EMPLOYMENT TRIBUNALS

Claimant **Mr K Racey**

Respondent **Pets At Home Limited**

REASONS OF THE EMPLOYMENT TRIBUNAL

Heard at North Shields **On 21st -25th May 2018**
Before Employment Judge Garnon
Members Ms C Hunter and Mr S Moules

Appearances
For the Claimant: Mr R Owen (CAB)
For the Respondent: Mr B Williams of Counsel

REASONS (bold print is our emphasis)

1. The Complaints and Issues

1.1. By a claim presented on 25 October 2017, the claimant brought complaints of constructive unfair dismissal, direct disability discrimination, discrimination because of something arising in consequence of his disability, failure to make reasonable adjustments, direct sex discrimination and harassment related to disability and sex. The respondent defends the claims which are of the claimant's alleged treatment by certain managers from late 2016 until he resigned on 14 September 2017.

1.2. The respondent concedes the claimant had at all material times a disability, namely a mental impairment identified as general anxiety disorder, depression and post traumatic stress disorder. At a case management hearing Employment Judge Johnson ordered the parties to agree a detailed list of issues which reads:

1 PRELIMINARY ISSUES:

1.1 Discrimination – Time

(a) Has there been a continuing act of discrimination?
(b) Are any of the complaints out of time?
(c) If so, would it be just and equitable to extend the time limit for the submission of these claims?

2 SUBSTANTIVE ISSUES:

2.1 Constructive Unfair Dismissal

(a) Did the Respondent subject the Claimant to the following treatment:

(i) The alleged incidents of discrimination listed at paragraphs 2.2-2.5?
(ii) Failure to take the Claimant's grievance seriously?
(iii) Subjecting the Claimant's grievance to an unreasonable delay?
(iv) Failing to properly investigate the Claimant's grievance?
(v) Unreasonably failing to uphold the Claimant's grievance?

(b) Was any of the treatment the Claimant was subjected to, either singularly or cumulatively, a breach of the implied term of trust and confidence?
(c) If yes, then was it a repudiatory breach of that term?
(d) If it was, did the Claimant resign in response to the repudiatory breach of contract?
(e) Did the Claimant waive any breach by waiting too long to resign?
(f) If the Claimant was found to have been dismissed by the Respondent, then was that dismissal for a potentially fair reason, namely 'some other substantial reason'?
(g) If it was, did the Respondent act reasonably in all of the circumstances in dismissing the Claimant for this reason?

2.2 <u>Direct Disability Discrimination</u>

(a) Was the Claimant subjected to the following treatment:
(i) Between December 2016 and May 2017 repeated unfair and unreasonable criticism and undermining of all aspects of his work by Laura Findlay?
(ii) Between December 2016 and May 2017 a refusal by Laura Findlay to give assistance and guidance to the Claimant when he asked for it?
(iii) Between December 2016 and May 2017 Laura Findlay refusing to discuss things directly with the Claimant and leaving blunt and hostile notes reprimanding him or making negative comments about him?
(iv) Between December 2016 and May 2017 Laura Findlay blanking the Claimant on a daily basis?
(v) In early 2017 Laura Findlay criticising the Claimant for his management of other colleagues during deliveries and instructing the Claimant to give them a verbal warning?
(vi) In or about March 2017 being reprimanded by Nicola Irwin for failing to complete store tasks in line with new models?

(b) If so, was the treatment less favourable treatment than as compared with a hypothetical comparator, that is, an employee who did not suffer with the Claimant's disability, (but otherwise where there was no material difference between their circumstances and those of the Claimant)?
(c) Can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment in relation to was because of his disability?
(d) If so, can the Respondent prove a non-discriminatory reason for any proven treatment.
(e) If an act of discrimination is found to have occurred, did the Respondent take reasonable steps to prevent such an act from occurring?

2.3 Direct Sex Discrimination

(a) In making the comment "the mutual appreciation society cutting themselves up over how hard it is being a dad. It's ridiculous. In my day dad's just got on with it" was the Claimant subjected to less favourable treatment than as compared with a hypothetical comparator, that is, an employee was was a woman, (but otherwise where there was no material difference between their circumstances and those of the Claimant)?

(b) Can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment in relation to was because of his disability?

(c) If so, can the Respondent prove a non-discriminatory reason for any proven treatment?

(d) If an act of discrimination is found to have occurred, did the Respondent take reasonable steps to prevent such an act from occurring?

2.4 Discrimination Arising from Disability

(a) As a consequence of the Claimant's disability does the Claimant suffer from:

(i) Increased anxiety; and/or

(ii) The need to avoid being confrontational or too forceful with people

(b) Was the Claimant subjected to the following treatment:

(i) In April 2017 a comment from Laura Findlay that she refused to communicate with him about workplace issues verbally "in case you lash out or go on the sick"?

(ii) In May 2017, being called by Janet Hodgson in an aggressive and confrontational manner demanding an explanation and trying to dissuade him from taking matters further?

(iii) Between May and July 2017 being deleted from social media by Laura Findlay and blocked by Janet Hodgson and Nicola Irwin?

(iv) A failure to protect his confidentiality relating to his mental health during the grievance process by not taking steps to ensure that the number of employees made aware of them were limited?

(c) If so, was the Claimant subjected to such treatment because of the matters listed at paragraph 2.4(a)?

(d) If he was, then was the treatment a proportionate means of achieving a legitimate aim of the Respondent?

(e) If an act of discrimination is found to have occurred, did the Respondent take reasonable steps to prevent such an act from occurring?

2.5 Failure to Make Reasonable Adjustments

(a) Was the Claimant subjected by the Respondent to the PCP of "being required to be at work to carry out the essential functions of Assistant Manager"?

(b) If so, did this put the Claimant at a substantial disadvantage as compared to those without his disability?

(c) If so, would the disadvantage have been removed by the Respondent making adjustments in the form of:

(i) Transferring the Claimant to another store in March 2017; or

(ii) Implementing the recommendations of the Occupational Health report dated 25 July 2017

(d) If they would, then would such an adjustment have been reasonable for the Respondent to make in all of the circumstances?

(e) If an act of discrimination is found to have occurred, did the Respondent take reasonable steps to prevent such an act from occurring?

2.6 Harassment Related to Disability

(a) Was the Claimant subjected to the following treatment:

(i) In April 2017 subjected to negative comments regarding past leave and discrimination complaint by Laura Findlay?

(ii) Between December 2016 – May 2017 set unattainable targets by Laura Findlay?

(iii) At least twice a week have hostile notes left in view of other colleagues by Laura Findlay?

(iv) Between late 2016 – May 2017 being blanked by Laura Findlay?

(v) In early 2017 having progress recorded on store iPads by Laura Findlay?

(vi) In early 2017 being forced to discipline colleagues by Laura Findlay?

(vii) In February/April 2017 a refusal to pass on necessary information for the Claimant to perform his role by Laura Findlay?

(viii) In February/April 2017 Laura Findlay informing the Claimant that the Store Manager was angry at him?

