



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4102808/16

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**Hearing Held at Dundee on 19, 20, 21 September 2017, 4, 5, 6, 7 &
8 December 2017, 23 May 2018, 3 August 2018, and 11, 12 & 13 February and
9 May 2019**

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**Employment Judge: Mr J Hendry
Members: Mr IC MacFarlane
Mr CR Neill**

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Mr A

**Claimant
Represented by:
Ms Beedie
Solicitor**

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Z Limited

**First Respondent
Represented by:
Not Present**

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Mr X

**Second Respondent
Represented by:
In person**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that:

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- 1. The Claimant's application for a finding that he was victimised contrary to section 27 of the Equality Act 2010 succeeds and the Second Respondent shall pay the sum of Fifteen Hundred Pounds**

(£1500) to the Claimant for injury to feelings with interest thereon at the rate of eight per centum per annum from the 4 March 2016 until payment in full.

- 5 **2. The Claimant's application for a finding that there was a breach of section 20 of the Equality Act 2010 by the Second Respondent succeeds and the Second Respondent shall pay the sum of Six Thousand Pounds (£6000) to the Claimant for injury to feelings with interest thereon at the rate of eight per centum per annum from the 8 March 2016 until payment in full.**

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REASONS

15 1. The Claimant in his ET1 contended that he was employed by the First Respondent as an Estate Agent. Following a hearing to determine his status it was determined that he was a worker and not an employee. The Claimant's position was that he had been discriminated against by the Respondents because of his disability (ADHD). He also sought payment of various monies that he said were owed to him because of his estate agency activities on their behalf. The First Respondent sought to counterclaim for monies they say the Claimant was due through his breach of contract. Prior to the final hearing the Tribunal was advised that the First Respondent had been struck off the Register of Companies.

25 2. The Second Respondent Mr X was added as a Respondent during the currency of the proceedings. Mr X had in fact represented the First Respondent throughout. Both Respondents denied any discrimination. Their position was that the Claimant's contract had been terminated because of his behaviour. Disability status was initially resisted but eventually conceded by them.

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3. The claims for disability discrimination and payment proceeded to a merits hearing. The tribunal heard evidence from the following witnesses:

- The Claimant
- Ms B
- Mr X
- Mr Y

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4. The Tribunal also had the benefit of a joint bundle of productions (JB1-55 and A-Z1).

10 **Issues**

5. Essentially the Claimant's position was that the Respondents had no proper cause to materially change the basis on which he was contracted to work for them and that thereafter on discovering that he had ADHD terminated the business relationship without notice. He made claims arising from this termination contained in a Schedule of Loss which was lodged with the tribunal.

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6. The Tribunal had to determine the reasons for the termination of the relationship and if these were tainted by disability discrimination. It had to determine who was in breach of the agreement between the parties and if any damages flowed from such breach or breaches. In her submissions Ms Beedie argued that Mr X should be responsible for any damages the company was liable for on the grounds of an apparent quasi-partnership between them. This argument arose as the First Respondent, as noted earlier, were dissolved as a company in early 2019.

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Facts

30 The tribunal made the following findings of fact.

Background

7. The Claimant is a successful estate agent. He is enterprising and innovative. He can be volatile. He was approached to work with the X Limited. He was during this engagement well regarded by the Respondent's Directors for his work in the estate agency.
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8. Mr X was the principal shareholder of Z Limited and was at the relevant time the Managing Director. He is a qualified solicitor. The company at the relevant time operated a chain of estate agencies. Mr X also had his own law practice which dealt with much of the conveyancing generated through the estate agency.
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9. The Claimant often worked closely with another director Mr Y. Mr Y had a long association with Mr X. He dealt with financial products and was involved solely in the estate agency. He worked in the same office as Mr X and took guidance and instructions from Mr X.
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10. The business model for the Estate Agency was that the business had numerous designated Estate Agents throughout Scotland. They had a degree of autonomy. They would locally handle the marketing and sale of mainly residential properties. They were given an incentive to persuade the sellers to use the conveyancing services of Mr X's law firm which was based in Kirkintilloch.
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11. In about the winter of 2015/16 the estate agency business, although it had grown, was not generating sufficient profit or cash flow especially over the winter months. Mr X decided that various changes had to be introduced to the way in which the company carried out its business, particularly that it would no longer adhere to the practice of allowing sellers to list their properties with the company for free and then wait until they were sold before paying any fees or commission. This was in his view a 'loss leader' which could no longer be afforded.
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12. The Claimant as an Estate Agent in the network was entitled to share commissions. The Claimant had considerable leeway in the way in which he provided local estate agency services but was tied to the network's policies and procedures. He had to use their sale boards and sales materials.

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13. The Claimant was contracted to the network on the basis of a style or standard contract. That contract ran in the name of Y Limited the previous name for Z Limited. A copy of the contract is produced (JB34-41). The contract has the following provisions:

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“Agent Undertakings:

1A: The Agent agrees to exclusively market the services of the Firm within their local area, to locate clients wishing to use the estate agency & legal services of the Firm. An Agent must act in their own personal capacity.

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2A; The Agent shall not offer the services of any other estate agency or Firm of Solicitors during the period of this agreement, but the Agent shall be free to enter into all other forms of work, at any time which work does not compete with the commercial interests of the Firm. The Agent will not offer letting or estate agency services in their own right.

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3A; The Agent shall have no fixed hours of work, but undertakes to ensure they will deal with all property marketing calls and e-mails without delay. The Agent shall deal with all customer enquiries promptly and in a professional manner, and shall, at all times keep all parties, whether sellers or prospective purchasers, advised of all matters, developments and any changes to the marketing of any properties. The Agent shall reply to all customer's telephone calls, email and other enquiries on the same day that they are received. The Agents shall also ensure that they contact each of their clients, each week by telephone for an update of the sale of their property.

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4A: The Agent shall at all times act in a professional and unbiased manner, and shall not mislead clients, omit information from sellers or purchasers and operate the marketing of all properties in a transparent, open and honest manner.

