



EMPLOYMENT TRIBUNALS

Claimant

Mr J Black

v

Respondent

Foreign and Commonwealth Office – FCO Services

Heard at: Bury St Edmunds

On: 29, 30 & 31 July 2019 and 1, 5, 6, 7, 8 & 9 August 2019

Before: Employment Judge M Warren

Members: Mr C Davie and Mrs S Blunden

Appearances:

For the Claimant: Ms C Bell, Counsel

For the Respondent: Mr C Stone, Counsel

JUDGMENT having been sent to the parties and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. By a claim form received on 26 September 2016, Mr Black brought claims of Unfair Dismissal, (including automatic unfair dismissal) for whistle blowing, Breach of Contract and for holiday pay. The claims are resisted.
2. The matter came before Employment Judge Adamson on 25 January 2017, when he identified the issues in the claim, as they then were. He made case management orders and listed the matter for hearing on 22 – 26, 31 May 2017 and 1 June 2017.
3. By letter dated 4 April 2017, Mr Black withdrew his whistle blowing complaint. No judgment dismissing the claim upon withdrawal appears to have been made and so we included judgment to that effect in our judgment at the conclusion of these proceedings.
4. By letter dated 5 May 2017 Mr Black, through his Solicitors, sought leave to amend his claim in order to bring a complaint of Disability Discrimination. That application came before Employment Judge Sigsworth on 2 October 2017, the earlier listing of the case for a Final

Hearing having been postponed. Employment Judge Sigsworth granted leave to amend. Amended particulars of claim and grounds of resistance were subsequently filed.

5. The matter then came before Employment Judge Postle for a Preliminary Hearing on 7 August 2018. The issues in this case were identified at that hearing, as set out in the hearing summary of that date, more of which see below. Employment Judge Postle directed that the matter be listed for a further Open Preliminary Hearing on 11 March 2019, in order to determine the issue as to whether or not Mr Black was a disabled person at the relevant times, as defined in the Equality Act 2010. Directions were made for the preparation of an Impact Statement and disclosure of medical records. He also listed the matter for Final Hearing on 29 July – 9 August 2019.
6. Subsequently, the Respondent conceded that Mr Black was a disabled person at the material times. The matter has thereby come before us for a Final Hearing.

Preliminary Issue – Witness Statement of Ms Forster

7. At the start of the hearing, Ms Bell raised the matter of Ms Forster's witness statement, the existence of which Mr Black and his legal advisers were unaware until the previous day, Sunday 28 July 2019. He had not had the opportunity to read it.
8. The Respondent's explanation is that when witness statements were exchanged, by email, someone at the Government Legal Department neglected to attach Ms Forster's statement.
9. Witness statements were to have been exchanged in accordance with Employment Judge Postle's Order on 14 June 2019. They were in fact exchanged on 13 July 2019.
10. Ms Bell objected that the Respondent ought not be allowed to rely on Ms Forster's evidence. She explained that Mr Black is autistic and he needs to prepare well in advance to avoid high levels of stress. She made reference to the overriding objective and the need to try to place the parties on an equal footing; the Respondent is amply resourced and has had plenty of time to prepare, Mr Black is autistic and is significantly disadvantaged. We indicated that we would make a decision the following day, having taken day one to read the witness statements and read or look at the documents referred to and so gain a greater understanding of what the case was about.
11. In reaching our decision, we had regard to the overriding objective and to the relative prejudice to the parties of allowing or not allowing Ms Forster's witness statement in evidence.
12. We read and had regard to a report from a Consultant Psychiatrist, Dr Goodsell, provided in preparation for these proceedings. Dr Goodsell observed at paragraph 3.5 of her report that Mr Black is intellectually capable but has deficits in reciprocal social communication. There is no

reference in the report to a particular vulnerability to stress. We also have regard to Mr Black's impact statement; there is no reference to stress in there either.

13. Of course, a hearing is stressful and this situation, being presented with an unexpected, overlooked, witness statement is stressful.
14. Ms Forster is an HR Adviser, she will give evidence about the grievance investigation, (the Grievance Officer Miss Thompson has left the Respondent's employment and is not to give evidence), she was involved in drafting the grievance outcome letter. She gave advice with regard to the appeal, she wrote the appeal outcome letter and she was involved in the decision to suspend. None of her evidence appeared to be particularly surprising. The evidence she introduces is a significant part of the factual matrix of the case, not referring to it and to the documents she introduces would leave a significant hole in the evidence.
15. Ms Forster was not to be called until day six, after next weekend. She was to be the last witness to be called. Mr Black and Ms Bell would have plenty of time to consider her evidence and prepare cross examination.
16. The prejudice to the Respondent were the evidence excluded would be great, the prejudice to the Claimant if the evidence were included would be minimal. In our view it would have been disproportionate that such evidence should be excluded because of a clerical error. We therefore decided to allow Ms Forster's witness statement in evidence and will allow Ms Forster to give evidence.

Evidence

17. We had before us witness statements and heard evidence from:
 - 17.1 Mr Black;
 - 17.2 Mr Martin Powell, Head of Production, former Manager of Mr Black;
 - 17.3 Ms Joanne Toms, Head of Technical Services Centre, former Line Manager of Mr Black;
 - 17.4 Ms Rebecca Forster, Reward and Systems Lead, HR Adviser;
 - 17.5 Mr Steven Hoarder, former Network Services Director, heard Appeal from dismissal; and
 - 17.6 Mr Stuart Fleet, formerly Head of Professional Services Centre Secure Global Services, heard Grievance Appeal.
18. We had before us four bundles:
 - 18.1 Bundle one running to page 510;
 - 18.2 Bundle two running to page 868;
 - 18.3 Bundle three running to page 1072; and
 - 18.4 Supplementary bundle, running from page 1 to page 152.
19. We had at the outset:
 - 19.1 An opening note from Ms Bell;
 - 19.2 Skeleton Argument from Mr Stone;

- 19.3 A reading list;
 - 19.4 A suggested timetable;
 - 19.5 An agreed chronology; and
 - 19.6 A cast list.
20. At the conclusion of the case, Ms Bell produced written, "Claimant's Closing Submissions" and Mr Stone produced the Respondent's, "Summary of Evidence". Both Counsel then made further oral submissions to comment on their opponent's submissions. I prevented them from reiterating what they had already set out in writing.

The Issues as identified by Employment Judge Postle at the Preliminary Hearing on 7 August 2018 are as follows:

Dismissal

- (1) Did the Respondent commit a repudiatory breach of the term implied into the Claimant's contract that without reasonable and proper cause it would not act in a manner calculated or likely to destroy the implied term of trust and confidence, by:
 - i. unfairly terminating his employment on 24 June 2016;
 - ii. acting unreasonably in suspending the Claimant and failing to ensure that the period of suspension was reasonable;
 - iii. failing to pay the claimant the sums referred to in paragraph 7 of the ET1 during his suspension;
 - iv. failing to apply for security clearance for the Claimant; and / or
 - v. unreasonably confirming to the claimant that it considered that there had been a breakdown in trust and confidence.
- (2) Did the respondent commit a repudiatory breach of other of the claimant's terms and conditions of employment by:
 - i. failing to provide the Claimant with work and associated pay in accordance with paragraph 7 of the ET1;
 - ii. failing to suspend the Claimant on reasonable grounds for a reasonable period; and / or
 - iii. failing to pay the Claimant his full pay during suspension in accordance with the payment due to him as outlined in paragraph 7 of the ET1.
- (3) If 1 or 2, above are satisfied, did the claimant resign in response to that repudiatory breach(es)?
- (4) If the claimant did resign in response to that repudiatory breach(es), did he affirm the contract before resigning?

If the claimant resigned in response to the repudiatory breach(es) and did not affirm the contract before resigning, he was dismissed pursuant to s.95(1)(c) of the Employment Rights Act 1996 ("ERA").

Unfair Dismissal

- (5) If the Claimant was dismissed, did the Respondent dismiss the Claimant for a potentially fair reason, namely the Claimant's conduct and / or some other substantial reason?
- (6) If the Claimant was dismissed for a potentially fair reason, did the Respondent act reasonably in all the circumstances of the case by treating that reason as sufficient reason to dismiss him?

Unfair Dismissal Remedy

- (7) If the Claimant was unfairly dismissed pursuant to s.98, what amount of compensation would be just and equitable in all the circumstances (section 123(1) ERA), in particular taking into account:
 - i. the extent to which the Claimant's dismissal was caused or contributed to by the actions of the Claimant (Section 123(6) ERA); and / or
 - ii. the extent to which the Claimant's employment would have terminated in any event.

Unlawful Deduction of Wages

- (8) Did the respondent make an unauthorised deduction from the claimant's wages contrary to s.13 ERA by:
 - i. failing to pay the Claimant his usual contractual pay throughout his period of suspension, to include his usual contractual assignments?
 - ii. failing to pay the Claimant his statutory holiday pay on 1 August 2018. [This allegation is admitted. The Claimant to confirm he agrees with the Respondent's calculations].

Breach of Contract

- (9) The claimant repeats the matters set out in paragraph 2, above, as a separate claim for breach of contract.
- (10) Was the Respondent in breach of the implied term that it would provide the Claimant with work by suspending him and / or preventing him from undertaking assignments?

Disability Discrimination

Disability

- (11) At the material times, did the Claimant have a disability within the meaning of Section 6 of the Equality Act 2010 ('the 2010 Act')? The Claimant relies on Autism Spectrum Disorder ('ASD').

Discrimination Arising from Disability

- (12) At the material times, did the Respondent know, and if not, could it reasonably have been expected to know, that the Claimant was disabled?
- (13) Did the Claimant's social interaction and difficulties arise in consequence of his disability?
- (14) If so, did the Respondent treat the Claimant unfavourable because of his difficulties with

social interaction? The Claimant relies upon those matters set out in paragraph [18], below.

- (15) If so, was the treatment a proportionate means of achieving a legitimate aim?

Failure to Make Reasonable Adjustments

- (16) Did a PCP of the Respondent place the Claimant at a substantial disadvantage when compared with persons who are not disabled?

- (17) The PCPs on which the Claimant relies are:

- a) The Respondent's expectations regarding appropriate conduct and in particular, social interaction;
- b) The Respondent's procedure in scheduling assignments to its employees;
- c) The Respondent's practice of changing line managers of employees within the TSC;
- d) The application of the Respondent's investigatory and disciplinary process; and
- e) The procedure of providing references in respect of security clearance.

- (18) The substantial disadvantages on which the Claimant relies are:

- a) Being tasked on significantly fewer assignments;
- b) The Respondent's actions as referred to in paragraphs 1 and 2, above;
- c) Lack of progression and career development with the Respondent;
- d) Suspension from carrying out assignments in December 2015 and further suspension from all duties in January 2016;
- e) Dismissal on the grounds of gross misconduct on 24 June 2016;
- f) The other complaints raised by the Claimant within the grievance process, of bullying and unfair treatment of the Claimant by his managers and colleagues; and
- g) Negative feedback pursuant to the security application process in a statement that the Claimant's employment had been terminated by reason of gross misconduct without mention of the fact that he had successfully appealed against his dismissal, as advised to him by the Security Clearance Officer, Peter Jones.

- (19) At the material times, did the respondent know and, if not, could it reasonably have been expected to know, that the claimant had a disability and was likely to be placed at the disadvantages referred to in paragraph [18], above.

- (20) If so, did the Respondent take such steps as it was reasonable to have to take to avoid the disadvantage? The step(s) which the Claimant says the Respondent should have taken are:

- a) Providing the Claimant with consistent management;
- b) Appointing a colleague of the Claimant to act as a mentor to assist with any issues with which the Claimant required support;

- c) Permitting the Claimant to attend assignments following the Dhaka Assignment and ensuring that he was not suspended pending completion of the disciplinary / grievance investigation;
- d) Reducing the disciplinary sanction from dismissal or otherwise waiving the disciplinary proceedings in favour of monitoring and assisting the Claimant in his performance; and
- e) Omitting information caused by the Claimant's disability during the security application process.

Remedy

- (21) To what remedy, if any, is the claimant entitled? The claimant seeks compensation.
21. We were directed to the List of Issues in the reading list at the outset of the case. There was no suggestion at the outset that the List of Issues did not correctly reflect the issues that are to be determined by this Tribunal.
22. In her closing submissions, Ms Bell raised matters that were not identified in the List of Issues:
- a. At paragraph 14 of her skeleton argument, she sets out 10 items of 'something arising' in consequence of disability in relation to Mr Black's disability related discrimination claim. The List of Issues merely refers to Mr Black's social interaction difficulties. The parties agreed that there is a typographical error in Employment Judge Postle's decision at paragraph 14 (13) in that "and" should not appear between "interaction" and "difficulties".
 - b. Ms Bell set out at her paragraph 127 a whole new set of acts Mr Black claims to have given rise to his resignation and upon which he says he relies as cumulatively amounting to a breach of the implied term to maintain mutual trust and confidence.
 - c. At her paragraph 28, she adds what she describes as matters relevant to repudiatory breach, not referred to in the List of Issues. It is not clear whether these are meant as further examples of breach of mutual trust and confidence or breach of other express or implied terms of the contract.
23. Mr Stone explained to us that at the Preliminary Hearing there had been an agreed List of Issues before Employment Judge Postle on which there was an area of dispute, which is whether the 'something arising' at (13) should include, "and the behaviours considered objectionable by his managers". Employment Judge Postle ruled that those words should not appear in the List of Issues.
24. The List of Issues in Employment Judge Postle's Order, is that which was agreed between the parties, both represented by Counsel, subject to some rulings from Employment Judge Postle on disputed points.

25. Ms Bell anticipated the argument, for she dealt with the issue at paragraph 13 of her skeleton argument. She refers us to the Judgment of the then President of the Employment Appeals Tribunal, The Honourable Mr Justice Langstaff, in the case of Millin v Capsticks Solicitors LLP UKEAT/0093/14, where he said at paragraph 25,

“We do not think that a List of Issues demands to be construed as if it were a formal contract pleading or statute. Rather, it is a useful tool to allow the Tribunal to case manage a hearing so as best to ensure justice between the parties.”

26. Mr Justice Langstaff, in that case, in fact quoted Lord Justice Mummery in the Court of Appeal in the case of Parekh v London Borough of Brent [2012] EWCA Civ 1630:

“A List of Issues is a useful case management tool developed by the Tribunal to bring some semblance of order, structure and clarity to proceedings to which the requirements of formal pleadings are minimal. The list is usually the outcome of discussions between the parties or their representatives and the Employment Judge. If the List of Issues is agreed, then that will, as a general rule, limit the issues at the substantive hearing to those in the list.”