(ix) On 24 April 2017 being forced to change his personality by Nicola Irwin?

(x) On or around 27 May 2017 a comment made by Janet Hodgson of "Well there's two self-mutilators together then"?

(b) If he was, then was that treatment related to his disability?

(c) If it was, then did the treatment have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile degrading, humiliating or offensive environment for him?

(d) If it had that effect, was it reasonable to do so?

If an act of harassment is found to have occurred, did the Respondent take reasonable steps to prevent such an act from occurring?

2 The Relevant Law

2.1. As both parties have experienced legal representatives need not set out the law in exhaustive detail. We start with the claim of constructive unfair dismissal.

2.2. Section 95(1)(c) of the Employment Rights Act 1996 (the Act) says an employee is dismissed if: -

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

2.3. An employee is "entitled" so to terminate the contract only if the employer has committed a fundamental breach of contract, ie. a breach of such gravity as to

discharge the employee from the obligation to continue to perform the contract, Western Excavating (ECC) Ltd v Sharpe [1978] IRLR 27. The conduct of the employer must be more than just unreasonable to constitute a fundamental breach.

2.4. The claimant alleges he raised grievances which were not properly or promptly handled. There is a term implied in every contract of employment that an employer will afford to its employees a reasonable opportunity promptly to resolve grievances they have, see WM Goold (Pearmak) Ltd -v- McConnell. In that case two salesman attempted to raise a grievance about pay with the managing director and were blocked by his Personal Assistant from even seeing him. The obligation on the employer is to afford the necessary opportunity to resolve grievances, so if they provide options as to **how** to resolve grievances and the employee fails to take the best option, it is unlikely to be a breach of this term. In the list of issues the parties record questions as to whether the grievance was taken seriously, properly investigated and unreasonably rejected. Those matters may form part of the breach of next term we address.

2.5. Where an employer has not breached any express or other implied term, an employee may rely on the implied term of mutual trust and confidence. In Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347, the EAT, said: -
"*It is clearly established there is implied in a contract of employment a term that the employer would not, without reasonable and proper cause, conduct themselves in a manner, calculated or likely to destroy or seriously damage the relationship of confidence and trust between an employer and an employee. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The Tribunals function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it any longer. Any breach of that implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract."*

2.6. Malik v BCCI held if conduct, **objectively** considered, was likely to cause serious damage to the relationship between employer and employee, a breach was made out irrespective of the motives of the employer. They emphasised the conduct must be without "reasonable and proper cause" and that too must be objectively decided by the Tribunal. It cannot be enough the employer thinks it had reasonable and proper cause or that his conduct fell within the range of reasonable responses. Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908.

2.7. An employer is liable for the acts of its managers towards subordinates done in the course of their employment whether the employer knew or approved of them or not, Hilton International v Protopapa. There are countless examples of the ways in which the implied term may be breached, for example, unjustifiably telling an employee he is incapable of doing the job, Courtaulds v Andrew and failure to take seriously complaints of harassment Bracebridge Engineering -v- Derby . A point frequently misunderstood is that it is **the manner in which** criticism of performance is directed to employee which may constitute a breach. A manager may have valid concerns about the employee's performance but, if instead of using established performance management methods, she resorts to humiliation, intimidation and making unwarranted criticisms, the implied term will be breached.

2.8. A breach of the implied term of mutual trust and confidence may result from a number of actions extending over a period of time. This is sometimes called the last straw doctrine and was explored in London Borough of Waltham Forest v Omilaju [2005] IRLR 35. The last straw does not in itself have to be a breach of contract or of the same character as the earlier acts. Its essential quality is that when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term. It must contribute something to that breach, so an innocuous act of the employer cannot be a last straw, even if the employee genuinely interprets it as hurtful and destructive of trust and confidence .

2.9. Resignation is acceptance by the employee that the breach has ended the contract. Conversely, he may expressly or impliedly **affirm** the contract and thereby lose the right to resign in response to the antecedent breach. There is an explanation of the principles in WE Cox Toner (International) Ltd v Crook [1981] IRLR 443, which the Court of Appeal confirmed in Henry v London General Transport [2002] IRLR 472. Delay of itself does not mean the employee has affirmed the contract. As recently affirmed in Kaur-v-Leeds Teaching Hospital, a valid last straw may re-ignite the right to resign in response to conduct previously affirmed. On the respondent's version, there is a tenable affirmation argument in this case only in respect of the conduct of Ms Findlay from late 2016 to the spring on 2017 .

2.10. Even if there has been a fundamental breach which has not been affirmed, if it is not at least in part the effective cause of the employee's resignation, there is no dismissal, see Jones v F.Sirl Furnishing Ltd and Wright v North Ayrshire Council

2.11. Even a constructive dismissal may be fair if the respondent shows a potentially fair reason and acts reasonably. The reason for dismissal in a constructive dismissal case as explained in Berriman v Delabole Slate Company [1985] ICR 546 is the reason for the conduct which entitled the employee to resign.

2.12. The claims under the Equality Act 2010 (EqA) involve the same factual enquiry but very different legal considerations. One act of discrimination alleged is constructive dismissal which is defined as dismissal under the EqA . Section 39 includes as a discriminatory act subjection to any other detriment which is also alleged, as is refusal of opportunities for training.

2.13. Section 13, headed " Direct discrimination" says

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

2.14. Section 23 includes :

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

(2) The circumstances relating to case include a person's abilities if-

(a) on a comparison for the purposes of section 13, the protected characteristic is disability

Stockton Borough Council-v- Aylott held direct discrimination was less favourable treatment because of a **particular** disability. The Tribunal found the respondent had a stereotypical view of mental illness which caused them to treat Mr Aylott less favourably than they would have treated a person with physical illness. Under the Disability Discrimination Act (DDA) the comparator was "*a person not having that particular disability whose relevant circumstances, including abilities, were the same as, or not materially different from, those of the disabled person*" . The EqA omits reference to "particular" disability but s 23 limits the comparison in the same way.

2.15. Section 15 of the EqA does not require the claimant to establish **less** favourable treatment than that experienced by any comparator . It says

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

2.16. In respect of discrimination contrary to section 13 or 15, malicious motivation towards the claimant is not a necessary ingredient. However benign motivation is no defence as illustrated by Amnesty International -v-Ahmed. There the employee wanted to work in a part of the world where her employer believed, due to her race and religion, she would be vulnerable to physical harm so it refused her application for a post there . Despite its motivation, she was treated less favourably because of a protected characteristic. In our judgment, if treatment is objectively unfavourable it is no defence for the employer to say it was not intended to be.

2.17. The section applies if the "reason why" the treatment was afforded was "something" arising in consequence of disability. There may be a "chain" of consequences eg because the claimant is disabled he behaved in a certain way in the past and because he did he was treated unfavourably.

