



THE EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr T Butt

v Instyle Direct Limited

Heard at: London Centra **On:** 24 – 26 April 2019 & 7 May 2019 (in chambers)

Before: Employment Judge H Clark

Members: Ms S Boyce

Mr R Pell

Representation:

Claimant: In person (supported by the PSU)

Respondent: Ms N Ling - Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that the Claimant's claims of unfair dismissal and disability discrimination are not well founded.

REASONS

- 1 By a Claim Form presented on 9 April 2018 claims of disability discrimination and unfair dismissal were made against the Respondent. These were denied in a Response Form dated 15 August 2018. The issues were agreed at a closed preliminary hearing held on 29 October 2018, however, the Claimant was subsequently granted to leave to amend his claim to include a claim of disability related discrimination concerning his dismissal.

The Issues

2. The issues which the Tribunal had to determine were:

Disabled Status

2.1 Whether the Claimant was disabled for the purposes of the Equality Act 2010 at the material time.

2.2 If so, whether the Respondent was aware at the relevant time that the Claimant was so disabled.

Harassment

2.3 Whether all or any of the following factual allegations amounted to conduct related to the Claimant's alleged disability which had the purpose or effect of violating his dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for him:

a) In the appeal hearing, Mr von Grundherr's stating, *"imagine if she showed these messages to the police," "if you rape someone or come to the office drunk you will be dismissed," "you could have murdered her and said I was not myself."*

b) In the disciplinary meeting, Mrs Mehra's saying, *"if she reports you to the police you will be deported from this country."*

c) Mr Mehra's saying, *"imagine it could have been worse"*.

d) Failing to show the Claimant the details of a complaint against him.

e) On 12 March 2018, failing to provide the Claimant with evidence when he was given a warning.

Failure to Make Reasonable Adjustments

2.4 Did the Respondent apply to the Claimant a provision, criterion or practice (PCP) of not showing details of the complaint and not providing the evidence when giving him the warning?

2.5 If so, did this PCP put the Claimant at a substantial disadvantage in comparison with persons who are not disabled?

2.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant was disabled and that it put him at that disadvantage?

2.7 Did it fail to take any such steps as were reasonable to avoid that disadvantage?

Disability Related Discrimination

2.8 Was the Claimant dismissed for a reason related to his disability?

2.9 If so, was the Respondent's reason for dismissing the Claimant a proportionate means of achieving a legitimate aim?

Unfair Dismissal

2.10 What was the reason for the dismissal? The Respondent relies on conduct.

2.11 Did the Respondent acted reasonably in treating conduct as the reason for the dismissal?

It was agreed that issues of remedy would not be addressed in the first part of the hearing, as it appears that disclosure is not been completed in relation to the Claimant's earnings from his work as an Uber driver.

The Hearing

3. The Claimant was asked at the outset of the hearing whether he was seeking any adjustments to the hearing process. He confirmed that he might need additional time to answer questions as he was prone to memory lapses. The Claimant was also offered additional breaks. Although the Claimant was not obviously a vulnerable witness and was clearly capable of representing himself effectively, the Tribunal recognises the stressful nature of legal proceedings, particularly to a litigant in person and sought to minimise this stress where possible. On the final day of the hearing, the Claimant told the Tribunal that he had not slept the previous night. The Tribunal invited the Claimant to indicate if he was feeling tired or his concentration was suffering, in order that he could have additional breaks or get some fresh air. In the event, this did not prove necessary.

4. At the start of the hearing, the Claimant expressed his concern at the late disclosure of two emails from a colleague who complained about his behaviour on 6 March and 18 March 2018. These documents were not included in the bundle until the day before the hearing. Whilst the Tribunal understands why these emails were not disclosed to the Claimant during the internal disciplinary proceedings, they clearly should have been in the course of routine discovery. The Respondent explained that they had difficulty in tracing the emails and it was not

until Counsel spotted their absence that steps were taken to produce them. This is less than satisfactory and, perhaps understandably, has contributed to the Claimant's general suspicion as to the Respondent's motives. Whilst the emails were short and their contents did not materially change the nature of the case, the late production of documents is unsettling for an unrepresented party.

5. The Claimant also invited the Tribunal to draw a negative inference from the fact that the Respondent's Solicitor was not present throughout the hearing. The Claimant suggests that the Respondent's Solicitor absented himself from the hearing when the Claimant opened an envelope containing the original disciplinary minutes. The Tribunal explained to the Claimant in the hearing itself and reiterates in this decision, that the Respondent's Solicitor's pattern of attendance at the hearing was unremarkable in the Tribunal's experience. The Respondent was represented by Counsel at the hearing, so having an additional lawyer present would have been unnecessary and costly.

6. The Tribunal heard evidence from the Claimant and from Mrs M Mehra, Mr V Mehra, Mrs A Mehra and Mr M von Grundherr on behalf of the Respondent. They were all cross-examined on their evidence. There was a joint bundle of documents running to some 403 pages. The parties provided written and oral submissions. Given the time constraints, the Tribunal invited the parties to restrict their oral submissions to 30 minutes. The Claimant had not finished his submissions after 40 minutes, but Ms Ling had not been provided with them in advance (which is no criticism of the Claimant). Accordingly, the Tribunal ordered the Claimant to provide his written submissions to the Respondent and the Tribunal by email in order that the Respondent would have an opportunity to read them in their entirety. The Claimant did so and made some supplementary submissions/observations in further emails. The Respondent subsequently confirmed it had no further submissions to make in light of those of the Claimant.

The Law

7. The law that the Tribunal has to apply in relation to the Claimant's disability discrimination claim is contained in the Equality Act 2010. Section 6 defines a disability as a "*physical or mental impairment,*" which has a "*substantial and long-term adverse effect on [the Claimant's] ability to carry out normal day-to-day activities.*" The burden lies on the Claimant to prove that he is disabled.

8. Schedule 1 of the 2010 Act provides that the effect of an impairment is long-term if,

(a) *It has lasted for at least 12 months,*

(b) *It is likely to last for at least 12 months, or*

(c) *It is likely to last for the rest of the life of the person affected.*

2(2) *If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.*

The effect of medical treatment is ignored in the assessment of whether an impairment has a substantial effect on the ability of a person to carry out normal day to day activities (section 5 of Schedule 1). "*Likely to last*" can be interpreted as "*could well*" last.

9. Appendix 1 of the Equality and Human Rights Commission Code of Practice on Employment 2011 issued pursuant to the Equality Act 2010 Codes of Practice (Services, Public Functions and Associations, Employment and Equal Pay) Order 2011 SI 2011/857 provides further guidance to assist Tribunals in interpreting the law in this area. "*There is no need for a person to establish a medically diagnosed cause for their impairment. What it is important to consider is the effect of the impairment, not the cause.*" (paragraph 7). The Tribunal should bear in mind that some people might naturally underplay the effect of their symptoms.

