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EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Mr D Patel-Jones	**AND**	Babylon Partners Limited

Heard at: London Central **On**: 1-16 April 2019

Before: Employment Judge Glennie
Mr M Simon
Mr R Maheswaran

Representation
For the Claimant: In person
For the Respondent: Mr R Dennis, of Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that all of the complaints are dismissed.

REASONS

1. By his claim to the Tribunal the Claimant, Mr Patel-Jones, brought the following complaints:

    1. Direct Disability Discrimination
    2. Harassment related to disability
    3. Failure to make reasonable adjustments
    4. Detriments done on the ground that he had made protected disclosures
    5. Automatically unfair constructive dismissal

2. Th Respondent, Babylon Partners Limited, by its response disputed all of these complaints.

3. The Tribunal is unanimous in the reasons that follow.

The Issues

4. There was an agreed list of issues, a copy of which is attached as an Annex to these Reasons. The agreed list was revised during the course of the hearing in the following respects:

1. As will be explained, the Tribunal gave the Claimant leave to amend his claim so as to add the following additional issue:
"the making of a covert recording of the meeting 10 October 2017 is a further example of the Respondent's continuous act of discrimination and harassment of me".

2. The Claimant withdrew issues 3 (c), (d) and (e) in the course of cross-examining Mr Mudie, on the grounds that they were superfluous.

3. In the course of his own oral evidence, the Claimant withdrew issues 5a and 3b as complaints of harassment and direct discrimination respectively, but retained them as aspects of the complaint of failure to make reasonable adjustments.

Procedural Matters

5. As indicated above, the Claimant made an application to amend his claim in order to add an allegation that Mr Mudie's making of a covert recording of the meeting on 10 October 2017 was an act of discrimination because of disability and/or harassment related to disability.

6. Mr Dennis opposed this application on three grounds. The first was that this was this was a major amendment involving the making of an entirely new factual allegation. The Claimant did not dispute that this was the case. The second ground of objection was that the application was made many months out of time as the three month time limit from the act complained of expired on 9 January 2018 and the Claimant's application to amend was made on 5 December 2018. To this the Claimant stated that he had only become aware that the conversation had been recorded in the course of the disclosure process, which took place during the second half of November 2018. He could not have made the application to amend before being made aware of the recording and he had done so promptly on discovering it. Mr Dennis accepted that the Claimant had only become aware of the recording at the time of disclosure.

7. Mr Dennis also submitted that the complaint sought to be added by amendment had no reasonable prospect of success. He pointed to Mr Mudie's witness statement in which the latter said that he was unaware of the Claimant's depression before that meeting and that it was in the course of the meeting that the Claimant revealed this. Mr Mudie also provided an explanation for why he decided to record the meeting. Mr Dennis therefore submitted that there was no reasonable prospect of the Tribunal finding that Mr Mudie's decision to record the meeting was influenced in any way by the Claimant's disability. The Tribunal considered that this point was open to argument as the Claimant's case was Mr Mudie did know of his depression before this meeting, and Mr Mudie's evidence

to the opposite effect and as to his reason for recording the meeting was open to cross-examination.

8. The Tribunal had regard to the guidelines given by the Employment Appeal **Tribunal in Selkent Bus Company Ltd v Moore [1996] ICR 836**, as reflected in the 2018 Presidential guidance note concerning amendments. Consideration of an application to amend involves a balancing exercise of all the relevant factors, having regard to the interests of justice and the relative hardship that will be caused to the parties by granting or refusing the amendment.

9. As the Tribunal has already observed, the amendment is a substantial one. The new complaint is out of time, but the Tribunal considered that it would be just and equitable to extend time to allow it to be considered. It was not suggested that the Respondents would experience any evidential prejudice if the new allegation were to be considered. Mr Mudie had covered the relevant matters in his witness statement and there was no suggestion that he was at any disadvantage in dealing with them. As has already been stated, the Claimant could not be expected to have identified this complaint before discovering it as a result of the disclosure process.

10. Essentially the same considerations regarding the balance of prejudice between the parties are relevant to the discretion regarding the amendment application itself. The Tribunal considered that it would be unjust to refuse the amendment in circumstances where the Claimant had acted promptly on discovering the material relevant to it and where there is no evidential prejudice to the Respondent.

11. A second preliminary issue before the Tribunal concerned paragraphs 277-283 and 289-297 of the Claimant's witness statement. The Respondent applied to strike these out on the grounds that they were irrelevant to the issues to be determined, and that their inclusion would cause oppression to the Respondent, as they raised allegations that were not before the Tribunal for determination, but which could have an adverse effect on the Respondent's reputation if made public. In this connection, Mr Dennis reminded the Tribunal of Rule 44 of the Rules of Procedure, which provides that any witness statement which stands as evidence in chief shall be available for inspection during the course of the hearing by members of the public attending the hearing unless the Tribunal decides that any part of the statement is not to be admitted as evidence.

12. Mr Dennis also referred to the Employment Appeal Tribunal's decision in **HSBC Asia Holdings BV v Gillespie [2011] ICR 192** in which Underhill J reaffirmed the basic rule that if evidence is relevant it is admissible and if it is irrelevant it is inadmissible, citing the decision of the House of Lords in **O'Brien v Chief Constable of South Wales Police [2005] 2 AC 534**.

13. Mr Dennis contended that the disputed paragraphs in the witness statement did not relate to either of the two protected disclosures on which the Claimant relied, said to be made on 27 October and 1 November 2017, relating to the advertising strap line for a product known as GP at Hand. He contended that they amounted to allegations of other unrelated matters on which the Claimant

contended that the Respondent was open to criticism, but which would not assist the Tribunal in determining the issues in the case.

14. There was also a dispute about a number of documents in a bundle headed "disputed documents" which essentially stood or fell with the application regarding the witness statement as they were relevant to the allegations in dispute. The Claimant addressed the Tribunal in general terms on this point, mainly by reference to the documents, saying that the Tribunal would need to consider this material in order to get the full picture. When the Tribunal asked him to identify which issue or issues this evidence related to, he answered again in somewhat general terms that it related to the software not being safe or ready, and to whether or not users of the GP at Hand application would realise what they were signing up to when they chose to use it. He agreed that the material in the witness statement and the disputed documents was commercially sensitive.

15. Given the commercially sensitive nature of these matters, the Tribunal has not set out in these reasons the allegations made in the disputed paragraphs of the content of the disputed documents. We were satisfied, however, that the evidence was inadmissible because it was not relevant to the issues to be determined, in that it would not assist the Tribunal in reaching the necessary conclusions on those issues. It should also be excluded because allowing it to be given was liable to cause oppression to the Respondent because the evidence would be put into the public domain, and liable to cause delay to the hearing to the extent that the Claimant might argue that he should be allowed to cross-examine on that evidence. The Tribunal therefore ordered that paragraphs 277-283 and 289-297 of the Claimant's witness statement should be redacted and that no reliance would be placed on the disputed documents.

16. The final procedural matter that should be mentioned arose at the conclusion of the hearing. The evidence was concluded at about 12:15pm on day seven of the hearing. The Tribunal then adjourned and both parties produced written submissions, which they brought on day eight. The Tribunal read those and heard further brief oral submissions from the Claimant. The Tribunal then deliberated for the remainder of day eight and days nine and ten of the hearing. The deliberations continued on the morning of day eleven. The parties attended on that afternoon, when the Tribunal explained that it was ready to give its judgment and reasons, subject to one outstanding point on which it would invite further submissions. It was agreed that the best way to proceed would be for the Tribunal to give its judgment and reasons subject to this one remaining point, so that the parties could address it in the light of the findings that the Tribunal had made. The point concerned what degree of knowledge (actual or constructive) was required of a Claimant's disability in respect of a complaint of harassment related to disability under section 26 of the Equality Act 2010.

17. The Tribunal commenced giving its reasons, subject to this one outstanding point, at 2pm on the afternoon of day eleven. At about 2:20pm the Claimant became distressed and left the Tribunal building. The Tribunal had already announced its judgment and therefore he knew that, subject to the outstanding point, his complaints had been unsuccessful. The Tribunal decided to adjourn until 10am the following morning. At that time the Claimant did not attend and

the Employment Judge had to deal with another short hearing before recommencing this matter. At about 10:37am an email was received from the Claimant seeking written reasons. It was apparent to the Tribunal that he was not intending to attend on that day. The Tribunal therefore proceeded to hear further submissions from Mr Dennis on the outstanding point, determined it, and then reserved its reasons to be delivered in writing in full to the parties.

