EMPLOYMENT TRIBUNALS

Claimant: Mr D Shaw

Respondent: Intellectual Property Office

Heard at: Reading **On: On: 29, 30 April, 1-3, 7-10 May 2019**

Before: Employment Judge Gumbiti-Zimuto
Members: Mrs VH Parsons and Mr J Appleton

Appearances
For the Claimant: In person
For the Respondent: Mr M Williams (Counsel)

JUDGMENT having been sent to the parties on **27 August 2019** pursuant to Rule 62 of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In a claim form presented 2 December 2016 the claimant complained of unfair dismissal, unlawful deduction of wages and discrimination on the grounds of disability. The respondent denies the claimant's claims.

2. The claimant gave evidence in support of his own case. The respondent has relied on the evidence of Peter Mason, Karl Whitfield, Helen Edwards and Julyan Elbro. All the witnesses produced statements which were taken as their evidence in chief. The Tribunal was provided with a trial bundle of six volumes and 2504 pages of documents. From these sources we made the following findings of fact.

3. The claimant was offered employment by the respondent as a B2 grade Associate Patent Examiner. Before starting employment, the claimant was asked to complete a health declaration form which required that the claimant provide consent for 'Capita Health Solutions' to access his medical records. The health declaration asked the claimant a number of questions including; whether he had a disability; whether he had a medical condition; whether the claimant had any need for specific arrangements to assist in the performance of any aspect of his job and whether the claimant was aware of any medical problems that may affect his ability to

work regularly or effectively. To all these questions the claimant gave the answer no. The claimant was also asked to indicate whether he had any difficulty with 13 listed matters, including concentration, that interfere substantially with his ability to carry out normal day to day activities. The claimant did not indicate any.

4. The claimant commenced employment on 1 September 2014. After a six-week introductory programme of lectures and tutorials the claimant joined examining group EX18 led by Deputy Director Peter Mason. The claimant's revising officer was Richard Kerslake.

5. At his request the claimant was assigned a window seat in the area of the open plan office space occupied by EX18. The claimant found that the noise levels made it difficult to concentrate and asked to be moved. The claimant was moved to a new desk at which although not insulated from noise the claimant found it easier to concentrate.

6. Peter Mason, to foster a collaborative work environment, arranged regular group meetings and required everyone in EX18 to attend. EX18 also had monthly quality circle meetings at which B2 grade Associate Patent Examiners were required to attend to discuss work related matters. The claimant found it difficult to contribute at these meetings which he observed as being monopolised by specific extroverted individuals.

7. In around January 2015, after three months employment, the claimant had a mid-term appraisal carried out by his revising officer. The claimant describes being encouraged by the feedback which he felt was a fair reflection of his performance. Peter Mason comments on the claimant's performance at this time as being of a good standard.

8. The claimant describes how his relationship with Richard Kerslake "*soured slightly*" when it was "*apparent that Richard Kerslake was struggling to fulfil his output obligations while simultaneously revising the voluminous amount of work forwarded by me*". The claimant goes on to say that Richard Kerslake "*seeking to stem the tide acquired difficult cases from another revising officer and instructed him to undertake these tasks*" which were difficult cases clearly marked as not being for training.

9. The claimant refers to a group meeting which was addressed by a guest speaker on Autism at which one of his colleagues explained that he was on the Autism spectrum.

10. During the first 6 months the claimant had declined to participate in the various out of hours team building and social events organised in group EX18 save for one occasion when Peter Mason explicitly asked the claimant to attend.

11. The claimant found the noise levels in the open plan area became elevated. The claimant considered that this was exacerbated by team building initiatives introduced by Peter Mason.

12. The claimant raised the issue with Peter Mason informing him that he had difficulty concentrating because of the noise levels. Peter Mason informed the claimant that he was concerned that the claimant was not engaging with the group and explained his view that the claimant's progression as a patent examiner was being hindered because of his nonparticipation with the group.

13. Towards the end of the first six months revising period Peter Mason at a group meeting explained what to expect from the final performance appraisals. In about April 2015, the claimant's final performance appraisal was carried out by Richard Kerslake. The claimant was scored a ten (out of ten) for output, five (out of ten) for quality and one (out of four) for other.

14. "Other" is scored based on the employee's behaviours and wider impact. The claimant's score of one for other was lower than the usual mark for a B2, which was a score of two. B2's are usually scored two because they have little opportunity to engage in activities to get a higher score on "other". The claimant's score of one was given because Peter Mason and Richard Kerslake considered that the claimant had been unwilling to take constructive criticism of his work and he had not engaged with his peers e.g. by participating in group activities.

15. Richard Kerslake explained to the claimant that his performance scores for 'other' were reduced because, in Richard Kerslake's view, the claimant had "*little interaction with the group*" which was echoed by Peter Mason who as countersigning officer was concerned by, "*social isolation*". The claimant objects to these comments which in his view were not an appraisal of his work but were "*an assessment of my social acumen*".

16. In contemplation of making a complaint about his marks the claimant asked Peter Mason to provide him with his score. The claimant was told that there was usually a delay between the employee attending a meeting with his revising officer and the formal score being issued.

17. The claimant responded expressing concern that there was a spreadsheet with comments on the claimant's performance freely circulating and he was not being told what his score was. Peter Mason's response told the claimant that "*it is unfortunate if unofficial copies circulate*". Later Peter Mason told the claimant that "*there's been a misunderstanding, the list is often circulated to C2s and ROs as part of their senior management team*

role". The claimant did not accept the explanation that was given by Peter Mason.

18. After the first six-month period the claimant changed revising officer from Richard Kerslake to Amanda Mason.

19. The claimant was demotivated by the outcome of the appraisal process and decided to 'work to rule' by conforming only to the minimum stipulated targets. The claimant's output in April and May was reduced to just above the minimum level and just below the minimum level respectively. Issues had arisen about the claimant's flexi-time. The claimant was called to a meeting with Peter Mason and Heather Holder a HR Advisor.

20. Peter Mason saw the meeting as an opportunity to discuss the claimant's performance (his work to rule), the operation of the flexi-time system and the comments the claimant made in the PMF (appraisal) for the first revising period. In the meeting, on the 3 June 2015, they discussed the claimant's flexi-time working, the claimant's appraisal and the claimant's conduct in respect of the claimant's output. Following this meeting the claimant's performance improved.

21. The claimant continued to face difficulties with noise levels, he raised this in correspondence to Peter Mason and discussed it with Amanda Mason. Amanda Mason suggested that desk partitions are installed to block out noise. The claimant agreed and Amanda Mason requested desk partitions be installed for the claimant. The claimant describes these as "*not wholly successful*". The claimant requested that Peter Mason allocate him a desk in an unoccupied area elsewhere in the building.

22. To address the engagement issues that had arisen during the first revising period Amanda Mason suggested that the claimant shadow a meeting between senior management. When an opportunity arose, Peter Mason informed the claimant it was not possible because "*it's a bit late to get you on the list*" and he stated that "*I'll let you now the next interesting meeting and arrange for you to come along*".

23. At the end of the claimant's second revising period Amanda Mason completed a final appraisal for the claimant. The claimant asked to be provided with a copy of the redacted version of the master spreadsheet containing all the B2 examiners appraisal scores for the first revising period; after initially refusing Amanda Mason provided the claimant with a redacted copy of the spreadsheet. After reviewing the spreadsheet, the claimant composed a complaint. Shortly after the claimant received a copy of the spreadsheet Peter Mason was told that the claimant had said that the was able to identify individuals from the redacted spreadsheet.

Peter Mason considered that there had been a potential breach of data privacy and reported the issue to Julyan Elbro and HR.

24. On 21 October 2015 the claimant made a complaint which was dealt with by the respondent as a grievance. The claimant said that he did not want his complaint to be redistributed to any other individuals, but he did give his consent for the complaint to be shared with HR. The claimant did not want to attend a meeting to discuss the complaint and indicated a preference to proceed with written exchanges however Julyan Elbro wished to meet with the claimant on 27 October 2015.

25. Julyan Elbro met with the claimant and then later interviewed Richard Kerslake, Peter Mason Amanda Mason and Brian Woods. Julyan Elbro wrote to the claimant on 30 November 2015 informing him that his complaints had not been upheld.

