EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Darren Walters	AND	Motorway Direct Plc

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter **ON** 25, 26, and 27 February 2019

EMPLOYMENT JUDGE N J Roper **MEMBERS** Mrs M Corrick
Mr J Howard

Representation
For the Claimant: In person, assisted by Mrs Walters
For the Respondent: Mr J Heard of Counsel

JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claims are dismissed.

REASONS

1. In this case the claimant Mr Darren Walters, who was dismissed by reason of gross misconduct, claims that he has been wrongfully dismissed in breach of his contractual notice provisions, and claims that he was discriminated against because of a protected characteristic, namely his disability. The claim is for harassment, direct discrimination, and because of the respondent's alleged failure to make reasonable adjustments. The respondent concedes that the claimant is disabled, but contends that the reason for the dismissal was for gross misconduct, that accordingly no notice pay was due, and that there was no discrimination.
2. We have heard from the claimant. For the respondent we have heard from Mr Warren Parsons and Miss Helen Robinson.
3. There was a degree of conflict on the evidence. We have heard the witnesses give their evidence and have observed their demeanour in the witness box. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The respondent company provides warranty products for the motor industry. These products include warranty gap insurance, breakdown cover and tyre cover for cars, motorcycles and commercial vehicles. The respondent generally supplies to "trade",

meaning mainly car dealerships who then sell the respondent's products directly to the public. The respondent is regulated by the Financial Conduct Authority and is based in Sheffield.

5. Mr Warren Parsons, from whom we have heard, is the respondent's National Compliance and Field Operations Manager. When the respondent's previous Sales Director namely Mr Trevor Parker left the respondent in early 2017 Mr Parsons took over responsibility for the field sales team. This comprised of 12 Business Development Managers and three self-employed agents. Each Business Development Manager is based at his or her home address and each covers a particular geographical region. Their role is to look after existing dealerships, which includes training these dealerships on the respondent's products, and following up sales leads which are created by sales support, cold calling, site visits, or by recommendation.
6. The claimant Mr Darren Walters joined the respondent in January 2016 as Business Development Manager for the South West Region. He signed a contract of employment which afforded one month's notice of the termination of his employment, save that the respondent was entitled to terminate employment summarily in the event of any gross misconduct. The contract also had a disciplinary procedure attached which made it clear that summary dismissal would be the normal sanction for any gross misconduct.
7. The respondent's contractual documentation also included a Disability Policy. Its Policy Statement included the following commitments: 3.6.1 (2) "to ensure that where practicable disabled people are given support and are provided with equipment and facilities to enable them to carry out their duties"; and 3.6.1 (5) "to provide a safe working environment for disabled employees."
8. The claimant agreed and signed a job description which describes the main purpose of his job as being to manage, develop and grow the respondent's field dealer business including monitoring the underwriting performance at dealer level. It also includes promoting the continued growth in sales and product range to a suitable client base, and servicing, growing and developing existing accounts. In short, the claimant's role was the same as that of other Business Development Managers, in that he was given a region by the respondent and set the task of finding new business in the region whilst looking after existing clients. In the South West of England that included a large client account in the name of Vospers which is a large motor dealership throughout the South West.
9. The claimant asserts that he was recruited "to save the Vospers account" and that it was made clear to him by Mr Parsons' predecessor Mr Parker that this was his main role. Mr Parsons was not party to that alleged conversation, and he asserts that although Vospers is a large and valuable account, that was not the claimant's sole or main function. We prefer the respondent's evidence on this point because it is clear that other Business Development Managers worked for a number of different customers; the claimant also worked for other customers in his region; and the claimant signed his written job description which did not refer to limiting his duties to one main client whether Vospers or otherwise. It is also clear from the contemporaneous documents and the method of working which the respondent adopted that there was no requirement for the claimant to work solely or mainly on the Vospers account. It is also worth recording that despite the fact that the claimant was in a sales environment, he was not subject to any specific sales-related or other performance driven targets.
10. The claimant suffers from myalgic encephalomyelitis/chronic fatigue syndrome (ME/CFS). This was first diagnosed in 2003. This condition has a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities. The symptoms include fatigue, lack of concentration, muscle and joint pain, mental health effects such as low self-esteem and depression, and inadequate sleep patterns.
11. The claimant's sickness record was good for the first year of his employment, and he was only absent on certified sick leave for three days during his first year, from 25 May to 27 May 2016. The claimant was then absent on certified sick leave with effect from 3 January 2017 to 31 March 2017, which was a period of 64 days. Between 5 July 2017 and 2 August 2017, and again from 21 August 2017 to 18 September 2017, the claimant worked a three day week. This followed a recommendation from the claimant's GP that he was fit for work