2.18. The distinction between discrimination under s 13 and 15 on the one hand and s 19 and 20/ 21 on the other was explained by Mummery L.J. in Stockton Borough Council-v- Aylott

26. .. In the case of direct discrimination on a prohibited ground the aim is to secure equal treatment protection for the individual person concerned on the basis that like cases should be treated alike. The essential inquiry is into why the disabled claimant was treated less favourably than a person not having that particular disability.

27. In the case of indirect discrimination the aim is to secure equal treatment results for members of a group to which that individual belongs. The essential inquiry is into whether the members of that group, who appear not to have been discriminated against on the ground of disability, have not in fact had equal treatment protection on the basis of the prohibited ground as a result of the disproportionate adverse impact of a neutrally worded provision, criterion or practice.

2.19. The phrase *provision, criterion or practice.*is abbreviated to "PCP". When his Lordship said this, there was no " indirect discrimination "under the DDA, so he was talking of failure to make reasonable adjustments in para 27. Also, what he was

saying in para 26 would now apply to s15 save that the treatment does not have to be "less favourable" only " unfavourable" .Discrimination occurs when one treats people whose circumstances, apart from the protected characteristic, are the same differently OR when one treats people the same when their circumstances because of the protected characteristic, are different. The first situation is s 13 and/or s15 , the second s19 and/or 20 . Indirect discrimination under s 19 in practice adds little to the protection afforded by s 21 and we commend Mr Owen for not pleading both. If the claimant succeeds in his s13 or s15 claims, he may not need s20/21.

2.20. Section 39 (5) imposes the duty to make reasonable adjustments, Section 20 sets out three requirements but only the first is relevant in this case .
(3) The first requirement is a requirement, where a ***provision, criterion or practice*** *of (the employer) puts a disabled person at a* ***substantial disadvantage*** *in relation to a relevant matter* ***in comparison with persons who are not disabled****, to take* ***such steps as it is reasonable to have to take to avoid the disadvantage****.*

and section 21 says

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

2.21. Under s 15 the respondent may avoid liability if it shows it **did not** know, and **could not reasonably have been expected** to know, that the claimant had a disability. This is often termed "actual or constructive knowledge. The duty under section 20 only arises where the employer has actual or constructive knowledge of the adverse effects too. The respondent rightly did not run this argument.

2.22. As Langstaff P explained in Nottingham City Transport Ltd v Harvey UKEAT/0032/12 *…"Practice" has something of the element of repetition about it.* ***something that is applicable to others than the person suffering the disability."*** HH Judge Shanks said similarly in Carphone Warehouse Ltd v Martin UKEAT/0371/12:
…What the Employment Tribunal found, in effect, was that the lack of competence or understanding by The Carphone Warehouse in preparing the Claimant's wage slip for July 2010 was capable of being a "practice" .. and that the reasonable step they should have taken was the step of not delaying payment of the correct amount of pay. Mr Hutchin says, in effect, that this approach is misconceived. We .. agree with him in this contention... First, a lack of competence in relation to a particular transaction cannot, as a matter of proper construction, in our view amount to a "practice" applied by an employer any more than it could amount to a "provision" or "criterion" applied by an employer.

2.23. Schedule 8 para2 says reference in section 20(3) to a PCP is a reference to a one applied **by or on behalf of the employer**. Read together with section 109 (see below) if a manager has a practice, **it is** a practice of the employer.

2.24. Newham College –v-Sanders upholding Environment Agency v Rowan 2008 IRLR 20 gave guidance for reasonable adjustment claims . As well as identifying the offending PCP the tribunal must establish the nature and extent of the substantial disadvantage suffered by the disabled employee in comparison with non-disabled

people . Further, it must be clear what 'step' the employer has allegedly failed to take to remedy that disadvantage and whether it was reasonable to take that step.

2.25. Section 26 headed " Harassment" says

(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.

The relevant protected characteristics include disability and sex. Section 40, headed "Employees and applicants: harassment", says

(1) An employer (A) must not, in relation to employment by A, harass a person (B)—
(a) who is an employee of A's;

2.26. One problem in this case is of more academic than practical importance. Before harassment was a separate statutory tort, if a person engaged in conduct towards another which was by the nature of the conduct itself **related to**, say, sex but did not do so **because of** sex, there was no direct discrimination and no unlawful act unless the conduct constituted a PCP which impacted more on women than men. In Porcelli –v-Strathclyde Council two male employees were in the habit of looking up Ms Porcelli's skirt. The tribunal found they did so not because of sex, but simply because they did not like her and knew it would annoy her. She lost her claim. The new tort was a means of dealing with this. On a literal reading, the link is now between the protected characteristic and the conduct. Victims do not have to possess the 'protected characteristic' themselves. Section 212(1) includes

" detriment" does not, subject to subsection (5), include conduct which amounts to harassment.

So if the detriment caused by conduct falling, for example, within s. 15 creates a hostile environment , s. 40 is infringed, not s.39. However, "dismissal" under the EqA includes constructive dismissal so if the conduct is because of a protected characteristic and is so bad as to cause the claimant to leave, s212 does not apply

2.27.The IDS Handbook "Discrimination at Work" says section 26 includes everything which used to be direct discrimination **as well as** conduct related to a protected characteristic but not done because of it . Our Employment Judge has never been convinced by this. In Bakkali-v- Greater Manchester Buses Slade J said

31. In my judgment the change in the wording of the statutory prohibition of harassment from "unwanted conduct on grounds of race …" in the Race Relations Act 1976 section 3A to "unwanted conduct related to a relevant protected characteristic" affects the test to be applied. Paragraph 7.9 of the Code of Practice on the Equality Act 2010 encapsulates the change. Conduct can be "related to" a relevant characteristic even if it is not "because of" that characteristic. ***It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant.*** *However, "related to" such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader enquiry. In my judgment the change in the statutory ingredients of harassment requires a more intense focus on the context of the offending words or behaviour.*

2.28. It is the emboldened words which we question. We think the issues of "the reason why" the alleged discriminator acted as he did and whether the conduct itself relates to the protected characteristic should be kept separate. When conduct is both because of a protected characteristic and related to it, in the sense of making reference to that characteristic, s212 says it is harassment contrary to s40. But if there is no reference to the protected characteristic in the conduct itself, we believe it should be found to be detriment contrary to s39. Both are unlawful. This point may never be appealed because. whichever view is right, the remedy is the same.

2.29. The only remaining unlawful act under the EqA is victimisation contrary to section 27. It has never been pleaded therefore is not in the list of issues.

2.30. Section 109 includes

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(3) It does not matter whether that thing is done with the employer's .. knowledge or approval.

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—

(a)from doing that thing, or

(b)from doing anything of that description.

