EMPLOYMENT TRIBUNALS

Claimant: **Mr M Kelly**

Respondent: **Allianz Management Services Limited**

Heard at: **Birmingham**

On: **11, 12 and 16-20 September 2019**

Before: **Employment Judge Flood**

Mr N Forward

Mr N Howard

Representation

Claimant: In person

Respondent: Mr Smith (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The complaints against the respondent of direct sexual orientation discrimination and harassment related to sexual orientation relating to incidents on 12 October and 7 December 2017 and of direct age discrimination and harassment related to age arising out of an incident in July 2017 are dismissed upon withdrawal.

2. The remaining complaints against the respondent for constructive unfair dismissal; direct perceived disability discrimination, harassment related to perceived disability; direct sexual orientation discrimination; harassment related to sexual orientation; direct age discrimination; harassment related to age and victimisation are not well founded and are dismissed.

REASONS

The Complaints and preliminary matters

1. The claimant was employed by the respondent, from 18 March 2013 until he resigned on 22 March 2018 with his employment ending on 2 April 2018. By a claim form presented on 23 April 2018, following a period of early conciliation from 12 February to 26 March 2018, the claimant brought complaints of constructive unfair dismissal; direct perceived disability discrimination, harassment related to perceived disability; direct sexual orientation discrimination; harassment related to sexual orientation; direct age discrimination; harassment related to age and victimisation.

2. A Deposit Order was issued by EJ Dimbylow in respect of all the claims made at a preliminary hearing on 24 July 2018. The deposit Order was paid by the claimant, so the claim proceeded to hearing. I explained the consequences of this to the claimant at the outset of the hearing.

3. There was an agreed list of issues which we have referred to throughout the hearing. This was amended during the hearing with the claimant withdrawing certain complaints and such complaints being dismissed upon withdrawal – the deletions are shown below.

The Issues

~~4. **PRELIMINARY ISSUE**~~

~~4.1. **Jurisdiction**~~

~~4.1.1. Does the Tribunal have jurisdiction to determine the claimant's complaints insofar as they relate to alleged acts of discrimination which occurred more than three months prior to the date of presentation of the claimant's claim on 9 April 2018, subject to any extension of time by virtue of the ACAS Early Conciliation provisions? In particular:~~

~~(a) In relation to the alleged acts of discrimination, has there been any discriminatory conduct extending over a period for the purpose of s123(3) EA? If so, until when?~~

~~(b) If any of the claimant's complaints were presented outside the applicable primary time limit, would it be just and equitable to grant an extension of time under s123(1)(b) EA in relation to any such complaints?~~

5. **UNFAIR DISMISSAL**

5.1. **Was the claimant constructively and unfairly dismissed?**

5.1.1. Did the respondent breach the claimant's contract of employment? It is the claimant's case that the respondent's HR policies (specifically the: i) Absence and Attendance policy; ii) Bullying and Harassment policy; iii) Discrimination policy; iv) Stress at Work policy; and v) Grievance policy) were contractual and were breached by the respondent in the following ways (or, in the alternative, that the respondent's conduct constituted a breach of the implied term of mutual trust and confidence):

(a) The respondent breached the Stress at Work policy in the way that it responded to the queries raised by the claimant after 18 December 2017 about the contractual nature of its policies and procedures, specifically by amending / updating the Stress Policies without consultation with its employees (including the claimant);

(b) Victoria Black sent a text message to the claimant in relation to his illness on 6 November 2017 in breach of the provision of the Absence and Attendance Policy which states "*Allianz handles absence issues carefully, fairly and consistently and in a supportive manner for all our employees"*;

(c) The respondent acted in breach of the provision of the Absence and Attendance policy that states "*if you are absent due to stress, anxiety or depression, in order for you to receive support as quickly as possible, we automatically arrange for you to have a consultation with our external occupational health consultants"* as it failed to automatically arrange for him to have a consultation with its occupational health consultants until 18 January 2018 despite the fact that Victoria Black, Jennifer Brown and Tracey Simkins were aware of the claimant being absent from work with a stress-related illness since 5 December 2017;

(d) the spreadsheet used by Sarah Whitehouse to track employees' absence from work is in breach of the provision of the Absence and Attendance policy which states "*we review absence using a tool known as the Bradford Factor"*;

(e) Victoria Black's language and style "*constitutes bullying on a wider scale"* in breach of the Bullying and Harassment policy;

(f) The course of action taken by the management team of the respondent was in breach of the sickness absence reporting procedure outlined in the Absence and Attendance policy;

(g) The respondent acted in breach of the Stress at Work policy by failing to give the claimant clarity of what was expected from him

at work, specifically by providing two variations of the policy obtained at the beginning of the process (Stress at Work Version 1 November 2017 & Stress & Well-Being Version 2 November 2017);

(h) The provision of the Discrimination policy which states "*any incidents of bullying or victimisation are dealt with fairly and seriously*", and/or the Bullying and Harassment policy and/or the Stress at Work policy and/or the Grievance policy was breached by the respondent's failure to address bullying and harassment appropriately, in particular by:

(i) Mark Carlyon-Smith of the respondent who, as part of his grievance outcome:

(1) failed to address issues relating to the claimant's protected characteristics in his response to the claimant's grievance of 18 December 2017, including the Facebook message from Victoria Black to the claimant containing a picture of two naked men;

(2) was unclear in his response about who should contact employees who are absent from work due to illness; and

(3) stated that the comment allegedly made by Jennifer Brown, "*I know this is real to you, but you are unwell and unwell people don't see clearly, I'm sending you home*", was meant to be supportive of the claimant.

(ii) Kathryn Fryer of the respondent who:

(1) refused to respond to the questions raised in the claimant's appeal questionnaire in person at the claimant's grievance appeal hearing on 8 February 2018;

(2) retracted her responses to the questions raised in the claimant's appeal questionnaire;

(3) was unclear in her response to the claimant's questions about an occupational health referral; and

(4) Spoke down to and was hostile towards the claimant in their face to face meeting on 8 February 2018.

(iii) Jeremy Trott of the respondent who did not allow the claimant to raise a grievance against Ms Fryer on 5 April 2018;

(iv) Emma-Louise Knight of the respondent in the way that she investigated the grievance the claimant raised about Victoria Black regarding alleged victimisation.

5.1.2. If so:

(a) Was any breach of the claimant's contract of employment serious enough to be a repudiatory breach?

(b) If so, did the claimant affirm his contract of employment?

(c) Did the claimant resign in response to a repudiatory breach of contract, or for some other reason?

5.2. If the claimant was dismissed by the respondent, was that dismissal unfair?

6. **DISCRIMINATION / HARASSMENT – PERCEIVED DISABILITY**

6.1. **Direct perceived disability discrimination**

6.1.1. Did any of the individuals identified below, because of a perception that the claimant was a disabled person (specifically, by reason of a mental impairment of anxiety, stress and depression), treat the claimant less favourably than they treated or would have treated others[1], in any of the following alleged respects:

(a) comments allegedly made by Victoria Black during telephone conversations on 5 December 2017 about the claimant's absence from work and the absence tracker spreadsheet, in particular that:

(i) his illness would be recorded on Sarah Whitehouse's spreadsheet and perceived by senior management that he could not cope;

(ii) Tracey Simkins had questioned whether it was possible to self-certify for stress; and

(iii) his absence could affect his future;

[1] The claimant relied on Victoria Black as an actual comparator, or in the alternative a hypothetical comparator.

(b) comments made by Victoria Black in a text message exchange between her and the claimant on 6 December 2017, in particular that he was "*being a touch irrational"* and "*you have to let go of or learn to cope with whatever is eating you else it will destroy what could otherwise be a lucrative career"*;

(c) on 7 December 2017, Victoria Black contacting the claimant via text message and allegedly pressuring him to return to work;

(d) comments allegedly made by Jennifer Brown during a telephone conversation with the claimant on 7 December 2017 regarding his absence from work, in particular, her question about whether the claimant was using anti-depressants, her comments about her son's mental health and the question "*How will you support David if you are not working?"*;

(e) Victoria Black's alleged actions at a return to work meeting with the claimant on 8 December 2017, namely saying that it was not possible to record the claimant's absence as stress so it would need to be recorded as exhaustion instead;

(f) comments allegedly made by Jennifer Brown at a meeting with the claimant on 11 December 2017, in particular "*I know this is real to you, but you are unwell and unwell people don't see things clearly, I'm sending you home"*;

(g) the respondent's alleged failure to consult occupational health automatically in relation to the claimant's absence from work due to "anxiety with depression", contrary to the respondent's Absence and Attendance policy;

(h) the respondent's handling of the appeal raised by the claimant in respect of his first grievance, specifically:

(i) the letter from Suzanne Lunnon of the respondent to the claimant dated 29 January 2018, in which Ms Lunnon invited the claimant to a grievance appeal meeting and said "*I know you raised in your letter that you are anxious that Lesley Proctor is a peer of Sarah Whitehouse, however we would like to follow our policy and we have every confidence that this meeting will be handled in a professional, fair manner";*

(ii) Ms Lunnon contacting the claimant the day before the grievance hearing of 7 February 2018 explaining that the hearing would need to be cancelled as the respondent was struggling to find people to attend the meeting;

(iii) the manner in which Ms Fryer and Priyanka Gupta of the respondent conducted the appeal hearing, in particular by:

(1) refusing to answer the claimant's questions regarding (a) the respondent's Absence and Attendance policy, (b) the claimant's appeal questionnaire, and (c) the contractual effect of the respondent's HR policies and procedures;

(2) being resistant to allowing the claimant to see questions put to the Occupational Health Expert regarding him.

(i) The content of Mr Trott's email on 27 March 2018 regarding an email sent by the claimant earlier that day, in particular, Mr Trott's comment "*whilst it is unusual for an employee to air their grievances in this manner, we do not wish to restrict freedom of speech"*.

6.2. **Harassment related to perceived disability**

6.2.1. Was the claimant subjected to unwanted conduct related to a perception that he was a disabled person (specifically, by reason of a mental impairment of anxiety, stress and depression), in any of the respects alleged at paragraphs 3.1.1(a)(iii), (b), (c), (d), (e), (f) and (g) above?

6.2.2. If so, did that conduct have the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, having regard to: (a) the perception of the claimant; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect?

7. **DISCRIMINATION / HARASSMENT – SEXUAL ORIENTATION**

7.1. **Direct sexual orientation discrimination**

7.1.1. Did Victoria Black or Jennifer Brown, because of the claimant's sexual orientation, treat him less favourably than they treated or would have treated others[2], in any of the following alleged respects:

~~(a) comments made by Victoria Black in a text message exchange with the claimant on 12 October 2017, in particular the comment~~

[2] The claimant relied on his heterosexual team colleagues as actual comparators, or in the alternative a hypothetical comparator.

~~"*hope you have lived to tell the tale of something you weren't looking forward to being put down your throat this afternoon"*~~;

~~(b) comments allegedly made by Jennifer Brown during a telephone conversation with the claimant on 7 December 2017 about how the claimant would support his same sex partner if he was not working; and~~

(c) Victoria Black sending a picture to the claimant via Facebook on 3 December 2017 of two naked men putting a Christmas tree up and included the caption "*you and Dave putting the tree up"*.