5A; *The Agent agrees that they are not employed by the Firm, but are retained by the Firm to provide services to clients, on this agreement for services, and they shall receive commission from the estate agency commission generated by their efforts.*

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Firms, Undertakings & Commissions

1B: *The Firm shall provide a complete internet marketing service, administration backup and initial marketing materials for the Agent. Initial Marketing Materials as outlined within the schedule annexed to this agreement.*

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2B: *In relation to all conveyancing referrals the agent shall be paid an introduction fee for legal work, if the client is not related to the estate agency sale client.*

3B: *The Firm shall pay introduction fees for various types of legal matters which the Agent can introduce to the Firm, the commission payments as set out in the Schedule annexed to this agreement as Additional Sources of Income.*

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4B: *The Firm shall pay all commissions in accordance with the Commission Payment Schedule, as attached within the Schedule to this agreement.*

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5B: *The Firm undertakes to make an Advertising Payment to the Agent. If the client defers the advertising payment or uses a no sale no fee package, or other package wherein they do not need to make an advertising payment, there shall be no advertising payment made to the Agent. There must be an advertising payment associated with each sale.*

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6B: *The Firm shall issue a username and password for the X Limited Web Site. This shall allow the Agent direct control of their properties on this site and all other linked property portals. The Agent shall ensure that this username and password is not disclosed to any third parties, and if they suspect that it has become known they must e-mail the Firm and ensure that the login details are changed. The Firm shall from time to time cycle all passwords to ensure confidentiality of the client's information. In such*

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a case, the Agent shall be given notice of the password change by e-mail from the Firm.

5 7B: The Firm shall authorise the agent to negotiate the sales commission on any property which is being brought to the market, with the condition that the overall percentage commission shall not be less than 0.75% of the sales price.

10 8B: The Firm shall ensure that the Firms link line number appears on the for sale flags, schedule and of the X Limited Web Site. If approved, the Agent may have their X Limited Mobile number on the flag. The Agent shall not use any signs not ordered and approved by, through the Firm.

Termination of this Agreement

15 1B: Both the Firm and the Agent shall have the ability to terminate all clauses within this agreement with the exception of clauses 1K and 2K by giving 30 days notice in writing to the other, of their intention to do so. However the Firm reserves the right, in cases of a serious or repeated breach of this agreement, or estate agency procedure, to terminate in this manner by giving 24 hours notice. However, in all cases of termination, both parties agree that such termination will not relate to clause 1K and
20 2K of this agreement which will continue in full force and effect for a period of twelve months after the termination of all other causes.

Other Matters

25 1G: The Agent acknowledges that they have received a copy of the Firms Estate Agency Procedure and that they will adhere to this procedure during the term of this agreement. The Firm shall, from time to time, revise the estate agency procedure and send updates to the Agent. It is the Agent's responsibility to make themselves aware of any changes to the operating procedure and ensure that they are complied with at all
30 times."

Claimant's Disability

14. The Respondents accepted in the course of the proceedings that the Claimant was disabled in terms of the Equality Act 2010 at the relevant time which was February and March 2016. The Claimant has had Attention Deficit Disorder or ADHD since childhood. It has a substantial effect on his ability to carry out day to day activities. He regularly takes medication for his condition.

15. The Claimant consulted a Dr Stephen Humphries a Consultant Psychiatrist in August 2015 and October 2015. Dr Humphries prepared reports on the Claimant's condition (JB42-45). On page 43 the psychiatrist writes:

"In terms of symptoms nowadays Mr A completed the ASRS screening tool for ADHD which showed inattentiveness and impulsivity together with a degree of emotional dysregulation. Certainly Mr A struggles with rage episodes in which he feels frustrated and unable to articulate or resolve his problems and feels overwhelmed by his experiences. He told me the tale of how during his trip to Harley Street to see me he ended up in a misunderstanding over a bacon sandwich and a verbal confrontation with the train staff who actually called the police although no action was taken. I do take this as an example of how he becomes exasperated and sometimes overwhelmed by his experiences and is unable to remain calm in a stressful situation. The story of the bacon roll does sound however to be not of his doing. Mr A's tendency towards emotional dysregulation and outbursts of uncontrolled emotion have led"

As part of the assessment the doctor completed a "Conners 66-item Long-Scale Score" which revealed the following findings:

*"Inattention/memory problems: 32 out of 36 – high.
Hyperactivity/restlessness: 26 out of 36 – moderate.
Impulsivity/emotional liability: 31 out of 36 – high.
Problems with self-concept: 16 out of 18 – high.*

This gives a DSM diagnosis of ADHD Combined Type of Severe Nature with an index score of 83 out of 90.”

- 5 16. The Claimant finds it difficult to keep symptoms of condition under control particularly when under stress. He is likely to react to situations in an impulsive and volatile manner.
- 10 17. The Claimant would regularly speak to Mr X. He was regarded by Mr X as being 'high maintenance' in that he often required reassurance and guidance. Any eccentricities in his behaviour were tolerated because he was a talented estate agent and brought in considerable business.
- 15 18. On occasion the Claimant seemed to the Respondents to be short of money despite earning healthy commissions. On one occasion before Christmas, Mr X agreed to loan the Claimant money on the strength of sales commissions that were shortly due to be paid early in the new year.
- 20 19. The Claimant regularly attended meetings with other estate agents on the network together with Mr Y and Mr X to discuss and plan the business.

Changes to Terms and Conditions and Termination of the Contract

- 25 20. On or about 24 February 2016 Mr X advised the Claimant (and other Agents) by email (JB220) of a proposed change to their terms of business to take effect on the 14 March. The change was imposed unilaterally on Agents. It included a requirement not to accept free listing of properties and to charge a monthly fee of £30 for listing. This was similar to a scheme introduced by DM Hall Chartered Surveyors. The Claimant contacted Mr X and said he could not list new properties under these terms. The call ended with Mr X
- 30 agreeing to come back to the Claimant. In the event he did not contact the Claimant as promised. The Claimant telephoned the head office and both Mr X and Mr Y's mobile phones over the next few days but they did not respond to his call. This was distressing to the Claimant who became very anxious about his future financial position.

21. The Claimant had been successful in obtaining business through the use of free listing of properties. He believed that the changes were wrong in principle and would be detrimental both to his ability to encourage sellers to list properties through him with and consequently to his ability to earn an income. He felt very strongly about the matter.
22. The Claimant had become frustrated and stressed at the situation that then developed. Because of his condition he became very emotional and found it impossible to discuss issues calmly. He tried repeatedly to discuss the changes with Mr X and Mr Y. They were aware that he opposed the changes. The Claimant was annoyed at Mr X's failure to speak to him despite trying to contact him on a number of occasions. He was in contact with Mr Y on 2 March by telephone. The Claimant vociferously opposed the proposed changes. He made his unhappiness clear to Mr Y in an emotional and loud manner. Mr Y was unsure how to react. The Claimant became increasingly angry and frustrated at the Respondent's refusal as he saw it to alter the policy in response to his concerns. He felt that they were in breach of the agreement he had with them.
23. As the call went on the Claimant became loud, angry and agitated. At some point in the call he seemed to suggest that he might have to list properties, who wanted to list with no fee, elsewhere in the future if the policy wasn't changed. Mr Y unsuccessfully tried to mollify him. He was concerned about the Claimant's behaviour on the call and what he took as a threat to list elsewhere. He reported the Claimant's position and behaviour on the call to Mr X. He in turn e-mailed the Claimant on 2 March at 12:54 (JB46):

"Dear Mr A,

Resignation / Material Breach of Contract.