but with the comment "suggest 60% usual hours". It is clear from contemporaneous emails that the claimant was grateful to the respondent for accommodating his disability and putting in place this suggested adjustment. The claimant also had four days' sickness absence from 5 October to 10 October 2017, but otherwise was not absent for reasons of sickness after 18 September 2017.

12. During 2017 Mr Parsons had become increasingly concerned about the claimant's performance and conduct. In October 2017 he sought advice from Miss Helen Robinson, who is the respondent's HR manager, PA to the directors, and company secretary, and from whom we have heard. The concerns expressed by Mr Parsons were as follows: (i) significant communication issues, particularly being unable to get hold of the claimant when required, and not knowing whether he was working or not; (ii) the claimant's poor sales performance; (iii) poor feedback and complaints which Mr Parsons had received from some of the claimant's customers and dealers; and (iv) concerns that the claimant had been falsifying his mileage claims by way of claiming expenses for miles which he had not actually driven.
13. Mr Parsons and Miss Robinson discussed the matter, and decided that they should address these issues with the claimant at a meeting. They also discussed the fact that the claimant would attain statutory unfair dismissal rights once he had completed two years' continuous service. They did not wish to allow the claimant to extend his period of employment unnecessarily with this deadline in mind. They therefore took the joint decision that they would not tell the claimant the purpose of their meeting. They were concerned that he might be absent on sick leave which would delay or frustrate Mr Parsons' wish to address and resolve these issues.
14. Mr Parsons therefore invited the claimant to a meeting which took place on 1 November 2017. The claimant was not informed that he was to face allegations of poor performance and gross misconduct, nor that it might result in his dismissal. He was not afforded the opportunity to be accompanied by a companion or representative. He was not told that anyone would be present other than Mr Parsons. The respondent did not have any office premises in the region, and the meeting took place at the Holiday Inn in Torbay, which was where the claimant and Mr Parsons had met previously. The meeting took place in part of the public reception area.
15. There is a dispute between the parties as to exactly what happened at that meeting. The claimant says that he objected to the meeting and that he was not allowed to leave. However, it is agreed between the parties that the meeting took approximately two hours and that the claimant was shown the relevant documents and asked to give his views on Mr Parsons' concerns relating to communication difficulties, poor sales performance, complaints from customers, and the mileage claims. Miss Robinson took detailed minutes which the claimant now says are not accurate. However, Mr Parsons and Miss Robinson were present with the claimant at that meeting and confirm the accuracy of the minutes. In addition, Mr Parsons and Miss Robinson give a consistent version of the events that occurred on behalf of the respondent, and the weight of evidence is in their favour. For this reason we prefer the evidence of the respondent as to what occurred at that meeting. This includes the fact that the claimant had his company laptop with him and was invited to run through the entries in his Outlook diary with the respondent when he suggested that that Outlook diary would exonerate him from the allegations of inaccurate mileage claims. The claimant chose not to do so and closed his laptop. In particular, we also reject the claimant's assertion that his responses were disregarded, and that he was not allowed to leave the meeting. It is true that the respondent did not accept the claimant's responses, but the claimant had the opportunity to give his version of events in reply to the allegations raised, and these were considered by Mr Parsons and Miss Robinson. It is also true that at one stage the claimant objected that he had been "ambushed" into attending the meeting, but nonetheless it cannot be said that either (i) he did not have the opportunity to state his case in response to the allegations put to him, or (ii) that he was prevented at any stage from leaving the meeting if he so chose.
16. The meeting was adjourned so that Mr Parsons could discuss the claimant's responses in detail with Miss Robinson. During this break, which lasted between 30 minutes and an

hour, the claimant left the premises to make a telephone call. On resumption Mr Parsons decided to dismiss the claimant summarily. We accept the evidence of Mr Parsons and Miss Robinson that Mr Parsons took the decision to dismiss the claimant partly because of his concerns about the claimant's performance, but predominantly because of the claimant's gross misconduct, namely falsifying his mileage claims. We accept their evidence that the claimant's disability played no part in their decision to dismiss him.