10. The Code further provides that, "*A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.*" (paragraph 8). Examples of normal day to day activities are given in the guidance to include, *walking, driving, using public transport, cooking, eating, lifting, carrying everyday objects, typing, writing, going to the toilet, talking, listening to conversations or music, reading, taking part in normal social interaction or forming social relationships, nourishing and caring for one's self.*"

11. The Tribunal was referred to the case of *J v DLA Piper UK LLP UKEAT/0263/09/RN* and the observations of Underhill J at *paragraph 38*

"There are indeed sometimes cases where identifying the nature of the impairment from which a claimant may be suffering involves difficult medical questions; and we agree that in many or most such cases it will be easier – and is entirely legitimate – for the tribunal to park that issue and to ask first whether the claimant's ability to carry out normal day-to-day activities has been adversely affected – one might indeed say "impaired" – on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the claimant is suffering from a condition which has produced that

adverse effect - in other words, an "impairment". If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve difficult medical issues of the kind to which we have referred."

At paragraph 40 he stated as follows:

"Accordingly in our view the correct approach is as follows:

*(1) It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in **Goodwin**.*

(2) However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in para. 38 above, to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings.

*(3) These observations are not intended to, and we do not believe that they do, conflict with the terms of the Guidance or with the authorities referred to above. In particular, we do not regard the **Ripon College** and **McNicol** cases as having been undermined by the repeal of para. 1 (1) of Schedule 1, and they remain authoritative save insofar as they specifically refer to the repealed provisions."*

12. The substantive provisions concerning harassment are set out in section 26 of the Equality Act 2010. Disability related harassment can occur regardless of whether a Claimant is a disabled person. Section 26 provides:

26(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.

(2).....

(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 Claimant.....”

13. The right not be unfairly dismissed is contained in the Employment Rights Act 1996. It is for the Respondent to prove the reason or principal reason for dismissal and that that reason was a potentially fair one under section 98 of the 1996 Act. An employee’s conduct is such a reason. Where there is a potentially fair reason for dismissal, the Tribunal must go on to consider whether dismissal for that reason was reasonable in accordance with section 98(4) of the 1996 Act, namely.

“whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.”

14. In applying that test, the Tribunal must be careful not to substitute its own view of the reasonableness of the Respondent’s actions, but to determine whether the Respondent’s decision to dismiss the Claimant (looking both at the procedural and substantive aspects of the dismissal) fell within the range of reasonable responses of a reasonable employer. In cases of misconduct the Tribunal has regard to the guidance given in the case of *BHS v Burchell* [1980] ICR 303 that a dismissal for misconduct will not normally be fair unless the employer genuinely believes that the employee is guilty of the misconduct alleged and that belief is a reasonable one based on a proper investigation. The Tribunal must not ask itself whether the employee was guilty or innocent of the allegations relied upon, but whether the employer had reasonable grounds for believing he was at the time of dismissal. To be adjudged reasonable, the dismissal should fall within a band of reasonable responses available to the employer. In determining whether misconduct amounts to gross misconduct, an employer’s own disciplinary procedures can inform the answer to this question.

15. The degree of formality appropriate in the investigation and disciplinary process will vary depending on the circumstances of the case – factors such as the size of the employer’s organisation and the gravity of the allegations being relevant to the sophistication of the process. However, the conduct of internal

disciplinary proceedings is a management function, not a judicial one and thus, whilst the rules of natural justice should be observed, an overly legalistic analysis of the steps an employer has taken is not appropriate – the overriding question is whether the decision maker acted fairly and justly. The Tribunal will have regard to the ACAS Code of Conduct on Disciplinary and Grievance Procedures in determining whether or not a dismissal was procedurally fair.

Factual Background

16. The Claimant started employment as an accountant with the Respondent on 19 February 2010. There were no contractual documents provided to the Tribunal, but apart from a dispute about the disciplinary procedure, the terms of employment were uncontroversial. The Respondent is a small family company involved in interior design. It has an administrative office in Finchley Road employing fewer than 20 members of staff and a warehouse with 20 – 25 people.

17. In 2014 the Claimant decided that he wanted to work for the Respondent in Pakistan, where his wife and children lived. This suggestion was met with some scepticism by the Respondent with Mrs A Mehra suggesting that “*he was mad*” to want do so because she thought it might jeopardise the Claimant’s immigration status in the UK. However, Claimant persuaded the Respondent that the arrangement could work and they agreed to give them a try. The Respondent’s witnesses confirmed that the arrangement worked better than they had anticipated, at least until early 2017.

18. On 21 April 2017 Mrs M Mehra sent an email to the Claimant explaining that people in the London office had been complaining that he was unreachable by telephone. The email warned the Claimant, “*If this happens again – we will have to shift the whole accounts operation to India where our office is open and responsive at all times. You have to answer all calls and emails should be answered the same day.*” This unsettled the Claimant and appears to have triggered a dissatisfaction with the Respondent.

19. On 21 May 2017 the Claimant informed of the Respondent that he wanted to return to live and work in London describing that he had spent the last few weeks “*in panic. I am having concern for long term feasibility of my work and would like to request resumption of my job, I will be coming back to London soon to settle permanently,*”

20. The Respondent wrote to him on 25 June 2017 informing him that it did not wish him to return to work in London. On 28 June 2017 the Claimant informed the Respondent that he was going to return to the UK in any event. The Respondent eventually agreed to this but, initially stated that his pay would not be increased

from the level he was paid in Pakistan. The Claimant said he needed at least £30,000 in order to be able to sponsor his family to join him in UK. In the end the Claimant returned and at the date of his dismissal he was earning £37,000 per annum, so the Respondent agreed to the Claimant's pay demands. The Tribunal accepts this demonstrates the Respondent's general flexibility and willingness to accommodate the Claimant.

21. In December 2017 the Respondent decided that the Claimant needed some help with the accounts and there were discussions with the Claimant about his pay level and his working from home. The Claimant was asked to help to train a member of staff who was visiting from India, which the former regarded as a betrayal and refused to come into work, although did provide some training the member of staff over the telephone.

22. At around the same time that the Claimant was feeling insecure at work, he was under some pressure in his private life (the details of which are not relevant to this decision). A young female colleague of his, AB, showed some concern for the Claimant when he was in the office kitchen on 12 December 2017. Whilst they had been colleagues for four or five years, AB's act of kindness or support took on a significance for the Claimant which was not shared by her. The Claimant's description of what ensued in his witness statement was that from 12 December 2017 to 1 March 2018, *"There are numerous occasions when I reacted in abnormal manner with my colleague in context of above event due to triggers on my mental health and reacted as 5 year old child, for example moving of her desk, leaving without saying bye, passing by me while walking on road with her friend etc, according to my weak mental health all of these triggers meant for me to put me back into situation on 12 December 2017 when I was flat on sofa with stress, I am unable to put my mental disorder in complete order because 02 03 2018 onwards every message itself became trigger and every event itself became trigger so putting a mental disorder."*

23. As alluded to above, on 2 March 2018, the Claimant was upset by the fact that AB had left the office without saying goodbye to him and started to call her on the company phone and then texted her in what he describes as a "completely abnormal manner". The Claimant then sent an email to AB stating:

"I hope you reach home ok. You are the most important to me in my entire life with due respect to each n every other relation I have."

At 1.38am on Saturday 3 March 2018 he emailed AB with the subject heading, "Goodbye"

“Just to let you know if I’m dead over the weekend is becuz of you! Trying to get in touch since hours like mad as did not get chance to speak yesterday at all so my heart is restless n beating fast.”

