could compare the style and content. One member of staff had mental health issues while the other had physical health issues.

317 Mr Leader met with Mr Wilson on one occasion and with Ms Brooks on three occasions. We had the notes of those meetings in the bundle. He did interview Ms Brooks after he was given the full grievance letter. Although he was aware that the Claimant had issued a claim at the employment tribunal and brought an earlier

grievance, Mr Leader was not familiar with those documents. We find it unlikely that he was influenced by them in his decision on the grievance and that he prided himself on making an independent decision on the grievance.

318 Ms Brooks and Mr Wilson were clear in their evidence to Mr Leader that there was no attempt to remove the Claimant from the LTS scheme. The intention was to get an up-to-date report on his health and a prognosis on his return to work. Ms Brooks' evidence was that she used the word '*tampered'* to mean *altered* or *amended without the Respondent's knowledge.* Her evidence was that she did not mean to malign the Claimant or to suggest dishonest intent on his part in seeking to make the amendments. She meant that the report should be released in its original form. She reiterated in her evidence to Mr Limani and to the Tribunal that her letter was only sent to the Claimant's solicitor and shared with those in HR who were dealing with his sickness absence. It was not shared with his managers and was not shared with the Respondent's legal advisers until he issued the second ET1.

319 Ms Brooks' evidence was that the statement about '*undue pressure'* was really directed at the Claimant's solicitors and a reference to the contents of Mr Daniel's letters to Dr Isaacs such as that dated 26 April in which the GMC Guidance is quoted or other letters where it was made clear that the Claimant did not consent to the report being released in its original form. Ms Brooks believed that this made Dr Isaacs worry that he could be struck off the register if the Claimant made a professional complaint about him, which he thought he might – given the contents of those letters.

320 Mr Limani was at all the investigation meetings. His role was to provide Mr Leader with HR advice on procedure and to assist him in ensuring that he covered all the matters raised in the grievance. Mr Limani also assisted by asking questions. He was not a witness in the grievance investigation.

321 On 23 November, at another meeting where Mr Limani was present, Mr Leader discussed with Ms Brooks whether the Claimant's existing ET1 complaint had influenced her assessment of the process surrounding the medical report. The note of that meeting recorded that she confirmed that it had not. It was in this meeting that Ms Brooks confirmed that she had dealt with 30 -40 medical reports on employees prior to this one and that 2 of those had been related to people who were on the LTS scheme. She had not had experience of an employee withdrawing their consent to share a medical report before. Mr Limani added his experience with obtaining OH reports which was that they should only contain medical opinion. Mr Leader considered interviewing Dr Isaacs and decided against it.

322 Mr Leader confirmed that in these meetings he asked the questions and that where it is noted that Mr Limani spoke it was either to advise him or to ask supplemental questions to what he had asked for further clarification.

323 Mr Leader had already drafted his report and had kept it back until the last meeting with Ms Brooks. Once he had clarified with her that the ET had not influenced her writing of the letter dated 11 August, he completed the grievance outcome letter and sent that to the Claimant solicitors on the same day, 23 November.

324 In the letter, he concluded that the Respondent believed that it had been agreed with the Claimant through his solicitors that any comments the Claimant had on Dr Isaacs report would be contained in an appendix and not in the main body of the report and that is why Ms Brooks was concerned when this did not happen. It was the Respondent's standard procedure that employees on the LTS scheme would be provided with a draft copy of the medical report by the occupational health advisor/doctor/medical practitioner so that they could have an opportunity to correct any typos or obvious inaccuracies. Once that was done, the finished medical report would be provided to the Respondent with the employee's consent. Mr Leader concluded that it was unusual to have a situation where an employee was refusing consent to the release of the medical report or that the employee felt the need to make significant comments on the contents of medical report.

325 It was important for the Respondent as the administrator of the LTS scheme to be able to read and absorb the medical opinion of its appointed occupational health advisor separately from that of anyone else.

326 As for the point that the Claimant did not remember giving consent, Mr Leader referred to the Claimant's signature when he confirmed his acceptance of the conditions of the LTS scheme. The Claimant signed the form on 12 September. In the form he agreed to regular medical reviews whenever deemed appropriate by the Respondent, to ensure that he remained eligible to receive benefits under the scheme. He also confirmed his consent to undergo a medical examination by a doctor nominated by the Respondent and for that doctor to disclose to the Respondent a report arising from the same.

327 Mr Leader answered all the questions that the Claimant's solicitor asked in the grievance letter. Mr Leader did not see the original report that Dr Isaacs had prepared as the Claimant did not consent for it to be released to the Respondent. However, he concluded that it must be very different to the original one as the Claimant had not given consent for it to be released but he had consented to the amended version being released. Also, approximately 8 weeks had elapsed between the date that Dr Isaacs told the Respondent that he had sent the report to the Claimant for approval and the date that the amended version was sent to the Respondent when the usual turn-around time was around 48 hours.

328 Mr Leader considered that the use of the word '*tampering'* was not a reference to the Claimant's journalistic practice but, taken in context, the statement in the letter did not actually accuse the Claimant of tampering with the report or say that the report had actually been tampered with. Instead it stated that this should not happen. The Respondent was not alleging that the contents of the disclosed report were untrue – it was simply a matter of being able to tell what was medical opinion and what was the Claimant's or anyone else's opinion. The Claimant was not being accused of dishonesty.

329 Mr Leader's conclusion was that there no evidence that Ms Brooks or anyone else within the company victimised the Claimant by seeking to ensure that there was no tampering with the medical opinion in the report. He also concluded that there was little likelihood of the report of the Respondent's comments on it getting into the public domain as it was personal to the Claimant and a confidential document. He therefore

also did not uphold the Claimant's grievance point that he was victimised by the 11 August letter – whether intentionally or unintentionally. He found no connection between the Claimant's first employment tribunal claim and the 11 August letter.

330 At the end of his letter, Mr Leader referred to the Claimant having issues of trust relationship with the Respondent. Mr leader had spoken to Mr Wilson and Ms Brooks as part of his investigation of the grievance and it is likely that he got the impression from those conversations that there were wider issues of trust here. Mr Leader suggested that it may be beneficial for the Claimant and the Respondent to participate in the mediation process, with a trained mediator. He repeated the Respondent's commitment to supporting the Claimant in his recovery and to facilitate a return to work in the future.

331 We find it highly unlikely that Mr Limani took any part in the decision making on the grievance. We find that it is more likely that Mr Leader made the decision on his own. However, we find that Mr Limani was involved in Mr Leader coming to the decision to offer the Claimant mediation. Mr Limani had experience of this as part of the HR department and it is likely that he suggested that this could be a way forward for the Claimant and the Respondent. It is also likely that he read Mr Leader's suggested outcome letter to make sure that Mr Leader covered all the points raised in the grievance letter.

332 We find that the Claimant appealed against the outcome in a letter dated 11 December. The letter was written by Mrs Cole. The Claimant was unhappy that Mr Limani had been involved in advising Mr Leader as well as being a witness in the investigation. He was unhappy about Mr Leader's conclusions in relation to use of the word '*tampering'* and he was unhappy about the claim that he might have put undue pressure on Dr Isaacs.

333 On 17 January 2016, Sharon Alexander, senior manager at the Respondent's HR department asked Cassie Spring whether she would take on the HR function in arranging the Claimant's appeal against the grievance outcome. Ms Spring agreed and then sent a general email to all the Respondent's managers asking for a senior manager to act as a hearing manager. She suggested that the case was complex and indicated that it might require the hearing manager to conduct about 3 meetings which could include the individual, the previous hearing manager and the previous HR representative. It was appropriate for Ms Spring to give managers an early indication of the time commitment that this might involve so that they could make an informed decision about whether they could take it on, with their existing workload.

334 We heard from Ms Spring in evidence. The Respondent's grievance procedure gave the hearing manager the option of holding an appeal meeting. It also stated that in some cases, the manager could choose to re-hear the grievance. It did not elaborate on what kind of circumstances might lead the manager to decide to do so. At the appeal meeting, the employee has the right to be accompanied.

335 Ms Spring confirmed that the focus in an appeal is to look at the process and decide whether it was applied fairly.

336 Dean Kiernan, Head of Account Management, offered to conduct the grievance appeal. Mr Kiernan was an experienced manager at the time and had a team of 27 people reporting to him. Ms Spring arranged to speak to him as she wanted to give him the appeal documents and to ensure that he understood the time commitment involved. Although the procedure allows for a rehearing in certain cases, Ms Spring incorrectly advised Mr Kiernan that his role as grievance appeal manager would not be to re-hear the grievance and make a new decision but to look at the process followed by Mr Leader, in the light of the complaints and points made in the appeal letter and see if any of those should be upheld.

337 We find that Ms Spring was aware that the Claimant had brought an earlier grievance and that there was an existing employment tribunal case in progress. However, we do not find that she was deliberately trying to narrow the scope of the appeal process or that she was trying to influence Mr Kiernan against the Claimant in assisting him in dealing with the grievance appeal.

338 Ms Spring had not been involved in correspondence with Dr Isaacs or in correspondence with the Claimant or his solicitors about Dr Isaacs report. There was no evidence that she had been involved in the stance that Ms Brooks had taken over Dr Isaacs report either.

339 We find that Ms Spring assisted Mr Kiernan in conducting the grievance appeal process and that after some delay in getting the process started because Mr Kiernan had been away on a trip, she emailed him to remind him that they needed to move quickly on it. We find that she did this because she was concerned about delay.

340 Mr Kiernan met Mr Leader on 1 March 2018 and Ms Spring took a note of the discussion at that meeting as she also took notes at Mr Kiernan's meeting with Ms Brooks. By the time of our hearing, Ms Spring had no independent recollection of the meeting and could not confirm that the minutes were accurate. Her evidence was that as an experienced HR advisor she took minutes of the meetings she attended and sent them to those who also attended for comments. As she did not receive any comments or suggested amendments from anyone she assumed that the notes are accurate.

341 Mr Kiernan asked Mr Leader whether the existence of the Tribunal claim and/or the previous grievance had affected his conduct of the grievance investigation or its outcome. Mr Leader assured him that it had not. Mr Kiernan accepted that. He asked Mr Leader why he had not interviewed Dr Isaacs. The note written in reply it that he stated that he had not done so because of the ET claim. In our hearing he did not recall saying so but did recall that there had been a discussion about the existence of an ET claim and the notetaker may have been summarising his comments. He did get a copy of the notes and did not correct that.

342 Mr Kiernan also met and questioned Ms Brooks as part of his conduct of the grievance appeal although he did not ask her about the 11 August letter. He wrote to Mrs Cole to try to get access to the correspondence the Claimant had directly with Dr Isaacs but the Claimant refused to let him have it. The Claimant rightly stated that the Respondent had not seen that correspondence before writing the 11 August letter so it should not be relevant to the conduct of the appeal. He did not speak to

Mr Limani or Mr Wilson as they had not been the decision maker on the grievance. He went through the process Mr Leader had gone through in coming to his decision on the grievance.

343 We find that Mr Kiernan wrote to Mrs Cole on the 7 March to inform her of the outcome of the grievance appeal hearing. In the letter he acknowledged that there had been a delay in the appeal process and that this had been due to his involvement in the Respondent's performance review process that happened in January. He confirmed that what he wanted to see from the Clamant was not so much any emails to Dr Isaacs but the original medical report that he had sent to the Claimant for approval. He contended that although the Respondent did not know the contents of the correspondence the Claimant had with Dr Isaacs, it did know that it was likely to contain comments on the report and an indication that he did not agree with its contents and that is what the Respondent wanted to see.

344 He did not uphold the Claimant's appeal. He found it likely that although the emails between the Claimant's solicitor, Mr Daniels and Mr Wilson of the Respondent did not expressly state that an agreement had been made about the way in which the report would be written, the correspondence around that time between them, the telephone conversation and the lack of a response from Mr Daniels to say that there was no such agreement; led him to conclude that it was reasonable that Ms Wilson and Ms Brooks believed that there had been such an agreement.

345 He did not accept that any professional misconduct allegation was made by Ms Brooks when she used the word tampering. In the hearing he referred to it as 'poor phrasing' by Ms Brooks.

346 In relation to the complaint about victimisation, it was Mr Kiernan's conclusion that he did not believe that Ms Brooks was influenced or motivated by the employment tribunal proceedings by the Claimant's disability to take the position she did in the 11 August letter. He concluded that the Respondent's questions were intended to ensure the proper administration of the LTS scheme and he did not accept that they were in any way a form of retaliation for the report received from Dr Isaacs.

347 Mr Kiernan closed letter by a reference to the offer of mediation which Mr Leader made in his grievance letter. He clarified that the Respondent offer was of a workplace mediation process, facilitated by a trained mediator, which would not require either party to be legally represented. He stated that he believed that mediation will help to address the Claimant's concerns and could help to repair the relationship between the Respondent and the Claimant. He encouraged the Claimant to participate in such mediation.

348 The Claimant's grievance appeal letter had suggested that the Respondent should obtain a report from Dr Mark Harvey, to ascertain if the Claimant is well enough to enter the mediation offered and what adjustments would be required to enable him to do so. In his letter, Mr Kiernan confirmed that the Respondent was happy for Dr Harvey to produce an occupational health report, after a consultation with the Claimant, as a precursor to mediation.

349 We find it unlikely that Mr Kiernan's approach to the grievance appeal and his decision was influenced by the by the fact of the Claimant's existing employment tribunal claim or his grievance. Mr Kiernan was not a member of the Respondent's HR team and had not worked with Mrs Brooks. He was a busy, senior manager within the business. We find it likely that in dealing with this appeal he had not read any documents relating to be Claimant's Employment Tribunal complaint or his first grievance.

350 We also find that even though Ms Spring had advised him that he did not need to re-hear the grievance, Mr Kiernan had done as much as re-hear the grievance again in the way he conducted the appeal hearing. He had written to the Claimant to raise further queries, he had spoken again to Mr Wilson and Ms Brooks and also to Mr Leader about his approach. He had not simply looked at the appeal letter and the grievance decision letter to see if Mr Leader made any procedural errors.

351 At the time of the hearing the Claimant was signed off sick. The latest medical certificate in the bundle was for the period 27 April 2018 to 27 July 2018. The Claimant was unfit for work because of anxiety with depression and continues to be under the case of a consultant psychiatrist who we find is likely to be Dr Arkell. The last medical letter from Dr Arkell to the Claimant's GP in the bundle was dated 10 January 2018 and confirmed that the Claimant was still unwell. It also recorded the effect of the disclosed emails on the Claimant's psyche.

352 The first claim was issued on 3 June 2016. That was a complaint of discrimination arising from disability and of a failure to make reasonable adjustments. REJ Taylor recorded in her judgment at the preliminary hearing on 22 March 2018 that the Claimant's application to amend to add a complaint of direct discrimination was made on 23 August 2017 in circumstances where the last possible act of discrimination relied on was alleged to have occurred on 2 June 2016.

353 After hearing evidence from the Claimant and submissions from both parties, REJ Taylor concluded that throughout the course of these proceedings the Claimant's ability to give thorough attention to the grievance, the subject access request, and at the same time, to the allegations and arguments in the claim form had been impeded by his mental health. The medical records showed that he was being medically treated between February 2016 and August 2017 and that as a direct consequence of his ill health he was having difficulty coping with his interactions with the Respondent in respect of the internal grievance and with the demands of this litigation. At times this ill heath included suicidal thoughts relating to the Claimant's contact with the Respondent. The Tribunal accepted the Claimant's evidence that as soon as he felt able to he re-engaged with these proceedings. The Tribunal also found on the balance of probabilities that his severe ill health and his medical treatment adversely affected his ability to provide instructions to his solicitors and process legal advice for much of the period after the claim was presented.

354 REJ Taylor also concluded that the weight of evidence tended to show that the Claimant's mental ill health supported his evidence that he could only concentrate on the grievance and the subject access request until their conclusion, before turning his full attention to the tribunal claim. These amounted to special circumstances such as would support granting leave to amend. The Tribunal considers that as soon as the

Claimant began to re-engage with these proceedings he indicated his intention to make the application to amend to include direct discrimination.

The Respondent's treatment of Mr Edward Hadas

355 We find that Mr Hadas began taking periods of sickness absence from around August 2015. There was an email the in the bundle from him to Mr Cox dated 17 August in which he referred to a need to have 2 weeks off as *'doctor recommended leave'*. He informed Mr Cox that he was finding his workload too stressful. Mr Cox was his line manager. He also reported to Mr Foley as he managed the team within which Mr Hadas was based.

356 On 4 November 2015 in another email he referred to stress having a really bad effect on his health. He asked to take two days off as sick leave. Mr Hadas' live evidence at the hearing was that his health deteriorated dramatically around this time. He went on extended sick leave due to stress, anxiety and other personal issues. He was off sick from November 2015. Although Mr Hadas' partner told Mr Foley on 12 November that he was unable to come in to work and that he should be left to rest, Mr Foley replied to ask whether he could speak to him. Mr Foley also forwarded the email from Mr Hadas' partner on to Mr Cox. In his email to Mr Cox, Mr Foley appeared to question whether Mr Hadas was as ill as his partner stated in the email. He also indicated that he had spoken to HR about it and would want to set up a *'proper sick leave procedure'.* We were not sure what that referred to. We find that although Mr Hadas was quite ill with stress and anxiety, he was not a disabled person for the purposes of the Equality Act 2010, as far as we were told.

357 Mr Foley forwarded Mr Hadas' medical certificates to Mr Cox and discussed with him what they should say to his colleagues if they asked.

358 Mr Hadas kept in touch with the Respondent with regular emails updating Mr Foley on his health. The copy emails in the bundle of documents show that he emailed his manager, Mr Foley on at least one occasion a month to update them on his health, his attempts to return to work and his prognosis – when he had one.

359 On or around 9 January 2016, Mr Hadas emailed Mr Foley to inform him that he was suffering from stress burn out, that he would probably need to use the full 6 months of the Respondent's contractual sick leave and that he was not sure what would happen after that period.

360 Later in January, he indicated that he thought he was getting better and looking forward to returning to work. In an email dated 9 February he informed Mr Foley that he had thought that he would be able to come back to work but after trying to do some work at home he felt very ill. He advised that he had been told that he had experienced a bad stress burnout which was likely to leave him '*durably weakened'*.

361 On 7 March he wrote to Mr Foley to inform him that despite making some progress he did not know when or indeed whether he would be able to start work again. It was unlikely to be within the following weeks. He asked whether it was possible to sit down with HR and Mr Foley to discuss matters soon. Mr Foley was pleased to hear that he was thinking of coming back but in his response suggested that

it was likely to be on a phased return basis and that he needed to consider the advice of Mr Hadas' counsellor and of the Respondent's OH adviser.

362 His email on 29 March to Mr Foley suggested that Mr Hadas was thinking of returning to work. They planned to meet to discuss the details. Mr Foley also engaged in correspondence with Mr Cox about whether what Mr Hadas wanted to do in terms of work was in line with what the Respondent needed. Mr Foley was concerned that if Mr Hadas came back to work on the same salary and was seen to be doing considerably less work than previously, there may be comments from his colleagues who may perceive it as unfair and in addition, that to do so may have a knock-on effect on the arrangements made for the Claimant's return to work.

363 In April the Respondent had 2 reports from Dr Khan occupational health in respect of Mr Hadas. One report was done following a telephone consultation and another after an in-person consultation. The reports were commissioned by the Respondent as Mr Hadas asked to be considered for benefits under the LTS scheme. They confirmed that while he did not have a major mental health condition, Mr Hadas was suffering from *'typical stress type symptoms and an ongoing low-level of anxiety attributed to his perceptions of the workplace….. His inability to work and a loss of confidence are all typical of this scenario*'. He was at risk of psychological ill-health. The adviser recommended that the Respondent should explore redeploying him into an alternative role or arranging a phased return to work. His main recommendation was that Respondent conduct a stress risk assessment of his role which would highlight specific areas of concern and facilitate open discussion about which aspects were stressful and whether these can be addressed.