I understand that you have been speaking to Mr Y this morning regarding future listings and have advised that your intention is to list future properties with another Solicitor/Network. We are therefore unfortunately

having to treat this as a material breach of your contract with us which has now resulted in termination of your membership.

I hope that you will understand that it is not possible for an Agent to act for the Company yet place future business with a competitor.

5 *As a result I have instructed a letter confirming your termination to be sent to you and a cancellation of your login for the system, has now taken effect.*

I am sorry that things have not worked out, however I wish you success in your future endeavours.

10 *Regards,*

Mr X.”

24. The Claimant had earlier tried to log into the computer system operated by the First Respondent. His account had been deleted at Mr X's instructions.

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25. Once he found out that he had been blocked from the system the Claimant tried but could not get to speak to Mr X or Mr Y by telephone. His partner Ms B telephoned on his behalf and immediately got through to speak to Mr Y. She discussed the termination of the contract and the reasons being given for that. She advised that the Claimant, her partner, had a disability namely ADHD. Mr Y told her that he had discussed the Claimant's behaviour with Mr X and they had both speculated whether or not he had some disability 'or was on the spectrum'. She told Mr Y that the Claimant had no intention of listing properties elsewhere. The call ended with agreement that the Claimant's contract would not be terminated as long as he agreed to list new properties.

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26. Following the call Mr Y 'Googled' ADHD and discussed his findings with Mr X. They could not reconcile the Claimant's behaviour with their understanding of ADHD which they believed from their own limited knowledge and the search findings that a common feature of the condition was a lack of attention whereas they had always found the Claimant focussed and retaining a detailed grasp of his business dealings. They were sceptical that the Claimant

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was actually disabled as he suggested. If he was disabled they were concerned about his behaviour and the impact this might have on the business.

5 27. The Respondents operate a 'Top Agent' system whereby agents were ranked by a points system that measured their efficient conduct of the work. The Claimant was the highest ranked. This information was available to prospective clients. The Claimant believed that his high ranking was important in gaining new business. He was also very proud of the ranking.

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28. When the Claimant was removed from the network his ranking was reduced to zero. Following the Claimant's reinstatement Mr X instructed steps should be taken to put the Claimant back on the system and the company's IT specialists contacted to do this. The Claimant noted on the 3 March that although he was reinstated in the system his points had not been reinstated. He was upset at this. He contacted Mr Y by telephone. He explained that he had a severe form of ADHD. He told him he was upset about the points being removed. Mr Y told him the points would be restored. After a period they were partially restored. On the same day the Claimant also spoke to the Respondent's contact 'Michael' who worked for the IT company that administered the system. He was also in contact with Ms C his Personal Assistant who worked at the head office in Kirkintilloch who in turn was in contact with the IT company. She wrote at page 48,

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"Hi Michael,

I hope you are well.

I was wondering if you could help me, Mr A's account was deleted off and then re-instated, which has caused two issues and I would really appreciate your help.

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Bruce Avenue is a property we were selling that has just gone under offer but it has been deleted completely off the system, could you get this back on and 'under offer'. The other thing is in regards to Mr A's points that he has worked exceptionally hard to accumulate. He was sitting at 2970 points when it was deleted.

Look forward to hearing from you, thanks again.”

He responded (JB48):

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“Hi Ms C,

There was an issue in the system where properties could be accidentally unlinked from an agent if the agents account was deactivated, I put a fix in for this yesterday afternoon but this I must have got caught up in the issue before I managed to upload the fix. I’ve re-linked with Mr A’s account so it should be back in the list now.

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Regarding the points, I’ll need to run this past Mr Y and Mr X before I make any changes to it, I don’t much about what happened but it does seem that the points system may have been a contributing factor to what transpired yesterday and I don’t want to get into the middle of anything.”

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She responded (JB48):

“Thanks for putting Bruce back in Michael, I appreciate it.

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Ah okay, I understand re: points, myself and Mr A have worked so hard on this, I would be devastated myself if this were not to be reinstated, I also worked hard on trying to obtain points on Mr A’s behalf because that was the goal/aspiration put to us and we were staying top due to a lot of hard work and effort.

Thanks again Michael, appreciate your kind assistance.

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Have a good day.

Ms C”.

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29. Mr X became aware of the issue around the Claimant’s points but did not intercede to have them restored. He took no steps to reassure the Claimant that they would be fully restored.

30. The Claimant e-mailed Mr X on 4 March. He headed the e-mail “Disability Discrimination in the Workplace” (JB50):

“Afternoon Mr Y/Mr X

I have been made aware through Michael that the points system in relation to Top Agent is not a mistake and this was altered after what
5 *‘transpired yesterday’, all that transpired yesterday was the fact that I suffer from Severe Combined type ADHD and after you were made aware of this you instructed my points to be removed.*

I was told yesterday by Mr Y that this would be rectified immediately but this has not been done. I have to work twice as hard as someone without
10 *my condition and already work with my hands tied behind my back, this is having a detrimental effect on my ability to earn and causing me a great deal of stress and anxiety which makes my condition much worse.*

All I want to do is continue in my position and continue to work hard for you as I always have. Please can you have this amended to reflect the
15 *work that I have done and to stop causing me more distress.*

I am also worried about my future pay with the firm and I did not expect for a second that I would be sacked as a result of complaining about a
20 *cut in my commissions which is a genuine issue which I feel you should have discussed or at least acknowledged.*

I just want to get back to how we were and at no point have I ever said that I want to work for another firm and your information is factually
25 *incorrect.*

Mr X – Can you please call me so we can get back on track and I can get back to doing what I do best.”

31. After having received the email Mr Y telephoned Ms B telling her that the email was ‘strongly worded’. Ms B asked for the points to be restored as this had caused the Claimant considerable concern and had affected the Claimant’s health. Despite her plea the points were not fully restored by Mr X
30 nor were they instructed to be restored by him.

32. The situation that developed was distressing to the Claimant. He could get no reasons why his points had been taken away. He was not getting to speak

directly to Mr X who he knew was the person in control of events. His Personal Assistant Ms C told him that IT had, in turn, told her that they had been reduced because of what had happened on the 3 March. He contacted the IT representative to confirm the situation.