On Saturday 3 March 11.03 the Claimant messaged AB asking when he could call her. At 3.55 pm on the 3 March he messaged,

“I will never be able to take u out of my heart.....My feelings for u r not temporary which will go away, u don’t just live in my heart you own it.” And

“Each n everything happening in my life since last few months belong to you n only u n also all I’m stressed sick n crazy belong to you...”

AB replied to the Claimant on Whatsapp on Saturday 4 March in the following terms:

“Please leave me alone. What are you doing! Please don’t make it difficult. I will pretend like nothing has happened.”

24. AB was very upset by the Claimant’s messages and quite clearly did not reciprocate his expressed feelings for her. The Claimant explained in evidence that he knew she had a boyfriend. As far as he was concerned, this knowledge on his part, together with the fact that he was married and loved his family, proved in retrospect that he was sending AB these messages because he was mentally ill, not because he had genuine romantic feelings for her.

25. AB reported the Claimant’s *behaviour* to her line manager on 6 March 2018 and forwarded him the messages she had received. He, in turn, sent them on to Mrs M Mehra, a director of the Respondent. Mrs M Mehra met with AB and described her as distraught and that her health had been affected by the Claimant’s behaviour. On 9 March AB emailed Mrs M Mehra saying that even hearing the Claimant’s name was affecting her. Mrs M Mehra took on the role of supporting AB, who was given permission to return home to Lithuania to help her recover, which she did from 11 -18 March 2018.

26. Mrs M Mehra informed her husband and fellow director, Mr V Mehra of the Claimant’s communications with AB. Mr Mehra immediately went to the office and asked the Claimant to leave the building on 6 March. The Claimant was instructed not to contact AB again and to work from home in the meantime. Claimant took exception to being required to leave the office as he felt it implied that he was posing some sort of immediate physical threat to AB (which was not alleged). Mr Mehra walked around with the Claimant for a while and tried to calm him down and subsequently met with him a number of times over the following days.

27. Over subsequent days, the Claimant sent various messages to Mr Mehra making his romantic intentions towards AB clear – including the fact that the Claimant was “*looking to form marital relations*” with AB. They also met on a few occasions at Mr Mehra’s private office, where he had offered the Claimant a space to work, should he prefer not to work at home on his own. Mr Mehra was supportive towards the Claimant (albeit the Claimant now regards his actions otherwise). In the immediate aftermath of the complaint, although AB stated she could not work in the same office as the Claimant, she was not pushing for his dismissal, provided they did not come into contact and his attentions stopped. Mr Mehra explained that the Claimant had been good at his job, was a long-serving employee and would be difficult to replace, so the Respondent wanted to explore whether there was a way in which the Claimant could continue to work for the Respondent, whilst also protecting AB. Disciplinary proceedings were not ruled out, but the Respondent’s immediate approach was to look for a solution that did not involve the Claimant’s dismissal.

28. The Claimant complains that he was not offered the right to be accompanied when he met with Mr Mehra in the days after 6 March 2018. Mr Mehra explained that they did not have any formal meetings in early March and certainly not disciplinary meetings. Mr Mehra was worried about the Claimant and was trying to help him. The timings of some of Mr Mehra’s messages support this contention, as he would respond to the Claimant outside office hours, sometimes late in the evening. On 6 March Mr Mehra offered to arrange counselling for the Claimant, but the latter did not respond to this offer. The Claimant now suggests that Mr Mehra should have arranged counselling for him regardless and forced the Claimant to attend. When the Claimant did not accept the offer of counselling, Mr Mehra provided the Claimant with the details of the Samaritans on the 9 March (at 22.43), because he was concerned about the Claimant’s emotional state.

29. The Claimant discussed his feelings for AB with Mr Mehra and tried to find out from him whether AB had accepted his apology for his behaviour towards her. Mr Mehra knew that she had not, but he was concerned that this would upset the Claimant further and so told him, “*she still needs time.*” The Claimant was expressing to Mr Mehra the stress he was under, that it was causing him to dance hard to loud music and that he had a bad cold and temperature. In a Whatsapp message to Mr Mehra the Claimant stated, “*Do not think I took everything for granted, my heart is broken to leave company and support you have given me will never be forgotten.*” In other Whatsapp messages with Mr Mehra, he was variously apologetic for his behaviour and blaming others for it. In their conversations in the aftermath of 6 March, the Claimant alleged that Mr Mehra had upset him by banging on the table saying, “*this is man to man talk.*” The Claimant asserts this triggered a decline in the Claimant’s mental health. The

Claimant told Mr Mehra that he was planning to see his GP, which he did on 12 March 2018.

30. One of the solutions discussed by Mr Mehra and the Claimant, was the latter's resignation. They entered into email discussions about this and the Claimant indicated his agreement to resign on 12 March 2018. In an email dated 13 March 2018, Mr Mehra wrote, "*I would again like to reiterate that in view of recent events you must not at any time during your notice period contact [AB] in any way at any time of day or night. This means that you must not go to the offices at Finchley Road.... You should not discuss any personal matters with any other members of staff. If you do feel you need to speak to someone at work about any personal issues, please contact me. If you do not adhere to these terms then you will be subject to immediate disciplinary action which could lead to the premature termination of your employment with us*". The Claimant and Mr Mehra eventually agreed on a termination date for the Claimant's employment of 31 July 2018 on the basis of the Claimant's resignation.

31. One of the Claimant's complaints about the Respondent's handling of the situation was that he was not given a complete picture of just how upset AB had been about his behaviour and he was not provided with her written emails of complaint. Had he been provided with this information, he says, that he would not have contacted AB again. As it was, he suggests that "*the respondent played various tricks on my mental health so that I ended up contacting my colleague again.*"

32. On 18 March 2018, notwithstanding clear verbal and two written instructions from Mr Mehra not to contact AB (and AB's own request that the Claimant stop contacting her), the Claimant sent a lengthy Whatsapp message to her in which he explained,

"I have lost many things but not sure what's more coming after this SMS if you tell anyone I have texted you Im done from every side, I have literally last warning from Vidhur. Trust me it will literally happens as Im squeezed from every side n it's getting worse n worse .but I really need your help [..] as company is getting very difficult with me, they want me to train [x] on Tuesday for my job....last Monday Vidhur sent me official email about not contacting you again n something about not contacting your late night, [AB] I thought you trusted me...

It continued:

"it was not my lust made me contact you but lack of peace which I didn't had on that day because was not able to spend few seconds with you in name of something. I have been going through very difficult times n still going on due to

[external personal factors]. Trust me you was not just a girl which I wanted to have by hook or crook but you was much more than this bullshit which I never thought about you n always in my heart n in prayers prayed for you but if you think I was after something else then please just ignore me becz everything is irrelevant in that case..."

AB received this lengthy message from the Claimant just as she was boarding a plane back to the UK. She reported it to Mrs M Mehra on her return in the following terms:

"as you asked me to let you know as soon he get in touch again...He is mentally unstable and he made things up. Don't know what to expect next."