17. Following that meeting Miss Robinson wrote to the claimant and confirmed the decision to dismiss him summarily. The letter confirmed that the dismissal was because of the claimant's "conduct and behaviour" and that the four concerns identified were: "(1) The falsification of mileage claims for journeys that you have not made; (2) Your lack of communication and the fact that you are normally not contactable during working hours; (3) Your behaviour damaging the relationship with customers; and (4) Your financial performance."
18. The claimant was afforded the right of appeal. Miss Robinson invited him to an appeal hearing on 6 December 2017. That date had to be rearranged at short notice because Mr Parsons had suffered a bereavement. The respondent rearranged the hearing for 13 December 2018, but the claimant requested that this be moved. Eventually the claimant was offered the choice of three dates on 4, 5 and 8 January 2018 at the respondent's head office, and the respondent offered to pay travelling expenses and overnight accommodation. The claimant then said he was unable to travel because of his health, and did not pursue subsequent offers by the respondent to rearrange the appeal hearing.
19. We now set out our findings with regard to the criticisms made of the claimant's performance and conduct. Before we do so we make the following observations about the claimant's credibility. We did not find the claimant to be a credible witness. He made a number of criticisms of Mr Parsons and the respondent generally, when the contemporaneous documents at best did not support any such contention, and at worst undermined the claimant's assertions. As a simple example, he denied that there were any communication problems, when it is clear that on occasions Mr Parsons emailed the claimant, and sent reminders, without reply by the claimant. In addition, it is clear from other contemporaneous emails that the claimant failed to respond in good time to requests from colleagues for information or documents to assist the administration of the respondent's business. More importantly is the matter of the mileage claims explained below. The claimant asserts that the false mileage claims were based on a mistaken assumption by the respondent, namely that his call log (which is a form of diary setting out what customers the claimant attended and when) was an inaccurate starting point (in that it did not provide an accurate record of his actual whereabouts), and that the claimant's Outlook diary, which he maintained on his laptop computer, gave a more accurate explanation of his whereabouts and travel. Nonetheless there were at least three occasions upon which mileage claims were not supported as alleged by the claimant from his own Outlook diary, and were therefore, on the face of it, dishonest claims. For all these reasons where there was a conflict on the evidence between the parties, we preferred the evidence of the respondent, because the weight of evidence was in the respondent's favour, and we found the claimant not to be a credible witness.
20. We deal with the mileage claims further below, but our findings with regard to the other criticisms are as follows. The first criticism is that of lack of communication and the claimant not being contactable during working hours. We accept Mr Parsons' evidence that he had difficulty on occasions in making contact with the claimant. He would try to telephone the claimant without success, and left messages, which often were not returned. Although we accept the claimant's evidence that on occasions he might have had his telephone turned off whilst at a customer meeting, it is clear from Mr Parsons' evidence and some contemporaneous emails that he became frustrated that he was often unable to make contact with the claimant, and that, as the claimant's line manager, the claimant did not return his calls. In addition, we have seen emails under which the respondent's warranty department tried unsuccessfully to obtain necessary information from the claimant in a timely manner. With regard to training, all of the respondent's Business Development Managers were required to complete a number of computerised training modules annually.

During 2017 the deadline for so doing was extended generally. The Business Development Managers were able to manage their own appointments, and to complete the modular training at convenient times between these appointments. It is also clear, despite reminders from Mr Parsons, that the claimant had failed to complete a significant number of these training modules when required to do so.