364 Mr Hadas also had osteoarthritis in his left hip which the OH doctor described as a condition that would bring him under the Equality Act 2010.

365 Dr Khan stated that in relation to the LTS scheme he did not consider that the Claimant had a medical condition that rendered him unfit for his role and which would be expected to do so period of at least 12 months. The Respondent considered the medical reports and relied on them in reaching its decision that the Claimant was not eligible for the LTS scheme.

366 Mr Hadas was unhappy about that decision and wrote to the Respondent about it. He considered that the respondent was largely responsible for his mental health state and that *"my current condition is in fact largely the result of excessive job demands. I worked for more than 35 hours a week set out in my contract…….. I was asked to take on even more duties, well beyond those for which I had been hired…"* At the hearing his evidence was that he wrote that email when he was in a difficult place emotionally and was frustrated with his illness.

367 Mr Hadas stated that the job was stressful for someone of his age and that possibly the full role was no longer suitable for someone approaching their 60s. The global nature of his role meant that he had to be on call for news from Asia first thing in the morning, the European news during the working day and for news from the US in the evening. That meant that he frequently worked outside of his working hours.

368 Mr Hadas was unhappy with the conclusions reached by the OH doctor and asked for the views of his GP and psychological counsellor to be considered by the trustees of the LTS scheme, as part of the assessment. That offer was refused. Mr Hadas had by this time sought the advice of an employment lawyer, which he informed the Respondent about. The LTS scheme allowed no possibility of appeal.

369 In an email dated 20 May 2016 which was discussed the hearing, he stated that he held the Respondent responsible for his current condition. He referred to the 50-hour weeks in the office, being on-call most nights and weekends, having numerous deadlines each day and a steady but unpredictable stream of demands for comment on unexpected developments. He also referred to the interregnum period in the London office in 2015 during which had to do most of the editing while writing his column and keeping up globally as economic editor.

370 In his evidence at the hearing, Mr Hadas stated that on reflection he could see that he was being unfair at the time as a large part of the stress that he was under was personal stress as he was caring for his partner and was having relationship difficulties.

371 In his witness evidence Mr Hadas stated that those emails were written when he was suffering from stress and anxiety and that now, with the benefit of hindsight, he could see that the decision of the LTS panel was correct as his symptoms were not permanent and he could have returned to work for the Respondent.

372 However, at the time, Mr Hadas opened discussion with the Respondent about the possible possibility of severance package to end his employment as he did not believe that he could ever return to working in an environment with daily deadlines.

373 Although Mr Hadas tried to resubmit an application to the LTS scheme and raised in his emails the possibility of bringing a grievance, he did not pursue those options as he reached an agreement with the Respondent for the termination of his employment.

374 Mr Hadas ceased to be employed by the Respondent in July 2016. He has continued to work on a freelance basis with the Respondent. He writes a weekly column and occasionally helps with other projects. He produces around 4 articles for the BV each month. Mr Hadas works entirely from home in his own time.

Training at the Respondent

375 The Respondent offered general diversity training to his managers. Mr Cox confirmed that he attended that training and that it mostly focused on gender equality in the wake of the #metoo anti-sex harassment political movement. Mr Foley confirmed that he had attended various training sessions on employee relations matters such as equal opportunities and diversity and inclusion matters. That included a mandatory equality and diversity online training module.

376 The Employee Relations team at the Respondent carries out monthly training sessions for the HR generalist team on matters including updates on discrimination and how to support employees with disability. There is also peer-to-peer training on various matters including dealing with employees on sick leave. HR advisors at the

Respondent received training from external sources including from the Respondent's OH advisers. The Respondent provides employees with information about mental health issues and on diversity and inclusion matters on its website through videos and online training. Mr Wilson's evidence was that in addition to all the above, he attended a mental health well-being training session in 2017 provided by the Respondent's employee counselling service. The Tribunal did not see any of the training materials.

Law

377 The Claimant brings complaint of direct disability discrimination contrary to section 13 of the Equality Act 2010, discrimination arising from disability contrary to section 15 of the Equality Act 2010 (EA), failure to make reasonable adjustments section 20 EA, indirect discrimination, section 90 EA and disability related harassment (section 26 EA) and victimisation, and lastly, victimisation under section 27 EA.

Direct discrimination

378 Section 13 Equality Act 2010 stipulates that direct discrimination occurs when 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. Section 23 deals with the issue of comparators. It states that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case. In relation to direct disability discrimination complaints, the circumstances related to the case include a person's abilities if, on a comparison for the purposes of section 13, the protected characteristic is disability.

379 In a complaint of direct discrimination, the relevant comparator is someone who does not have the particular disability of the disabled person, whose relevant circumstances are the same as, or not materially different from those of a disabled person; *Aylott v Stockton on Tees Borough Council* [2010] IRLR 994 CA.

380 The Respondent conceded that the Claimant was a disabled person for the purposes of the Equality Act 2010 by reason of his depression and anxiety. It was also agreed that the Respondent had knowledge of the Claimant's disability.

381 Ms Newton relied in her submissions and reply submissions on the cases of *Zafar v Nagarajan*, *Glasgow City Council v Zafar* [1998] IRLR 36 and *Nagarajan v London Regional Transport* [1999] IRLR 572 as authority for the statement that those who discriminate may not be aware of their prejudices. In *Nagarajan*, it was stated that many people are unable or unwilling, to admit even to themselves that actions of theirs may be (racially in that case) motivated. An employer may genuinely believe that the reason why he acted in that way had nothing to do with the employee's protected characteristic but after careful and thorough investigation of a claim, members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it or not, the protected characteristic was the reason why he acted as he did. The Claimant submitted that much of the discrimination in his case was subconscious/unconscious and was therefore operating at a level where the perpetrators were unaware of their discriminatory motivation. It was his submission that the Respondent's motivation emanated from subconscious prejudices held about employees with mental impairments.

382 The burden of proving the discrimination complaint rests on the employee bringing the complaint. However, it has been recognised that this may well be difficult for an employee who does not hold all the information and evidence that is in the possession of the employer and also, because it relies on the drawing of inferences from evidence. Section 136 of the Equality Act 2010 was introduced to address that and follows on from the cases of *Igen v Wong* and other authorities dealing with shift in burden of proof. Section 136 states that:

> "If there are facts from which court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred".

383 If A is able to show that it did not contravene the provision and that there is a non-discriminatory, provable explanation for its conduct, then this would not apply.

384 In the case *Laing v Manchester City Council* [2006] IRLR 748, tribunals were cautioned against taking a mechanistic approach to the proof of discrimination in following the guidance set out above. In essence the employee must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer had committed an unlawful act of discrimination against them. The Tribunal can consider all evidence before it in coming to the conclusion as to whether or not a Claimant has made a prima facie case of discrimination (see also *Madarassy v Nomura International plc* [2007] IRLR 246.

385 In every case, the Tribunal has to determine why the claimant was treated as s/he was. This will entail, looking at all the evidence to determine whether the inference of unconscious as the Claimant submits, or conscious discrimination can be drawn. As Lord Nicholls put in *Nagarajan v London Regional Transport* [1999] IRLR 572*: "This is the crucial question"*. It was also his observation that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator. If the Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial.

386 In assessing the facts of this case, the Tribunal is also aware of the comments made in the case of *Bahl v The Law Society* [2003] IRLR 640 that simply showing that conduct is unreasonable and unfair would not, by itself, be enough to trigger the reversal of the burden of proof. Unreasonable conduct is not always discriminatory whereas discriminatory conduct is always unreasonable.

387 The Claimant also submitted that an inference of discrimination can be drawn from an evasive or false explanation in a document other in a questionnaire, as held in the case of *Dattani v Chief Constable of West Mercia Police* [2005] IRLR 327 (EAT). Inconsistent explanations can also give rise to an inference of discrimination (*Hussain v Vision Security Ltd & Another* [2011] EQLR 699 EAT).

388 The Claimant relied on the case *of Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11. In that case the House of Lord said that:

> *"The test that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment must be applied by considering the issue from the point of view of the victim. If the victim's opinion that the treatment was to his or detriment is a reasonable one to hold, that ought to suffice. While an unjustified sense of grievance about an allegedly discriminatory decision cannot constitute "detriment", a justified and reasonable sense of grievance about the decision may well do so".* It is not necessary to demonstrate some physical or economic consequence.

389 In relation to the burden of proof, the Claimant referred to the '*something more'* that is needed once the Claimant proves facts from which an inference of discrimination could be made. This has been identified by Judge Sedley in the case of *Denman v The Commission for Equality & Human Rights* [2010] EWCA Civ. 1279 as:

> "the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances, it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances, it may be furnished by the context in which the act has already occurred."

390 Unfairness cannot shift the burden of proof but as Ms Newton submitted, a false explanation for the less favourable treatment added to a difference in treatment and a difference in race can constitute the something more required to shift the burden of proof (*The Solicitors Regulation Authority v Mitchell* UKEAT/0497/2012).

391 The Claimant also complains of <u>discrimination arising from disability</u>. Section 15 of the Equality Act 2010 states that:

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

392 The way in which a Tribunal should approach section 15 claims was provided by Simler J (then President) in the case of *Pnaiser v NHS England* [2016] IRLR 170 as follows: -

> (a) The Tribunal should first identify whether there was unfavourable treatment and by whom.
>
> (b) The Tribunal must then determine what caused the impugned treatment, or what was the reason for it. The focus is on reason in the mind of the alleged discriminator at this point;
>
> (c) The "something" that causes the unfavourable treatment need not be the name or sole reason, but must have at least a significant or more than trivial influence on the unfavourable treatment, and so amount to an effective reason or cause of it;

(d) The causal link between the "something" that causes unfavourable treatment and the disability may include more than one link. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator;

(e) The knowledge required is of the disability only, and does not extend to a requirement of knowledge but the something leading to the unfavourable treatment is a consequence of the disability.

393 What is unfavourable treatment? The Claimant referred to the case of *Trustees of Swansea University Pension & Assurance Scheme v Williams* [2015] IRLR 885 EAT in which it was held that it is for the tribunal to recognise when an individual has been treated unfavourably. The meaning of unfavourable in section 15 cannot be equated with the concept of 'detriment' used elsewhere in the EA. Nor does the word require a comparison with an identifiable comparator, whether actual or hypothetical, as would the description 'less favourable'. Instead, the court held that the determination of that which is unfavourable involves an assessment in which a broad view can be taken and which is judged by the broad experience of life. Persons may be said to be treated unfavourably if they are not in as good a position as others generally would be.

394 The Claimant referred to EHRC (Equality of Human Rights Commission) Code of Practice on Employment [2011]. At paragraph 5.9 there is some commentary on the meaning of the phrase "something arising in consequence of disability". The Code states that the consequence of a disability includes anything which is the result, effect or outcome of a disabled person disability. It also goes on to state that so long as the unfavourable treatment is because of something arising in consequence of the disability, it will be unlawful unless it can be objectively justified, or unless the employer did not know or could not reasonably have been expected to know that the person was disabled. It is therefore not necessary for the causal connection also to be part of the reason which operates on the decision-maker's mind.

395 The Code discusses when discrimination arising from disability can be justified. Unfavourable treatment will not amount to discrimination arising from disability if the employer can show that the treatment is a *"proportionate means of achieving a legitimate aim".* It is for the employer to justify the treatment. They must produce evidence to support their assertion that it is justified and not rely on mere generalisation. The Claimant submitted that the Tribunal should not simply review the employer's reasons applying a margin of discretion, but must carry out a "*critical evaluation"* and determine for itself whether, objectively, the means used are proportionate to any legitimate aim, balancing the detriment to the Claimant against the legitimate aim and considering whether that aim could have been achieved by less detrimental means (*Allonby v Accrington and Rossendale College and others* [2001] ICR 1189). The Tribunal should make its own objective assessment of the relevant facts and circumstances, having regard to the employer's reasonable business needs, business considerations and working practices.

Indirect discrimination

396 Section 19(1) of the Equality Act states that indirect discrimination occurs when a person (A) applies to another (B) a provision, criterion or practice (PCP) that is discriminatory in relation to a relevant protected characteristic of B's. A PCP has this

effect if A applies or would apply a PCP to persons with whom B does not share the relevant protected characteristic; the PCP puts or would put persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share the characteristic; the PCP puts or would put B at that disadvantage, and A cannot show that the PCP is a proportionate means of achieving a legitimate aim.

397 In the case of *Bilka-Kaufhaus GMB H v Weber von Harz* [1987] ICR 110 ECJ the Court held that to justify an objective which has a discriminatory effect, an employer must show that the means chosen for achieving that objective correspond to a real need on the part of the undertaking, are appropriate with a view to achieving that objective in question, and were necessary to that end. To be proportionate, a measure has to be both an appropriate means of achieving the relevant legitimate aim and reasonably necessary to do so. The decision as to whether the PCP is justifiable or not is not one for the employer. It is one for the Tribunal to make after intense scrutiny of the evidence *(Mba v Mayor and Burgesses of the London Borough of Merton* 2013 EWCA Civ. 1562).

Failure to make reasonable adjustments

398 Section 39(5) of the Equality Act imposes on the employer a duty to make adjustments where a PCP (provision, criterion or practice) of the employer puts a disabled person at a substantial disadvantage in relation to relevant matter, in comparison with persons who are not disabled. The employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. The employer is not under a duty to make adjustments if the employer does not know and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the substantial disadvantage. Section 212(1) of Equality Act defines a substantial disadvantage as something that is more than minor or trivial. An employer who fails to comply with a duty on him to make adjustments in respect of a disabled person discriminates against that disabled person.

399 In the case of *Archibald v Fife Council* [2004] ICR 9454 HL, the duty was described as one that requires a degree of positive action from employers to alleviate the effects of PCPs on disabled employees. The duty to make reasonable adjustments was stated in *Archibald* as necessarily requiring the disabled person to be treated more favourably in recognition of their special needs.

400 In the case of *Croft Vets Ltd v Butcher* [2013] UKEAT/0430/12 [2013] All ER (D) 261 (Oct) the EAT held that a tribunal was entitled to conclude that an employer had failed to make reasonable adjustment when it failed to implement a recommendation made by a consultant psychiatrist in circumstances where the Claimant was absent from work due to depression and stress caused primarily by work related issues.

401 In the case of *Project Management Institute v Latif* [2007] IRLR 579 the EAT decided that the Claimant must show evidence from which it could be concluded that there was an arrangement or a PCP causing a substantial disadvantage and that there was some apparently reasonable adjustment which could have been made. If the Claimant does this the burden shifts. Once the burden has shifted, the claim will succeed unless the employer is able to show that it did not breach the duty.

402 In the case of *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ. 640 CA the Court of Appeal held that the duty to comply with a reasonable adjustment requirement under section 20 begins as soon as the employer can take reasonable steps to avoid the relevant disadvantage.

403 The Claimant relied on 3 PCPs. Firstly, it was submitted that the Respondent operated a capability process (informal or otherwise) from October 2015 to 3 June 2016. It was submitted that this was the application of its formal performance/capability policy as well as informal performance management and monitoring once Mr Foley took over the London BV office. Secondly, the holding of performance management appraisal meetings and one-to-one meetings where management discussed matters with their employees. Thirdly, the introduction of a Breaking Views service that was 'smarter and faster' which impacted working hours, work duties and work time frames and/or required higher quality work from 1 September 2015 to 3 June 2016.

404 It was submitted that each of these 3 PCPs put the Claimant at a substantial disadvantage in comparison to non-disabled persons.

Harassment

405 The Claimant brought a complaint of harassment under the Equality Act. Section 26 says as follows:

> "(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 purpose or 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."

406 The Tribunal considered the case of *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336 in which Tribunals were advised on the approach to take to harassment

claims. The Tribunal is to focus on three elements (a) unwanted conduct; (b) having either the purpose or effect of either (i) violating the Claimant's dignity or (ii) creating and adverse environment for him; (c) related to the prohibited ground i.e. disability.

407 As set out above, the law changed slightly with the passing of the Equality Act 2010 so that now, the unwanted conduct only has to be *"related to"* the prohibited ground which allows for a broader approach. The Court also held that even if the conduct had the prescribed effect, it must be reasonable that it did so. This was confirmed in the case of *Pemberton v Inwood* [2018] IRLR 542 in which Underwood LJ stated as follows:

> *"In order to decide whether any conduct falling within subparagraph 1(a) of section 26 EA has either of the prescribed effects under subparagraph (1)(b), a tribunal must consider both whether the putative victim perceives themselves to have suffered the effect in question and whether it was reasonable for the conduct to be regarded as having that effect. It must also take into account all the other circumstances."*

408 The question of whether an act is sufficiently serious to support a harassment claim is essentially a question of fact and degree (*Insitu Cleaning Co Ltd v Heads* [1995] IRLR 4).

409 The Respondent submitted that the Claimant cannot be said to have been harassed by the emails sent between his managers while he was on sick leave as it cannot be said that he was subjected to unwanted conduct. It was submitted that although harassment does not need to be targeted at the employee in question for it to amount to harassment, the must be a degree of proximity to the Claimant. In *Moonsar v Fiveways Express Transport Ltd* [2005] IRLR 9 (EAT) it was held that where pornography was downloaded by the Claimant's colleagues in the office where she worked, that there was close enough proximity to her for it to be considered as degrading or offensive to her. Both parties in this case agreed in their submissions that there needed to be sufficient proximity to the Claimant for the emails to constitute unwanted conduct.

410 In the case *of Land Registry v Grant (Equality and Human Rights Commission intervening)* [2011] ICR 1360 LJ Elias stated that "Tribunals must not cheapen the significance of these words (in section 26 above) …..They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment".

411 The case of *De Souza v Automobile Association* [1986] ICR 514 was referred to by the Respondent.

<u>Victimisation</u>

412 The Claimant brings a complaint of victimisation under the Equality Act.

413 Section 27 of the Equality Act stipulates that a person (A) victimises another person (B) if A subjects B to a detriment because –

(a) A does the protected act, or

(b) A believes that B has done, or may do, a protected act.

414 The Claimant submitted that unreasonable conduct by an employer, failure to adhere to its own rules and out of character behaviour are all matters which might lead to an inference that the decision which has been made is victimisation for an earlier protected act *(London School of Economics v Lindsay* [2013] EWCA Civ. 1650).

415 The Claimant also submitted that conscious motivation on the part of discriminator is not a necessary ingredient of unlawful discrimination. Victimisation may be 'by reason of' an earlier protected act if the discriminator subconsciously permitted that act to determine or influence his or her treatment of the Claimant. *Nagarajan v London Regional Transport* [1999] IRLR 52.

Time limits

416 The Tribunal was conscious that the time limits in employment tribunals must be strictly applied and where claims have been issued outside of the time limit, the discretion to extend time should only be applied where the Claimant has shown that it would be just and equitable to do so.

417 The Respondent submitted that most of the Claimant's complaints were out of time and that there was no continuing act which could enable the Tribunal to be able to determine each of his allegations. In determining whether there was *"an act extending over a period"* rather than a succession of unconnected or isolated specific acts as the Respondent submitted, the Tribunal's focus will be on the principles set out in the case of *Hendricks v Commissioner of Police for the Metropolis* [2003] IRLR 96. The effect of *Hendricks* is that a Claimant would not have to prove that the incidents referred to in the claim indicate some sort of general policy or practice but rather that they are inter-linked, are discriminatory and that the employer is responsible for this continuing state of affairs.