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33. The Claimant spoke to Mr Y on the 4 March. He told him that the ongoing difficulties were affecting him badly and explained about his condition. He found Mr Y to be dismissive about it. He told the Claimant that he preferred to refer to it as a 'condition' rather than a 'disability'. He was left with the impression that Mr Y did not believe he suffered from ADHD or any other such serious disability. The Claimant was outraged at what he saw as being the minimisation of his condition.

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34. The Claimant finally got to speak to Mr Y again on the 7 March. He was upset and angry. He told Mr Y that he felt discriminated against. Mr Y was shaken by the vehemence of the call. He reported the situation to Mr X who decided to terminate the Claimant's contract. He was sceptical that the Claimant was in fact disabled and was unsure and uneasy as to how the situation should be handled if he was disabled. He was not prepared to put up with the Claimant's behaviour. He considered that as believed that he was legally entitled to terminate the contract without any danger of proceedings being taken against the company as the Claimant was not an employee or worker but a self- employed contractor.

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25 35. On 8 March Mr Y e-mailed the Claimant (JB52-53):

"Dear Mr A,

I have received your text messages this morning, I feel that there has been a complete breakdown in the working relationship between yourself and the Company.

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As a director of the Company I feel that it is best, at this point, to bring your position as self employed agent with the Company to an end, and

as such, please treat this email as notification of our intention to do so, as of today's date.

I would therefore like to manage matters post termination in the following manner.

- 5 1) *Please cease all listings on behalf of the company*
 2) *Please dispose of all Company materials*
 3) *Please do not hold yourself out as an Agent for the Company*
 4) *We are aware that you have some sold properties waiting for dates*
10 *of entry and we would propose that you will receive payment for these*
 as they sell in the normal terms. There is no requirement from the date
 of this email for you to represent the Company or continue with any
 duties as our agent to receive these commissions.

15 *All of this post termination offer is on the basis that you act in a*
 professional manner in your dealings with the Company and members of
 Staff, and you do not act in a way which is detrimental to the Companies
 commercial interests and you do not contact sellers who are contracted
 to the Company.

20 *We hope that this is satisfactory and I wish you well in your future*
 endeavours."

- 25 36. The Claimant texted Mr X several times on receipt of the email but Mr X did
 not telephone him. He e-mailed Mr X (JB55-58):

"Mr X
25 *I have received an email from Mr Y today.*
 Within his email it is clear that you wish to hold me ransom for monies
 that are due to me for works carried out, and further discriminating against
 me, after I complained about unfair treatment.
 As mentioned on a call to Mr Y yesterday, I no longer feel safe in my role
30 *with X Limited. It was made very clear to me last week that going against*
 the grain (communicating my concerns over intended contract) would
 result in my employment being terminated, without notice, my properties

and clients divided amongst the other agents and attempts to poach my PA.

5 *After this event neither yourself nor Mr Y would speak with me regardless of my numerous documented attempts to open up lines of communication. Rather than speak to me you chose to speak to my partner Ms B. The following day I spoke with Mr Y, I was of the understanding that issues had been resolved at this point and I also made Mr Y aware of my disability and how that disability affects me on a daily basis, and the efforts I have put in to be on top of the network and stay there, specifically relating to the points system.*

10 *It was noted on the system after the conversation with Mr Y that my ranking in the company had changed significantly. The points that I had worked very hard to achieve and gone to great lengths to keep and grow had been reduced dramatically and thus taking my ranking as the number 1 agent in the company to bottom of the league. Immediately I contacted both yourself and Mr Y regarding this, neither of you came back to me. Again I made numerous attempts to contact you with no avail.*

15 *My PA Ms C contacted Michael in IT regarding the issue and he emailed her back to say that he did not want to get involved, but, that yourself and Mr Y had said the points will not be put on due to what transpired yesterday. The ONLY thing that changed the day prior was my highlighting to Mr Y that I suffered from a disability and that it was a struggle to keep myself on top with the ranking and points system due to that disability.*

20 *After this event I again tried numerous times to contact both yourself and Mr Y to no avail. During the period I was extremely stressed and upset at what was going on, it was embarrassing, detrimental to my work and very disheartening to say the least.*

25 *My numerous attempts of trying to open up the lines of communication to remedy the situation went unheard. I made it very clear what the issue was and the effect it was having on my emotional state due to my disability, but still no contact from either of you. I then wrote a complaint via email to yourself and Mr Y regarding disability discrimination. This*

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email was in hope to highlight the seriousness of the situation and your responsibility as an employer to take action on the concerns raised as it was having a negative impact on myself due to my disability.

5 *Within four minutes of sending the email my partner Ms B had a call and voicemail from Mr Y to ask her to call him. Ms B called and discussed the email I had sent, he said specifically that it was a 'strongly worded email'; I asked to speak to Mr Y whilst Ms B was on the phone to him but he declined thus further causing me emotional torment.*

10 *After this I continued to try and contact both yourself and Mr Y with no avail. I am sure you can imagine this was hugely stressful for me especially as I suffer from a disability that affects my emotions. I felt you were both tormenting me and victimising me.*

15 *As I had not had any response from my numerous attempts to contact you both I sent a message urging you to contact me or I would take action, I then finally received a call from Mr Y.*

20 *On this call Mr Y told me that he did not think I was disabled and that he would prefer to say I had a condition. He said it was not a disability a number of times which was witnessed by my partner Ms B – it was highlighted to Mr Y on the call she was there and listening. Mr Y then said he thought the call was 'off the record'. I had to end the call with Mr Y due to a prior arranged meeting at my son's school that afternoon, I said to Mr Y I would call him back to which he agreed. Later that day I called back and no answer or returned call.*

25 *This morning I text as I had no returned calls and again highlighted the emotional distress this situation is causing me. In return I received an email terminating my employment with you.*

Please be advised I have sought advice from a number of different sources, namely, Equality and Human Rights Commission, ACAS, three different lawyers specialising in employment and disability cases.

30 *1) Direct discrimination; due to a protected characteristic where you are being treated less favourably due to a prejudice.*

2) What has been less favourable.