26. The claimant's revising officer changed from Amanda Mason to Brian Woods in about October 2015.

27. Around November 2015 five new Associate Patent Examiners joined EX18. The claimant noted an elevation in the noise levels and pressed Peter Mason about alternative seating arrangements.

28. At a six-week review meeting on 16 November 2015 the claimant and Brian Woods discussed a number of matters including the problems the claimant had about noise levels, his view on quality circles, his position on group related activities, social events, and views about the performance appraisals process.

29. On 19 November 2015 the claimant missed a quality circle meeting. Attendance at quality circle is mandatory. The claimant sent an email to Peter Mason explaining his non-attendance: "*I elected not to attend this afternoon 'Quality Circle' as I had not been included in any discussions regarding its operation.*" The claimant went on to say that he did not find Quality Circle meeting beneficial, he found them "*more as a social gathering… than as a learning tool.*" There followed an exchange of emails between the claimant and Peter Mason. In one email Peter Mason to help the claimant get more out of the quality circle sessions, suggested the claimant discuss with Brian Woods *"courses/mentoring/coaching if it will enhance the experience".* Peter Mason describes one email from the claimant as *"aggressive and insubordinate".* Concerned by the nature and tone of the claimant's emails and to convey to the claimant that his behaviour was unacceptable Peter Mason invited the claimant to discuss his email.

30. At the disciplinary meeting on the 27 November 2015 the claimant acknowledged that his email was inappropriate and apologised but added that it was not baseless and that he had felt provoked and was treated poorly. The claimant was issued with a verbal warning to be placed on his personal file but to be disregard for disciplinary purposes after a period of six months, provided the claimant’s conduct improved to satisfactory level.

31. On 30 November 2015 the claimant received Julyan Elbro’s grievance outcome report. Julyan Elbro rejected the claimant’s criticisms of the performance appraisal system, rejected the claimant’s criticisms of his revising officers, rejected criticisms of the overall management of the group and rejected criticism of the use and circulation of the B2 performance spreadsheet.

32. In December 2015 the claimant was summoned to undertake jury service and was provided with a laptop to carry out work on the days that he was not required for jury duty.

33. In his grievance outcome report Julyan Elbro asked that further investigation take place as to the question of the claimant’s possible access to an unredacted version of the B2 performance assessment moderation spreadsheet. The claimant was asked to attend an investigation meeting with Phil Thorpe. The claimant gave information to the investigation by responding in writing to written questions. The conclusion of the investigation was that the claimant did not recover redacted confidential information from a copy of the B2 spreadsheet that Amanda Mason provided him. The investigation report was dated 8 February 2016. It was not until 15 March 2016 that the claimant was informed that the investigation into his alleged misconduct had been concluded and that there was no case to answer.

34. At the suggestion of Brian Woods, the claimant met with a staff counsellor, Ceri Davis, in March 2016. At his meeting with Ceri Davis the claimant explained the nature of his disability and the problems that he had experienced. This was the first time that the claimant disclosed that he had a disability. The claimant consented to Ceri Davis discussing the claimant’s anxiety difficulties with HR. It is not clear to the Tribunal how much she knew about the claimant’s condition or what she told HR.

35. The claimant had requested to be moved out of Peter Mason’s group to another EX group. Peter Mason had formed the view that the claimant should move to another EX group. The claimant was to be moved to EX21. On 30 March 2016 the claimant met with Joanne Pullen who was the Deputy Director of EX21. Also present at this meeting was the claimant’s new revising officer Karl Whitfield. During the meeting, among

other things, the claimant mentioned his requirements in respect of his seating arrangements.

36. The meeting did not go well. The claimant wrote to Heather Holder in HR setting out his concerns. The claimant stated that he had hoped that the group change would be an opportunity to meet new colleagues and a fresh start in more hospitable and positive working environment instead he was "*treated as if … some sort of naughty school kid*". In his view, Joanne Pullen had been given the understanding that the Claimant had been transferred for reasons associated with his (mis)conduct. The claimant expressed the view that the he would be forced to work in an environment that is detrimental to his mental health. He complained that he was being treated with the utmost contempt. The claimant explained that he had a genuine issue that should entitle him to a small level of dispensation: "*It may well be inconvenient, but is that not insignificant when compared to the state of my mental health and well-being?*" The claimant also explained that having seen where his desk was that this was likely to be a significant difficulty for him to deal with and asked for an alternative working arrangement or location to be devised.

37. The claimant wrote to Heather Holder again on the 31 March 2016. In this email he included the following: *"the working arrangement available within the EX21 block is by no means conducive to my ability to work, or indeed to my continued wellbeing. I realise it may seem 'fussy' or 'difficult', but respectfully you are not me, and therefore have limited, if any, appreciation for the difficulties I face absent significant personal space. When I come to work my goal is to work, but if my mind is triggered into a constant state of hyper vigilance owing to a feeling of being 'surrounded' or 'under constant observation' then, for perhaps obvious reasons, I am simply unable to concentrate… I must insist, and as a someone with a protected characteristic, the organisation has something of a duty of care to facilitate, within reason, the request I am making (whether it introduces minor 'difficulties' for managers, or otherwise).*"

38. On 1 April 2016 the claimant and Karl Whitfield had a meeting at which Karl Whitfield set out how he expects to work with the claimant and other matters. Karl Whitfield later set these out in an aide memoire for the claimant. The claimant describes this document as setting out "*in entirely dogmatic terms the manner in which he preferred to work with Associate Patent Examiners.*" Later that day the claimant wrote an email in reply to Karl Whitfield setting out a request for compromise in view of their oppositional "*working styles and working preferences*" and also pointing out that he had made a request to HR to find him an alternative desk to the one that he had been directed to work from.

39. The claimant pressed Heather Holder to deal with his desk location request as a matter of urgency and asked that he remain where he was located when working in EX18 until the matter was resolved. On 4 April 2016 after trying to do as instructed and work from the desk in EX21 the claimant went back to his desk in Ex 18. The claimant informed Karl Whitfield about this.

40. On 4 April 2016 Heather Holder wrote to the claimant explaining that his current location in EX18 was due to be occupied. She copied the email to, among others, Helen Edwards. The claimant was informed that he could install the desk partitions at the new desk location in EX21. The claimant was asked to "*try it out and see how you get on*". Heather Holder explained that Joanne Pullen and Karl Whitfield were unaware of *"any personal issues you may have regarding seating arrangements prior to meeting with you.*" Heather Holder stated that in her conversation with Ceri Davis she did not discuss the fact that the claimant had a protected characteristic or whether the claimant was covered by the Equality Act 2010 and said that *"the more information you can provide on this would help us.*" The claimant responded explaining that he was "*completely unable to work in GB05*" and that "*if I am made to sit at that desk my output, and my performance as an examiner, will drop no doubt into poor performance levels. Moreover, I will become so unhappy and so stressed that I will be forced to tender my resignation.*" Karl Whitfield wrote to Heather Holder saying *"that as matter of urgency we need to get to the root of what Daniel has referred to variously in recent days as special needs, protected characteristic and mental health*" and pointing out that *"if there is an issue we should make reasonable adjustments."*

41. A meeting was arranged to discuss matters with the claimant. Heather Holder stated that the claimant had been working for the respondent *"for 18 months without us being aware of you having any issue such as mental health, so that has come out of the blue*."

42. The meeting took place on the 6 April 2016 at which present with the claimant were Karl Whitfield and Heather Holder. The claimant was asked to provide more information about the nature of his 'protected characteristic', because without specifics it was difficult to understand and help him: the claimant was asked whether when he used the word 'anxiety' it was 'a turn of phrase' or a diagnosed medical condition. The claimant's response was that he did not wish to go into further private information but that when he used the word anxiety it was 'not a turn of phrase'. The claimant said, when he requested to Peter Mason that he move desks it was due to noise issues and that "*he was unwilling to share anything further and that it caused him great psychological issues*". Heather Holder explained that where health issues were raised referral to occupational health was standard. Following the meeting it was agreed that that the

claimant could work from an unoccupied glass partitioned office near to EX 21. The glass partitioned office was only a temporary solution.