418 Section 123 of the Equality Act states that a complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act to which a complaint relates, or such other period as the Employment Tribunal thinks just and equitable. Firstly, the Tribunal must consider whether there was an act extending over a period. If not, then the Claimant submitted that the Tribunal should extend time on a just and equitable basis to allow it to consider all complaints in the Claimant's case.

419 In the case of *Hutchinson v Westward TV* [1977] IRLR 69 it was held that these words – 'just and equitable extension' give the employment tribunal there was discretion to do what it thinks is just and equitable in the circumstances. They entitle the tribunal consider anything which it judges to be relevant. At the same time, in the case of *Robertson v Bexley Community Centre* [2003] IRLR 434 the Court of Appeal held that:

> *"time limits must be exercised strictly in employment cases, and there is no presumption that a tribunal should exercise its discretion to extend time on a 'just and equitable' ground unless it can justify failure to exercise the discretion; as the onus is always on the Claimant to convince the tribunal that it is just and*

equitable to extend time 'the exercise of discretion is the exception rather than the rule''.

420 In *Abertawe* referred to above, the Court of Appeal made the following points: -

(a) The reference to (such other period as the Employment Tribunal thinks just and equitable) indicates that Parliament chose to give the tribunal the widest possible discretion;

(b) There is no prescribed list of factors for the tribunal to consider in determining whether to use its discretion. However, factors which are almost always relevant to consider (and are usually considered in cases where the Limitation Act is being considered) are the length of and the reasons for the delay and whether the delay has prejudiced the Respondent.

(c) There is no requirement that the tribunal has to be satisfied that there was a good reason for the delay before it could conclude that it was just and equitable to extend time in the Claimant's favour.

421 It was also said in that case that there are 2 questions to be asked when considering whether to use this discretion*:*

'the first question …… is why it is that the primary time limit has not been met; and insofar as it is distinct the second question is (the) reason why after the expiry of the primary time limit the claim was not brought sooner than it was'.

422 The Claimant submitted that the application of a discriminatory policy or regime pursuant to which decisions may be taken from time to time is an act extending over a period. They can be a policy even if it is not a formal nature or expressed in writing, and even though it is confined to a particular post or role (*Cast v Croydon College* [1998] IRLR 318 CA).

Applying law to facts

423 The Tribunal will now go through each of the issues listed in the list of issues for both claims and give its reasons and judgment on each.

Time

424 The Tribunal is aware that it needs to consider time limit for the Claimant's two claims separately.

425 In relation to the first claim the Claimant initially brought complaints of discrimination arising from disability and a failure to make reasonable adjustments on 3 June 2016. In that claim he refers to alleged breaches up to 3 June 2016. His complaint of direct discrimination was added by REJ Taylor after a preliminary hearing on 22 March 2018, from an application to amend that was made on 23 August 2017.

426 Although the complaints were alleged to have occurred up to 3 June 2016, it is this Tribunal's judgment that the allegations of indirect discrimination, reasonable adjustments and direct discrimination in the first claim were likely to relate to the period ending on 8 January 2016 at the latest. In relation to the three PCPs relied on by the Claimant, even if they were being operated by the Respondent, they would cease to be so after the Claimant went on sick on 8 January. The Claimant has not been invited to any appraisal or one-to-one meetings after 7 January 2016. He has not been subjected to the requirements of the BV service after 7 January 2016 or any capability process, if one was operated against him.

427 It is also our judgment that the complaints in the first claim all relate to the Claimant's management by Mr Foley/Mr Cox from 1 September 2015. But, it is this Tribunal's judgment that there was no policy or regime applied to the Claimant under which decisions were taken from time to time. It is the Tribunal's judgment that there was no continuing act here.

428 The Tribunal then considered whether it should extend time on a just and equitable basis to allow it to consider the complaints in the first claim. The Tribunal considered the principles set out in the cases of *Abertawe* and *Robertson.* Firstly, the Tribunal looked at the reasons why the Claimant did not issue his complaints within the primary time. We considered the medical records in the bundle and the conclusions drawn by REJ Taylor at the preliminary hearing on the Claimant's state of health in 2016, 2017 and 2018. It is our judgment that the Claimant's mental impairment considerably worsened from January 2016 onwards. He had been hospitalised and he has had suicidal thoughts on more than one occasion.

429 From the medical evidence in the bundle, right up to Dr Arkell's most recent report in January 2018, the Claimant has been seriously unwell throughout this time. From REJ Taylor's conclusions, we judge that it took him some time to instruct solicitors to issue the clam. It is also our judgment that even after he had issued the first claim and although the Claimant had solicitors acting for him in this matter, the state of his mental health meant that he found it extremely difficult to give thorough attention to the grievance, the subject access request, and at the same time, to the allegations and arguments in the claim form. The Claimant's medical evidence produced at the preliminary hearing showed that he was being medically treated from February 2016 and that as a direct consequence of his ill health he was having difficulty coping with his interactions with the Respondent in respect of the internal grievance and with the demands of this litigation. The Claimant was unable to give instructions to solicitors any earlier to issue these proceedings.

430 The second question is why was the claim issued when it was. The claim was initially issued while the Claimant pursued his grievance. He then became more ill and was unable to provide instructions. Proceedings were stayed for a while. It is our judgment that the direct discrimination claim was issued as soon as the Claimant felt able to re-engage with the Tribunal. It is also the Tribunal's judgment that the Claimant's severe ill health and his medical treatment adversely affected his ability to

provide instructions to his solicitors and process legal advice before and for much of the period after the claim was presented.

431 It is highly likely that the Claimant's mental ill health meant that he could only concentrate on the grievance and the subject access request until their conclusion, before turning his full attention to the tribunal claim. It is this Tribunal's judgment that the claim was issued in June 2016 and that this was the earlies that the Claimant's ill health allowed him an opportunity to issue the claim and that he became much more ill in addressing and pursuing the grievance with the Respondent which meant that he was unable to pursue the claim at the same time. The contents of the documents revealed by the Subject Access Request also had an adverse effect on his health. As soon as the Claimant began to re-engage with these proceedings he indicated his intention to make the application to amend to include a complaint of direct discrimination and it was made.

432 In our judgment, although there is a considerable amount of time between the events complained about in the first claim and the issue of the claim - including the amendment; the Claimant's severe mental ill-health and its effects on his ability to give his solicitors instructions before June meant that he was unable or it would have been extremely difficult for him to have issued proceedings before then. It is our judgment that it is just and equitable to use our discretion to extend time to allow us to consider all the complaints.

433 It is our judgment that the Tribunal has jurisdiction to consider the Claimant's complaints in the first claim.

434 The Claimant's second claim was issued in February 2018. The allegations in the second claim relate to the period January 2016 to November 2017 and, to a series of emails sent between the Respondent's management, and between the Respondent and Dr Isaacs. The Claimant had disclosure of those documents/copy emails from the Respondent as part of a response to a Subject Access Request. The Respondent disclosed these documents to the Claimant in July 2016.

435 We first considered why this claim was not issued within the time limits set down in the Equality Act, three months from when the Claimant discovered the emails. It is our judgment that the Claimant was severely unwell in late 2016 and throughout 2017. It was in 2017 that he was hospitalised with having suicidal thoughts. The Claimant was described as agitated and severely distressed in 2016 soon after receiving the SAR documents.

436 It is our judgment that the Claimant was not capable of issuing these proceedings earlier. It is also clear to us that the Claimant was totally distressed and upset by what he discovered in the documents disclosed to him because of the SAR and that he instructed his solicitors to issue proceedings in relation to them as soon as he was able.

437 In the circumstances, it is this Tribunal's judgment that it is just and equitable to extend time to allow the complaints to be considered.

438 We will now go through all the complaints in order.

Issues in the First Claim

Failure to make reasonable adjustments (section 20(3) EA 2010

439 The first issue in dispute for the Tribunal to decide is whether the list of PCPs at paragraph 4 in the first list of issues were PCPs applied by the Respondent that put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled.

Item 4(a) in the list of issues - Operating a capability process (informal or otherwise) from October 2015 to 3 June 2016.

440 It is our judgment that the Respondent was not operating a capability process in relation to the Claimant between October 2015 and June 2016. It is our judgment that the Respondent was monitoring the Claimant's performance, which is different from applying or operating a capability process. The Claimant was part of a team that was strong but was not performing at its optimum at the time that Mr Foley took over. That much is borne out by the note produced by Pierre Briancon in which that he stated although this was a competent and able team, it was a bit chaotic and the writing could be better. It is our judgment that he was not simply talking about the Claimant but referring to the whole team. The Claimant was the assistant editor which was a senior role and only one tier below Mr Foley/Hughes. He confirmed that his role was an important one within the business. He was an experienced journalist of 25 years. He was expected to write agenda setting pieces with financial insight, to edit the pieces of other less experienced journalists within the team and to help them to achieve the standard required.

441 When Mr Foley had a look at some of his articles before taking up the role he questioned to himself whether the quality of the Claimant's writing was affected by time pressure, habit or lack of ideas. However, he took no action on this initial opinion and in our judgment, was prepared to give the Claimant and the rest of the team the opportunity and the tools to be able to improve.

442 The Respondent's opinion was that other members of the team were also not performing to the standard it required. It was not just the Claimant. We referred above to the Respondent's opinion on Swaha's election piece.

443 Mr Foley's response to his concerns about the work produced by the whole team was to organise training to increase their knowledge of financial terms, provide them with subscription to EIKON and to be flexible in the ways he allowed them to use their time during the day. He was aware that everyone worked quite late in the evening and he tried to encourage them to change that habit, to work smarter such as by preparing parts or a draft of articles before a news story broke so that it would be easier to produce the finished product once the story had broken.

444 During the period 1 September 2015 to January 2016, there were genuine concerns about the Claimant's performance expressed for example, by Mr Foley, Mr Cox, Mr Hay and Mr Goldfarb. There was no evidence that Mr Goldfarb or Mr Hay

were aware of the Claimant's disability or were making malicious comments about the Claimant's work. It would not have been helpful the Claimant for concerns about the quality of his work – in terms of analysis and financial insight to have been ignored by the Respondent.

445 The Claimant was a senior and very experienced editor. He is in the position of Assistant Editor at the BMEA office and therefore it would be proportionate and reasonable for the Respondent to expect him to take on a leadership role in the office – which he did - and to produce exemplary work. Indeed, the Claimant had applied for the most senior leadership role in the office on 2 occasions and was proud of the fact that he had helped to steer the office during the interregnum. The Claimant had a salary of £125,000 and could also earn an annual bonus of a further £50,000 which made him a senior employee. That does not mean that the Respondent can treat him in a discriminatory fashion. However, in our judgment it does confirm that the Claimant was junior only to Mr Foley in the office and was expected to lead by example. His writing had to set the bar for junior colleagues. That should include being critical of the work of others, keeping to deadlines set by the company, accepting criticism and acclaim of his work from his manager and colleagues across the business.

446 Before Mr Foley came to take over the office in London, he was aware the Claimant was disabled and he was also aware from his conversation with Mr Hughes that the Claimant was sensitive to criticism. There was no awareness at the time, from either party, that the two were related. The Claimant's emails to Mr Hughes at the time he got upset at the criticism on the article and his emails to Mr Foley after the 7 October and 13 November meetings do not refer to his managers' criticism as being one of the triggers for his ill-health.

447 There were issues about the quality of some of the articles the Claimant had written but overall, the Claimant's performance had been good. Those concerns were not about the Claimant's performance overall. It is our judgment that Mr Foley made no decisions about the Claimant or anybody else in the London EMEA office before he took over in July. There was no evidence that any decision had been made to subject the Claimant to a performance monitoring process before Mr Foley took over in London.

448 Once he took over the reins of the London office, Mr Foley paid attention to everyone's work. It is our judgment that the Claimant's performance was one of the things that Mr Foley occasionally talked about with his own manager, Mr Cox. He sought support from his manager in managing the Claimant. It is likely that they also had discussions about other people's performance in the team and that the focus was not solely on the Claimant.

449 It is our judgment, that between September 2015 and January 2016 there were deficiencies in the Claimant's writing/editing in relation to the financial numeracy and the insightful commentary that the Respondent expected and required of its senior staff. That warranted comment between Mr Foley and his line manager to whom he would have to answer to if he did not ensure that the quality of the product being put out by the London office was up to a good standard. There were also issues with how quickly the Claimant produced his articles. Again, from the emails from Chris Hughes to the team in 2014 it is likely that getting the work out on time was an issue that related to the whole team and had been an ongoing issue since at least 2014.

450 It is also our judgment that it was not only Mr Foley or Mr Cox who made comments on the Claimant's pieces of work. Comments from Mr Goldfarb in relation to the Claimant's financial numeracy appeared to be valid as demonstrated in their email exchange in June 2015.

451 Comments were made in relation to the Heineken article in September 2015 when the Claimant had chosen not to do a piece focussing on financial information/analysis but to do a different article; the AB InBev and SAB Miller piece published on 7 October 2015, the Syngenta article in November 2015 in which the Claimant had made a basic error which was not typographical as it was not a letter or punctuation mark out of place and the Marks and Spencer piece on 7 January; all of which drew criticism from the Claimant's colleagues as well from Mr Cox and subsequently Mr Foley. The Claimant was told of the issues with the Ab InBev piece on the day the article was written. There was also a William Hill story that was spiked because it lacked insight. Apart from the Heineken story, the Claimant accepted that there were issues with these pieces during the hearing.

452 It is our judgment that Mr Foley wanted to handle this matter appropriately and sensitively. Mr Foley himself was also suffering from depression although we were not told that he was disabled. Mr Foley wanted the Claimant to improve and wanted to support him to do so. In our judgment, that is why he sought the advice and assistance of the Respondent's HR team from September 2015. He frequently spoke to Ms Gajdus to gauge whether what he was proposing to do or what he had done/said were right.

453 Mr Foley also was clear that he did not want to start any kind of formal or informal performance monitoring process on the Claimant. Ms Gajdus advised him that he could do so but he was clear that he did not want to. In our judgment, that is because of the Claimant's seniority. Also, in our judgment, Mr Foley believed that he could work with the Claimant to get his writing to be consistently at the standard he required. Even at the end of the meeting on 7 January both Mr Foley and the Claimant agree that he stated that he wanted to help him improve.

454 It is our judgment, that the Respondent was monitoring the Claimant's performance as it would have monitored the performance of other members of the team. It is our judgment, that they did so sensitively and while at the same time, not wanting to refrain from giving the Claimant real feedback on his pieces of work. It is our judgment that there was no secret or pre-determined process.

455 In our judgment, the Respondent was not operating a capability process - informal or otherwise – on the Claimant, between October 2015 and 3 June 2016.

Item 4(b) in the list of issues – Holding performance management appraisal meetings/one to one meetings from October 2015 to 3 June 2016.

456 The suggested PCP incorporates the disadvantage to the Claimant as it refers specifically to the one-to-one meetings and appraisal meetings conducted with him. However, it is our judgment that the Respondent did conduct annual performance management appraisal meetings with its employees. Managers also held regular one-

to-one meetings with their direct reports. In that sense, there was a practice that was applied.

457 It is our judgment that the Respondent held one-to-one meetings with the Claimant between October 2015 and June 2016 but that they were not performance appraisal meetings. We saw two appraisals conducted with the Claimant by Mr Hughes. After Mr Hughes departure, there was one appraisal meeting on 7 January 2016 with Mr Foley. The Claimant's performance was simply monitored and feedback provided within the confines of the usual line management process.

Item 4(c) in the list of issues: Introducing a Breaking Views (BV) service that was "smarter and faster" which impacted on working hours, work duties and work time frames and/or required higher quality work from 1 September 2015 to 3 June 2016.

458 It is this Tribunal's judgment that the Respondent did not introduce a new service from 1 September 2015. As the Claimant agreed in evidence, the Breaking Views service (BV) at EMEA office in London always had to be smart and fast, first with the news and the views and provide insight and analysis of the financial news of the day; quickly and swiftly to its subscribers. Mr Cox's email to the team in July 2015 reminded the team of this. What had happened during Chris Hughes' tenure and before Mr Foley arrived was that the emails and bulletins had been going out later than they should have done and Mr Foley wanted to bring that back to an earlier time of 9.45am. The Claimant initially supported him in doing so as evidenced by him asking Mr Foley to send an email to staff to reinforce the message.

459 There was additional pressure on the managers because of the launch of the Bloomberg 'Gadfly' service and members of staff were told about this and reminded of the principles and objectives of the service. What happened in September 2015 was not the introduction of a new regime but a restatement of the original principals and objectives of the service.

460 Because of the introduction of the 'Gadfly' service and Mr Foley's stated intention of getting the service back to its original value proposition of being first with the news and the views; the Respondent did stress speed in its communication with the Claimant and the rest of the team.

461 In tandem with his desire to get the BV service reaching the original ideals of being first with the news and views, providing insight and analysis on the financial news of the day, quickly and swiftly to subscribers; Mr Foley put measures in place such as giving the team a subscription to EIKON, training on financial terms and a more flexible work day to assist the team in being able to return to and meet those original value propositions.

462 It is our judgment that whereas Mr Hughes was prepared to move the Claimant over to managing people and focussing on writing and editing articles on companies, 'viewed through an investment prism', Mr Foley wanted the Claimant to perform the duties of his job as assistant editor at BV. He was expected to lead on the provision of agenda-setting insight to the financial elite – either through writing or editing flashes, articles and opinion pieces or assist more junior journalists to do so. In that way the

Respondent accepted that Mr Foley required the Claimant and his colleagues to produce a higher quality of work than Mr Hughes because he was a different manager, because he wanted BV to achieve the original value propositions and because of the competition from the Bloomberg's Gadfly service.

463 We did not have evidence that the working day was longer after Mr Foley arrived. The Claimant worked long days before Mr Foley arrived and when he took over he positively encouraged staff to leave early and the Claimant did do so.

464 In this Tribunal's judgment the Respondent did not introduce a BV service that was smarter and faster, impacted on working hours, work duties or work timeframes from 1 September 2015 to 3 June 2016. However, from 1 September the Respondent did require a higher quality of work from the Claimant and his colleagues.

465 It is the Tribunal's judgment, that the Respondent did not apply the PCP in 4(a) above – it did not operate a capability process between October 2015 and June 2016. The Respondent did hold performance appraisal and one-to-one meetings with the Claimant. That is the PCP at 4(b) above. Lastly, the Respondent did not introduce a Breaking Views service that was "smarter and faster" as described in 4(c) above but did require a higher quality of work from the Claimant and his colleagues.

466 In our judgment the two PCPs that were applied by the Respondent were (b) the holding of appraisal and one-to-one meetings and the requirement to produce a higher quality of work in comparison to Mr Hughes' standards.

The issue raised at paragraph 6(i), (ii) and (iii) are whether the application of those PCPs put the Claimant at a substantial disadvantage due to his disability when compared to non-disabled persons.

467 Our judgment in relation to these as follows.

468 6(i) – 6(iii) The Respondent conceded that the Claimant suffered from low self-esteem at times and indeed that was the Claimant's evidence in the hearing. It was accepted that the Claimant has suffered from anxiety and depression since 1991.

469 However, the Tribunal had no evidence that this made him more vulnerable to stressful situations. The medical report referred to above from Dr Harvey stated that the Claimant did not indicate to him that he was aware of any specific triggers over the years. He did not immediately recognise stressful situations or criticism as major triggers. In his contemporaneous emails he referred to discussions about cost-cutting, his elderly mother's failing health and general tiredness as being the triggers for the episode in November 2015. He referred to his '*editing inadequacies'* in an email in October 2015. In his request to Mr Foley to be considered as '*chief of stuff*' he did not link this to his disability or to the fact that he could not cope any longer with the stress of being a journalist at the Respondent.