7.2. **Harassment related to sexual orientation**

7.2.1. Was the claimant subjected to unwanted conduct related to sexual orientation, in any of the respects alleged at paragraphs 4.1.1~~(a), (b) and~~ (c) above?

7.2.2. If so, did that conduct have the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, having regard to: (a) the perception of the claimant; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect?

8. **DISCRIMINATION / HARASSMENT – AGE**

8.1. **Direct age discrimination**

8.1.1. For the purpose of this claim, the claimant identifies: (a) his own age group as 'under 40s'; and (b) the age group for comparison as 'over 40s'.

8.1.2. Did Victoria Black, because of the claimant's age, treat him less favourably than she treated or would have treated others, in any of the following alleged respects:

~~(a) comments allegedly made by Victoria Black to the claimant in July 2017 that he was a "*clever boy"* in relation to a written proposal prepared by him; and~~

(b) a comment allegedly made by Victoria Black to the claimant on 4 December 2017 that the claimant needed to "*grow up"* in respect of the difficulties he was experiencing with Marc Asson.

8.2. **Harassment related to age**

8.2.1. Was the claimant subjected to unwanted conduct related to age:

(a) in any of the respects alleged at paragraphs 5.1.2~~(a) and~~ (b) above; and

(b) as regards a question allegedly asked by Jennifer Brown during a telephone conversation with the claimant on 7 December 2017, querying how he would support his partner if he was not working (thereby implying that the claimant had a responsibility to support his partner, because he was the older of the two and must therefore be earning more)?

8.2.2. If so, did that conduct have the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, having regard to: (a) the perception of the claimant; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect?

9. **VICTIMISATION**

9.1. Was the claimant's grievance of 18 December 2017 a protected act?

9.2. If so, by giving him an unjustifiably low performance rating (on the claimant's case) in February 2018, did Victoria Black subject the claimant to a detriment because he had done a protected act?

9.3. Was the claimant's Facebook message/post of 27 March 2018 a protected act?

9.4. If so, by referring to this Facebook message/post (but not to the claimant by name) in an email sent to employees of the respondent (it is the claimant's position that he was excluded from the email), did Jeremy Trott subject the claimant to a detriment because he had done a protected act?

9.5. Was the claimant's email to Mr Trott on 3 April 2018 in which he informed Mr Trott that he "*will be bringing legal action against the business*" a protected act?

9.6. If so, in his responses on 5 April 2018 and 27 April 2018 to the claimant's question of 3 April 2018 "*Can you please tell me what policies had a contractual effect and which ones did not?*", did Mr Trott subject the claimant to a detriment because he had done a protected act (as the claimant considers Mr Trott did not answer the question)?

10. **REMEDY**

10.1. If any of the claimant's complaints are upheld by the Tribunal, what compensation, if any, should he be awarded for:

10.1.1. a basic award for unfair dismissal?

10.1.2. injury to feelings?

10.1.3. financial loss?

10.1.4. interest?

10.2. What adjustments, if any, should be made to any such award?

Findings of Fact

11. The claimant attended to give evidence and Mr Mark Carlyon Smith (MCS), Ms Katherine Fryer (KF), Ms Suzanne Lunnon (SL), Mrs Vicki Black (VB), Ms Emma Louise Knight (EK), Mrs Jenny Brown (JB) and Mr Jeremy Trott (JT), gave evidence on behalf of the respondent. We considered the evidence given both in written statements and oral evidence given in cross examination, re-examination and in answer to questioning from the Tribunal. We considered the ET1 and the ET3 together with relevant numbered documents referred to below that were pointed out to us in the Bundle produced by the respondent and a supplementary Bundle produced by the claimant. Some additional documents were produced by the respondent during the hearing which the claimant did not object to. The parties did not refer to these.

12. There were not that many significant disputes of fact on many of the events taking place so it has not been necessary to make detailed findings on all the matters we heard in evidence. However, we have made findings not only on allegations made as specific discrimination complaints but on other relevant matters raised as background as there may have been relevance to drawing inferences and conclusions. We made the following findings of fact:

12.1. The claimant is 34 years old and is a homosexual male who cohabits with his same sex partner Mr Kirkbride (who he met in March 2017) who supported him throughout the hearing. The claimant gave clear and open evidence about previous health issues he suffered with since his early teens and his work history, which was not disputed, and we accept this its entirety. He is currently suffering from anxiety and depression.

12.2. The respondent is in business as a provider of personal and business insurance. The claimant started work at the respondent in 2013 in the respondent's Birmingham office in a Customer Claims Support role on a salary of £18,000. His contract of employment was shown at page 137. As well as the contract of employment, the respondent operated on its intranet numerous policies and procedures and the claimant's contract states at page 141 "*Other information and any policies and procedures which you will be subject to can be found on our HR intranet (for example*

our policy on Facebook). Many of these are detailed in the enclosed welcome guide." We saw copies of the access pages for the HR intranet.

12.3. The claimant progressed through the company and was promoted quickly to different roles. He was recognised as an outstanding performer in his first 3 years and a high performer in his fourth year with the respondent. He was very well regarded as an employee and received recognition for his achievements by way of positive feedback and internal awards.

12.4. The claimant had been friends outside work with Mr Marc Asson (MA) since 2010. MA joined the respondent after the claimant, having been referred by him. MA also progressed well in his employment with the respondent. He subsequently applied for a Team Leader role at the same time as the claimant did. MA was successful in achieving this role and the claimant was not. The claimant's evidence, that we have accepted, is that he was pleased for MA and acknowledged feedback about his own performance. The claimant then applied for a role of Deputy Team Leader with a view to achieving a Team Leader role at the next time of applying. This role was to assist VB who was team leader in the Motor Claims department. He received coaching from another team leader, JB, on his application in advance of his interview. He was interviewed by VB and was successful in obtaining the position initially on a secondment basis. This was confirmed in writing on 13 April 2017 (page 170). The claimant was informed that his salary would not change but that if the role became permanent at the end of the secondment, it would increase to £26,000. He started his new role on 1 May 2017.

12.5. In June 2017, having announced his new relationship on Facebook, the claimant experienced an unpleasant incident at work when another employee made derogatory comments about the apparent age difference between him and his partner and called the claimant a "kiddy fiddler" which, understandably, upset the claimant. This employee apologised and the claimant accepted his apology – no complaint is pursued in these proceedings related to this matter. The claimant informed VB what had happened, and she was compassionate. He did not make a formal complaint about this to the respondent at the time.

12.6. In June 2017, the claimant's friendship with MK came to an end. The claimant's partner Mr Kirkbride became unwell on 16 June 2017 and the claimant attended hospital and Mr Kirkbride was admitted as an in-patient. The claimant informed VB about these matters, as by this time he was developing a great working relationship with her. We were shown several text messages between the two that were friendly and cordial and showed them sending informal messages and exchanging information about their personal lives.

12.7. During 2017 the claimant developed a new workflow tool which was very well received by VB and her line manager Mrs Tracey Simkins (TS). VB referred to the claimant as a "*clever boy*" when praising him for his work on this innovation. The claimant did not apply for the next Team Leader vacancy that arose around this time after taking the advice of VB. The claimant was asked to work with other teams in the department spending one week on each team introducing the workflow tool.

12.8. In September 2017 after experiencing heartburn, the claimant was prescribed medication and was referred for a gastroscopy procedure at the Queen Elizabeth Hospital in Birmingham to rule out the possibility of cancer. This caused the claimant some anxiety. He shared his concerns with VB and said she was supportive. Mr Kirkbride was also unwell again at the same time this was taking place. E mails were exchanged at the time between the claimant and VB on this matter which formed part of the initial complaint, but were withdrawn, so no further findings are made in this regard.

12.9. The claimant's secondment came to an end and he was confirmed in the role of Deputy Team Leader from 1 November 2017 and this was confirmed in writing on 26 October 2017 (page 177). The claimant was unwell on 1 November 2017 and informed VB of this and she sent a message asking what time he would be in and whether he wanted it recorded as sick or late, also stating "*its bad timing for a headache*" (page 69 supplemental bundle). There was some discussion in cross examination about this, but it does not form part of the complaint, so we have not considered it further.

12.10. The claimant was sent to work with the team headed up by MA in the week starting 12 November 2017 (as part of the work described above). He found this a difficult week and discussed his concerns before and after with VB.

12.11. The claimant was on holiday from 23 to 27 November 2017 with Mr Kirkbride. They had become engaged on 13 November 2017 and were planning an engagement party for 2 December and some of the respondent's employees including everyone working on VB's team had been invited. On his return from work on Tuesday 28 November 2017 the plan was that he was supposed to stay with VB's team for the rest of that week and then go to another team leader, Joanne Smith's team starting on Monday 4 December. On Friday 1 December VB informed the claimant that he had been invited to work on a new project called the HIT squad which would be headed up by MA. This was a team of experienced and productive claims handlers designed to reduce a work backlog. The claimant had a conversation with VB about this where he explained that he was concerned about working on this project with MA. It was agreed between the claimant and VB that he would not go and

work on the project. VB told the claimant she would speak to her manager TS or JB about what would be happening.

12.12. The claimant was then invited to a meeting with MA about the HIT squad. When he asked VB whether he should attend, given their discussion, she informed him that he should as she had not yet spoken to either TS or JB about what had been discussed previously. Before the meeting was due to take place, the claimant went to speak to MA (JB was also present) and set out his concerns to MA. MA said he did not agree with these concerns. JB said it would be up to the peer group to decide what would happen. The claimant and MA then attended the meeting about the HIT squad project, together with other employees involved. The claimant did not speak at all during this HIT squad meeting. After the meeting, the claimant having told VB what had happened, VB spoke to MA. VB then informed the claimant that he would no longer be working on the HIT squad as MA had informed her that he appeared disengaged in the meeting. VB reassured the claimant and informed him that he would continue to work with Ms Smith's team the following Monday as had been agreed after their earlier discussion.

12.13. The claimant and Mr Kirkbride's engagement party took place on Saturday 2 December 2017 and VB attended along with another team member. On Sunday 3 December, VB sent claimant a link on Facebook with an image of two naked men decorating a Christmas tree with a caption "*you and Dave putting up the Christmas tree*" accompanied by a heart, a Christmas tree and a laughing emoji (page 292 or page 91 supplemental bundle). The claimant responded with a thumbs up emoji. When asked about this the claimant said he does not remember sending the acknowledgement but accepts that he did. He said it was just an acknowledgement, not a response or an indication of approval; no comment was made; and he make the point that he does not, for example, send a laughing emoji. The claimant's evidence at the hearing was that he did not find this funny and that it frustrated him, which we accepted We also accepted VB's evidence that it was sent as a joke. The claimant also acknowledged that it could have been sent as a joke and that he did not believe VB to be homophobic. We have considered the surrounding circumstances here, but as a finding of fact, we have determined that VB did not send this message in the course of her employment with the respondent. This was a private Facebook message sent on VB's personal phone directly to the claimant on his personal number and following a social event unrelated to work the night before. This was not in any way connected to the respondent and VB did not refer at all to the respondent or any of the respondent's employees in the message.