43. The respondent's position was that the claimant request for reasonable adjustments could not be considered properly without the claimant explaining the basis for the adjustments. The claimant was reluctant to provide further information and was resisting any referral to occupational health which he considered to be a threat that if he did not attend the referral then his request would be refused. The claimant continued to be concerned that his emails to his managers on the issue were being copied to additional individuals without his permission.

44. In around April 2016 Joanne Pullen was replaced by Helen Edwards who was on a short-term promotion as head of EX21. The claimant met with Helen Edwards on the 21 April 2016. In that meeting they discussed the claimant's seating arrangements; the claimant stated that his preferred option was home working; the claimant was urged to agree to a referral to occupational health.

45. In May 2016 the claimant's performance rating in the performance appraisal for the revising period with Brian Woods was an 'Acceptable' performance rating. The claimant considered his work "*more befitting an 'Outstanding' rating.*"

46. The claimant wrote to Julyan Elbro concerning his performance rating for October 2015 to March 2016. The claimant was unhappy with the 'Acceptable' rating and asked for guidance on how to appeal. In a email dated 19 May 2016 the claimant stated that he had a medical condition covered by the Equality Act 2010 but did not elaborate further. The claimant wrote to Heather Holder indicating his intention to appeal and also requesting a referral to occupational health.

47. The claimant became unwell and was off work from 31 May 2016 until the 2 June 2016.

48. Following the claimant's return to work on the 8 June 2016 it was announced that EX21 would be relocated to the third floor. The claimant wrote to Helen Edwards with a proposal as to where he could be seated on the third floor. Helen Edwards informed the claimant that they could consider seating arrangements when she has the final plan for the third floor and that if the claimant's OH referral has taken place before the move they could take advantage of the outcome of that to determine the most appropriate seating arrangement for the claimant. In further correspondence with Helen Edwards the claimant said: *"I am not entirely sure how, or indeed why, you've been informed of my pending OH assessment. To be clear though, I made the request for a referral in*

excess of three weeks ago and have not yet been given a date.” In her communication with the claimant Helen Edwards had raised the issue of the claimant not engaging with his colleagues asking whether this was something the claimant could discuss with his revising officer, Karl Whitfield, or a staff counsellor. The claimant’s response was to draw Helen Edwards’ attention to the Equality Act 2010 and stating that requiring everyone to participate in team building activities was discriminatory.

49. On 9 June 2016 the claimant was informed that his OH assessment would take place on the 1 July 2016.

50. On the 14 June 2016 the claimant wrote to Jessica Ross indicating an intention to make a complaint. In that letter the claimant wrote: *“By way of information disclosure, please find the attached document … detailing a medical condition. I am aware that the office has, until this point, had no prior knowledge of said medical condition and therefore has not been legally required to provide myself with reasonable adjustments.”*

51. The claimant complained that he had been discriminated against on the grounds of his disability, because it had been asserted that his performance or abilities as an examiner are limited (despite the said limitations being protected characteristic traits). The claimant made reference to the perceived lack of involvement or participation with the office; the claimant complained of having been victimised for making a formal complaint; the claimant complained that his correspondence with managers containing details of his medical condition was forwarded to Helen Edwards despite his consent for her involvement not having been sought.

52. As a reasonable adjustment the claimant asked that he be allowed home working or a desk substantially away from others; the removal of the disciplinary warning; that markings in his performance appraisal be readjusted; that his performance ranking of ‘Acceptable’ be adjusted to ‘Outstanding’ and that he be issued with an apology.

53. The claimant’s letter of 14 June 2016 was treated by the respondent as a grievance complaint and he was written to by Lillian Stone on the 16 June 2016 inviting him to attend an investigation meeting under the grievance procedure on the 27 June 2016.

54. The claimant responded to Lillian Stone by reiterating that the letter to Jessica Ross was not a complaint it was *“purely for the purpose of disclosing information”* and that he would be making his complaint on the 4 July 2016. The claimant stated that as he had *“not yet submitted a complaint per se”* he saw *“no reason to attend any meetings or for you to*

commission any investigations". The claim again made clear that he did not consent to his confidential information being disclosed.

55. There followed an exchange of correspondence between the claimant and Lillian Stone in which the claimant was seeking a substantive response to the proposals that he had made but was met with a response to the effect that the respondent wished to wait until the OH assessment had taken place before the matter could be addressed. When the claimant suggested a face to face meeting, he was met with the response that the meeting should await the outcome of the OH assessment. The claimant wanted a face to face meeting "*to discuss the matter broadly*" so that "*complaint submissions can be effectively avoided*".

56. The claimant's OH assessment took place on the 1 July 2016. The OH report included the following passages;

> "Mr Shaw does describe long term difficulties related to interactions with others and coping in group situations. Relevant to employment he reports heightened difficulties related to working amongst colleagues and with prestation work.
> …
> In my opinion Mr Shaw is likely to be covered by the Equality Act. I do feel further assessment is required to establish the severity of difficulties. I would advise you to consider reasonable adjustments. Please meet with Mr Shaw to discuss what you can accommodate.
> …
> What reasonable adjustments are recommended?
> Mr Shaw does feel he was coping in his previous work location; please discuss whether he can work in a location with enhanced privacy."

57. The OH report was sent to Lillian Stone on the 6 July 2016. A meeting between the claimant, Lillian Stone and the claimant's line manager was to be arranged. The claimant objected to the presence of his line manager at the meeting, the claimant suggested that Julyan Elbro attend the meeting instead. This was agreed by Lillian Stone, but the meeting could not take place until 21 July 2016.

58. The claimant asked that Karl Whitfield carry out a mid-term performance appraisal before the meeting with Julyan Elbro and Lillian Stone. Karl Whitfield did not agree and suggested that the meeting with Julyan Elbro and Lillian Stone should take place first before the mid-term review. The claimant tried to get Helen Edwards to intervene so that Karl Whitfield prepared the report before the meeting: she did not intervene. Helen Edwards told the claimant: "*I can assure you that you are not being*

disadvantaged compared to your peers as not all B2 mid-term reviews for this group have been conducted yet."

59. On 15 July 2016 the claimant wrote to Helen Edwards complaining about the conduct of Karl Whitfield. Glyn Hughes was asked to act as the investigating officer into this complaint. Glyn Hughes summarised the claimant's complaint as having two aspects (1) that Karl Whitfield sought to delay the claimant mid-term review process in order that any subsequent adjustments to the claimant performance assessment could in effect be cancelled out and (2) that Karl Whitfield attempted to discuss a confidential sensitive matter with the claimant whilst it could be over heard by others.

60. The meeting to consider the OH report took place on Thursday 21 July 2016. Present at the meeting were the claimant, Julyan Elbro and Lillian Stone.

61. Julayn Elbro explained that he was not clear on what the claimant's issues were and until he understood them, he could not understand how any particular accommodation was going to help address the issues. He stated that the more information he had the more help he could give the claimant in tailoring any adjustments and accommodations, in looking at additional training to ensure that any disadvantage the claimant was suffering was eliminated. The claimant's response was that his medical records were an entirely private matter and that he considered that the respondent had all the necessary information to make the changes asked for.

62. The claimant explained that he was unable to concentrate when other things were going on around him, that he found it difficult interacting in groups of three or more people and that he struggled to take in oral feedback.

63. The claimant requested a number of adjustments. These were, that the verbal warning that Peter Mason had given him on 27 November 2015 was revoked and a staff bonus paid in full; that his rating of "acceptable" be changed to "outstanding" and that he was paid a bonus; that he was given five days paid leave; that he was permitted to work from home; that in the interim he is given a lap to work with while homeworking arrangements were set up; that the number of absences used to trigger the formal absence management process was increased. The claim was asked if he would consent to the respondent having access to his medical records for the for the sole purpose of making adjustments to his role, the claimant refused. His position was that the respondent had all the information it needed to make the adjustments requested.

64. At the end of the meeting the claimant was told that he would be told about an interim solution on Monday 25 July 2016. Following the meeting Lillian Stone wrote: "*Meeting very successful in terms of understanding requirements for adjustments however, didn't deal with any of the discrimination claims and as not right process and explained to Daniel that he can evoke the grievance process if he wishes to pursue these further. We have an immediate next step of finding a room for Daniel to work in rather than in an open environment".*

65. Julyan Elbro considered that it was paramount to move the claimant to a quieter place to work. He identified a one to one meeting room within the area where the claimant EX21 group was moving to that would give the claimant the quieter environment that he wanted and still keep him within the group. Julyan Elbro instructed that the claimant's desk to be placed in the one to one room. The claimant was on leave on the 22 July 2016 he was to be informed when he returned to work.