18. These are the Tribunal's reserved reasons.

Evidence and Findings of Fact

19. The Tribunal heard evidence from the following witnesses:

1. The Claimant, Mr Patel-Jones.
2. Mr Gary Mudie, the Respondent's Chief Technical Officer and the Claimant's Line Manager.
3. Mr Ali Parsadoust (known generally as Mr Parsa), the Respondent's Chief Executive Officer.
4. Ms Rebecca Ingram, now the Respondent's Chief of Staff but during the Claimant's employment Talent Director.
5. Mr Paul Bate, the Respondent's Director of NHS Services.

20. In the course of the evidence other individuals were referred to beyond those who attended as witnesses. These have been identified in these reasons by initials only in a way that the Tribunal hopes will enable the parties to understand who is being referred to at any given point.

21. There was an agreed bundle of documents and page references that follow in these reasons relate to that bundle.

22. The Respondent company was launched in April 2013 by Mr Parsa and Mr Mudie. At the start it had two or three employees: by the time of the events with which the Tribunal was concerned there were around one hundred employees.

23. The Respondent provides digital healthcare services. Initially it offered these services in the private sector in the UK, subsequently it extended its operations to the NHS in the UK and to international provision of these services. The hearing was primarily, but not exclusively, concerned with two products developed for use in the NHS sector, namely "GP at Hand" and "NHS Online" both of which were smartphone applications designed to give users access to NHS services.

24. It is accepted by the Respondent that the Claimant is and was at all material times disabled within the meaning of the Equality Act. Although a specific diagnosis is not essential for a finding that a person is disabled, the Claimant relies on diagnoses of depression, anxiety and panic disorder, initially diagnosed when he was around nineteen years old, he now being aged thirty-nine.

25. It was also accepted that he Claimant's partner is disabled within the meaning of the Equality Act by reason of a medical condition suffered by him.

26. Between June and October 2016 the Claimant worked for the Respondent as a freelance consultant. He commenced employment as Head of Product Delivery (a title which he chose) on 3 January 2017. The agreed salary was £77,500 and there was a scheme for granting share options. The Claimant's role was to oversee the delivery of the Respondent's products.

27. Clause 11 of the contract of employment on page 246 provided as follows:

> "Your normal working hours shall be forty per week (with a daily one hour break for lunch). You may be expected to work such additional hours as required for the proper performance of your duties, you will not be paid for overtime".

28. On 1 September 2017 the Claimant was given a salary increase of £11,000 and his share options were doubled. Mr Mudie's evidence, which the Tribunal accepts, was that the Respondent was happy with the Claimant's work. Ms Ingram in her oral evidence described him as "great at his job".

29. Mr RS joined the Respondent on 4 September 2017 as a Product Director and a member of the consumer product team of which the Claimant was head.

30. All of the dates that now follow are in 2017. On 5 October there was a meeting involving Mr Mudie, the Claimant, RS and others. There was a dispute about precisely when Mr Mudie joined the meeting which does not bear on the issues which the Tribunal has to decide. It was common ground that there was some discussion about the allocation of tasks and that there was a confrontation between the Claimant and RS. It was further agreed that Mr Mudie said that RS rather than the Claimant should manage a project known as V3 in future. The Claimant then became angry and upset and left the meeting, saying words to the effect that in that case RS could manage it or take it over (he and Mr Mudie differed as to the exact words used).

31. In paragraph 22 of his witness statement Mr Mudie said this:

> "In line with this comment, we all agreed – including Mr Patel-Jones - that RS should continue the work on V3 so that Mr Patel-Jones could concentrate on the NHS projects".

32. In answer to a question from the Employment Judge, Mr Mudie said that there was no further conversation with the Claimant beyond that set out above. It seemed to the Tribunal that he must therefore have meant that the Claimant's agreement referred to in his witness statement derived from the angry words that the latter had said as he left the meeting.

33. The Tribunal finds that this was said in the heat of the moment and that the Claimant did not actually mean that he agreed to RS managing V3. We are supported in that view by an exchange of emails between the Claimant and Mr Parsa that evening. At 19:20 at page 345-346 the Claimant wrote that he was approaching Mr Parsa for support. He said that he knew that he could deliver V3

and that Mr Mudie said that RS would be delivering that product, not him. He said that he did not feel this was right, that he had a lot of demands on his time but had both NHS products under control and that "whilst it will mean even longer days, I don't care; I will do whatever it takes for V3 to be delivered on 8 December". The Claimant said he did not believe that RS was right for the team. He said that he did not think that RS should "be here anymore" and he asked, "can RS be terminated before it is simply too late?"

34. Mr Parsa replied the next morning at page 343 in terns which suggested an attempt to defuse the situation, and the Claimant in turn responded at page 342 in a conciliatory manner.

35. There was a further meeting on 6 October involving the Claimant, Mr Mudie and RS. This followed an exchange of emails between the Claimant and RS on the subject of who was managing V3. Mr Mudie's intention was that the meeting should address the V3 issue and they began with that subject. The Claimant and Mr Mudie differed what was said about V3. The Claimant's evidence was that Mr Mudie said that he was still delivering V3 while Mr Mudie's evidence was that it was established that RS would focus on V3 and the Claimant would focus on NHS projects.

36. In the meeting the Claimant then made allegations of homophobic and racist conduct towards him by RS. There were exchanges about that and the Claimant added something to the effect that if Mr Mudie did not believe him, or backed RS, he also was racist. The Claimant's evidence was that at this stage he broke down in tears. The Tribunal accepts that, as this was clearly an emotional situation. The Claimant then left the building, handed in his laptop at reception, and went home.

37. Mr Mudie told Ms Ingram what had happened and she telephoned the Claimant that afternoon. There was a dispute about what the Claimant told Ms Ingram in the course of this call. The Claimant stated that he told her that he was suffering from depression and was suicidal. He said he was contemplating jumping from the balcony of his flat. Ms Ingram's evidence was that the Claimant said that he was feeling stressed and depressed, he did not mention suicide and that she would have remembered it if he had done so. Moreover, she said that had he mentioned this, she would have done something about it. However, Ms Ingram considered the Claimant was "incredibly distressed" and that she considered that this had to be addressed.

38. There was also a related issue as to what, if anything, Ms Ingram said to Mr Mudie about this conversation. The Tribunal found it probable that, whatever it was that the Claimant said, Ms Ingram conveyed that at least in general terms to Mr Mudie. It would make sense for her to do so, given that Mr Mudie was the Claimant's manager. Furthermore, in cross-examination Ms Ingram said that she had told Mr Parsa "what had happened" concerning the Claimant but "did not necessarily speak about the content of the conversation". It was a little difficult to interpret exactly what Ms Ingram meant by this, but we concluded that it was probable that she told Mr Mudie and/or Mr Parsa what the Claimant had said to

her and that either directly from Ms Ingram or via Mr Pars, Mr Mudie was made aware of this.

39. In that connection, Mr Mudie's evidence in cross-examination was that he "could not recall" Ms Ingram telling him that the Claimant said he was suffering from depression or was suicidal. It was a feature of Mr Mudie's oral evidence that he often replied to questions that he could not or did not recall matters that were put to him. It was not always easy to discern whether by this he meant that he did not believe the matter in question had occurred or had been said, or that he was simply unable to say one way or the other whether it had or had not. On this particular point, in answer to questions from Mr Maheswaran and the Employment Judge, Mr Mudie replied both that he thought that he would be able to recall these things had they been said, and that Ms Ingram might have said them.

40. The Tribunal found that the Claimant did not say, or perhaps did not say in terms that were clear to Ms Ingram, that he was suicidal. Had he done so, it was likely that Ms Ingram would not simply have arranged a meeting, as she did, but would have asked the Claimant to see a doctor urgently or checked on his wellbeing the next day, or taken other steps with regard to his welfare. The Tribunal considered that it may be that the Claimant is now recalling how he felt rather than what he said.