21. The next criticism is that the claimant's conduct with some customers was unhelpful and affected the relationship with the respondent's business generally. Mr Parsons made contact with a number of customers, many of whom confirmed that the claimant was not managing their accounts efficiently, that the dealers were unhappy with the low level of support, and that they were thinking of taking the business to a competitor.
22. The next criticism is that of the claimant's financial performance. In short, the region for which the claimant was responsible was losing the respondent money. Whereas comparable Business Development Managers were making an operating profit for the respondent, the claimant was recording a loss. In the year to September 2016 the claimant made a loss of nearly £16,000. For the year from October 2016 to September 2017 the claimant made a further loss of about £16,000, and also made a small loss of £641 for October and November 2017.
23. Finally, we turn to the main reason for the claimant's dismissal which was that of falsified mileage claims. Mr Parsons had instituted a system of "call logs". This was a pro forma document which was required to be completed each week by the Business Development Managers (including the claimant) and sent to Mr Parsons. This form required each Business Development Manager to record the following information for each working day: the date; the location of work and any appointments with customers; the name of the person at the customer's address with whom contact had been made; and whether there were any action points to follow-up. The claimant, along with other employees at his level, were able to submit claims to the respondent company for repayment of their mileage where they had undertaken business trips on behalf of the respondent. This required completion of an expense claim known as a Business Mileage Log. The information required for this form was the date of the trip; the postcodes of the start location and finish location; milometer readings both before and after the trip, and the resulting number of miles claimed. Each form had an employee declaration which stated: "I understand that this mileage log must be accurate and must not include personal mileage; and I understand that this log will be audited and must tally with my diary and the activity analysis information in the office …"
24. The investigation into the claimant's inaccurate mileage claims commenced when Mr Parsons noticed that the dates, appointments, and mileage claimed in the claimant's Business Mileage Logs did not tally with the claimant's appointments and whereabouts generally as recorded in his pro forma call log documents. Mr Parsons prepared a schedule between 5 June 2017 and 31 August 2017 and found 13 inaccuracies or inconsistencies between the mileage expenses claimed by the claimant, based on his appointments and whereabouts at certain dates, which were simply not reflected in the relevant call logs. Given that Mr Parsons' instructions to all Business Development Managers, including the claimant, was that the call logs were an important management tool for recording dates and times of appointments, and any follow-up action, and needed to be submitted for management purposes, we find that he was entitled to take this document as the relevant starting point. The claimant suggests that appointments vary and that for this reason his business call log forms were not always accurate, but equally Mr Parsons' instructions were that the form had to be completed to reflect the appointments actually taken, even if planned appointments had changed.
25. Of the 13 inaccuracies shown in Mr Parsons' schedule, we have been referred to and have considered in detail only four representative examples. These are as follows.
26. The claimant claimed 111 miles in respect of a trip on 7 June 2017. This was inconsistent with the claimant's call log which indicated that the claimant had done no such trip. The claimant claimed 193 miles for a trip on 9 June 2017, when the call log indicated that the claimant had done no such trip. The claimant claimed 167 miles for a trip on 25 July 2017, when the call log indicated that the claimant had done no such trip. Finally, the claimant

claimed 101 miles on 9 August 2017 and 198 miles on 10 August 2017 when the call log indicated that no such trips had been made and/or that the claimant was not working. These discrepancies were put to the claimant at his dismissal meeting on the basis that the claims were fraudulent. The claimant's considered reply was that appointments vary during his working day and that the call logs were not an accurate starting point, but rather that the respondent should refer to his Outlook diary, which he kept on his computer and which recorded the appointments which he had attended more accurately. He asserted that Mr Parsons had access to this Outlook diary and that the allegations against him were untrue.