66. Over the weekend of the 23/24 July 2016 EX21 moved to the third floor. The claimant's desk was cleared, and his computer equipment was placed in an individual room.

67. On 25 July 2016 the claimant attended work to find steps that had been taken. He was unhappy with this action taken without informing him: the claimant had arrived at his desk to find nothing there. The claimant made it clear to Lillian Stone that he was wanting a homeworking arrangement to be put in place and to be supplied with a laptop that he could use for working from home in the interim. The claimant did not use the individual room that had been identified and continued to work from the open plan office.

68. On the 26 July 2016 in an email to Helen Edwards the claimant explained his frustration and said that "*I will be putting myself on sick leave for the entirety of tomorrow, and presumably the remainder of this week."* The claimant did not return to work after that date.

69. Lillian Stone wrote to the claimant apologising for the failure to communicate with the claimant before he attended work on Monday 25 July 2016. She went to say that "*we are becoming increasingly concerned by the tone and content of your e-mail correspondence in which an innocent mistake has been misinterpreted … as humiliating and discriminatory*" and went to warn that "*if this kind of correspondence continues we are concerned that it could lead to a breakdown in the employment relation*". The claimant's response included the comment that *"it is my position that such a breakdown has already occurred… the IPO has completely failed in its duty of care towards myself".*

70. On 29 July 2016 Glyn Hughes informed the claimant that he was going to investigate the claimant's complaint made on the 15 July 2016 about the conduct of Karl Whitfield. Helen Edwards was to act as the claimant's revising officer while the complaint against Karl Whitfield was investigated. The claimant was invited to confirm Glyn Hughes understanding of the grievance or to indicate that he wished to have a meeting. The claimant wrote to Glyn Hughes on 1 August 2016 further explaining his grievance.

71. On 1 August 2016 the claimant wrote to Lillian Stone stating that he was making complaints of discrimination under the Equality Act 2010 referring to sections 13, 15 and 20-21.

72. On 2 August 2016 Julyan Elbro wrote to the claimant setting out his response to the claimant's request for reasonable adjustments following the meeting of the 21 July 2016. The decision was that the respondent was willing to make workplace adjustments including granting the claimant five days paid leave, increasing the sickness absence procedure trigger from six to eight days, providing the claimant with an individual room to work from, allowing the claimant to work from home two days a week on a trial basis for three months and assigning the claimant to another line manager while his complaint against Karl Whitfield was investigated.

73. A retroactive uprating of the claimant's performance markings was not agreed and the claimant's most recent PMF ratings were not adjusted. The claimant was not given a laptop for work, Julyan Elbro considered a laptop unsuitable for carrying out the claimant's role. In the respondent's view, while a laptop was appropriate for when the claimant was on jury service, to enable the claimant to keep in contact with the office via email to be kept aware of what was going on, it was not suitable for carrying out the claimant's examining role. In the claimant's view, a laptop was adequate for carrying out the full range of duties at least on a short-term basis and he contends that he had done so when on jury service. Homeworking is usually only granted for employees who are grade C1 and above. In Julyan Elbro's view, the claimant was still in a trainee role, he still needed to discuss cases with his revising officer, to attend training sessions and other events including quality circles. Julyan Elbro decided to grant the claimant two days homeworking per week initially on a trial basis.

74. The claimant issued a second complaint, on the 2 August 2016, about a failure to make reasonable adjustments in that complaint he made it clear that he would only be satisfied with home working at least three days a week.

75. The respondent appointed an independent HR consultant to *"review and fully investigate"* the claimant's complaints about discrimination by a

number of individuals but mainly Peter Mason and the complaint regarding reasonable adjustments. The person appointed was Catherine Oliver. It was agreed that whilst the grievance was being investigated the claimant would be granted special leave initially for four weeks, however, this was extended until the resolution of the grievance process.

76. The respondent began making arrangements to enable the claimant to commence his home working arrangement.

77. After 25 August 2016 the claimant was informed that Glyn Hughes's investigation into the grievance concerning the conduct of Karl Whitfield was not upheld. The claimant challenged the investigation, in part, on the basis that there was a failure to consider whether he was discriminated against under section 13 Equality Act 2010. Glyn Hughes produced an addendum to his report addressing this but did not change the outcome. The claimant challenged the decision, correspondence ensued relating to the decision and the matter was considered on appeal. The claimant's appeal was rejected.

78. On the 23 September 2016 Catherine Oliver sent the claimant a copy of her report. The claimant did not accept the conclusions. In correspondence about the report the claimant states: *"I touted the possibility of reaching a settlement agreement. It was apparent that a continued employment relationship was unlikely to be possible."*

79. Catherine Oliver's report was considered by Liz Coleman who informed the claimant, on the 5 October 2016, that his grievance complaints had not been upheld. The claimant was informed that his period of paid leave was to end and that he was to return to work on the 10 October 2016. The claimant appealed. In his appeal the claimant said that "*it is in the IPO's interest to construct a settlement agreement to resolve this issue."*

80. The claimant was informed that his revising officer on his return was going to be Helen Edwards and that he was being moved to Ben Buchanan's group. The claimant informed the respondent that he was unwell, and not capable of working. The claimant did not return to work on 10 October 2016.

81. The claimant was invited to an appeal meeting in respect of Liz Coleman's decision following Catherine Oliver's report. The claimant declined a meeting and asked that the matter be considered on the basis of written representations. Sean Dennehey considered the claimant's appeal and, on the 26 October 2016, informed the claimant that he was "*satisfied that Liz Coleman's conclusions and her reasoning were sound and reasonable"*. The claimants appeal was not upheld.

82. On 10 November 2016 the claimant was informed that arrangements had been made for a home working IT Kit to be delivered to the claimant's home.

83. The claimant wrote to Caroline Edmunds stating, among other matters, that he would not be returning to work until the full package of reasonable adjustments had been implemented. The claimant referred to the adjustments that had been requested before the meeting with Julyan Elbro and Lilian Stone on the 21 July 2016 relating to the competency framework, the performance figures and promotion criteria. The claimant went on to say that: "*Until such time as the IPO has implemented these adjustments, the IPO will be in breach of the Equality Act 2010. I will therefore be claiming back, with interest, the entirety of any financial loss arising from this ongoing situation. In the event that such a breach extends beyond Friday 18 November, I regret that I will be forced to consider myself as having been dismissed."*

84. Julyan Elbro replied to the claimant's letter. The reply included the following: *"Regrettably, the view which I share with a number of your colleagues is that the working relationship has indeed fundamentally and, it would appear, irretrievably broken down. Despite the IPO's best efforts it is clear that there is again an impasse preventing any progress whatsoever towards your return to work."* The claimant was invited to attend a meeting to discuss *"where we go from here".* The claimant was urged to attend the meeting and told that if he did not *"I will have no option but to make a decision in your absence based on the information available to me. I must make you aware that one potential outcome is dismissal upon notice."*

85. It was eventually agreed that the meeting would not take place in person, but the meeting would take place by telephone on 18 November 2016. The claimant wrote to Caroline Edmunds making complaints about her on the 4/11/2016 and 10/11/2016. The claimant complains that these complaints were not investigated but were dismissed out of hand. In his telephone discussion with the claimant on the 18 November 2016 Julyan Elbro said that the complaints had "*no basis to them in any sense*" and cited these complaints as examples of instances where it illustrated how the employment "*relationship has entirely broken down*". Julyan Elbro went on the explain that he considered that communicating with the claimant by email had not worked.