41. We found that the Claimant told Ms Ingram that he was feeling stressed and was suffering from depression; and that she conveyed this and her impression that the Claimant was incredibly distressed directly or indirectly to Mr Mudie.

42. The Claimant remained absent from work at this stage but came in for a meeting with Mr Mudie and Ms Ingram on 10 October. Mr Mudie decided to record the meeting and did not tell the Claimant he was doing so. This became the subject of the issue that the Tribunal allowed in by amendment identified as issues 3(aa) and 5(aa).

43. The Claimant put it to Mr Mudie that recording the meeting was a deliberate, concerted, action which was agreed with Ms Ingram and Mr Parsa. Mr Mudie replied that it definitely was not. His explanation for making the recording was that previous meetings such as the one on 6 October had taken unexpected turns, and that he wanted to replay the recording in order to see whether he was doing something wrong in his interactions with the Claimant.

44. The Tribunal comments that it is generally an unfair practice to make a covert recording of a meeting. This is because the person doing so knows about this and can tailor what he or she says accordingly, but the person who does not know is unable to do the same. In the present case, we can understand the Claimant's distress and anger about this as in the meeting he spoke about some private personal matters, and apart from anything else, these have now been revealed to the person who transcribed the recording.

45. There were also some anomalies in the Respondent's evidence about the recording. Mr Mudie's evidence was that he did not tell Ms Ingram that he was

making the recording. In paragraph 13 of her witness statement, Ms Ingram said that she could not now recall whether she was aware that Mr Mudie was doing so at the time. In cross-examination however, Ms Ingram said that she believed that she would have remembered if he had told her, which gave a somewhat a different impression from that in her witness statement.

46. The Tribunal found Mr Mudie's explanation for making the recording implausible. Although he said that he did indeed replay the recording in order to see how the meeting had gone, the Tribunal could not understand why he went to the lengths of making a covert recording for this purpose when he could have asked Ms Ingram for her view of his conduct of the meeting. He himself said that this was the only occasion on which he had recorded a meeting, yet on his account he did not ask Ms Ingram's opinion on the merits of doing so. His stated reason does not explain why he did not tell the Claimant what he was doing nor, on his account, Ms Ingram.

47. In any event, the Respondent accepts, and the Tribunal finds, that at this meeting the Claimant referred specifically to his disability and to that of his partner. He said that his own condition was long-standing and was usually controlled with anti-depressants. The Claimant gave considerable detail about his condition and about events in his personal life.

48. There was also some mention by Mr Mudie in the course of the meeting of the possibility of the Claimant spending more time at home, which the Claimant accepted meant working from home. Also in paragraphs 134-135 of his witness statement the Claimant referred to Mr Mudie promising him two days per week working from home and said that this offer was made on 10 October. The Claimant's case was that this offer was not sincere as all concerned knew that working from home would be impossible for him at that time. There was no evidence, however, that the Claimant had ever asked for or proposed a day working from home and had been refused this.

49. Then on 15 October Mr Mudie sent an email at pages 386-387 to all members of the team, including the Claimant. This set out in some detail the areas of work on which each member of the product team was to concentrate. RS was to lead in relation to V3. Other members were to focus on other products. The Claimant was to focus on the NHS products which Mr Mudie described as "game changing".

50. There was an issue as to why Mr Mudie sent this email. His stated reason was to ensure delivery of the various products. The Tribunal accepted his evidence on that point. The email is not directed to the Claimant alone but to the whole team and refers to eight areas of activity, of which the NHS is one. The Tribunal found it plausible that with various projects underway and a need to ensure that each was delivered on time, Mr Mudie would direct individuals to focus on particular aspects.

51. The Claimant returned to work on Monday 16 October. At the Respondent's invitation he attended one session with a therapist and reported

that he found it beneficial, although his evidence to the Tribunal was that he did not in fact find it helpful. He did not book any further sessions.

52. There was a meeting about the GP at Hand project on 27 October. The Claimant's case is that he made a protected disclosure orally at this meeting. In paragraph 45 of the document headed as his list of issues, but which was really further particulars, the Claimant described the disclosure in the following terms:

> "That the PR campaign for the GP at Hand launch was misleading, could cause serious harm to the public and that the strap line should be changed before the campaigns were finalised later that afternoon".

53. The strap line read "see an NHS GP in minutes for free 24-7". In paragraph 300 of his witness statement the Claimant stated that he said that this should be changed. He stated that a user who registered for the service would not be able to see a GP within minutes after signing up. He further stated that this was because the Respondent had engaged insufficient clinically trained support staff to process the forecasted number of applications and because once the user had completed registration they could not immediately receive a GP appointment until their GP records from their existing practice had been transferred.

54. There was some debate about whether any such concerns were well founded. Ultimately the Tribunal did not find it necessary to resolve that issue.

55. There was however a relevant issue as to whether the Claimant said these things at all at the meeting. His account was that he stated his concerns in no uncertain terms and that Mr Parsa replied "it is not f***ing misleading we are not changing it". The Claimant continued that Mr HB stated that he had concerns over the legality of the claims in the advertising material and that Mr Parsa replied to this "this is why I don't hire f***ing lawyers, I don't need a f***ing lawyer to tell me what to do".

56. In cross-examination Mr Parsa said that he categorically denied the Claimant's account. He said that there was discussion of the tag line but that no objection was made that it was misleading. Mr Mudie was also at the meeting: in his witness statement and in cross-examination he stated that the Claimant did not say that the strap line was misleading or should be changed. Later in his cross-examination, however, he said that Mr Parsa had "a strong view that the strap line should stay as it was". The Tribunal considered that it was probable that Mr Parsa would express a strong view of this nature only if it were being suggested that the strap line should be changed. This assisted us is finding, as we do, that the Claimant did express the concerns that he describes about the strap line.

57. The Claimant and his team worked over the weekend of 28-29 October to make changes to GP at Hand. This was the subject of issues 3(c) to (e) which have been withdrawn.

58. There remains an issue about payment for working over the weekend. We have already referred to the Claimant's contract and accept the Respondent's

evidence that senior managers were not as a matter of policy paid overtime. That is a common practice among many employers.

59. In this particular case it was agreed that team members would be paid £500 each per day worked over that weekend. On 1 November the Claimant sent to Ms Ingram a list of the team members at page 457 to be paid accordingly. He did not include his own name. Mr MT twice suggested in emails to the Claimant that he should do so (pages 465-466) but he did not. The Tribunal found that Ms Ingram's reason for not paying the Claimant was the policy that senior managers would not be paid overtime (and in addition that this probably explains why the Claimant did not ask to be paid). The Tribunal found that this decision was unrelated to the Claimant's disability.

60. On 1 November the Claimant sent an email to Mr Mudie at page 448 which he relied on as containing his second protected disclosure. This concerned a feature of the GP at Hand project whereby any applicant who had been waiting more than forty eight hours for their sign up to be completed would receive a text message. An engineer, Mr SP, had designed a script to achieve this. The relevant part of the Claimant's email read as follows:

> "We had iterated that it is not safe to execute a script on production at will, as there are inherent risks with using the production core system to complete such commands, without it having gone through proper, rigorous testing – the script SP created has not been tested against production code by QA and we run the risk of bringing down the entire system on launch weekend".

61. Mr Mudie's evidence was that when the Claimant wrote that it was "not safe" to proceed in this way, he must have meant unsafe in a technical sense (ie that there was a risk of failure) rather than in any clinical sense. In cross-examination the Claimant said that there was a clinical risk in that if the server went down users would not be able to access the application and so would not be able to arrange GP appointments, giving rise to a clinical risk.

62. The Tribunal concluded that the Claimant was advancing this argument with hindsight and in the light of having made his complaints of automatic unfair dismissal and public interest disclosure detriments. We found that the natural reading of the email was the technical one advanced by Mr Mudie and that the Claimant was not at the time asserting that there was a risk to the health and safety of users.

63. Further to this aspect Mr Mudie's evidence, which the Tribunal accepted, was that once he had been made aware of the issue, he checked it, and that his reaction to the situation was that the Claimant was doing his job in raising it.