- Bottom of the rankings after being at the top*

- *Deducted 2500 points after advising of my disability*
- *Continual ignoring of my contact after my email regarding discrimination*
- *Calling Ms B but ignoring me*

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3) *Inferences*

- *Don't believe I have a disability*
- *IT department confirming that it was not an error but intentional.*
- *My discrimination email was regarded as 'strong'*
- *When I spoke about my disability discrimination email to Mr Y he said 'come on' in a condescending tone, after which he said he did not believe I had a disability.*
- *Being terminated because of my complaint regarding disability discrimination.*
- *Points not being amended despite other issues being dealt with.*
- *Reason as to why I am being terminated constantly evolving and changing after learning of my disability.*
- *Stating in your email I am to be terminated after a breakdown in communication, the breakdown resulting from your not responding from my calls, texts or emails.*
- *Ignoring my calls but speaking to my partner.*

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The above is not an exhaustive list.

As mentioned I have also sought advice relating to my working relationship with the company and whether or not I am employed or indeed self employed, a close family member is an employment and tax investigator with HMRC and has highlighted a number of areas in which your agents could be seen as employed. This of course has not been done in an official capacity and strictly 'off the record'.

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I have attached an invoice, this invoice pertains to the work I have carried out and includes:

- *Commission due for all properties marketed by myself including those under offer.*

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Should this invoice be paid by no later than close of business on Friday 11th March 2016 I will consider this matter resolved.

To make you aware you do not have authorisation to use my photographs or property descriptions for any purpose, if this matter has not been settled by close of business on Friday of this week you will be charged £100 per property per day of unauthorised use from today's date being Tuesday 8th March 2016.

I would like to draw a line under this and as long as my work is paid for in full by close of business Friday I am happy to put an end to all of this and move on with other endeavours.

Should I not hear back from you regarding my offer by close of business tomorrow being Wednesday 9th March 2016 I will assume you do not accept and will move forward with all actions being brought against your company and both yourself and Mr Y personally.

The above does not form part of any contract.

Without prejudice.

Mr A”.

37. Mr X responded on 9 March 2016. His email was acknowledged by Mr X on 9 March (JB65):

“Thank you for your email, I look forward to hearing from your Solicitors in due course. I would appreciate if you would allow them to communicate with me directly, I would propose under the circumstances that we have nothing further to say, and I will therefore not reply to any further of your emails.”

38. The Claimant responded on 9 March 2016 (JB66-67):

“Mr X,

You had the chance with amicable but you did not take it despite repeated attempts by me to contact you.

You clearly are very ignorant to Employment, Equality and human rights legislation and extremely arrogant.

As you have declined my offer I will now proceed with ACAS initially for reconciliation and thereafter (if not resolved) we will be pursuing X Limited, Grant and Mackay and both yourself and Mr Y on an individual basis.

5 *Any agent that gets involved with this dispute will also face legal action and I will be making them aware of this. Any agent accepting transfers will also be liable to pay me for use of my copyright as outlined in my earlier email. This will be in addition to the charges outlined for X Limited unauthorized use.*

10 *On the day I started you agreed with me that Exit fees were at my discretion so no exit fees will be due by clients and I will back this up and remind them of this.*

Many clients and purchasers have been getting left waiting and this is causing a detrimental effect to them. I will advise clients to complain to the law society after your conduct as you are leaving little option and putting clients after your own self interest.

15 *I have also been made aware that your email system is insecure and we have evidence of this. IT dept previously mentioned that you were not willing to pay the extra £2-3 Pounds per month to secure the email system leaving clients info at the mercy of hackers which is a clear breach of data protection.*

There will be 4 separate claims on each firm and each director, 2 of which are disability related and two employment related which I have been advised are 'Clear Cut'

25 *I have instructed Ewan Stafford @ Harper Macleod to deal with this matter and they will be acting on my behalf to pursue you. I have not been paid on any of the properties listed and I WILL be getting paid for these or I will simply take MY clients and properties and deal with them elsewhere.*

30 *Your claims below are a fiction of your imagination and I think you clearly underestimate me Mr X.*

I think you will also have a difficulty getting any of the agents to deal with my properties but good luck!

You should hear from ACAS in the coming days. You had mentioned previously that Mr Y is a Director however he is not listed on companies house. Can you confirm this as I will need to include in the claims.

None of the above forms part of any contract.

5 *Without prejudice”*

39. Mr X replied (JB68-69):

“Dear Mr A,

10 *Thank you for your email, I have read Mr Y’s email to you, and I can see that he has offered you the commission on all of your properties which have sold, and will be settling over the next few months. As you have done the work I feel that it is inequitable to terminate you as the Firm Agent and not pay you the pipeline commission, I hope you will accept*
15 *this offer.*

Obviously, with all terminations we require an undertaking from you, that you will act professionally and not damage or attempt the commercial interests of the Firm. As you know all clients are contracted to the Firm for their marketing and you, as the Firms Agent, will have received any
20 *payments due to you for listing these properties. As these properties have not been sold, you are not due any commission for them.*

I notice that a great deal of your email refers to a disability/condition which you believe that you have. The Firm was completely unaware of any issue with your health, and at no time did you inform or disclose to the
25 *Firm that you suffered from this condition. I believe that the Firm was advised you had a condition by your wife when she called the office, and spoke to Mr Y, wherein she asked for your reinstatement, after your initial dismissal. I know that you have been the Firms Agent for a considerable*
period of time and I was surprised to hear of this matter.

30 *I wish you well Mr A, but I do feel that it is better for all parties to move on in an amicable way. I know that you have been getting ‘clients’ to call the Firm to ask questions regarding your termination as the Firms Agent and you have been recording the Firms replies, as a result I have instructed*

staff not to discuss any matter with you, and I would prefer if everything from this point on is dealt with by email.

If you wish to accept Mr Y's offer please let me know, I think it is reasonable and fair, conversely if you do not wish to accept, please advise.

*Regards,
Mr X".*

Properties Already Listed Claims and Aftermath

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40. Following the termination of the Claimant's position the First Respondent divided responsibility for the Claimant's listed properties between other agents. In this period the First Respondent's staff received a number of calls from concerned property owners who were marketing their properties through the Claimant. The Claimant received no payment for properties that were unsold or withdrawn.

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41. At the point at which the Claimant's role as Estate Agent with the First Respondent was terminated he had a number of properties listed with the network. In the course of time as the properties sold he was paid his commission by the First Respondent.

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42. On the 17 March the Claimant texted Mr Y (JB p193) calling Mr X and Mr Y criminals and writing: "*You are leaving me no option that to start flipping over clients ...*"

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43. In relation to one property being marketed, the Claimant was asked on a number of occasions to hand the keys to the First Respondent's agents (JB p188). He delayed to do so and the First Respondent had to engage a locksmith to change the locks. In relation to another property the Claimant refused or delayed handing in the keys for some time until he eventually did so.