33. As AB was not responding to the Claimant's attempts to contact her, the Claimant contacted another member of staff who was a friend of hers on 17 and 18 March making his feelings for AB very clear, stating, *"I have recently lost my whole world, a person from whom personality I was so much inspired and I was looking form a relationship..."* He was hoping that this friend could reassure him of AB's attitude towards him.

34. In light of the Claimant's contact with AB on 18 March 2018, he was invited to attend a disciplinary meeting by letter dated 19 March 2018. He was advised of his right to be accompanied at this meeting and was provided with a witness statement from Mrs M Mehra on 20 March 2018. The allegations of misconduct were set out in the latter as follows:

"1. That over a period of time, but particularly on 2 March 2018, 3 March 2018 and 18 March 2018, you sent messages to [AB] which caused her alarm and distress (and which you knew, or ought to know, would cause her alarm and distress).

2. That on 18 March 2018 you sent a message to [AB] in deliberate breach of an express instruction from [Mr Mehra] not to do so."

The Claimant was warned that each of the allegations of misconduct were very serious and might be regarded as gross misconduct warranting his immediate dismissal.

35. A disciplinary meeting was held on 21 March 2018 with Mrs A Mehra presiding. She had not been closely involved in the issue up until then as she had been abroad on business. Mr Mehra took notes of the meeting, but the Claimant has challenged the authenticity of the minutes. He considers they were manufactured to bolster an account given in the amended Response Form. The

Claimant made a similar allegation about the Respondent's disciplinary policy and procedure.

36. The document provided does not contain verbatim minutes. The original was provided to the Claimant on the morning of the hearing. They contained Mr Mehra's handwritten notes which surround a typed agenda for the disciplinary hearing and continued on the reverse of the agenda and the back of a copy of the witness statement of Ms M Mehra. The manuscript includes a couple of crossings out. The Claimant remembered that Mr Mehra wrote on a pad rather than on separate sheets of paper and did not accord with his recollection of the hearing.

37. The informal appearance of the notes in themselves enhances their credibility. Mr Mehra strongly denied any suggestion that they were fabricated. The Tribunal had the benefit of hearing and observing Mr Mehra give oral evidence over a couple of hours. Mr Mehra was willing to make concessions where appropriate, he displayed commendable patience with the Claimant who holds him partly responsible for a decline in his mental health and the escalation of his conduct towards AB. He gave cogent explanations for his actions in the run up to the Claimant's dismissal. Mr Mehra's email correspondence with the Claimant was supportive, he offered to share his own office with the Claimant on a temporary basis in order that the Claimant was not working at home on his own at a time when he was emotionally fragile and was willing to respond to late night Whatsapp messages from the Claimant, including providing a link to the Samaritan's website when the Claimant appeared upset. He did not present as a man who was out to dismiss the Claimant or defeat his Tribunal claim at any cost. Quite the contrary. The Tribunal found Mr Mehra to be an entirely credible witness and accepts his evidence (without hesitation) that the minutes provided to the Tribunal were those he took in the disciplinary meeting.

38. The main point of contention in the minutes was the phrasing of a comment about the police. The Claimant alleges that Mrs A Mehra said something like, *"if she reports you to the police you will be deported from this country."* Mrs Mehra's recollection was different – she told the Tribunal that she felt concern for the Claimant's wellbeing and the adverse effect it might have if he had a police record given he was hoping to bring his family to the UK to join him. The minutes also suggest that there was threat that the Respondent would report the Claimant to the police, but Mrs Mehra did not recall that. In fact, neither the Respondent nor AB involved the police at any stage. It was only the Claimant who made a police report in relation to his perceived mistreatment by the Respondent. The Tribunal accepts that Mr Mehra's minutes are genuine and a confusion between whether it was suggested that the Respondent or AB might report the Claimant to the police does not undermine that conclusion. At the disciplinary hearing, the Claimant admitted that the messages he had sent to AB were inappropriate and had been

sent late at night and that he had sent a message after he had been instructed not to do so by Mr Mehra. The Claimant apologised to the Respondent's directors and AB and said he would have stopped sending messages if AB had asked him to do so. The Claimant said he was depressed but that Mr Mehra had supported him, but he had felt ignored when Mr Mehra did not reply to one of his messages. After that he felt guilty and contacted AB again. He wanted to explain himself to AB.

39. Following the disciplinary hearing, Mrs A Mehra told her son and fellow director, Mr Mehra, that she had decided that the Claimant should be dismissed. Mr Mehra explained this to the Claimant and gave him an opportunity to resign immediately, rather than have a finding of gross misconduct on his record. On 26 March 2018 the Claimant sought to resign with immediate effect, albeit Mr Mehra urged him to take some time to think about whether this is what he wanted to do. However, two days later the Claimant sought to extend his resignation to 12 October 2018, which the Respondent did not agree. The Claimant later withdrew his second resignation and was permitted to do so by the Respondent and was reinstated on 19 April 2018. The Claimant suggests that he was permitted to do this because Mr Mehra felt guilty about putting the Claimant under pressure to resign in the first place. Mr Mehra's invitation to the Claimant to take some time to consider his resignation does not support this inference.

40. On 24 April 2018 the Claimant was given the outcome of the disciplinary hearing, which was that he was being summarily dismissed for gross misconduct. Mrs A Mehra's letter sets out her reasoning in some detail and expressly referred to her consideration for the Claimant's length of service and his emotional state over the previous couple of months. Mrs Mehra drew particular attention to the email sent by the Claimant to AB in the middle of the night on 3 March 2018 (with the heading, "Goodbye"), stating she strongly suspected it was designed to alarm AB so much that she would respond to it.

41. The Claimant appealed against his dismissal on the same day asking that consideration be given to his mental health (given the number of stressful circumstances in his personal life), relying on the messages he sent to AB as proof of his ill health. On 25 April the Claimant emailed Mr Von Grundherr, who was to consider the appeal, explaining that he was getting help from Mind and some other online websites. He mentioned "bipolar", which he wrote, "*I do not have*" but suggested he was going to get some treatment and make people aware around him. On 26 April Mr Von Grundherr offered to postpone the appeal hearing for up to 6 months to enable the Claimant to "*have been home to Pakistan and obtained the diagnosis and treatment you feel you need.*" The Claimant was suspicious about Mr Von Grundherr's motives and preferred for the appeal to go ahead, since he considered the evidence of his mental health was clear from his communications with AB and he was leaving for Pakistan on 10 May 2018.

42. The appeal was arranged for 3 May 2018 and the notes suggest that the Claimant jumped from one topic to another making coherence very difficult. The Claimant focused on the fact that AB had not told him to stop contacting her and go away (apparently forgetting or ignoring her message precisely to that effect). He admitted to knowing that what he did was gross misconduct but had not understood that he could be dismissed without any notice, which he felt was unfair, although an ex gratia payment of £2,000 had already been agreed in the context of his resignation.

