



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Michael Blakeborough

**Respondent:** John Lewis plc

**Heard at:** Bristol **On:** 9, 10, 11, 12, 13 September 2019

**Before:** Employment Judge Street, Mr E Bees, Mr H Adams

## Appearances

**For the Claimant:** Mr D Robson (lay representative)

**For the Respondent:** Mr Curtis (counsel)

**JUDGMENT** having been sent to the parties on 30 September 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

## 1. Judgment

- 1.1. The Judgment of the Tribunal was that Mr Blakeborough succeeded in claims of direct discrimination in respect of the events of 9 February 2018 and 20 June 2018 and in his claim of unfair constructive dismissal.
- 1.2. The claimant's remaining claims of direct discrimination, of harassment and victimisation and failure to make reasonable adjustments were dismissed.

## 2. Evidence

- 2.1. The Tribunal heard from Mr Blakeborough, from Ms Griffiths-Lumb, and for the Respondent, from Mr Thomas Philip, Team Manager, from Ms Alice Clements, Branch Manager, from Mr Simon Brumby, Head of Branch in Portishead, and grievance manager and from Ms Gray, Appeals Manager.
- 2.2. The Tribunal read the documents in the bundle referred to.

### 3. Issues

- 3.1. The claimant brought claims of unfair constructive dismissal, of direct disability discrimination and a failure to make reasonable adjustments, harassment and victimisation.
- 3.2. The issues before the Tribunal to decide were agreed as follows, not including those limited to remedy.

#### *Jurisdiction*

1. Are the acts complained of by the Claimant part of a continuing act within the meaning of section 123 (3)(a) Equality Act 2010 ("EA 2010")?
2. If so, what was the date of that last series of acts?
3. Has the Claimant brought his complaints under the EA 2010 within the three-month time limit (s123 (1)(a) EA 2010)?
4. If not, would it be just and equitable for the Tribunal to extend time (s123 (1)(b) EA 2010)?
5. The Respondent contends that any alleged acts of discrimination relied upon by the Claimant that took place more than three months prior to 11 June 2018 are out of time.

#### *Disability Discrimination*

6. The Respondent accepts that the Claimant was disabled by reason of his anxiety and depression within the meaning of section 6 (1) EA 2010 at the time of the alleged discriminatory treatment.
7. Did the Respondent know, or could it reasonably have been expected to know, at the time of the alleged discriminatory treatment that the Claimant was disabled by reason of his anxiety and depression?
8. The Respondent contends that it did not know, and could not reasonably have been expected to know, that C was disabled at the material time.

#### *Direct discrimination – (s. 13 EA 2010)*

9. The Claimant relies on the following treatment:
  - a. Acts by Tom Phillip on 30 November 2017;
    - (i) Summoning the Claimant aggressively by tannoy;
    - (ii) Belittling the Claimant in front of colleagues and customers;
    - (iii) Being unnecessarily angry with the Claimant;
    - (iv) Aggressively holding items in front of the Claimant's face in a way that someone might rebuke a child;
    - (v) Speaking over the Claimant, preventing him from defending himself;
    - (vi) Failing to heed the Claimant's requests for him to stop;
    - (vii) Following the Claimant telling him that he was not okay, gesticulating to the products and telling that the Claimant that they, not him, was his problem;
    - (viii) In the Partner Dining Room, preventing others from assisting the Claimant;

(ix) Imposed himself upon the Claimant such that he had to pretend that he was okay and was then able to leave his presence.

b. The decision of Simon Brumby to reject the Claimant's grievance on or around 9 February 2018;

c. The decision of Ruth Gray to reject the Claimant's appeal against the decision of Simon Brumby on or around 8 June 2018;

d. The decision by Alice Clements to hold a meeting with the Claimant on 8 August 2018, which the Claimant contends was "an attempt to scare him away from pursuing legal action, using his generalised anxiety disorder as a tool to harm him." (*The date has since been corrected to 20/08/18*)

10. Did these acts or omissions amount to less favourable treatment (by reference to a hypothetical non-disabled comparator) whose circumstances are not materially different to the Claimant's?

11. Has the Claimant proved primary facts from which the Tribunal could conclude that the Respondent has directly discriminated against the Claimant because of his disability?