The last subsection usually requires more than simply having non-discrimination policies. Mr Williams rightly did not press this point in submissions. Had he done a comment allegedly made by an HR officer to the claimant and his wife, about Ms Findlay's past management of employees at an "off the record" discussion on 5th July would have assumed great importance

2.31. Section 123 so far as relevant provides

(1) . proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

2.32. The question of acts " extending over a period" has been considered in Cast-v-Croydon College 1998 IRLR 318 and Hendricks-v-Commissioner of Police for the Metropolis 2003 IRLR 96. The later held a succession of isolated unconnected acts are not an act extending over a period. The wording of s 120 is significantly different from its various predecessor Acts. But the guidelines on exercising th discretion as to what is "just and equitable" are well described in British Coal Corporation v Keeble [1997] IRLR 336. The EAT said the tribunal would be assisted by the factors mentioned in s.33 of the Limitation Act 1980, which deals with the exercise of discretion by courts in personal injury cases. It requires consideration of **the prejudice each party would suffer** as the result of the decision and regard to **all the circumstances of the case** in particular the length of and reasons for the delay, whether the claimant was being advised at the time and if so by whom and the extent to which the quality of the evidence is impaired by the passage of time. Although the discretion to extend is broader now than it was, as held in Robertson –v- Bexley Community Centre we must have some judicial reason for granting a period longer than three months and cannot do it simply out of sympathy for the claimant

2.33. Using internal proceedings is not **in itself** an excuse for not issuing within time see Robinson v The Post Office but is a relevant factor. However, for over a decade Parliament has tried various means to ensure that before employees rush to a Tribunal , they try to resolve problems internally with the employer. That is exactly what the claimant did. If we do not exercise the discretion, his forebearance in bringing proceedings in order to allow the respondent the opportunity to remedy the situation would be rewarded with a decision that wrong was done to him but he can have no remedy because he waited too long. That is not just or equitable.

2.34. The dismissal claim is undoubtedly issued in time. The claimant's main case is of conduct extending over a period culminating in dismissal. If we reject that discrimination and harassment alleged against Ms Findlay and Ms Hodgson could be a separate unrelated act which gives rise to a just and equitable extension point .

3. Findings of Fact

3.1. We heard evidence from the claimant and his wife Catriona Racey, and read the witness statement he produced from Ms Anne (known as Annie) Louise Oates. At the time of the claimant's alleged dismissal he was employed at the Hexham store as Assistant Manager, his first managerial appointment since he started working for the respondent in 2008. The store manager was Nicola Irwin, her deputy was Laura Findlay. They and the claimant were the management team at that store where non-managerial staff are referred to as "colleagues". The area manager is Mr Michael Southwick. Ms Janet Hodgson worked at Consett store, where the claimant previously worked as a colleague. The person who dealt with the claimant's grievance is a store manager from a different region Mr Paula Hull. We heard the oral evidence of all five named.

3.2. In 2011, when employed as a colleague at the Gateshead store, the claimant's mental health began to deteriorate. He became dependent upon medication. He raised a grievance at that time which was not, in his opinion, adequately dealt with. This sincerely held opinion has coloured his perceptions in this case. He says if he had a physical disability everything would have been done better and he believed his complaints were not taken seriously because he was making allegations against the company which tried to protect everybody but him . If that were true, which we do not believe it to be , it could be victimisation , a claim which has never been pleaded.

3.3. Ms Hodgson and Ms Findlay were at the Gateshead store during that period. Ms Findlay recalls the claimant being open about his condition and telling the store manager , Debbie Joicey, when he was having a bad day. They would try to keep him away from the public at that time. Ms Findlay says it was difficult to work with him as he could be verbally aggressive to customers and colleagues. The claimant denies this but admits he had panic attacks so his behaviour may have been seen as unacceptable. When his mental health was at its worst, he self harmed by cutting his arms and still bears visible scars. Ms Hodgson's daughter Sarah has severe bipolar disorder and has also self harmed by cutting her wrists.

3.4. By 2013 the claimant's mental health declined to such an extent that he went on sick leave for over a year. The respondent could have taken steps to dismiss for ill health capability reasons, but it did not. He returned to work in February 2015 at the Consett store part-time, 24 hours per week rather than 40. Ms Hodgson had moved to Consett in 2014. She says the claimant's time there was happy, his performance as a colleague perfectly acceptable and his relationship with her and colleagues was good. She made the claimant's wedding cake and along with many colleagues attended his wedding. She described him as being an entirely different person from the very ill one she knew at Gateshead. However, he had some performance problems which she very fairly described in her oral evidence. For example, if he had four tasks to perform he would try to perform them all at once but finish none of them properly. She encouraged him to prioritise the tasks and do them one by one. He had one baby, was often tired and admits he did fall asleep during his break times.

3.5. By 2016 he had successfully completed a programme for progression to management called Rising Stars, indeed Mr Southwick says he was very impressive. He and his wife were expecting their second child who was born on 2 July 2016. An assistant manager role became vacant at the Hexham store. Ms Hodgson had doubts as to whether he was ready for the step up. His mental health was better but the transition from being a person who takes orders to be one who gives them is a challenge for everybody. Also his hours would increase from 24 to 40 per week.

3.6. He lives in Swalwell which is very close to the Gateshead store and not difficult to commute to Consett. The Hexham store is considerably further away . Ms Findlay was asked how she would feel about the claimant coming to work at Consett. She had no objections at all, however says in her statement she had reservations about his ability to manage colleagues. Ms Irwin had no personal knowledge of the claimant but did discuss him with Ms Findlay, and briefly with Ms Hodgson as well.

3.7. The case falls into three phases. The first is the claimant's experiences at Hexham from starting in July 2016 to late May 2017. The second is a specific

episode on 27th May in which he was told of comment allegedly made by Ms Hodgson which caused him to go sick from 1 June . The third is the handling by the respondent generally, and Mr Southwick in particular, of the complaints he made.

PHASE ONE

3.8. The claimant says from starting at Hexham in July 2016 to late October or early November he had no major difficulties in his relationship with Ms Findlay. He accepts he was apprehensive about working with her again but in oral evidence said he knew his mental health was better and believed she did too. Ms Findlay's statement says "*our relationship was a bit wobbly to begin with. I felt as though we were awkward around one another , as we hadn't spoken for approximately 5 years. I still saw him as the Kevin I had known at Gateshead and who I felt I had to tread very carefully around. That made me wary of raising issues or concerns that I had around his work with him in a way I may not have been with another Assistant Manager. That isn't to say I didn't do this at times, but I was certainly very careful about what I said to Kevin and how I said it because of my previous experience of him. I didn't want to put pressure on him*". **She thereby admits that because of something arising in consequence of his disability (his behaviour at Gateshead) she was treating him differently. The key question is whether the treatment was unfavourable and unwanted .** We take the claimant's allegations of such treatment separately, but their cumulative effect is greater than the sum of the parts.

3.9. Ms Findlay denies she "***blanked***" the claimant. She accepts she spoke less to him than to others, saying she and he had little in common, which we saw from their oral evidence. In contrast, the claimant and Ms Irwin liked the same television programmes and would talk about their children. The vital point to emerge from Ms Irwin's evidence was she had worked with Ms Findlay for three years, and for a good time with the previous assistant manager, Rachel Eccles, of whom will hear more later. The Hexham store is comparatively small. There are company standards across all stores but each develops Its own ways of working. The claimant would have to integrate into a small established team.