64. A workshop took place on 2 November. The original invitation was sent to various people, not including the Claimant at that stage, at 1:42pm for a 2pm meeting (page 462). Ms MC forwarded the email to the Claimant at 1:56pm. Mr Parsa's evidence was that the Claimant was one of several people unintentionally omitted by his PA and that this was subsequently corrected. The

Tribunal accepted this evidence. The timing of the invitation supported it – this was not a long standing invitation – as did the fact that the Claimant was in the end included.

65. On 6 November the Claimant was due to deliver a presentation jointly with Mr Bate. This was due to start a few minutes after 9am. The Claimant's case was that he arrived just before nine and that at about three or four minutes past nine he was about to step up to the podium when Mr Bate started to give a different presentation without him. Mr Mudie's evidence was that the Claimant should have been there by 8:45 in order to make a prompt and orderly start, but he had not arrived by nine, and so Mr Bate went ahead without him. Mr Bate said he had no recollection of this event but that this was a very busy time and if something had not gone quite to plan that would not be particularly memorable.

66. The Tribunal accepts Mr Mudie's evidence about this aspect. It would normally be the case that someone giving a presentation would arrive a while in advance, particularly when it was a joint presentation and there might be last minute changes to discuss. The Claimant's evidence was that he had been working on this presentation over the weekend, and perhaps so had Mr Bate, which might explain why what he presented seemed unfamiliar to the Claimant. On his own account, the Claimant was ready to proceed a few minutes after 9am, by which time the others involved might well have decided to start without him.

67. The Claimant also stated that on 6 November Mr Mudie excluded him from an interview of a new member of the product team, saying that he saw MC, EM and RS conducting this interview. Mr Mudie's evidence was that there was no such interview on that particular date and that he was unware of what interview this might have been. He did not, however, exclude the possibility that an interview had taken place at some point without the Claimant. He said that it was not possible for every relevant person to interview every candidate and that if the Claimant was not involved, there would have been a business reason for it.

68. The Tribunal found Mr Mudie's explanation realistic given the pressure on the Respondent to deliver the various projects. We accepted that, if the Claimant was absent from a particular interview, this was because he was needed to attend to other matters.

69. It was common ground that additionally on 6 November, after presentations, Mr Parsa made an announcement about job titles. The Claimant's evidence was that he said that those with "head of" in their job titles would lose their roles. The Tribunal finds that this cannot be right, in the sense of losing their jobs or something similar, as there is no suggestion that this was what was intended. Later correspondence, to which we will refer, shows that what was intended was a rationalisation of titles throughout the organisation. There were at the time about five individuals, including the Claimant, who had "head of" job titles.

70. The Claimant also stated that at this same meeting Mr Parsa refused or failed to shake his hand, having shaken the hands of all the other team members after the presentations. Mr Parsa stated that he had no recollection of failing to

shake hands with the Claimant and that he would not do so (as suggested) because of any association with the Claimant's partner's disability.

71. The Tribunal found it improbable that Mr Parsa refused to shake the Claimant's hand for any malicious or improper reason. It is not suggested that he shook hands with everybody present except the Claimant. We considered it more likely that he shook hands with those who he thought deserved congratulation on that occasion, who did not included the Claimant as he had not given a presentation. However, the Tribunal essentially finds that the factual basis of this complaint has not been established: we find that Mr Parsa did not single out the Claimant in any way by not shaking his hand.

72. On 8 November the Claimant brought into the office some cakes that his partner had brought from the USA. It was not unusual that employees, including the Claimant, would bring in cakes to share. The Claimant's complaint was that Mr Parsa did not join in with the eating of the cakes. The Claimant asserted that this too was connected with his partner's disability.

73. Mr Parsa stated that he had no recollection of this event, and that he did not generally eat cake when this was available. He said that he would not, in any event, refuse an offer of cake for any reason connected with the Claimant's partners disability.

74. The Tribunal found that, although Mr Parsa probably did not join in with the eating of cake on this occasion, this was coincidental and not as a result of any conscious choice beyond (as we find) his usual practice on not eating cake. Essentially, the Tribunal found that this allegation was not made out on the facts.

75. There was a planning workshop at 2pm on 8 November. The Claimant's case was that Mr Parsa excluded him from this. Mr Parsa's evidence was that this was not arranged by him, but by Mr ST. The email inviting individuals to this meeting at page 487a was indeed from ST. It is the case, as pointed out by Mr Parsa, that Mr Bate was also not invited, and so it appears that ST had not singled out the Claimant. The Tribunal found that the factual basis of this complaint had not been established in that this was not done by Mr Parsa and it was not the case that the Claimant in particular was not invited.

76. There was then at 3pm on 8 November a GP at Hand planning and progress meeting, attended by various team members including the Claimant. It was common ground that Mr Mudie said something to the effect of "we should all be working through the night to deliver".

77. The Claimant's evidence was that Mr Mudie looked at him and at MC when he said this and that he added words to the effect of "we (meaning himself and Mr Parsa) are more likely to die" the suggestion being that they were older. When Mr Dennis put it to the Claimant that on his own evidence, the comment was not directed at him in particular, the Claimant replied that MC would never work beyond office hours and so it must have been meant for him.

78. The Tribunal found the Claimant's interpretation of this comment as being directed at him to be unrealistic. Mr Mudie said "we" not "you" and was not looking at the Claimant alone. Essentially, we found that this allegation was not made out on the facts.

79. Still on 9 November, at page 488 Mr TB raised an issue about what would occur when a GP at Hand patient downloaded and signed on to NHS Online, in terms of ability to book an appointment with a GP. The Tribunal was satisfied that this was a genuine issue. In paragraphs 198-199 of his witness statement, the Claimant described being approached by Mr Bate and TB about this issue and the need to make what he described as yet another last minute and major change to NHS Online. It was clear from what he said in his witness statement that the Claimant was very disturbed by this request. He said, "this was the final straw, enough was enough, I was a human being, not a robot." He further stated that this would require the entire NHS squad, including himself, to work every day including weekends until launch day until on 29 November, and that this would be to deliver a product that he believed to be of no value to patients.

80. This gave rise to the issue about thirty nine days' continuous work referred to in issue 3(m). The Claimant confirmed that he was not alleging that this was an express demand, but rather what he calculated would be the effect of the required changes.

81. In cross-examination the Claimant said that Mr Bate probably was not motivated by his depression in requiring this change, although Mr Mudie was. It seemed to the Tribunal that the Claimant was therefore accepting that Mr Bate had a genuine business or technical reason for seeking the change, and that the need for the change therefore actually existed. The Tribunal found that the same must have been true of Mr Mudie. TB's email shows that the issue had arisen. It was, we found, improbable that Mr Mudie or Mr Bate would require a change to the product for any reason other than a genuine belief that it was required. They would not want to delay the launch with unnecessary changes. We found that this was their reason for requiring this change and that the request was not related to the Claimant's disability.

82. During the afternoon of 9 November, the Claimant received an invitation to meet Ms Ingram on 15 November to discuss company levels and titles (page 545). This referred to the matter raised by Mr Parsa on 6 November. Other individuals were sent invitations in identical terms, for example Mr Bate at page 589e. The Tribunal found that Ms Ingram caused these invitations, including that to the Claimant, to be sent for the reasons stated, namely that she wished to discuss levels and titles.

83. The Claimant's evidence continued that during the afternoon of 9 November he began to break down emotionally. His partner came to collect him from work at about 6:15pm. As they were about to leave, Ms Ingram asked to speak to the Claimant and they went together into a meeting room.

84. There was some difference between the Claimant and Ms Ingram about the Claimant's emotional state at this meeting and as to which one of them

expressed uncertainty about where the Claimant's role fitted into the organisation. However, it is clear to the Tribunal that the Claimant was visibly distressed and that there was discussion about his role, in emotional terms.

85. It was common ground that the Claimant said words to the effect that the Respondent was trying to edge him out of the business. His evidence was that Ms Ingram said that he should speak to Mr Parsa. Ms Ingram's evidence was that she said that they should get together with Mr Mudie. Little turns on exactly what was said on this point; clearly Ms Ingram was saying that she could not resolve the matter herself. Whether Ms Ingram said that the Claimant should speak to Mr Parsa or to Mr Mudie or to both, the Tribunal found that her reason for doing so was the simple one that they would best placed to address his concerns.