27. Mr Stone referred us to Scicluna v Zippy Stitch Limited [2018] EWCA civ 1320. This was another Court of Appeal case, the Judgment was from Lord Justice Underhill, former President of the Employment Appeals Tribunal. At paragraph 14, he wrote:

“Ever since the Woolf reforms, parties in the High Court have been required to agree lists of issues formulating the point which need to be determined by the Judge. That list of issues then constitutes the road map by which the Judge is to navigate his or her way to a just determination of the case. Employment Tribunals encourage parties to agree a list of issues for just that reason and if advocates are retained on both sides, it is right and proper for a list of issues to be prepared.”

Under paragraph 22 he said,

“There are exceptional cases where it may be legitimate for a Tribunal not to be bound by the precise terms of an agreed list of issues.”

28. Mr Stone rightly submitted that there are serious issues of natural justice if legally represented parties agree on a list of issues, for a case to be prepared and heard on the basis of that list of issues, only for one party in closing submissions to seek to argue the case on the basis of further issues and allegations. What, we rhetorically ask, is the point of holding preliminary hearings and nailing the parties on the issues at an early stage, if that is permissible? We may as well just have a free for all. We determined that we will decide this case based upon the list of issues appearing in the preliminary hearing summary of Employment Judge Postle.

The Law

Disability Discrimination

29. Disability is a protected characteristic pursuant to s.4 of the Equality Act 2010.
30. Section 39(2)(c) and (d) proscribes discrimination by an employer by either dismissing an employee or subjecting him to any other detriment.
31. Section 39(5) imposes a duty on an employer to make reasonable adjustments.
32. Two limbs of disability discrimination are relied upon by Mr Black; discrimination arising from disability and failure to make reasonable adjustments. The Respondent in both instances relies upon the defence that it did not know and could not reasonably have been expected to know, that Mr Black was a disabled person.
33. In respect of disability related discrimination, section 15(2) provides:
- (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*
34. In respect of reasonable adjustments, paragraph 20 at Part 3 of Schedule 8 to the Act provides:
- (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-*
- ...
- (b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.*

Knowledge

35. The question of knowledge in relation to reasonable adjustments was considered by the court of Appeal in Gallop v Newport City Council [2013] EWCA Civ 1583. Lord Justice Rimer said at paragraph 36:
- “Ms Monaghan and Ms Grennan were agreed as to the law, namely that (i) 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 s 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 Sch 1. Counsel were further agreed that, 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 s 1(2). I agree with counsel that this is the correct legal position."

36. That was a case in which Mr Gallop was known to have stress related symptoms and depression and had periods absence from work through ill health. Two different occupational health advisors had expressed the view that he was not, "disabled" as defined in what was then the Disability Discrimination Act. The Employment Tribunal found that he was disabled. The Court of Appeal held, (overturning the ET and the EAT) that the employer had constructive knowledge of that disability, it had unquestioningly adopted the OH's unreasoned opinion, the employer has a duty to make its own Judgment. Rimer LJ went on to hold at paragraphs 41 to 43:

"... the task for the ET was to ascertain whether, at the material times, Newport had actual or constructive knowledge of the s 1/Sch 1 facts constituting Mr Gallop's disability. The ET did not engage in that inquiry. ...

This may perhaps seem a hard result, but I consider it follows from the terms of the legislation. The problem with certain types of disability, or claimed disability, is that it is only when eventually the ET rules on the question that it is known whether the claimant was in fact a disabled person. In the meantime, however, the responsible employer has to make his own judgment as to whether the employee is or is not disabled. In making that judgment, the employer will rightly want assistance and guidance from occupational health or other medical advisers.

...In such cases, the employer must not forget that it is still he, the employer, who has to make the factual judgment as to whether the employee is or is not disabled: he cannot simply rubber stamp the adviser's opinion that he is not."

37. More recently, the question of knowledge, this time in the context of disability related discrimination, has been considered by HHJ Eady QC in A Ltd v Z UKEAT/0273/18/BA. Z had mental impairments: stress, depression, low mood, schizophrenia. She kept them hidden from her employer. She was dismissed for, amongst other things, poor attendance related to those impairments. The tribunal found that the employer should have made more enquiries and that it therefore had constructive knowledge of her disability. In considering remedy, the tribunal found that had the Respondent made further enquiries, Z would have refused to engage with occupational health or any other medical referral and that therefore, there was a 50% chance there would have been a non-discriminatory dismissal and reduced her compensation accordingly. The

Respondent's appeal was allowed: the tribunal had focused on what further steps the employer could reasonably have been expected to take, but failed to ask itself whether the employer could then have been reasonably expected to know of z's disability. That question was answered by the tribunal's findings on remedy and that therefore, the Respondent neither knew, nor could it have been expected to know, of Z's disability. HHJ Eady QC set out the following principles:

“(1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment, see York City Council v Grosset [2018] ICR 1492 CA at paragraph 39.

(2) The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of section 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) longterm effect, see Donelien v Liberata UK Ltd UKEAT/0297/14 at paragraph 5, per Langstaff P, and also see Pnaiser v NHS England & Anor [2016] IRLR 170 EAT at paragraph 69 per Simler J.

(3) The question of reasonableness is one of fact and evaluation, see Donelien v Liberata UK Ltd [2018] IRLR 535 CA at paragraph 27; nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.

(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for EqA purposes (see Herry v Dudley Metropolitan Council [2017] ICR 610, per His Honour Judge Richardson, citing J v DLA Piper UK LLP [2010] ICR 1052), and (ii) because, without knowing the likely cause of a given impairment, “it becomes much more difficult to know whether it may well last for more than 12 months, if it is not [already done so]”, per Langstaff P in Donelien EAT at paragraph 31.

(5) The approach adopted to answering the question thus posed by section 15(2) is to be informed by the Code, which (relevantly) provides as follows:

“5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a ‘disabled person’.

5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.”

(6) It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so (Ridout v TC Group [1998] IRLR 628; SoS for Work and Pensions v Alam [2010] ICR 665).

(7) Reasonableness, for the purposes of section 15(2), must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code.”

38. The EHRC code of practice is referred to in the quote above, paragraphs 5.14 and 5.15. An example is given at 5:15 as follows:

Example: A disabled man who has depression has been at a particular workplace for two years. He has a good attendance and performance record. In recent weeks, however, he has become emotional and upset at work for no apparent reason. He has also been repeatedly late for work and has made some mistakes in his work. The worker is disciplined without being given any opportunity to explain that his difficulties at work arise from a disability and that recently the effects of his depression have worsened.

The sudden deterioration in the worker's time-keeping and performance and the change in his behaviour at work should have alerted the employer to the possibility that that these were connected to a disability. It is likely to be reasonable to expect the employer to explore with the worker the reason for these changes and whether the difficulties are because of something arising in consequence of a disability.

In the context of reasonable adjustments, the code at 6.19 reads:

For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

Example: *A worker who deals with customers by phone at a call centre has depression which sometimes causes her to cry at work. She has difficulty dealing with customer enquiries when the symptoms of her depression are severe. It is likely to be reasonable for the employer to discuss with the worker whether her crying is connected*

to a disability and whether a reasonable adjustment could be made to her working arrangements.

Reasonable Adjustments

39. Section 20 defines the duty to make reasonable adjustments, which comprises three possible requirements, the first of which is that which might apply in this case set out at subsection (3) as follows:-

“The first requirement is a requirement, where a provision criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.”

40. Section 21 provides that a failure to comply with that requirement is a failure to make a reasonable adjustment, which amounts to discrimination.

41. There are five steps to establishing a failure to make reasonable adjustments (as identified in the pre-Equality Act 2010 cases of Environment Agency v Rowan [2008] IRLR 20 and HM Prison Service v Johnson [2007] IRLR 951). The Tribunal must identify:

- a. The relevant provision criterion or practice applied by or on behalf of the employer;
- b. The identity of non-disabled comparators, (where appropriate);
- c. The nature and extent of the substantial disadvantage suffered by the disabled employee;
- d. The steps the employer is said to have failed to take, and
- e. Whether it was reasonable to take that step.

42. The employer will only be liable if it knew or ought to have known that the Claimant was disabled and that he was likely to be affected in the manner alleged, see Schedule 8 paragraph 20 and Wilcox v Birmingham CAB Services Ltd EAT 0293/10 where Mr Justice Underhill said of the equivalent provision in the Disability Discrimination Act 1995 that an employer will not be liable for a failure to make reasonable adjustments unless it has actual or constructive knowledge both that the employee was disabled and that he or she was disadvantaged by the disability.

43. The Equality and Human Rights Commission: Code of Practice on Employment (2011) at paragraph 4.5 suggests that PCP should be construed widely so as to include for example, formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. It may also be a decision to do something in the future or a one off decision.

44. The decision of Mrs Justice Simler DBE, (then President) in Lamb v the Business Academy Bexley UKEAT/0226/JOJ assists with identifying what

is and what is not, a PCP. The phrase is to be construed broadly, having regard to the statute's purpose of eliminating discrimination against those who suffer from disability. It may in certain circumstances include one-off decisions, (paragraph 26). She approved though, the comments of the former President, Langstaff J in Nottingham City Transport Ltd v Harvey UKEAT/0032/12 where he referred to, "practice" as having an element of repetition. In the former case, a teacher was dismissed after a long period of absence during which a grievance was investigated and an outcome provided. The PCP was the requirement to return to work without a proper and fair investigation. There were repeated failures to properly investigate and repeated delays; that was a practice. In the latter case, involving a claimant suffering from depression returning from work and confused by a new swipe card system altered his time sheet, the EAT held that the one-off application of a flawed disciplinary procedure did not amount to a, "practice". In Fox v British Airways Plc UKEAT/0315/14, HHJ Eady QC agreed that, "practice" required an element of repetition and also suggested that an act of dismissal itself, (as opposed the application of a PCP that led to the dismissal) is not a PCP.

45. It is important for the claimant to identify the PCP relied upon and for the Tribunal to makes it decision on the PCP advanced by the claimant, see Secretary of State for Justice v Prospere UKEAT/0412/14.
46. The duty is to make "reasonable" adjustments, to take such steps as it is reasonable for the employer to take to avoid the disadvantage. The test is objective, (Smith v Churchill Stairlifts plc [2006] ICR 524). Our focus should be not on the process followed by the employer to reach its decision but on whether there is an adjustment that should be considered reasonable.
47. On the question of comparators, the Code states at 6.16 that the purpose of comparison with people who are not disabled is to establish whether it is a PCP that places the disabled person at a disadvantage and therefore there is no need to identify a comparator whose circumstances are the same as the Claimants, (in contrast to such a requirement in claims of direct and indirect discrimination).

Disability Related Discrimination

48. Disability Related discrimination is defined at s.15 as follows:
 - (1) *A person (A) discriminates against a disabled person (B) if—*
 - (a) *A treats B unfavourably because of something arising in consequence of B's disability, and*
 - (b) *A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
 - (2) *Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*
49. The difference between Direct Discrimination on the grounds of disability and Disability Related Discrimination is often neatly explained in these

terms: direct discrimination is by reason of the fact of the disability, whereas disability related discrimination is because of the effect of the disability.

50. As for the difference between making a reasonable adjustment and disability related discrimination, in General Dynamics v Carranza UKEAT 0107/14/1010 HHJ Richardson explained that reasonable adjustments is about preventing disadvantage, disability related discrimination is about making allowances for that persons disability.
51. There are 2 separate causative steps: firstly, the disability has the consequence of causing something and secondly, the treatment complained of as unfavourable must be because of that particular something, (Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN).
52. There is no requirement that the employer was aware that the disability caused the particular something, City of York Council v Grosset [2018] EWCA Civ 1105 although, as the Court of Appeal observed in that case, if the employer knows of the disability, it would be, "wise to look into the matter more carefully before taking the unfavourable treatment".
53. Simler P gave helpful guidance on the correct approach to s15 in Pnaiser v NHS England [2016] IRLR 170 as follows:

"...the proper approach can be summarised as follows:

(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to [counsel's] submission (for example at paragraph 17 of her skeleton).

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in Land Registry v Houghton UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) [Counsel] argued that 'a subjective approach infects the whole of section 15' by virtue of the requirement of knowledge in s.15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26–34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of s.15(2) makes clear (as [counsel] accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a

tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's disability'. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

54. If there has been such treatment, we should then go on to ask, as set out at s.15(1)(b), whether the unfavourable treatment can be justified. This requires us to determine:
 - a. Whether there was a legitimate aim, unrelated to discrimination;
 - b. Whether the treatment was capable of achieving that aim, and
 - c. Whether the treatment was a proportionate means of achieving that aim, having regard to the relevant facts and taking into account the possibility of other means of achieving that aim.
55. The test of whether there is a proportionate means of achieving a legitimate aim, (often referred to as the justification test) mirrors similar provisions in other strands of discrimination, such as in respect of indirect discrimination under s19 of the Equality Act, the origins of which lie in European Law.
56. There is guidance in the Equality and Human Rights Commission's Code of Practice on Employment, which reflects case law on objective justification in other strands of discrimination and which can be relied on in the context of disability related discrimination.
57. Thus, in Hensam v Ministry of Defence UKEAT/10067/14/DM the EAT applied the justification test as described in Hardys & Hansons Plc v Lax [2005] EWCA Civ 846. The test is objective. In assessing proportionality, the tribunal uses its own judgment, which must be based on a fair and detailed analysis of the working practices and business considerations involved, particularly the business needs of the employer. It is not a question of whether the view taken by the employer was one a reasonable employer would have taken. The obligation is on the employer to show that the treatment complained of is a proportionate means of achieving a legitimate aim. The employer must establish that it was pursuing a legitimate aim and that the measures it was taking were appropriate and legitimate. To demonstrate proportionality, the employer is not required to show that there was no alternative course of action, but that the measures taken were reasonably necessary.
58. The tribunal has to objectively balance the discriminatory effect of the treatment and the reasonable needs of the employer.
59. "Legitimate aim" and "proportionate means" are 2 separate issues and should not be conflated.
60. The tribunal must weigh out quantitative and qualitative assessment of the

discriminatory effect of the treatment, (University of Manchester v Jones [1993] ICR 474).

61. The tribunal should scrutinise the justification put forward by the Respondent, (per Sedley LJ in Allonby v Accrington & Rosedale College [2001] ICR 189).

Burden of proof

62. The Court of Appeal gave guidance on how to apply the equivalent provision of s.136 under the previous discrimination legislation, in the case of Igen Ltd v Wong and Others [2005] IRLR 258. There, the Court of Appeal set out a series of guidance steps. That guidance may still be relied upon, see Underhill LJ at paragraph 14 in Greater Manchester Police v Bailey [2017] EWCA Civ 425. We have carefully observed those steps in this case in considering the claims of discrimination, on the basis that those steps assist equally well under the Equality Act 2010.