43. In the course of the appeal hearing Mr Von Grundherr tried to explain to the Claimant that mental health problems would not necessarily lead to there being no consequences to misconduct. He gave an extreme example to illustrate the point, which, on reflection he appreciates would have been best not expressed. Mr Von Grundherr gave the example of a member of staff murdering someone and then blaming it on not being themselves - the implication being that this would not mean that the act itself was acceptable or should not have consequences. This upset the Claimant and prompted him to make a police complaint against Mr Von Grundherr and to visit his GP to put the accusation on record. The Claimant interpreted the comment as an accusation that he might have murdered or at least have been capable of murdering AB. This interpretation by the Claimant was consistent with his outrage about being asked to leave the office on 6 March 2018, in circumstances where he had not been accused of physically harassing AB.

44. Since his return to the UK in July 2018, the Claimant has resumed his role as an Uber driver, which he had carried out alongside his employment with the Respondent.

Impact Statement

45. The Claimant has set out the effect that his claimed mental health problems have had on his day to day activities in a separate witness statement. He explained that he first realised that he must have been suffering from bi-polar disorder when he viewed videos on the Mind website of people describing their own experiences and symptoms of bi-polar disorder in the spring of 2018. Since he first raised this possibility with the Respondent in late April 2018, it seems likely that he viewed the video around this time. The Claimant variously described having racing thoughts, mood swings, sudden memory losses, isolating himself from friends and colleagues, moving addresses, being unable to cope with cold weather, having disturbed sleep, feelings of anxiety, fear, guilt, embarrassment, He says that smelling smoke is a trigger for him and has been since he was a small child, such that he has to get away from people who have been smoking on public transport, he has a fear of disease (particularly from the use of public toilets) and suffered from a lack of energy and motivation after his dismissal. The

Claimant says he had an interview for a new job in March 2018, which he did not get because he forgot something important at the end of his interview. He also points to the fact that he told the Judge at his case management hearing that he was not claiming disability related discrimination in relation to his dismissal, when he was. In February 2018 and early March 2018 he described singing songs and spontaneously dancing in the street, office and at home.

46. Looking back at some of the physical problems he has had over the years, the Claimant considers they were related to his mental health. The examples he provided were feeling a shortness of breath in 2007 or 2008 when an ambulance was called, but no physical cause was found. Similarly, in Pakistan in 2004 or 2005 he felt a pressure on his chest and breathlessness and was investigated for heart problems. He said he suddenly left a job in Pakistan in 2002 or 2003 and in London in 2009, both of which he now puts down to episodes of bi-polar disorder.

47. The Respondent's witnesses accepted that the Claimant's behaviour towards AB was out of character for him. They had some concerns about his mental health in early March, but only in the context of his devastation at being rejected by AB and other pressures in his life. This certainly informed Mr Mehra's dealings with him and Mrs A Mehra recognised the Claimant's emotional state in the dismissal letter. Whilst the Claimant points to a comment made by Mrs A Mehra about his being "mad" to want to return to Pakistan in 2014, the Tribunal is satisfied that this was an unfortunate colloquialism, not a recognition that the Claimant was displaying signs of a mental impairment. A comment by AB in her email of complaint about the Claimant's message to her on 18 March 2018 suggesting that he must be mentally ill, was not an expert assessment but her rationalisation of why the Claimant might have persisted in contacting her notwithstanding her request that he did not. It does not assist the Tribunal in its assessment of the Claimant's disabled status.

Medical Evidence

48. The Tribunal has been provided with the Claimant's GP records from the UK and a letter from a Consultant Neuro-Psychiatrist and Psychotherapist, Lt Col Nadeem Ahmed in Pakistan dated 5 June 2018. After his dismissal, the Claimant returned to Pakistan and visited a private walk-in centre there to obtain a diagnosis, which he knew would be quicker than in the UK. He explained that he spent about 40 minutes with someone going through pre-assessment questions and then spent around 10 minutes with Lt Col Nadeem Ahmed, who gave him a "working provisional diagnosis" of bipolar illness and he prescribed 5 different tablets. The Claimant did not take any of this medication as he is generally reluctant to take medicines and did not want to take it pending consultation with

doctors in the UK. The undated letter from Lt Col Nadeem Ahmed provides as follows:

“Mr Tanveer Javaid Butt....has request a brief summary for communication with his treating consultant. As per our record, the client consulted our services once on 5/6/18 as a outdoor consultation and his history, mental status examination and clinical examination was carried out. On examination his mood was variable with ideas of grandeur and retained insight. He was advised Tab Sodium Valproate 500mg Bid and Tabl Olanzapine 5mg 1/2HS. He was advised to continue medication and investigations to rule out Organicity. He was recommended to consult Psychiatrist in UK through his general physician. His working provisional diagnosis on 5/6/18 was Bipolar illness. This communication is for his treating consultant only and not valid for Court of Law.”

49. The Claimant's GP records have been provided with a summary dating back to 2006. Until 2018, there are no entries which suggest any history of consultations about his mental health. The Claimant consulted his GP on 12 February 2018 apparently concerning a long-standing cold and then on 8 March 2018 (immediately after AB's complaint). There are no notes of what was discussed on the 8 March, but the Claimant states his doctor suggested he self-refer to the Brent mental health services (IAPT). This is consistent with a later entry in his GP's record on 27 April 2018 which stated *“pt will self refer to IAPT as was adv prev”*.

50. On 27 April 2018 the GP notes suggest that the Claimant attended *“as says he has had a lot of stress, says has had family problems [which are described] and problems at work now unemployed and so mood low. Sleep ok.”* The Claimant was issued with a fit note suggesting he was not fit for work from 27 April to 11 May with a diagnosis of *“Stress related illness and low mood.”*

51. On 8 May 2018 the Claimant visited his GP again with a history of *“ongoing stresses. Director at work accused pt of inappropriate emails being sent to a female colleague, (but nothing much was in emails) pt was told by director he could have murdered the female colleague and made excuses...pt has had insomnia since this comment. Going back to Pakistan in 2 days time, will be back in October. Police have been informed of the director's comments. Pt came in today and asked me to document the above.”* The Claimant confirmed in evidence that this visit to his GP was not to seek medical advice or treatment, but to ensure the above was on record (as the GP's note suggests).

52. On his return from Pakistan in July 2018 (earlier than originally planned) the Claimant moved GP's. He first consulted his new GP on 7 November 2018, shortly after the case management hearing, giving a history of *“15y – extreme*

mood swings: elation to depression in between spends too much, ideas of working for big companies when elated, people comment on his actions. Later on realises that he was "silly" When depressed v low mood, self-isolates poor sleep, worthless, useless feeling. No DSHT/suicidal ideation. Seen by psychiatrist in Pakistan diagnosed BOD, has been adv to use meds. Not started yet." On examination the Claimant was observed to be well kempt with good eye contact. The GP's comment was "chat, possible BPD, good insight, refer MHT."

53. The Claimant made a subsequent visit to his GP on 20 November 2018 and then 21 November (to correct some factual issues). On 20 November the GP's comment was "*History of mental illness, not on medication. Feels has mood swings. Was prescribed medication in Pakistan but never took it. Has unusual thoughts.*"

54. The Claimant could not remember when he tried to contact Brent Mental Health Services, but says he now has an appointment with an equivalent service in Slough in a month's time. He has not had any treatment for any mental health difficulties in the UK (by way medication or talking therapies) and declined to take the medication prescribed to him in Pakistan or attend a follow-up appointment with Dr Ahmed.