12.14. The claimant attended for work on Monday 3 December, but VB was not in work as she was unwell. He was informed by TS that he should

work with his home team that day, in VB's absence, and then go the next day to work with Ms Smith's team as originally planned. When the claimant informed Ms Smith of this, she said she was confused as she was expecting the HIT squad to work with her that day (including the claimant). The claimant then went to discuss with MA what the position was and whether plans had been changed. MA told the claimant to speak to VB. When the claimant said that VB was unwell and absent from work, MA repeated that VB would have to inform the claimant of the position, and that it was not MA's responsibility to give him direction. This upset the claimant and caused him confusion as to what he should be doing, which we found was understandable. The communication of what was happening here this day was not exactly clear. We accept that this may have been partly due to the unexpected absence of VB that day due to illness. The claimant tried calling VB and having no response sent a text asking her to call him. In the meantime, he asked to have a meeting with VB's manager, TS.

12.15. VB called the claimant from home shortly after this. During their conversation the claimant told her that he thought MA was being intentionally difficult with him and he had no choice but to involve TS. It is in this conversation that the claimant says that he was told by VB that he should "*grow up*". We accept that the comment was made, and we also find that this was done in the course of VB's employment with the respondent. Although VB was calling from home when she was off sick, this was a call during working time about a work-related matter. The claimant says that he felt humiliated when she said this as he took this as suggesting he was acting like a child. VB says that the comment was made in the context of the dispute with MA, trying to encourage the claimant to move forward with his issue with MA. She also gave evidence that that this is a comment that she had used in the past to other people of various ages when she felt that their behaviour needed to be addressed. The claimant acknowledged in evidence that there is no basis for suggesting she would not have made the same comment to somebody aged 41 or in a different age group to the claimant.

12.16. The claimant then met with TS at 2pm to discuss the problems he had been experiencing. He became tearful in this meeting and informed TS that he was worried about the possibility that he would not be considered for a promotion as he would become MA's peer. He also asked TS to confirm what he would be doing for the rest of the week. TS went to speak to MA after that meeting and met again with the claimant at 4.30 pm and informed him that he was not required to work with MA and again mentioned the feedback that he had been disengaged in the meeting led by MA the Friday before. The claimant was upset after this meeting and that evening started to experience pelvic pain and found it hard to sleep.

12.17. The claimant did not attend for work next day Tuesday 5 December 2017 and telephoned VB to inform her that he would be going to the doctors and would not be able to attend work. He said he would call her back later to inform her what the doctors said. The claimant's notes of the times of calls in and out on this and subsequent days were at page 246-249 of the Bundle and we were referred to this on many occasions. The claimant tried to call VB 10 times between 12.04 and 2.29 pm. After speaking to another colleague, the claimant spoke to VB after she called him back at 2.43. During this conversation the claimant alleges that VB seemed frustrated, told me that this wouldn't look good, it would be perceived that he couldn't cope and said he would end up on "*Sarah's spreadsheet*". The claimant says that he told VB he was stressed and felt unable to cope and he alleges that VB said, *"okay then, that's what I will tell them*". The claimant says he felt threatened. VB does not recall whether she mentioned the spreadsheet but that she didn't say he couldn't cope. Our finding was that comment was made that the illness would be recorded on the spreadsheet but that he was not told by VB that he could not cope. The claimant refers to the spreadsheet in contemporaneous text messages. He doesn't mention any comment made that it will be perceived that he can't cope in these messages. We think that it was likely a comment about how being off work would be perceived was made. VB gave evidence about the use of the management phrase "*Projection is Perception*" or PISP which she used with her team to describe the importance of how employees project themselves with colleagues. The background of the argument with MA and the subsequent absence from work, we find was for the main reason for this comment.

12.18. VB called the claimant again at 15.02pm and said that she had discussed this with her manager TS and informed him that TS had asked VB whether you could "*even self-certify for stress*". The claimant said that he told VB that he was upset by this remark and it demonstrated a lack of care. He claimed that VB then pleaded with him not to take the sick leave and told him that this could affect his future. We do not accept that she said at this time that his absence could affect his future. This has been attributed to this conversation perhaps in error.

12.19. We find that VB did not have a perception at that time of making these calls that the claimant was a disabled person. This was the first day of the claimant's absence from work for stress; the claimant was self-certifying and had not been signed off by a doctor. She was aware of the argument with MA and this was in the forefront of her mind. She was encouraging the claimant to come back to deal with the work-related disputes. She was also aware of Mr Kirkbride's illness and the claimant's worries about this. However, the main gist of the calls made to the claimant on Tuesday 5 December was in relation to practical matters as

to how the claimant should report his absence, whether he could self-certify and so forth.

12.20. That evening Mr Kirkbride became unwell again with neck pain and the claimant telephoned NHS direct for advice.

12.21. The claimant was not feeling well enough to attend work on Wednesday 6 December but it did not cross his mind to contact work as he had already told VB that he intended to take 7 days off. The claimant received a linked in request that day from a colleague who was a member of JB's team which he felt might be connected to his absence. At 11.37 am VB called the claimant to ask how he was feeling, and the claimant told her he wasn't feeling any better and that he was also concerned about his partner. He also mentioned the linked in request and his concern that he was being discussed in management meetings including those attended by MA. VB also asked the claimant whether he would like to meet the following day in a pub near work and asked whether TS could call him to see if there is anything she could do to help. The claimant said he was uncomfortable with this and VB suggested that perhaps JB could call instead as she has a softer tone.

12.22. The claimant was taking Mr Kirkbride to see the doctors when he received another call from VB at 15.44 pm. As he was driving at the time, he informed VB that he could not talk and asked her to call back. On arrival at the doctor's surgery, the claimant texted VB and said he could not talk as he was now in the doctors and so thought best to text instead. VB sent a text to the claimant at 16.02 saying that TS would be calling him to see how he was feeling and whether she could do anything to help. She also repeated the offer of lunch and enquired about Mr Kirkbride's health (page 235 and page 48 supplemental bundle).

12.23. The claimant then missed a call from TS at 16.26 who left a message asking the claimant to call her back and said that she wanted to see if there was anything they can do to help. The claimant described the tone of this message as friendly. The claimant texted VB at 16.27 expressing his surprise that TS would be ringing him as he thought it had been agreed that JB would ring him, he also raised the point again about the linked in request from Sean stating that he was concerned that "*maybe my stress could've been the topic of the management huddle which Marc would be privy too, that would be upsetting*". He also updated VB on DK's condition and further said "*I think that its best that I take my DR's recommendation to take the week off and review then. Does the process require that I contact every day?*"

12.24. VB responded to this text at 17.16 and her response was shown at page 236. She responded to each of the questions raised by the claimant explaining that JB had been in a meeting with TS and had

agreed to ring the claimant and that Sean was away on a leadership course at the time. She also told him that he should take tomorrow off to be with David and that the process when self-certifying was that the claimant needed to call in daily, that 2-3 days is the norm and said, "*see how you feel each day*". A further text was sent at 17.17 which read "*Went early sorry*" which I take to have been meant to read "Sent early sorry". Another text was then sent which read: "*Personally I think you are being a touch irrational re: T/L huddle, you wouldn't be discussed like this, there is so much to discuss that MK really isn't a regular feature of our agenda. We need to find some time to chat and if it can't be tomorrow when will be good for you? Incidentally one of the things that Marc does seem to be able to project is professionalism in the workplace (& as we know PisP is so important) He & Sue presented AllAbility sessions today and did really well, I sat in for VickiC & Tom L's session they represented our team and subsequently offered complimentary feedback. You have to let go of or learn to cope with whatever is eating you else it will destroy what could otherwise be a lucrative future career. Please let me help you. I hope David's ok and that the pain subsides soon. Speak tomorrow Vicki xx*"

12.25. We found that VBs comments in this message were in reference to the dispute with MA and not any perception of the claimant's illness or a perceived disability. It was sent out of a desire to assist in resolving the dispute. This was the second day of the claimant's illness which VB primarily attributed to the dispute with MA. VB admitted that this would have been better dealt with in a face to face discussion and we agree with this. Although we accept her explanation that the comments made were meant to coach and provide guidance to help the claimant resolve work difficulties, it was not helpful to the situation at the time where the claimant was off sick and concerned about his partner's ill health.

12.26. The claimant was taken aback and became very upset at this message. He replied to VB at 19.03 – text message at 238 and 239. He reminded VB that he had been to the doctors and had been diagnosed with stress, that he didn't feel rational and that VB's view "*made him feel stupid*". He went on to make comments about the issues with MA and the HIT squad. He went on to say "*I feel threatened by the pisp and you'll be on Sarah's spreadsheet, Comments like this are making me feel worse because I am destroying the future (crying face emoji). I really feel as though I am losing grip of myself and I really don't know what to do. Please can I just take the Dr's advice*". The claimant was clearly distressed at this point. VB replied straight away with "*Yes I wish you'd let me help*". Mr Kirkbride's health deteriorated overnight and the claimant became increasingly concerned for his welfare. He called NHS Direct and had a call back from a doctor at a hospital. By this time Mr Kirkbride was asleep so was advised to leave him. The claimant did not sleep well that night.

12.27. The next morning, the claimant was again not well enough to attend work. He did not phone VB to report this. VB sent a text at 10.12 am asking whether the claimant managed to speak to TS and that JB would phone him today for a catch up. She asked whether Mr Kirkbride and the claimant were doing ok this morning. The claimant's reply confirmed that Mr Kirkbride was unwell and that he was going to take him to hospital. He also confirmed that he had not managed to speak to TS. VB replied saying "*OK, poor David, I can imagine its adding to what's already a stressful week; let me know how you get on and when we can get together. Vx*" The claimant asked when JB would be calling him and the response was *"Now?*". We found that at the time these messages were sent VB did not have a perception that the claimant was a disabled person. She knew he was stressed, and she knew that his partner was becoming more unwell. However there was no perception that he had a disability. The primary reason for the initial contact was the fact that the claimant did not call in, as required, so that is why the text was sent. This was not related to any perceived disability.

12.28. JB called the claimant at 10.33 am. The claimant said that he was worried that his lucrative career was at stake and concerned about his partner's welfare, so he accepted the call although he did not want to. We find that the reason that JB called the claimant was primarily because TS had tried to call him the day before but had not been able to speak to him, and as TS was not in the office that day, she had asked JB to check on him. They often worked together in this way as regards to members of their teams. At this point JB did not perceive that the claimant was a disabled person either before during or after the call was made.

12.29. The call with JB is described by the claimant at page 31 and 32 of his witness statement. JB's account of the call is at page 4, 5 and 6 of her witness statement. There were not many disputes of fact about what was discussed. The dispute with MA was discussed and JB shared experiences of difficulties she had with colleagues at work and how these had been resolved. They also discussed other issues that the claimant was experiencing at the time including the illness of Mr Kirkbride and his sister. The issue of the financial implications of absence was raised but this was a two-way discussion. We found that it was the claimant that first raised the financial issue and how he would be affected if he was off sick and JB was responding to this. JB wanted the claimant to return to work and encouraged him to do so firstly as if he was off for a long period of time, he might feel worried to return; and because he was a valued employee of the business. We accepted that JB referred to how the claimant would support his partner if he was on long term sick. We did not accept that JB said or implied that the claimant was the breadwinner. However, we found that the reason that all of these comments were made were not because JB perceived the claimant to have a disability

relating to mental health. JB did not at that time perceive the claimant to be a disabled person. The call was an attempt (perhaps clumsy attempt) to reassure the claimant. It may not have come across like that to the claimant who did not feel reassured. The claimant said he felt under extreme pressure during and after this call and that he therefore agreed that he would return to work.