Constructive Dismissal

63. The right not to be unfairly dismissed is provided for at section 94 of the Employment Rights Act 1996, (ERA).

64. Section 95 defines the circumstances in which a person is dismissed as including where:

“(c) 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 employer's conduct.”

65. That is what we call constructive dismissal. The seminal explanation of when those circumstances arise was given by Lord Denning in Western Excavating(ECC) Ltd v Sharpe 1978 ICR 221:

“ If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employers conduct. He is constructively dismissed.”

66. The Tribunal's function in looking for a breach of contract is to look at the employer's conduct as a whole and determine whether it is such that the employee cannot be expected to put up with it, (see Browne – Wilkinson J in Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347).

67. A fundamental breach of any contractual term might give rise to a claim of constructive dismissal, but a contractual term frequently relied upon in cases such as this is that which is usually described as the implied term of mutual trust and confidence.

68. The leading authority on this implied term is the House of Lords decision in Mahmud & Malik v BCCI [1997] IRLR 462 where Lord Steyn adopted the definition which originated in Woods v W M Car Services (Peterborough) Ltd namely, that an employer shall not, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.
69. The test is objective, from Lord Steyn in the same case:
"The motives of the employer cannot be determinative or even relevant.....If conduct objectively considered is likely to destroy or seriously damage the relationship between employer and employee, a breach of the implied obligation may arise."
70. Individual actions taken by an employer which do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of undermining trust & confidence, thereby entitling the employee to resign and claim Constructive Dismissal. That is usually referred to as, "the last straw", (Lewis v Motorworld Garages Ltd [1985] IRLR 465).
71. In Kaur v Leeds Teaching Hospitals NHS Trust [218] EWCA 978 the Court of Appeal, (Underhill LJ and Singh LJ) reviewed the law on the doctrine of the last straw and formulated the following approach in such cases
"In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:
(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
(2) Has he or she affirmed the contract since that act?
(3) If not, was that act (or omission) by itself a repudiatory breach of contract?
(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)
(5) Did the employee resign in response (or partly in response) to that breach?"•
72. The last straw itself need not be unreasonable or blameworthy conduct, all it must do is contribute, however slightly, to the breach of the implied term of mutual trust and confidence, see London Borough of Waltham Forrest v Omilaju [2005] IRLR 35. However, an entirely innocuous act can not be a

final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of mutual trust and confidence.

73. A fundamental breach by an employer has to be, “accepted” by the employee, to quote Lord Browne-Wilkinson in the EAT in W.E. Cox Toner (International) Ltd v Crook 1981 IRLR 443 :-

“If one party (the guilty party) commits a repudiatory breach of the contract, the other party (the innocent party) can chose one of two courses: he can affirm the contract and insist on its further performance, or he can accept the repudiation, in which case the contract is at an end...

But he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by an express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation...

Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contractual obligation, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation...”

74. Another way of putting it is, that affirmation is essentially the legal embodiment of the everyday concept of letting bygones be bygones, see Cantor Fitzgerald v Bird 2002 IRLR 267. In that case, waiting 2 months did not amount to affirmation because Mr Bird had made his discontent known and was giving clear signs that he intended to leave.
75. In a review of the law of affirmation in the employment contract context, HHJ Burke QC in Hadji v St Luke’s Plymouth UKEAT 0857/2012 summarised the law as follows:

(i) The employee must make up his [her] mind whether or not to resign soon after the conduct of which he complains. If he does not do so he may be regarded as having elected to affirm the contract or as having lost his right to treat himself as dismissed. Western Excavating v Sharp [1978] QB 761, [1978] 1 All ER 713, [1978] ICR 221 as modified by W E Cox Toner (International) Ltd v Crook [1981] IRLR 443, [1981] ICR 823 and Cantor Fitzgerald International v Bird [2002] EWHC 2736 (QB) 29 July 2002.

(ii) Mere delay of itself, unaccompanied by express or implied affirmation of the contract, is not enough to constitute affirmation; but it is open to the Employment Tribunal to infer implied affirmation from prolonged delay – see Cox Toner para 13 p 446.

(iii) If the employee calls on the employer to perform its obligations under the contract or otherwise indicates an intention to continue the contract, the Employment Tribunal may conclude that there has been affirmation: Fereday v S Staffs NHS Primary Care Trust (UKEAT/0513/ZT judgment 12 July 2011) paras 45/46.

(iv) There is no fixed time limit in which the employee must make up his mind; the issue of affirmation is one which, subject to these principles, the Employment Tribunal must decide on the facts; affirmation cases are fact sensitive: Fereday, para 44.

76. The employee must prove that an effective cause of his resignation was the employers' fundamental breach. However, the breach does not have to be the sole cause, there can be a combination of causes provided an effective cause for the resignation is the breach, the breach must have played a part (see Nottingham County Council v Miekell [2005] ICR 1 and Wright v North Ayrshire Council UKEAT/0017/13).
77. An employee is perfectly entitled to wait for a period of time to seek alternative employment before resigning, see for example Walton & Morse v Dorrington [1997] IRLR 488.
78. In Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908 the Court of Appeal held that a repudiatory breach cannot be unilaterally cured by the party in default. However, Lord Justice Sedley warned:
- “A wronged party, particularly if it fails to make its position entirely clear at the outset, cannot ordinarily expect to continue with the contract for very long without losing the option of termination, at least where the other party has offered to make suitable amends”*
79. There is also implied in every contract of employment, an obligation to deal with Grievances timeously and reasonably, see WA Goold (Pearmak) Ltd v McConnell [1995] IRLR 516.

Findings of Fact

80. At the outset we express that we acknowledge that we have to approach the evidence of Mr Black with caution for reasons set out in detail in Mr Stone's closing submissions. By way of example, at paragraph 78 of his Witness Statement, Mr Black said that he had not been subjected to disciplinary proceedings, or any kind of performance improvement process prior to the events in question. That is simply not true and obviously so. At paragraph 58 he referred to earlier disciplinary matters as being groundless, which they plainly were not. There were many well founded reasons set out by Mr Stone as to why Mr Black's evidence had to be treated with considerable caution and we did so.

81. The Respondent is a Government body which supplies technical services to the Foreign and Commonwealth Office.
82. Civil Servants are bound by the Civil Service Code, which appears in the bundle at page 1035. Civil Servants are required always to act in a way that is professional and that deserves and retains the confidence of all those with whom they have dealings.
83. The Respondent's disciplinary policy starts in the bundle at page 943. Its provisions as to suspension relevant to these proceedings is at page 950:

"There may be instances where suspension with pay is necessary while an investigation is carried out. FCO Services has the right to suspend an employee on full pay to allow for an investigation or a short cooling off period while consideration is given to the next steps. Suspension will only be implemented where there are reasonable grounds for concern. For example,

- *Evidence may be tampered with or destroyed;*
- *Witnesses might be pressurised; and / or*
- *There is a potential risk to the business, other employees or third parties in allowing the employee to remain at work."*

It further states:

"Suspension will be on the basis of full pay and any additional allowances / benefits normally received will continue to be paid".

84. The grievance procedure is at page 998, where it states with regard to suspension:

"There may be rare occasions where suspension with pay is necessary while an investigation is carried out. The Line Manager must consult HR prior to taking a decision to suspend an employee. FCO Services has a right to suspend any employee on full pay to allow for an investigation or a short cooling off period while consideration is given to the next steps. Suspension will only be implemented where there are reasonable grounds for concern that,

- *Further actions may occur which could give rise to additional accusations;*
- *Evidence may be tampered with or destroyed;*
- *Witnesses may be pressurised; and / or*
- *There is a potential risk to the business, other employees or third parties in allowing the employee to remain at work."*

85. Mr Black has Autism Spectrum Disorder. As mentioned above, we have the benefit of a report from a Doctor Goodsell produced for the purpose of these proceedings. Quoting from this report she makes the following remarks,

Para. 3.5 *"He is clearly intellectually capable but has deficits in*

reciprocal social communications”;

- Para 3.6 *“He struggles to comprehend non-verbal communication as well as misinterpreting verbal statements at times, for example literal interpretations of what is said to him. Reading other individuals is very challenging for him and due to this can act in a manner that may be considered socially inappropriate. Appears to have difficulty interpreting the emotional state of others. Difficulties understanding non-verbal communications can lead to challenges identifying the intentions as well as utterances of others. They may follow their own train of thought or actions without assessing possible consequences which in my opinion fits with Mr Black’s assertions and presentation.”*
- Para 3.7 *“His inability to perspective take or put himself in another person’s shoes will clearly limit successful interactions.”*
- Para 3.8 *“His thinking is particularly rigid and once he has decided on a course of action or made a decision, it is challenging for him to consider alternative possibilities or listen to advice to the contrary. Mr Black was reported during the assessment to be very inflexible and this was observed on several occasions. He was unable to consider other points of view and believed he was right even though evidence was presented to him confirming that he had made a mistake.”*
- Para 3.9 *“He presented as being emotionally dysregulated showing disproportionate anger and intolerance.”*
- Para 3.10 *“Mr Black can become over focused on situations and finds it very challenging to let things go. He states his views several times and provides convoluted, indirect responses and often talks over the other people present. He can, unfortunately, present as socially awkward, or as aloof and disinterested.”*
86. At the relevant time, the times in question in these proceedings, Mr Black knew none of that. He did not know this during his employment with the Respondent, for he was diagnosed in May 2017.
87. Mr Black’s employment commenced with the Respondent on 16 September 2002, initially as a trainee and then as a Computer and Electronic Engineer. In due course his job description became Technical Installer. His contract is at page 112. Mr Black worked in what was known as Technical Services, (TSC). His role involved the installation of various types of electrical equipment for the Respondent across the globe.
88. Teams would be put together to travel to overseas locations to carry out installations. These trips abroad would entail being away for many weeks at a time and the financial compensation would be advantageous to the individuals concerned. The teams would consist of people with different skills as required for the particular job. They would be managed whilst away by a variety of Team Leaders.

89. We begin our analysis with Mr Black's appraisal for the year ending March 2011, carried out by his Manager Mr Dyson. The appraisal begins at page 889. The scoring assessment scheme consists of five possible scores; 1 to 5. His overall annual assessment was a score of 3 which is, *'effective - good performance in many areas across the year, or key performance objectives met'*.
90. At page 892, Mr Dyson wrote on 2 December 2010:
- "John needs to also work further to improve his interpersonal skills which at times comes across in the task assessments that we have so far, as it has caused tensions in the past on some trips."*
91. At page 893, Mr Dyson wrote on 24 May 2011:
- "What John may see as banter, but others may find not, what some have put down as immaturity in task assessments. This area can cause aggravation at times with his colleagues, so it is an area that John is still pushing the boundaries of at times which is why his interpersonal skills score remains lower than I would like to see. Although this hasn't appeared as a problem in the latest assessment, so hopefully he is taking notice of this."*
92. Mr Black wrote that he thought that this was a fair assessment and that he had made a lot of effort with everything from his personal and interpersonal skills to try and get higher qualifications for both the sake of the business and his own sake.
93. His Senior Manager wrote, at page 894:
- "He should note that he needs to work on his interpersonal skills and communication. He is an engaging character but he is sometimes talking when he should be listening. There is still much more that John himself can do to improve his performance and his relationship with his colleagues."*
94. During 2012 and 2013 Mr Black was managed by a Mr Powell. The appraisal for year ending March 2012 is at page 897. His overall year assessment score is again 3, although he scored a 2 for processes.
95. At page 901, Mr Powell wrote on 17 January 2012:
- "Verbal accounts from John's peers generally indicate numerous areas of improvement required. I believe the areas of concern largely centre on his interpersonal skills and communication skills."*

And a little later,

"John seems to have matured recently in his approach, he actively looks at ways to improve himself. I would like to see much more evidence on file."

96. At page 902, Mr Powell wrote on 28 March 2012:

“John should continue to be conscious of his performance and how his tendency to be outspoken can be misinterpreted by others.”

97. A Senior Manager wrote that the coming year would potentially be the turning point for Mr Black's career and as long as he was willing to take on board comments regarding his interpersonal communication skills, he should progress.
98. Mr Black wrote that he was glad that his efforts had been noted and he said that he looked forward to breaking down some preconceived ideas about him that some staff seem to have created, or heard, and enjoy the surprise on their faces when they see that he is a different person.
99. In January 2013, whilst on an assignment in Maputo, an incident occurred for which disciplinary action was taken against Mr Black. He explains that after a night out, when he got into his work supplied vehicle to return home, a young woman got into his car. It was dark, there were many people around, he felt it would be dangerous to make a scene by getting her out of the car, so he decided to take her back to her village. That was apparently a 50 kilometre round trip on rough roads during which some plastic on the body of the vehicle was damaged and the vehicle became muddy. There were other allegations. There was a disciplinary investigation.
100. The outcome of the disciplinary investigation on 25 February 2013, is at page 869. The findings were that Mr Black had incurred a substantial amount of additional mileage, he had not followed FCO Security Guidance in giving a lift to a stranger, he had not used an official vehicle within permitted terms of use, he had neglected good health and safety practices by going to work without sufficient rest and he had caused a significant amount of disruption during his short visit to Maputo between 6 January and 23 January 2013, which had reputational implications for the Respondent.
101. Mr Black is recorded, at page 870, of acknowledging that he had given a lift to a local person but had thought it was a gentlemanly thing to do. The outcome records that he was informed that the disciplinary officer did not believe, considering the evidence and explanations in mitigation offered, that the allegations had been substantiated and he was therefore pleased to confirm that he had decided on this occasion that there would be no formal disciplinary penalty imposed. However, he added that overall Mr Black's behaviour was not always what one would expect from someone of FCO Services and he should consider more carefully his future conduct on overseas trips. In particular the impact of his behaviour and what that might have on FCO Services perception by its customers at what they call Post and on other members of the team he was working with. It was suggested he wrote a letter of apology.
102. Mr Black complains, generally, that unfair and untrue rumours were spread about him in respect of this matter to the effect that he had taken a prostitute home and had driven a vehicle whilst drunk.

103. His next annual appraisal was in March 2013, this begins at page 903. His overall performance assessment was a 3, but in terms of customer relations, his assessment was a 2, which is, *'partially met, performance delivers objective and most of the success indicators are met'*.

104. At page 905, Mr Black has written a contribution to the assessment which includes an explanation of two unsuccessful job applications that he had made. It is convenient to quote what Mr Black says there, by way of explanation for the purposes of these Reasons as to what occurred. He wrote:

"I applied for two different TPB4 positions throughout the appraisal period this year. I was severely disappointed with HR and the process in the first instance. They managed to completely fail at every guideline, deadline and hurdle with the staff involved. I was subsequently informed I missed out by the slimmest of margins as my application was weak enough on the Financial and Commercial Management examples that had prevented me from being given a position.