86. Following the telephone conversation with Julyan Elbro the claimant wrote to Julyan Elbro resigning his employment. The claimant resigning his employment in a letter of the 18 November 2016 stated that it was clear to him that the respondent was not going to implement the adjustments; that respondent was seeking to terminate his employment; that the situation

had arisen because of complaints that the claimant had made; that the respondent was not willing to follow its own grievance policy and investigate his complaints. The claimant's letter included the passage: *"Following a telephone conversation held this afternoon, it has become clear that the Intellectual Property Office will not be implementing these adjustments and, further, that it will not be offering 'Disability Leave' for any further delay. … Given the aforementioned I regret to inform you that, as of Friday 18 November, I must tender my resignation as Associate Patent Examiner. As I consider that the Intellectual Property Office to have made it impossible for me to continue to be employed in this role."*

87. On 21 November 2016 Julyan Elbro wrote to the claimant accepting the claimant's resignation.

88. The claimant replied to Julyan Elbro stating that he had hoped, having read his letter, *"the IPO may seek to negotiate so as to allow us to continue with the employment relationship."* The claimant also wrote that: *"the IPO has made it impossible for me to continue working as things stand, and I would implore you to reconsider before we are embroiled in a lengthy legal dispute. Is there really nothing that can be done, or an agreement that can be reached, in order for this situation to be avoided?"* Julyan Elbro's response was to say that the respondent was not willing to revisit the decision to accept the claimant's resignation.

Unfair dismissal

89. Section 95 (1) (c) Employment Rights Act 1996 provides that an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employers conduct. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment.

90. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

91. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract.

92. The test of whether there has been a breach of the implied term of trust and confidence is objective. The conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".

93. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents.

94. Was the claimant dismissed? Was the respondent in fundamental breach of the contract of employment, and/or did the respondent breach the so-called 'trust and confidence term', did it without reasonable and proper cause, conduct itself in a manner calculated to likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant? The claimant relies on a number of matters in support of his case.

Neither contest nor concede the claimant's disability, contrary to the actions of a reasonable employer?

95. The claimant's complaint in this regard must relate to events before the claimant resigned his employment with the respondent if the respondent's position in respect of his disability is to be capable of amounting to breach of the implied term of trust and confidence. We are not satisfied that the claimant has shown that the respondent's attitude towards his assertions that he was someone who was disabled shows that there was a breach of contract.

96. The respondent did not deny that the claimant had a disability, the respondent was seeking to get the claimant to explain the nature of disability and the claimant was unwilling to do so. The claimant did not say to Peter Mason that he suffered from a medical condition that caused an impairment amounting to a disability. The first time that the claimant informed Julyan Elbro that he had a medical condition which was covered by the Equality Act 2010 was on 17 May 2016, subsequently when he was asked to expand on the nature of his condition and provide access to his medical records for the purposes of getting more information on his condition the claimant refused. Although the claimant told Karl Whitfield that he had a medical condition he did not explain what it was, whether it was mental or physical, what the symptoms were or what effect they had on the claimant's work. Although the claimant informed Helen Edwards of his need for reasonable adjustments he did not explain what the reason was or give her information on which she could assess the proper adjustments that were required.

97. The claimant's position in respect of his medical evidence was to keep it confidential. The claimant did not agree to an occupational health referral until May 2016. We are unable to conclude that there was anything in the respondent's attitude towards the claimant's correct assertion that he had a disability that amounts to a breach of contract. At all times up until about 21 July 2016 the respondent was seeking to get the claimant to explain the nature of his condition so that it could be understood what adjustments were required.

Subject the claimant to a protracted and continuing campaign of disability discrimination and/or fail to treat the claimant in accordance with stipulated equality and diversity procedures.

98. The Tribunal have not been able to conclude that the claimant was subject to a protracted and continuing campaign of disability discrimination. The Tribunal have not found that the claimant failed to treat the claimant in accordance with stipulated equality and diversity procedures.

Threaten to and actively seek to dismiss the claimant absent permissible grounds.

99. The Tribunal do not consider there is evidence that the respondent was seeking to dismiss the claimant. The time when dismissal was considered was when Julyan Elbro wrote to the claimant in November 2016 and clearly stated that he wished to discuss the claimant's continuing employment. The claimant himself at about this time wrote in terms suggesting that he considered that the way he was being treated by the respondent called his continued employment into question. On 4 November 2016 the claimant wrote to Julyan Elbro in terms which included the passage: *"In the meantime I intend to remain on leave until such time as these questions have been answered, and the tenability of my continued employment decided upon."* Julyan Elbro was clear in his evidence that he considered that as a result of the claimant's conduct there had been an irretrievable breakdown in the relationship of trust and confidence between the claimant and the respondent caused by the breakdown of the claimant's relationships with his colleagues. It is the view of the Tribunal that this was a view for which there was justification and that for Julyan Elbro to seek to discuss the claimant' ongoing employment with the respondent in the circumstances was justified.

Fail to properly and impartially investigate the claimant's grievances.

100. All the claimant's grievances were investigated by the respondent. From the evidence that we have heard we have not been able to conclude that they were not fairly and impartially investigated. Both Glyn Hughes and Catherine Oliver carried out thorough investigations. The investigation by Glyn Hughes included a further addendum addressing the claimant's criticism that the investigation failed to address the issue of direct disability discrimination and found that there was no direct disability discrimination.

Attempt to and/or unduly influence an external investigation into the claimant's grievances, in particular by obfuscating the relevant issues and/or by painting a picture of that the claimant was oppressive and unreasonable.

101. The Tribunal have not been able to conclude that this criticism and complaint against the respondent is made out by the evidence we have heard.

Disregard the claimant's right to privacy and/or breach an obligation of confidence and/or fail to treat the claimant's personal sensitive information in accordance with stipulated data handling procedures.

102. This complaint is not made out by the evidence we have heard. The high watermark of the claimant's case in this regard is that there were occasions when one manager informed another manager about a matter relating to the claimant when the claimant had asked that they do not do so. In each instance when this has been shown to have occurred there was in our view a justification for sharing information by the relevant manager.

103. Karl Whitfield made the point that he explained to the claimant that emails the claimant sent him may be copied or forwarded to others where appropriate, where input was needed from more senior management or HR. Julyan Elbro explained that the respondent only ever seeking to act in the claimant's best interests disclosing information across departments to ensure progress is made and to assist the claimant.

104. We have not found an instance where the respondent was in breach of any specific legal obligation in respect of data handling. We also note that the claimant's article 8 rights to privacy. The claimant has the right to respect for his private and family life, his home and his correspondence. This is not an unrestricted right. There shall be no interference with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. In this case where the respondent has a duty to address issues of potential disability discrimination and where the claimant is making complaints that his health and wellbeing is being affected by his work place environment the circumstances might justify some interference to ensure that the information is given to those who need to know to ensure that the claimant is able to work unimpeded.

Made unlawful deductions to the claimant's wages.

105. We have not been able to find that there was may deduction from the claimant's wages. The claimant complained about failure to be given bonuses. The claimant did not qualify for a bonus. There was deduction from wages in not paying that claimant a bonus.

Failed to set objectives and/or objectively appraise the claimant's performance.

106. This complaint is not proved by the claimant. There is no basis for concluding that the respondent failed to set the claimant objectives. There was clear evidence given by Julyan Elbro and Peter Mason as to the operation of the respondent's appraisal process. While the claimant

criticises the appraisal process there is no justification for a conclusion that the claimant's performance was not objectively appraised. The markings of the claimant and justification for the low marks in particular in respect of "other" in the PMF was in our view cogently explained and it is not for the Tribunal to apply its own test as to whether the markings were correct.

107. The conclusion of the Tribunal is that the claimant was not dismissed.

Unlawful deduction from wages

108. There was no unlawful deduction from the claimant's wages.

Knowledge of the claimant's disability

109. The claimant has referred the Tribunal to the case of Donelien v Liberata UK Limited [2018] EWCA where it was stated that for an employer to have "constructive knowledge", that is knowledge that the employer could reasonably be expected to have had, the employer must have knowledge that the employee had a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. The court of appeal referred to the decision in Gallop v Newport City Council [2013] EWCA Civ 1583 where Rimer LJ stated

> before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person; and (ii) that for that purpose the required knowledge, whether actual or constructive, is of the *facts* constituting the employee's disability as identified in section 1(1) of the DDA. Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties; and whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Schedule 1. … provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a 'disabled person' as defined in section 1(2).

110. The claimant relies on communications from the claimant's managers or communications to the claimant's managers from which he states that the Tribunal is able to infer that the respondent acquired knowledge of the claimant's disability.