12.30. There were a further series of messages between the claimant and VB later that day which were at pages 240 and 241. This included the claimant confirming that he would be in, apologizing for him having been "*a pain this week*". VB responded to this with what she said was a light-hearted text saying that he had not been any more of a pain than "*the other darlings – don't beat yourself up*". The claimant thanked VB and said, "*I really respect you*". There was a further text discussion about Mr Kirkbride's health he says "*It's just been one thing after another. Thanks for your concern*".

12.31. The claimant came back to work the next day Friday 8 December and we accept that he was still feeling very unwell and should probably not have attended work on this day. The next complaint related to a return to work meeting held with VB that morning. The allegation relates to the reason for absence. The claimant alleged that he was told that it was not possible to record this as stress and it would need to be recorded as exhaustion. VB said that although she cannot recall the exact conversation, she recalled it being at the request of the claimant that the absence was not recorded as stress but that it was described as exhaustion. On balance we preferred the version of events of VB purely because it makes more logical sense. The claimant was concerned at this time perhaps because of his interpretation of the contact he had already had with the employees of the respondent as to how absence might be perceived. We can find no reason why VB would have a problem recording the absence as stress. We also find that although VB was aware that the claimant was unwell at this time, she did not have a perception that he was a disabled person and this exchange was not due to any idea that the claimant had a mental health condition. This was just a brief administrative discussion as to how absence was recorded. We note that a similar thing had happened before when the claimant had to take time off for a headache (see paragraph 12.9 above). None of this took place because of a perception of VB that the claimant had a disability.

12.32. After the weekend, the claimant again attended for work on Monday 11 December. It is not clear how the morning went but the claimant's unchallenged evidence was that he was still feeling very unwell and that his thoughts were racing throughout the day. He said he could not concentrate and so started looking at the various HR policies. Following

returning from a break, the claimant attended an unscheduled meeting with JB at around 2.30 pm. This was a key meeting and it was clearly very difficult for the claimant. His evidence of the meeting is set out at pages 35 and 36 of his witness statement. JB's recollection of this meeting was set out at paragraphs 25-31 of her witness statement. There is very little in dispute about how this meeting went so we do not need to make many findings of fact. Save to say that the claimant contended that she said, "*I know this is real to you, but you are unwell and unwell people don't see things clearly, I'm sending you home*". JB admitted saying "*I know this is real to you, but you are unwell and unwell people don't see things clearly*" but denies saying that she was sending the claimant home. On this point, we found that the claimant is mistaken about the precise words used. JB suggested that the claimant should go home, and the claimant then asked, "are you sending me home?" to which JB replied that it was up to the claimant as he was an adult. This makes more logical sense as a conversation.

12.33. JB's evidence was that she noted that there were physical changes in the claimant that day when she met with him as he "*was unshaven, frowning and looked a little dishevelled*". This was not his normal appearance. However, we did not conclude that this was sufficient to make a finding that JB perceived the claimant to be disabled due to a mental health condition at that time. She could see that he was unhappy to be at work and seemed hostile, but there is nothing in any of the evidence to suggest that JB had a perception at this time that the claimant was a disabled person.

12.34. The phrase "*you are unwell and unwell people don't see things clearly*" which causes the claimant a real issue, was not made because JB perceived the claimant to be a disabled person (she did not have that perception). JB was taken aback by the fact that the claimant was not his usual self and was hostile to her and he suggested that he should not have come in to work and he only did so because he felt pressurised to do so by contact and conversations with her, VB and TS. JB did not think the claimant was correct in the way he had interpreted the conversations that had taken place the previous week. She says therefore she suggested that the claimant was not seeing things clearly. We accept her evidence that she was pointing out that in her view that "*when we feel ill or upset, the world can look different and we can be more sensitive to things that we would ordinarily be*" We accept that no harm was meant to the claimant by making this statement. It was perhaps a heavy-handed way of expressing a genuine attempt to empathise. It might have been better if this comment had been put in a less emotive way. We do however acknowledge that the claimant was upset by this comment and remains very upset to this day about the connotations of the suggestions

that he was not seeing the world clearly. He came back to this throughout his evidence and this is something that he felt very aggrieved about.

12.35. The claimant left work after this and subsequently attended his GP where he was signed off work initially for two weeks with "Anxiety with Depression" and prescribed anti-depressant medication.

12.36. The claimant raised a grievance on 18 December 2017 where he raised issues of bullying and harassment and *"unlawful discrimination in the Birmingham office*". This document was shown at pages 217 to 257. There was no reference in this grievance to the Facebook message sent by VB on 3 December 2017. A grievance meeting took place at the respondent's office in Birmingham on 28 December 2017 and was conducted by MCS of the respondent with Sue Swinton from HR and the claimant was accompanied by Ms Zoe Gold, a colleague. At the end of the meeting the claimant produced a further letter shown at pages 271 to 273 and further documents headed "Additional Evidence" shown at pages 274-296. This additional letter did not specifically refer to the Facebook message or complain about discrimination on the grounds of sexual orientation. The pack of additional evidence did contain a copy of the message sent on 3 December 2017.

12.37. The claimant had no complaints about the way that the grievance meeting was conducted so we did not need to make any findings about that or what happened in the intervening period. Suffice to say that MCS met with JB, VB, TS and Sarah Whitehouse in early January 2018 and the notes of those meetings were contained in the bundle.

12.38. The claimant made several complaints about the outcome provided by MCS on 16 January 2018 which is contained at pages 318 to 322.

12.39. The first matter complained about is that MCS failed to address issues relating to the claimant's protected characteristic in his response, including the Facebook Message at page 292. It is accepted that the grievance outcome did not specifically address this issue. MCS explained in his witness statement that this was because he dealt with the complaints raised in a thematic way and although he did not include a finding in the outcome letter, he did take the issue seriously and discussed it with VB. His finding was that he did not consider it appropriate for such a message to be sent by a line manager to one of her direct reports. He also said that he considered that the message had been sent as a joke between friends and that context was very important in this regard.

12.40. The second matter was an alleged lack of clarity with regards to who should contact employees who are absent from work due to sickness. This was dealt with in the outcome letter - there was no lack of clarity.

The third matter was the finding made by MCS that the comment by JB that "*you are unwell and unwell people don't see clearly*" was meant to be supportive. It is agreed that such a finding was made by MCS.

12.41. The claimant was referred to the respondent's OH provider Nuffield Health on 18 January 2018.

12.42. The claimant appealed against the outcome of this grievance by a letter of 22 January 2018 addressed to J Dye, the then CEO of Allianz (shown at page 323-338). On 23 January 2018 the claimant was contacted by Nuffield Health and completed a medical assessment over the telephone and a report was sent to the respondent on the same date.

12.43. On 25 January 2018, the claimant's My Performance Objective document was completed by VB. This is shown at pages 343-361 of the Bundle. The claimant was awarded an "on target" rating by VB. We accepted the evidence of VB as to how she assessed that the claimant was awarded this rating. She explained that on target ratings were unusual for an individual embarking on a new role and it would be more normal for an award of developing to be made. This rating was in her view "*unusually high*" and that this reflected the fact that she held the claimant in such high regard, he was good at his job and showed real potential. We accepted her evidence that the fact that the claimant had raised a grievance did not play a part in her decision making.

12.44. The claimant's appeal against his grievance was acknowledged by a letter from Amanda Haig the respondent's HR Manager (AH) (although it has the electronic signature of SL on it) dated 29 January 2018 inviting him to a meeting on 8 February 2018. This letter was written from a template belonging to AH by SL. The claimant made a specific complaint in relation to one comment in the letter which stated "*I know you are anxious that Lesley Proctor is a peer of Sarah Whitehouse, however we would like to follow our policy and we have every confidence that this meeting will be handled in a professional and fair manner*". We accepted the evidence of SL, that at the time of writing this letter, she did not know the claimant or have any specific details of his complaints. There is no evidence and we did not find that she had a perception that the claimant was a disabled person. We also accepted her evidence that she thought at this time that Ms Proctor was a fair and reasonable person to hold the appeal hearing and was dealing with the claimant's previous objection to her hearing it in this comment.

12.45. The claimant responded to this e mail on 30 January 2018 informing AH that he is upset and frustrated by the respondent's ignorance to his anxieties but that he will attend the hearing with Ms Proctor. Having received this email AH made the decision that the respondent would try and appoint another appeal manager and she started to take steps to

find another suitable manager. SL contacted the claimant on 7 February (the day before the hearing) by e mail to confirm that the appeal hearing scheduled for the next day would need to be cancelled as nobody other than Ms Proctor was able to attend. We accepted the evidence of SL that this decision was made in order to try and accommodate the claimant's request and was not made based on any perceived disability. SL did not have a perception that the claimant was disabled at this time. It might have been better for the respondent's employees to have let the claimant know after he sent the e mail of 30 January 2018, that they were looking for an alternative manager (and that there may be difficulties with doing so), to keep him informed of progress so it was not such a shock at the time he was told that the meeting was to be postponed.

12.46. The claimant was very upset and angry about this following a further exchange of emails and telephone calls, the hearing was again confirmed to take place the next day 8 February 2018 but with a different manager, KF. We noted that there is no evidence and we conclude that at the time the appeal meeting took place neither KF nor PG had any perception that the claimant was a disabled person.

12.47. The hearing took place as planned with PG in attendance from a HR perspective. There are a significant number of documents in the bundle with regards to notes of meetings, minutes, e mails and other material regarding this appeal. However, the claimant made 2 complaints in relation to this appeal hearing so for the purpose of our fact finding we have concentrated on these two matters alone. Firstly, the claimant complained that KF and PG refused to answer questions with regard to the respondents' Absence and Appeal Procedure, the appeal questionnaire and the contractual effect of the respondent's HR policies and procedures. At the appeal hearing the claimant presented to KF an appeal statement (contained at pages 380-381) and an appeal questionnaire (pages 453-461). KF had only been appointed to hear the appeal the previous day. She had spent the morning of the appeal hearing reading the relevant paperwork created to date. These additional documents had not been seen by KF in advance and she was not expecting any additional documents. KF initially resisted answering the questions in the appeal questionnaire on the basis that she had told the claimant that she would not be providing an outcome today and thought that it was reasonable to consider and implement his requests. As the claimant was unhappy with this response, KF said she reluctantly agreed to try and answer the questions at the end of the appeal hearing. This took place at the end and was clearly a very difficult part of the meeting.

12.48. KF was resistant to answering the questions raised as she had not seen the questions in advance or carried out any of her investigations. Some

questions were answered, and the claimant noted down the answers. However, he was becoming agitated at this stage and was unable to continue with this process, so PG took over noting down the answers. This was clearly a very tense part of the meeting. The claimant alleged that KF was very hostile and spoke down to him during the meeting. KF denied that this was the case. From her evidence at the tribunal we do not accept that she was hostile at the meeting. We found her to be a calm, cool and measured individual and it is not plausible that she would have become emotional or hostile in this manner. She was clearly on the back foot having been put on the spot. The allegation that KF leant over the desk and was waving her arms about is also not plausible. It is denied by KF and PG and we accepted their evidence in this regard.