Conclusions

Disabled Status

55. The Tribunal reminds itself that a Claimant can be disabled through a mental impairment which does not have a specific diagnosis or that has not yet been diagnosed. Whilst there used to be a legal requirement that a mental impairment was "clinically well-recognised," that is no longer the case. It should not be necessary for a Claimant to adduce costly expert evidence in order to establish disabled status, albeit the Tribunal's task is made easier when such an expert report is available. This Tribunal finds itself in the territory described in *JLA Piper*, but with the additional difficulty that a number of the behaviours relied on by the Claimant to evidence a mental impairment are consistent with those experienced by someone who was infatuated with his colleague. The Claimant clearly had strong feelings for AB and was devastated when she rejected his advances. He then had to contend with the implications of his behaviour towards her on his long-standing employment, alongside the unrelated personal difficulties that he was experiencing and referenced more than once, including to his GP.

56. The Tribunal starts with the claimed substantial effect on the Claimant's ability to carry out normal day-to-day activities. In his impact statement, the Claimant has looked back at a number of events in his life and interpreted them in

light of his belief that he has bipolar disorder. The Tribunal appreciates that there might be a number of reasons why someone does not seek medical help in relation to a mental health problem, including the stigma which can be attached to such a diagnosis. However, in considering whether the historic claimed effects on the Claimant's day-to-day life were substantial, the Tribunal does bear in mind that the Claimant first raised any concerns about his mental health with his GP on 8 March 2018.

57. The Claimant refers to two occasions where he experienced either chest pain or breathlessness over 10 years ago. Without any medical evidence, the Tribunal is unable to accept that these physical problems were a manifestation of a mental health problem. As breathlessness or chest pain could be a sign of a panic attack, it is reasonable to assume that this was discounted by those treating the Claimant at the time.

58. The Claimant relies on a number of decisions he took to change jobs or, more recently to move back to Pakistan to demonstrate impulsive or irrational behaviour on his part. The only detail about these decisions available to the Tribunal was his desire in 2014 to return to Pakistan. As his wife and children were living there and he was able to negotiate with the Respondent to enable him to work for them from there, this was an entirely rational and understandable decision. The Claimant's subsequent desire return to the UK in 2017 (and bring his family over to join him) appears to have been a reaction to the warning he received in May 2017 and, again, was a rational response to it. In so far as the Claimant suggests that his decision-making was impaired, the examples provided do not support this contention. Similarly, the Claimant states that his knowledge that AB had a boyfriend and the fact that he loved his wife and family should lead inexorably to the conclusion that his approach to AB must have been a manifestation of a mental health problem. The Tribunal takes judicial notice of the fact that people without mental health problems have affairs, so is unable to draw this conclusion as a matter of logic.

59. The Tribunal accepts that disturbed sleep, feelings of anxiety, fear of disease and feelings of guilt or embarrassment are likely to have an effect on day-to-day activities if they occur regularly or at a particular intensity. All of these experiences or emotions are equally commonly occurring human reactions to life events. Whilst the Claimant was messaging AB, there is evidence that he was awake in the early hours of the morning. The Claimant told his GP on 27 April 2018 that his sleep was ok, however, he complained of insomnia after the appeal hearing (telling his GP that he had been told that he could have murdered his female colleague). Whilst there is no evidence that the Claimant suffered from disturbed sleep or insomnia to any material or unusual extent prior to the events with which this Tribunal is concerned, it is accepted that the Claimant had periods of poor

sleep from March 2018. A lack of sleep is likely to cause difficulties in concentration and even memory lapses, which can be regarded as a substantial adverse effect on the Claimant's ability to do a variety of tasks, particularly those associated with his work. As to feelings of guilt or embarrassment, the Claimant has provided no further details from which the Tribunal could determine that they had a substantial adverse effect on the Claimant's day-to-day activities. There was limited contemporaneous evidence of the Claimant's feelings of guilt or embarrassment in relation to his conduct towards AB and nothing from which an inference could be drawn that the Claimant had these feelings to an unusual extent or that they prevented him from carrying out any particular day-to-day activities.

60. The Respondent's witnesses considered that the Claimant was acting "out of character" in early March and April 2018. He was easily upset and very focused on his feelings for AB and a concern as to whether she had forgiven him. The Tribunal accepts that the Claimant's heightened emotional state would have distracted him from everyday tasks to some extent, thus, whilst he continued to work from home, his focus was elsewhere. During this period, the Claimant was under a good deal of external stress, both personally (unrelated to his work or the events there), in relation to unreciprocated feelings for AB and the resultant impact on his working arrangements and subsequent dismissal. The variations in his mood over that period, in reaction to these circumstances, were more than usually extreme, such that he was considered unfit for work by his GP for a two-week period from 27 April to 11 May 2018. The Tribunal is, therefore, satisfied that for the period late February 2018 to mid-May 2018 the Claimant was affected by mood swings and occasional difficulties in sleeping which affected his memory and concentration in a substantial way.

61. The Tribunal does not accept that the Claimant's failure to include a disability related discrimination claim in the list of issues at the case management hearing, was an example of on-going memory loss. It is quite clear from the record of the closed preliminary hearing that the Judge specifically asked him whether he was making such a claim, so it was not a case of forgetting (the claim was foreshadowed in his Claim Form), but more likely a failure as a litigant in person to appreciate the potential significance of such a claim. The Claimant sought to reinstate the claim following legal advice from ELIPS and was permitted to do so.

62. The Tribunal has no reason to doubt the Claimant's evidence that he has a particular sensitivity to smoke. Were smoking permitted in public buildings or on public transport, such a sensitivity would restrict his mobility, however, a need to move away from someone who has been smoking on public transport, whilst no doubt inconvenient, does not, in the Tribunal's judgment, amount to a significant adverse effect on the Claimant's mobility. Similarly, a sensitivity to cold is

inconvenient, but there is no evidence that the Claimant's day-to-day activities were affected sufficiently by his intolerance/dislike of cold, such that it could amount to a substantial adverse effect for the purposes of the 2010 Act.

63. There is limited evidence, apart from the Claimant's own account, from which the Tribunal could conclude that the substantial effects on the Claimant's ability to concentrate and remember things which he experienced around the time of his misconduct and the aftermath was likely to last at least 12 months. Apart from the Claimant's leaving out his section 15 claim and the fact that he has moved house a few times, the Claimant accepted he had been working consistently as an Uber driver since his return to the UK. Whilst the ability work is clearly not inconsistent with having a qualifying mental impairment, bearing in mind the Claimant has received no treatment for his mental health, there is no evidence that the Claimant has experienced the sort of strength of feelings, mood changes or insomnia he experienced before and around his dismissal. These effects on his abilities were wholly consistent with a reaction to a variety of adverse circumstances. As the Respondent observed, the Claimant was acting out of character in early March 2018 and was simultaneously describing and experiencing difficulties in his private life both related to and independent of his employment.