111. The Tribunal do not agree with the claimant's chronology in so far as it seeks to place the respondent in a position where it was aware of the claimant's disability in March 2015. In our view the correct date from which the respondent is to be taken to have knowledge of the claimant's disability is in March 2016. The respondent's knowledge before that date was limited to the claimant making at various times various managers aware of the effect of his disability in ways that were entirely disembodied from any impairment. The claimant did not inform the respondent of the cause of the "effects", so while the claimant may have been known by the respondent to have isolated himself from others, or the fact known by the respondent that the claimant was unable to11 contrate due to noise levels, there was no indication that this was due to any impairment. There was no reason why the mangers would have known that these effects were due to an impairment. Until all the facts are known the employer does not have constructive knowledge of the disability. This remained the position until March 2016. In March 2016 it was possible to say that the respondent knew the facts constituting the claimant's disability because by then it became possible to say that the respondent knew that the claimant had a mental impairment. We note that at the time, during 2016, the claimant did not consider that the respondent had knowledge of the impairment and had not been required to provide reasonable adjustments until 14 June 2016.

Direct discrimination on grounds of disability (section 13 and section 39(2)(d) Equality Act 2010)

112. 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.

113. 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. This does not apply if A shows that A did not contravene the provision.

114. Has the respondent subjected the claimant to the following treatment falling within section 39(2)(d) Equality Act 2010? **-** On 13 July 2016 Karl Whitfield withheld the claimant's mid-term review because the claimant was attending a meeting to discuss reasonable adjustments.

115. By 13 July 2016, while the respondent may have been actually or constructively aware of the claimant's disability Karl Whitfield was not. The claimant had specifically refused to tell Karl Whitfield what the connection between his meeting with Julyan Elbro and HR was with the mid-term review. To the extent that Karl Whitfield had any knowledge of matters relating to the claimant's disability they related to the claimant's working environment and not with the any matter he understood to relate to the mid-term review.

116. There are two different phases to consider in respect of the complaint of direct discrimination. The first stage is the period before Helen Edwards sent her reply to the claimant's email of the 13 July 2016, when Karl Whitfield was unaware of the purposes of meetings between the claimant, Julayn Elbro and HR, and the period after the email of the 14 July 2016 (copied to the claimant) when Karl Whitfield was aware of the purpose of the claimant's meeting with Julyan Elbro and HR.

117. During the first stage Karl Whitfield explained clearly to the claimant he would not carry our the mid-term review before the claimant had his meeting with Julyan Elbro and HR. Karl Whitfield asked the claimant to explain the connection between meeting that was due to take place and the mid-term review. The claimant refused to do so. Karl Whitfield explained to the claimant that as *"the outcome of your discussions with HR and Mr Elbro will have implications for your mid term review and that obviously neither of us can know in advance what the outcome will be, I do not feel able to review your mid-term point until the outcome is clear."*

118. When Karl Whitfield became aware of the purpose of the meeting, the second stage, his position remained the same. Karl Whitfield became aware that the purpose of the meeting with Julyan Elbro and HR was to discuss reasonable adjustments. Prior to the claimant writing in his email of the 14 July 2016 he had been careful not to explain the subject of the meeting to Karl Whitfield. When the claimant and Karl Whitfield subsequently discussed the claimant's request for a mid- term review, Karl Whifield's view was that he should hold off scheduling the review until after the meeting because if he carried out the review before the meeting and it transpired that changes to the review were required as a result of the outcome of the meeting, then he would need to conduct the review again. Karl Whitfield considered that this would not be a good use of management time.

119. It is not proved that Karl Whitfield withheld the claimant's mid-term review because the claimant was attending a meeting to discuss reasonable adjustments on the 13 July 2016. Karl Whitfield was only aware of the nature of the meeting from the 14 July 2016.

120. The refusal to carry out a mid-term review was not less favourable treatment of the claimant. Karl Whitfield was due to go on annual leave around this time; other B2 examiners had not received their mid-term reviews at this stage. The Tribunal has not been able to conclude that a non-disabled person whose circumstances are the same as the claimant, but for the disability, would have been treated differently by Karl Whitfield. The conclusion of the Tribunal is that there was no less favourable treatment of the claimant.

121. If the claimant had been able to establish that there was less favourable treatment of him, in respect of the period up to 13 July 2016 (which is the scope of the complaint set out in the list of issues), we would in any event

have concluded that he has not established facts from which we could conclude that the difference in the treatment was because of disability. The extent to which Karl Whitfield understood the claimant to have an impairment that affected him in his work was confined to the claimant's seating arrangements, consideration of the claimant's disability was not any part of Karl Whitfield's considerations when he decided to act as he did in respect of the mid-term review in the first phase.

122. We accept the evidence that Karl Whitfield has given about his lack of knowledge about the nature of the claimant's disability or its relevance to the mid-term review. Karl Whitfield has established that the claimant's disability was not any part of the reason for the decision he took in respect of the mid-term review.

123. The claimant's complaint of direct disability discrimination is not well founded and is dismissed.

Discrimination arising from disability (section 15 Equality Act 2010)

124. Section 15 of the Equality Act 2010 provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. This 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.

125. The something arising in consequence of disability is that the claimant tended to process everything going on around him and register every detail, resulting in the claimant not being able to concentrate when things were going on around him. Further the something arising in consequence of disability is that the claimant found it difficult to interact with groups of three or more people. Further the something arising in consequence of disability is that the claimant found it difficult to take in oral feedback.

126. The claimant alleges that he was treated unfavourably because of something arising from disability when in 2015 Peter Mason failed to secure a change of seating for the claimant. The conclusion of the Tribunal is that when Peter Mason was approached by the claimant in January 2015 and discussed the claimant's seating arrangements, he did take the claimant's comments into account and in February 2015 agreed to move the claimant to another part of the open plan area away from the B2 examiners to the area occupied by the senior examiners. In July 2015 the claimant discussed noise levels around the area where the claimant sat with Amanda Mason but did not require a move at that time. The claimant discussed seating arrangements with Peter Mason again in September 2015 and further discussions followed where the claimant expressed dissatisfaction with his seating arrangements. At various times the claimant was told that there was no alternative seating. Later, when the claimant was offered a move to a quite area within another group, the

claimant declined the offer of alternative seating made by Peter Mason. The claimant was offered the use of a one to one meeting room on an ad hoc basis and did use it on occasions. The claimant was offered the use of one of the desks outside Peter Mason's office.

127. At no point did the claimant inform Peter Mason that he had an impairment that affectED his concentration.

128. In respect of the issue of seating arrangements the Tribunal is satisfied that Peter Mason did not know and could not reasonably have been expected to know that the claimant had a disability. The claimant did not tell him and was careful to ensure that he did not tell him about the disability.

129. The Tribunal are not satisfied that the claimant was treated unfavourably by Peter Mason in respect of the issue of finding the claimant a desk. Peter Mason listened to the claimant's concerns and tried to accommodate them within the constrictions of the available space, the way that Peter Mason considered that B2 examiners should work within the group, and the claimant's explanations (short of identifying any disability) of why he needed to be moved. The Tribunal is of the further view that the way the claimant was treated by Peter Mason in respect of seating arrangements was proportionate and legitimate having regard to the situation that he was presented with.

130. The claimant alleges that he was treated unfavourably because of something arising from disability when in around 2015 Peter Mason advised that the claimant have additional training to facilitate his engagement in group sessions. The Tribunal is of the view that this was not unfavourable treatment. Further in any event we consider that bearing in mind that the claimant was expressing a view that he was not able to obtain benefit from group activities such as quality circles it was legitimate and proportionate for the claimant's manager to seek to assist the claimant by offering him training in the way stated. The offer of training was made in the context of an exchange of emails where the claimant had expressed himself in terms which were so aggressive and insubordinate, they resulted in disciplinary action being taken against the claimant. Although the claimant did not appeal the disciplinary action taken, when the matter was subsequently considered in the context of the claimant's grievance the disciplinary action taken was not subject to any censure in the claimant's grievance outcome and was not upheld. The actions of Peter Mason are to be judged on the basis that he was not aware and could not reasonably be expected to know that the claimant had a disability at the relevant time.

131. The claimant alleges that he was treated unfavourably because of something arising from disability when he received lower performance assessments in 2015 and 2016 from, Richard Kerslake and Brian Wood because of his social capabilities and was removed from bonus eligibility.