27. We accept Mr Parsons' evidence that he did not have access to that diary, but that the claimant did have access to it and referred to it during the meeting which led to his dismissal on 1 November 2017. Mr Parsons offered the claimant as much time as he wished to consult this Outlook diary in response to the allegations that the mileage claims were inaccurate. The evidence of Mr Parsons and Miss Robinson is the claimant chose not to do so and closed his laptop. It was subsequently removed from the claimant when he was dismissed. We have now seen extracts from the claimant's Outlook diary which have been printed off and included in the agreed hearing bundle for this hearing. Unfortunately, and for reasons which never became clear during the hearing, there are no entries on the dates in question against which we were invited to cross refer for the purpose (from the claimant's point of view) of proving the more accurate version of his appointments so as to exonerate him from allegations that the mileage claims were inaccurate.
28. With regard to the four inaccurate mileage claims set out above, an apparently innocent explanation has come to light during this hearing in respect of the dates of 7 and 9 June 2017, which was not noticed by the respondent nor raised by the claimant at the dismissal meeting. This is that the claimant's business mileage log, which is a computerised pro forma spreadsheet form, appears accidentally to have deleted the row of information for 6 June 2017, and the relevant information for 7 and 9 June 2017 may have been accidentally transposed against the wrong dates. In other words, it does look as if the claimant may well have completed the mileage claimed, albeit a day earlier than claimed on the form which he signed and submitted.
29. For the remaining two claims set out in detail above, there is no evidence in support (from the claimant's Outlook diary or otherwise) that the claimant attended the appointments claimed in his mileage expense form, and that the claims were therefore accurate. When questioned about this at this hearing, the claimant asserted that Mr Parsons or someone else at the respondent must have deliberately and dishonestly doctored and/or redacted his Outlook diary in order to undermine his otherwise lawful mileage claims. These are serious allegations of dishonesty against Mr Parsons and/or other unnamed managers of the respondent. There was no evidence to support any such serious assertion, which Mr Parsons strongly denies.
30. In addition, we have been directed to further discrepancies on 21 and 22 August 2017. In an email dated 21 August 2017 the claimant informed Mr Parsons that he was attending an appointment with his GP on 21 August 2017 and had a private specialist appointment on 22 August 2017. The claimant claimed mileage of 57 miles and 151 miles for each of these two days. These were then identified as discrepancies by Mr Parsons. These mileage claims did not tally with the claimant's call log.
31. We accept Mr Parsons' evidence which is supported by the contemporaneous documents which we have seen. We therefore find as a matter of fact that the claimant made repeated dishonest claims for repayment of mileage expenses to which he was not entitled. These dishonest claims amounted to an act of gross misconduct by the claimant for which the respondent was clearly entitled to dismiss him summarily.
32. That information was before Mr Parsons and Miss Robinson at the time they took the decision to dismiss the claimant. We accept their evidence that the claimant was dismissed for reasons which related to his performance, and in particular his gross misconduct, and that their decisions to call the claimant to the disciplinary hearing, to challenge him about his performance and this potential gross misconduct, and then to dismiss him summarily, were in no way related to the claimant's disability.
33. Having established the above facts, we now apply the law.

34. The claimant's claim for breach of contract in respect of his unpaid notice period is permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and the claim was outstanding on the termination of his employment.
35. This is also a claim alleging discrimination because of the claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct disability discrimination, failure by the respondent to comply with its duty to make adjustments, and harassment.
36. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person. In addition, paragraph 6(1) of Part 1 Schedule 1 EqA provides that Cancer, HIV infection and multiple sclerosis are each a disability.
37. As for the claim for direct disability discrimination, under section 13(1) of the EqA 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.
38. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first is relevant in this case, namely that where a provision criterion or practice 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, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
39. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.
40. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that if there are facts from which the 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. However by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
41. We have considered the cases of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL; Igen v Wong [2005] IRLR 258 CA; Madarassy v Nomura International Plc [2007] ICR 867 CA; Environment Agency v Rowan [2008] IRLR 20 EAT; Archibald v Fife Council [2004] IRLR 651 HL; Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265; We take these cases as guidance, and not in substitution for the provisions of the relevant statutes.
42. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").
43. There have been two case management preliminary hearings in this case, the first on 24 August 2018 and the second on 10 December 2018. The agreed list of issues to be determined by this tribunal are set out below, and relate to the claimant's wrongful dismissal claim in respect of his lost notice period; and his disability discrimination claims for harassment, direct discrimination, and in respect of an alleged failure by the respondent to make reasonable adjustments. We deal with each of these in turn.
44. We deal first with the claimant's claim for wrongful dismissal, which is a claim in respect of his notice period of one month which was not given on the termination of his employment when he was summarily dismissed. The respondent asserts that the dismissal was by

reason of gross misconduct and in those circumstances no notice pay is due to the claimant.