86. It was common ground that Ms Ingram did not mention the Respondent's grievance procedure. The Tribunal accepted her evidence that her reason for this was that the Claimant did not say that he wanted to raise a grievance.

87. There was an issue as to whether the Claimant made some form of demand for £100,000 in the course of this conversation. Ms Ingram maintained that he did, and that although in paragraph 59 of her witness statement she referred to this as a pay increase, in cross-examination she said that she thought he meant increased stock options.

88. The Claimant was not cross-examined at length on this meeting as he became distressed while giving his evidence, but the Tribunal understood that he denied asking for or demanding money. It was difficult for the Tribunal to reach a firm conclusion on this point, as not only was the meeting emotional, but also so was the Claimant's evidence at this stage. We noted, as we will describe, that the Claimant did demand money soon after this meeting and that in a letter of 10 November at page 529 Ms Ingram referred to a demand for £100,000. Ultimately, it was not necessary to reach detailed conclusions about this aspect nor to determine the issues before the Tribunal: but we found that there was at the meeting discussion of money in some terms.

89. At 7:45pm on 9 November the Claimant sent a text message to Mr Mudie at page 399 which read:

> "Hi, can you call me. What I have to say should not be sent over email".

90. Mr Mudie replied that he would respond in ten minutes. In fact, about twenty minutes later Mr Mudie called the Claimant, by which time the latter had sent an email to him. The Claimant asked Mr Mudie whether he had read the email, Mr Mudie said he had not and the Claimant said that he better had. There was a dispute as to whether the Claimant asked Mr Mudie to call him back. The Tribunal found that whether he expressly said so or not, Mr Mudie would have realised that this was what he wanted given the original text message.

91. At 8.01pm on 9 November the Claimant had sent an email to Mr Parsa, Mr Mudie and Ms Ingram, pages 516-517. In this email the Claimant complained of

a continued hostile working environment within the product team, created by Mr Mudie. He criticised the lack of contribution, as he saw it, by various members of the team. He said that he was not recognised and that he was shouted at and bullied by RS. He said that he did every aspect of the product work for all of his product deliveries. He said that he had transformed the organisation and gave details of what he had done. Then he complained that he did not now know what his role actually was.

92. The Claimant then observed that there was one common denominator in that the individuals about whom he had complained were white but he, as he described himself, was brown. He said Mr Parsa had made a comment to an individual "why do you only hire Indians? No more Indians". The Claimant then wrote addressing Mr Parsa and Mr Mudie

> "Ali, you're an immigrant refugee, don't forget that. I am Indian and I was born here, in England. I have held a British passport since my birth can you say the same? Who are you to judge Indians? What makes you or the white race so superior?"
>
> "Gary, some of the things you come out with are truly disgusting and you should be ashamed of yourself".

93. The Claimant then referred to two colleagues, one of whom was fired and one retained, and suggested that the former was fired because he was gay. The Claimant referred to himself as gay and brown and said that the only reason he had not been fired was because he continuously delivered. The Claimant continued as follows:

> "Now, as I continue to own the precious 'GP at Hand' – shall we talk exit deal?"
>
> "The NHS project is a very controversial subject of course – one which I am worried about if I am honest. Let's agree a golden goodbye and we can part ways forever. Your precious, racist, homophobic RS can deliver it all for you"
>
> "Financially I have lost a significant amount of money since giving up my freelance career to join you permanently in a role, which did not exist …"

94. Concluding the email, the Claimant described himself as a mug, said that he trusted the offer would be a significant one, and finished with the following words:

> "Yes, I am depressed and have been suffering lately but only because of what you have done to me over nearly two years and then think I can be readily discarded? I don't think so".

95. Mr Mudie read this email after the brief telephone conversation described above. Thereafter he spoke to both Mr Parsa and Ms Ingram. All three of these

gave evidence that they decided that the best approach would be to not respond immediately. This was for two reasons: one was that they wanted to give the Claimant a chance to calm down, and the other was that they wished to discuss in greater depth how they should respond.

96. The Tribunal found both of these reasons to be entirely plausible. The Claimant's email was unusual and troubling. We found it natural that Mr Parsa, Mr Mudie and Ms Ingram would want to think carefully before responding and that they would hope that the Claimant might have calmed down by the morning. We found that their reasons for not responding that evening were as they have stated and that, contrary to the Claimant's suggestion, they did not fail to respond in order to "allow him to fester" or anything similar.

97. At 00:17 on 10 November the Claimant sent a further email to all three recipients at page 516 which read as follows:

> "To be completely clear, I am treating this as a constructive dismissal and will not be returning to work".
>
> "I expect a swift resolution and agreement to an exit package otherwise, I will be commencing further action".

98. The Tribunal accepted that each of Mr Parsa, Mr Mudie and Ms Ingram read this email at some point the following morning.

99. Meanwhile, at 00:35 and 00:45, still on 10 November, the Claimant sent messages to the company messaging system that would be available to be read by all members of staff. These read as follows:

> "Due to the continued discriminatory practices of our dear leader Ali Parsa and his side kick Gary Muddy [sic], I have decided to leave Babylon Health. I have genuinely loved worked with you all and I wish you all the best to Ali and Gary, you're truly awful. Best, Dylan"
>
> "And to be clear, I have resigned on my own accord due to the unscrupulous behaviour of our leaders, particularly, our incompetent CTO – COO [a reference to Mr Mudie], whatever he calls himself this week. Will miss the team, care of yourselves and keep in touch".

100. Meanwhile at some point during 9 to 10 November the Claimant had sent to his private email address twenty-eight company emails.

101. Also during the morning of 10 November the Claimant sent text messages to Mr Mudie and Ms Ingram. The Claimant wrote the following to Mr Mudie at pages 399-400.

> "If I do not hear from you in the next three hours, I am going to start my whistleblowing and slowly, over be course of the weekend, reveal everything and I mean everything. You had better call me c***"

> "I have everything – and I mean everything – I will destroy you for what you have done to me".
>
> "Next Monday, Babylon will have another big PR day this time, for a totally different reason, trust me I am not bluffing I have lost everything because of you".
>
> "Do you think the Sony scandal was bad? You haven't seen what's coming".
>
> "Wonder how Ali's meeting with Theresa will go next week?"

And then later

> "Just a teaser"
>
> "And to be totally clear, I don't care about the confidentially agreement. You will be exposed for the evil what you are, you have two hours".

102. The Claimant sent with these texts photographs of some of the contents of company documents that he had emailed to himself earlier.

103. To Ms Ingram the Claimant wrote:

> "There's plenty more"
>
> "I'll bring down Babylon like a house of cards unless your offer is a HUGE one".

104. At 11:08 on the same day Ms Ingram emailed the Claimant at page 518a saying "we are receiving your messages and I will come back to you later today". Then at 1:25pm Ms Ingram emailed a letter to the Claimant at pages 529-530. This referred to the various items of correspondence and said that the company accepted the Claimant's resignation. Ms Ingram wrote that the company would look into the very serious allegations that had been made. She stated that the Claimant had suggested that he wished to take matters to the press but would not do so for a payment of £100,000 or a "huge" offer. She said that he had started sending confidential company information and showing what information he would share with the press. Ms Ingram wrote that this would be a breach of the employment contract but also "your threats constitute blackmail which is illegal. If these continue we will have no choice but to contact the police to report this crime".

105. Ms Ingram referred to what she described as the threatening and abusive text messages sent to Mr Mudie and said that if the Claimant continued to send such messages legal action would be taken. She referred to the company-wide messages and said that the company did not regard the matter as constructive dismissal. Ms Ingram urged the Claimant to consult a lawyer and concluded her letter with the following words.

> "We require you to provide an undertaking by email … by 2:20pm today that you will not publish any confidential information about Babylon falling within the scope of clause 20 of your employment contract …failing which we will have to apply to Court for an emergency injunction and make a report to the police".

106. It is the case, as complained of by the Claimant in issue 3(s), that Ms Ingram's letter alleged that his messages constituted blackmail and that it threatened him in the sense quoted above with the police and/or a High Court injunction. The Tribunal found that Ms Ingram did this purely because of the content of the Claimant's communications, which could be regarded as amounting to blackmail, and in which he was threatening to try to damage the company by revealing confidential information. We found that her doing so was unrelated to the Claimant's disability.