64. The Tribunal can give only limited weight to the medical report of Dr Ahmed. Firstly, it was accepted that he did not have the benefit of any of the Claimant's medical records and on the Claimant's own account, the consultation took about 10 minutes. Dr Ahmed's opinion is expressly a provisional one and stated not to be used "in a court of law". It followed the Claimant's self-diagnosis of bipolar disorder based on his identifying with symptoms described on a video he had viewed. Whilst the Claimant has a reluctance to take medication, which can be respected, his apparent lack of urgency in following up this provisional diagnosis on his return to the UK is notable. The Tribunal cannot rule out that the Claimant's reluctance to seek treatment is itself a manifestation of a mental impairment, but it could also be an indication that, outside these proceedings, the Claimant does not feel any pressing need for diagnosis or treatment. When he did visit his GP in early November 2018, no immediate action appears to have been taken by either the GP or the Claimant to obtain a diagnosis or treatment. It is a reasonable inference, therefore, that the on-going effects of any mental impairment have not been substantial.

65. Whilst, as stated above, it is not necessary for the Claimant to have a diagnosis of a particular mental impairment, such a diagnosis might assist the Tribunal, in particular, in its assessment of the likely duration of the effects of such an impairment. The Tribunal is used to seeing Fit Notes which cite short term anxiety, stress, depression or low mood as a reason for unfitness to work, such as has been provided in the Claimant's case. Had the Claimant an established

diagnosis of bipolar disorder, the Tribunal would have accepted that the effect on the Claimant's day-to-day activities would be likely to last for more than 12 months. However, apart from a two-week period up until 11 May 2018, the Claimant has not been considered unfit for work by his GP, or at any pressing need of treatment. Such medical evidence as there is, suggests that the Claimant's low mood was a reaction to the undoubted stress which he was under in March and April 2018 for the reasons which have been outlined. As such, it was reasonable to expect that it would resolve within a relatively short period of time. The evidence does not suggest that, on the balance of probabilities, that the Claimant was suffering from a mental impairment which could well have a long-term effect on day to day activities. That is not to minimise the Claimant's distress at the circumstances in which he found himself in the Spring of 2018 and the fragility of his mental health at the time. In the Tribunal's judgment, however, it was not such as to amount to a disability for the purposes of the Equality Act 2010.

66. Even if the Tribunal is wrong in this conclusion, it is not satisfied that the Respondent had constructive knowledge that the Claimant was disabled at the time of his misconduct or dismissal. The Respondent's directors considered that the Claimant was acting out of character in relation to AB and that he was emotionally fragile, but, for reasons outlined above, concluded that this was a temporary reaction to the circumstances in which he found himself. They treated the Claimant with sensitivity and when the Claimant suggested he might have mental health problems in the context of the appeal, they offered to postpone his appeal for 6 months to enable him to seek a diagnosis and treatment, so clearly contemplated the possibility that his condition might be more serious than it appeared. When the Claimant made it clear that he wished for the appeal to proceed prior to his leaving for Pakistan, they reasonably agreed to his request. The Respondent cannot have been expected to have better medical knowledge as to the likely duration of the Claimant's impairment than his own GP.

Harrassment

67. The Claimant's claims of harassment related to disability do not stand or fall on the Claimant's disabled status. The Tribunal deals with the allegations in turn.

- a) In the appeal hearing, Mr von Grundherr's stating, "*imagine if she showed these messages to the police,*" "*if you rape someone or come to the office drunk you will be dismissed,*" "*you could have murdered her and said I was not myself.*"

Mr Von Grundherr accepted he made comments along these lines to the Claimant in the appeal hearing and regrets doing so. The Tribunal accepts

that the remarks were unwanted by the Claimant and caused offence to him, because he understood them to mean that Mr Von Grundherr was suggesting that he was or might have been capable of murdering AB and claiming that he was not responsible due to mental health problems. In relation to the comment, “*you could have murdered her and said I was not myself*” a link was being made to the potential impact of having a mental health problem on culpability and, therefore, can be regarded as related to disability. Causing offence to an employee potentially creates an offensive workplace environment for them. The Tribunal has no doubt that Mr Von Grundherr did not intend to cause offence to the Claimant and he expressed his regret for what he said in the Tribunal. It was not his purpose to offend. He was trying to help the Claimant to understand that the Respondent had wider obligations to its staff and, even if the Claimant was disabled, and the Claimant’s misconduct was caused by his disability (put in simple terms), that did not mean that there would not be consequences to his actions. Whilst the Tribunal accepts that the Claimant was offended by Mr Von Grundherr’s remarks, because he misinterpreted them, section 26(4) of the 2010 Act requires the Tribunal not only to take account the Claimant’s perception, but also all the circumstances and whether, objectively, it was reasonable for Mr Von Grundherr’s comments to have that effect on him. In the Tribunal’s judgment, it was not reasonable of the Claimant to interpret the comments in the way he did. The Tribunal accepts Mr Von Grundherr’s explanation of the context and purpose of the comment – to provide an extreme hypothetical example for the purposes of illustration. Given there was never any suggestion or implication that the Claimant had harassed AB in a physical sense, that this was some sort of accusation by Mr Von Grundherr was not a reasonable interpretation of his remark. As such, the Tribunal is not satisfied that it amounted to unlawful harassment.

b) In the disciplinary meeting, Mrs Mehra’s saying, “*if she reports you to the police you will be deported from this country.*”

The Tribunal considers that the Claimant has exaggerated Mrs A Mehra’s comment to him in the disciplinary hearing when she suggested that the Claimant’s stated wish to bring his family to the UK might be affected if AB had made a complaint to the police. It is unclear how either comment related to or could be associated with disability. The Claimant struggled to explain the link when cross-examined, beyond suggesting that the effect on him was harassing because he was mentally unstable. It would be consistent with the purpose of the legislation that an employer who sets out to exploit a disabled employee’s particular vulnerabilities in the knowledge that they will not be able to cope as a result of a mental health problem,

would amount to a form of discrimination or, possibly, harassment. However, the Tribunal finds, without hesitation, that Mrs Mehra (and Mr Mehra) did not set out to exploit any vulnerabilities or sensitivities which the Claimant might have had. Quite the opposite. There is nothing in expressing a concern that the Claimant's conduct might affect his immigration status that could link Mrs Mehra's comment to disability. As such, the requirements of section 26(a) are not met.

c) Mr Mehra's saying, "*imagine it could have been worse*".

Whilst Mr Mehra cannot recall saying this to the Claimant and the Claimant has not specified the date when the statement was made, for the reasons set out above in relation to allegation (b) if the comment was made, the Tribunal is not satisfied that it was related to disability.

d) Failing to show the Claimant the details of a complaint against him.

It is admitted that AB's email of complaint was not shown to the Claimant. Whilst a failure to do something is unusual as an allegation of harassment, the Tribunal does not need to engage with the theoretical possibility of harassment by omission, because the Tribunal is not satisfied that the conduct related to disability. Further, the Tribunal did not have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. It is the Claimant's case that, had received AB's complaint, he would not have contacted her again. The Tribunal expressly rejects that suggestion, as the Claimant was repeatedly told in clear terms verbally and in writing not to contact AB, including by AB herself.

e) On 12 March 2018, failing to provide the Claimant with evidence when he was given a warning.