132. At the end of the first revising period Richard Kerslake gave the claimant a score of one in respect of "other" in the PMF. The score for B2 examiners is usually two for "other". The justification for a score of one was because the claimant had failed to engage with the wider group and also because the claimant had been unwilling to take constructive criticism of his work. The lower mark is unfavourable treatment.

133. The lower mark is however justified objectively, in the absence of knowledge of the claimant's disability. During the first revising period the claimant had performed well but had been less impressive in relation to his engagement with others and in respect of his willingness to accept criticism of his work. The mark of one was in our view legitimate and proportionate. The mark of one was also given in a context where the person awarding the score Richard Kerslake, and Peter Mason whose role in the appraisal process was countersigning officer both considered that the claimant's performance merited that score.

134. Peter Mason and Richard Kerslake did not know, and could not reasonably have known, at that time that the claimant had a disability that would have prevented the claimant from scoring a two.

135. In the PMF for the third revising period Brian Woods initially marked the claimant two for "other". This was reduced to one after consultation with Peter Mason as the countersigning officer. The reason for the reduction was because Peter Mason considered that the claimant did not deserve a two because he had received a verbal warning for his conduct during the revising period. The score of one has been given to others in similar circumstances for misconduct.

136. The unfavourable treatment of scoring the claimant one for "other" in the PMF for the third revising period was not arising from something in consequence of the claimant's disability. It was because of the claimant's misconduct. Further in any event Brian Woods and Peter Mason did not know and could not reasonably have known at that time (March 2016) that the claimant had a disability.

137. The claimant alleges that he was treated unfavourably because of something arising from disability when on 13 July 2016, Karl Whitfield withheld the claimant's mid-term review because the claimant was attending a meeting to discuss reasonable adjustments. The Tribunal is not satisfied that the failure to carry out the mid-term review as requested by the claimant was unfavourable treatment. The reason for withholding was a reasonable and cogent reason for withholding the review at the time. It was legitimate and proportionate for Karl Whitfield to do so. Further Karl Whitfield did not know that adjustments were being requested initially (i.e. on 13 July 2016) and could not have reasonably known because the claimant's issue up to then had been about his seating arrangements and not as Karl Whitfield understood things anything to do with the mid-term review process. After the 14 July 2016 email Karl Whitfield was still unwilling to carry out the mid-term review because while

he was aware that the claimant had an issue about reasonable adjustments, he did not know that what the issue was. The claimant at the time was fastidious in ensuring as little information about his disability was exposed as possible. In the circumstances the Tribunal is satisfied that the actions of Karl Whitfield were legitimate and proportionate.

Victimisation (section 27 Equality Act 2010)

138. A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. Each of the following is a protected act; bringing proceedings under the Equality Act 2010; giving evidence or information in connection with proceedings under the Act; doing any other thing for the purposes of or in connection with the Act; making an allegation (whether or not express) that A or another person has contravened the Act.

139. The claimant has relied on the document that he sent to Julyan Elbro on the 21 October 2015. There is no explicit mention of the Equality Act 2010 in this document. The claimant contends that the document is “a complaint implicitly pursuant to the Equality Act”. The claimant says: “the complaint was issued in part to combat Mr Mason’s assertions that the claimant socially isolated himself and did not engage with his peers. As the respondent was constructively aware of the claimant’s disability at the relevant time, the claimant’s complaint implicitly pertains to discrimination in so far as it recounts…”

140. The respondent states that there is no reference to any protected characteristics in this document.

141. Section 27(2) (d) of the Equality Act 2010 provides that “making an allegation (whether or not express) that A or another person has contravened this Act” is a protected act.

142. The document is not in our view a protected act for the purposes of section 27. The claimant summarises the nature of his complaint in the section of the document headed conclusion. This makes clear that the claimant is asking to be assessed fairly this complaint cannot be understood fairly read as making an allegation (whether or not express) that the respondent or another person has contravened the Equality Act in the performance appraisal process.

143. The claimant relies on the email sent to Helen Edwards on the 15 July 2016. This is not a protected act. The claimant complains about the position that Karl Whitfield had taken in his email, he does not make an allegation that the respondent or another person has contravened the act.

144. The claimant also relies on a number of documents detailing allegations of discrimination sent to the respondent in 2016, the last of which was issued to Lillian Stone on the 2 August 2016. The following documents contain protected acts within the meaning of section 27; the claimant’s email letter

to Lillian Stone dated 1 August 2016; the claimant's complaint dated 2 August 2016 sent to Lillian Stone. There are other documents which contain protected acts these are; the claimant's email to Caroline Edmunds dated 4 November 2016 and the claimant's email to Caroline Edmunds dated 10 November 2016.

145. The claimant states that he was subjected to detriment because of a protected act by the respondent instituting a disciplinary investigation in the claimant's alleged access to performance appraisal spreadsheets. The claimant's case is that the complaint to Julyan Elbro made on the 21 October 2015 was the relevant protected act.

146. The Tribunal reject this complaint. The Tribunal does not conclude that the 21 October 2015 complaint was a protected act.

147. If the Tribunal's conclusion that the letter of 21 October 2015 was not a protected act is wrong we would in any event have concluded that the institution of disciplinary proceedings was not because the claimant had carried out a protected act. Julyan Elbro explains how the investigation into the B2 examiner spreadsheet came about: *"Whilst the claimant had confirmed that he did not have access to the unredacted version of the spreadsheet, the claimant had specifically referred to being able to identify certain individuals from the spreadsheet he had been given… Brian Woods confirmed that it was his understanding that the claimant had somehow accessed the redacted information. 31. On learning of this from participating in the complaints process, the HR advisor, Heather Holder, informed me that this would require investigation. She did so given that a serious breach of the information security may have been committed. The IPO as an organisation is required to hold and store large quantities of commercially sensitive and confidential information therefore security is a priority."* The Tribunal accepts this evidence.

148. The reason for the instigation of the disciplinary process was not related to the claimant's complaint but arose as a result of matters which emerged during the investigation which appeared to require investigation. The complaint made by the claimant or the subject matter of the complaint had no influence on whether there was an investigation under the disciplinary process.

149. The claimant states that he was subjected to detriment because of a protected act by the respondent failing to address the fact that the claimant already complained to the respondent about the spreadsheets. The Tribunal reject this complaint. A detriment exists if a reasonable worker would or might take the view that the treatment accorded to him or her had in all the circumstances been to his or her detriment. While we remind ourselves that whether there is a detriment should be judged from the point of view of the victim: There was in our view no detriment here. The claimant's complaints about the spreadsheets was addressed by Julyan Elbro in his investigation report, it dealt with the claimant's complaint that the spreadsheet was being circulated amongst managers.

150. The claimant states that he was subjected to detriment because of a protected act by the respondent delaying informing the claimant the investigation had not been upheld. The reason for the delay in informing the claimant that the investigation had not been upheld was due to Julyan Elbro's delay. Philip Thorpe concluded the investigation on the 8 January 2016 and sent a copy of the report to Julyan Elbro. Julyan Elbro was then on leave between 11 and 18 February 2016. Around this period Julyan Elbro had a disrupted work pattern because of family circumstances. There was a delay until 15 March 2016 before reporting the outcome of the investigation to the claimant. Julyan Elbro in his evidence during questioning by the claimant said that *"three months including the Christmas break is not untypical of how things go"*. Julyan Elbro denied that there was any pretence of misconduct and accepted that the investigation *"could have been turned out sooner – better if I had turned it around sooner: I am sorry about that. There was no pretence to maintain. It was a serious issue we looked into it".*

151. The Tribunal accept the evidence given by Julyan Elbro and are satisfied that such detriment as the claimant suffered as a result of the delay in dealing with the claim was not because the claimant had done a protected act.

152. The claimant states that he was subjected to detriment because of a protected act by the respondent on 14 November 2016 inviting him to a formal meeting and advised him that his dismissal could be a potential outcome of such meeting: the claimant contends that this was an attempt to coerce the claimant to resign.