On the second attempt this was completely rectified with an increased knowledge of the system, processes and understanding of what is needed. I, however, had just returned from annual leave and was sick with fever. I thought it unprofessional to postpone the interview and armed with this knowledge, the panel still found me just below average in a couple of areas. Despite my being highly above average in the majority of areas, according to official feedback. This wasn't enough to be given one of the positions, or even a temporary promotion as has been done in the past."

105. On this particular point, we break into the narrative to say that Mr Black says that Mr Dyson had told him that it would be okay for him to change out of his shirt and tie into a polo shirt, because he was sweaty and unwell. Continuing with the quote:

"These two incidences of the system have completely dispelled my moral to pursue further similar positions in the future. It is unlikely I will apply again for quite some time despite my clear and proven ability to perform the job to a high level. I can only feel this is a loss for the department for me to be able to take teams of individuals away, grant greater flexibility and to educate, teach and develop our more inexperienced staff members as I had been praised for doing during the reported period."

106. At page 908, Mr Powell wrote on 18 September 2012:

"I seem to have received slightly more unsolicited 360 feedback on John's performance than I do on other people. Quite often it is regarding performance from previous reporting periods which is often irrelevant now and sometimes unfairly biased and based on misperceptions rather than actual facts."

And a little lower,

“Recently John applied for a TPB4 CCTV/ACS position with the TSC. Although John was unsuccessful, he progressed through all stages of the recruitment process which shows he was considered a credible candidate. If he wishes to apply again in the future he should take on board the feedback given.”

107. At page 909, Mr Powell wrote on 17 May:

“From my perspective I feel John’s performance output has been slightly stronger than his core behaviours. At times John attracts controversy which means he requires more of my time and involvement compared to others I Line Manage. John’s strengths lie in his improved work ethos while on site delivering project work.”

A little lower:

“Going forward, John needs to move on improving his:

- 1. time managing skills;*
- 2. compliance with I-Time / expenses;*
- 3. compliance and understanding of FCOS policies; and*
- 4. effective communication skills.”*

108. In October 2013, there was a further disciplinary issue. This was with regard to his use of a lap top supplied by the Respondents. Mr Black says that it was issued to him as a personal lap top and that he had sent an email to the Respondents to that effect. Having received no contradictory reply, he proceeded to use it as if it was his personal lap top. He also said that he did not sign the Respondent’s ‘Acceptable Use’ policy. When the laptop was handed in for repair, the Respondent discovered pornographic images, naked images of Mr Black himself and of “FO employees” naked.

109. The outcome of this disciplinary matter is at page 877, dated 22 October 2013. The author of the letter is Mr Dyson. It records that the IT equipment used was the property of FCOS, it had been used inappropriately on several occasions to access the internet and to view pornographic material and that there were some discrepancies over paperwork. The outcome was a final written warning for gross misconduct. Mr Black appealed the outcome, but the final written warning was upheld. A consequence was that someone called Mr Badcock was appointed to be his mentor, page 879. Neither party expanded on precisely what an NLP Master Practitioner is, but Mr Badcock was one such, which was said to be significant. They had six meetings. In cross examination, Mr Black said he did not find the mentoring helpful, although it had prompted him to do some further research for himself.

110. In the meantime, Mr Powell refused to continue to manage Mr Black. He had been distressed by what he had seen on Mr Black’s lap top. He felt strongly that Mr Black had been treated too leniently. Over the next year, therefore, Mr Black was managed by three different people in rotation; Mr Cragg, Mr Harle and Mr Lawrence.

111. At this point it is convenient to note that historic appraisals by a current line manager are not shared with future line managers.

112. Mr Black's next annual appraisal for the year ending March 2014, begins at page 912. His overall annual assessment is a score of 3, he gets a couple of scores of 4 which is 'exceeded' indicators, he gets a score of 2 under the heading 'People and Reward' and a 2 for, "interpersonal skills and communications". The reviewing Manager was Mr Cragg. A Team Leader is recorded as writing at page 916:

"Mr Black has a good grasp of CCTV, his work can be fantastic."

113. At page 917, Mr Cragg wrote,

"John and I discussed in depth the frustrations he is experiencing in seeing around him. The biggest issue is his general lack of overseas work and feels there is alienation towards him by particular PMs (which we take to be Project Managers). I explained that there isn't a vast amount of work around."

114. At page 918, on a 360 review, a colleague wrote of him:

"The usual reputation precedes him, perhaps he generates a bit more friction than the average installer, but he spoke openly about working on his people skills and believe he is definitely trying harder now. He was helpful and friendly to staff at Post and his team members."

115. At page 919, somebody else wrote of him:

"I think he generally does not realise that his actions can and do cause stress in others. I don't know if he has done a stress awareness course but it might be an idea. He seems oblivious to most things that did not involve his own personal issues and interests."

116. Somebody else wrote:

"Having worked for John in Tripoli, Libya, I feel he can take banter too far. On many occasions I had to explain to people, FCO staff and Guarda World CP teams that John's intentions are good, however, perhaps he could not express himself in a positive light as on many occasions staff would ask me why he was treating me with contempt and shouting."

117. At page 920, Mr Black wrote that this had been his hardest year so far. He said he understood he could be a difficult person to work with sometimes and he knows that he can cause friction through questions, disagreement and his self-confidence. He referred to himself as being highly analytical, intelligent, confident and motivated to be precise and correct with an enormous level of comprehension. He said that he knew that he had a reputation for trouble, much of which is exaggerated. Some

having basis in truth, some complete fabrication. He said that he had worked with many different people and they all have a different style and that this was something that he struggled with most of all. He said he was continually working on his interpersonal skills and was at that time undertaking a Management Trio of courses designed to educate him through coaching, feedback, constructive conversations and performance management. He put forward a suggestion that it would help if he had a single mentor to provide protection both to Project Managers and Resource Management so that he will not cause a scene, but also providing honest feedback on how he really was.

118. At page 921, the Senior Review Manager was a Ms Toms of whom we will hear more later. She wrote on 15 August 2014 that it was clear from the feedback that Mr Black's work was to a good standard, the issues which he faces are around his communication and interpersonal skills and that the box marking on his behaviour reflects that. She said that it was pleasing to note that he was trying to address these issues with mentoring and training. She notes Mr Black's complaint that he has little in the way of overseas trips and records that she had reassured him this was not a penalising issue and they are constantly trying to make sure that trips abroad are fairly shared out.
119. On 1 April 2014, a Mr Warren Robe wrote a report about Mr Black and sent it to Mr Cragg. It begins at page 241. The passage we need to quote is at page 246, he wrote:
- "I believe that John has a very mild form of autism. He just does not fit in on too many occasions and as a Manager to him there is a kind of blockage / brick wall that I cannot get through. I have tried many tactics to get through to him, but I am not able to."*
120. In June 2014, Mr Black saw a psychologist. He was referred by his General Practitioner. He paid for it himself. He had two sessions, one was introductory, followed by one further session. There was no diagnosis that we know of arising out of that and no suggestion of autism.
121. During August of 2014, Mr Black attended a series of Service Management Courses recommended to him by an assistant RDM, Ms Benyom, which he describes as a tryptic of communication courses. They included 'Guidance on Holding Constructive Discussions'.
122. On an assignment in Islamabad in August 2014, a Team Leader told Mr Black that when the team was being put together it had been suggested to him that he did not want Mr Black. The Team Leader told him that many others had made remarks about his people skills and that some Team Leaders had specifically refused to take him on assignment.
123. In September 2014, Mr Black complained of a lack of consistent Line Management and Ms Toms then volunteered to manage him exclusively. Ms Toms thereafter, held regular quarterly one to ones with Mr Black to discuss *"his promotional aspirations and his Performance Development Plan"*. Those meetings were minuted. She says she also had informal one to ones with him when there were adverse reports about his behavior.

Those informal meetings were not minuted.

124. Mr Black's next annual appraisal for the year ending March 2015, now called a 'Performance and Development Review', starts at page 922. The first page records that his career goal at that point was to get promoted during the course of the year. The Manager has written that they need to develop his softer skills and that she will work with him to identify where he needs to develop.

125. At page 923, another Manager wrote,

"He does however, need to accept views other than his own, even if he doesn't agree with them. This is improving but can sometimes be a battle of wills. John has provided limited task assessments on individuals and needed some guidance around language used."

126. At page 925,

"While carrying out the RDM role I had a few contacts with John, mainly to do with disputed claims and times. John can be very frustrating in that even when the policy or rules have been pointed out to him, he still feels that if this seems unfair to him personally, it shouldn't apply and arguing the point can be very time consuming."

127. At page 926 there is a record of the three courses we have just referred to being undertaken and there is a record that he has agreed to meet his Manager every quarter.

128. At page 928, the scoring records his overall assessment as being 'partially met' and in particular under the heading, 'Leading and Communication' there is a score of 'partially met'.

129. At page 929, Ms Toms sets out a series of comments. These include

"The overall view is that he isn't particularly good at taking instruction or being an active listener with examples of him talking across those trying to give him advice and continually arguing the point. One of the areas he needs to pay particular attention to is knowing when to stop and think about whether a point has been pushed too far. Sometimes he needs to accept a situation even if he doesn't agree with it."

130. She makes a reference to an incident on assignment in Columbo, which had initially resulted in the Project Manager asking him to be removed from Post. Ms Toms records that she had to apologise to Post and smooth things over as best she could. She commented that Mr Black had not seen how serious the situation was.

131. Mr Black wrote, at page 930:

"As demonstrated in the huge variety of tasks attempted and performed in this year, I am clearly able to adapt through the many faces of our business. Coupling this with a confident and

outspoken personality I would expect that I should be someone the Management are keen to work with and progress. It seems to me that is not the priority.”

132. Between 13 September and 13 November 2015, Mr Black was on assignment in Dhaka. The Team Leader was a Mr Nichol. On 12 November 2015, Mr Warren Robe telephoned Ms Toms and told her that Mr Black had sexually harassed the wife of an employee at a dinner party. Ms Toms spoke to Mr Nichol, who followed up that conversation with an email, at page 511 through to page 513.
133. Mr Nicholl identified somebody called Mr Steve Acott as the Senior Manager. The event had been at the home of somebody described as the FCO Corporate Services Manager. Mr Nicholl said that it was not clear if the offended party was going to make a complaint, although, as time went by, he believed it less and less likely. He refers to Mr Black during the journey back in a minibus, being loud and vociferous about the evening and in particular, how the lady in question was *“coming on to him”*. He referred to Mr Acott quickly developing a dislike for Mr Black and apparently wishing to push it as far as it could go.
134. A little later in the day, Mr Nichol wrote that he had heard that neither the offended party nor her husband wished to take the matter any further, but that this may still may not be an end of the matter because the Corporate Services Manager was furious that this had taken place in his house during his hospitality. He said that the image or reputation of FCOS had been damaged and there was going to be a further discussion later that day.
135. Mr Nichol wrote again a little bit later, at page 513, still having heard nothing further and expressing that he understands that if nothing further comes back, they probably will not be able to take it any further and:

“It has been a headache I could do without and I know for sure that if nobody from Post comes forward then Mr Black is just going to deny everything or make counter allegations, that will be a scene that I don’t particularly want to be involved in.”

He then goes on to say that he wants to put it all behind him and get back, with a fresh attitude and a less problematic team.

136. Mr Robe had written, at page 514, to Ms Baynard and Ms Toms. He understands that the husband and wife concerned do not want to take the matter any further. He comments that the reputation of FCOS has not been damaged and Post see it as an isolated case with one particular individual.
137. The said Mr Acott wrote, at page 520 to page 521, of Mr Black’s constant and highly vocal expressions in the Embassy bar, claiming to be staff and entitled to privilege. The privilege of being served after hours I think that is. It appeared to him that other members of the team did not wish to be associated with Mr Black, he described him as an embarrassment to FCO Services and he wrote of being aware that the woman in question during

the dinner had become increasingly agitated by Mr Black's unwanted advances whilst at the table. He referred to Mr Black's actions as damaging to the company's reputation.

138. There were then further discussions between Mr Nichol and Ms Toms, which are noted at page 563. He describes the dinner party and Mr Black sitting close to the lady at the table, but that he had not himself noted anything untoward. However, in the minibus on the way home, he said that Mr Black had been bragging that the lady had been coming on to him and that he could have had her at any time and told everybody how many condoms he had brought with him.
139. Ms Toms asked Mr Nichol whether this was one off behaviour or whether anything else had happened during the trip. Mr Nichol went on to give examples of other perceived misbehavior by Mr Black on the trip. He spoke of having to talk to Mr Black every day about something and that he saw him as a huge management overhead. He spoke of Mr Black becoming arrogant and rude to staff when the Club had been closed. He described him slipping off a step ladder and proceeding to, in anger, smash a child's table by kicking it. He referred to a security issue; security levels had apparently increased because of a recent ISIS attack on an Italian National and staff had been told not to wear anything that identified them as visitors or government officials, i.e. t-shirts with a British Embassy logo on them. Mr Black had turned up with a t-shirt from, he said, the British Embassy in Washington and was told not to wear it, but then he did so again later on the trip. He also spoke of Mr Black regularly coming down too late in the morning for transport to the site they were working on, so that he would grab food from the dining room and eat it in the vehicle whilst in transit. He referred to Mr Black slipping down some stairs and swearing and having to be told to stop because there were children around. He also spoke of Mr Black bragging about how he had got away with previous misconduct cases.
140. Ms Toms then went on to hold a discussion with a Mr Denton and a Mr Winchcomb on 17 November 2015, recorded at page 565. They spoke, or Mr Winchcomb spoke, of Mr Black being loud and arrogant with the more alcohol that he drank and of his treating staff like waiters. He referred to him having a one track mind and that his mind set became stuck. He referred to his swearing during pre-dinner drinks. They spoke of his boasting in the minibus on the way back from the dinner party with regard to the host's wife, that he could have had her whenever he wanted and that they had been touchy feely under the table. He also said that the next day, Mr Black could not work properly and had come into work saying that he was not going to go up a ladder before 10 o'clock, a reference to his being hungover.
141. Mr Denton confirmed he had witnessed Mr Black smashing a child's table when he had slipped off a ladder, kicking it from one end of the room to the other, swearing and Mr Denton having to pick up the pieces and apologise to Post. He also said that he had witnessed Mr Black swearing after tripping down some steps when children were present and looking over and he confirmed the same comments made by Mr Black in the minibus as Mr Winchcomb had suggested.