470 It is our judgment that the Respondent was not making significant and demanding changes to the structure and nature of the work they required the Claimant to perform. The Claimant was being asked to change slightly the way in which he

worked so that he frontloaded the work and did the research on EIKON among other sources, prepared a draft of an article beforehand when it was expected that a news story on a particular company or industry was about to break or a particular corporation was about to announce its year-end figures. If that was done, when the financial news broke, as an experienced journalist, he would be primed to write the article. The idea was that it would allow him to work shorter days and be more focussed in his work. It was expected that this would produce better quality writing. This was not a smarter and faster regime but a more efficient way of using resources. The Claimant could not say whether Mr Foley's way of working would make no difference to the length of his days or the amount of work he had to do. He continued to work long days and had not used EIKON as much. For example, although he looked at it for the Heineken article he did not use the information that he found. There was no independent evidence that a person with low self-esteem and depression and anxiety would be less able to work in the way that Mr Foley wanted, especially if it meant more resources and shorter days than before. We did not have evidence that a person with low self-esteem and anxiety and depression would not be able to cope with one-to-one meetings and appraisal meetings. The Claimant had been able to cope with those with Mr Hughes and previously.

471 As the Respondent submitted, the Claimant applied for the position of running the EMEA office on two occasions which would indicate that he considered himself quite able to deal with changes and the pressure and stresses as well as the demands of being senior line management as well as the pressures of getting the emails out on time. In addition, the Claimant had spoken to Mr Foley about his health and said that he was managing his condition. The Claimant had always informed his managers that he was managing his condition and that it did not interfere with his work.

472 There was no change to the content of the work that he was expected to produce. The Claimant was still required to produce agenda setting financial journalism with analysis and insight. He was asked to do this to time rather than behind the deadline.

473 There were two articles that we have referred to above that were commented on by the Respondent as not being of the required standard which were filed late. The other articles referred to were also problematic because of the content and either the lack of financials and/or the lack of the cutting-edge financial analysis and financial insight that should have been included in them.

474 Although there were many articles that the Claimant wrote well, in the Respondent's judgment, he found it difficult to consistently write about corporate financials in a way that provided the insightful analysis and commentary that the Respondent's clients expected and would find essential reading. The Respondent took this up with him in relation to many articles and we have referred to those in the findings of fact above.

475 We had no evidence that Mr Foley and/or Mr Cox knew that the Claimant could not cope with the requirement that he produce articles that met with the Respondent's 5 value propositions – first with the views, value for time, with analytical depth and that were enjoyable. He did not say that he could not do that and it was not referred to when he asked Mr Foley to make him *'chief of stuff'.* The Respondent did not have any

medical evidence that said that he could not do that. The Respondent needed him to produce cutting-edge financial commentary at speed with valuable and unique insights into the top financial news stories of the day. That was the Respondent's reason for being and it continued to be so after Mr Foley arrived. The Claimant was producing the work, it was just that the Respondent had issues with the quality of the articles that he was writing.

476 The issues with the quality of the Claimant's articles were highlighted before Mr Foley took over. Mr Hughes made a comment about one of the Claimant's articles in October 2014. The Claimant reacted strongly to this and had to leave work and did not return to the office for some time thereafter. That was not part of any smarter and faster regime or because he had to produce work of a higher quality. At the hearing the Claimant agreed that the criticism was fair and that Mr Hughes managed him fairly.

477 It is our judgment that the Claimant certainly struggled to accept any feedback which did not focus solely on the positive.

478 When the feedback from the Claimant's colleagues was constructive and suggested how what he had written was incorrect (the Goldfarb comments) or inadequate (Mr Hughes or Mr Foley), they were still not well received by the Claimant. Although the Claimant confirmed that Chris Hughes' comments were reasonable and constructive, at the time, he responded negatively and assumed that the flashes had gone down badly with Mr Hughes and became upset. It is our judgment that it is likely that he considered Mr Goldfarb's comments to be wrong or inappropriate and that is why he forwarded them to his managers. Although the Claimant admitted in the hearing that he made a typographical error, he did not do so in the emails with Mr Goldfarb and instead argued that his interpretation of the formula was correct. In the hearing he dismissed Mr Hay's comments on his work as that of someone seeking to promote himself.

479 Also, in the appraisal meeting on 7 January, it is our judgment that Mr Foley did praise the Claimant in relation to the way that he kept the office running as he was part of the team who kept the office running during the interregnum. That was discussed in the meeting. He also quite rightly also informed him about the standard of some of the articles he had written/edited. Because the Claimant had no insight into any shortcomings in some of the articles that he had written, Mr Foley, in an attempt to bring some clarity with the situation, told him that he lacked basic financials. That upset the Claimant.

480 Despite conversations that he had had with Mr Foley about the Ab InBev/SAB Miller article, the article that he was writing earlier that morning on Marks & Spencer and the article in October; the Claimant went into the appraisal meeting with no expectation that the standard/quality of some of his work and his financial analysis would be mentioned in the meeting. Those articles did not amount to most of his work. In our judgment, Mr Foley was still not proposing to implement any kind of formal capability process against the Claimant which would need to be recorded on his file. His clear commitment to assisting the Claimant to address any issues with his writing or editing would have been to the Claimant's advantage should he want to go on and work at another part of the Respondent or in another company altogether.

481 Given the Claimant's position within the organisation and his seniority and experience as a journalist, the Respondent would have felt it necessary and it was to his advantage for Mr Foley to raise his concerns with him as part of a balanced appraisal and feedback process. It is our judgment, that Mr Foley gave both positive as well as negative feedback in that appraisal meeting.

482 We did not have evidence from which we could conclude that the people with the same disability as the Claimant would experience disadvantage if they were as experienced as he was, was employed as Assistant Editor on the BV service and were asked to produce a higher quality of work after 1 September 2015. It is also our judgment that this was not a significant and demanding change to the structure and nature of the work that the Claimant was required to perform.

483 It is our judgment that the application of the practice of holding performance appraisal meetings and/or one to one meetings did not put the Claimant to a substantial disadvantage. There are couple of meetings at which the Claimant became upset, notably meetings with Mr Foley about specific pieces of work on 7 October and 13 November 2015; and the appraisal meeting on 7 January. However, the Claimant had been subject to many one-to-one and appraisal meetings in the past for many years while being a disabled person and we were not told that he had been disadvantaged by those meetings or the process by which they were set up. The Claimant has been a disabled person since 1991 and has been a journalist for the past 25 years.

484 When he told Mr Hughes about his condition, he added that it was being managed successfully but that it was susceptible to stressful situations and then spoke about his mother who was very ill at the time. When he told Mr Cox about his health in November 2014 he referred the conversations at work about cost-cutting, concerns about his mother and tiredness as being possible triggers for this episode of his ill-health. The Claimant did not refer to meetings with managers, one-to-one meetings or appraisal meetings as the source of stress or possible triggers.

485 Although he referred in that email to '*rethinking his responsibilities'* at the Respondent he also stated that the essence of his present job suited him well. The Claimant returned to work after a period off sick and this was not referred to again by either party. The Claimant then applied for the EMEA editor position which both parties agreed was a more responsible, stressful, visible and managerial position than that of assistant editor which is his current role.

486 When he met with Mr Foley and asked to be made '*chief of stuff*' he did not relate that to his disability but instead stated that he was not the greatest of writers and saw himself taking on a more management role.

487 The Claimant's job of a journalist with the Respondent had always been stressful. This was a stressful environment replete with deadlines, as is the nature of journalism. He confirmed that the job of a journalist has always been in a high-pressured environment and that he had managed successfully in it for 25 years.

488 The Claimant's case was that as a person with anxiety, depression and low self-esteem he was more vulnerable to an adverse reaction to a practice that places him in stressful situations. We did not have evidence that having low self-esteem or his

anxiety and depression made the Claimant vulnerable to stressful situations. The Claimant has worked and thrived in a profession that he agreed usually creates stressful working environments.

489 It is this Tribunal's judgment that the Respondent did apply a practice of regular one-to-one meetings between it and its employees along with annual appraisal meetings. However, it is our judgment that this practice did not put the Claimant at a substantial disadvantage

490 The Respondent did not have evidence that the Claimant's condition of depression and anxiety and his low self-esteem would make him more vulnerable to the comments that Mr Foley made in the meeting. This is so particularly, where the Claimant would have been aware of the articles and the issues that arose within them as they were written quite recently (in October, November and January) and had already been the subject of discussion between him and his manager.

491 The Claimant submitted that his performance was impacted by his health. The Claimant's case was that he was not able to perform as well at a time that he was unwell when he did not even know that he was being closely reviewed. The Tribunal did not have evidence that his ill-health affected his performance in the way suggested. We did not have evidence that the quality of his analysis or his writing was affected by his disability.

492 The Claimant applied for the Head of EMEA role which was subsequently filled by Mr Hughes and then applied again when Mr Hughes left. The Claimant must have envisaged that he could cope with the stressful situation of managing the whole team, producing the product, getting it out on time and responding to the demands of the international management. The Claimant had occupied many senior roles within journalism over the years that he had been suffering with depression. The Claimant informed the Respondent upon his appointment and continued to do so when asked about his health by Mr Foley and others to say that it does not affect his ability to do his job and that he had strategies for dealing with it.

493 In relation to issue 6(iv), it is our judgment that the Respondent did not dispense with the Respondent's company performance management procedures or take short cuts or deal with him in a way that lacked objectivity. The Respondent in the form of Mr Foley, sought assistance and support from HR in the way that he was addressing his concerns with the Claimant and chose not to institute any capability processes as he did not want anything to be on the Claimant's record and he did not want to jeopardise the Claimant's position and future career. He was dealing with his concerns about the Claimant's writing in a more protracted way than in the Respondent's procedures as he believed that any performance management process would add stress to the Claimant – whether formal or informal. Mr Foley considered that the Claimant needed support to make his articles more incisive, insightful and with more financial analysis rather than any performance management process which he considered would just add stress rather than help the Claimant. He clearly also believed that he could successfully support the Claimant to turn around his performance without the need for any formal procedures.

494 In the meeting on 7 January, he informed the Claimant that he wanted to support him in the future so that the Claimant could achieve the more traditional goals that are set for him. He did not judge him on 2016s goals as they had not yet been set. However, it was unlikely that the 2016 goals would be the same as in 2015, the main goal of which had been to keep the office running and the product being put out – which the Claimant had achieved.

495 In Dr Harvey's OH report of 19 August 2016, he confirmed that the Claimant had been suffering from depression from around 1991. The doctor concluded from his discussion with the Claimant that his symptoms had not been of sufficient severity to cause any significant compromise to his work capacity before 2015/2016. At the appointment, the Claimant did not indicate to him that he was aware of any specific triggers over the years. It was only during this assessment that the doctor observed that it is likely that the perceived criticisms of his work in the 7 January meeting led to a catastrophic reaction which has caused him to be unwell since then.

496 It is likely therefore that prior to the appraisal meeting and this analysis by the doctor, the Claimant were not aware that criticism could cause a severe reaction in his health and a deterioration in his health.

497 In the email the Claimant sent to Mr Hughes after the incident in November 2014, he did not refer to criticism of the article but did refer to many personal matters that might have triggered that period of strain. In the emails that he sent to Mr Foley after the article in October, he refers to other matters which may have caused him to have what he referred to as *'one of his episodes'*. Those were the deterioration in his mother's health and the possibility that she may well pass away at any moment and other matters. The Claimant never referred to criticism or negative feedback as causing his ill-health.

498 It is this Tribunal's judgment that the Claimant was not put to substantial disadvantage due to his disability by the application of the PCPs of having one-to-one/appraisal meetings and by the requirement to produce a higher standard of work than had previously been required by Mr Hughes; on Mr Foley's arrival.

Issue number 7: Was the Respondent under an obligation by section 20 and section 21 of the Equality Act to make reasonable adjustments from on or about 1 September 2015 to 3 June 2016?

499 As stated in the law section above – where a provision, criterion or practice (PCP) of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, A is under an obligation to take such steps as it is reasonable to have to take to avoid the disadvantage.

500 It is this Tribunal's judgment as set out above that the PCPs as drafted in the list of issues were not applied to the Claimant but that the Respondent did operate a PCP of conducting one-to-one meetings and an annual appraisal meeting with each member of staff. Also, Mr Foley did require a higher quality of work from the team on his arrival at the office. But it is our judgment that this was not new. He required the team to produce work that complied with the Respondent's core values and he

introduced a subscription to EIKON and financial training to assist the journalists in the team to get there.

501 As already stated above, in this Tribunal's judgment the practice of conducting one-to-one meetings and appraisal meetings between an employee and their line manager where they review the work that has been done, and the line manager provides positive and negative feedback, where appropriate; did not put the Claimant as a personal with a mental impairment at a substantial disadvantage.

502 This was so because those meetings were conducted in an environment where Mr Foley consulted with HR before holding his meetings, spoke to the Claimant in a measured and calm way and provided him with positive as well as negative feedback, as it was appropriate to do.

503 The Respondent shared its concerns with the Claimant in discussions on 7 October 2015 and 30 October. He forwarded the discussion that he had had with Mr Goldfarb in June 2015 to his managers and he had a discussion with Mr Foley on 13 November. On those occasions our judgment is that the comments about the specific pieces of work were reasoned and he was given examples of how the work could be improved or properly evidenced. In our judgment, the Claimant should have been aware that the criticism of those pieces of work or reservations were not subjective or of impressions but real and grounded. In our judgment, the performance monitoring was not secret. The Claimant was given very specific and constructive feedback.

504 It was appropriate for the Respondent to monitor the Claimant's performance as it is likely that they did with other members of the team. We did not believe that the Claimant was the only person whose performance was discussed by the managers. There were comments that at least one article Swaha wrote was also not up to standard and that the whole team was not up to standard as among other things, they had become used to producing their articles late or after the desired time.

505 Mr Foley had a different management style from Mr Hughes.

506 The Respondent is a commercial organisation which aims for the attributes of being first with the views, value for time, with analytical depth and enjoyable. Agenda setting insight was required by the Claimant and his colleagues. As Assistant Editor, the Claimant was expected to assist in maintaining and raising the standard of others within the team. This had always been the case since he joined the Respondent as Assistant Editor in 2010.

507 This is a subscription service to well educated, sophisticated clients who pay a premium for it. That had always been the case. The Claimant's evidence was that he was used to working in a high-pressured environment and that he had been a senior journalist for many years, holding down responsible positions at other publications.

508 It is this Tribunal's judgment that the application of the PCPs to have one-to-one management and appraisal meetings and to produce higher quality work did not put the Claimant at a substantial disadvantage.

509 The Respondent was not under a duty to make reasonable adjustments.

510 The Respondent was aware that the Claimant was sensitive to criticism. However, they did not know and could not have known that this was related to his mental health condition as at the time, neither did the Claimant. It is not until the occupational health report produced by Dr Harvey in August 2016 is the link made. Until that time, as the Claimant stated to Dr Harvey, he was not aware of any specific triggers over the years.

511 Being aware that the Claimant was sensitive to criticism, Mr Foley sought advice from the Respondent's HR section and prepared to be cautious, supportive and balanced in his discussion with the Claimant in the appraisal meeting on 7 January. It is likely in our judgment, that it was in response to the Claimant's assessment that there was only an issue with 1% of his work that Mr Foley informed the Claimant that he did not have baseline financial skills. It is our judgment that those were not the best choice of words for Mr Foley to have used in this situation but it is our judgment that the statement was not made because of the Claimant's disability but because of Mr Foley's frustration and the Claimant's refusal to accept that there were any issues with his work. Also, that statement was made in the context of his informing the Claimant that he was prepared to work together with him to improve the quality of his work, to be accessible to him. Mr Foley also confirmed that the Claimant had achieved his targets for 2015. He had also acknowledged the Claimant's huge contribution to keeping the office running and getting the product out during the interregnum.

512 It is our judgment, that the Claimant did not face a barrage of abuse from anyone at the Respondent. He did not face a barrage of abuse in the appraisal meeting on 7 January. The Claimant was informed that he had achieved the goals that had been set for him. He was also told, that the Respondent were prepared to support him in relation to the aspects of his work that needed support. The Claimant was awarded his bonus and was told that he had achieved his targets for 2015. He was also told that there were some required skills that he needed to improve on.

513 In our judgment, the reasonable adjustments suggested by the Claimant, would not have alleviated any disadvantage for him. The Respondent still had to feedback to the Claimant on the quality and standard of his work in the articles that had already been discussed with him earlier in the year.

514 Mr Foley agreed with the Claimant in the meeting and in the hearing that the Claimant did lots of good work but that the articles with which the Respondent had issues demonstrated that there were some skills in terms of financial analysis and insight that the Claimant had not demonstrated when writing them.

515 It would not have been possible or appropriate for the Respondent to refrain from giving the Claimant that feedback. That is so given the Claimant's position of Assistant Editor and his seniority within the profession within the team.

516 Those were also the reasons why Mr Foley was determined not to start any informal for formal processes in relation to the Claimant's performance. Even though he was advised by HR that he could do so, he chose not to. He did not want this to be on the Claimant's record.

517 There was no representative for the Claimant at the meetings that he had with Mr Foley. The Claimant did not ask for representative and there is no indication that he needed one or that having one would have made a difference. The Claimant was not being disciplined or taken through any process. Mr Foley did ask HR whether it was their advice that he should be given the opportunity to have a companion and the advice was against it because it was likely to alarm and worry him and cause him more concern. He regularly sought advice from HR in managing the Claimant and especially in relation to giving him feedback because he was aware that he was sensitive to feedback.

518 When the Claimant asked to meet with Mr Foley on 8 January, he did not ask for a representative as he felt capable of raising the issues that he had with Mr Foley directly and without any assistance or support. This demonstrates, that the Claimant did not need this adjustment and felt able to speak directly to Mr Foley and express his feelings.

519 It is this Tribunal's judgment that the suggested adjustments would not have made any difference to the Claimant.

Issue number 8: To what extent would these reasonable adjustments (singularly or cumulatively) have ameliorated, avoided or removed the alleged substantial disadvantage/s?

520 It is this Tribunal's judgment that the Claimant was not put at a disadvantage because of his disability in relation to the requirement to produce a higher quality work or in the practice of regular one-to-one meetings between managers and their direct reports. There was no duty to make reasonable adjustments.

521 The Claimant was upset during meetings with Mr Foley and suffered a mental crisis at the appraisal meeting on 7 January. In our judgment this was not because of unfair criticism or because he did not know that he was being monitored. The Claimant found it difficult to accept any commentary that was not positive. That is demonstrated by his reaction to Mr Hughes comment in November 2014 and his reaction to Mr Goldfarb's comments. He became upset in meetings with Mr Foley that took place in October and November 2015 where specific articles were discussed either because of the content or because they had been produced after the deadline. From our findings above it is our judgment that those were not unfair criticisms. On each occasion the Claimant was being notified of the Respondent's concerns, which were detailed and specific.

522 In this Tribunal's judgment the Respondent was not under a duty to make reasonable adjustments. The claim is dismissed.

Indirect discrimination: -

Item 9 in the list of issues: whether the Respondent operated the three PCPs referred to at paragraph 4 above.

523 The Tribunal repeats its judgment on the PCPs referred to paragraph 4 of the list of issues as they are the same PCPs referred to earlier.

524 It is our judgment, that the Respondent did operate a practice of holding one-to-one meetings between managers and staff and an annual appraisal meeting.

525 Mr Foley also required a higher quality of work once he took over the EMEA office.

Item 11 in the list of issues: If so, did or would the Respondent apply the PCP to persons who did not share the Claimant's protected characteristic?

526 The practice of conducting appraisal meetings and one-to-one meetings with members of staff was a practice that the Respondent applied to all staff. So was the requirement by Mr Foley for higher quality of work. That was expected of the whole team. Members of the team did not share the Claimant's protected characteristic as they were not disabled or as far as we were told, did not have the same disability as the Claimant.