12. If so, has the Respondent proved that the treatment was for a non-discriminatory reason?

*Failure to make reasonable adjustments - (s. 21 EA 2010)*

13. The Claimant relies on the following provisions, criteria or practices ("PCPs"):

a. To work a shift pattern which caused him to be in contact with the protagonist who caused/exacerbated his disability;

b. Failing to allow flexibility in the shift pattern to avoid the Claimant meeting Mr Philip at work.

14. Did the Respondent apply these PCPs to the Claimant?

15. If yes, did these PCPs place the Claimant at a substantial disadvantage when compared with people who did not have the Claimant's disability?

16. Did the Respondent know, or could it reasonably have been expected to know, that these PCPs placed or were likely to place the Claimant at the substantial disadvantage in question?

17. Would it have been reasonable for the Respondent to take steps in order to avoid the substantial disadvantage in question? The Claimant contends the following adjustments should have been made and maintained (and were not):

a. That the Claimant be allowed to work on Sundays only, it being a day upon which Tom Phillip had said he did not wish to work.

*Harassment - (s. 26 EA 2010)*

18. Did the Respondent engage in unwanted conduct? The Claimant relies on the following alleged unwanted conduct:

- a. Alleged unwanted conduct by Tom Phillip on 30 November 2017 (see paragraph 9 (a) above);
- b. Alleged unwanted conduct by Alice Clements on 8 (that is, 20) August 2018. The Claimant asserts that he was required to attend a meeting with Ms Clements and with a notetaker as a result of his attempt to secure witness evidence in support of his case. The Claimant was accused of having upset and/or frightened colleagues.

19. If the Respondent engaged in the above unwanted conduct, was the conduct related to the Claimant's disability?
20. If yes, did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
21. If not, did the conduct have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
22. Having regard to all the circumstances, should the Respondent's conduct be reasonably considered as having that effect?

*Victimisation – (s. 27 EA 2010)*

23. Did the Claimant do a protected act? The Claimant asserts that he committed 2 protected acts;
  - (a) Bringing proceedings under the Act;
  - (b) Issuing a grievance which contained allegations in respect of the Act.
24. Did the Respondent subject the Claimant to a detriment because he had done a protected act? The Claimant relies on the following treatment:
  - a. The decision by Alice Clements to hold a meeting with the Claimant on 8 (20) August 2018, which the Claimant contends was "an attempt to scare him away from pursuing legal action, using his generalised anxiety disorder as a tool to harm him."

*Constructive Unfair Dismissal – (s. 95 Employment Rights Act 1996)*

25. The Claimant contends that the follow acts were breaches of the implied term of mutual trust and confidence:
  - a. The matters set in paragraphs 9, 13-17 and 18 (b) above;
  - b. Respondent failed to deal with bullying by Tom Phillip of the Claimant (by taking appropriate disciplinary action);
  - c. The Respondent failed to assure the Claimant that Tom Phillip would not return to the Claimant's workplace;
  - d. Rejected the Claimant's offer to reduce his working hours to avoid working at the same time as Tom Phillip;
  - e. On 5 October 2018, rejecting the Claimant's further request to avoid the overlap between him and Mr Phillip at work.

26. What was the reason for the Claimant's resignation? Was it because of the matters set out at paragraph 25 above?

27. Did the matters at paragraph 25 constitute separately and/or cumulatively a fundamental breach of the express terms of the Claimant's contract of employment?

28. In the alternative, did the matters at paragraph 25 constitute separately and/or cumulatively a fundamental breach of the implied term of trust and confidence?

a. Was the conduct complained of calculated or likely to destroy or seriously damage the employer/employee relationship of trust and confidence?

b. Did the Respondent have reasonable and proper cause for that conduct?

29. Has the Claimant delayed and therein affirmed his contract of employment?

#### **4. Findings of Fact**

4.1. Mr Blakeborough commenced employment with John Lewis plc on 4/05/11.

##### *Disability and Knowledge of disability*

4.2. Mr Blakeborough has suffered a General Anxiety Disorder, leading to anxiety and depression, from the age of 18. He has had counselling. He has learned over the years to manage his symptoms. He is open about his condition. He moved from the Bath branch to Melksham because it was smaller, quieter and less pressured and so an easier environment for him to manage. He was happy there, on the whole, finding the staff supportive and a happy environment check his final letter.