142. Ms Toms then spoke to a Mr Sykes on 18 November 2015, noted at page 567. He recalled the concern over the security situation because of the ISIS attack on an Italian National who was killed and being told not to wear clothing that identified him as being connected with FCOS or the Embassy and the following day, Mr Black turning up with a British Embassy t-shirt on when he had been told not to. He witnessed the incident of the child's table being kicked and smashed. He referred to Mr Black treating staff like waitresses. He referred to an incident when they had been sitting in the Club watching football, he said Mr Black had taken off his shorts and sat in his pants. He referred to Mr Black as a social hand grenade. In respect of the minibus, he said that Mr Black had been bragging about how many condoms he had brought with him. He also said that he had heard Mr Black the following day say that he should not be using an angle grinder; a reference to the fact that he was hungover after having drunk so much the night before.
143. Ms Toms then met with Mr Black himself, page 573, on 18 November 2015. It is interesting to quote what he said about the incident with the woman concerned. He said he had been engaged in very flirty conversation and that:
- “He didn’t do anything inappropriate and the worst he could imagine being accused of would be that he had put his hand on her leg through the course of normal dinner table movements”.*
- He said he could not remember saying anything on the bus, everybody had been drinking and it was all just laddish behaviour.
144. With regard to the incident with the child's table, Mr Black protested that he was being asked to do some wiring whilst on a ladder, when there should have been a platform. He said he had complained that he did not want to just use the ladder, but was told to get on with it. He had fallen off the ladder while pulling cabling through. He said he had just managed to land on his feet, narrowly missing a picnic table, which could have caused a serious accident. He acknowledged that in his frustration, he kicked an old and dirty small plastic table as it rolled away, breaking a single leg. He apologised and offered to fix or repair it.
145. Ms Toms informed Mr Black that as a result of these behaviours, he was 'grounded', meaning that he would not go on away trips. Mr Black was due to go to Nairobi within a few days and he was told he would not be going on that trip.
146. Mr Black then went on to complain about the Team Manager Mr Nichol, referring to receiving offensive and abusive messages from him. He provided some copies of texts and he also said that Mr Nichol had been intimidating and had been drunk when sending the texts.
147. As a consequence of being grounded, an employee loses the opportunity to earn the lucrative additional allowances: short trip allowance, hazardous conditions allowance and so on. He loses his expenses, (which of course help save money) and the overtime opportunities that are associated with

overseas assignments.

148. Mr Black complains of having complained to Ms Toms about Mr Nichol's behaviour and having provided lengthy follow up details, which are at page 611a-q. He was told that those allegations would be investigated, but that Mr Nichol was nevertheless not grounded. We know Mr Black is correct in that, because we see this referred to in email correspondence, (page 551) between Ms Benyom and a Ms Dungate, in which she acknowledges that Mr Nichol was not officially grounded.
149. Ms Toms and Mr Black met again on 3 December 2015, page 577. At the outset Mr Black said that he was familiar with the misconduct process and that he had no confidence in it. In discussing the allegations, he said that he did not own a British Embassy Washington t-shirt and that the t-shirt in question was a British High Commission Kingston Club members t-shirt, which was not in any way a work t-shirt. He said that the shirt that he wore did not suggest that he worked for the British government. When asked about the incident when it was suggested that he had taken his trousers off in the Club, his explanation was that he had changed out of a pair of shorts into a pair of trousers, because there were lots of mosquitos around. When asked about being late for work and taking breakfast with him in his hand from the dining room, he said there was only one occasion when he was late and he apologised. But then he did acknowledge that there may have been one or two occasions when he did take breakfast to the car. He acknowledged that he had flirty conversations with the wife of the host in Dhaka and he said he was not surprised that she had not made a complaint or any written accusation, because they had been chatty and flirty and shared cheeky jokes. He referred to the woman as a kindred spirit. He also said that this was in the privacy of his own time. As for the behaviour in the minibus on the way back that evening, he referred it to being laddish behaviour, they were jokey throw away comments and that he had not meant to cause offence to anybody. With regards to the suggestion that he was under the influence of alcohol at work the following morning, he said nobody had breathalysed him. He said that he had been feeling rough, as he had drunk wine the night before and he thought it was a usual reaction to a new type, or age of wine. He acknowledged that he did not think that he had been clear headed enough to use the grinder, but nevertheless he had been told to get on with it. He acknowledged that when he had slipped, he had said the word 'fuck' and a few other minor swear words. He said he had been embarrassed, but there were no children around at the time. He acknowledged that there could have been.
150. We now turn to some correspondence at page 139, regarding Mr Black's security clearance, referred to as DV clearance. His security clearance was due to expire in March 2016. At page 139 we see an email from a Miss Hutchinson of the Personal Security Team, saying that she had a call from Mr Black that afternoon (3 December 2015) asking about the next steps towards extending his DV clearance. She enquired of Ms Toms whether she has any observations on his behaviour, attitude or any security concerns over the course of the last year, commenting she is not aware of any adverse reports or issues. Ms Toms replied on 4 December 2015 to explain that she was currently taking Mr Black through a gross misconduct investigation after a recent trip to Dhaka and that he has been

stopped from travelling to Nairobi whilst that is investigated. She explained this concerned his behaviour and his language and a possible complaint of inappropriate touching, although that had not materialised. She said that they were looking at his behaviours across the whole trip.

151. We then go to page 132, where Ms Hutchinson writes to Mr Black by email on 11 December 2015. Referring to their earlier conversation, she confirms that Mr Black's DV clearance had been previously extended for one year in late 2014, when his clearance was last reviewed. She then explains that she has in the meantime spoken to his Line Manager, she understands that there is a misconduct fact finding investigation underway and until the outcome of that investigation is known, she is not prepared to do any more than grant a temporary extension to his DV clearance until 31 March 2016.
152. On 9 December 2015, Mr Black queried whether Mr Nichol was working on an assignment in Brussels. He received a reply that he was not, (see page 547).
153. On 10 December 2015, Mr Hatfield reported to Ms Toms that Mr Black had contacted him and that he was trying to contact a Mr Steven Sykes, (pages 549 and 548). Ms Toms advised that consideration should be given to suspending Mr Black as a result, page 190, but a decision was made not to do so.
154. On or by letter of 16 December 2015, (page 555) Ms Toms confirmed to Mr Black that there was a disciplinary case to answer. The allegations were:
 - a. Deliberate damage to property, (in relation to the child's plastic table);
 - b. Being under the influence of alcohol while on duty (a reference to his being hungover the morning after the dinner party);
 - c. Conduct or behaviour likely to bring FCO Services into disrepute, (a reference to his swearing and to his behaviour at the dinner party including swearing and loudness) and
 - d. Failure to follow the reasonable instructions of a Manager (a reference to his failing to comply with security advice not to draw attention to himself by wearing a t-shirt with a High Commission / Embassy logo).
155. The letter explained these were potentially serious breaches of the Civil Service Code of Conduct, that the damage to property and bringing the Service into disrepute was potentially gross misconduct. The offensive language and inappropriate behaviour is described as potential misconduct. He is told that until the outcome of the hearing is known, he will not be able to travel for work, in other words travel abroad. He is then told in the concluding paragraph:

"I would remind you that the disciplinary process is impartial and

confidential. At no time should you act in any way which may unfairly prejudice the situation and the matter should not be discussed with colleagues or others who are not involved in the process, although you may confer with your Manager, your chosen companion, Health and Welfare or an employee assistance provider if you wish.”

156. Mr Black then raised a grievance, page 191. He complained of:
- a. Being subject to multiple misconduct cases;
 - b. There being a consistent and unacceptable lack of tasking, (in other words, not being given overseas assignments);
 - c. Being subjected to an environment that allows staff and Managers to make and discuss claims about his behaviour, spreading rumours and slanderous comments;
 - d. Of being shifted from one Line Manager to another;
 - e. Suggestions that he makes being ignored, and
 - f. Being subjected to social isolation and widespread bullying.
157. Ms Toms produced an investigation report in respect of the disciplinary matters on 17 December 2015, this begins at page 558.
158. On 22 December 2015, Mr Black wrote an email to his colleagues, page 203. He referred to it as an email that was to staff in confidence and that it was not to be discussed or shared with anybody else. He wrote that he was writing to the recipients because they were someone that had either been directly mentioned to him, or someone who he thinks might be relevant. He says that he has been told by somebody that there was unacceptable conduct by other members of staff in reference to him, where they have said that they have heard and seen discussions about him of a personal and unacceptable nature. He wrote that he did not envisage the e mail being something that was going to identify individuals specifically, but more that there was a culture within the organisation that allowed, or even fosters, such unacceptable behaviours. He stated that there is a grievance in motion to deal with these issues and he explained that he is emailing to ask if the recipient had witnessed such gossip, personal defamation, slander or forms of written communication at any time that was unacceptable and which they were willing to help him with, and in that case, would they please contact him. He gave a reassurance that any replies will be kept confidential.
159. The Tribunal notes that in his resignation letter, (page 142) Mr Black referred to the purpose of this letter as being to collect evidence in order to support his position relating to the allegations. That said, we struggle to see the connection between what is actually written in that letter at page 203 and the disciplinary allegations against him, which are very specific.

160. On 5 January 2016, Mr Black made an application under the Respondent's voluntary exit scheme. We are not told precisely what that is, but it is obviously a scheme whereby people can leave the Respondent's employment on certain favourable financial terms. His application was rejected on 26 January 2016, page 134.
161. On 6 January 2016, Mr Hatfield reported by email to Ms Toms and Mr Powell, (page 202) that he had received the email we have just quoted from at page 203. Mr Powell then wrote to Ms Forster forwarding the email, saying that he was concerned that Mr Black was trying to portray an inaccurate picture of TSC culture and fishing for snippets of information that might do this. He says he has received another email from somebody else who has been approached by Mr Black with the same email, that person specifically asks for her identity to be kept secret.
162. A decision is then made to suspend Mr Black. The letter of suspension is at page 225. The author is Ms Forster. She refers to the earlier letter of 14 December 2015, informing Mr Black of the outcome of the investigation into his alleged misconduct whilst in Dhaka which reminded him, she says, that at no time should he act in any way which may unfairly prejudice the situation and that these matters should not be discussed with colleagues who are not involved in the process. She explains that the decision to suspend him is based upon evidence that he has contacted a number of colleagues in writing requesting that they send him information regarding unacceptable conduct or referencing gossip. She takes the view that: the correspondence amounts to a break down in trust, which cannot be resolved until the disciplinary grievance process has run its course; that there is a compromise to his own disciplinary and grievance cases; that witnesses may be pressurized, and that evidence may be tampered with or destroyed. She states that the suspension will be reviewed on a weekly basis. Over the page she sets out the next steps, which include that the disciplinary process will be put on hold, pending the outcome of the investigation into the grievance, which will now take place and a grievance investigator appointed.
163. Ms Thompson is appointed to investigate the grievance. She is Head of Commercial Policy and Governance.
164. The pay which Mr Black received whilst he was suspended continued to be the flat rate of pay. Although it included, we believe, an allowance that he received for attending the UK location of his work.
165. There was a telephone meeting between Ms Thompson and the Claimant on 14 January 2016, recorded at page 229. Here he tells Ms Thompson that he believes himself to be good at reading people and he has an analytical nature. He says that his appraisals will show that he is very competent, although he needed to learn when to speak and when to stay silent. He said his perception was that maybe people found him difficult to interact with, but this has never been formally raised with him or managed. He agreed that he had a tendency to speak his mind and he did ask questions, but that he always tried to make things constructive. Ms Thompson then met with various individuals from whom written statements were taken between 10 February and 21 March 2016. These are at pages

323 to 390.

166. The statement from Mr Dyson starts at page 323. At page 324, the minutes record he was asked whether it was the case that it was difficult to schedule Mr Black onto trips because of Team Leaders refusing to work with him and he said that was true, that they did not object if they were new Team Leaders who had never worked with him before, but otherwise they struggled. Ms Thompson notes at page 325 that Mr Black had been consistently picked up for his interpersonal skills. Mr Dyson is recorded as saying at page 326, that most Team Leaders had incidents with Mr Black on trips overseas, which made it difficult to add him to schedules. At page 328, Mr Dyson said that Mr Black had so many Managers over the years because he was so complicated, that Mr Black was not over looked for scheduling and that he was not actually considered as a Team Leader because he was thought too much of a risk.
167. The interview with Ms Toms begins at page 329. She said that there was an issue with allocating overseas trips because Mr Black was regarded by Team Leaders as, "such a management overhead". At page 330, she said that Mr Black did speak over people, he travelled with around about 90% staff who had first hand experience of what he was like and most of them said they found him an embarrassment and did not have the patience to deal with him. At page 311, she made reference to an incident in Colombo where he was said to have made a sexist remark, making a woman feel uncomfortable and he had been rude. She said he was always argumentative and just did not seem to know when to stop and if he did not get the answer that he wanted, he would keep on pushing. She described him as very intelligent, but equally that he was very childlike in the way in which he constantly asked, 'why' and interrupted people. She was aware that Mr Black thought that he should be promoted, but commented that a promoted position would be about developing staff and being able to interact with people, which he was not able to do. At page 333, she said that Mr Black was not the only person in teams that had personality clashes with others, but he was probably the worst. She recalled one particular trip for which she put forward Mr Black and she was told that if Mr Black went on that trip, the Team Leader in question would resign. At page 335, referring to another trip to Colombo she had proposed to send Mr Black on, the Team Leader had said he would not go unless they took Mr Black off the team. She said she did not think Mr Black understood the impact of his behaviour, there were elements that he needed to develop but he is not aware that there is not anything that he is not good at, so that it was hard to get through to him.
168. The interview with Mr Jonathan Lawrence is at page 337. Asked whether he thought Mr Black was allocated fewer trips abroad than others, he replied that was probably true and that it was because Mr Black was so difficult to manage. He said Team Leaders in the past had tried to manage him, thinking they could fix his behaviours, but then something would happen and they would refuse to ever travel with him again. He said Mr Black did not pick up on people's body language when they felt uncomfortable and that if he ever spoke to someone about something that started to make them feel uncomfortable, Mr Black would just keep pushing on the subject. He said, at the top of page 338, that he believed

Mr Black to be somewhere on the Asperger's scale as his daughter had been out with someone who was and that person's behaviour had been similar. He explained that Mr Black had no social brakes and did not understand when to stop pushing.