3.10. Ms Findlay is a different character to Ms Irwin and has a different managerial style. If Ms Findlay is displeased with something she will say so in forthright terms whereas Mr Irwin will be more circuitous in her approach. At the time Ms Irwin was struggling with her own mental health so any confrontation with colleagues would tend to be dealt with by Ms Findlay. Whilst we do not think she intentionally "blanked" the claimant, she did not communicate with him verbally which is the mode of communication he much prefers. We accept he perceived he was being blanked by her and such perception was not unreasonable . Moreover, as Ms Irwin admitted, Ms Findlay is normally good at explaining to people who are failing to perform how they may improve, and she does so by talking to them. If therefore, as we find, she was not communicating with the claimant as she normally would, he would be placed at a disadvantage. Ms Irwin agreed this was so.

3.11. Ms Findlay also denies she **wrote unacceptable notes** to the claimant. The store is open from 9am to 8pm daily, with normally one member of the management team in charge of a number of colleagues. Managers work alongside colleagues as well as performing managerial tasks. The manager on duty would arrive at 7 am, or

6 am on two delivery days per week. There is a "daily planner", a spiral bound book, in which managers write notes to one another when their shifts do not coincide. The claimant says Ms Findlay's notes to him, often written in capital letters with underlining and exclamation marks, were brash, such as " *Why is this not done?"* and " *What the hell ???"* . Notes Ms Findlay left for Ms Irwin or Ms Irwin left for the claimant were polite . Ms Irwin says notes would often be left by one manager to another in the daily planner some of which were criticisms of what they had or had not done on the previous shift. She herself would leave such notes in polite terms. She never saw any from Ms Findlay which could be regarded as objectionable. It is significant the claimant does not complain of any notes left by Ms Irwin. The claimant never kept copies of what Ms Findlay wrote and did not raise it as a grievance until July 2017. Routinely pages dealing with dates which had passed are discarded, so the absence of any copy of such notes does not reflect badly on either the claimant or the respondent. We accept the claimant's evidence some of Ms Findlay's notes to him were unfavourable in tone and content **.** The fact they could be seen by colleagues who looked in the book, which was left on a desk in the colleague room, would also be of embarrassment to the claimant thereby placing him at a disadvantage. It is likely had Ms Findlay not been avoiding verbal communication with claimant, she would not have written such terse notes.

3.12. The claimant's allegation Ms Findlay would **come in early to catch him** out for unfinished tasks is strongly denied by her. She gets in early anyway. Taking photographs on her iPad of good and bad work done by all members of staff is also something which she does routinely and an illustration of good work by the claimant can be seen at page 78. Particularly on days when the deliveries arrived neither Ms Irwin nor Ms Findlay were satisfied with the tidiness of the premises when the claimant was on duty. He said he would have had it tidy by the time Ms Findlay was due to arrive but she subjected him to unreasonable criticism for a half finished task. We find Ms Findlay had high standards and viewed the claimant as too " laid back" , This view was **not** because of how he had been at Gateshead. She simply saw him as spending too much time in the office, even on delivery days, rather than on the shop floor. He also said she criticised him for matters he describes as" trivial". We do not accept they were trivial. Indeed, his inconsistency in signing financial documents was quite a serious cause of concern. In these respects we do not accept criticism of him was unjustified or discrimination/harassment in any way.

3.13. The claimant says Ms Findlay **refused to give him assistance or guidance** when he asked for it. The claimant has been unable to be specific about when and how he asked and the allegation is denied by her. However, we find it is a natural consequence of not communicating with him verbally, as she did with others, that he was left to struggle without her explaining to him exactly what she wanted him to do.

3.14. The claimant says she **undermined** him meaning that by not telling him how to manage colleagues an atmosphere was created in which colleagues did not regard him as part of the management team. He said he " *had no credibility with colleagues*". A recurring theme is of him being told by both Ms Findlay and Ms Irwin to behave more like a manager and less like a colleague, and take responsibility for ensuring colleagues did what he asked them to do. Ms Irwin recalls an incident in January 2017 when Ms Findlay found the store in an untidy condition and the claimant blamed two colleagues, Kate Oliver and Natasha Richardson. Ms Richardson heard

about this and protested. There are some texts between the claimant and Ms Oliver in which he apologises. The claimant was struggling to assert authority as a manager. Unfavourable treatment may be an omission. By omitting to guide the claimant how to exert authority over colleagues, other than by saying "*give them a kick up the backside*", Ms Findlay, unintentionally, undermined him.

3.15. In March 2017 Ms Irwin reprimanded him for failing to complete tasks in line with new models. She accepts this and says the criticism was valid. The claimant alleges Ms Findlay had deliberately withheld from him information about the new models in order to get him into trouble. A recurring feature in this case is that the claimant sees motivations which probably are not there. Ms Findlay says she was herself unaware of any "new models" , and we accept that.

3.16. Ms Irwin and Ms Findlay gave the claimant a chance to "bed in " to his new role in the first 2-3 months. However, he kept missing important points like financial recording. The explanation for the change in Ms Findlay's behaviour from late October /early November is that she ran out of patience with the claimant before Ms Irwin did. Ms Irwin gave the claimant a good mark in his appraisal in January 2017 and tried to focus on the positive points, but she did record for the need for him" *to start thinking more like a manager less of a colleague*".

3.17. Ms Irwin at paragraph 10 of her statement says the claimant showed no signs of improvement. She also says he was keen to get away at the end of his shift to go home to his wife who was looking after the two children. He accepts this. Ms Irwin points out he should have delegated tasks to colleagues so he could get away. She refers to a specific incident when she delegated to him the changing the tickets for a promotion which was not done properly so wrong prices were being displayed to customers. When she flagged this up to the claimant she says it "caused him to panic". Notwithstanding that, the claimant directs little criticism towards Ms Irwin but rather directs his complaints towards the behaviour of Ms Findlay.

3.18. Paragraph 24 of Ms Irwin's statement recalls two occasions when the claimant said he was not feeling well but she is unable to recall when. During the hearing the claimant disclosed texts, page 94A, he had sent to his wife which enabled us to pinpoint the time he discussed with Ms Irwin his problems with Ms Findlay as 22 March 2017. On 21st March he had thought of talking directly to Ms Findlay but his wife advised against it. That day Ms Findlay approached Ms Irwin to say she was having difficulty dealing with the claimant because of what she knew from the past . Ms Irwin encouraged Ms Findlay to speak directly to him. Ms Irwin must also have said something to the claimant because he texted his wife " *Apparently she's* (Ms Findlay) *concerned to talk to me about stuff because of who I used to be "*

3.19. On 22nd March the claimant told Ms Irwin that Ms Findlay was being "passive aggressive". He texted his wife after meeting with Ms Irwin " *I feel like I can't escape who I was whilst still working with people from that era and it's holding me back from performing to the level they expect me to. …..So hopefully I'll get moved but I acknowledge I still have a lot of room for improvement and need to step up more"* Ms Irwin raised the matter with Ms Findlay who had a discussion with the claimant to "clear the air" on 23rd March . During this she said she was handling him with care due to his behaviour when she last knew him. He told her he " *wasn't that guy any*

more" but accepted it would take her time to *"adjust to the new Kevin*". He alleges during this conversation ,when he asked why she was treating him differently her response was "*in case you lash out go off sick*". She denies saying anything about "lashing out" but may have made a comment about going sick. We find she said both.