It is admitted that the Claimant was not provided with evidence from AB about the effect the Claimant's conduct had on her. He was not given a disciplinary warning on the 12 March 2018. For the reasons set out in (d) above, this was not related to disability, nor did satisfy the provisions of section 26((1)(b)).

Unfair dismissal

68. There is no dispute that the Claimant was dismissed for his conduct, which is a potentially fair reason for dismissal. Regardless of whether harassment appeared in a disciplinary policy or procedure in a non-exhaustive list of examples

of gross misconduct, the Tribunal would have been satisfied that the Claimant's conduct towards AB, in direct contravention of a reasonable management instruction and expressly unwanted by her, amounted to gross misconduct.

69. The Tribunal rejects the Claimant's assertion that the Respondent's disciplinary policy and procedure was fabricated for the purposes of the proceedings. Although a small family-run Company, the Respondent had professional help with the employment side of the business. The disciplinary policy and procedure provided was a standard example of such a document and the Tribunal is satisfied that the Claimant would have been sent an earlier version of it when he started work in 2010 as Mr Von Grundherr explained in his evidence. As a long-standing, senior employee of the Respondent the Tribunal simply does not accept that the Claimant was unaware of the existence of the Respondent's policies and procedures stored on the Respondent's live drive.

70. Whilst the Claimant did query a reference to the Respondent's disciplinary procedures with Mr Von Grundherr in the course of his appeal, the Tribunal is satisfied that the Respondent's disciplinary policy and procedure applied to the Claimant. It contained a non-exhaustive list of examples of gross misconduct, including "*harassment or bullying, other than minors acts.*"

71. This was not a case in which any sophisticated investigation of the facts was needed. The Claimant's communications with AB were admitted by him, the clear and repeated management instruction from Mr Mehra not to contact her further was a matter of record (and was acknowledged by the Claimant himself in his message of the 18 March 2018 to AB). That the Claimant's romantic attentions were unwanted by AB was expressed to him by AB on 5 March 2018 and were related to AB's sex as a woman. It is clear from AB's emails of 6 and 18 March 2018 and from Mrs M Mehra's evidence about the effect the Claimant's behaviour had on her, that at the very least, the Claimant's communications created an intimidating environment for her at work. As such, they amounted to sexual harassment of AB by the Claimant and the contact on 18 March 2018 was in contravention of a direct and reasonable management instruction. The Respondent's belief in the Claimant's guilt was genuine and largely based on the Claimant's own admissions.

72. The Claimant asserts that the Respondent should have given him a formal disciplinary warning soon after 6 March 2018. If it had done so, he suggests that he would not have made any further contact with AB. The Tribunal observed that this submission is inconsistent with the Claimant's contention that his conduct was somehow outside his control due to his mental health problems, which he suggests were deliberately exacerbated by the Respondent. In any event, the Tribunal considers that the Claimant can have been in no doubt that further

contact with AB would result in very serious consequences for him. The Claimant himself admitted as much in his message to AB on the 18 March 2018.

73. Whilst many employers would have immediately dismissed or otherwise disciplined an employee who behaved towards a junior member of staff as the Claimant did prior to 6 March, the Tribunal accepts that the Respondent's failure to do so was well motivated towards the Claimant and self-interested to the extent that they really did not want to lose the Claimant. As Mr Mehra explained, he did not otherwise need supervision in his work and would be difficult to replace. AB was not pushing for the Claimant's dismissal in the first instance, she wanted his behaviour to stop. The Respondent was hoping that a solution could be found perhaps where the Claimant worked away from the office and at the same time, discussions were ongoing as to the terms of the Claimant's first resignation. The Tribunal is satisfied that the issuing of a formal disciplinary warning immediately after 6 March 2018 would have made no difference to the Claimant's subsequent contacting of AB on 18 March 2018.

74. Although the inclusion of the Claimant's conduct prior to 18 March in the disciplinary hearing might be seen as inconsistent with the informal manner in which the Respondent initially dealt with them, the Tribunal is satisfied that it was not a material error to include them in the disciplinary hearing. The nature and fact of the Claimant's communication with AB on 18 March 2018 was sufficient on its own to amount to gross misconduct. In addition, the deliberate failure to follow clear and repeated management instructions not to contact her separately amounted to serious misconduct. The Claimant has not suggested that he had inadequate notice of the hearing. He was provided with Mrs M Mehra's statement in advance and was offered the right to be accompanied. The failure to supply AB's communications with Mrs Mehra was reasonable in the Tribunal's judgment. AB had a reasonable expectation of confidentiality as to the effect the Claimant's behaviour had on her (particularly in so far as it affected her health). It was not necessary for the Claimant to have access to AB's emails, as he was given a summary of the relevant facts in Mrs M Mehra's witness statement, supplied to him prior to the disciplinary hearing.

75. The Respondent is a small Company with one administrative office. There was no doubt that the impact of the Claimant's conduct on AB, a junior member of staff was very serious. Whilst the Claimant's long service and fragile mental health were taken into account by Mrs Mehra in considering whether dismissal was the appropriate sanction, neither circumstance was sufficient mitigation for such serious misconduct. In the circumstances, it is the Tribunal's unanimous decision that the Respondent acted reasonably in dismissing the Claimant for sexually harassing a junior member of staff. As such, the dismissal was fair.

76. In light of the Tribunal's finding that the Claimant was not disabled at the material time, the obligation to make reasonable adjustments did not arise and the Claimant cannot have been dismissed for a reason arising out of a disability. However, if the Tribunal is wrong in its conclusions concerning the Claimant's disabled status, it considers that there are a number of issues which would be fatal to his alternative claims. The first, in the context of his reasonable adjustment claim, is that the Respondent's failure to provide the Claimant with AB's complaints placed him at a substantial disadvantage as a disabled person. The Tribunal has found as a fact that providing the Claimant with this information would have made no difference to his subsequent behaviour. Further, the Respondent did not know and could not reasonably have been expected to know that the Claimant would have been placed at any such disadvantage.

77. Even if the Claimant was disabled when he sent messages to AB and he could establish that his conduct towards AB and in ignoring a management instruction, arose out of his disability, the Tribunal would have, nonetheless, regarded his dismissal by the Respondent as lawful. The legitimate aims on which the Respondent relies are incontrovertible – an employer has a legal obligation to keep their employees safe from sexual harassment by other members of staff and, where employees have been subjected to harassment, to protect them from further harassment. An employer is entitled to ensure that employees follow lawful and reasonable instructions. The Respondent was potentially vicariously liable for the Claimant's conduct towards AB and once the Claimant had demonstrated his unwillingness or inability to comply with management instructions to refrain from contacting AB, any possibility of their continued working together at separate locations became impractical. Further, the Respondent could have had no confidence that the Claimant would not continue to contact AB when it had been made abundantly clear to him that he should not do so and that there would be serious consequences if he did. In those circumstances dismissing the Claimant (rather than forcing AB to leave, whether actively or constructively) was a proportionate means of keeping AB safe, maintaining discipline and demonstrating its lack of tolerance for harassment in the workplace.

Employment Judge Clark

Dated: 10 May 2019

Judgment and Reasons sent to the parties on:

29 May 2019

For the Tribunal Office