4.3. All managers at Melksham were aware that Mr Blakeborough had mental health difficulties, pointing to a need to treat him in a calm and considered way without anger or aggression – as in fact all partners were entitled to be treated. (Nicola Griffiths-Lumb ws para 14, unchallenged)

4.4. On 18/08/16, a referral by manager to Partnership health service for anxiety and depression (87). At that time, he was encouraged to take care of his health overall and to avoid too much overtime, to maintain a life/work balance (91). A report was made to the employer.

4.5. There was an incident between Mr Blakeborough involving Mr Philip in either August 2016 or April 2017 (their accounts differ), when Mr Philip challenged Mr Blakeborough over a mistake in making a sale before formal Sunday opening hours, and Mr Blakeborough experienced an anxiety reaction. It is agreed that Mr Blakeborough spoke to Mr Philip directly about his health and the way it impacted his life and the Branch Manager at the time, Alex Usher-Bolton asked Mr Philip to bear in mind that Mr Blakeborough suffered from anxiety (Tom Philip ws para 7).

*30/11/17*

4.6. In November 2017, Mr Philip was working at the Melksham branch of Waitrose, where Mr Blakeborough also worked as an assistant.

4.7. On 30/11/17, Nicola Griffiths-Lumb, formerly the Partner Coordination Manager, conducted a performance discussion with Mr Blakeborough. There had been a discussion about grades at a managers' grading calibration meeting. Mr

Blakeborough had not been told the outcome, which was a drop from very good to good. He was frustrated at the downgrading and unsettled that this arose without warning about the deficiencies that led to it. With consent from Ms Griffiths-Lumb, he took an early break that evening. On his return he was dealing with product reductions for sale prior to closing.

- 4.8. Mr Philip was the manager on duty. He was unhappy over the content of the reduction trolley. Mr Blakeborough was in charge of reductions but had left the job with Vicky while he took his break. On his return, he collected a couple of meat packets that needed to be reduced and moved to the reduction bins. Mr Blakeborough says that he was aware of Mr Philip being concerned about the reduction bins – “I saw Tom Philip searching through the dump bins of reductions talking angrily to himself”.
- 4.9. There was a brief exchange of words, which Mr Blakeborough found made him anxious and nervous. He felt he was following guidance to make fewer reductions, to prevent automatic reordering and explained that – “Leanne’s plan”. He moved away until called back by Mr Philip over the tannoy.
- 4.10. Mr Philip’s account is this,

“I was walking past the reduction bays on the shop floor which contain the products which are going out of date that day, and I noticed that the reduction bays were very full, more so than I would have expected at this time of the evening.... ..I noticed some cakes which were going out of date that day that hadn’t been reduced appropriately... I was concerned that, as there was not long left until 8pm when the branch was due to close, if the products were not reduced properly, customers might not buy them and then we would have to waste them and the branch would lose money.

I asked Mike where he was up to with his reductions and I asked him whether he needed any help. Mike then immediately starting shouting at me. Mike said that he didn’t like the way I was speaking to him and he threatened to hand in his notice. He asked me whether I wanted to give him a disciplinary and I said that this was not my intention, nor was this necessary. I explained that I simply wanted to ensure that as many products as possible could sold to avoid wastage. i can’t remember exactly how we left the conversation , but I seem to recall Mike storming away from me. (Tom Philip, ws para 11,12).

- 4.11. Mr Blakeborough made a note as to what happened at the time and set it out in a grievance statement that he produced at the meeting on 14/12/17. It echoes the content of his contemporary email to Ms Griffiths-Lumb.

“(He) called a Tannoy for me to come to Checkouts so I walked back round and before I could respond to anything he was talking at me getting loud and showing me items he was blaming me for not reducing and started telling me how I had plenty of time to do my job properly so why was this and this and this and that. He was doing this really fast. He held various things in front of me accusingly. I felt I was going to have a panic attack if he did not stop the aggression so I said to him three times while he was speaking over me and he was getting louder and louder, “Tom, I’m not in a good place right now” Tom, I am not in a good place” “Tom, I am in a really bad place in my mind” as he carried on humiliating me in front of Partners and Customers by the tills. ....