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Witnesses

44. The Claimant was a difficult witness to assess. He is clearly intelligent but can get easily frustrated and angry at what he genuinely sees as the injustice of the situation. He is often grandiose in his manner and sweeping in his generalisations. As a consequence, he often seems to jump to conclusions without listening carefully to what is being said or allowing some pause for reflection. To an extent we accepted that these traits were related to his condition but we came to the conclusion that on occasion the Claimant was exaggerating his reactions for effect. Overall, we generally found much of his narrative essentially credible but he was not a particularly reliable witness.
45. Ms B the Claimant's partner was both credible and reliable in our view. Her evidence was measured and careful. Our assessment seemed to be shared by Mr Y and Mr X who used her on occasions as a reliable intermediary between the Claimant and themselves. The honesty of her evidence was not disputed although there was some disagreement between her recollection of two calls with Mr Y and herself. On balance we found her evidence the more persuasive.
46. We did not find Mr Y a particularly persuasive witness. We formed the view that to protect his and the company's position he was not wholly candid and forthcoming about these events. It was clear to us that he worked very closely with Mr X and had no doubt discussed the events at issue with him on a number of occasions. Indeed, we understand they shared an office room. This is not a criticism as such as it would be natural to do so but in these circumstances, especially when his recollection was poor in parts, it called into question both his reliability and credibility in the mind of the Tribunal.
47. Mr X had a strong grasp of detail and was a reliable historian. He was at times self-serving in his evidence. We formed the view that at points his evidence was confusing particularly around his assessment of the Claimant being disabled in some way which he would now accept and then even at the close of the case he would suggest that as Mr A did not fit the stereotype for

someone with ADHD that it was understandable that he had been sceptical. We also took the view that he would exaggerate evidence when he thought it would be advantageous to his position. On one occasion he said that the police had to be called to recover keys for a house that was being sold from the Claimant because he refused to hand them back after his termination. It turned out that the Police Service was not involved in an official capacity and an off duty Policeman who was acquainted with a staff member acted as go between to pick up the keys from the Claimant.

10 **Submissions**

48. Separate submissions were lodged by the First and Second Respondents. Ms Beedie asked us to disregard the First Respondent's submissions prepared by Mr X. He had in the course of the proceedings confirmed that he was no longer acting for the company and that it had been dissolved. This was an attractive argument but at the end of the day Mr X could have simply lodged the Submissions in his own name as the issues are intertwined and interlinked. Nothing said in those submissions could have come as a surprise as they reflected the First Respondent's position taken throughout the case. We accordingly treated the submissions as being supplementary to his.

49. The First Respondent's submissions dealt in detail with the evidence and rehearsed their position which had been taken throughout the case. Mr X the Second Respondent pointed specifically to evidence which he said indicated that he had in fact helped the Claimant rather than discriminated against him at any time. He denied being in partnership with the First Respondent stressing that the company was a proper legal vehicle which he was entitled to use for his business activities.

30 **Claimant's Submissions**

50. The first issue addressed by Ms Beedie was the interrelationship between the parties. She submitted that any award for disability discrimination should be awarded against Mr X as the Second Respondent. She also argued that as

the 'guiding hand' behind the First Respondent (major shareholder and Director) any award for discrimination/victimisation should be made against Mr X. She argued that the First Respondent and Second Respondent exist or existed in a *quasi-partnership* relationship. Reference was made to the case of ***Ebrahimi v Westbourne Galleries Ltd [1973] AC 360***. Notwithstanding the fact she said that that the Second Respondent is not mentioned at Companies House now or at all in relation to the various entities that we have heard run or ran the estate agency network he was, in fact, the 'guiding hand' behind them. The just and equitable provisions that flow from the foregoing case have been held to apply in a wide variety of situations (not just to the facts of the foregoing case). Her submission was that it must apply in these circumstances. In those circumstances she submitted any award of compensation for payment of monies the Claimant asserts are due to him for invoices unpaid as pleaded is competent to be enforced against the Second Respondent.

51. Ms Beedie then turned to the sums sought by way of breach of contract. The Claimant denied threatening to 'list his properties elsewhere' during a telephone call or at all and in those circumstances the Tribunal cannot find, if his evidence is accepted, that there was any breach on his part. The Claimant's contract was terminated as a result of that behaviour which is directly related to the nature of the disability – ADHD. It was submitted that the Respondents acted in material breach of contract, specifically that they failed to give the relevant 30 days' notice to terminate the contract. In the event that there was a serious breach on the part of the Claimant she submitted that the Respondents still failed to give the adequate 24 hours' notice and rather the notice of the first termination was given with immediate effect. In relation to the second termination that was she said clearly a material breach on the part of the Respondents, giving no contractual notice whatsoever. It is trite law in her submission that a party who breaches the terms of a contract with another party cannot then seek to rely on the balance of the provisions of that contract to their own ends. In those circumstances Ms Beedie submitted that the Claimant is entitled to be paid for work carried

out and expenses incurred by him as demonstrated in his invoices in the sum of £29,879.02 all as set out in the ET1.

52. Turning to discrimination it was suggested that it is trite law that discrimination will almost certainly always be grounds for a repudiatory breach of contract. It was submitted that the Respondents knew or ought reasonably to have known that the Claimant was a disabled person in terms of the relevant provisions of the Equality Act 2010 and that the Claimant's behaviour as a consequence of his disability was the reason for both terminations. In evidence, Ms B indicated that Mr Y and she had a telephone conversation later in the day of the first termination where she explained that the Claimant had a disability. Her evidence is that Mr Y said to her that he and Mr X had thought for a while that there was something wrong with the Claimant 'on the autistic spectrum or something along those lines'. In evidence Mr Y said that there were things he couldn't recall as events took place 3 years ago however he could recall not having made the foregoing statement. The Tribunal is asked to accept Ms B's evidence in relation to this.

53. Further, notwithstanding that Mr X gave evidence that the Claimant's behaviour at the time of the termination of both contracts was 'out of the blue', that his initial reaction was 'shock'. When asked by the EJ on 11 February 2019 in re-examination whether he had similar issues in the past Mr X replied no – although he had had some stressful conversations. He said he thought he was 'having a bad day' which doesn't sit well with the apparent aggressiveness that he insists was meted out by the Claimant and his state of 'shock'. Neither does it sit well with Mr X's evidence given in December 2017 that the Claimant had '*never been easy to deal with*' and that he '*had to tread carefully*' with him, nor the document produced by Mr X at page 194 entitled 'What aspects of the Claimant's conduct caused concern'. That document implies that there had been conduct concerns, many of which fit precisely with behaviour sparked in those suffering from the disability the Claimant suffers from.