Item 12 – 14 in the list of issues: If so, did these PCPs put those suffering from the same relevant protected characteristics as the Claimant at a particular disadvantage when compared with persons who do not have the same relevant protected characteristic? If so, was the Claimant put to that particular disadvantage?

The Claimant relies upon the disadvantages listed under the alleged substantial disadvantages at 6(i) – 6(iii) above;

527 The requirements to have one-to-one meetings and appraisal meetings would not have put those suffering from the same disability as the Claimant at a particular disadvantage.

528 Looking at the substantial disadvantages the Claimant relies on in the list of issues, it is our judgment that it was clear from the hearing that the Claimant did suffer from low self-esteem. However, it also appeared that he found it difficult to accept his manager's opinion that his work was anything less than perfect. His response to Mr Hughes comment on the article in November 2014, his response to Mr Cox's email of 30 April making some suggestions on editing Swaha's piece and his response to Mr Foley in the office in the morning of 7 January show that he would reject or become upset at any critique on his work. Each of those were specific, detailed and constructive.

529 We did not have medical evidence that showed that having low self-esteem, anxiety and depression would make the Claimant more vulnerable to stressful situations. It is possible that anxiety may do so. However, it does not appear that the Claimant thought this either. The Claimant applied for a more senior position on two occasions while working for the Respondent. The Claimant clearly considered himself to be able to cope with the stress of being the Editor of the EMEA office in London in 2013 and again in 2015 when he put himself forward for the post. The Claimant has held senior positions at the Times and other publication in the past, while suffering from depression. This is even though he has had episodes over the years of being ill. It is our judgment, that the Claimant has managed very well in stressful situations and the

evidence we had gave no indication to the Respondent that a person with anxiety, depression and low self-esteem would be less able to quickly adapt to changes in the workplace.

530 It is also our judgment that the Claimant was not asked to adapt quickly to changes in the workplace. Mr Foley took the time to set up training for members of the team and to talk to the Claimant before he took up the office about how he wanted the office run and the standards such as getting out the email on time, that he wanted to resume. Those changes Mr Foley introduced to the way in which the work was to be prepared were aimed at supporting the Claimant and his colleagues to produce their best work. The Claimant does not complain that the subscription to EIKON or the expectation that he and his colleagues would do research ahead of financial news coming out on a company or, finally, the financial training that was organised for the team; put him at a disadvantage and those were the changes that Mr Foley put in place to support the team.

531 The Claimant had at least a month or more to adjust to Mr Foley's way of doing things as he took over in July.

532 In his closing submissions, the Claimant mentions Mr Foley referring to the speed of the Respondent's delivery of the bulletins to their clients, being one of his prime areas of focus for his role. Also, that Mr Cox referred to the need for speed and that they needed to get faster to hold on to the Respondent's lead in speed.

533 In our judgment, the Respondent's product had always been one that was meant to be produced quickly and to be punchy and sharp in its focus, analysis and advice to its corporate clients. Mr Foley's take on his job, was that he really wanted to emphasis those points on his arrival in London but it was not new. Emails from Mr Hughes in the bundle and referred to above show that he also made attempts to get the team to produce their articles quicker. In our judgment, Mr Foley focussed on speed and getting the bulletin out early because there had been some slippage in the time in which the emails were produced during the interregnum. It was accepted that there were difficulties which caused that to happen and there was no blame put on any individual for that but Mr Foley wanted to turn that around during his tenure. The subscription to EIKON, the training that was provided, the access that the Claimant and his colleagues had to the Reuters news information and Mr Foley's intention that the work should be frontloaded so that members of staff worked as much as possible to prepare stories before they broke; should have meant that it was not obvious that there would be an increase in work times, working hours and work timeframes because of the way that Mr Foley decided to run the London office.

534 It is our judgment that the Claimant was not closely reviewed as suggested in substantial disadvantage paragraph 6(iii). There was no suggestion that Mr Foley had paid more attention to his articles than anybody else's. The comments that were made were made in the normal course of either editing articles or of reading articles that needed to be sent daily to subscribers. The product always needed to be insightful and analytical.

535 It is our judgment that the comments made by Mr Goldfarb, Mr Hay, Mr Cox and Mr Foley were not nit-picking or unjustified or unwarranted given the Claimant's seniority, experience and position within the organisation.

536 After the meeting in November the Claimant sent an email to Mr Foley to say thank you for his help with everything and in our judgment, he was indicating that he did not feel that he had been treated unfavourably or in any way to his detriment in that meeting. It is our judgment that it is more likely that he got upset because he was not happy with any criticism of his work. The Claimant find it difficult to accept criticism of his work or any feedback which critiqued his work.

537 When Mr Hughes commented on the Claimant's article which had been written with Quentin Webb, his response was completely different to the Claimant's response. Mr Webb accepted the criticism whereas the Claimant became upset and he had to leave work that day.

538 In our judgment, it is likely that the Claimant went into the appraisal meeting, on 7 January, not expecting any issues to be brought up with his work despite the comments that had been made to him about an article that he had written earlier that day and the conversations that he had had with Mr Foley in October and November about other pieces of work. It is agreed that it was not most of his work but it also was not 1% as the Claimant contended in the meeting. The Claimant found it difficult to hear and accept any feedback that was not a complete endorsement of his work and appeared not to fully understand the comments that were being made. It is likely that that is why he thought they were unreasonable and upsetting. That is also why the Claimant considered that the comments that were made about his work were without justification.

539 In our judgment, the Claimant was not put under poor performance management process whether informal, formal or otherwise. Although Mr Foley stated to Mr Cox that the Claimant's performance was not what he expected or needed from a senior editor, he did not want to put the Claimant under the performance management process whether formal, informal or otherwise but preferred instead to feedback directly to the Claimant on his concerns about the Claimant's work and work with him/support him to improve. At the same time, he let the Claimant know that if he needed to leave work for any reason, he only needed to send Mr Foley an email and he could leave. Although Mr Hughes had informed Mr Foley that the Claimant was sensitive to criticism, Mr Hughes had not said that it was linked to the Claimant's disability. Mr Hughes' concerns when leaving the Respondent were that the Claimant and Mr Foley may have tension in their relationship because the Claimant applied for the job and not been appointed. Also, because of the Claimant's disability and his mother's failing health.

540 It is therefore this Tribunal's judgment that we have been shown no evidence that the Claimant was put to the alleged substantial disadvantages listed at paragraph 6(i), 6(ii) and (iii).

541 It is also this Tribunal's judgment that Mr Foley's aim in conducting the appraisal meeting in the way that he did and feeding back to the Claimant in October and November on his performance was to ensure that the Claimant's work in the articles that he produced and the work that he edited was of the standard that the Respondent's clients expected. The Respondent was seeking to ensure that Breaking Views complied with its value propositions set out above and that it could compete with

and surpass its competitors in terms of the provision of financial news; and to ensure high morale and strong performance within the team. The Respondent wanted to communicate openly and constructively with the Claimant about his performance and to monitor and evaluate the performance of all the Respondent's employees to ensure that the product, the BV service, was of the quality and depth that the Respondent had promised its clients.

542 It is our judgment that Mr Foley's actions in managing the Claimant and feeding back to him in the appraisal meeting and in the meetings of October and November were proportionate to achieving that aim.

543 It is our judgment, that despite Mr Cox's comment about Britain exiting the EU and his disquiet about the Claimant's holiday and any other comments made in emails, the Respondent did not have any intention of dismissing the Claimant. The Respondent's intention was to have the Claimant perform well at the level of Senior Assistant Editor on Breaking Views.

544 The complaint of indirect discrimination fails and is dismissed.

Direct Discrimination and Discrimination Arising from Disability (section 13 and section 15 Equality Act 2010

Issue 16 was written in the list of issues as alternative issues. The issues require separate analysis which we will do now. Firstly, direct discrimination. Was Mr Cole treated less favourably because of his disability between 1 September 2015 to 3 June 2016?

545 In considering this part of the claim the Tribunal must consider the mental processes (conscious or unconscious) of the alleged discriminator. We also address points i – xv of issue 16.

546 It is this Tribunal's judgment that there was no secret or pre-determined process going on in relation to the Respondent's approach to dealing with the Claimant's performance. The Respondent was not proposing to take the Claimant through any formal or informal performance management process as it did not consider that it had got to that stage and because Mr Foley hoped that with support the Claimant could improve in those areas that were not up to the standard he required; making any such process unnecessary. We did not have evidence on which we could base a conclusion that the Respondent decided – whether consciously or unconsciously - upon hearing of the Claimant's disability, that he should be removed from the office.

547 In our judgment, if that were the case, Mr Foley and Mr Cox would have moved to a formal performance management process as soon as Ms Gajdus advised them on 5 November of that possibility and managed the Claimant out of the business. Instead, our judgment is that Mr Foley spoke to the Claimant on at least two occasions as well as in the appraisal meeting about the issues – such as financial analysis of the type produced by the BV service and getting his articles out on time – in the hope that he would agree that these were issues that needed to be addressed and they could work on together.

548 In our judgment, Mr Foley sought support from his manager and told him about the issues in the London BV office. Those were the reasons why he wrote to Mr Cox to let him know of various things that occurred after he arrived in London and sought support for dealing with them. Mr Cox was his line manager. It was appropriate for Mr Foley to discuss his work – which included managing the Claimant – with his line manager. This was not a secret or pre-determined process. Mr Cox was more direct and blunt in his comments but he did give the Claimant the Ab InBev story to write and considered him for the role of EMEA editor when Mr Hughes left. This was after he became aware that the Claimant was a disabled person.

549 It is our judgment that the Respondent did speak to the Claimant about specific articles – such as on 30 April when Mr Cox commented on his editing of Swaha's piece, 7 October where the main issue was the fact that the article had been late as the Claimant had not prioritised his work for that day; on 13 November in relation to an article that lacked robust financial analysis and was filed later than the agreed deadline; and on 7 January when again another article lacked insight. In addition, the Claimant had written articles that were spiked and not published. There were the other articles where concern was expressed by Mr Hay and Mr Goldfarb. The Claimant had forwarded the email discussion with Mr Goldfarb to his managers.

550 It is therefore our judgment that the Claimant did have notice of the concerns that the Respondent of his performance. He did know that the Respondent considered that some of his articles lacked sufficient insight and that there was an issue with his late completion of articles. Although he had only been spoken to about a few articles, the Respondent considered that they demonstrated a more fundamental issue that it wanted to address.

551 Even though he had seen the emails from Mr Hughes informing the Respondent of the Claimant's disability before taking up his office in London, it is our judgment that Mr Foley considered him as someone he could rely on in the office to assist in raising the standards that had fallen during Mr Hughes' tenure. Mr Foley's email discussions with the Claimant and their meeting in April were about how they could get everyone to begin to present their articles earlier and what support Mr Foley was going to put in place when he arrived to assist with the depth of financial dexterity in the office. The Claimant agreed that these were real issues in London. He agreed that articles were being presented late and that is why he asked Mr Foley to send an email direct to the team to assist in getting the message across. They were working together at that time.

552 When Mr Foley looked through the work of the Claimant and his colleagues before he arrived in London he had concerns but was willing to wait until he took up hid post and had given everyone in the team time to settle in with his ideas of how to work before drawing any definite conclusions on their abilities. The Claimant and Mr Foley worked as a team in the beginning and before Mr Foley arrived in London. We did not have evidence to lead us to conclude that when Mr Foley arrived with an unsympathetic approach to the Claimant or the Claimant's disability.

553 The Claimant did get upset in two meetings with Mr Foley before the January appraisal. Mr Foley quickly ended the meetings when that happened so that the Claimant did not have to continue the discussion while upset and so he could go home. At the meeting on 7 October, the Claimant did say in the meeting that he could not go

any faster. He also informed Mr Foley of his disability and the way in which he had managed his illness up to that date. Mr Foley advised the Claimant to take whatever time he needed, when he needed it. He was flexible about the Claimant's work hours and although the Claimant came to work very early, his evidence was that the Claimant frequently left work early and he was fine with that. It is our judgment that at the time, the Claimant did not believe that any other action was necessary as later that day he wrote an email to Mr Foley thanking him for his help with everything.

554 On 11 November they spoke about the fact that the Claimant was stressed in relation to family matters that were worrying him after Mr Foley enquired after his health. The Claimant also got upset in a meeting on 13 November when discussing the article on Syngenta that had been filed late. Mr Foley believed that he was stressed about work in the meeting when he got upset and the time that he took off work thereafter was not recorded as sick leave. The Claimant talked in that meeting about how many hours he was working and that he could not go any faster. He was not being asked to go faster but to produce his articles to time. Mr Foley offered to assist him to plan his work more effectively to ensure he was not working so many hours. He was not expected to work from dawn until late at night. Mr Foley also told the Claimant that he would look out for articles that he would be interested in writing. He attempted to address the issues that the Claimant raised in that meeting and to assist him or reorganising the way he worked so that the work did not contribute to the stress he was clearly under.

555 The Claimant and his colleagues had been used to working quite late before Mr Foley took over the London office and that was one of the things that Mr Foley wanted to address at the start of his tenure. The attempts he made to get the team to frontload the work so that they did the research on a company before the news broke, so that they would be primed and ready to write the story when it did; had not yet become the norm at the office. The Claimant had not gotten used to using EIKON either.

556 There was no evidence that Mr Foley and/or Mr Cox had consciously or unconsciously decided once they heard of the Claimant's disability that he had to go or that he had no place in the team or that he was a weak link in the team.

557 It is our judgment that the Respondent gave the Claimant a balanced view of his performance at the appraisal meeting on 7 January. He was praised for keeping the office going during the interregnum. He was told that he had achieved his target for 2015 and that generally, the daily emails had gone out on time. Those were all positive things.

558 A balanced view of his performance would also mean that he would be told of any shortcomings in his performance. It was when the discussion turned to the future that Mr Foley addressed the areas of his performance that required improvement. It is our judgment that the Claimant was not assessed on 2016 targets as they had not yet been set. However, based on some of the concerns that the Respondent had over some of the Claimant's articles, Mr Foley wanted to support him to achieve those more traditional targets in 2016. More traditional targets would have included producing articles to time with credible analysis and agenda-setting insight. Mr Foley was attempting to set in motion some support that would assist the Claimant in achieving

those traditional targets in 2016. If he had wanted to terminate the Claimant's employment as submitted then there would be no need to raise the subject with the Claimant and he would not have offered any support.

559 In our judgment, it is unlikely that Mr Foley told the Claimant that he was resistant to change but he did tell him bluntly that he lacked baseline skills and that he was unwilling to learn. The Claimant resisted Mr Foley's comments that in looking forward to 2016 they needed to work together to improve his performance on all fronts. He was told that the problem was not just with 1% of his work. His response was to tell Mr Foley that he was treating him like a child. Mr Foley was surprised that the Claimant was unwilling to accept his comments about his performance and it is our judgment that it was in that context that he told the Claimant that he lacked baseline skills. The Claimant's response to his comment about the lack of insightful financial analysis in the article earlier that day was that he had been doing the job for 25 years. He did not accept Mr Foley's opinion. It is likely that this was the basis for Mr Foley's comment in the appraisal meeting that he was unwilling to learn.

560 It is our judgment that these comments were appropriate - in the context of the discussion they were having about the Claimant's performance - in the appraisal meeting and were not made consciously or unconsciously because the Claimant is disabled.

561 Mr Foley considered whether to invite HR to the appraisal meeting. He did not invite HR to the appraisal meeting because he did not want to alarm the Claimant as it was unusual to do so. He did get HR's advice on this and read the Respondent's policies before conducting the meeting. His decision not to include HR in the appraisal meeting was made because he did not want to make the Claimant anxious about it or for it to appear that it was more serious than it was.

562 Mr Foley did require a higher quality of work from the Claimant and from his colleagues in order to be able to deliver on the Respondent's value propositions, but he had no intention of putting him under a performance improvement plan or disciplining him to achieve that. He planned to change the Claimant's performance with training and more effective collaboration. This is what he offered the Claimant at the appraisal meeting.

563 The Claimant has failed to prove facts from which we can conclude that the decision not to refer the Claimant to occupational health – either in relation to the two previous meetings or to the 7 January one – and not to invite HR to the meeting was made because of the Claimant's disability or because of anything arising from it.

564 It is our judgment that Mr Foley was not cold and detached in his meetings with the Claimant. In our judgment, he was calm and measured in his speech seeking not to upset the Claimant while he discussed what had gone wrong with the articles on 7 October and 13 November and while he conducted the appraisal meeting on 7 January 2016.

565 In our judgment Mr Foley was aware that the Claimant might get upset in the appraisal meeting as he had done previously. The way Mr Foley chose to prepare for that possibility by reading the Respondent's relevant policies and procedures, talking to

HR and by preparing what he was going to say to the Claimant. He wanted to ensure that he was clear and that the Claimant knew that he was being offered support. Also, the Claimant had been clear to him that his condition was under control and that he had strategies for successfully managing it. In our judgment these are also the reasons why the Claimant was not offered the opportunity to have a representative or colleague with him in the appraisal meeting. Mr Foley did not want the Claimant to think that this was a disciplinary meeting or a capability meeting or any meeting under the Respondent's procedures. Mr Foley was hoping to resolve this without recourse to the Respondent's procedures.

566 The question of minutes of the meeting or follow up in writing from HR was not something that was raised between the Claimant and Mr Foley or Mr Wilson after the appraisal meeting. The Claimant met with Mr Foley on 8 January and asked for mediation.

567 The Claimant has stated in his reply submissions that this is about the Respondent's failure to put its concerns about his performance to him in writing. The sentence in 16(xiii) refers to '*follow up'* which means that it is likely to be a reference to follow up after the 7 January meeting. If it was about the Respondent's failure to set out its concerns about the Claimant's performance in writing – it is our judgment that doing so would have formalised it and would have led the Claimant to feel that he was in a capability or disciplinary process. The Respondent did not want to worry him. Also, in our judgment, the Respondent considered that its concerns about the Claimant's writing and the timeliness of the articles he produced related to more than 1% of his work but was not serious enough to warrant the application of any of these processes. The proposal was to support him and provide training so that those issues could be resolved. From the Claimant's perspective, he considered that Mr Foley's comments in the appraisal meeting were serious, unforgiveable and threatened his career. He reacted strongly, suffered a mental breakdown and there is now a chasm between him and his employer that may not be bridgeable. It is our judgment that by keeping its monitoring of his performance informal and by seeking to support him without going through any formal processes, this was what the Respondent was seeking to avoid.

568 It is our judgment that the Claimant has not proved facts from which we could conclude that the Respondent were moving to dismiss him without following its processes and procedures because of his disability. We did not have evidence that could lead us to conclude that Mr Foley considered the Claimant's disability to be a problem that he did not want to deal with. In our judgment, he made attempts to assist and support the Claimant.

569 It is this Tribunal's judgment that we did not have evidence that the Claimant was treated less favourably because of his disability.

The second part of issue 16: was the Claimant otherwise treated unfavourably for something arising in consequence of his disability by the Respondent, between 1 September 2015 and 3 June 2016.

570 The 'something arising' is clarified at paragraph 17 in the list of issues as the Claimant's performance (volume/speed) arising in consequence of his disability.

571 The Claimant had been used to performing in a high-pressured environment as he had worked in similar senior positions as a journalist over the years and had worked as Assistant Editor here since 2010. This was all while being a disabled person. During that time, he had won a Reuters own award and had been awarded '*Achieved'* in his appraisals. At the same time, Mr Hughes was giving the Claimant work such as the Predictions Annual and the World Cup illustration as well as assisting in recruitment and line management in the office which suggested that he was moving him away from editing and writing articles. At the same time, the evidence was that Mr Hughes did not refer to any performance issues in his emails to Mr Cox although he did speak to Mr Foley about the Claimant's sensitivity to feedback.