169. The interview with Mr Martin Powell, starts at page 340. He said that Mr Black was someone whose reputation preceded him and someone who got himself into difficult situations. He described Mr Black at page 341, as a complex character, people used to talk to him about his high IQ and that he was not using his full potential. He said he had a clever head on his shoulders, he enjoyed conversation, but he could be verbose and irrational. He said that one to ones with Mr Black were not productive, because he would not listen or take feedback. He referred to people that refused to travel with Mr Black and described him as a social hand grenade. At page 342, he described one to ones with Mr Black as two steps forward and one step back and never getting to a finite decision. He said Mr Black would wind people up and rub them up the wrong way. That he did not understand how his actions affected others and he did not empathise or realise that he could offend others. At page 343, he said he did not empathise, did not listen and did not understand his impact on others. At page 344, he was a complex character and possibly his needs had not been appreciated or recognised by the organisation.
170. The interview with Ms Benyom is at page 345. She made reference to a trip to Tripoli, after which she said she had coached Mr Black because his behaviour towards a particular individual had been unacceptable. That individual said Mr Black had been racist towards him, but did not want to take any formal action. Ms Benyom said she spent a few hours trying to explain to Mr Black why what he had done was unacceptable and that he did not appear to understand or empathise. At page 346, she explained how she had tried to help Mr Black by encouraging him to attend the courses that we have heard about. At page 347, asked whether Mr Black was tasked on overseas assignments less than others, she said that he was but that was due to the fact that Team Leaders do not want to take him away and colleagues do not want to travel with him. She said they had ended up taking other people off trips just to ensure Mr Black gets some overseas trips. At page 348, Ms Thompson noticing that Mr Black's appraisals pick up on his interpersonal skills. Ms Benyom said that he was an, 'incomplete performer' and that was a score that had been given the previous year, which had upset him and which he had raised a grievance about. At page 349, she said there was never a grey area with Mr Black, he always believed he was 100% in the right and the other person was 100% in the wrong. She said she believed that until Mr Black learned to empathise or learn that his behaviours were unacceptable, he could not change. She said he was capable of changing and he was very intelligent.
171. The interview with Mr Roger Harle begins at page 351. At page 352, he commented that Mr Black did not understand the impact he had on other people and although he was not medically trained, he believed that Mr Black had a problem of some sort.
172. The interview with Mr Jonathan Dixon is at page 360. He described Mr Black as a difficult individual and that he was described that way by people

who are usually very tolerant. He said he was aware of a lot of people who would refuse to travel with Mr Black.

173. The interview with Mr Robert Ladd is at page 363. He said he thought the problem for Mr Black was that people did not want to work with him because of his past issues. He said that then made it difficult for the RDMS to task him. He said that he himself had not really had any issues. At page 364 he was asked whether there was any perception about Mr Black in terms of tasking? He replied that he felt that Mr Black was tasked less than his colleagues. He had noticed that on quite a few of the jobs he was scheduled for, Team Leaders would refuse to take him away, so he could see why Mr Black was not tasked as much as others.
174. The interview with Mr Nick Andreoli is at page 373. He said that he thought that it was 100% true that Mr Black was not tasked with overseas trips as much as others and that was because so many people would not travel with him. Many of these were more senior members of the teams who had travelled with him previously and had bad experiences. He said he felt sorry for Mr Black, it was as if there was some sort of social impairment and he thought he should stay away from alcohol.
175. The interview with Mr Avery is at page 375. He said that Mr Black had a personality which was an acquired taste. He said he did not read situations well or see how he was perceived by others, he could wind people up as he did not know when to stop and that he could misjudge situations.
176. The interview with Mr Thomas Bond is at page 379. At page 380 he said that Mr Black struggled to know how to behave in social situations and seemed to have a blanket way of behaving which was not always appropriate.
177. Mr Paul Hatfield at page 381 described Mr Black as a social hand grenade.
178. The interview with Mr Warren Robe starts at page 387. He said that Mr Black did not seem to understand social issues or issues of morality. He said that he was always a nightmare on trips and an overhead to the teams, which meant that people did not want to work with him. He said he always pushed boundaries in and out of the working environment and just did not understand that this was a problem which made him very different from others. At page 388:

“WR added that he was advised indirectly via JB’s biological father that he had two sons and both suffered from Asperger’s. WR assumed that HRD knew this and that was why they had left him alone and treated him differently. When he researched the condition, everything seemed to fall into place with JB – it was like reading an essay about him.”

Commenting on that for a moment, this passage, when we were taken to it, puzzled the Tribunal as we have heard nothing about Mr Black’s biological father or any siblings. Mr Black was unable to enlighten us as to

what Mr Robe was referring to.

179. At page 389, Mr Robe described Mr Black as being a square peg in a round hole, he just did not fit in.
180. On 6 February 2016, Ms Forster emailed Mr Black to confirm to him that his suspension continues and that she would review it at the end of the grievance process, (page 866).
181. On 30 March 2016, Ms Thompson produced her grievance report, which starts at page 273. It has appended to it her notes of the statements taken from all of those various witnesses that we have been quoting from. She summarises their content to a degree. We note at page 287 she wrote that she obtained copies of Mr Black's appraisals for the previous three years and she notes that all appraisals mention development needs in interpersonal skills and communication skills. Under 'Findings and Recommendations', (which start at page 291) she says that there was evidence to show that Mr Black's career path may have been different to others and he may not have had as many overseas trips. She says that he has not been excluded from travelling, but the number of trips which were available to him were limited for a variety of reasons. At page 292, she does not recommend disciplinary action against any Manager, she says she has not found significant evidence of unacceptable behaviour, victimisation or bullying on the part of Managers. She does believe there are improvement actions which could be put in place. She commented that she would certainly have expected a 'Performance Improvement Plan' to have been put in place. She notes that the constant change of Team Leader and fairly frequent Line Management changes had not helped. She said that there was little consistency in the way Mr Black has been treated and which can be seen as giving rise to a negative reflection on Team Leaders.
182. We note that the various statements from which we have been quoting were never copied to Mr Black. Although he was provided with the report, he was not provided with the statements.
183. At this point we note in the chronology, Mr Black's DV clearance expired on 31 March 2016, (page 132).
184. The grievance outcome is provided in a letter dated 8 April 2016 which is at page 436. Ms Forster is the author. She says that there is insufficient evidence to corroborate the claim by Mr Black that he was an alleged victim of multiple misconduct cases. She acknowledges that he had less tasking abroad than others. She says the evidence suggested that the reasons for this are numerous but include: Team Leaders and Project Managers being reluctant to include him in their teams, but also pre-booked leave, grounding, lack of relevant technical skills and a decrease in project work since 2015. She said that an effort is made to ensure tasking fairness. She said there was no evidence that multiple Line Managers had caused a detriment and that there had been valid reasons for changes. She said there was no evidence that he had been passed over for jobs. The recommendations were: no disciplinary action against Managers; Management of poor performance to be prioritised; Team

Leaders to undergo Management training to ensure consistency of approach when dealing with issues overseas, and a revised approach to tasking to ensure fairness when work is allocated.

185. On the same date, 8 April 2016, Mr Black was issued with a summons letter in respect of the disciplinary allegations, (page 624). Although the Hearing was set for 20 April 2016, he requested a postponement.
186. Ms Forster wrote to Mr Black on 11 April 2016, at page 629. She states that as the grievance had not been upheld, they were now going to proceed with the disciplinary hearing. She identified Ms Christine Cook as the Disciplinary Hearing Officer. The final paragraph of this email says that his suspension has been reviewed; he is informed that as his grievance has not been upheld and the disciplinary process is to proceed, he is to remain suspended on full pay until the completion of the Disciplinary Hearing.
187. Ms Forster met with Mr Black on 14 April 2016, this is noted at page 471. She went through the grievance outcome with him.
188. Mr Black appealed the grievance outcome by email dated 27 April 2016, (at page 490 and duplicated at page 479). The grounds of the appeal were summarised by Ms Forster in an email of 3 May 2016, page 494, as being:
 - (1) That witness statements, including email correspondence received prior to the investigation, have not been fully considered by the Grievance Investigator; and
 - (2) That the evidence regarding lack of tasking are not congruent with the grievance outcome.
189. By letter dated 6 May 2016, Mr Black was informed that his suspension would continue, (page 888).
190. A Mr Fleet heard the Grievance Appeal on 12 May 2016, (page 498). We note that in these notes, Mr Fleet says Mr Black could be assured that he had read through everything thoroughly and so was in a position to be able to give a balanced and fair view. Mr Fleet confirmed in his evidence before us, the documents he had included the witness statements contained within the grievance report. Mr Fleet was Head of Professional Services Centre, Secure Global Services; he is now retired from the Respondent's employment. We note that he had coincidentally, undergone training with regard to Autism Spectrum Disorder in respect of somebody working on his team who had Asperger's. He provided a Grievance Appeal outcome in a letter dated 16 May 2016. He said that he was satisfied that the misconduct cases for which Mr Black was investigated, were managed appropriately. On the subject of tasking for overseas assignments, he said that this point had been acknowledged in the original report and that the potential reasons were further discussed, including pre-booked leave, grounding, Team Leaders and Project Managers not wanting him on their team, lack of relevant skills and a decrease in project work in 2015. He said he was in agreement with the

Report of Ms Thompson, that there was no evidence of Management fueling the rumour mill. He said that Management could not control every individual's behaviour but when they became aware of inappropriate behaviour, appropriate action had been taken. He acknowledged that Mr Black had been through a few Managers in previous years, but he did not think that was an unusual situation in the Respondent's organisation. He noted that Mr Black had argued with regard to promotions that he had not been approached directly and encouraged to apply for promotion opportunities and he said that was not the Respondent's policy. Overall, he did not uphold the Appeal against the grievance outcome.

191. A further summons in respect of the disciplinary hearing was therefore issued on 25 May 2016, (page 664). This refers to witnesses who Mr Black had already indicated he would like to be called, namely Mr Nichol, Mr Sykes, Ms Toms, Mr Winchcomb and Mr Denton. Ms Cook asks Mr Black to let her know by return why each of these people were being called and what they would contribute.
192. On 6 June 2016, Mr Black sent a list of questions, his email is at page 666, the questions are at page 687. He also set out key questions at page 676 and photographs that he wanted taken at page 682. Generally speaking and by way of broad summary, it is all off point with regard to the matters he is accused of in the disciplinary proceedings.
193. On 8 June 2016, (page 753) Ms Forster wrote by email to Mr Black with regard to the Hearing scheduled for that day, in which she explains that the purpose of the Hearing was not to examine the behaviour of others on the trip. The Hearing Officer would hear his case and then make a decision on whether to call witnesses, or request a response from them in writing to any points which he may make and if that is necessary, she will adjourn the Hearing.
194. Ms Forster also confirmed that they would permit Mr Black to be accompanied by his partner, rather than by a work colleague or Trade Union representative.
195. The Disciplinary Hearing took place later that day before Ms Cook. The minutes are at page 755. She comments early on that she is unlikely to allow witness questioning, as she did not believe that to be necessary. She indicated she would be happy to change her mind later.
196. At page 757, Mr Black is recorded as confirming that he was aware of the behaviour that was expected of him whilst working overseas. She asked him whether there were any other factors she needed to be aware of that may have affected his behaviour while on the trip and he said that there were, making reference to significant under tasking which had caused financial and mental stress. He confirmed that he had not used the internal Occupational Health scheme. He said that he had seen a psychologist outside of work, as he had been referred by his GP due to the stress that he was under. He said that he was aware that although his work was good, he could sometimes cause offence, but if his behaviour had been unacceptable enough for it to be his last chance then his behaviour should have been treated under a formal disciplinary, but they

never were. He said he was aware that his interpersonal skills were lacking.

197. Ms Cook asked Mr Black, (bottom of page 758) if anybody at FCO Services knew that a psychologist had diagnosed him as having a condition that affected the way in which he made decisions due to the stress he was under and Mr Black confirmed he had communicated to the RDMs informally when he was in their room. Mr Black said he could not remember exactly who it was in the room at the time, but he believed it was Ms Toms and Mr Powell.
198. At page 760, Ms Cook started to review the specific allegations:
- a. Deliberate damage to the child's plastic table, which he was said to have admitted doing. Ms Cook suggested that this was quite an extreme reaction to the situation. Mr Black replied he was frustrated as the task should not have been done in the first place and it was not being done properly.
 - b. In respect of the accusation of being under the influence of alcohol whilst at work, Mr Black explained he had arrived at work on time, he had made a comment that he had a headache and due to that, he had made a jokey comment that he was not going to be jumping up a ladder. He said he was not intoxicated and he had been open about the amount of drink that he had consumed. He confirmed that he had made the comment about not using the angle grinder.
 - c. In discussion about his remarks in the minibus on the way back from the dinner party, he said he could not remember exactly what was said, but it was a bus full of lads and the majority of the time guys travelling with each other have inappropriate conversations and that nobody was uncomfortable. Ms Cook confirmed that people had said they could not remember exactly what had happened due to the fact they had all been drinking. Mr Black said his language matched the situation and he had been appropriate at all times.
 - d. At page 765, they discussed the accusation of bringing FCO Services into disrepute by swearing in public situations and where children and customers were present. Mr Black confirmed that he had perhaps sworn in the context of an adult environment. He was asked why he had sworn on other occasions when there may have been children present? Mr Black's reply was that children were not present on either occasion and that people had misremembered in their witness statements. He said that when he fell off the ladder they were working in a children's play area, which was closed off to children at the time. He said that when he fell down the steps on the Tuesday morning, it was very unlikely that there were children around.
 - e. At page 767, the discussion turned to the t-shirt which he had worn. Mr Black said he had not been told not to wear a High Commission t-shirt. If he had been told not to wear it, he would have put it back

into his suitcase. He had worn it twice in seven weeks and he said if it was a serious issue, he should have been spoken to about it the first time.

199. At page 768, Ms Cook explains that she was going to adjourn and postpone the Hearing as she wanted to hear from some witnesses. She made clear that she did not want the next hearing to go over the same ground and wanted to stick to the allegations. She asked him to go through the statements, look for inaccuracies and put in order some new questions. She reiterated to Mr Black that the case was about his behaviours on the six allegations that were put to him and not about anybody else's thoughts or behaviours.
200. On 13 June 2016, Mr Black sent his revised questions to Ms Cook, (page 781). On 14 June 2016, Ms Cook confirmed to Mr Black that in fact none of those five witnesses would be available, (page 783). She provided a response to his questions at page 784. At page 796, Mr Black wrote on 17 June 2016 to Ms Cook confirming that he would be attending the adjourned hearing; unfortunately Mr Black had mistakenly mistyped Ms Cook's address, so that email did not reach her. He followed it up on 20 June 2016, as we see at page 796, from which we can see there had just been a conversation between Mr Black and Ms Cook, for which he has to apologise, referring to a heated phone call. He acknowledged that it had been stipulated that he was to confirm whether or not he was attending by Friday 17 June 2016, noting that his misdirected email is timed at 23:54 hours on 17 June 2016 and he asks Ms Cook to allow himself and his partner to attend the reconvened hearing.
201. Ms Cook declines to allow Mr Black to attend the reconvened hearing, replying on 20 June 2016, (page 795). She said that she had asked him to confirm his attendance by 17 June 2016, told him that it was his responsibility to ensure he followed the process, that all he had to do was click, "reply" to her email to say he was attending but instead, he had chosen to create a new email and had failed to address it correctly. She said that all of the witnesses had confirmed they were unavailableS she had received answers to written questions which she attached and says she will consider the answers in light of all the other evidence. She considered that she had sufficient evidence to conclude her deliberations and said she would conclude the hearing the following day. Mr Black was told not to attend.
202. We note that at page 800, is a photograph of the t-shirt in question, with a British High Commission Kingston Coat of Arms apparent on the left breast.
203. We note, at page 791, that Ms Cook asked for the grievance report as it could have relevance to the hearing. The reply which she received from Ms Forster was a summary of the outcome of the grievance. The grievance report itself was not attached. Ms Cook resumed the Disciplinary Hearing in the company of an HR Representative and notetaker, but in the absence of Mr Black and his representative, on 21 June 2016. The minutes begin at page 810.