12.49. On 23 February 2018 the claimant attended a meeting with Leanne McGarrity (LM) to discuss his 2017 MPO performance rating. This meeting would normally have taken place with the claimant's line manager but was held by LM given the fact that a grievance had been raised by the claimant against VB. He then raised a grievance against this MPO rating to PG by a letter dated 24 February 2018.

12.50. At the appeal hearing it was agreed that the claimant should be referred again to the respondent's OH providers. The claimant attended an appointment on 8 March 2018. A report was provided to the claimant on 15 March 2018 (page 445.14). The report said it addressed the questions raised by the respondent but did not set out the questions that were raised. The claimant requested that these questions were disclosed to him and there was then an exchange of correspondence between the OH provider, Nuffield Health, and PG on 16 March 2018 as to whether the respondent would agree that the questions could be disclosed. PG initially said she did not want the questions to be disclosed and a transcript of the telephone conversation that took place is shown at page 818.8. Following a further e mail exchange, PG confirmed later that day that she was comfortable with Nuffield Health adhering to any request within the claimant's legal right. We accepted the explanation that the initial refusal was due to an error on the part of PG. The claimant challenged PG on the fact that in her initial witness evidence she had said that she did <u>not</u> initially refuse to disclose the questions but that on receipt of the transcript of the call above, she provided further witness evidence clarifying her position. We do not attach much weight to this inconsistency. This is because we rely on the transcript of the conversation from that day together with the contemporaneous e mails sent at the time. Interestingly we note that this transcript confirms that the view of PG at the time was that the claimant was not a disabled person under the EQA. This is clear contemporaneous evidence that PG did not have a perception that the claimant was a disabled person.

12.51. KF conducted an extensive investigation which is documented in her witness statement and in various notes of meetings. As part of her investigations she did investigate the Facebook message sent on 4 December 2017. KF delivered the appeal outcome to the claimant on 21 March 2018 in person and prepared a letter setting out her conclusions at pages 677-701. The claimant had prepared and brought with him a further outcome questionnaire to the outcome meeting (pages 703-709).

12.52. The claimant made specific complaints in relation to the response firstly that KF retracted her responses to the questions raised in the appeal questionnaire. In responding to the question as to the contractual nature of the policies, KF refined her answer from the straight "yes" she gave at the meeting itself. However, we accept her explanation that she did this because by the time of completing the investigation and preparing the outcome she had taken HR guidance and had accordingly adjusted her response.

12.53. The claimant resigned his employment on 22 March 2018 by providing one month's notice. He attended a grievance meeting on 26 March 2018 chaired by Emma Louise Knight dealing with his MPO rating. Notes of this meeting are shown at pages 728-731.

12.54. The claimant sent a further letter to Mr Dye of the respondent on 26 March 2018 raising a grievance against KF in relation to his grievance appeal.

12.55. The claimant made a Facebook post and sent an e mail to a closed group of employees of the respondent in Birmingham on 27 March 2018. These documents are shown at pages 744-748 and 757-762. This referred to Discrimination and disclosed detail about his health problems, absence from work and how it had been addressed by the respondent. This was sent to JT, the respondent's Head of Claims Operations later the same day. JT sent an email to the same group addressing this and within this was the statement that the claimant complained about namely, *"whilst it is unusual for an employee to air their grievances in this manner, we do not wish to restrict freedom of speech*". JT explained that he took HR and Legal advice before sending this message. He contended that the response was fair and measured and his explanation was that he had sent the message because he was concerned about the people mentioned in the e mail and how this might reflect on them. He also said that the message put lots on information that was personal and confidential into the public domain so he needed to address it. We accepted JT's evidence that this message was in no way to punish the claimant for having raised a grievance or indeed for posting the Facebook message in the first place. His view was that it was necessary and appropriate to respond to the message in order to correct what he saw was an inaccurate and unfair picture. He explains the reference to

the word "unusual" was that he felt it was not an orthodox way to air grievances. There was no evidence and we did not conclude that JT had a perception that the claimant was a disabled person under the EQA at this time. He admits that having read the post, he was concerned for the claimant and thought that he must be in a bad place. However, this is not the same as having a perception that the claimant is disabled under the EQA.

12.56. JT wrote to the claimant on 28 March 2018 confirming that he would not be permitted to pursue his grievance against KF, as it would not be appropriate to convene a further grievance as the grievance and appeal process stages had already been completed and that the grievance procedure does not provide for a further right of appeal. There was a further exchange between the claimant and JT whereby the claimant asks JT to respond to his question regarding the contractual status of the respondent's policies and procedures. No definitive response was provided on this question.

The Law

13. Section 94 of the ERA sets out the right not to be unfairly dismissed and Section 95 (1) (c) of the ERA says that an employee is taken to have been dismissed by his employer if the employee terminates his contract of employment (with or without notice) in the circumstances in which he is entitled to terminate if not notice by reason of the employer's conduct i.e. constructive dismissal.

14. If the dismissal is established, then the Tribunal must also consider the fairness of the dismissal under Section 98 of the ERA. This requires the employer to show the reason for the dismissal (i.e.: the reason why the employer breached the contract of employment) and that it is a potentially fair reason under sections 98 (1) and (2) and where the employer has established a potentially fair reason then the Tribunal will consider the fairness of the dismissal under section 98 (4), that is:

    14.1. did the employer act reasonably or unreasonably in treating it as a sufficient reason for dismissal; and

    14.2. was it fair bearing in mind equity and the merits of the case.

15. It was established in the case of Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 that the employer's conduct which can give rise to a constructive dismissal must involve a "*significant breach of contract going to the root of the contract of employment*", sometimes referred to as a repudiatory breach. Therefore, to claim constructive dismissal, the employee must show:-

    15.1. that there was a fundamental breach by the employer;

15.2. that the employer's breach caused the employee to resign;

15.3. that the employee did not delay too long before resigning, thus affirming the contract of employment.

16. If the act of the employer that caused resignation was not by itself a fundamental breach of contract, the employee may on a course of conduct considered as a whole in establishing constructive dismissal. The 'last straw' must contribute, however slightly, to the breach of trust and confidence (Omilaju v Waltham Forest London Borough Council[2004] EWCA Civ 1493, [2005] IRLR 35, [2005] 1 All ER 75).

17. It was confirmed in the case of Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978, [2018] IRLR 833 in an ordinary case of **constructive dismissal** tribunals should ask themselves the following questions:

17.1. 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?

17.2. Has he or she affirmed the contract since that act?

17.3. If not, was that act (or omission) by itself a repudiatory breach of contract?

17.4. If not, was it nevertheless a part…of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term?

17.5. Did the employee resign in response (or partly in response) to that breach?

18. The relevant sections of the Equality Act 2010 ("EQA") applicable to this claim are as follows:

"4 The protected characteristics

The following characteristics are protected characteristics: …
Age; disability; ….sex;"

"**6 Disability**

(1) A person (P) has a disability if -
(a) P has a physical or mental impairment, and
(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

"13 Direct discrimination

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

"**23 Comparison by reference to circumstances**

(1) On a comparison of cases for the purposes of section 13....there must be no material difference between the circumstances relating to each case."

"**26 Harassment**

(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect."

"27 Victimisation

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

"109 Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.
(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.
(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval."

"**136 Burden of proof**

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

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

19. The relevant authorities that were considered were as follows:

19.1. Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL – *"the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class"*.

19.2. Anya v University of Oxford & Another [2001] IRLR 377 **-** it is necessary for the employment tribunal to look beyond any act in question to the general background evidence in order to consider whether prohibited factors have played a part in the employer's judgment. This is particularly so when establishing unconscious factors.

19.3. Igen v Wong and Others [2005] IRLR 258 and Madarassy v Nomura International PLC [2007] IRLR 246. The employment tribunal should go through a two-stage process, the first stage of which requires the claimant to prove facts which could establish that the respondent has committed an act of discrimination, after which, and only if the claimant has proved such facts, the respondent is required to establish on the balance of probabilities that it did not commit the unlawful act of discrimination. In concluding as to whether the claimant had established a prima facie case, the tribunal is to examine all the evidence provided by the respondent and the claimant.

19.4. Nagarajan v London Regional Transport [1999] IRLR 572, HL,-The crucial question in every case was, *'why the complainant received less favourable treatment … Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?*'

19.5. Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, [2001] IRLR 830, [2001] ICR 1065, HL, - The test is what was the reason why the alleged discriminator acted as they did? What, consciously or unconsciously was their reason? Looked at as a question of causation ('but for …'), it was an objective test. The anti-discrimination legislation required something different; the test should be subjective: *'Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.*'

19.6. The Chief Constable of Norfolk v Coffey [2019] EWCA Civ 1061 "*in a claim of perceived disability discrimination the putative discriminator must believe that all the elements in the statutory definition of disability are present – though it is not necessary that he or she should attach the label "disability" to them….what is perceived must, as a simple matter of logic, have all the features of the protected characteristic as defined in the statute*"

19.7. Richmond Pharmacology V Miss A Dhalliwell [2009] ICR 724. There are two alternative bases of liability in the harassment provisions, that of purpose and effect, which means that the respondent may be held liable on the basis that the effect of his conduct has been to produce the prescribed consequences even if that was not a purpose, and conversely that he may be liable if he acted for the purposes of producing the prescribed consequences but did not, in fact, do so. A respondent should not be held liable merely because his conduct has had the effect of producing the prescribed consequence. It should be reasonable that the consequence has occurred and that the alleged victim of the conduct must feel that their dignity has been violated or that an adverse environment has been created. Therefore, it must be objectively decided whether or not a reasonable person would have felt, as the claimant felt, about the treatment in question, and the claimant must, additionally, subjectively feel that their dignity has been violated, etc.

19.8. Pemberton v Inwood [2018] EWCA Civ 564. Underhill J *"In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))*.

19.9. Jones v Tower Boot Co Ltd [1997] IRLR 168, [1997] ICR 254, CA - The correct test of whether something is done in the course of employment is whether, interpreting the words 'in the course of employment' as they would be interpreted in everyday speech, the conduct in question falls within the meaning of the phrase.

19.10. Forbes v LHR Airport Ltd [2019] IRLR 890 - the question of whether conduct is or is not in the course of employment within the meaning of s 109 is very much one of fact to be determined by the tribunal having regard to all the relevant circumstances. The words 'in the course of employment' are to be construed in the sense in which the lay person would understand them and there is no clear dividing line between conduct that is in the course of employment and that which is not. Each case will depend on its own particular facts. The relevant factors to be taken into account might include whether the impugned act was done at work or outside of work, and if done outside of work, whether there is nevertheless a sufficient nexus or connection with work such as to render it in the course of employment. Just as is the case with the physical work environment, whether something is done in the course of employment

when done in the virtual landscape will be a question of fact for the tribunal in each case having regard to all the circumstances.

20. We were also referred to additional authorities by Mr Smith which are set out in writing in the document submitted on the final day of the hearing titled "Respondent's Closing Submissions". We do not set all of these references out in our written reasons (as both parties have a copy of this document), but refer to any relevant particular points made in our conclusions below.