107. In a similar vein, solicitors instructed by the Respondent wrote to the Claimant on 10 November asking for undertakings and an affidavit relating to the confidential information. The Tribunal makes the same finding in relation to the Respondent's reasons for causing this to be done, and as to this action being unrelated to the Claimant's disability.

108. The Claimant raised a lengthy grievance on 14 November. We can describe the relevant steps in relation to this quite shortly.

1. Ms Ingram decided not to meet the Claimant. She fairly briefly interviewed Mr Mudie and RS.
2. Ms Ingram then dismissed the grievance and invited the Claimant to submit any appeal to Mr Parsa.
3. Mr Parsa also decided not to meet the Claimant.
4. Mr Parsa dismissed the appeal.

109. Ms Ingram's explanation for not meeting the Claimant was three-fold, given in paragraphs 96, 97 and 98 of her witness statement. She said first that, as the Claimant had resigned, the ACAS code did not on her understanding apply and she was not required to meet him. Second, she said she did not want to meet him because of the abusive messages that he had sent. Third, she stated that she felt that she already had all the information she needed from him in writing, since his grievance letter ran to thirty three pages and included screen shots of texts messages, letters and emails.

110. The Tribunal considered that the third of these stated reasons was not very compelling and that the primary reason was probably the first given, in other words that Ms Ingram decided not to meet the Claimant because she believed that she was not obliged to do so. The Tribunal accepted that additionally she did not want to meet him.

111. Mr Parsa in paragraph 79 of his witness statement referred to the same reasons as given second and third by Ms Ingram. He was not cross-examined about this aspect but the Tribunal considered it likely that he too decided not to meet the Claimant in the main because he saw no obligation to do so. Ms

Ingram and Mr Parsa both said that they dismissed the Claimant's grievance and the appeal respectively on their merits. They were not directly challenged on this, although the Tribunal did not take this as indicating that the Claimant accepted their evidence on this point.

112. The Tribunal founds Ms Ingram's investigation of the grievance to be somewhat sketchy. She briefly interviewed RS and Mr Mudie and, as we have stated, did not speak to the Claimant at all. Mr Parsa did not undertake any further investigation in relation to the appeal.

113. Ultimately, the Tribunal found that Ms Ingram and Mr Parsa did not deal with the grievance as thoroughly as they might otherwise have done primarily because the Claimant had resigned and their understanding was that there was therefore no obligation to follow the provisions of the ACAS Code; and additionally because his correspondence had been hostile, aggressive and threatening to the company's interests. The Tribunal found that their decisions to deal with the grievance in this way were not influenced in any respect by the Claimant's disability.

The applicable law and determination of the issues

114. Although the order in which the issues are presented in the list of issues is not entirely chronological the Tribunal will for ease of reference follow that numbering.

Complaints under the Equality Act

115. Some of the allegations are presented as both direct discrimination and harassment. A dual finding is excluded by section 212(1) of the Equality Act 2010. In dealing with the question whether a particular item of conduct was because of disability (for the purposes of direct discrimination) or related to disability (for the purposes of harassment) the Tribunal will address the latter test first. This is because it is a less stringent test than the "because of" provision. If conduct was not "related to" disability then as a matter of practice it is extremely unlikely, if not impossible, that it could have been "because of" disability.

116. Section 136 of the Equality Act makes the following provision about the burden of proof:

(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.

117. In **Igen v Wong [2005] IRLR 258** and **Madarassy v Nomura [2007 IRLR 246**, both of which cases were decided under the previous anti-discrimination legislation, the Court of Appeal identified a two-stage approach to the burden of proof. At the first stage, the Tribunal would determine whether, in the absence of

an explanation, the facts were such that it could properly conclude that discrimination had occurred. In **Madarassy** the Court of Appeal emphasised that this must be a conclusion that the Tribunal could properly reach. There would have to be something more in the facts (although this might not of itself be very significant) than a difference of treatment and of protected characteristic, to enable the Tribunal properly to reach such a conclusion. If the facts were of this nature, the burden would be on the Respondent to prove that it did not in any way discriminate against the Claimant.

118. In **Hewage v Grampian Health Board [2012] UKSC 37** the Supreme Court observed that Tribunals need not always make a great deal of the burden of proof provisions, in the sense that these have nothing to offer when the Tribunal is in a position to make positive findings on the evidence one way or another.

119. Under issue 1, it was agreed that the Claimant had a disability at all material times.

120. Issue 2 was as to when the Respondent first became aware of the Claimant's disability, was it on 6 or 10 October 2017. The question of knowledge is relevant to all of the Equality Act complaints. An employer could not do something "because of" disability, as required for direct discrimination, if it did not know about the disability. Mr Dennis accepted, and the Tribunal found, that knowledge here means knowledge of the facts that establish disability, rather than knowledge of the legal concept of disability.

121. In relation to the duty to make reasonable adjustments, paragraph 20(1) of Schedule 8 to the Equality Act provides that:

> *(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know, -*
> *(a)…….*
> *(b) …..that an interested disabled person has a disability…..*

122. This provision introduces the prospect of constructive knowledge of disability for the purposes of a reasonable adjustments complaint. It is necessary to determine not only whether the employer did know of the disability (again meaning the relevant facts, not the legal concept) but also whether it could not reasonably be expected to know.

123. The point on which the Tribunal sought further submissions before giving its judgment and reasons concerned knowledge in relation to harassment, and was as to whether constructive knowledge of disability was sufficient, or actual knowledge was required. In either case the knowledge required would be as to the relevant facts, not as to the legal concept of disability.

124. Mr Dennis made further submissions on this point. The Claimant did not because, as we have recorded above, he had left the hearing early on in the Tribunal's attempt to give its reasons, and did not return. Mr Dennis cited the judgment of HHJ Eady QC in the Employment Appeal Tribunal in **Ali v New**

College Manchester Limited **UKEAT/0154/16** in which the EAT proceeded on the basis that both direct discrimination and harassment required knowledge of the factual basis or "constituent elements" of a disability. This was in contrast to the position with regard to reasonable adjustments where constructive knowledge of those elements would be sufficient.

125. Mr Dennis further argued, and we accepted, that the connection required between the act complained of and the disability is looser with regard to harassment ("related to") than with regard to direct discrimination ("because of"). This, however, refers to the type of connection required, and does not indicate any difference regarding the knowledge required of the disability.

126. The Tribunal therefore concluded that, in relation to the complaints of harassment, actual knowledge of the factual basis or constituent elements of disability was required.

127. The Tribunal found that the Respondent was aware of the Claimant's depression as from the conversation between him and Ms Ingram on 6 October 2017. We found, however, that the Respondent (through Mr Mudie and Ms Ingram) only became aware of the facts that established that the Claimant was disabled within the meaning of the Equality Act in the course of the meeting on 10 October 2017. In particular, it was only at this stage that the Respondent became aware of the duration of the Claimant's condition and the fact that it was usually controlled by medication.

128. In the event, the issue as to the date of the Respondent's knowledge of the Claimant's disability was only relevant to issue 3(aa). The other allegations of harassment and/or direct discrimination all arose after 10 October, by which time the Respondent had actual knowledge of the disability. The complaints of failure to make reasonable adjustments were unaffected by any question of knowledge during the period 6-10 October as the Claimant was absent from work on sick leave at that time. In practical terms, any question of adjustments could only arise once he was able to return to work. Furthermore, the Respondent would need some time to consider and put into effect any adjustments, and it would be unlikely that there could be a failure in respect of the duty to do so within a few days of learning of the Claimant's condition.

129. The Tribunal will now address the individual complaints listed under direct disability discrimination. Unless otherwise indicated these also arise as allegations of harassment, and we will deal with them at this stage in relation to both causes of action.

130. Section 13 of the Equality Act 2010 makes the following provision about direct discrimination:

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

131. Section 26 of the Equality Act provides as follows in relation to harassment:

(1) A person (A) harasses another (B) if –
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) The conduct has the purpose or effect of –
(i) Violating B's dignity, or
(ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
(4) In deciding whether the 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.