204. Turning to page 813, Ms Cook records that she had considered Mr Black's mitigation. She felt that the allegations had been substantiated and were upheld. She believed the compound nature of the multiple offences were a serious breach of discipline, so serious that it destroyed the employer/employee relationship. She wrote that she considered whether a final written warning with a ban on overseas trips was appropriate and whether there was any other work Mr Black could do, solely based in the UK. After making enquiries of HR, she records there were no other roles suited to Mr Black's skill set. She said she did not feel that a final written warning was appropriate, given the level of gross misconduct, neither was a transfer or a demotion.
205. Mr Black was then informed of his dismissal by a letter dated 24 June 2016, at page 807. It records that he admitted to deliberately kicking the child's table and causing damage, to swearing in the presence of customers and to wearing an item of clothing he had been told previously not to wear. She records that although he did not admit to being under the influence of alcohol, statements from other witnesses were consistent with that being the case and she concluded it to be so. She made reference to Mr Black's previous disciplinary record, the events in January 2013 and August 2013. She referred to his mitigation in the form of significant under tasking, financial and mental stress and his Grandfather's ill health at the time. She concludes that the compound nature of the multiple offences supported, by substantial evidence, leaves her with no alternative but to dismiss him on the grounds of gross misconduct.
206. We note some correspondence that same day regarding Mr Black's DV clearance, (page 139). Ms Hutchinson from the Personal Security Team asked for an update and Ms Toms replied that actually, the situation had still not been resolved. Obviously, at this point she has not been informed of the outcome. Then at the top of page 138, on 24 June 2016, Ms Hutchinson replied to say that in the absence of a valid DV, Mr Black will not be allowed to walk back into the job automatically when the outcome of the misconduct hearing is known, but if during the process it is considered appropriate to allow him to return to work, they will need to know so they can revalidate his DV. This would not, it was said, require a full vetting process. She wrote that she expects they will probably put him back on a limited validity DV for about six months.
207. Mr Black appealed against his dismissal, (page 814). He wrote that the evidence did not support the findings, the Disciplinary Policy was not followed, (in that he was denied a reasonable opportunity to state his case) and the sanction imposed was not reasonable.
208. On 5 July 2016, Mr Black was interviewed for new employment. It is not entirely clear when he applied for that new employment.
209. On 14 July 2016 a Mr Hoarder, Chief Operations Officer, held the Disciplinary Appeal meeting, (page 856). He explained that he had received advice that morning to the effect that Mr Black should have been given the opportunity to attend the final part of his Disciplinary Hearing. He gave Mr Black two options. He could continue with the Appeal hearing on the basis he was going to accept the Disciplinary Hearing had been

completed, or the second option was that they could reconvene the Disciplinary Hearing with Mr Black in attendance.

210. Mr Black said that he had no confidence in the office or in going back over the Hearing again, he did not trust that the outcome would be any different.
211. Mr Black and Mr Hoarder are recorded in the minutes of having a discussion or debate about how the Respondent should proceed. That has been portrayed to us by Mr Hoarder as concluding with Mr Black agreeing that the matter would be referred back to a fresh Disciplinary Officer. That is not how we read those minutes. Mr Black made it clear that he does not agree.
212. The Appeal outcome is provided to Mr Black, (page 854) in a letter dated 21 July 2016. The outcome was that his appeal was upheld on procedural grounds, because he was not given the opportunity of attending the second stage of his disciplinary hearing. His disciplinary case was to be reheard by a new Disciplinary Hearing Manager. It was stated that no other grounds of appeal would be considered. In the meantime, he was reinstated on his previous terms and conditions, but he was to remain on suspension. He was told that his continuing on suspension was:

“As confirmed in your previous suspension letter dated 11 January 2016, evidence that you previously contacted a number of colleagues in writing requesting that they send you any information they have regarding yourself and unacceptable conduct or reference / gossip to such conduct and your DV clearance expired on 31 March 2016. HR is of the belief that due to the reasons above

- *There is a breakdown in trust which cannot be resolved until the discipline process has run its course;*
- *There is a compromise to your own disciplinary case;*
- *Witnesses may be pressurised;*
- *Evidence may be tampered with or destroyed; and*
- *Without DV clearance you are unable to attend site.”*

213. On 25 July 2016, Mr Black was offered new employment with a new employer, after his earlier interview.
214. On 29 July 2016, he resigned his employment with the Respondents. His letter of resignation is at page 142. We quote excerpts from that letter:

“You also state that you believe there has been a breakdown in trust which cannot be resolved at this stage and that my continued suspension is necessary.”

“I wholly disagree that my suspension has been reasonable, there is no reasonable evidence in place to suggest that I may have tampered with evidence or pressurised witnesses. I agree that I sent an email to staff members, the purpose of which was to collect

evidence in order to support my position relating to the allegations. The FCO Handbook permits me to take such steps."

...

"Further, whilst my DV clearance expired on 31 March 2016, it was unreasonable for the organisation not to renew this for me."

...

"This failure clearly demonstrates that the organisation has already reached its decision in wishing to terminate me."

...

"There is no evidence to suggest that my suspension has been kept under review."

...

"I have been deskilled from my chosen industry as I have been forced to sit idle over the past seven months."

...

"I believe the investigation into disciplinary proceedings have arisen due to the email I sent to Danny Payne CEO and Helen Sullivan Finance Director, which detailed TSE failures and significant wastes of tax payers' money in project delays and inefficiencies I had personally witnessed."

...

"Ultimately, your confirmation that there has been a breakdown in trust, my unreasonable suspension, the organisation's unreasonable handling of the disciplinary proceedings and unwarranted allegations which I believe were raised due to my disclosures raised to Danny Payne and Helen Sullivan has had the effect of destroying the trust and confidence that I have in the organisation to treat me in a fair manner in the future."

...

"Please accept this letter as my resignation."

215. There are a few other things that we need to deal with. At page 159, we see that on 8 August, somebody called Craig Campbell from an organisation called National Security Screening Agency, wrote to the Respondent in respect of security screening it was carrying out for a client, presumably Mr Black's new employer, asking for a reference on a pro-forma document.

216. On 5 September somebody from the Respondent's HR, a Ms Kingham, wrote what can only be best described as a neutral reference, stating that they are unable to provide details of length of service and position and that they are unable to comment further as it is FCO Services policy only to provide references that simply confirm length of service and position.
217. What has happened subsequently, as we understand it, is that in December 2016, Mr Black's girl friend suggested that he displayed some symptoms similar to Autism Spectrum Disorder, having herself carried out some research prompted by the behaviour of a work colleague she was managing. As a consequence of that, he went to his GP and on 25 January 2017, was referred to Dr Goodsell. As we saw at the beginning of these findings of fact, she diagnosed him with Autism Spectrum Disorder. That was on 19 April 2017.

Conclusions

Knowledge of Disability

218. We are going to deal first with the issue of the Respondent's knowledge, or otherwise, of Mr Black's disability. We wish to record that the Tribunal finds it odd that the Respondent does not share appraisals from one manager to the next. That said, we find that certainly up to the point of the grievance investigation and report, nothing in those appraisals could be said to reasonably trigger the managers or their HR advisers to consider that Mr Black may be suffering from a mental impairment that might amount to a disability.
219. It is for the employer to show that it is unreasonable for it to be expected to know that an employee has a disability. The assessment by us is to be objective. From the plethora of comments in the grievance report, we consider that experienced managers and experienced HR advisers acting reasonably, ought to be alerted that Mr Black may have a potential mental impairment which is potentially long term and which may potentially impact upon his day to day activities. The Respondent ought then to have considered what to do about it. It is reasonable to expect that it would have referred Mr Black to Occupational Health, with his consent and with the information which it has gathered in the grievance report about his behaviour.
220. In reaching this conclusion, we considered that Mr Black has already been to a psychologist and the Respondent knows that. He is a person of a certain age and one might subconsciously think that a person of that age, if they have some kind of mental impairment, would have been diagnosed already. We have considered Mr Black's own comments, as have been highlighted to us by Mr Stone in his excellent skeleton argument, to the effect that he is aware of his effect on others, that he has improved himself and so on. With those points in mind, is it really reasonable to expect an employer to make these enquiries?
221. But it seems to us there is so much information to hand, the Respondents are plainly alerted to the fact that something is not right. In the words of

Ms Bell, *"it is blindingly obvious"*. It is equivalent to the periods of absence alerting an employer to possible depression, used in the examples in the ECHR Code at 5.15, that there should be further enquiry. Indeed, that the Claimant had been to a psychologist might prompt the Respondent to say well, let's ask the psychologist, in light of this information, what the situation is. Or, let's ask Occupational Health to approach the psychologist to see if there is an underlying mental health issue. In doing so, providing information about his behaviour which of course, the psychologist would not have previously seen.

222. We ask ourselves, would Mr Black have refused to go to Occupational Health? Would he have refused any referral of any kind? There are references in the evidence to Mr Black telling people that he would not go to Occupational Health, or he would not use the Employee Assistance scheme, because he did not want anything like this on his record. He would not want there being concerns about his mental health on his employment record. Mr Black said, in evidence, that he would have done so, had he been approached in the right way. Well, he would say that wouldn't he? However, the question is about what the employer could reasonably have been expected to know? An employer with competent and reasonable managers and HR advisers, would have the skills to explain to Mr Black, at the point of the grievance report publication, showing him the statements made by his colleagues and Managers, (that he had never in fact been shown) that it is in his best interests to co-operate in the referral. We find that he would probably have gone along with the referral, as he would have realised what was at stake, with the disciplinary action against him pending.
223. What would have been the outcome of such a referral? The Respondent would argue that there may be no such diagnosis. After all, Mr Black boasts of Dr Goodsell's exceptional and rare expertise. But the Respondent would have provided Occupational Health and any medical adviser with the information that it had gathered in the grievance report, from which, one would think and we find, diagnosis would be straight forward.
224. Dr Goodsell did not have this information during the first hour of her consultation with Mr Black when, as he put it, she regarded him as just another rude, arrogant individual.
225. From the grievance report, the Respondent should have made enquiries. The outcome of which would probably be that Mr Black is disabled. The Respondent would then have an understanding of his disability. From the date of the grievance report as published, 30 March 2016, an employer could reasonably have been expected put everything on hold pending those further enquiries. We conclude that the Respondent could reasonably have been expected to know that Mr Black was disabled. Anything that happens after the grievance report is subject to scrutiny, on the basis the Respondent has constructive knowledge of Mr Black's disability.

Disability Related Discrimination

226. We deal with the Disability Related Discrimination claims first. For convenience, I am going to use the numbering as it is presented in the List of Issues.

- (13) Did the Claimant's social interaction difficulties arise in consequence of his disability?

As is clear from Dr Goodsell's report, yes, they did. We refer to our quotations from her report at the outset of the Findings of Fact.

- (14) If so, did the Respondent treat the Claimant unfavourably because of his difficulties with social interaction?

The Claimant relies upon those matters set out at paragraph 18 of the list of issues:

(a) Being tasked on significantly fewer assignments? No, because before he was grounded and then suspended, the Respondents could not reasonably be expected to have known that Mr Black was disabled.

(b) The Respondent's actions as referred to in paragraphs (1) and (2) [of the list of issues]. This means we now have to turn to paragraph (1) of the List of Issues, where there is a list of the alleged breaches of the implied term of mutual trust and confidence. We consider each in turn:

- (1) i. Unfairly terminating his employment on 24 June 2016:

The grounds for dismissal are set out in the letter of 24 June 2016, at page 807. We considered each such ground in turn.

Kicking the child's table - this was something that was done in bad temper. It is not, in our view, something that is related to social interaction skills.

Swearing in the presence of customers and perhaps children – that is something that relates to his social interaction skills.

Wearing an item of clothing he had been told not to wear – is something that relates to his social interaction skills. He took what he was told literally, not to wear an Embassy t-shirt. The t-shirt he in fact wore, as we saw in the photograph, is to the neuro typical person, obviously a t-shirt that identifies one as probably a British subject and probably connected in some official way to the British Government. But having regard to Mr Black's disability, he did not understand it that way.

Being under the influence of alcohol – is not connected to Mr

Black's disability. Being hungover is being under the influence of alcohol.

Ms Cook takes into account in her decision to dismiss, Mr Black's previous conduct, which she is entitled to do. The problem is, now, when she does so, by the time she is considering the disciplinary issue, the Respondent should have known that Mr Black has Autistic Spectrum Disorder, which explains much of his previous conduct. This then leaves just kicking the child's table and being under the influence of alcohol as reasons for dismissal that are not related to disability. Dismissal for those unrelated reasons, particularly given that it is clear there is a culture of excess drinking from time to time, would not have been within the range of reasonable responses. That is not to suggest those two allegations are not serious, of course destroying that table and of course when one is using machinery one should not be under the influence of alcohol, (which includes feeling delicate because one is hung over). Ignoring the disability and bringing into account Mr Black's disciplinary record, swearing in front of customers and potentially children and ignoring security advice, would bring the decision to dismiss inside the range of reasonable responses. The disability caused the misconduct and this conduct was the reason for dismissal. There is no requirement that the Respondent should know of this cause. The claim in respect of disability related discrimination in the decision to dismiss, therefore succeeds, subject to the justification defence.

- ii. Acting unreasonably in suspending the Claimant and failing to ensure that the period of suspension was reasonable:

The Respondent did not have constructive knowledge of Mr Black's disability when it took the decision to suspend. That is not therefore, disability related to discrimination. As to the period of suspension; when one bears in mind that there was a lengthy, thorough grievance investigation that involved interviewing 21 people scattered around the world, that the disciplinary process could not be progressed until the grievance was completed, that Mr Black appealed the grievance outcome and so that had to be dealt with before the disciplinary process progressed, the period of suspension was, in our view, not unreasonable.