Conclusion

21. **UNFAIR DISMISSAL**

21.1. **Was the claimant constructively and unfairly dismissed?**

21.1.1. The first question we asked ourselves was whether the respondent breached the claimant's contract of employment? The claimant contended that the respondent's HR policies (specifically the: i) Absence and Attendance policy; ii) Bullying and Harassment policy; iii) Discrimination policy; iv) Stress at Work policy; and v) Grievance policy) were contractual and amounted to terms of his contract of employment. We considered this first. There is no specific clause in the claimant's written contract of employment (page 137) dealing with the status of the policies. We referred to our findings of fact at paragraph 12.2 above where we set out how policies and procedures and the HR intranet are referred to (page 141). We noted that the other provisions in this section headed "*Other Conditions of Employment*" deal with matters that would ordinarily be regarded as terms and conditions of employment, for example obligations on leaving employment, confidential information etc. There is also no statement in the section dealing with policies and procedures, as there is on the bonus clause provision, that expressly says that these are not intended to be contractual. However, we also noted that there are a huge variety of policies and procedures contained on the HR intranet. It is unlikely in our view, that all these policies were intended by either of the parties (but the respondent in particular) to be contractual on a wholesale basis.

21.1.2. There is considerable uncertainty within the suite of documents on the HR intranet as to the status of such documents. We found this surprising given the size and resources of the employer and the HR policy and legal advice potentially available. We agreed with the claimant that it is ambiguous and confusing. Neither the claimant, nor indeed the Tribunal, was able to get an answer from anyone at the respondent as to what, at the very least, the respondent intended in relation to the various policies and their contractual status. We accepted that determination of the question is a legal issue, which the Tribunal had to decide in this claim. Yet on a wider point it would

seem to be unhelpful for no such statements or guidance to be included within any of the documents themselves or on the HR intranet as to what their status is.

21.1.3. We therefore had to look at each policy that the claimant relied on to determine whether any of those policies were as Mr Smith reminds us "*apt for incorporation*" and had contractual effect. We took note of and considered all the relevant case law pointed out by Mr Smith in his written submissions, and specifically the case of Sparks V Department of Transport [2016]IRLR 519 and the guidance given by Smith J in the case of Hussain v Surrey & Sussex Healthcare NHS Trust [2011] EWHC 1670. The authorities required us to take into account the importance of the provision to the contractual working relationship; the level of detail prescribed by the provision; the certainty of what the provision requires and the context of the provision and where it is included within the various provisions; and whether the provision would be workable if it were to have contractual status.

21.1.4. We considered each policy that the claimant relies upon as having been breached and set out below our conclusions on each matter raised in the List of Issues. We set out our answers below to the following questions:

- was this a contractual term and if so, was it was breached by the respondent or; in the alternative,

- was the respondent's conduct related to the matter complained of a breach of the implied term of mutual trust and confidence.

(a) The first allegation is that the respondent breached the Stress at Work policy in the way that it responded to the queries raised by the claimant after 18 December 2017 about the contractual nature of its policies and procedures, specifically by amending/ updating the Stress Policies without consultation with its employees (including the claimant). It was not clear what part of the Stress at Work the claimant alleges has been breached. It appeared that the claimant's suggestion was that by amending or updating this policy in November 2017, and doing so without consulting with the claimant, that the respondent was in breach of the policy itself. Firstly, the Stress at Work policy is not apt for incorporation and so does not form part of the contract of employment. We respondent's submissions that the policy sets out aspirations as to how the working environment should be managed and provides general advice, information and guidance to employees and to managers of employees as to how to

manage stress. Other than a reference to the provision of counselling via the Employee Assistance Line, it does not grant any rights or benefits to employees or indeed impose any obligations on employees or on the respondent. There is no entitlement for individual employees to be consulted about changes to the Stress at Work policy. It provides that the respondent will consult with trade union safety representatives on the policy, but the claimant was not such a representative. In terms of the updating of the policy in 2017, nothing changed other than the date, formatting and the version number. This did not affect the claimant at all. We concluded that there was no contractual entitlement; and in any event no breach of policy. Accordingly, there was no breach of the implied term of trust and confidence either. There is no evidence that there was a sinister motive to the changes made to the policy. This is particularly so when it is noted that there was no substantive change to content. This was conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence.

(b) The next allegation made is that when VB sent a text message to the claimant on 6 November 2017 that this was in breach of the provision of the Absence and Attendance Policy which states "*Allianz handles absence issues carefully, fairly and consistently and in a supportive manner for all our employees*". Firstly, this term of the Absence and Attendance policy is not apt for incorporation as a contractual term when looking at the tests we set out above. Whilst this is an important provision, we do not find that it has enough certainty to confer contractual rights. In any event, VB was not in breach of the policy. The text message was sent because the claimant did not call in to report his absence as required by the policy. This also leads us to conclude that the sending of this message could not amount to a breach of the implied term of trust and confidence either. It was sent for a specific permitted purpose and was not a deliberate or calculated act which was likely to damage the relationship of trust and confidence.

(c) The next allegation is that respondent acted in breach of the provision of the Absence and Attendance policy that states "*if you are absent due to stress, anxiety or depression, in order for you to receive support as quickly as possible, we automatically arrange for you to have a consultation with our external occupational health consultants*" as it failed to automatically arrange for him to have a consultation with its occupational health consultants until 18 January 2018 despite the fact that VB, JB and TS were aware of the claimant being absent from work

with a stress-related illness since 5 December 2017. On the first question of contractual status, we did form the view that the Absence and Attendance Policy may have some aspects within it that were apt for incorporation. This policy deals with matters such as how an employee must report sickness, payment sick pay and withholding and recovery of sick pay by the company. Some of these are likely to be provisions that the employer would want to rely upon as contractual. However, the particular provision relied upon was not apt for incorporation and concluded it is not a contractual term. The OH referral is primarily for the benefit of the employer, so that it can comply with its other obligations. The policy specifically states that it is "*in order to ensure that you receive support as quickly as possible*". It is not the OH referral itself that constitutes the support but what happens after that depending on what the report concludes. This is not by its nature a term apt for incorporation. In any event, we also conclude that the claimant did not fall within the ambit of the policy. It is contained in the section of the policy headed "Long term sickness and occupational health" which is further defined in the policy as being absence for periods of 4 weeks and more. On 5 December 2017, the claimant had only been off with stress for 1 day. The claimant was referred for OH on 18 January 2018 which was reasonably prompt. If there was a non-compliance with policy, it was a minor non-compliance and as soon as it was pointed out, the claimant was referred straight way. This cannot amount to a breach of trust and confidence.

(d) The next matter complained about is the spreadsheet used by Sarah Whitehouse to track employees' absence from work which is said to be in breach of the provision of the Absence and Attendance policy which states "*we review absence using a tool known as the Bradford Factor*". We firstly the provisions on the Bradford factor in the Absence and Attendance policy were not apt for incorporation. These set out a management tool for keeping track of absence and creating trigger points for possible action. We refer to the case of Wandsworth LBC v D' Silva [1998] IRLR 193 and consider this is an appropriate authority here. The reference to Bradford Score is doing nothing more than setting out how absence is monitored and what trigger points might be for further action. There is no automatic consequence set out as to what will happen in the event of any such trigger point being reached. We also conclude that the use of this spreadsheet by the managers is not a breach of the policy in any event. The policy refers to the Bradford Factor but there is nothing in it to say a spreadsheet can't be used by

management in addition. Also, we do not conclude that the keeping of the spreadsheet or recording basic absence data on it could in any way be seen to be a breach of trust and confidence. This was done for valid management purposes and not to deliberately undermine the relationship of trust and confidence.

(e) The next matter complained about is that VB's language and style "*constitutes bullying on a wider scale*" in breach of the Bullying and Harassment policy. We have considered whether the Bullying and Harassment policy is apt for incorporation. This is clearly a very important policy, but we do not think the nature of the document is one which is intended to lay out contractual rights and obligations. The procedure is not prescriptive in terms and what must be done and when by employer and employee but sets out very important principles about the respondent's approach to this issue, what it expects of employees and managers and provides information and sets out the way it will approach complaints. This cannot have been intended to create contractual rights for any employee who may think they have been the subject of bullying. It is of course open to such an employee to expect it is followed and point out any failures to do so and challenge them, but this is very different to saying that it has contractual status. The claimant does not particularise as to what comments of VB are relied upon here as bullying so we cannot deal with this matter further as to whether there was a breach of trust and confidence. However, we do deal with specific comments relied upon as part of the claimant's complaint of discrimination as relied upon below. We do not find that any of the matters raised here are enough to amount to conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence, given our conclusions on each point as set out below.

(f) The claimant then complains about the "course of action taken by the management team of the respondent" being "in breach of the sickness absence reporting procedure outlined in the Absence and Attendance policy". Our conclusions on the possible contractual status of this policy are set out at (c) above. Moreover, the claimant does not particularise which parts he relies upon or indeed which conduct of the management team is said to be a breach. We have taken the conduct complained off to refer to the means and frequency of contact between the claimant and his line manager and other managers of which we say more below. There is nothing express in the policy which specifies the level of contact from managers or which says that managers other than the direct line manager should not contact

employees off sick. Therefore, there does not appear to be any term that exists which is apt for incorporation that could be relied upon or that any breach took place of the policy in any event. We conclude that all contact made with the claimant was done for a specific reason and purpose, and none of this was conduct which was intended or objectively likely to destroy the relationship of trust and confidence. We accept that the claimant found the contact level and type disproportionate and it caused him distress. However, this is different to saying that the contract amounted to a breach of contract, either of an express term or the implied term of trust and confidence. We do not find the actions meet the tests required to establish this.

(g) The claimant also says that the respondent acted in breach of the Stress at Work policy by failing to give the claimant clarity of what was expected from him at work, specifically by providing two variations of the policy obtained at the beginning of the process (Stress at Work Version 1 November 2017 & Stress & Well-Being Version 2 November 2017). We accept that it is not ideal and a little unhelpful to have two policies which appear to cover the same subject matter. However, we also conclude that neither are apt for incorporation for the reasons set out at paragraph (a) above. Both policies were both available on the intranet and really there is nothing contained in the policies that caused the claimant any concern. It may be sensible for the respondent to rationalise such policies if it has not already done so, but we do not find a breach of contract here either or any express term or of the implied trust and confidence term.

(h) The next matter complained of is that the respondent breached that part of the Discrimination policy which states "*any incidents of bullying or victimisation are dealt with fairly and seriously*", and/or the Bullying and Harassment policy and/or the Stress at Work policy and/or the Grievance policy was breached by the respondent's failure to address bullying and harassment appropriately. For the reasons set out above, we cannot see how any such provision could be apt for incorporation. The claimant went on to specify matters which we deal with separately below, but as a general comment, we find that the way that the respondent handled the various grievances and appeal raised by the claimant was reasonable. Many managers devoted significant amounts of time to hearing the claimant's complaints and investigating them. This is evidenced by the large amount of correspondence on this part of the claim in the bundles. We do not see any basis for suggesting that the respondent did not deal with the complaints seriously. It also

appears to us that the respondent behaved reasonably and fairly in the way it dealt with the claimant's complaints. Employers are not held to standards of perfection in the way they conduct internal investigations and certain managers acknowledged that if they were doing it again, they may have approached questions differently. However, this does not amount to a breach of any express or implied term. Dealing with the conduct the claimant complains about:

(i) MCS as part of his grievance outcome:

(1) failed to address issues relating to the claimant's protected characteristics in his response to the claimant's grievance of 18 December 2017, including the Facebook message from VB of 3 December 2017. It is correct that this was not addressed in the response and MCS said that perhaps he should have done this and would have included a specific response if he was doing it again. However, we also noted that this allegation did not appear in the written grievance submitted to the respondent on 18 December 2017 (pages 217-257). The further letter handed in at the grievance meeting with MCS did not specifically address this, although the supporting documents attached to the letter contained a copy of the message. We concluded that MCS considered this and questioned VB about the message during his investigation. At worst, we find that it was an oversight by MCS that this matter was not specifically included in the outcome response. It was not excluded deliberately. We also note that the respondent dealt with the complaint in full and responded when it was raised on appeal. We do not find that this omission by MCS at this stage meets the threshold for amounting to a breach of the implied duty of trust and confidence.