132. Issue 3(aa) was the complaint added by amendment in relation to the meeting of 10 October 2017. The Tribunal's relevant findings of fact are that at the time of deciding to record the meeting Mr Mudie was aware that the Claimant was suffering from depression although he was not aware of the facts that would have enabled him to know that the Claimant's condition was such as to give rise to a disability. The Tribunal has rejected Mr Mudie's explanation of why he decided to record the meeting and, the Tribunal concluded, that it could properly reach a decision that his decision to do so was related to the Claimant's depression. The fact that he had been informed of this condition might have influenced Mr Mudie's decision to make the recording.

133. Potentially, therefore, the burden of proof provisions were engaged. However, given the decision that we have made on the point of law which the Tribunal drew to the parties' attention immediately before given its reasons subject to that point, and on which only the Respondent has made submissions, constructive knowledge of disability would not be sufficient. We have concluded that for both direct discrimination and harassment, actual knowledge of the factual basis or constituent elements of disability is required. For this reason, the complaints based on this allegation fail.

134. Issue 3(a) was an allegation of direct discrimination only. The Tribunal found that the decision to permanently remove the NHS delivery work from the Claimant was not less favourable treatment because it was part of a general allocation of responsibilities in which all team members, including the Claimant, were to focus on particular aspects of the Respondents work. We have also found that this was done for genuine business or operational reasons and was not done because of the Claimant's disability.

135. Issues 3(b) (in relation to direct discrimination), (c), (d) and (e) have been withdrawn.

136. In relation to issue 3(f), it is the case that Ms Ingram decided not to pay the Claimant overtime for the weekend of 28-29 October 2017, but the Tribunal has found that this was done for a reason that was not related to his disability.

137. In relation to issue £(g) the Tribunal has found that this was not made out on the facts because ultimately the Claimant was not excluded from the meeting on 2 November 2017. To the extent that he was invited at a later point in time than others who were also invited, the Tribunal has found that this was inadvertent and so not related to his disability.

138. Issue 3(h) was not made out on the facts because there was no change of plan in relation to the presentation on 6 November 2017 other than one arising from the Claimant's late arrival. This finding equally means that the Claimant's not making his presentation was not related to his disability.

139. In relation to issue 3(i) the Tribunal has found that, to the extent that the Claimant was absent from a particular interview, this was because he was needed elsewhere was not related to his disability.

140. Issue 3(j) concerned the change of job titles for those with "heads of" the Tribunal found that this was not less favourable treatment of the Claimant as there were proposed changes of title throughout the company and that furthermore the loss of the "head of" title applied to all five with such titles, not just to the Claimant. Additionally, the Tribunal has found that this was a genuine rationalisation of titles and so not related to the Claimant's disability.

141. Issue 3(k) has not been made out on the facts in the sense that the Tribunal has concluded that this was not a situation where the Claimant was "excluded" from a meeting by Mr Parsa. We have found that the decision about attendees at the meeting was made by Mr Tsimelzon. Furthermore, this was not a case of less favourable treatment of the Claimant as Mr Bate was also not invited. Finally, there was no evidence that Mr Tsimelzon knew about the Claimant's depression and therefore no basis on which the Tribunal could conclude that the failure to invite him to the meeting was related to that. Given Mr Bate's non-attendance, the Tribunal found that it was probable that Mr Tsimelzon decided for operational reasons that it was not necessary to invite those concerned with delivery to that particular meeting.

142. In relation to issue 3(l), the request or requirement for last minute changes to the NHS Online product was indeed made. However, the Tribunal has found that this was done for genuine business and/or technical reasons and that this request or requirement was not related to the Claimant's disability.

143. Issue 3(m) follows from issue 3(l) and the Tribunal's conclusions and reasons are the same.

144. Issue 3(n) is an allegation of direct discrimination only. It is the case that the Clamant was invited to a meeting on 15 November to discuss titles within the company. However, this was not less favourable treatment of the Claimant as the same invitation was sent to the other employees with "head of" titles. Furthermore, the Tribunal's finding as to the reason for these invitations being sent excludes this being done because of the Claimant's disability.

145. Issue 3(o) was an allegation of direct discrimination only. The Tribunal has found that the reason why Ms Ingram did not mention the grievance procedure to the Claimant was that he had not said that he wanted to raise a grievance. She did not do so because of his disability.

146. Issue 3(p) was also an allegation of direct discrimination only. The Tribunal concluded that whether Ms Ingram said that the Claimant should raise his concerns with Mr Mudie or Mr Parsa or both, this was not less favourable treatment. They were the individuals to whom his concerns would most naturally be addressed. We have also found that his was the reason why Ms Ingram said what she did: she did not say this because of the Claimant's disability.

147. Issue 3(q) concerned Mr Parsa, Mr Mudie and Ms Ingram not responding to the Claimant's email of 9 November at 20:01 until 11:08 the following day. The Tribunal has found that they did this for the reasons that they have given, namely to give him time to calm down and to give themselves the opportunity to discuss and consider how to respond. We find that this was not in any way related to the Claimant's disability.

148. Issue 3(r) was an allegation of direct discrimination only. The Tribunal's findings and reasons are essentially the same as those for issue 3(q).

149. Issue 3(s): it is the case that Ms Ingram stated that the Claimant's communications amounted to blackmail, and it is the case that she made what could be regarded as a threat of being arrested or subject to an injunction. The Tribunal has found that Ms Ingram wrote as she did because she believed that what the Claimant was saying did indeed amount to blackmail and because she considered that involving the police and/or the Courts might be necessary to protect the Respondent's interests. This was unrelated to the Claimant's disability.

150. In relation to issue 3(t), the reasoning given in relation to issue 3(s) applies to the instructions to the Respondent's solicitors to write to the Claimant in the terms that they did.

151. Issue 3(u)(v)(w)(x) and (y) all concern the Claimant's grievance. Here, the Tribunal has found that Ms Ingram and Mr Parsa dealt with the grievance and the appeal in a somewhat perfunctory manner, but that they did so for reasons unrelated to the Claimants disability.

152. The Tribunal now turns to the complaint of harassment related to disability, to the extent that the allegations have not already been dealt with under 3(aa) to (y) above. The remaining issues were 5(c), (e), (f), (5(a) having been withdrawn in relation to harassment).

153. Issue 5(c) has not been made out on the facts in that the Tribunal has found that there was no refusal to shake the Claimant's hand but rather that Mr Parsa simply did not shake his hand. To the extent that Mr Parsa made a decision about whose hand to shake, the Tribunal has found it probable that he decided to shake the hands of those he considered deserved congratulation on that

particular occasion. This was unrelated to the Claimant's disability or to his partner's disability.

154. The Tribunal's conclusions are similar in relation to issue 5(e). The Tribunal has found that Mr Parsa did not on this occasion eat any cake, but that this did not amount to a positive refusal to do so. We have also found that, to the extent that he did not eat any cake, his reason was probably that he did not want any, and that this was unconnected with the Claimant's or his partner's disability.

155. Issue 5(f) also fails on the facts in that the Tribunal has found that it is not the case that Mr Mudie told the Claimant specifically that he should be working through the night, but rather that this was a generally addressed comment. Furthermore, we have found that Mr Parsa said what he did in order to encourage employees to make a special effort and not for any reason related to the Claimant's disability.

156. The Tribunal now turns to the complaint of failure to make reasonable adjustments. The provisions in section 21 of the Equality Act include the following as to the duty to make reasonable adjustments:

(3) The first requirement is a requirement, where a provision, criterion or practice ["PCP"] of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

157. In issue 9 the Claimant relied on two PCP's namely:

1. Being required to work exponentially long hours to midnight and at weekends.

2. Not being permitted to work from home.

158. With regard to the first suggested PCP, this was not a case where the Claimant was expressly required or requested to work particular hours. However, it was common ground that he had to work long hours in order to deliver the products. In cross-examination Mr Mudie readily agreed that the Claimant would be working many more than forty hours per week.

159. The Tribunal therefore found that there was a practice of working long hours.

160. As to the second PCP, as we have said, at the meeting on 10 October Mr Mudie told the Claimant that he could work from home two days per week. The Claimant's evidence was that this was not possible and he never sought to take this up. Had the Claimant asked to work from home on a particular occasion or occasions and had been refused the position might have been different. But, given that Mr Mudie said that he could work from home, and the Claimant never tested this but instead took it that this was impossible, the Tribunal found that there was no PCP that he could not work from home.