- iii. Failing to pay the Claimant the sums referred to in paragraph 7 of the ET1 during his suspension. (We take that to mean paragraph 7 of the amended particulars of claim):

Not paying Mr Black overseas allowances whilst he was suspended is the problem. He was already subject to a decision not to pay him those allowances because he was grounded, before the Respondent had constructive knowledge of his disability. Should, or would, the

Respondent have reversed that decision having received knowledge of his disability? The investigation of any misconduct whilst on assignment results in grounding as standard practice. The non-disability related misconduct, i.e that which is not related to his interpersonal skills, (kicking the table and working under the influence of alcohol) would have called for grounding in just the same way. We therefore conclude that is not disability related discrimination.

iv. Failing to apply for security clearance for the Claimant:

His security clearance lapsed on 31 March 2016. Security clearance is not in the gift of the Respondent, it is managed by an independent organisation. Whilst the allegations are investigated, some of which are not disability related, that organisation would not renew his clearance. This is not disability related discrimination by the Respondent.

v. Unreasonably confirming to the Claimant that it considered there had been a break down in trust and confidence:

The list of issues does not specify when and where. However, the Respondent appears to use this expression twice.

Firstly, in the dismissal letter as the basis upon which Ms Cook dismissed Mr Black and we have already found that the dismissal was disability related discrimination, (subject to the justification defense) as is therefore the use of this expression.

Secondly, the expression was used in the letter of Ms Forster confirming the outcome of the Appeal against dismissal, that there would be a re-hearing of the disciplinary charges. The Respondent states therein that one of the reasons for continuing Mr Black's suspension thereafter is the breakdown in mutual trust and confidence. By this time, the Respondent does have constructive knowledge of disability. The question is, was finding that trust and confidence could not be resolved until the outcome of the disciplinary hearing, disability related discrimination? There is no explanation in Ms Forster's witness statement, or in her evidence, why she thought there was a breach of trust at this stage. It dates back, it seems, to why Mr Black was suspended in the first place. The reason he was suspended in the first place was that he wrote to colleagues about his grievance. It was not made clear to Mr Black that he should not contact people about his grievance. Mr Black had not received a letter telling him what he could and could not do with regard to his grievance and the investigation, not before he wrote his letter to his colleagues on 22 December 2015. The letter about the grievance which contains the paragraphs telling him he should not be contacting people, is

dated 11 January 2016, (page 217); i.e. after the offence. It is not clear from the policy that a grievor should not be contacting people. On its wording, the wording of the letter of page 203, it seems to us that it is plainly correspondence to his work colleagues about his grievance, not about the matters of which he is accused. In reaching this conclusion, we appreciate what he said in his resignation letter. However, in our view, neuro typical person might have thought, just as Mr Black did, that it was okay to write such a letter and therefore, his suspension for doing so does not arise from his disability, nor does using the expression, “break down in trust and confidence” in this context.

(2) This is a further list of repudiatory breaches relied upon by Mr Black:

i. Failing to provide the Claimant with work and associated pay in accordance with paragraph 7 of the ET1.

This was before the Respondent had constructive knowledge of the disability.

ii. Failing to suspend the Claimant on reasonable grounds for a reasonable period.

As we have just explained, we do not think that suspension was related to disability and the original suspension was before the Respondent had constructive knowledge of disability.

iii. Failing to pay the Claimant his full pay during suspension in accordance with the payment due to him as outlined in paragraph 7 of the ET1.

We have already dealt with this at (1)(iii) above.

227. We return to the subparagraphs to (18) to continue the analysis of the allegations of unfavourable treatment, (I overlooked this in our oral decision, my thanks to Mr Stone for pointing this out)

(c) The issue of lack of progression and career development arose before the Respondent had constructive knowledge of disability.

(d) Suspension from overseas assignments and from duties generally both took place before the Respondent had constructive knowledge of Mr Black’s disability.

(e) We have found above, that the dismissal was unfavourable treatment because of something arising from Mr Black’s disability.

(f) The complaints raised by Mr Black in the grievance process

predate the Respondent's constructive knowledge of his disability.

- (g) Ms Bell clarified in her written submissions that the complaint is about negative feed back as reported to Mr Black by Mr Peter Jones. We set out below our finding that the Respondent did not give negative feedback.

- (15) Was the treatment a proportionate means of achieving a legitimate aim?

To recap, the disability related discrimination claim succeeds in respect of Ms Cook's decision to dismiss Mr Black and her using the expression and finding that there had been a breakdown in trust and confidence in the context of dismissal. Was there a proportionate means of achieving a legitimate aim? We refer to Mr Stone's skeleton argument at paragraph 59, where he sets out the legitimate aim relied upon and we agree, it is a legitimate aim. That is, ensuring that employees are safe, particularly whilst abroad and ensuring that employees on assignment abroad carry out projects properly and efficiently and observe proper standards of conduct and behaviour. Has the Respondent adopted a proportionate means of achieving that legitimate aim by Ms Cook deciding to dismiss him and saying that there had been a breakdown in trust and confidence? Firstly, on the Respondent's own case, it over turned the decision to dismiss and remitted the matter for a further fresh hearing. Secondly, it ought to have obtained information on the Claimant's mental impairment. That would have informed the Respondent of the influence of Mr Black's disability on his actions and the allowances and adjustments that it ought to have made and would have led them to understand that only two items of misconduct, for which Mr Black was culpable and for which he was dismissed, would place a dismissal outside the range of reasonable responses. It was therefore not proportionate because, as the Respondent recognised, its procedure was unfair and as we have found, it ought to have made enquiries about Mr Black's mental impairment.

Failure to make reasonable adjustments

228. Turning now to the Failure to Make Reasonable Adjustments.

- (16) Did a PCP of the Respondent place the Claimant at a substantial disadvantage when compared with persons who are not disabled? The PCPs relied upon are at (17) and the alleged substantial disadvantages are set out at (18). In oral closing submissions, Ms Bell linked specific disadvantages at (18) to specific PCPs at (17). We deal with them accordingly:

- (a) The first PCP is the Respondent's expectations regarding appropriate conduct and in particular social interaction. The PCP of the Respondent's expectations are relevant in so far

as they are applied after it has constructive knowledge of the disability on 30 March 2016.

The disadvantages relied on are (18(d)) suspension from assignments in December 2015 and from all duties in January 2016, and (18(e)) that these expectations led to Mr Black's dismissal.

Suspension was before constructive knowledge and therefore the duty to make reasonable adjustments does not arise. Dismissal took place after constructive knowledge, the duty to make reasonable adjustments arises in that respect. Mr Black was placed at such a disadvantage, because his Autistic Spectrum Disorder meant that he was more likely to have conduct issues.

The adjustment contended for would be reducing the disciplinary sanction, allowing that swearing and the wearing of t-shirts were matters that were connected to his disability, for which he was therefore less culpable, removing that disadvantage.

- (b) The PCP of the Respondent's procedure in scheduling assignments to its employees was applied before the Respondent had constructive knowledge of Mr Black's disability and the duty to make reasonable adjustments does not therefore arise.
- (c) The PCP of the Respondent's practice of changing Line Managers of employees within the TSC, similarly does not arise because its application pre-dates the Respondent's constructive knowledge.
- (d) The PCP of the application of the Respondent's investigatory and disciplinary process. The disadvantage Mr Black relies upon is at 18(d) suspension, and at 18(e) dismissal. A person with Autistic Spectrum Disorder would be at a disadvantage in that he or she would have difficulty interacting and communicating with the investigatory and disciplinary Officer. However, we did not see evidence and did not find, that Mr Black actually himself experienced such disadvantage.
- (e) The PCP of the procedure of providing references in respect of security clearance. We understand this to be a reference to pages 158 and 159. The Claimant's prospective employer instructed a security business to carry out a security check. The Respondent's policy is to provide neutral bare fact references, (page 160). Does providing such a reference, as policy, place a disabled person at a disadvantage? No, it does not, it places them in the same position as a non-disabled person.

There is a wrinkle here, in that we see at 18(g), confusingly, a reference to a Peter Jones, a Security Vetting Officer, telling Mr Black that he had received a negative reference from the Respondent. At paragraph 120 of his witness statement, Mr Black tells us that this person was from the UK Vetting Agency, which is the Respondent's internal vetting agency, not that from his prospective employer. Mr Black's oral evidence was that this person was from UKSV. The Respondent produced email correspondence from UKSV, page 160 A-D. We see that Peter Jones did interview the Claimant on 1 February 2017 and UKSV have confirmed that they were not provided with a negative reference. We accept that documentary evidence as accurate. The claim in this respect does not succeed.

229. To recap, the reasonable adjustment claim has succeeded in respect of the disciplinary process only; the adjustment being a reduction in sanction from dismissal to something less than that.

230. Now we turn to the Unfair Constructive Dismissal claim.

(1) The alleged repudiatory breaches of the implied term to maintain mutual trust and confidence:

i. Unfairly terminating his employment on 24 June 2016.

Yes, Mr Black's employment was unfairly terminated, because the Respondent ought to have informed itself of his disability. However, counterintuitively, this cannot have caused him to resign, because he did not know at the time that he had a disability and he did not know that the Respondent's actions were discriminatory.

ii. Acting unreasonably in suspending the Claimant and failing to ensure that a period of suspension was unreasonable.

We have made findings about this; suspending Mr Black was unreasonable, but that was on 11 January 2016 and he resigned on 29 July 2016. By his remaining in employment and receiving pay in the meantime, he waived that breach. We have already explained that the period of suspension was in our view reasonable. In the context of a constructive dismissal claim, the Respondent had reasonable and proper cause for the length of suspension.

iii. Failing to pay the Claimant the sums referred to in paragraph 7 of the ET1 during his suspension, that is failing to pay the overseas allowances.

The Respondent had reasonable and proper cause. Mr Black was not working overseas whilst he was being investigated in accordance with standard practice.

- iv. Failing to apply for security clearance for the Claimant.

That is not the process. The Respondent does not “*apply*”. It is a matter between the Vetting Agency and the individual. The Respondent provides information. It did not act inappropriately or unreasonably. It had reasonable and proper cause for its actions.

- v. Unreasonably confirming to the Claimant that it considered there had been a break down in trust and confidence.

As discussed above, firstly, the use of that term in the dismissal letter is because of his conduct. The Respondent does not have reasonable and proper cause for that, because it has not paused to consider the possibility that the Claimant is disabled by a mental impairment. However, the Claimant did not know that at the time, so it cannot have operated in his mind as a reason for his resignation. Absent disability, the Respondent had reasonable and proper cause for its statement. Secondly, the term was also used in the Appeal outcome letter. That derived from the original decision to suspend, which was because the Claimant had written to his colleagues regarding his grievance, which we find was not something he was clearly told not to do. Any breach by use of the expression was waived in respect of the January letter but not in respect of the June letter.

- (2) These are alleged breaches of specific terms and conditions of the Claimant’s contract:

- i. Failing to provide the Claimant with work and associated pay in accordance with paragraph 7. This is overseas work.

There is no doubt that Mr Black did have fewer overseas assignments than his colleagues. There was however, no contractual term providing him with any entitlement to any particular amount of overseas work. The evidence was that the Respondent was entitled to expect its employees to work abroad for a minimum of 22 weeks a year, but there was no reciprocal contractual entitlement to be provided with a minimum of 22 weeks a year working abroad. We considered whether one might say this was a breach of the implied term of mutual trust and confidence, although that is not set out as such in the List of Issues. The Respondent had reasonable and proper cause for giving him fewer overseas assignments because of the difficulty it faced in placing Mr Black in teams with other people, as so many were not prepared to work with him, (bearing in mind they had no constructive knowledge of his disability at that time).

- ii. Failing to suspend the Claimant on reasonable grounds and for a reasonable period.

We have dealt with this already. There was no breach of contract and the Respondent had reasonable and proper cause for the period of suspension.

- iii. Failing to pay the Claimant his full pay during suspension in accordance with the payments due to him as outlined in paragraph 7 of the ET1.

We have dealt with this already. He was already grounded with reasonable and proper cause, which meant that he was not entitled to receive the overseas allowances. There was no breach of contract.

231. We have one potential breach of contract: that is the Respondent reiterating in the Appeal outcome letter that his suspension continued, i.e. potentially undermining mutual trust and confidence. Is it enough to amount to a fundamental breach? On its own, in our view, it is not. It is not in our view a fundamental breach of the contract of employment.

- (3) This poses the question, “if (1) or (2) above are satisfied, did the Claimant resign in response to that repudiatory breach?” We therefore ask ourselves, had we decided differently, would we have found that Mr Black resigned in response to a breach, or because he had found some other work, another job? It is a hypothetical question and whilst we grappled with it, we were unable to answer it. It would involve understanding which of the allegations we might otherwise have upheld. Mr Black looked for work because of what was going on, because the writing was on the wall. Whether any particular matter, hypothetically amounting to a breach, caused him to resign, would depend on what in particular we had found amounted to a fundamental breach. We therefore reach no conclusion.
- (4) If the Claimant did resign in response to a repudiatory breach, did he affirm the contract before resigning? The arguments, or the reasoning, we have just set out apply to that point as well.
- (8) Did the Respondent make an unlawful deduction of wages?

This poses the question, did the Respondent make an unauthorised deduction from his wages, by paying him his usual contractual pay throughout his period of suspension, to include his usual contractual assignments? He was paid his basic pay, plus what we call his Milton Keynes allowance. He was not paid his overseas allowances. He was grounded because of the investigations, that was not a breach of contract. There was his normal pay at the time he was suspended and that is what he continued to receive.

We assume the issue of holiday pay has been resolved.

232. To recap:

- a. The claim of constructive unfair dismissal fails and is dismissed.

b. The claim of Disability Related Discrimination and Failure to Make Reasonable Adjustments succeeds in respect of the decision by Ms Cook to dismiss. In all other respects, those claims fail.

233. What are the implications of this? The decision by Ms Cook to dismiss amounted to discrimination. Compensation is to place the Claimant in the position that he would have been in had the discrimination not taken place. Had there been no discrimination, the Respondent would have obtained a psychiatric report and Mr Black would have been diagnosed with Autism Spectrum Disorder. The Respondent would have obtained and implemented recommendations for allowances and reasonable adjustments to be made. Mr Black would not have been dismissed, but would have received a warning for destroying the child’s table and being at work hungover. Appropriately managed with adjustments, Mr Black’s employment would have continued and he would not have resigned. Therefore, he should receive compensation for injury to feelings and loss of earnings. There would be an element of contribution on the usual principals of civil damages in tort in respect of the two matters for which he would have received a warning.

234. For what it is worth and subject to hearing submissions, we do not think the injury to feelings award would be in the upper Vento band, whether it is lower or middle is something we would have to hear submissions about.

Employment Judge M Warren

Date: 30 September 2019

Judgment sent to the parties on

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For the Tribunal office