(2) was unclear in his response about who should contact employees who are absent from work due to illness. Our findings are that his response was clear. There was no deliberate act designed to destroy trust and confidence.

(3) stated that the comment allegedly made by JB, "*I know this is real to you, but you are unwell and unwell people don't see clearly, I'm sending you home*", was meant to be supportive of the claimant. We understand and appreciate that the claimant did not think this was

supportive and the statement in question was of real concern to him. However, MCS formed the view that it was meant to be a supportive statement. He listened to the allegation, called in the member of staff concerned, investigated it and took a view on the intention of JB. The view that he reached was one that he was entitled to take on the evidence he found. The claimant didn't agree and someone else investigating the grievance might have taken a different view. However, in no way was this a perverse or unreasonable view to have taken. This cannot be categorised as a breach of contract, either of an express or an implied term.

(ii) KF of the respondent

(1) refused to respond to the questions raised in the claimant's appeal questionnaire in person at the claimant's grievance appeal hearing on 8 February 2018. Firstly, KF didn't refuse to respond, although it is true she was reluctant to do so. She attempted some questions at the end of the meeting. This was not a breach of contract and not conduct designed to fundamentally destroy or damage trust and confidence. KF was taken aback by the number of questions and not having the opportunity to review these in advance. Considering the shortness of notice, we do not find it unreasonable that KF wanted to defer answering the questions until she had the opportunity to review them. This is not unreasonable and accordingly it is also not a breach of any trust and confidence term. It would seem to be the eminently sensible approach to take in order that the claimant's questions were dealt with in a considered and careful way.

(2) retracted her responses to the questions raised in the claimant's appeal questionnaire. She did change her response – see paragraph 12.52 above. However, this was done because after taking advice KF found out that she needed to clarify what she had originally said. at the meeting. This was the right thing to do rather than have an incorrect response remain. That said, this cannot amount in any way to a breach of contract, express or implied.

(3) was unclear in her response to the claimant's questions about an occupational health referral. We conclude that if there was any lack of clarity here, it was an error

or there was some confusion about the nature of the question being asked. Either way it was not an intentional act to try and mislead or deliberately evade the question. We do not see any grounds for suggesting that there was a breach of contract.

(4) spoke down to and was hostile towards the claimant in their face to face meeting on 8 February 2018. We have already made a finding of fact above that KF was not hostile and did not speak down to the claimant during the hearing on 8 February (paragraph 12.48). It was a difficult meeting, inevitably, with a degree of tension which could have been misconstrued by the claimant. KF was on the back foot from the start having been asked to complete the questionnaire out of the blue and we accept that she may have come across in a defensive manner. However, we do not conclude that this equated to hostility and believe it was always professional. The claimant was ill at the time and was distressed and upset. He may have been intimidated by the serious nature of the meeting and perhaps the seniority of KF. However, we find that this was not caused by any deliberate or conscious act by KF or PG. This does not amount to a breach of either an express term or of trust and confidence

(iii) JT of the respondent who did not allow the claimant to raise a grievance against Ms Fryer on 5 April 2018. Whatever the reason for deciding on 5 April 2018 that the claimant would not be able to pursue a grievance against KF in relation to the appeal hearing, this took place after the claimant had already resigned. It is therefore not relevant as, even if there was a breach here, it cannot have been a breach of contract that led the claimant to resign.

(iv) Emma-Louise Knight of the respondent in the way that she investigated the grievance the claimant raised about Victoria Black regarding alleged victimisation. In the same way, as (iii) above, as this took place on 26 March 2018 after the claimant resigned on 24 March 2018, it is not relevant. We have therefore not considered it further

21.1.5. Having concluded that there were no breaches of the claimant's contract of employment in any of the matters above, then we did not need to go on to answer the remaining questions as to whether any was serious enough to be a repudiatory breach; whether the contract

was affirmed or whether the claimant resigned in response, or for some other reason.

21.2. We do not find that the claimant was dismissed by the respondent, it cannot be an unfair dismissal and the claimant's complaint of constructive unfair dismissal is accordingly dismissed.

22. DISCRIMINATION / HARASSMENT – PERCEIVED DISABILITY

22.1. Direct perceived disability discrimination

22.1.1. Firstly, we have considered the very important constituent of this complaint and that is whether the various employees of the respondent the claimant complains about have a perception that the claimant was a disabled person (specifically, by reason of a mental impairment of anxiety, stress and depression). That requires us to have found that each individual perceived that he satisfied all the components of the statutory definition of disability by reason of a mental impairment at the material times. They must therefore have perceived him to have a mental impairment that had a substantial and long-term adverse effect on his ability to carry out day to day activities. We take on board the point raised many times by Mr Smith that this was not put to <u>any</u> of the relevant witnesses in cross examination. Nevertheless, we have considered in respect of each individual whether they had such a perception when considering each of the complaints of direct discrimination. Our findings of fact confirm that we did not find that any such individual had a perception that the claimant was a disabled person at the relevant time. This does mean that the claimant's complaint of direct discrimination on the grounds of a perceived disability is bound to fail. Without having the perception required it is impossible for any of the actions complained of to be because of such a perception. However, for completeness, we refer to our findings of fact and conclude on each of the individual mattters identified below from the List of Issues, whether the allegations of less favourable treatment because of a perception that the claimant was a disabled person are made out:

(a) comments allegedly made by VB during telephone conversations on 5 December 2017 about the claimant's absence from work and the absence tracker spreadsheet, in particular that:

(i) his illness would be recorded on Sarah Whitehouse's spreadsheet and perceived by senior management that he could not cope;

(ii) TS had questioned whether it was possible to self-certify for stress; and

(iii) his absence could affect his future. We found as a fact that VB did not have a perception that the claimant was a disabled person at the time of making comments during these telephone conversations. The dispute with MA was at the forefront of VB's mind and the conversations were largely about the practical matters related to absence (see paragraph 12.19) above. We do not conclude in any event that what was said during these conversations amounted to detrimental treatment.

(b) comments made by VB in a text message exchange between her and the claimant on 6 December 2017, in particular that he was "*being a touch irrational*" and "*you have to let go of or learn to cope with whatever is eating you else it will destroy what could otherwise be a lucrative career*". We have already found that the comments made at this time were made in reference again to the dispute with MA and not due to a perception that the claimant was a disabled person (see paragraphs 12.25). Whilst it may not have been ideal for such comments to have been made in a text message, we also conclude that this was not detrimental treatment in the sense that VB had a genuine motive of resolving an employee dispute, getting an employee who was valued back to work and helping the claimant.

(c) on 7 December 2017, VB contacting the claimant via text message and allegedly pressuring him to return to work. We found that the reason for this contact on 7 December was because that the claimant did not call in sick as he was required to do (paragraph 12.27). Again, we were very clear that there was no perception here that the claimant was a disabled person. We do not conclude that anything said in this message could objectively amount to detrimental treatment.

(d) comments allegedly made by JB during a telephone conversation with the claimant on 7 December 2017 regarding his absence from work, in particular, her question about whether the claimant was using anti-depressants, her comments about her son's mental health and the question "*How will you support David if you are not working?*" To the extent we found comments to have been made in this call, we concluded that JB did not at the time of this call have a perception that the claimant was a disabled person and so the comments cannot have been because of this (paragraph 12.29). The call was made as an attempt at reassurance and to encourage the claimant to return to work not because of any perceived disability. She was not

seeking to subject the claimant to a detriment and objectively speaking it is hard to see how this could be interpreted as such.

(e) VB's alleged actions at a return to work meeting with the claimant on 8 December 2017, namely saying that it was not possible to record the claimant's absence as stress so it would need to be recorded as exhaustion instead. Again, there was no perception by VB at this time that the claimant had a disability (paragraph 12.31). This was a brief administrative exchange and nothing more. There was nothing in this meeting that could amount to a detriment.

(f) comments allegedly made by JB at a meeting with the claimant on 11 December 2017, in particular "*I know this is real to you, but you are unwell and unwell people don't see things clearly, I'm sending you home*". We acknowledge that this comment perhaps caused the claimant the most upset in the whole process. However, it is clear to us and we found as a fact that JB did not perceive the claimant to have a disability at this time (paragraph 12.34). Therefore, this cannot amount to perceived disability discrimination. This meeting did not go well but we cannot conclude that what was said or done by JB in the meeting viewed objectively can amount to detrimental treatment.

(g) the respondent's alleged failure to consult occupational health automatically in relation to the claimant's absence from work due to "anxiety with depression", contrary to the respondent's Absence and Attendance policy. We have already made findings of fact and conclusions about the referral to OH (paragraphs 12.41 and 21.1.4 (c)). We saw no issues with the way this was handled and there is nothing to suggest that the reason why the claimant was not referred to OH before 18 January 2018 was because anyone at the respondent perceived the claimant to have a disability. This was a relatively prompt referral (we note that the time in question includes the Christmas holiday period) and was not a detriment to the claimant. This cannot amount to direct perceived disability discrimination.

(h) the respondent's handling of the appeal raised by the claimant in respect of his first grievance, specifically:

(i) the letter from SL of the respondent to the claimant dated 29 January 2018, in which SL invited the claimant to a grievance appeal meeting and said "*I know you raised in your letter that you are anxious that Lesley Proctor is a peer of Sarah Whitehouse, however we would like to follow our policy and we have every confidence that this meeting will*

be handled in a professional, fair manner". We have already found as a fact that SL did not perceive the claimant to be disabled at the time (paragraph 12.44). She was drafting a letter for a colleague and didn't know the claimant or his circumstances in detail. We conclude that the reference to "*anxiety*" here really relates to the specific complaint made by the claimant about the impartiality of Ms Proctor not the claimant's anxiety more generally. It was perhaps an unfortunate term but there was nothing in any way to suggest that SL perceived the claimant to be a disabled person nor that this statement was added because of any such perception nor that it was detrimental treatment.

(ii) SL contacting the claimant the day before the grievance hearing of 7 February 2018 explaining that the hearing would need to be cancelled as the respondent was struggling to find people to attend the meeting. We refer again to our findings of fact that SL did not have a perception that the claimant was a disabled person at that time (paragraph 12.45). The contact made on this day was clearly because she was trying to accede to his request to find an alternative manager. This was not subjecting the claimant to any detriment but trying to deal with his concerns.