3.20. Ms Irwin's statement at paragraph 15 says **in April**, when she was questioning her own ability to manage the claimant to best effect, she attended a conference where she spoke to Mr Colin Dale, manager of the Gateshead store, who had more experience than she did , had not worked with the claimant before and may be better for him. She says she offered the claimant a transfer to Gateshead which he declined saying he was happy to continue at Hexham. The claimant denies this ever happened saying he would have jumped at the chance because the Gateshead store is only five minutes from his home. The claimant says he asked her for a transfer to another store on 22 or 23 March and Ms Irwin offered him none.

3.21. When people give different accounts of events it does not mean one of them is lying. Imagine a situation in which a woman says to her husband she is going to be late home from work because the staff are having a few drinks and the husband replies he had been counting on her getting home on time that night .She says "*but I told you last week I'd be late*" . He replies " *No you didn't".* The possibilities are she told him but he forgot, or she thought she had told him, but forgot to.

3.22. We put to Ms Irwin she may well have thought about the claimant transferring to Gateshead but never made that offer to him .She said she was sure she "*would have done*", but accepted the conversation was **in March** when she did not know whether there was a vacancy at Gateshead and , if her statement is correct as to dates, had not spoken to Mr Dale. She not cleared it with Mr Southwick who would have the final say on any transfer . In our view, her recollection is unreliable but that does not mean we think she is lying. She denies the claimant ever asked for a transfer but we now have texts between the claimant and his wife in which the claimant says he did speak to Ms Irwin about transfer. Possibly he was telling his wife what he was going to do, but when it came to speaking with Ms Irwin, he was, as Mr Williams put it, "Stoic" when saying he wanted to continue at Hexham. The claimant says he thought a transfer may be to the Kingston Park store whence he was reluctant to go because people who remembered him from what he describes as the "era" at Gateshead now worked there . In short, the question of transfer is one on which we believe no witness lied, but no one remembers the discussions accurately.

3.23. There is a very significant review meeting with the claimant and Ms Irwin on 24 April 2017 In which the claimant does accept the relationship with Ms Findlay had improved. It was over a month since he had the "clear the air" meeting with her and he worked with her for another five weeks after the review. Although he now says, looking back , she did not improve, we believe she did .Ms Irwin's manuscript notes show continuing concerns about the claimant's ability to manage colleagues which would now be better addressed since the "*atmosphere* " and "*communication*" between him and Ms Findlay was better. The claimant says he was pressured to "*change his personality*". An entry at page 96 is he must "*change his personality* ***with the team***" i.e. by more of a manager and less of a colleague.

3.24. Ms Irwin' staunchly denies denying him training opportunities. We find she advised him against enrolling on the deputy manager training programme because he had not yet mastered being an assistant manager. He was not given microchipping or Cat Specialist training for wholly non discriminatory reasons set out at paragraphs 28-29 of Ms Irwin's statement which we accept. As for issues 2.6. (a) (ii) and (viii) , there is no evidence Ms Findlay set any "targets" for the claimant , and while we accept Ms Findlay may have said something to the claimant which he interpreted as indicating Ms Irwin was displeased with him , there are no facts from which we can infer either that Mr Irwin was so displeased, or that Ms Findlay told him so. because of his past performance at Gateshead.

3.25. As for issues 2.4. (b) (iii) and (iv) , Ms Findlay accepts she deleted the claimant from her social media contacts as she does from time to time delete others with whom she has little contact . The point was not put to Ms Hodgson or Ms Irwin . In any event, what they did on social media does not in our view show discrimination or unreasonable behaviour in the course of employment . We find no evidence of the claimant's mental health details being shared with anyone who did not need to be involved in the grievance process.

PHASE TWO

3.26. An incident on 27 May triggered events leading to the claimant's resignation. He had arranged to meet some colleagues from the Consett store at a pub . He arrived at about 6 pm . At about 7 pm Ms Oates approached the claimant who was with Adam Young and Karen Pringle and told him she had been in the store when Ms Hodgson was speaking with Rachel Eccles about the imminent move to Hexham of Mr Carl Darville to do a managerial role during Ms Irwin's 7 week sick absence which had commenced on about 7th May. Ms Hodgson had limited contact with Carl and did not know he had self harmed in the past . Ms Eccles said Carl was nice but could be quite chatty with colleagues and deviate from the task in hand so her big concern would be, if Carl and the claimant got chatting in the colleague room, there would not be much work done. Ms Oates alleged Ms Hodgson then said: "*that'll be right, two self mutilaters together"*. Neither Ms Eccles, Mr Young nor Ms Pringle heard this. Ms Oates told the claimant she had been in two minds whether to tell him because she knew it would upset him. She was right. In his word, he was "*floored*", as he believed Ms Hodgson knew he was no longer the mentally ill man he had been when both of them worked together at Gateshead and should never have said anything like that.

3.27. The store manager at Consett was Chris Parnell. On 30 May he told Ms Hodgson as she entered work the claimant had been on the phone saying he was lodging a complaint against her because she had said he and Carl were going to be "*in the office together cutting themselves*" . She was so stunned she dropped her bags. She then went with Mr Parnell to a disused room in the building from where she used the speakerphone to telephone the claimant. She asked "*what the bloody hell is going on*" and whether he seriously thought, with her daughters problems, she would ever say so something so hurtful. He replied "*well no not really but the company has history with me and someone has to pay*". She ended the call. We accept the claimant did not mean " pay" financially, but rather "be accountable".The claimant had believed everything Ms Oates had said because he trusted her, but never realised she may be credible, honest but mistaken. There is the possibility that,

because she was being disciplined at the time for lateness by Ms Hodgson, she may have made it up. She was due to give evidence here, but did not.

3.28. Ms Hodgson vehemently denies saying what is alleged and we believe her. As she put it , "*when you've seen your daughter lying in intensive care after cutting her wrists and felt guilty she is like that, you don't joke about things like this*" . She has thought back and tried to figure out what she may have said which was misheard or misconstrued. She recalls a discussion with Ms Eccles about what a tough time Ms Findlay was having at Hexham store when Ms Irwin was off sick . When she was told Carl was to provide some managerial support, she believed from her limited contact with him Carl was lazy. He had said to her in the past he was tired because he had small children. The claimant also complained of being tired after his first child was born. Ms Hodgson says she **may have said** something like" *two of them, full of mutual admiration. In my day dads got on with it, not cutting themselves up about how hard it is with children*". We do not think she used these words either. She is looking for words which sound like those alleged (*mutual* and *mutilator*) or are the same word (*cutting*) in a different context . She is a lady in her sixties and was expressing her view that young people complain too much of being tired when coping with a baby who sleeps poorly and use tiredness as an excuse for not doing as much work as is expected of them.