153. The Tribunal reject the claim that the respondent attempted to coerce the claimant to resign.

154. The reason that the claimant was invited to attend a meeting with Julayn Elbro was explained. The claimant had been off work since 25 July 2016, around 15 weeks, with no prospect of returning to work. The claimant had stated that he was not willing to set foot on the respondent's premises until his proposed adjustments had been agreed to. The claimant was requesting further paid leave. The claimant's relationships with several of his colleagues had broken down. Julyan Elbro explains*: "I therefore decided in consultation with HR that I would write and invite him to a meeting to discuss his ongoing employment… I noted that the claimant has 'called into question the integrity of every member of staff cited… and disparaged the IPO as an organisation'. I also noted that he clearly held the respondent in 'very little regard' and that there was little if any prospect of the claimant agreeing with the respondent on anything. I felt therefore that our bests efforts had been exhausted. I conclude my letter by making it clear that I was not saying this because of the complaints which he had submitted, or the adjustments which he had requested, but instead because of this 'attacks on people's character' and his 'lack of cooperation'*."

155. The Tribunal accept the evidence given by Julyan Elbro. The claimant's relationship with the respondent had broken down by this time. The claimant himself recognised that his relationship with the respondent had broken down. We consider that the evidence is clear that there had been an irretrievable breakdown in the relationship between the claimant and the respondent. We do not consider that there was any victimisation of the claimant in inviting him to a formal meeting to discuss this situation.

156. The claimant states that he was subjected to detriment because of a protected act by the respondent on 10 October 2016 Helen Edwards failed to show care and compassion in dealing with the claimant's sickness absence, asserted that he had contravened the absence policy and that he would be required to provide further information if his absence continued.

157. The claimant was expected to return to work on Monday 10 October 2016. He had contacted Caroline Edmunds by email copied to Helen Edwards stating that he "*would not expect to be in work*" because of "*levels of stress and anxiety*". Responding to the email Helen Edwards contacted the claimant by email, the claimant's requested means of communication, stating that she had not received confirmation whether the claimant was "*coming to work today.*" Helen Edwards' email asked the claimant, as is set out in the sickness absence policy, to "*phone before (sic) on the day you are not coming to work.*" The view of the Tribunal is that there is no detriment evidenced in what Helen Edwards did. We do not consider that there was a detriment. A detriment exists if a reasonable worker would or might take the view that the treatment accorded to him or her had in all the circumstances been to his or her detriment. In our view there is no such thing evidenced in the conduct of Helen Edwards in sending her email on the 10 October 2016.

Reasonable adjustments (sections 20 and 21 Equality Act 2010)

158. The duty to make reasonable adjustments contained in section 20 includes the requirement, where a provision, criterion or practice of an employer's puts a disabled employee 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. The claimant relies on the following provision, criterion or practice: A practice of conducting oral meetings in relation to grievance submissions; a practice of conducting oral meetings to establish reasonable adjustments; a practice of requiring staff to work in an open plan environment; a practice of assessing performance figures without reasonable adjustments; a practise of assessing the performance and potential for promotion of staff by reference to competencies and other qualities which include matters such as social interaction/networking.

159. A practice of conducting oral meetings in relation to grievance submissions; and a practice of conducting oral meetings to establish reasonable adjustments: The respondent concedes that the claimant was

invited to attend meetings to explain his complaints and or discuss reasonable adjustments. The claimant contends that he was subjected to a substantial disadvantage in that he was less able effectively to participate and structure his arguments orally than were he allowed to do so in writing. The respondent states that the claimant was in fact given the option to do so by email which he often did. The respondent says that it did make the adjustment of allowing written representations. The claimant makes specific reference to the way that his appeal against the decision made by Liz Coleman was handled by Sean Dennehey.

160. The conclusion of the Tribunal is that in regard to this complaint the claimant's complaint is not made out there was an adjustment made in every instance that the claimant requested it in respect of the way that the respondent dealt with the grievances. The claimant was allowed to make written representations. In the case of Sean Dennehey's appeal hearing the adjustment that the claimant argues for was made, from consideration of the claimant;s submissions it is the failure to properly consider the claimant's appeal that appears to be the gravamen of the claimant's complaint.

161. The respondent did take steps that it was reasonable to take to avoid the substantial disadvantage that the provision, criterion or practice of respondent's put the claimant in comparison with persons who are not disabled. There was no breach of the duty to make reasonable adjustments.

162. A practice of requiring staff to work in an open plan environment: The respondent concedes that the office was largely open plan and that the default location for the claimant was in the open plan office.

163. The claimant states that he suffered a substantial disadvantage in that open plan environments impaired the claimant's concentration and/or compounded his anxiety and/or meant that his performance figures suffered. This was not really challenged by the respondent.

164. The claimant states that the respondent should have adjusted his performance figures upwards to reflect an earlier period during which the claimant had been disadvantaged by his accommodation.

165. The claimant did not disclose that he had a disability until March2016 and then he did not specify the nature his disability. The claimant had been discussing with his line manager his accommodation from about 2014, long before the respondent knew that the claimant had a disability. From January 2015 the claimant's requests were discussed with managers and from time some accommodation changes were either made or suggested. At times the claimant was made offers of accommodation which were rejected. The Tribunal does not accept that the respondent considered that the claimant's requests for adjustment were baseless. Throughout the respondent was asking the claimant to explain the nature of his disability to enable the respondent to consider his requests. For much of the time

the claimant was unwilling to give information that might have enabled the respondent to assess his requests, however notwithstanding the claimant's refusal to give information, e.g. access to claimant's medical information, the respondent did make adjustments.

166. The claimant contends that the adjustments were not adequate. The Tribunal considers that having regard to the limitations imposed by the accommodation and working practices of the respondent the number and manner of the adjustments shows that the respondent was actively seeking to address the claimant's disadvantage. We consider that the respondent generally acted reasonably even if the adjustments made did not always address the claimant's requirements or resolve all issues for the claimant.

167. We make specific reference to the claimant's request for homeworking. We consider that the respondent acted appropriately in offering the claimant homeworking two days a week. The Tribunal accepts the respondent's evidence explaining why this facility was exceptional and the rationale for offering the facility for two days a week. It was the claimant and not the respondent who prevented this being implemented.

168. While there were very real problems for the claimant arising from working in an open plan office we are satisfied that the respondent did take reasonable steps to avoid the disadvantage. We do not consider that the respondent has breached the duty to make reasonable adjustments in this regard.

169. A practice of assessing performance figures without reasonable adjustments: The respondent denies that the respondent applied such a provision, criterion, or practice. It is said that the evidence of the respondent's witnesses was that there were adjustments made in respect of some employees and that the reason there were not adjustments made in the claimant's case was because there was a lack of knowledge of what the nature of the disability was and the adjustments that should be made. It is further said when the respondent became aware of the claimant's disability and had a better understanding of the claimant's requirements in respect of adjustments that the adjustments would be made.

170. The conclusion of the Tribunal is that the respondent did not have a provision, criterion, or practice of assessing performance figures without reasonable adjustments.

171. The respondent committed to the claimant "to take into account any representations that you make with regard to the promotion criteria at the relevant time" and in respect of performance figures in the PMF, "any representations you make in relation to any markings will continue to be taken into account." In respect of this aspect of the claim there was no breach of the duty to make adjustments.

172. A practise of assessing the performance and potential for promotion of staff by reference to competencies and other qualities which include matters such as social interaction/networking: This provision, criterion or practice is not challenged by the respondent.

173. The claimant states that he found social interaction/networking difficult and this caused him to receive lower performance markings and impaired his ability to receive performance bonuses or to progress via promotion. The claimant states that the respondent should make an adjustment of to the competency framework/performance appraisal/promotion criteria

174. However, what the respondent does say is that the claimant did not complete his training and was never eligible for promotion. He would not have been in contention for promotions until he had been in training for between two and two and a half years. At the relevant time this had no applicability to the claimant. The respondent does not accept that adjustments were not made for others and also does not accept that adjustments, if appropriate, would not have been made for the claimant. The respondent further states that the claimant's output figures were constantly high, unless he chose to work to rule when his figures dropped, and so any disadvantage in this regard is not because of the provision, criterion or practice but due to the claimant's deliberate action. Finally, the respondent states that promotion takes into account a wide range of variables. We accept the respondent's evidence and in the circumstances we do not consider there was a breach of the duty to make reasonable adjustments.

175. The claimant's claims are not well founded and are dismissed.

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Employment Judge Gumbiti-Zimuto

Date: 8 October 2019

Sent to the parties on: ....

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For the Tribunals Office

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