572 It is this Tribunal's judgment that Mr Foley needed the Claimant to be an Assistant Editor and assist him in producing exemplary work that could be emulated by his less experienced/younger colleagues. Mr Foley did not need a *'chief of stuff*'. However, even though in Mr Foley and Mr Cox's opinion the Claimant needed to improve the level of the insight and the financial analysis that he had in his articles, they were prepared and ready to support him to get to that level, rather than take him through a performance management process or to dismiss him. At the meeting on 7 January Mr Foley did not say that he was starting a formal performance management process. The Claimant acknowledged that Mr Foley stated that he wanted to help him improve.

573 The evidence was that the whole team was in the habit of putting their work out late. It was not just the Claimant. The Claimant had initially been supportive of Mr Foley's attempts to get the daily email out earlier and during the interregnum he asked Mr Foley to send a message direct to the team to assist him with his efforts. The emails from Mr Hughes to the team shows that this was a longstanding issue for the whole team. Later, in the meetings between them in October and November the Claimant did say that he could not go any faster. We had little independent evidence that the Claimant's difficulty in producing work to time was something arising from his disability. The only evidence that points in that direction are the statements he made in meetings with Mr Foley that he could not go any faster and that if he was pushed to go faster, he would fall over. From that we judge that it is possible that the Claimant's difficulty in producing articles on time was affected by his disability.

574 We did not have evidence that the Claimant's volume of work had reduced or was different after 1 September 2015. What was unsatisfactory to the Claimant's managers and was the subject of comment to the Claimant was the quality of analysis and financial insight that was missing from some of his work. We did not hear evidence that his volume i.e. the number of articles he produced was an issue for the Respondent.

575 Did the Respondent treat the Claimant unfavourably because his work was sometimes behind the deadline?

576 On his arrival Mr Foley resolved to bring the service back to the original value propositions, one of which was to be first with the views. We were not told that the Claimant was given less time to write articles. Mr Cox's email to everyone after the Respondent found out about Gadfly stated that the practice of holding back articles and

flashes in search of perfection should cease. The priority was to get the email out on time rather than perfect it. The emails had been going out at around 10am which was too late. In our judgment this had started to turn around. In the appraisal meeting on 7 January Mr Foley told the Claimant that the emails had generally been going out on time. This was mainly his achievement and Mr Foley did acknowledge that.

577 Before the appraisal meeting, the Respondent had spoken to the Claimant about articles being produced late. The Ab InBev story had been produced late and the Claimant was spoken to about it.

578 It is our judgment that the Respondent tried to talk to the Claimant to improve his ability to produce articles on time. Mr Foley did not intend to discipline the Claimant or to take him through a capability process to get the Claimant to produce his articles on time. At the appraisal meeting on 7 January 2016 he told the Claimant that this had improved.

579 It is our judgment that the Respondent put measures in place to assist the team to get the work out on time. Mr Foley asked staff to use EIKON for quick and accessible information about the company. When writing an article, the Claimant looked at it but decided not to use it. Mr Foley wanted the team to do some research about a company beforehand so that when it released its annual data or other company news the journalist would already have an idea/outline of the article and be ready to write it. Mr Foley asked the team to go home early. He was flexible in that regard and was content for the Claimant and the rest of the team to go home early if they needed. We did not have a tally of how late the Claimant worked before Mr Hughes left. In his conversation with Mr Foley in November he did say that he was working until very late at night but it is our judgment that he was not required to do so and it is possible that he had always worked late. Mr Foley was willing and offered to support him to start working in another way which it is likely would have reduced the number of hours he worked and streamlined the work.

580 It is therefore our judgment that there was no requirement to conduct a risk assessment of any risks to the Claimant because of Mr Foley's decision to require the daily emails to go out on time compared to when Mr Hughes ran the office as he also tried to do so.

581 Being first with the news was one of the Respondent's value propositions. It is our judgment that it always was one of the Respondent's value propositions and was one before Mr Hughes left.

582 The Claimant had not asked to be made chief of stuff as a reasonable adjustment. He had not referred at all to his disability in his request.

583 It is our judgment that Mr Hughes may well have steered clear of giving the Claimant feedback on his performance after the Claimant's reaction to his comments in November 2014. He was aware that the Claimant was sensitive to feedback and as they were friends he did not want to upset him any further. Mr Foley chose to manage him differently. He knew that the Claimant was an experienced journalist and could do good work so he resolved to point out to him what needed to be improved and support him to get there, in the belief that he could reach the required standard.

584 Mr Foley spoke to the Claimant about getting the daily email out on time since before he took up his post in September 2015. Mr Hughes spoke to the team about this before he left. There was no proposal to take any formal action on it. In the appraisal meeting he was told that he had improved and that the articles/emails were hitting the time target more. Mr Foley acknowledged that in the appraisal meeting and proposed to help him work more on that in 2016.

585 In our judgment, it was not clear to us whether the fact that the Claimant's articles were sometimes late was something arising from his disability. If it was, the Claimant was spoken to by his manager about the fact that his articles were sometimes submitted late. He was also spoken to about it at the appraisal meeting. There was no proposal to start capability or disciplinary proceedings about it. No sanctions were imposed on him because of it. He had been told by Mr Foley that he would get assistance with it.

586 In those circumstances, it is our judgment that the Respondent did not treat the Claimant unfavourably for something arising in consequence of his disability.

587 The direct discrimination complaint and the complaint of discrimination arising from disability fail and are dismissed.

Issues contained in the second claim

Direct Disability Discrimination

Issue 3: From 7 January 2016 to 23 November 2017, was Mr Cole treated less favourably by the Respondent, within the meaning of section 13 of the Equality Act, because of his disability?

588 This complaint relates to the emails that were disclosed to the Claimant as part of the SAR. In this part of the complaint he refers to 5 emails, as follows: The email dated 16 February 2016 was Mr Cox's email in which he stated that he was '*pissed off*' by the photos of the Claimant skiing with his family while off sick and that it made him feel taken advantage of. An email on 26 February when Mr Cox asked if it was 'ti*me for Britain to exit the EU'*, and another on 11 April 2016 from Laura Nagy in the US who asked questions about the Claimant's employment situation including*, 'when is it legal and/or appropriate to replace him?';* an email dated 28 June which was part of an email conversation between Mr Cox and Mr Wilson and Mr Foley in which Mr Foley expressed his frustration on the *'lengthy commentaries'* the Claimant posted on *Brexit* on Facebook; and lastly, the email of 11 July 2017, which was from John Foley commenting on the Claimant performing at Edinburgh.

589 It was clear to the Tribunal from the particulars of the second claim and the Claimant's evidence at the hearing that the Claimant was upset by the contents of these emails. He was seriously ill at home and unable to return to work at the time these emails were sent.

The question for the Tribunal is set out in Issue 4: whether the Respondent made comments in those emails, (whether consciously or unconsciously) to the effect that the Claimant was malingering, exaggerating his illness or behaving in a way that was tactical or contrived?

590 It is this Tribunal's judgment that the Claimant's managers were not suggesting that he was malingering, exaggerating his illness or behaving in a way that was tactical or contrived in these emails. In our judgment, if the Respondent believed that he was malingering or that he was exaggerating his illness it is highly likely that it would have taken some form of formal action about it.

591 *(16 February 2016*) Mr Foley and Mr Cox made comments about the Claimant's action in posting photos of his skiing holiday on Facebook while he was off sick. The comment was not about Mr Cole's daughter as suggested in the Claimant's submissions. The background to Mr Cox's comments throughout this case is that he was ignorant of UK employment legislation or employee rights. In our judgment, his statements stem from an ignorance of UK employment law rather than malice towards the Claimant. Mr Cox did also state that it made him feel taken advantage of. That and Mr Foley's comment that it raised questions about his fitness to come to work were comments on whether the holiday was consistent with the Claimant's sickness.

592 In addition, in our judgment, there was a real concern that the Claimant's colleagues were seeing these posts on Facebook. The Respondent appeared to be more exercised about the posting of the photo on Facebook than the fact that the Claimant was on holiday, although that was a query, particularly from Mr Cox. Mr Foley and Mr Cox were not aware of the Claimant's up-to-date medical situation. Mr Wilson did know as he was in contact with the Claimant and in receipt of his sick certificates. He informed them that the Claimant was entitled to take a break while sick and in our judgment, that was the end of the matter.

593 As stated in the findings above, it is our judgment that Mr Cox believed that it was tactless of the Claimant to post photos of him skiing while he was off sick knowing that his colleagues would see them. Those colleagues were not aware of the reason why he was not at work. In our judgment, the concern about what the colleagues who were still at work felt was legitimate and real. Mr Foley's email to the Claimant's colleagues after he went sick simply told them that the Claimant would be out for a while. This was a small team and it is likely that there was some curiosity about what had happened to the Claimant and when he was returning. It is likely that the questions that these photos would raise amongst the team was a real matter for the Messrs Foley and Cox.

594 (*26 February*) The email referred to in the list of issues was sent on 26 February. Although the Claimant's submissions referred to an email on 25 February, there is no reference in the second claim to the email of 25 February. We will consider the emails of 26 February. In this Tribunal's judgment, there were 2 emails on that day, one from Mr Foley asking how this could be brought to the least painful outcome and the other was from Mr Cox raising the possibility of the parties been able to come to a mutually beneficial agreement that would include the Claimant's departure from the Respondent on terms. At the time of this email sent the general opinion was that should the Leave campaign succeed, the UK would exit the EU on terms beneficial to both sides. There was never any idea that the UK would be dismissed or kicked out of the EU against its wishes. In the Tribunal's judgment, Mr Cox was referring to the possibility of a negotiated settlement/agreement with the Claimant rather than his dismissal.

595 It is also our judgment that Mr Foley's email was also raising the possibility of mutual severance between the parties. That is, an agreed settlement/agreement between the Claimant and that the Respondent by which he would leave his employment for an agreed sum and at an agreed time. In his evidence during the hearing, the Claimant confirmed that when he mentioned in the meeting with Mr Foley on 8 January that he wanted to resolve the dispute '*between these four walls'* and that he wanted mediation, he was also talking about a severance agreement or negotiated settlement. This was also against the background of the Claimant having said to Mr Foley that he did not enjoy this job and having enquired of Mr Cox some time before whether he could be employed elsewhere within Reuters. This discussion was not about dismissal but was about opening up discussion with him to see whether there was possibility of an agreed settlement.

596 (*11 April 2016)* The list of issues referred to the email on 11 April which was the subject of the Respondent's submissions. The Claimant's submissions referred to an email dated 13 April. Although we looked at both emails in the hearing, in the Claimant's 2nd claim form at paragraph 27, the item referred to is the email on 11 April. The 13 April email is not referred to in the grounds of complaint. In our judgment, it is the 11 April email that we need to consider.

597 In the email of 11 April 2016, Laura Nagy, the HR equivalent in the US asked on Mr Cox's behalf, what was happening with the Claimant, whether he had any intention of returning to work and when was it was legal and/or appropriate to replace him. Ms Nagy clearly also had no knowledge of UK employment law and it was appropriate to refer her manager's questions to Mr Wilson as the Respondent's local HR person who had been dealing with the Claimant.

598 In our judgment these questions did not imply that the Claimant was malingering, exaggerating his illness or behaving in a way that was tactical or contrived. The Claimant agreed with this in his submissions. Mr Cox wanted information about how the situation could be resolved as far as UK employment law was concerned.

599 *(28 June 2016)* This was another email that Mr Foley sent to Mr Wilson and Mr Cox to see whether it had any bearing or relevance on his sickness, in circumstances where Mr Foley did not know the full or recent details of the Claimant's continuing sickness absence. The Claimant was writing publicly on Facebook about *Brexit* where his colleagues could see it and where they had seen it. It was not a full article but it was the sort of thing he would have been asked to do had been at work. Mr Foley was not suggesting that the Claimant was malingering, exaggerating his illness or behaving in a tactical or contrived way but was forwarding the information to HR in case it was relevant to his sickness. In the email, he asked how the Claimant's ill-health was progressing. He suggested that it appeared incongruous when the Claimant was off sick but he did not suggest that he had drawn any conclusions from this. He was prepared for HR to address whether it was so. It was a query to HR.

600 The last email (11 July 2017), related to the Claimant's intended performance over 20 nights at the Edinburgh Festival. The email is clear that Mr Foley's concern was about the message it sent the rest of the team rather than a suggestion that the

Claimant was malingering or exaggerating his illness or being tactical or contrived. Once again, he sent it to Mr Wilson in case it had bearing on the Claimant's ill-health.

601 This was a complaint of direct discrimination so the Tribunal also must consider whether the Claimant proved facts from which the Tribunal can conclude that the comments in these emails were less favourable treatment of him because he is a disabled person. It is our judgment that these emails were written about the Claimant who was off work with ill-health related to his disability.

602 In the email of 11 April Ms Nagy also asked what was happening with another member of staff, Mr Harthsworth, who had also been on long leave. We were not told that Mr Harthsworth was a disabled person. In another email in April, Mr Cox asked when Mr Hadas' support – meaning his paid sick leave – would run out and when could the Respondent seek a replacement for him.

603 It is also our judgment that the emails were not sent because the Claimant was a disabled person. The evidence shows that Mr Cox also sent emails querying whether it was possible to replace people who were away from work on sick leave but who were not disabled (Mr Hadas) as well as employees who were away for a long time (Mr Harthsworth). The other emails from Mr Foley raised queries about matters that had come to his attention that he thought that HR would be the more appropriate department to make further enquiries and decide whether the Claimant's actions were inconsistent with his sick leave.

604 It is our judgment that in a comparable situation of an employee who is off with a broken limb or other matter that is not related to a disability or is related to a physical disability, it is highly likely that Mr Cox and Mr Foley would have sent similar emails to HR if it had come to their attention that the employee had gone skiing or was about to perform at Edinburgh. It is highly likely, given the emails about Mr Hadas and Mr Harthsworth that these managers would have asked similar questions about what can be done would have been asked about such a person.

605 It is our judgment that the Claimant was not subject to less favourable treatment because of his disability by the comments in the emails dated 16 and 26 February, 11 April, 28 June 2016 and 11 July 2017.

Issue 5: From February and April 2016 inclusive, did the Respondent make plans to dismiss/propose to dismiss Mr Cole without having first consulted occupational health/going to capability procedure/going through any absence management process?

606 In our judgment the emails referred to here are those dated 16 February, 26 February and 11 April 2016. The April emails show that the Mr Cox floated the idea of the Claimant's dismissal and at the same time, asked Mr Wilson to prepare a severance offer for him. In the email of 16 February Mr Foley suggested that the Respondent should add another editor. In our judgment, this was a suggestion of an additional rather than a replacement for the Claimant.

607 In the email of 26 February, Mr Foley suggested that the Respondent needed to think about how it could '*bring this to the least painful outcome'* to which Mr Cox replied: '*Time for Britain to exit the EU?'.* We have already stated above that we find that Mr Cox is response was that this should be a negotiated settlement between the parties which resulted in the Claimant's departure from the business. In our judgment, they both suggesting that the Respondent should begin discussions with the Claimant to reach a negotiated settlement the result of which would be the end of the Claimant's employment.

608 In our judgment, the Respondent was not planning to dismiss the Claimant. These emails are not evidence of Mr Cox and Mr Foley making plans to dismiss the Claimant without going through any process. A severance is very different from dismissal. The dictionary meaning of severance is a golden handshake, compensation or termination pay. The only clear instruction that Mr Cox gives to Mr Wilson is to prepare a severance offer for the Claimant. Mr Cox appears to have used the terms *severance* and *dismissal* interchangeably which may have arisen because of his lack of knowledge of the UK employment legislation or possibly because he considered both ways of resolving the situation with the Claimant. However, as already stated, his instruction to Mr Wilson was to prepare a severance offer rather than to dismiss him.

609 He did also ask '*Can we terminate Cole?*' which was about dismissal but in our judgment, that never became the Respondent's plan or proposal. Mr Wilson immediately advised him on the Respondent's obligations as the Claimant employer and there never was a decision or plan to dismiss the Claimant. The Respondent then instructed OH to see the Claimant and an appointment was made for him to be seen in March.

610 It is our judgment that if Mr Foley and Mr Cox had decided, consciously or subconsciously to dismiss the Claimant they would have done so. The reference to the Claimant '*playing'* the Respondent was again a reference to his belief that the Claimant was trying to get more money in any settlement discussions with the Respondent.

611 The Respondent's concern was to comply with obligations to the Claimant as well as to his colleagues and to Mr Foley. Mr Cox wanted to resolve the situation so that the team could be fully staffed. Mr Foley, who was also suffering from depression, was near to burn out. Mr Cox floated the idea of dismissal but once he was advised it was not appropriate it did not become his plan. He instructed Mr Wilson to prepare a severance offer for the Claimant which could have been the start of a process to achieve a negotiated settlement with the Claimant.

612 The Respondent did not make plans to dismiss or propose dismissing the Claimant without first consulting OH or going through any capability or absence management procedures. It is this Tribunal's judgment that the Claimant did not suffer the alleged detrimental treatment.

Issue 6: Did the Respondent make comments about Mr Cole, as allegedly recorded in emails dated 16 February, 26 February, 11 April, 28 June 2016 and 11 July 2017 which damaged his reputation and undermined his prospects of a return to work?

613 We have referred above to the emails in February and April. The email 28 June is one in which Mr Foley refers to the Claimant's activity in writing commentaries on *Brexit* on Facebook. The last email was also from Mr Foley. It referred to the Claimant's 20-night run at the Edinburgh Festival.

614 It is our judgment that all these emails were sent between Mr Foley and Mr Cox and Mr Wilson or Laura Nagy of HR. They were not addressed to anyone else and we were not told that anyone else saw them or had access to them. It is already our judgment set out above that these emails did not suggest that the Claimant was malingering, exaggerating his illness or behaving tactically or in a contrived way.

615 It was appropriate for managers to raise queries or refer matters to HR when they not sure of the situation and to seek their direction and advice. That is the purpose of HR. By the time of the emails in April, June and July were sent, the Respondent had obtained an occupational health report on the Claimant and HR were aware of the severity of his ill health. Mr Cox and Mr Foley had not been privy to the contents of the report.

616 The Respondent did not accuse the Claimant of lying about his condition or his health or his ability to return to work.

617 It is our judgment that these emails did not damage his reputation in the workplace or with his managers. The emails were only seen by Mr Foley, Mr Cox and Mr Wilson. Ms Nagy worked in New York and as a professional HR person would be unlikely to treat the Claimant differently because of the email she wrote or the conversation she had with Mr Wilson. There were three other people mentioned in that email and it is unlikely that she would treat all of them differently because of that.

618 Mr Foley and Mr Cox were senior managers and in our judgment, would have been quite capable of working positively with the Claimant when he was well enough to return to work. It is our judgment that these emails did not undermine his prospects of return to work.

619 The emails did not talk about a plan to terminate the Claimant's employment. The only clear instruction from the Respondent to HR was to prepare a severance offer for him to see whether he was interested in it. At the same time, at the end of February, the Respondent was in the process of instructing OH to see the Claimant and prepare a report. Those emails did not damage the Claimant's reputation in the same way that the emails with questions about the other members of staff in Ms Nagy's email or emails elsewhere in the bundle about replacing Mr Hadas did not undermine their reputations or their relationships with the Respondent. Mr Hadas continues to work on a freelance basis with the Respondent.

620 In the circumstances, it is this Tribunal's judgment that the Claimant did not suffer detrimental treatment here. The comments in the emails referred to, did not damage the Claimant's reputation or undermine his prospects of returning to work.