161. The Tribunal therefore asked itself whether the PCP that has been established, namely that of working long hours, placed the Claimant at a substantial disadvantage.

162. The Claimant's case was that the medication for his depression stopped working when he suffered a lack of rest and relaxation and when he was under "extraordinary" stress. There was nothing to contradict this evidence, and the Tribunal finds that this was the case. The Tribunal found that, when such an effect occurred, it would amount to a substantial disadvantage.

163. Issue 10 asked whether the Respondent knew, or could reasonably be expected to know, that the Claimant was likely to be placed at that disadvantage. There was no evidence that the Claimant informed the Respondent of this disadvantage, nor (the Tribunal found) could the Respondent be expected to know this without being told. The Claimant had worked long hours in a stressful environment for some months. Also, his evidence in paragraph 82 of his witness statement was that he was able to cope with "particularly stressful" circumstances and that the disadvantage arose when these became "extraordinary stressful". This is not a distinction that the Respondent could be expected to know about without being informed. This means that the complaint of failure to make reasonable adjustments fails.

164. With regard to issue 11, the same reasoning would mean that it would not have been reasonable to require the Respondent to make adjustments in this regard.

165. That said, the Tribunal would comment that many employers might have taken a more proactive approach to enquiring about or monitoring the Claimant's wellbeing after his return to work on 16 October and in the light of their knowledge of his condition. This, however, is not sufficient to establish a failure to make reasonable adjustments.

<u>Complaints of public interest disclosure detriment and constructive unfair dismissal</u>

166. The first issue here (issue 12) is whether the Claimant made a qualifying disclosure. Section 43B of the Employment Rights Act 1996 provides in part as follows:

(1)…..a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:

(a) ……
(b) ……
(c) ……
(d) That the health or safety of any individual has been, is being or is likely to be endangered.

167. Issue 12(a) asks whether the Claimant disclosed information during the meeting of 27 October and in the email of 1 November. We have found that information was disclosed on both occasions.

168. Our findings about the email of 1 November however mean that the Claimant did not believe that the disclosure was made in the public interest, and that any such belief would not have been reasonable. As we have found, the disclosure meant that the script was operationally "unsafe" only. Similarly, (with reference to issue 12(d)), the Claimant did not at the time believe that the information tended to show that the health of safety of any individual was likely to be endangered, nor would any such belief have been reasonable. That email does not therefore amount to a qualifying disclosure.

169. We find the position to be different, however, with regard to the meeting of 27 October. On this occasion the Claimant disclosed information, namely that the strap line said what it did and that a user who registered for the service would not in fact be able to see a GP within minutes of signing up. These matters, the Tribunal found, would amount to information even though the first element might be obvious and the second element might be open to argument.

170. We find that the Claimant did believe that the disclosure was in the public interest and that this was a reasonable belief. It was expected that thousands of people would sign up to the service with a view to using it as their means of accessing a GP.

171. As to whether the Claimant believed that the information tended to show that the health or safety of any individual was likely to be endangered, there was as we have said a dispute about whether there was a period of "limbo" when a patient would be effectively stranded between GPs. We accepted, however, that the Claimant generally and reasonably believed that there would be a period after registration when a user would not be able to obtain a routine GP appointment via GP at Hand as their records would not have been transferred. Although it would always be possible to gain access to medical attention one way or another in an emergency, a delay in obtaining treatment could present a danger to the health of an individual. There was no suggestion that such a danger needed to be life-threatening or similar in order to quality under s.43B(1)(d).

172. The Tribunal therefore found that the Claimant had made a qualifying disclosure.

173. Issue 13 then relied on issues 3(g), 3(i) and 3(k) as the detriments to which the Claimant was subjected on the grounds that he made a protected disclosure. Our earlier findings about these and about the reasons why they occurred apply here. Our positive findings as to what occurred and why it occurred mean that these were not done on the ground that the Claimant had made a protected disclosure. (There is also an additional point in relation to issue 3(k), namely that there was no evidence to suggest that the person responsible for the alleged detriment, Mr Tsimelzon, was in any way concerned about the disclosure). The detriment complaint therefore fails.

174. Turning to the complaint of constructive unfair dismissal, issue 14(a) asks whether there was a breach of the contract of employment; 14(b) asks whether any such breach was repudiatory.

175. In this respect the Claimant relies on issues 5(a) to (g). His case about constructive unfair dismissal is not confined to the detriments relied on as a separate complaint.

176. Again, the Tribunal's earlier findings about issues 5(a) to (g) apply. Those findings lead us to conclude that there was no breach of contract. In particular:

176.1 Issue 5(a) was withdrawn, save to the extent that it went to the complaint of failure to make reasonable adjustments.

176.2 Issue 5(b) repeated 3(c), (d), (f) and (g). Of these, (c) and (d) were withdrawn. With regard to (f), the Claimant did not ask to be paid for working over the weekend, and Ms Ingram did not offer to pay him because there was a policy not to pay managers under such circumstances. In relation to (g), the Tribunal has found that this was not made out on the facts, and that aby lateness in inviting the Claimant to the meeting was inadvertent.

176.3 Issue 5(c) failed on the facts, and the Tribunal has found that there was an innocent explanation for Mr Parsa not shaking the Claimant's hand on this occasion.

176.4 Issue 5(d) repeated 3(i), (j) and (k). The Tribunal has decided that with regard to (i), the Claimant was absent from an interview because he was required elsewhere. Issue (j) involved a genuine rationalisation of job titles and was not confined to the Claimant. Issue (k) was not made out on the facts.

176.5 Issue 5(e) did not involve any snub to the Claimant or his partner.

176.6 Issue 5(f) failed on the facts in the sense that Mr Mudie's remark was not addressed to the Claimant specifically.

176.7 Issue 5(g) repeated 3(l), (m) and (q). The request in (l) was made for genuine business or technical reasons. Issue (m) followed from (l). In relation to (q), the Tribunal has accepted that Mr Parsa, Mr Mudie and Ms Ingram did not immediately reply to the Claimant's 9 November email because they wanted to give him time to calm down and themselves time to consider how to respond.

177. All of the above findings lead the Tribunal to conclude that there was no breach of contract by the Respondent and that if, contrary to this, there was a breach, it was not repudiatory. If we are wrong about that and there was a repudiatory breach of contract then for the complaint to succeed it would be necessary to find that the sole or principal reason for the treatment constituting a

breach of contract was the Claimant's making of a protected disclosure (issue 15). Again, the Tribunal's findings on issues 5(a) to (g) and the positive findings as to the reasons why these events occurred exclude this.

178. The complaint of automatic unfair dismissal therefore fails.

Polkey – Chagger

179. Finally, and on a contingent basis, the Tribunal has considered the principals in the cases of **Polkey** and **Chagger** in case we are wrong in any way in our conclusions.

180. The Respondent's case is that, if the Claimant had not resigned, he would have inevitably been dismissed because of his misconduct. Ms Ingram asserted in paragraphs 111-112 of her witness statement she would have dismissed the Claimant for either or both of:

1. His comment about Mr Parsa in his email of 9 November.
2. His actions in sending confidential material to his personal email address and using this in the way that we have described above.

181. The Claimant's case was that, had he been made the subject of disciplinary action because of these matters, he would have asserted that his actions were an aberration caused by his mental state at the time. This was not something that was put to Ms Ingram for comment in the course of her evidence, but the Tribunal considered that, event faced with that explanation, it was inevitable that the Claimant would have been dismissed and that the Respondent would have been acting within the range of reasonable responses in doing so. As Ms Ingram pointed out, the Claimant was already the subject of a final written warning. His conduct in relation to the information and the threats and demands that he made meant that the Respondent could not be expected to have confidence in him as an employee, regardless of his undoubted ability and work ethic. This, the Tribunal concluded, would inevitably be so whether the Respondent considered that the Claimant's actions had been calculated, or accepted that they amounted to an aberration.

182. The Tribunal therefore would have concluded that it any event the Claimant's employment would have been terminated within a short period, such as one week, from the date of his resignation.

183. In the result therefore, the complaints are all dismissed.

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Employment Judge Glennie

Dated: 16th July 2019

Judgment sent to the parties on:

19th July 2019

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For the Tribunal Office