54. It was Mr X's evidence was that it was Mr Y's decision to terminate on the second occasion. Mr Y accepted that following the discussion between himself and Ms B referred to above Mr X indicated that if the Claimant had a disability they had to reinstate him. Mr Y – purportedly a businessman of some experience stated that upon being told that by Mr X he did not question why. That, at any stretch of the imagination, is difficult to believe. Mr Y admitted that following the conversation referred to above with Ms B he 'googled' ADD (which is the same disability type as ADHD – both part of the same condition). He was asked whether he understood what he read and he replied – *'no, I'm not a Doctor'*. When he was asked whether the reading he did on the subject included behaviour such as rage Mr Y responded *'Yes, it did mention that'*.

55. Neither Mr X or Mr Y made reasonable adjustments or took it upon themselves to seek the advice and input of an occupational health physician. They simply reinstated the Claimant and did nothing further either to assist the Claimant or to inform themselves of the Claimant's condition despite Mr X stating that if the Claimant was disabled he would require to be reinstated. Mr X accepted in evidence that they had *'got it wrong'*. It is submitted that the Respondents knew or ought to have known the Claimant was disabled prior to the first termination. If they did not, which is denied, they certainly did and conceded that they did prior to the second termination. Instead of addressing the matter they simply terminated his contract because of the behaviour symptomatic of and sparked by his disability. Indeed, it is submitted that the Tribunal go further and find that not only was the Claimant discriminated against, he was victimised following his disability being raised and subsequently his complaint about disability discrimination (page 50). There was a refusal to speak to him or communicate with him which only exacerbated the Claimant's symptoms and ultimately his position was terminated when the Respondents – apparently – just couldn't be bothered to adhere to or inform themselves of their obligations in law in relation to the Claimant.

56. The Courts have provided employers over the years with an explanation of what the law requires them to do when an employee or worker is showing signs that they are unable to participate fully or effectively at work. This is a prompt to start discussions with the employee or worker, whether they are on sick leave or not, about any changes that could be made to working arrangements to achieve full and effective participation. As the **Equality and Human Rights Commission Code of Practice** says at **paragraph 6.9 in its Statutory Code of Practice - Equality Act - Employment** “... *it would be sensible for employers not to attempt to make a fine judgement as to whether a particular individual falls within the statutory definition of disability, but to focus instead on meeting the needs of each worker and job applicant*”. The Respondents did not adhere to that or to any other relevant parts of the Statutory Code at all. For the Respondents to say they did not know about their obligations or matters relating to the Claimant’s disability is disingenuous and ultimately no defence.

57. The Claimant contended that he might still be working for the First Respondent (at least until they gave up their estate agency work) had they adhered to their duties to avoid discrimination and of making reasonable adjustments or sought to inform themselves to assist all parties in continuing a relationship in which the Claimant had been the top salesperson, a dynamic driven individual. He sought compensation for financial loss as stated above and injury to feelings. The Tribunal is referred to ***Vento –v- Chief Constable of West Yorkshire Police [2002] EWCA Civ 1871***. It is submitted for the Claimant that any award for injury to feelings should be treated as an exceptional case over and above the top end of the top scale of the ‘Vento’ bands. He continues to suffer from the treatment meted out by the Respondents. It caused and continues to cause severe symptomatic episodes. The Claimant went from building up a successful career with the Respondents to having no income, losing his credit status as a result and having to sell his family home – all of which in themselves caused and continue to cause severe symptomatic episodes. The financial loss element is based on the Claimant’s invoices.

58. In conclusion she contended that the Tribunal should find for the Claimant both in relation to financial loss as claimed and referred to herein and to exercise its discretion in relation to an award for discrimination/victimisation as an exceptional case falling over and above the 'Vento' guidelines.

Discussion and Decision

Claims for Payment/Damages

59. The first issue that we addressed was the claim for unpaid 'wages', in this case commissions, made by the Claimant under section 18 of the Employment Rights Act 1996. The onus was on the Claimant to demonstrate that he was due commissions on sales made after he had left. The First Respondent accepted that such commissions would be due if the house the Claimant was selling had effectively sold i.e. missives had been concluded before the termination and it was a question of waiting until the date of entry for the commission to be taken from the purchase price and shared.

60. The Claimant was unable to convince us that any commissions or other payments were due to him. On this matter we accepted the evidence of Mr X that commissions due were properly paid when a house sale settled. On occasion a property would not sell or would be withdrawn from the market. We would observe that the Claimant's claim was not made easier to understand when he inflated it through the addition of fees (which included un-invoiced outlays) which were not related to the Estate Agency Contract or recoverable under it. As a practical matter if he had disagreed with the position taken by the Respondents that all the commissions due had been paid to him then he could have sought to recover documents or cite witnesses in relation to the other properties he had been selling.

61. In addition, we noted that while the Claimant could make claims for commissions under Section 18, no claim for breach of contract leading to damages had in fact been pled in the ET1. We had doubts as to whether one

was in fact competent in terms of section 2(a) of the Tribunals Act 1996 which refers to contracts of employment or contracts connected to employment. As the Claimant is not an employee it is arguable that the extension of jurisdiction is insufficient to cover the sort of agreement we have here and any damages arising from it. Finally the claim lies against the First Respondent who no longer legally exist.

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62. Similarly, there was no legal basis to allow us to award the First Respondent damages as a counterclaim even if one had been pled. As noted above the First Respondent are no longer in existence. Parties would, of course be free to litigate these matters in the Sheriff Court should they have the desire to do so and if the company is restored to the Register.

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63. In passing we considered the issue of quasi-partnership and the submissions made by Ms Beedie. The case of *Ebrahimi* turns on its own facts. It relates to rights between Directors in a small company and cautions that the use of the word quasi-partnership can be misleading. The submission in the present circumstances is not in our view well founded. The Claimant was not in any sense in quasi-partnership with Mr X allowing him to look to him for personal satisfaction for liabilities incurred by the First Respondent a limited company.

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Discrimination

64. A worker such as the Claimant is entitled to the protection from discrimination by virtue of section 83(2)(a) of the Equality Act 2010 ('EA').

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65. The claims advanced are for discrimination (section 15) and victimisation (section 27).

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"15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

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27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

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(a) B does a protected act, or

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

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

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(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

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(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

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(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.”

66. We also had regard to the burden of proof when considering the evidence:

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“136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) 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.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.”