He stopped for a moment and then finally acknowledged what I had said to him and responded very loud and with lots of gesticulation with the words - “With,

all due respect Mike that's not my problem .... THIS is my problem," (pointing to the reduction bins) (124)

4.12. Of that, Mr Philip agrees that he pointed to various items, and that Mr Blakeborough said, once, "Tom, I'm not in a good place right now." Mr Philip's account remains that Mr Blakeborough exploded "immediately" and without reason.

4.13. It is agreed that Mr Blakeborough went on to experience a serious panic attack, outside the Partners Dining Room where he was found by Victoria Clayton and then Alison Poole and moved into the dining room to sit down, feeling faint. Ali Poole left him with Melanie Metcalf, a first aider. Mr Philip then joined them and told Melanie to leave, and remained with Mr Blakeborough himself. Mr Blakeborough found that intimidating, and reports that he was particularly affected by the comment dismissive of his mental health.

#### *Grievance investigation*

4.14. On 4/12/17, Mr Blakeborough raised a grievance raised about the events of 30/11/17 (107, 122)

4.15. The grievance set out Mr Blakeborough's account of the shop floor incident and the way that Mr Philip excluded Melanie when she was helping him, leaving Mr Blakeborough without her support or on his own to recover, when in Mr Blakeborough's account, the incident had been triggered by Mr Philip's behaviour and attitude,

"Melanie Metcalfe.... was helping me get through it. Ali left because she saw I was in good hands with Mel. Tom came into the room and rudely and aggressively asked Mel to leave. He sat on the table next to me and asked me to look up at him in a harsh tone. I could not as my anxiety attack was getting worse again. I had to put my head down on the floor because I felt really faint. He said that was not going to help because I was bright red in the face and he thinks that's not the problem. It took everything I had to try and get out of the situation I only remember bits and pieces of conversation with him but I do remember saying to him this is what anxiety looks like and that it was his comment that started it."

4.16. Mr Brumby was asked to handle the grievance. He was also conducting another grievance investigation into a matter concerning Mr Philip.

4.17. The grievance meeting took place on 14/12/17 (136 – 138). Mr Blakeborough was accompanied by Ms Griffiths-Lumb.

4.18. Mr Brumby opened, after introductions and explanations, going through the grievance statement with Mr Blakeborough. Mr Blakeborough explained his anxiety condition and his use of Cognitive Behavioural Therapy. He explained that he was usually able to control his anxiety; panic attacks were rare. He described Mr Philip as being angry and gesticulating, incredibly red in the face, showing unexpected anger. He was accusing Mr Blakeborough of not using his time properly; there were too many unsold goods. Mr Blakeborough was sure he had explained that he was following Leeanne's plan, that is, not to reduce goods too much given that if sold, they would be automatically reordered. He said it began to feel like a personal attack, which is when he said "Tom, I'm not in a good place". In his recollection, it was Tom Philip who walked off.

- 4.19. He added that the only previous panic attack in Waitrose involved Mr Philip, and this had been worse. It was hard to manage the anxiety while having a conversation with the person who had caused it.
- 4.20. Possible witnesses were discussed and there was a reference to the fact that there would be CCTV cameras in the area which would still have the images from that day (157).
- 4.21. After the interview, Mr Blakeborough emailed Mr Brumby details about the end of year performance review he had had with Nicola Griffiths-Lumb prior to the incident with Mr Philip on 30/11/17. He had not been told of the change from very good to good or of the reasons for it. Ms Griffiths-Lumb had explained to him that he would be going back up to very good because he had become a key holder. Mr Blakeborough explained that because Mr Brumby had asked him what was on his mind before the incident with Tom Philip and he did not feel he had given a full explanation. Mrs Griffiths-Lumb had just told him that she had told Mr Philip on 30/11/17 that he was a bit upset about that.
- 4.22. On 22/12/17, Mr Blakeborough was referred to the Partnership Health Service and on 3/01/18, he went on sick leave.
- 4.23. Mr Blakeborough had identified witnesses to the incident on the shop floor, Melanie Metcalfe and Karen Gregory cashing up the cigarette and Alison Poole on one of the main checkouts, with a queue of 3 – 4 customers. Staff were stacking shelves. Some partners were doing their own shopping.
- 4.24. Mr Brumby spoke to the three named staff members and also to Victoria Clayton. Although they were present nearby, he did not ask Melanie Metcalfe or Alison Poole what had happened on the shop floor. His questions were about Mr Blakeborough and his health.
- 4.25. Mr Brumby interviewed Melanie Metcalfe by telephone on 10/01/18 (203) She wasn't asked what had happened on the shop floor. His question was,

“Do you recall seeing Mike Blakeborough in some distress on 20/11/18 in the Partners Dining Room?”