3.29 The first time the claimant knew she even claimed to have used these words was when he read the grievance result letter. Yet it is the basis of his sex discrimination/ harassment claim. We asked Ms Hodgson how she would react if a woman who had just had a baby complained all the time at work of being tired. Her answer was she would have said much the same because, as someone who worked full-time since her own baby was six weeks old, she was of a generation where people just got on with it. Her motivation was not sex at all, if anything it was age. The word "dads" is gender specific but if the claimant contends this remark created a harassing atmosphere for him, we find it is entirely unreasonable that it should do so. As Mr Williams said it is a strange case when somebody says words were not spoken, but if they were, they harassed him.

PHASE THREE

3.30. On 31st May the claimant raised this incident in an email to Mr Southwick at pages 97-98.. Mr Southwick was away when the email arrived. He returned on 5 June and immediately arranged to see the claimant at Gateshead on 6th June. The claimant did not want to meet at the store because it would bring back bad memories. Texts and emails on 6th June, many of which would have been while Mr Southwick was driving, show they had not arranged a time and place to meet before Mr Southwick received a call from the Consett manager to say Ms Hodgson was very upset and wanted to see Mr Southwick. He therefore drove the 20 minutes to Consett to speak to Ms Hodgson where he was told by her of the good relationship she had had with the claimant, and that she had definitely not said what had been alleged by Ms Oates, who was in her belief a gossip and troublemaker she had had to pull up over issues such as lateness. He then formed the view mediation between the claimant and Ms Hodgson may be a good idea and Ms Hodgson was agreeable.

3.31. The claimant's case is that his grievances were not properly handled. Mr Southwick contacted the claimant and arranged to meet in the Ikea Café, close to the Gateshead store, but a very public venue, on 8 June. Mr Southwick described the claimant, who was accompanied by his family, as being perfectly lucid. We accept Mr Southwick during this conversation, in relation to what would happen if the case proceeded down the formal grievance route, did use words like " *defamation of character*" and "*people may lose their jobs*" . He had reasonable and proper cause to do so. Being the victim of discrimination is awful but so is being wrongly accused of discrimination. If Ms Hodgson used the alleged words she may well have been dismissed. Had it been found Ms Oates made up the story, she may have been dismissed. The claimant was worried it was his job in jeopardy, but Mr Southwick did not say so. Mr Southwick had reasonable and proper cause to explore the possibility of mediation. His understanding from the meeting was that the claimant agreed it was the better course of action . It would have been through a third-party facilitator.

3.32. During our deliberations we had slightly different views about this. Mr Moules in particular felt the preferable course would have been to investigate the allegation first before contemplating mediation. The Employment Judge and Ms Hunter had reservations about the wisdom of trying to mediate when there was such a factual dispute, and there were other people involved such as Ms Oates and Mr Darville. However, we were unanimous in our view that even if Mr Southwick made an error of judgment, he did not do so for any discriminatory reason, nor was it such as to contribute towards a breach of the implied term of mutual trust and confidence. That does not detract from the fact the procedure which followed had a damaging effect on the claimant, probably due to his belief the grievance several years earlier had been badly handled, and he had a preconception the same would occur now.

3.33. Mr Southwick said at the next meeting they would discuss further the steps to be taken. We need not recount all the emails but are satisfied there was no avoidable delay. On 19 June the claimant , by email, asked for an update, page 103. A meeting was arranged for 5 July which was to serve a dual function of a "welfare meeting" under the sickness absence procedure and a discussion as to how mediation would follow once the claimant was fit . On 30 June a standard form letter sent to the claimant unfortunately referred to the first function only and caused him to believe , wrongly but genuinely , his concerns were being ignored. His email on 28 June makes it clear he wants an investigation. So the 5 July meeting then became simply a welfare meeting at which all discussion of the grievance was excluded. When our Employment Judge asked the claimant if he could see why HR were keeping the two matters of welfare and grievance separate, he said he could see now, but had not seen it then.

3.34. On 4 July there is an email exchange between him and Laura Johnson of HR in which she said they would discuss the next steps with regard to his complaints after the welfare meeting. Mr Southwick who was present at the meeting, observed the claimant's mental health was far worse than on 8 June. The claimant feels what happened in June and early July set him back considerably, and we accept it had.

3.35. The evidence of the claimant's wife on this point was critical. She said an off the record meeting took place after the welfare meeting at which Ms Johnson not only told them the procedure to be followed but advised, as the claimant appeared now to

be raising other complaints, he had the option of using his email of 31 May as his grievance or redrafting it to include those other matters .He chose the latter course. There is absolutely no evidence to support the claimant's belief the respondent was not taking mental health issues seriously or trying to avoid dealing with his grievance.

3.36. In the meantime an occupational health report which is not very helpful recommended the grievance be dealt with, which it was being. The grievance letter of 12 July was acknowledged immediately. It starts with the incident reported to the claimant by Ms Oates, documents the attempts to resolve the situation by various contacts with Mr Southwick and only on the third page raises issues at the Hexham store prior to 27 May . This order in our judgment reflects the order of importance to the claimant. It is unfortunate he was first offered a grievance meeting for 25 July when he had pre-booked annual leave. We accept the HR officer who wrote that letter may not have realised that. Another manager had been appointed to hear the grievance but when the claimant requested a different date, he was allocated 10 August and, as the person originally appointed to hear the grievance was then on annual leave, Paula Hull was appointed because she could do it more quickly.

3.37. Having seen the claimant, in order to investigate the grievance Ms Hull then had to speak to several people . The only extra person the claimant says she should have spoken to was Mr Carl Darville. He could not have contributed anything. The time it took to see everyone, in the holiday season, then to consider all the evidence, was perfectly reasonable In the meeting the claimant ruled out mediation at page 165. Mr Williams asked him what he wanted to happen . His reply was he wanted to be **listened to, believed, and have his mental health issues taken seriously**. He then accepted the only outcome that would have satisfied him would have been for all his complaints to be upheld. Therefore, when they were rejected in a letter of 8 September at page 245 he viewed this as the last straw which caused him to resign saying he had been made to feel as if he was lying.

3.38. All Ms Hull did was to decide on balance of probabilities between conflicting evidence, not from the claimant but from Ms Oakes, and from Ms Hodgson and all other people the first part could not be upheld. She thought, as do we, Mr Southwick had done a decent job in his approach to the complaint. As for the events at Hexham all she was saying was there were two sides to every story and what the claimant perceived as being " blanked" , et cetera, she could not find he had been done by Ms Findlay. We find absolutely no fault with Ms Hull in handling this investigation.

4. CONCLUSIONS

4.1 In Price v Surrey County Council Carnwath LJ, sitting in the EAT observed "*even where lists of issues have been agreed between the parties, they should not be accepted uncritically by employment judges at the case management stage. They have their own duty to ensure the case is clearly and efficiently presented. Equally the tribunal which hears the case is not required slavishly to follow the list presented"* The agreed list covers some matters which are not really in issue. The real core issues , defined in the correct legal context, are much shorter.