Issue 7: On or around 7- 28 January 2016, did the Respondent failed to follow its own procedures regarding performance assessment by failing to complete Mr Cole's appraisal form of failing to make any comments in Mr Cole's appraisal form, following the meeting on 7 January 2016?

621 The Claimant is correct in that Mr Foley did not complete the performance appraisal form because he did not make any comments in the Claimant's appraisal form following the appraisal meeting on 7 January 2016. Was this less favourable treatment on the grounds of his disability?

622 Mr Foley graded the Claimant as having achieved his targets for 2015 and the Claimant received a bonus. He did not suffer any detriment in that regard.

623 We did not have evidence that if he had had a disagreement about his assessment of the performance of an employee who had another disability and that discussion had not concluded, that Mr Foley would have put his comments about that employee's performance on their appraisal form and completed it. It is likely that in such a case he would not have completed the appraisal form and waited until the employee was back to work to agree a form of words to put in it.

624 At the 7 January 2016 meeting, the Claimant became upset and suffered mental distress when Mr Foley gave him positive and negative feedback on his performance during 2015. The Claimant had not been able to return to work since then. In our judgment, it was appropriate for Mr Foley to consider carefully whether he should complete the form in the Claimant absence or, whether it would more appropriate to wait until the Respondent had organised the mediation process as the Claimant requested because as part of that process, a way forward in relation to the appraisal process could be agreed.

625 In the circumstances, it is our judgment that the reason for Mr Foley's decision to not put comments on the form even though he had submitted a grade of achieved for the Claimant and so completed part of the process; was because of the Claimant being upset at their appraisal meeting and not because of the Claimant's disability. Initially, Mr Foley did not know that the Claimant suffered a mental breakdown in the meeting. His email in response to the Claimant telling him that he was unwell was to say that he was glad that he was taking a rest. It is likely that it was around this time that he decided not to complete the appraisal form. Thereafter, he chose not to complete the form so as not to upset the Claimant.

626 In our judgment, the Claimant did not suffer any detriment because of his disability by Mr Foley's decision not to put comments on the Claimant's performance into the appraisal form. The Respondent had entered comments on his previous appraisal forms. The omission on this occasion was because he got upset in the appraisal meeting and was unable to return to work, which meant that the process could not be completed with him. Mr Foley intended to complete the form when the Claimant returned to work. He had not refused to complete the form. In the interim, while he waited for the mediation process, he confirmed that the Claimant had achieved his targets and that he was entitled to a bonus.

627 In this Tribunal's judgment, the Claimant did not suffer less favourable treatment by Mr Foley's failure to insert comments in his appraisal form.

628 **Issue 8: from 24 March 2017 to 11 August 2017, was the Respondent's approach towards Mr Isaacs report (s) detrimental to Mr Cole?**

629 In its letter of instruction to Dr Isaacs the Respondent told him that they were appointing him as an occupational health specialist for the Claimant who had been on sickness absence since 11 January 2018. The letter asked him to: confirm the Claimant's diagnosis, the effect on this condition on his ability to carry out the principle duties of his job - now and in the foreseeable future - his ability to attend appraisal meetings, receive feedback or carry out duties in any suitable alternative role that the Respondent may identify. He was also asked about what adjustments that may be required to enable the Claimant to return to work as well as appropriate treatments.

630 The Claimant was quite ill at the time that he attended an appointment with Dr Isaacs and it may have been more appropriate for the appointment to have been rearranged. The appointment had been arranged sometime before and the Respondent would not have known how ill the Claimant would have been on that day.

631 It is likely that the Claimant did not recall signing a form to agree to the terms upon which he would receive payments under the LTS scheme. In the form which he signed on 12 September 2016, he agreed to regular medical reviews whenever deemed appropriate by the Respondent, to ensure that he remained eligible to receive benefits under the scheme. To be eligible for benefits under the LTS scheme, the Claimant had to be unable to work due to medical capacity. It was not inappropriate for the Respondent to check with Dr Isaacs what the up-to-date situation was with the Claimant's mental capacity and his ability to perform the duties of his job. The LTS scheme also referred to the need to ensure that the recipient of benefits under the scheme is unable to perform the principal duties of any other role or occupation that the company considers would be suitable for them.

632 The Claimant also confirmed his consent in writing to the Respondent to undergo a medical examination by a doctor nominated by the Respondent and for that doctor to disclose to the Respondent a report arising from the same. In the email asking for his consent he was told that the Respondent was intending to appoint a psychiatrist and the Claimant consented to that.

633 In this Tribunal's judgment, the questions asked in the letter of instruction to Dr Isaacs arose out of the conditions of the LTS scheme. The questions were appropriate and within the bounds of a comprehensive report for the purposes of the LTS scheme and for the Claimant's employer generally, in order that it could consider the possibility/likelihood of the Claimant's return to work and the adjustments that would be needed to enable that to happen.

634 It is likely in our judgment that the Respondent anticipated that the Claimant would want to change/amend or alter the medical report and that is why Ms Brooks wrote to say that he should he should not be allowed to do so. There was some confusion between the parties' solicitors as to whether there was an agreement that the Claimant's comments would be set out in an appendix or whether they should be incorporated into the report.

635 The Tribunal can see why Dr Isaacs considered that the Respondent's solicitors had been unpleasant to him when he was told that he did not know his job and that he would not be paid. This was said to Dr Isaacs on the telephone and letters worded in a similar way were sent to him by the Respondent's solicitors. This was not a dispute with the Claimant. The dispute was between the Respondent and its solicitors and Dr Isaacs. It was not until the grievance process that the Claimant was asked to produce copies of the correspondence between himself and Dr Isaacs. Until then, the content of the Respondent's correspondence, emails and telephone communication with Dr Isaacs was to the effect that he had not complied with its instructions, that he and the lawyers at the medical defence union had misunderstood the law surrounding his relationship with the Claimant and that he would not get paid unless he produce a report in a form that the Respondent wanted. In our judgment, this was the Respondent putting undue pressure on Dr Isaacs to produce the report in a particular way and to ignore the requests from the Claimant to add his comments/amendments/ additions to it.

636 In our judgment, the Claimant wanted to make the amendments to the draft report. The Claimant's wife, Mrs Cole who conducted the Claimant's correspondence with Dr Isaacs as the Claimant was quite unwell, asked Dr Isaacs if it was possible to make amendments to the report. In our judgment, he was seeking to do more than just correct typographical errors. The list of recommended adjustments which it is likely that the Claimant suggested could not be said to be correcting a typographical error. Also, in our judgment, the Claimant's solicitors put pressure on Dr Issacs when his solicitor quoted from the GMC guidelines in his communication with him. Because of that, Dr Isaacs had a real concern that he might be reported to the GMC and that his career might be affected.

637 The Claimant did so because he understood that the report was suggesting that he could soon return to work if he had a change of managers and a change of office. That was not quite what the report stated. It did say that he could return in the '*foreseeable future'* which was an undefined period. It was clear from the terms of the LTS scheme which had been sent to the Claimant sometime earlier, that the Respondent were entitled to obtain a medical report considering and addressing whether he could return to work and what adjustments would be required to make that happen, as well as a diagnosis of his present state of health and his ability to do his job at the time of his meeting with the doctor.

638 The Claimant's comments could have been either appended to the report as the Respondent wanted or incorporated into the report in the way that Dr Isaacs finally did, with clear identification of what were the Claimant's additions. Either way could have left the Respondent with clear sight as to what were the doctor's conclusions and recommendations and what were the Claimant's feelings about it.

639 In our judgment, the suggestion that the report should not be tampered with was hyperbole by the Respondent but was not a suggestion that the Claimant had actually tampered with it. It reflected the Respondent's strength of feeling that it only wanted Dr Isaacs report and opinion and nothing else. It is likely that if the Respondent considered that someone with a physical condition was likely to suggest amendments to a medical report that is being prepared for consideration in relation to their receipt of

benefits under the LTS scheme, it would ask the doctor to prepare a report based solely on his medical opinion and to append to the report the employee's comments.

640 It is this Tribunal's judgment considering everything that occurred in relation to the production of Dr Isaacs report, the Respondent's communication with the doctor was unhelpful to him and put him in a difficult position. Although it was reasonable for it to ask for the Claimant's comments to be put in an appendix to the report or to have them clearly identified in the report, we were concerned with the tone of the Respondent's communication with Dr Isaacs and the references to his professionalism. The Claimant's communication is more understandable as he was quite ill at the time and the prospect of being recommended to return to work must have been quite scary.

641 The Respondent's approach towards Dr Isaacs report was not detrimental to the Claimant. The approach was unhelpful and difficult for Dr Isaacs. The Claimant did get his comments, additions and suggested adjustments incorporated into the report. That was the report that was sent to the Respondent. Dr Isaacs accepted his comments/additions.

642 The complaint of direct discrimination in relation to the production of the report fails and is dismissed.

Issue 9: Did the Respondent's decision on 23 November to reject Mr Cole's Second Grievance (dated 1 September 2017) amount to detrimental treatment?

643 It was the case, as the Respondent submitted that it was not put to Mr Leader in the hearing that he had rejected the Claimant's second grievance because of the Claimant's disability.

644 However, the Claimant in his submissions has asked us to consider conscious as well as subconscious discrimination.

645 In our judgment, the decision to reject the Claimant's second grievance was a detriment to the Claimant because it was not upheld.

Issue 10 – was the Respondent motivated by Mr Cole's disability in relation to issue 9 above?

646 Mr Leader did not uphold the grievance because he accepted Ms Brooks' explanation for using the words that she had used in her letter and her evidence that it was unusual in the Respondent's experience for an employee to seek to make substantial changes in medical reports commissioned that it had commissioned. He did not agree, after considering the relevant evidence and what happened with Dr Isaacs' report that Ms Brooks' was accusing the Claimant of tampering with the report in her letter or that she was accusing him of putting undue pressure on Dr Isaacs.

647 Mr Leader had not worked with the Claimant before and there was no evidence that he knew or had worked with Ms Brooks or Mr Limani before he heard this grievance. He did take note of Mr Limani's suggestion that the Respondent should offer the Claimant the opportunity for mediation to try and resolve matters between the

parties and/or rebuild trust and confidence. The Claimant felt that this was not an appropriate suggestion but in our judgment, it was not less favourable treatment because of his disability to have suggested it. This is especially so when the Claimant had asked for mediation on 8 January and mediation is a way of employer and employee resolving matters and restoring trust between them.

648 The Claimant may not agree with Mr Leader's conclusion that the words '*tampering'* and '*undue pressure'* in the 11 August letter were not accusations against him but that does not, in our judgment, meant that he failed to uphold the Claimant's grievance because of his disability, whether subconsciously or consciously.

Issue 10: Was the Respondent motivated by Mr Cole's disability in relation to the other issues 4, 5, 6, 7 and 8?

Issues 12, 13 and 14: Further and in the alternative, would the Respondent have treated a hypothetical comparator with a physical as opposed to a mental illness more favourably than Mr Cole? Further and in the alternative, would the Respondent have treated a hypothetical comparator who was on sick leave for the same length of time as the Claimant, but who was not disabled more favourably than Mr Cole?

649 The Claimant was off sick with anxiety and depression which is his disability. However, in our judgment, the email conversations between Mr Foley, Mr Cox, Mr Wilson and Ms Nagy took place not because the Respondent was motivated by the Claimant's disability as opposed to being motivated by his absence from work.

650 It is our judgment that if an employee was off work with broken limbs (this is the example used by Ms Masters in the Respondent's submissions), and the Respondent found out that they were about to do something physical or something that required a lot of walking for example, it is likely that Mr Foley and Mr Cox would talk to HR about how that impacted on their absence.

651 It is our judgment that the Respondent would have treated a hypothetical comparator who had a physical rather than a mental illness and who was off for the same length of time as the Claimant in the same way as the Claimant was treated. If the Respondent found out that the hypothetical employee with broken arms and legs was about to do a marathon or if the Respondent discovered that the employee had written some sort of commentary on *Brexit* that he would have been expected to do at work, then those matters would have been discussed between the managers and HR. That was all that happened to the Claimant. No action was taken after the matters were referred to HR.

652 In our judgment, Mr Cox in that situation would be likely to have instructed Mr Wilson to prepare a severance offer and would have asked his HR person to enquire of Mr Wilson of the legal position in relation to such an employee.

653 It is our judgment that these emails were not sent because of the Claimant's absence from work with a mental disability.

Issue 11: In particular, did the Respondent's treatment of Edward Hadas (Former Global Economics Editor) demonstrate that it was motivated by Mr Cole's disability?

654 It is our judgment that Mr Hadas did not have a mental disability. He suffered from anxiety and symptoms related to burnout. If the Respondent had found out that while he was ill, Mr Hadas was about to perform at the Edinburgh festival or that he had written commentaries on *Brexit* on Facebook without informing the Respondent, Mr Foley and Mr Cox would have referred those activities to HR for HR to look at whether they were consistent with his sickness. When he did try to write, Mr Hadas did inform Mr Foley. He also let him know when his efforts to do so failed.

655 In our judgment, if the Respondent had seen photos posted on Facebook of Mr Hadas on holiday, in circumstances where he had been absent from work due to being ill for over a month, his colleagues were his friends on Facebook and they were unaware of the reason for his absence, it is highly likely that his managers would have queried these activities with HR. No action was taken against the Claimant because of these activities.

656 It is also our judgment that the possibility of a severance agreement was raised between Mr Hadas and the Respondent. The Respondent reached an agreement with Mr Hadas in which his employment ended and he returned to work for the Respondent on a contractual basis as a freelance writer.

657 The fact that Mr Cox asked when Mr Hadas' support would '*run out'* and when the Respondent could seek '*a replacement for him'* demonstrates that his question about when it was possible to '*terminate'* the Claimant although harsh, was not said because the Claimant was disabled with a mental condition but because he was absent from work as was Mr Hadas. Mr Cox treated them in the same way.

658 **Issue 14–16**: We have already addressed the time points above and determined that it is just and equitable to extend time to enable these claims to be considered given how seriously unwell the Claimant had been in 2017 so that the case had to be suspended until he was better.

<u>Discrimination arising from disability:</u>

Issue 17: From 7 January 2016 – 23 November 2017 was Mr Cole treated unfavourably by the Respondent within the meaning of s15(1)(a) EA 2010, as particularised at paragraph 23 of the Particulars of Claim and/or paragraphs 4 to 9 above, because of any of the following matters?

a- His absence from work/inability to work from January 2016 onwards

b- His ill-health – specifically the anxiety he displayed when he felt threatened, his actual or perceived lack of confidence, his outward demonstrations of vulnerability and/or his low mood and thoughts of suicide

659 It is our judgment that the Claimant's absence from work from January 2016 onwards happened because of his disability. Also, the Claimant did display anxiety, referred to a lack of confidence and thoughts of suicide. He was vulnerable. These were all matters arising in consequence of his disability.

660 It is our judgment that the emails were sent because the Claimant was absent from work. The Claimant's absence was something arising from his disability. It is also our judgment that the comments in the emails did not evidence a plan to dismiss the Claimant, did not suggest that he was malingering or exaggerating his illness or behaving in a way that was tactical or contrived and did not damage his reputation and undermine his prospects of returning to work.

661 The question for us in assessing the section 15(1)(a) claim is to determine whether they represented unfavourable treatment of the Claimant by the Respondent because of the matters arising as a consequence of his disability.

662 It is our judgment that the decision not to uphold his grievance which was made by a manager that had nothing to do with the rest of the Claimant's management; was not made because he was absent or because he displayed anxiety of lack of confidence. It was made because Mr Leader did not agree with the Claimant's grievance once he had investigated it.

663 However, the Respondent's emails to HR asking whether his skiing holiday, his commentaries on Brexit on Facebook, his appearance over 20 nights at the Edinburgh festival were written because the Claimant was absent. The correspondence with Dr Isaacs about his report and the decision to leave the completion of the appraisal form until the Claimant returned to work or there was a mediation process were all related to the Claimant's absence because of his disability.

664 Were the emails unfavourable treatment of the Claimant? Allying the principles in the case of *Trustees of Swansea University Pension & Assurance Scheme v Williams.*

665 It is our judgment that those emails and all the other the emails including that instructing Mr Wilson to prepare a severance offer and clarifying the legal position were not unfavourable to the Claimant. They did not result in a change in the Claimant's position. He could not, in our judgment, be said to be in a worse position after those emails were sent than before.

666 They were not circulated widely. They were only seen by Mr Cox and Mr Foley and HR. Mr Wilson advised Mr Cox that the Claimant's contract could not be terminated and that was the end of the matter. He advised both managers that the Claimant had pre-booked his holiday and was entitled to it and that the appearance at the Edinburgh festival may assist his recovery. Nothing further was said about these matters. If anything had been said it is likely that it would have been revealed in the SAR. No action was taken by the Respondent on any of the matters referred to in the emails.

667 It is our judgment that the Claimant was not treated less favourably by his managers sending these emails.

668 It is our judgment that the correspondence between the Respondent's HR and/or its solicitors with Dr Isaacs was not unfavourable to the Claimant. They were unprofessional to Dr Isaacs. The Claimant was not put in a position that was not as good as others generally would be, by the Respondent's correspondence with Dr Issacs.

669 It is our judgment that Mr Foley's decision not to complete the appraisal form was not unfavourable to the Claimant. He conducted the appraisal meeting and awarded the Claimant the grade of Achieved. He also confirmed that the Claimant was due a bonus. We did not have evidence that the failure to complete the appraisal form was unfavourable to the Claimant.

670 If we are wrong and the emails, Mr Foley's decision not to complete all parts of the appraisal form and the correspondence with Dr Isaacs are all considered to be less favourable treatment, we would then need to consider the Respondent's defence as follows:

Issue 19: Were the Respondent's actions a proportionate means of achieving a legitimate aim as per section 15 EA 2010?

671 The Respondent's actions are set out in Issues 4 to 9 above.

672 Most of those issues relate to the emails that Mr Foley and Mr Cox sent to HR about the Claimant's activities while sick. From our own evaluation of the evidence we conclude that Mr Cox and Mr Foley wanted to be fair to the Claimant and comply with their legal obligations as his employer while at the same time run the BV service.

673 In our judgment, there was a need to communicate openly and constructively about the Claimant's performance among managers and between managers and HR. Mr Cox had a particular style of writing emails which was blunt but in essence, he was communicating with Mr Foley and seeking advice from Mr Wilson about the Claimant and the need to manage his absence. The actions complained of in issues 4-9 all occurred after January 2016 and therefore after the Claimant began his sick leave. They were not emails or conversations about the Claimant's performance but were about his sick leave and how activities that had come to managers' attention related to his ill health. The Claimant's managers accepted Mr Wilson's advice.

674 Understandably, the Claimant found it difficult to communicate with Mr Foley once he informed him that he was sick as he considered Mr Foley to be responsible for his ill health. He chose to communicate directly with Mr Wilson. Mr Cox and Mr Foley referred matters to Mr Wilson who, as one of the Respondent's senior HR Business partners, was able to advise them because he knew of the Claimant's up-to-date situation and he could assist them in managing the Claimant's absence.

675 In this Tribunal's judgment, emails as opposed to meetings and letters to the Claimant were chosen as the way for the managers to communicate openly and constructively between them and HR about the Claimant's sickness absence, to manage it and to address any concerns that his managers had.

676 It is our judgment that those emails were not unfavourable to the Claimant; although members of the Tribunal or other managers may have chosen to use different words. The correspondence with Dr Isaacs was difficult for him. The second grievance was conducted in a proper way even though the outcome was not what the Claimant wanted.

677 In our judgment, the Respondent's actions as set out in Issues 4-9 were proportionate as no action was taken against the Claimant in relation to any of the concerns raised by managers. Once their queries were addressed the matter was left.