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67. The scope of Section 27 is broad and designed to protect employees from retaliatory action taken by their employers when seeking protection from discrimination. The Tribunal approached the matter by considering whether the alleged victimisation arose in any of the prohibited circumstances covered by the Equality Act.

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68. The submissions were silent as to what the protected act was but it presumably was the email from the Claimant headed ‘Disability Discrimination in the Workplace’ alleging that the reduction in his Top Agent points related to Mr Y becoming aware of his disability. In other words that there was a contravention of the Equality Act. The email clearly had an impact on the Respondents with Mr Y describing it at the time and in evidence as being a ‘strong email’. We considered what the detriment was that the Claimant alleged occurred.

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69. As we noted earlier we have no doubt that the Respondents were put on notice that the Claimant had a disability by Ms B and through telephone contact with the Claimant. The removal of his points and removal from top agent status was clearly upsetting for him. Initially, Mr Y told him that it would be resolved and the situation restored but it seemed clear to us that it was not resolved and that the Claimant was only, at best belatedly, given back some of the points he was entitled to. We could not go as far as to say that the points were taken away in response to the email from the Claimant on the 4 March which seems to be alleging disability discrimination but even if this was in fact an IT issue from the 4 March onwards (and no evidence was led from that source) the Respondents did not reassure the Claimant that he

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would get his full points back or have them restored on the system. An act of victimisation can be an omission and this is the conclusion we reached.

5 70. The Claimant's position was that the removal of the points and subsequent failure to restore them was linked to him telling Mr Y about his condition. We did not believe that this was sufficient to constitute a protected act and it was only after the email of the 4 March was sent that it is apparent that the Claimant is alleging disability discrimination through the Respondents' actions. We therefore looked closely at their actions following receipt of this
10 email.

15 71. We did not find the explanations given by Mr Y or Mr X at all convincing for the state of affairs that developed and even if the initial problem was an IT 'glitch' (and no evidence from this source was led) this does not explain their subsequent inaction when they were aware of how upset the Claimant was about the situation. It was clear to the Tribunal, and should have been after investigation by the Respondents, that the Claimant's behaviour was being exaggerated and magnified by the effects of his condition and the reaction he was having to stressful events. There was an element of trying to distance
20 themselves from heated telephone calls but no attempt at dialogue through other means such as via his partner.

25 72. We would comment that in relation to these matters as an innocent explanation for the subsequent actions of the Respondents was not forthcoming we concluded that they had not satisfied the burden of proof in relation to these matters namely the failure to restore, or fully restore the points or reassure him that it would be done. Mr X's position at the hearing was that they would in fact have been restored so we were puzzled that the Claimant was not told this at the time. Looked at in a wider sense the
30 circumstances strongly inferred that the Respondents were being deliberately awkward with the Claimant and that this inaction was in effect a retaliation against the Claimant's assertion that he had been discriminated against.

73. We then considered the claim under section 20 of the Act. For a claim to succeed the Claimant must establish that the unfavourable treatment (termination of the contract) arose 'because of something arising in consequence of (his or her) disability'. One of the factors that emerged in evidence is that neither Mr Y nor Mr X seemed to be able to cope with the Claimant's behaviour either his voluble and volatile matter or insistent texting and telephoning. These characteristics seem to be a feature of his condition.
74. We accepted the Claimant's evidence and that of his partner, supported by the medical reports that was produced that the Claimant's behaviour over these few days in March was strongly influenced by his condition which made him likely to react in the way he did. The circumstances demonstrated to the Tribunal's satisfaction that the Claimant's condition as it influenced his behaviour was the principal factor in the reason to terminate his contract. The Respondents simply struggled to cope with what was happening and how to deal with the Claimant's behaviour. They took what they believed to be the easiest and most risk free option of terminating his contract. The Claimant seemed to have backed down in relation to leaving the Agency and by implication accepted the changes that were to occur and there were no other strong reasons for termination which was the consequence of the disability related behaviour.
75. There was no basis before the Tribunal to hold that there was any objective justification for the Respondents' actions. He had not done anything that would merit termination of the contract other than being upset and emotional in the way we have painted. We considered that the Respondents could lawfully terminate the contract but it is clear that the Claimant was a valuable asset for their business and a certain amount of latitude had been given to him in the past such as ,for example, by advancing him commissions and that it was his behaviour and the fact he had some unusual (and difficult to deal with) mental impairment that weighted on the Respondents' minds in coming to the conclusion to terminate the contract.

76. We noted that the correct notice had not been given and the whole matter seems to have been dealt with in a poorly considered rush by the Respondents. We also noted that the contract was terminated in close proximity to the Claimant's email alleging discrimination. While we found that the Respondents' view was sceptical on whether the Claimant was disabled and what the true nature of the disability was they took what they believed to be the easy course of action which was to terminate the contract rather than try and understand and deal with the difficult situation which developed. At that point in time Mr X believed that the Claimant was neither an employee or worker and could not mount any claim against the company. As noted the Claimant's own behaviour did play a large part in these events. He was difficult and volatile but we were struck by the absence of any attempt to meet him face-to-face and discuss the issues that had arisen or to provide him with any reassurance as to what was going to happen once the termination was withdrawn.

77. The Tribunal had to look at the so called 'Vento' bands when considering compensation. The original three bands classified lower, middle and higher bands. The Tribunal were agreed that this case did not fall into the highest band which is reserved for the very worst cases of discrimination where there has usually been a lengthy period of discrimination. We considered that in our view this case falls into the lower band because the discrimination related to effectively one occurrence and did not take place over a long period of time. The Claimant led no medical evidence about the impact of the discrimination on him but we accept that he was very upset, frustrated and annoyed particularly with what he regarded as a failure to try and understand his condition. The original bands were set at £5000 to £15000. These bands became through the passage of time and inflation to require updating and we had regard to the Presidential Guidance (2017). The claim predated the Guidance which sets the lower band at £800 to £8400 for claims presented after September 2017. We concluded that an award in the lower band was appropriate for the victimisation claim given that this was a 'one off' matter and although upsetting it was only one element in the Claimant's distress at

the time. In relation to the claim under section 20 we concluded that this was the most serious aspect of the case involving as it did the ignoring of the Claimant's condition and indeed the refusal to fully acknowledge its existence and likely effect. This was still in our view in the lower band but towards the higher end of the lower band was applicable and award £6000. Accordingly, we make these awards with interest from the dates when the discrimination occurred the 4 March and 8 March 2016.

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Employment Judge:
Date of Judgment:
Entered in register:
and copied to parties

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James Hendry
03 June 2019
04 June 2019