4.2. The claimant agreed that Mr Williams had never called him a liar and he said he did not know why he felt Mr Hull had . We certainly have not found him to be a liar.

4.3. In the constructive unfair dismissal case we conclude the respondent did not breach the implied term of mutual trust and confidence either by the way in which Ms Findlay and/or Ms Irwin performance managed the claimant, or anything Mr Hodgson said about him or in the way his grievance was handled. In respect of the first, even if there were a breach, the claimant affirmed the contract when he agreed to work on after 23 March. From then until 27th May, the problems in his relationship with Ms Findlay lessened . When Ms Irwin went sick, the two of them worked hard and well together to keep the store running smoothly. Nothing which happened after 23 March re-ignited a right to resign in response to any antecedent breach. Not all discriminatory conduct by an employee of the respondent will automatically constitute a fundamental breach of contract. If, as in this case, there is subconscious and non-malicious treatment and/or conduct , it is a matter of fact and degree whether it is such that an employee can no longer be expected to put up with it. In our judgment , it fell far short of that, so there was no dismissal for the purposes of the Act or EqA .

4.4. In the direct sex discrimination claim, the claimant has not shown facts from which we could infer any person for whose acts the respondent is liable treated him less favourably than he or she treated or would have treated a woman. If he had, Ms Hodgson's explanation for her comment about "dads just getting on with it" satisfies us his sex was in no way whatsoever the reason she said it . To the extent it is suggested the comment, which is gender specific, constituted harassment, we find it was not reasonable that it should do so.

4.5. The claimant has not shown facts from which we could find Ms Irwin denied him training opportunities for the micro-chipping course, the Cat Specialist course or the Deputy Manager course for any discriminatory reason.

4.6. The difference in treatment of the claimant by Ms Findlay was not because of his particular disability. She was not making stereotypical assumptions about people with mental health problems, similar to the ones made in Aylott, but relying on her own personal experience. In the hypothetical situation she had managed at Gateshead somebody with a severe painful back condition who, when in pain, behaved untypically and went on the sick when his symptoms were bad, we accept she would have acted as she did to the claimant . The direct disability discrimination claim fails.

4.7. The reasonable adjustments claim departs from what the claimant himself is arguing .He was unable to identify anything which placed him at a substantial disadvantage. The pleaded PCP is of "being required to be at work to carry out the essential functions of Assistant Manager". That would not put him at a substantial disadvantage as compared to those without his disability. His case is that had he been treated by Ms Findlay in the same manner as she would have treated another new Assistant Manager who did not have his "history", he would have grown into the job. In his oral submissions Mr Owen refined the PCP to Ms Findlay requiring the claimant to use a confrontational management style towards colleagues. We do not accept she did. She and Ms Irwin wanted him to manage colleagues but did not mind whether he did so using the more forthright style of Ms Finlay or the more subtle style the claimant and Ms Irwin adopted. The claimant simply could not get past the first two steps of the Rowan tests.

4.8. On the section 15 claim, the claimant has shown facts from which the tribunal does infer Ms Findlay treated him unfavourably because of something arising in consequence of his disability. She did not do so maliciously but not communicating with him verbally, due to her belief that if she treated him in the way she treated others he would react badly, when he wanted to be treated like the recovered man he was, constituted unfavourable treatment and subjected him to detriment in that it placed him at a disadvantage. Had he been treated the same as she would have treated another new Assistant Manager his performance may have been better. The only point upon which we disagreed with Mr Williams submissions, was his assertion there is something incongruous in finding both that Ms Findlay had no intention to treat him unfavourably and that she did. The Ahmed case we cited at paragraph 2.16 above shows that can happen in direct discrimination and we see no difference in principle in a s15 claim. Although there is a shortage of specifics and many denials by Ms Findlay are credible, we do believe she treated him unfavourably as well as differently because of something arising in consequence of his disability. No defence of " justification" was argued by Mr Williams and rightly so. Subject to the reservation we express in the next paragraph, the s15 claim succeeds.

4.9. The comment made on 23 March that he may" *lash out or go on the sick*" was the only conduct which in itself related to disability. By virtue of section 212 we must find that to be harassment not detriment contrary to section 39. We refer to paragraphs 2.26-2.28 above . If the authors of IDS Handbook are right that if conduct is "because of " a protected characteristic , or something arising in consequence of it, that is enough to make it " related to " the protected characteristic, all Ms Findlay's acts and omissions which we find contravene s 15 would be "unwanted conduct" which had the effect, though not the purpose, of creating an intimidating, hostile and humiliating environment for the claimant. Having regard to all the circumstances, including his perception, it was reasonable for the conduct to have that effect . One of the greatest problems in disability discrimination law, which results in long pleadings and lists of issues, is that Parliament has created "overlapping" causes of action . Whichever view is right , one of these two claims leads to the same remedy.

4.10. What should have been a happy transition from colleague to manager in the few months from late October 2016 to late March 2017, was, for the claimant, a stressful anxious period in which his progress was impeded by lack of communication from Ms Findlay, punctuated with some robust criticism in the notes . However, by late March, the "clear the air" meeting had improved their relationship. We wholly agree with Mr Williams the detriments/ harassment in that period played no part in the claimant's decision to leave and had it not been for the inaccurate information he was given on 27 May by Ms Oates , the tragedy of this case would not have happened. The successful claim was of conduct which ended in late March 2017.

4.11. As for the time limit point, we apply the Keeble tests. The length of the delay was not great and the quality of the evidence has not been impaired by the passage of time. The reason for the delay was in part that the claimant was pursuing internal remedies. The greater part was his really bad mental health from June onwards when he may otherwise have realised this claim could be brought at an earlier stage than it was. If we did not take that into account we ourselves would be treating him unfavourably because of something arising his disability. Although the claim was

presented more than three months after the end of the period of unfavourable treatment, on about 23 March, it is just and equitable to deal with it.

5 REMEDY

5.1. We had agreed before we announced our decision we would not deal with remedy straightaway but we revisited that with the representatives once it became apparent that, there being no dismissal, the only financial remedy which could follow was an injury to feelings award for the limited acts of discrimination we have found.

5.2. Compensation in discrimination cases is based upon the tort principles, which includes the "eggshell skull" rule . But for the claimant's vulnerable condition, this would clearly have been a lower band injury to feelings case, just as, had he proved everything, it would have been higher band.

5.3. However the effect upon him of the four months of feeling uncomfortable with Ms Findlay's treatment of him caused him considerable stress and anxiety . If we looked objectively at how that conduct would have affected a person of pre-existing robust mental health, it would fall towards the bottom end of the lowest band but the claimant's vulnerability pushes it towards the top end of that band in our judgment. We award compensation of £8000 plus interest.

_____

Employment Judge Garnon
SIGNED BY EMPLOYMENT JUDGE ON 29th MAY 2018