45. The gross misconduct relied upon by the respondent is the falsification of mileage claims. We accept the evidence of Mr Parsons and Miss Robinson that they genuinely believed that the claimant had falsified his mileage claims. This was supported by the contemporaneous documentary evidence.
46. As confirmed in our findings of fact above, we considered this evidence and we have found that on the balance of probabilities that the claimant did indeed falsify his mileage claims. This was an act of gross misconduct, and in fundamental breach of his contract of employment. In these circumstances the respondent was entitled to dismiss the claimant without notice by reason of gross misconduct. Accordingly the claimant's wrongful dismissal claim is dismissed.
47. We now turn to the disability discrimination claims.
48. In the first place we find that the claimant was a disabled person at all material times. The claimant has suffered from myalgic encephalomyelitis/chronic fatigue syndrome (ME/CF) since 2003. This condition has had a long-term and substantial adverse effect on the claimant's ability to carry out normal day-to-day activities. The symptoms include fatigue, lack of concentration, muscle and joint pain, mental health effects such as low self-esteem and depression, and inadequate sleep patterns. The respondent concedes that the claimant is a disabled person for the purposes of these proceedings. We agree with that concession and we so find.
49. We deal first with the claimant's claim for harassment under section 26 EqA. The claimant relies upon three instances of unwanted conduct which are as follows: (a) misleading him into attending a disciplinary meeting on 1 November 2017 alone and unprepared; (b) disregarding his responses at that meeting; and (c) refusing to allow him to end or to leave that meeting.
50. We have accepted the evidence of the respondent's witnesses Mr Parsons and Miss Robinson to the effect that they had genuine concerns about the claimant's performance and misconduct. We have also accepted their evidence that they wished to act promptly, partly at least so as not to allow the claimant to attain two years' continuity of employment at which stage he would attain statutory unfair dismissal rights. We find that this is the reason that they did not inform the claimant that the meeting on 1 November 2017 was to be a disciplinary hearing, and that he might face dismissal. He was not informed in advance of the allegations which he had to face, and was not invited to bring a companion or representative.
51. These actions were in breach of the ACAS Guide on Discipline and Grievances Work (2017), and in the event that the claimant had a valid unfair dismissal claim, would appear to be significant breaches of procedure, and in breach of the normal accepted good practice for disciplinary and dismissal hearings. However, Parliament has decided that employees are required to attain two years' continuity of employment before being in a position to complain of unfair dismissal in these circumstances, and for this reason the claimant has no such complaint.
52. For the record, with regard to the allegations, we confirm our findings above that: (a) the claimant was required to attend a meeting on 1 November 2017 without knowing that it was a disciplinary hearing, and that he was alone and unprepared; (b) we do not accept that the claimant's responses were necessarily disregarded, it is more the case that they were considered but just not accepted by the respondent; and (c) we do not accept that the respondent refused to allow the claimant to end or to leave the meeting.
53. The problem for the claimant is this. Under section 26 EqA the unwanted conduct relied upon must be related to the relevant protected characteristic as a constituent element of the harassment claim. We find that the reasons for the respondent's actions in this respect were because of their genuine concerns about his performance and conduct, and their desire not to allow the claimant to achieve two years' continuity of employment so as to qualify for unfair dismissal. This may well have been unfair or unwanted conduct as perceived by the claimant, but we do not find that it was in any way related to the claimant's disability.