(iii) the manner in which KF and PG of the respondent conducted the appeal hearing, in particular by:

(1) refusing to answer the claimant's questions regarding (a) the respondent's Absence and Attendance policy, (b) the claimant's appeal questionnaire, and (c) the contractual effect of the respondent's HR policies and procedures. We firstly refer to our finding of fact that neither KF nor PG had a perception that the claimant was a disabled person at this time (paragraph 12.46). Any reluctance to answer questions wasn't to do with perceived disability, it was because KF was taken unawares and unprepared for the questions. It was reasonable for her to be reluctant to respond having been taken aback at receiving something so detailed to respond to with no notice. Any reaction was not a response to any perceived disability and not subjecting the claimant to a detriment.

(2) being resistant to allowing the claimant to see questions put to the Occupational Health Expert regarding him. This was a mistake made by PG in that

she initially said that the claimant could not see the questions asked. It was an honest mistake and was not done because of any perception of disability (paragraph 12.50). We do not see how it can therefore be said that PG had a perception that the claimant had a disability at the relevant time and accordingly this part of the complaint must fail.

(i) The content of JT's email on 27 March 2018 regarding an email sent by the claimant earlier that day, in particular, JT's comment "*whilst it is unusual for an employee to air their grievances in this manner, we do not wish to restrict freedom of speech*". We did not find any evidence and therefore could not find that at the relevant time, JT had a perception that the claimant had a disability (paragraph 12.55). The prime motivation in sending an e mail in response (which the claimant admits that it was appropriate for the respondent to do in some way) was that he was concerned about the other people mentioned in the e mail. It seemed to us a measured response in the circumstances and we do not find it was related to perceived disability or indeed detrimental treatment at all.

22.1.2. We did not need to apply the statutory burden of proof or to consider whether the respondents have discharged the burden of showing that the treatment was in no sense whatsoever on the grounds of perceived disability, given our conclusions above. Considering all of this, the claim for direct discrimination on the grounds of a perceived disability is dismissed.

22.2. **Harassment related to perceived disability**

22.2.1. The first question to consider here is was the claimant subjected to unwanted conduct related to a perception that he was a disabled person (specifically, by reason of a mental impairment of anxiety, stress and depression), in any of the respects alleged at paragraphs 3.1.1(a)(iii), (b), (c), (d), (e), (f) and (g) above. In light of all our findings and conclusions already on the direct perceived disability discrimination complaint, that none of the employees complained about had a perception that the claimant was a disabled person at the relevant time, then any such treatment as the claimant complains about cannot be related to such a perception. Accordingly, again the complaint must fail. None of the conduct in question would meet the test that the conduct was intended to violate the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him as we have made very clear findings as to the motivation of the various employees when carrying out this conduct. We absolutely accept that in many cases the conduct caused the

claimant distress (and sometimes significant distress) when he was feeling very unwell and going through a difficult time in his life. We do not need to go on to determine whether even if the conduct had the effect required, it was reasonable to have had that effect. We do comment that it is hard to see how this test would have been made looking at this, as we would be required by the law to do, from an objective stand point. Therefore, the claim for harassment related to perceived disability is also not well founded and is dismissed

23. **DISCRIMINATION / HARASSMENT – SEXUAL ORIENTATION**

23.1. **Direct sexual orientation discrimination**

23.1.1. The first issue is whether VB, because of the claimant's sexual orientation, treated him less favourably than she treated or would have treated others, in any of the following alleged respects:

~~(a) comments made by Victoria Black in a text message exchange with the claimant on 12 October 2017, in particular the comment "hope you have lived to tell the tale of something you weren't looking forward to being put down your throat this afternoon";~~

~~(b) comments allegedly made by Jennifer Brown during a telephone conversation with the claimant on 7 December 2017 about how the claimant would support his same sex partner if he was not working; and~~

(c) VB sending a picture to the claimant via Facebook on 3 December 2017 of two naked men putting a Christmas tree up and included the caption "*you and Dave putting the tree up*".

23.1.2. We have already made a finding of fact that VB did not send this message in the course of her employment of the respondent. We have considered section 109 (1) EQA and the relevant factors set out in Jones v Tower Boot Co Ltd [1997] IRLR 168 and Forbes v LHR Airport Limited [2019] UKEAT/0174/18/DA. Whether or not an act is in the course of employment within the meaning of that section is a question of fact for the Tribunal to determine having regard to all the circumstances. This might include whether the act was done at work or outside of work. This was a private Facebook message. We acknowledge that VB was the claimant's line manager, but this was not sent in this capacity. Therefore, whatever the rights and wrongs of sending the message, it is not something that we can find the respondent liable for in these proceedings and we must dismiss the complaint against it.

23.1.3. However, for completeness, we also refer to our findings of fact in relation to this message and the claimant's response to this message

(paragraph 12.13) and make the comment that in any event that this may not have been found to have been less favourable or detrimental treatment in light of the context in which it was sent, in a personal capacity, VB having attended the previous night the engagement party of the claimant and his same sex partner. The complaint of direct sexual orientation discrimination fails and is dismissed.

23.2. **Harassment related to sexual orientation**

23.2.1. Was the claimant subjected to unwanted conduct related to sexual orientation, in any of the respects alleged at paragraphs 4.1.1~~(a), (b)~~ and (c) above?

23.2.2. Again, we conclude that VB sent this email in the course of her employment of the respondent for the reasons set out above. Therefore, we must dismiss the complaint as it is made against the respondent.

23.2.3. Although it is not necessary for us to do so, we have looked at whether the claimant was subject to unwanted conduct related to sexual orientation which had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, having regard to: (a) the perception of the claimant; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect. This was an unprompted message and was not in response to any earlier communication, although there was a background to VB and the claimant sending informal text messages to each other. On balance we confirm it was unwanted and that it did it relate to the protected characteristic of sexuality. As to whether it had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, it did not have this purpose. It was meant as a joke, and the claimant acknowledged this and said that he did not believe that VB was homophobic. As to whether it had the effect on the claimant as said, although he did say at the hearing that he thought it was offensive, we were not persuaded by this and feel the offence was not felt at the time. No complaint was made, there was no comment or reply. The thumbs up was at best a neutral response. We note that in his first grievance letter he made no comment specifically raising this as a complaint. We accept he did not find it funny and it frustrated him. However, this is unlikely to have met the threshold that it had the effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment in any event. We do think it was ill advised, inappropriate and in hindsight should not have been sent. This does not impact the

conclusion though that the complaint of harassment on the grounds of sexual orientation fails on these grounds and is dismissed.

24. **DISCRIMINATION / HARASSMENT – AGE**

24.1. **Direct age discrimination**

24.1.1. For the purpose of this claim, the claimant identifies: (a) his own age group as 'under 40s'; and (b) the age group for comparison as 'over 40s'.

24.1.2. The issue to consider is whether VB, because of the claimant's age, treat him less favourably than she treated or would have treated others, in any of the following alleged respects:

(a) ~~comments allegedly made by Victoria Black to the claimant in July 2017 that he was a "clever boy" in relation to a written proposal prepared by him~~; and

(b) a comment allegedly made by VB to the claimant on 4 December 2017 that the claimant needed to "grow up" in respect of the difficulties he was experiencing with MA. We have found as a fact that the comment was made (paragraph 12.15) and we also conclude that this happened in the course of employment. However, when we go on to consider whether this was less favourable treatment and whether this because of the claimant's protected characteristic of age, we find that this was not the case on either count. This was a general statement made by VB of a behaviour trait which could be demonstrated by someone of any age. She found that she would have said that to anyone who she felt was behaving that way whatever the age. The claimant acknowledged that there was no basis for saying she would not have said the same to someone in a different age group (paragraph 12.15). Therefore, this complaint of direct discrimination fails and is dismissed.

24.2. **Harassment related to age**

24.2.1. The first question we must ask ourselves is whether the claimant was subjected to unwanted conduct related to age:

(a) in any of the respects alleged at paragraphs 27.1.1.2~~(a)~~ and (b) above; and

(b) as regards a question allegedly asked by Jennifer Brown during a telephone conversation with the claimant on 7 December 2017, querying how he would support his partner if he was not working (thereby implying that the claimant had a responsibility to support

his partner, because he was the older of the two and must therefore be earning more). In both respects we conclude that neither of the matters are related to age at all. The comment made by VB was related to behaviour and not age. We found that JB made a comment about how the claimant would support his partner if he was on long term sick during the conversation on 7 December 2017 (paragraph 12.29) but that no comment regarding breadwinner was made. We fail to see how this comment could in any way be seen to be age related.

24.2.2. Therefore we do not need to go on to consider whether any such conduct have the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, having regard to: (a) the perception of the claimant; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect. We would note that there is no evidence of any intention to violate the claimant's dignity, or create an intimidating, hostile, degrading, humiliating or offensive environment and indeed no evidence that it even had this effect. The complaint of harassment is therefore dismissed.

25. **VICTIMISATION**

25.1. The first issue to determine on the victimisation complaint is whether the claimant's grievance of 18 December 2017 was a protected act. We conclude that it was – it makes clear allegations of discrimination and or that the respondent had a discriminative culture. The respondent suggests that the claimant did not genuinely believe this to be the case, but we can find no evidence of this. Therefore, this element of the complaint is satisfied.

25.2. We then needed to go on to decide whether by giving him an unjustifiably low performance rating (on the claimant's case) in February 2018, did VB subject the claimant to a detriment because he had done a protected act. In the first instance, we do not conclude that the rating given to the claimant was unjustifiably low i.e. a detriment. It was not a bad rating. It is acknowledged that it was lower than ratings achieved by the claimant in the past. However, our findings of fact at paragraph 12.43 above lead us to conclude that it was not in fact unjustifiably low in the circumstances where the claimant had changed from a technical role to a management role (supervisory). Even if we had found a detriment, we were satisfied that the awarding of the rating by VB had nothing whatsoever to do with the fact that the claimant had raised a grievance. We accepted VB's evidence on this. There is no evidence that the claimant having raised a grievance played any part at all in the decision and all the evidence we have seen suggests that the rating was arrived at following the same process and principles as other employees. This

was subject to scrutiny by two separate managers and having examined their findings, we conclude that they were correct.

25.3. We then looked at whether the claimant's Facebook message/post of 27 March 2018 was a protected act and on balance we find that it was. We do not accept that the claimant did not genuinely and sincerely believe that he had been subject to discrimination at that time.

25.4. We then considered whether by referring to this Facebook message/post (but not to the claimant by name) in an email sent to employees of the respondent (it is the claimant's position that he was excluded from the email), whether JT subjected the claimant to a detriment because he had done a protected act. We conclude that the email or any of its contents was not a detrimental act at all. It was sent in response to the Facebook message/post but was a reasonable and measured response and didn't subject the claimant to any detriment. His name was not mentioned, and the response did not make any express criticism or comment on the claimant.

25.5. We also considered whether the claimant's email to JT on 3 April 2018 in which he informed JT that he "will be bringing legal action against the business" was a protected act and have concluded that it was given the context of the previous correspondence.

25.6. We then looked at whether JT's responses on 5 April 2018 and 27 April 2018 amounted to a detriment because of a protected act and have concluded that it was not. JT's failure to answer the question was not because the claimant had done a protected act. It was because he did not know the answer to the question and therefore referred this to the legal team. This was nothing to do with the fact that the claimant had done a protected act.

25.7. There is no causal link between the protected acts and the subsequent treatment. Therefore, we do not find that the claim of victimisation contrary to section 27 EQA is made out and it is dismissed.

Signed by: Employment Judge Flood

Signed on: Date: 9 October 2019