678 Without going through each of the 17 proposed legitimate aims set out at paragraph 20 of the second list of issues, it is this Tribunal's judgment that those are the legitimate aims that the Respondent was seeking to achieve in conducting the email correspondence between Mr Foley/Cox and HR, making the decision to leave completion of the appraisal documentation until his return or a mediation process ensued and seeking to get a medical report from Dr Isaacs that just contained his medical opinion.

679 Although the outcome of the second grievance was not what the Claimant wanted, it was an outcome that was open to Mr Leader to reach. It was not perverse or discriminatory for him to conclude that Ms Brooks did not mean to allege that he had actually tampered with the report or personally put undue pressure on to Dr Isaacs. It is our judgment that even though Mr Limani told Mr Leader about his experience with medical reports and advised/supported him in his recommendation of mediation, Mr Leader considered everything before coming to his decision. The evidence was that he made his own decision. His recommendation that the Claimant should consider mediation may not be what the Claimant wanted but it was not manipulative, inappropriate or discriminatory for him to suggest it.

680 In our judgment, in the emails sent by Mr Cox and Mr Foley, the Respondent was not seeking to prematurely terminate the Claimant's employment but were asking whether his activities outside work were consistent or inconsistent with work and what was the best way to resolve the situation. Once they were told that they were consistent with his absence, they accepted that and moved on. Once Mr Cox was advised that he could not be terminated as he had employment rights, he accepted that. If Mr Cox was insistent that his decision was to terminate the Claimant then it is likely that he would have instructed HR to take particular action.

681 In our judgment, the Respondent had to balance its duties to the Claimant as one of its senior employees, its duties to Mr Foley and its other employees with the business aim of ensuring that the BV product continued to be produced. We might have used different words in the emails but the test is not whether the emails were perfectly worded. The Respondent raised questions in frank emails between managers about the Claimant, his activities while sick, how those related to his sickness and how best to manage all of that. They took the advice from HR. The only instruction was to prepare a severance offer.

682 In consideration of all the above, it is this Tribunal's judgment, having looked at this carefully ourselves, that the Respondent's actions were a proportionate means of achieving the legitimate aim of seeking assistance and advice from HR, considering all possibilities, and the efficient running of the business.

683 It is also our judgment that the decision to leave the full completion of the appraisal form until the Claimant returned to work was also proportionate as Mr Foley had also confirmed his grade and his entitlement to a bonus so that the Claimant would not be disadvantaged by the delay in the completion of the form. The correspondence with Dr Isaacs and the outcome of the grievance were not unfavourable to the Claimant.

Issues 21–23: Time

684 The Tribunal has already addressed the time points in relation to the second claim.

Harassment

Issue 24: Did the Respondent engage in unwanted conduct relating to Mr Cole's disability which had the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for Mr Cole within the meaning of section 26 EA 2010?

685 The list of items that relate to this issue are the emails between the managers and between them and HR, and the correspondence with Dr Isaacs.

686 The Respondent's managers engaged in email correspondence with each other and with HR to manage his absence, to communicate openly about concerns regarding his health and to understand if his activities outside work were consistent/inconsistent with his absence from work.

687 The correspondence with Dr Isaacs were about his report, whether it was right for the doctor to treat the Claimant as his patient and only disclose the report with the Claimant's consent and whether his approach to the matter was correct or in accordance with the Respondent's understanding of his duty.

688 Applying the test set out in *Richmond*, when the Claimant discovered the existence of these emails after the SAR he was quite upset by them. He considered that they had created a hostile environment for him and that the emails asking whether it was time for Britain to exit the EU or whether the Respondent could terminate him were particularly upsetting for him. These emails are therefore unwanted conduct by the Respondent.

689 He was also upset by the Respondent's correspondence with Dr Isaacs when he found out about it.

690 The Respondent submitted that the Claimant was not *subjected* to this unwanted conduct. Was there sufficient proximity to him? In our judgment, even given the possibility that they may come to the Claimant's attention through a SAR, they were

not in sufficient proximity to him for it to be considered that he was subject to them. They were not sent to him and it was not the senders' intention that he should see them.

691 We recognise that the contents of the emails were surprising and upsetting for the Claimant when they were disclosed to him after he made the SAR (Subject Access Request). We agree with the Claimant in his submission that it is unlikely that *De Souza* would be considered good law today given society's total intolerance for the sort of word used by the Claimant's manager in that case to describe her in her absence. It is likely that any tribunal hearing that case today would agree that that sort of word would be offensive and discriminatory even though not said in her presence.

692 In our judgment, even though the existence of the right to make a SAR means that no one should assume that their email communications or documents will never be seen by the subject of them, it is still unusual for that to happen. The manager in *De Souza* was simply being abusive about the employee to another manager, which made her subject to his comments. At the time that they wrote their emails, Messrs Cox and Foley were not consciously thinking and had no intention that the Claimant would see these emails or of the email correspondence with Dr Isaacs and were not being abusive about him or, in our judgment suggesting that he was malingering, exaggerating his illness or behaving in a way that was contrived.

693 In our judgment, they had a different purpose than the manager who made the comment in *De Souza* so even though that case would most likely be decided differently today. It is our judgment that the contents of these emails did not have the purpose of creating a hostile, intimidating, degrading or offensive environment for the Claimant. They had the aims set out at paragraph 20 above.

694 The next step in the *Richmond* test is to ask whether the emails, the decision not to complete the appraisal form, the outcome of the 2nd grievance and correspondence with Dr Isaacs had the purpose or effect of harassing the Claimant.

695 Firstly, we considered whether they had the purpose of harassing the Claimant. It is our judgment that the items set out in Issues 4-9 above upset the Claimant. He felt very hurt when he obtained copies of the emails and the correspondence with Dr Isaacs. The emails did upset the Claimant. However, it is our judgment that they did not have the purpose of creating a hostile, humiliating and intimidating effect on him. The Respondent's managers in writing the emails were discussing his sickness absence, referring the Claimant's activities while off sick that had been drawn to their attention by his colleagues or what they saw themselves, to HR to see whether they were consistent or inconsistent with his sickness absence and discussing what might have to happen or could happen in the long term. They had no appreciation or intention that the Claimant might see the emails.

696 The correspondence with Dr Isaacs was also not intended to be shown to the Claimant. In conducting that correspondence with Dr Isaacs, the Respondent's HR and its solicitor were trying to force him to prepare his report in the way they wanted.

697 The second part of this analysis is to decide whether the actions in issues 4-9 have the effect of violating the Claimant's dignity or creating an intimidating and hostile environment for him and was it reasonable that it should have done so? It is our judgment that the emails were hurtful to the Claimant. He was completely devastated to read them. In our judgment the correspondence with Dr Isaacs also hurt the Claimant. Both the emails and the correspondence with Dr Isaacs made him believe that he could not return to work. His health suffered.

698 Was it reasonable that they should have done so? They were conversations between managers in private in which the Respondent was consciously or subconsciously alleging that the Claimant was malingering, exaggerating his illness or behaving in a way which was tactical or contrived and did not evidence a plan to dismiss him. It was not reasonable that the correspondence with Dr Isaacs and the outcome of the grievance should have the effect of violating the Claimant's dignity or creating a hostile environment for him.

699 The Claimant's submission was that it must be harassment because the Claimant became upset on seeing the contents of the emails and because they had a devastating impact on him and his mental health. Although they did have that effect, it is our judgment that the Claimant's managers must be able to discuss the management of a senior employee and who is off sick. Managers must be able to ask HR for advice or refer matters to HR for them to address. Those emails were not circulated to others. It represented discussions between managers and between managers and HR.

700 As already stated, the correspondence with Dr Isaacs represented a difference between the opinion of the medical defence union lawyers and the Respondent's solicitors on the status of Dr Isaacs' relationship with the Claimant and who he should take advice from on the contents of the report. Once the Claimant's solicitor made it clear that the GMC guidelines meant that Dr Isaacs had to incorporate the Claimant's additions to the report he decided that he would do what the Claimant wanted. Within the correspondence between Dr Isaacs the Respondent's solicitor/HR, Dr Isaacs was threatened that he would not be paid and told that he did not know what he was doing and had not done his job. Those were strong words but they were personal to Dr Isaacs, not addressed to the Claimant and only tangentially related to him.

701 It is our judgment that it was not reasonable for the matters raised in issues 4-9 to have created a hostile, intimidating, degrading, humiliating and offensive environment for the Claimant or to violate his dignity. Those issues were not disability-related harassment.

702 The complaint of harassment fails.

Issue 29: It is accepted that the Respondent applied a provision, criterion or practice (PCP) to Mr Cole of requiring regular attendance at work from 7 January 2016 until 9 September 2016 which is the point at which he was accepted on the Long-Term Sickness Scheme (LTS Scheme)

703 The Respondent accepted that it applied this PCP to the Claimant.

Issue 30: From September 2016 until 2 February 2018 (the date of issue of the second claim), did the Respondent apply a PCP, within the meaning of section 20 EA 2010, to Mr Cole of requiring a certain level of regular attendance at work to avoid a capability process and/or possible dismissal being considered?

704 It is this Tribunal's judgment that the Respondent was not contemplating applying a capability process to the Claimant. Dismissal was not anticipated. However, the Claimant is correct that in its formal procedures the Respondent did require a certain level of regular attendance at work to avoid a capability/attendance process being applied.

705 In our judgment, this PCP was not applied to the Claimant in the period referred to as the Claimant was never advised that his sickness absence had reached the threshold that required a process to be applied to him. We had no discussion of sickness absence procedures in the hearing and are not aware of what the threshold would have been.

Issue 31: Did this PCP place Mr Cole at substantial disadvantage i.e. his disability increased the likelihood of absence from work on ill health grounds on the basis of his disability?

706 The Respondent accepted that after 7 January 2016, the PCP above placed the Claimant at substantial disadvantage i.e. his disability increased the likelihood of absence from work on ill health grounds on the basis of his disability.

Issue 32: Pursuant to paragraph 20, Schedule 8, Part 3 of the Equality Act 2010, did the Respondent know, or should it have reasonably been expected to know, that Mr Cole was likely to be placed at the alleged disadvantage?

707 The Respondent accepted that it knew that the Claimant was likely to be placed at the alleged disadvantage.

Issue 33: Would it have been reasonable for the Respondent to take some/all of the following steps pursuant to section 20/21 of the Equality Act 2010:

708 The duty under section 20 Equality Act 2010 is to take such steps as it is reasonable to have to take to avoid the disadvantage.

709 The Tribunal will look at each of the suggested steps to see whether they/it would have been reasonable to take and whether it is likely that they would have avoided the disadvantage:-

709.1 *Delaying any alleged decision/proposal to dismiss Mr Cole for a reasonable period of time.* It is this Tribunal's decision that there was no decision or proposal to dismiss the Claimant. Mr Cox's only instruction to Mr Wilson was to prepare a severance offer for him. Severance is different from dismissal as severance would be a mutual agreement to end an employment contract.

709.2 *Refraining from making any alleged comments about a desire to dismiss him for a reasonable period of time.* It is our judgment that the Respondent did not have a strong desire to dismiss the Claimant. Mr Cox asked if that was a possibility and then in the same email instructed Mr Wilson to prepare a severance offer. The desire was to resolve the situation rather than to dismiss the Claimant and the two things were not synonymous.

709.3 *Adjusting absence management practices so as to discount or reasonably take into account absence due to Mr Cole's disability*. In our judgment, the Respondent had not yet applied any absence management practices to the Claimant. Managers raised queries with HR as to how his activities while off sick intersected with his ill health and Mr Cox instructed Mr Wilson to prepare a severance offer which as far as we were aware, was not proceeded with. The Claimant was not invited to absence management meetings and was not told that his absence had met any triggers.

709.4 *Adjusting absence management practices so as to arrange an earlier (or earlier) medical expert or Occupational Health appointment in order to assess the impact of his disability on his absence*. The Respondent did appoint OH to meet with the Claimant and prepare a report on the impact of his disability on his absence. The Claimant's initial sick note obtained in January was only for a couple of weeks. The second one was to expire at the end of February and it was then that the Respondent commissioned Ms Lewis' OH report. She spoke to the Claimant on 15 March and prepared her report. There was no evidence that obtaining an earlier OH report would have alleviated any disadvantage suffered by the Claimant. As soon as it became aware that the Claimant was very ill and likely to be off for a while, the Respondent commissioned the report.

709.5 *Arranging for training for Mr Cox, Mr Foley, Mr Wilson, Ms Brooks and Ms Nagy on how to manage or communicate with or about staff with mental health conditions including staff on sick leave.* As the Respondent submitted, Ms Nagy never communicated with the Claimant. Her email to Mr Wilson asked questions on behalf of Mr Cox in his usual blunt style. Messrs Cox, Foley and Wilson had all received training on equality and diversity along with Ms Brooks as an HR adviser. Mr Cox only communicated once with the Claimant while he was on sick leave. He did discuss the Claimant with Mr Foley, in emails that he did not expect the Claimant to see, in which he raised queries about the Claimant's employment but it has already been our judgment that those emails were not less favourable treatment and were not harassment. There was no disadvantage here to require an adjustment.

709.6 *Seeking earlier/early advice from HR on managing Mr Cole's absence.* In our judgment Mr Foley sought advice from Ms Gajdus of HR on a regular basis. He checked after every meeting he had with the Claimant to see whether he had expressed himself correctly and whether what he had

said to the Claimant was appropriate. He sought advice before the appraisal meeting on 7 January. As soon as the Claimant realised that he was too ill to return to work, he contacted Keith Wilson which brought HR into the situation at an early stage. Mr Wilson was the person Mr Foley and Mr Cox referred all queries that they had about the Claimant's ill health and how the Respondent could comply with its duties towards him as well as keep the business running. That adjustment was made.

709.7 *Involving an OH person in correspondence as a "buffer" from 13 January 2017.* In our judgment, having someone acting as a buffer between the Claimant and the Respondent was a good idea as by this time, any communication from the Respondent was upsetting and distressing for him. The Claimant asked, on his psychiatrist's recommendation for Dr Harvey of the Respondent's OH provider - who had only met the Claimant on one occasion - to act as a buffer between him and his employer. In our judgment, the point was to have someone who could act as a buffer between him and his employer. There was no particular reason that we could see that it had to be Dr Harvey. What was required was for communication between the Claimant and the Respondent to be done by someone who the Claimant trusted, an independent person and someone who could articulate what either side wanted to communicate. Those requirements were met by the Claimant's solicitor acting as a buffer along with Mrs Cole. Dr Harvey was not part of the Claimant's employer and did not know the ins and outs of his employment contract. To act as a buffer between him and the Respondent would have been to perform a completely different function from being an OH doctor. In the circumstances, although it was not what Dr Arkell recommended, the Respondent decided to treat Mrs Cole and the Claimant's solicitor as together creating a buffer between them and the Claimant which worked well for both sides. In our judgment, there was a buffer between the Claimant and his employers. It was not necessary to have only Dr Harvey as a buffer to alleviate any disadvantage. The Claimant's solicitor was more than capable of representing his interests and at the same time acting as a conduit for information to the Claimant.

710 It is our judgment that the Respondent complied with the duty to make adjustments by treating the Claimant's solicitor and Mrs Cole as providing a buffer in its communication with the Claimant or by seeking advice from HR all the way through Mr Foley's management. Otherwise, it is our judgment that the suggested adjustment would not have alleviated the disadvantage referred to.

711 The complaint of harassment fails.

Victimisation

Issue 38: Did any or all of the following amount to protected acts:

i. **Mr Cole's first Grievance dated 2 June 2016?**
ii. **Mr Cole's second grievance dated 1 September 2017?**

iii. The first Tribunal claim lodged on 2 June 2016

712 The Respondent agrees and it is the Tribunal's judgment that these were protected acts. In terms of timing, the particular protected acts that relate to this part of the claim are i. and iii, as the second grievance arose out of the matters that are complained of as acts of victimisation.

Issue 39: Did any of the following amount to detriments for the purposes of section 27 Equality Act 2010. There is a list of i to xii detriments in the list of issues which we will now address.

713 The Respondent accepted the Claimant on to the LTS scheme. One of the main conditions of the scheme was that there would be regular reviews at which the Respondent would consider his continued eligibility to participate in the scheme and/or whether any steps can be taken to facilitate his return to work, if appropriate. When the Claimant was told that by the Respondent that it was time to set up a meeting with an OH doctor, he was told that it was to be the first of the regular meetings that would be arranged to review his eligibility to continue to receive benefits under the scheme.

714 As the Respondent submitted, a condition of eligibility for benefits under this scheme is complete transparency. The Respondent did not say that the Claimant could not offer comments on the report prepared about his health (as suggested by detriment iii). What the Respondent was clear that it wanted was for the Claimant's comments to be appended to the report so it could see Dr Isaacs' medical opinion separately from the Claimant's comments which would have also been valid for it to see.

715 Because it was difficult to be able to determine what comments in the report were from the Claimant and what recommendations; the Respondent questioned whether the comments referred to at points v, vii and viii in the list of possible detriments – which were in the report - were the doctor's medical opinion or what he had been asked to incorporate into the report by the Claimant and/or his solicitors. It was not a detriment for the Respondent to seek to clarify what was medical opinion and what was the Claimant's opinion/desire/concern.

716 It is our judgment that the Respondent did not want the Claimant's comments so incorporated into the report that it was not possible to know which comments were from the doctor and what were suggestions from the Claimant or his solicitor. It is our judgment that it was not a detriment for the Respondent to be concerned that the Claimant's comments impinged on Dr Isaacs' medical opinion.

717 Ms Brooks did use the word tampering. She did not mean it in the sense of secretly modifying the report as any changes that were made would be made with Dr Isaacs consent. She did mean changing/altering it without the Respondent knowing what had been changed.

718 The way in which the Respondent spoke to and wrote to Dr Isaacs about his duties to the Respondent and to the Claimant in preparing the report was not appropriate and he recorded it as being unpleasant. However, in our judgment that

was not a detriment to the Claimant. Dr Isaacs produced the report amended as he wished. He did not suffer any detriment because of the Respondent's correspondence with Dr Isaacs as referred to in point x.

719 Ms Brooks' letter at point i. and at viii were not detriments to the Claimant.

720 It is our judgment that both parties had put pressure on Dr Isaacs although we find that it was the Claimant's solicitor who did so rather than the Claimant. We did not describe this as undue pressure. It is our judgment that the Respondent also put pressure on Dr Isaacs. Both parties considered that they were doing what was best for their side. The Respondent did not do so because the Claimant had brought a complaint in the Employment Tribunal but because it needed a report with the Claimant's comments and the doctor's medical assessment and advice clearly delineated for the LTS scheme and for its management of the Claimant's sickness.

721 It is our judgment that the list at paragraph 38 were either not detriments or were not done because the Claimant brought his first Tribunal claim or brought his first grievance. The Respondent were entitled as part of the Claimant's eligibility for benefits under the scheme to arrange medical reviews for him every 3 months to check that he is still eligible and to find out if there any adjustments that would enable him to return to work. The Claimant was quite unwell when he attended Dr Isaacs' appointment and did not have a clear idea as to why the appointment had been arranged. He subsequently sought to step back from statements made in the appointment. The Respondent had a different interpretation to Dr Isaacs' advisers as to where his responsibilities lay in the preparation of the report and he found its solicitors unpleasant in addressing that point. The report was produced with the comments and additions that the Claimant wanted. The Claimant did not suffer detriment in the preparation and delivery of this medical report.

722 It is our judgment that the Claimant's complaints of disability discrimination fail and are dismissed.

723 The Claimant has been seriously unwell for some time. It is hoped that this judgment, although delivered late, will provide some resolution to him of the issues in his claim.

Employment Judge Jones

19 March 2019