54. For this reason we dismiss the claimant's harassment claim.
55. We now turn to the claimant's claim for direct discrimination under section 13 EqA. The only allegation of direct discrimination is that of the act of dismissal on 1 November 2017. The claimant effectively asserts that he has been treated less favourably than a comparator, and he relies upon an hypothetical comparator. The hypothetical comparator must be someone in the same position as the claimant who does not have his protected characteristic of ME/CFS, in other words an employee with less than two years' service whom the respondent considers to be performing inadequately, and to have committed gross misconduct.
56. With regard to a claim for direct discrimination, the claim will fail unless the claimant has been treated less favourably on the ground of his disability than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The claimant needs to prove some evidential basis upon which it could be said that this comparator would not have been dismissed. In Madarassy v Nomura International Plc Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination". The decision in Igen Ltd and Ors v Wong was also approved by the Supreme Court in Hewage v Grampian Health Board.
57. In this case the claimant has not proven any facts upon which the tribunal could conclude, in the absence of an adequate explanation from the respondent, that an act of discrimination has occurred. The claimant may well consider that the respondent's actions were unfair and against the standards of normal industrial relations practice and/or the principles of natural justice, but that is not the same as proving that his dismissal was because of his disability. The claimant has adduced no evidence to suggest that someone without his disability who was otherwise in the same position would not have been so dismissed. Put another way, we accept the respondent's evidence that it dismissed the claimant for a non-discriminatory reason. In these circumstances the claimant's claim of direct discrimination fails, and is hereby dismissed.
58. We turn finally to the claimant's claim of an alleged failure by the respondent to make reasonable adjustments under sections 20 and 21 EqA. Applying Environment Agency v Rowan the Tribunal must identify (a) the provision criterion or practice (PCP) applied by or on behalf of an employer (or (b) the physical feature of premises occupied by the employer, which is not relevant in this case); (c) the identity of non-disabled comparators where appropriate; and (d) the nature and extent of the substantial disadvantage suffered by the claimant. Unless the Tribunal identifies these matters it cannot go on to judge if any proposed adjustment is reasonable.
59. The provision criterion or practice (PCP) relied upon by the claimant is requiring full-time working, or put another way the requirement by the respondent that its employees must work full-time. The claimant asserts that in comparison with non-disabled comparators, he was put to a substantial disadvantage in that working full-time caused him to suffer from pain and fatigue caused by his ME. The claimant originally asserted that the two reasonable adjustments which should have been put in place as reasonably required are twofold, namely (i) being permitted to work part-time; and (ii) being permitted to look after one major client only. He has since added a further eight suggested reasonable adjustments at this hearing which are as follows: (iii) adopting a more proactive way of communication with daily or weekly check ins at agreed times; (iv) jointly meeting with and jointly managing certain clients; (v) flexibility on achieving any agreed targets; (vi) additional support with other elements of the workload to allow the claimant to complete his training; (vii) extending a deadline by which training needed to be completed; (viii) being given time to fully understand and respond to concerns about the mileage claim; (ix) being allowed regular breaks away from laptop and phone; and (x) being given larger layout on forms to help with accuracy.

60. In our judgment the difficulty which the claimant faces is that the PCP upon which he relies, namely a requirement to work full-time, did not exist. This is because the claimant was permitted by the respondent to work a three day week on advice from his GP when he needed to do so to accommodate his disability. There was no ongoing requirement to work full-time. In circumstances where the only PCP upon which the claimant relies does not exist, his claim is dismissed.
61. However, if we are incorrect on this point, and the more correct analysis is that as a starting point there is a requirement or PCP for full-time working for all employees, then as a matter of fact the respondent had already put in place the first originally alleged reasonable adjustment of allowing the claimant to work part-time by way of the agreed three day week. This reasonable adjustment had already been made when requested by the claimant on advice from his GP. There was therefore no failure to make this reasonable adjustment.
62. As for the second originally suggested adjustment of allowing the claimant to work for one major client only, we have heard no evidence to suggest that this would necessarily have ameliorated any substantial disadvantage caused by the PCP relied upon (of having to work full-time), particularly given that adjustments were in place to work part-time when necessary.
63. As for the remaining eight suggested reasonable adjustments, which were included by the claimant in his closing submissions and not put to the respondent's witnesses during their evidence, we do not accept that any of these adjustments would have been reasonable because there is no evidence to suggest that the PCP relied upon (being required to work full-time) caused any substantial disadvantage to the claimant which would have been addressed or ameliorated by any of these proposed adjustments. By reference to these further adjustments, the PCP relied upon (of a requirement to work a five-day week): (iii) had no effect on the communication between the parties; (iv) could not be said to have been assisted by jointly working with clients; (v) cannot be said to have assisted the achievement of targets, given that there were no targets; (vi) and (vii) had no effect on the claimant's ability to complete his training within the generous and extended time period allowed which he was able to do from his own laptop in his own time when it suited him; (viii) had no impact on his ability to understand the alleged inaccuracies in the mileage claims which were put to him, or the seriousness of those allegations; (ix) did not preclude him from having regular breaks away from his laptop or his telephone, given that he controlled his own working day and his own appointments; nor (x) had any impact or effect on his ability to read the layout of the documents before him.
64. For all these reasons we also dismiss the reasonable adjustments claim.
65. In conclusion therefore all of the claimant's claims are hereby dismissed.
66. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 32; a concise identification of the relevant law is at paragraphs 34 to 42; how that law has been applied to those findings in order to decide the issues is at paragraphs 44 to 65.

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Employment Judge N J Roper
Dated 27 February 2019