- 4.26. In reply, she recounted that there was a conversation between Tom and Mike downstairs. Alison Poole told her that Mike was having a panic attack, in distress. Alison Poole asked her for help and support with Mike. Melanie Metcalfe is first aid trained. She felt she needed to tell a manager first “as it sounded quite bad”. She informed Tom as the only manager available that Mike was having a panic attack and asked him what he would like her to do. She says,

“He said ‘just ignore him. I said I would like to do something and he said ‘Do nothing, just ignore him’” (202)

- 4.27. She knew Mr Blakeborough suffered from anxiety, so she went up to support him.

“Mike was trying to monitor his breathing and myself and Ali calmed him down. When Tom Philip came, he mouthed to me ‘Get out’; and used a thumb sign to signal to me to leave. He then spoke to me in the corridor outside the Partners Dining Room saying that Mike needs to be ignored in situations like this, not to be given any attention. He then told her to finish her break in the Branch Manager's office. Mr Blakeborough was left on his own with Tom Philip.”



- 4.28. She said that Mike told her when he came down half an hour later that Tom had said that his mental health issues were not his problem. She had felt let down by Tom.
- 4.29. Alison Poole was interviewed on 11/01/18 (206). She was asked if she had witnessed Mr Blakeborough being upset in the branch on 30/11/17. She reported that she had: it was “very memorable, quite severe” (207).
- 4.30. She had gone upstairs to the Partners Dining Room and came across Mike, “on the floor in a foetal position, hands on his head, very distressed, using the wall as support. ...he couldn’t speak to me, had trouble breathing, he was very pale, trying to control his breathing with an app on his phone. I was extremely concerned.”
- 4.31. Once Melanie Metcalf had alerted Tom Philip, and returned with him, Alison Poole felt able to leave and go home.
- 4.32. There was no question as to whether she was aware of or had seen what had happened on the shop floor before this.
- 4.33. Mr Brumby interviewed Victoria Clayton “Can you recall seeing Mr Blakeborough upset in the branch on 30/11/17? She answered about the panic attack and having seen him outside the Partners’ Dining Room and had reported that to another partner. Victoria Clayton had been working with Mr Blakeborough before the incident with Mr Philip, as set out in the Grievance Statement, but was not asked about his mood or manner at that stage.
- 4.34. Karen Gregory was interviewed by telephone on 18/01/18 (218). She was working on checkout at the time of the conversation between Mr Blakeborough and Mr Philip. Mr Brumby asked her – for the first time in his investigation – about the conversation between Mr Philip and Mr Blakeborough on 30/11/17. She heard Mr Philip say something like “This isn’t acceptable”. She commented that the conversation had been within earshot of others and that Mike looked embarrassed. There are no follow up questions noted. Those responses invite further questioning.
- 4.35. Mr Philip was interviewed on 26/01/18. Mr Philip gave the earlier history of the Sunday trading incident, expressing surprise at the mistake and also at what he described as an explosive reaction to being found at fault (222). He confirmed that he was aware of Mr Blakeborough’s anxiety.
- 4.36. Mr Philip’s account in respect of 30/11/17 is that he had asked Mr Blakeborough a few questions about reductions, nothing more than , “Where are we with the current list, Bays are still full, do you need some help?” and “He exploded in front of me – really unreasonable reaction.” He described it as a normal shop floor conversation and the reaction “hugely concerning” (225 and 226). Mr Blakeborough later apologised for his reaction.
- 4.37. Mr Brumby put to Mr Philip some of the matters that emerged from the other witness statements. Mr Philip denied that he was annoyed. He did not recall Mike Blakeborough saying “I’m not ok”. If he had said that, he would have got Melanie back. He denied saying that Mike’s ‘mental health was not his problem’ He denied that he had himself used a thumb gesture to signal to Melanie to leave Mr Blakeborough alone or that he told her to ignore him. He acknowledged saying that Mike needed to be left alone to calm down – “as she was cuddling him potentially (she) could be making things worse.”
- 4.38. Mr Brumby faced a stark conflict between the evidence of Mr Blakeborough and the evidence of Mr Philip.

- 4.39. The incident on the shop floor took place near the till and the cigarette kiosk. There was CCTV footage available. Mr Brumby did not view the CCTV footage. It was automatically wiped after three months.

*Grievance outcome*

- 4.40. On 9/02/18, Mr Brumby rejected the grievance (238 – 242). He found no evidence to support Mr Blakeborough's account. He found no evidence of bullying or harassment by Mr Philip. Instead he recommended a tailored adjustment plan.

"I recommend that we agree a more tailored approach to give you feedback that minimises the risk of you having panic attacks and anxiety at work and supports your manager in having conversations with you when an issue needs to be addressed." (242)

*Appeal*

- 4.41. Mr Blakeborough lodged an immediate appeal (261).

- 4.42. The grounds were

- Discrimination under the Equality Act 2010
- His mental health being disregarded, despite previous knowledge of mental health and what he said during the incident
- No real back and forth to questioning during the investigation
- Missing/lost evidence such as CCTV of the event
- Delay during the investigations,
- Failure to take into account evidence of bullying conduct towards others.

- 4.43. Mrs Gray was appointed to handle the appeal. On 15/02/18, she invited Mr Blakeborough to attend the appeal hearing in London. He was still off sick.

- 4.44. The appeal hearing took place on 8/03/18 (270). He attended with Leanne Leonard-Sampson as his companion.

- 4.45. Ms Gray obtained a fuller description of Mr Philip's conduct on the shop floor on 30/11/17 (the company style is to put the interviewee's comments in statements as "You"),

"How Tom spoke to you made you feel you were in trouble. He was physically aggressive, picking up objects, showing them to you, arms in the air above his head, you believe that the CCTV footage would capture this, and Melanie (Metcalf) and Karen (Gregory) would have seen it.

- 4.46. Mr Blakeborough put the history in the context of the earlier incident with Mr Philip and that he was confident Mr Philip knew of his anxiety condition.

- 4.47. On 13/03/18, Mrs Gray interviewed Mr Brumby. He had found no corroboration for Mr Blakeborough's account of Mr Philip's behaviour on the shop floor. He had found Mr Philip's account to be more credible. He didn't believe that Mr Philip had told Melanie Metcalf to ignore Mr Blakeborough. He knew about the discussion about Mike's grading earlier that afternoon and concluded that Tom had spoken to him at the wrong time:

"Mike was trying to manage his thoughts and had a panic attack and Tom happened to be there at the wrong time." (274)

- 4.48. His recorded reason for not viewing the CCTV footage was that there were no cameras that captured that area - he had asked the Branch Manager (275).
- 4.49. Ms Gray didn't ask Mr Brumby why he had not explored more fully with the witnesses what had happened on the shop floor.

*Ms Gray's investigation: Melanie Metcalf*

- 4.50. On 1/05/18, Ms Gray interviewed Melanie Metcalf (280). She made summary notes of the responses.
- 4.51. Ms Metcalf initially said that she didn't see anything on the shop floor save that Mike was dealing with reductions,

"It didn't go 100% and he was feeling the pressure when Tom noticed that there still a lot of reduced items to sell."

but later when asked more specifically, she explained,

"When you were on the shop floor the reduction trolley was near your till. From what you can recall, the conversation was a tense conversation that maybe should not have happened on the shop floor. Body language, could see that Mike was getting stressed out and Tom was looking quite angry. His body language, he tends to go red in the face if he gets frustrated with a situation. (280, point 13).

"Never seen him that angry as you did that night – heard other Ps (partners) say that but not seen it before" (281, point 15)"

- 4.52. That comment was specifically in the context of the discussion taking place on the shop floor.
- 4.53. Her account of later events is this,

"Was in the lower warehouse when Ali Poole approached you and said Mike was having a panic attack. Tom was the only manager in that evening...Ali said she understood Tom was part of the problem, however you thought that he should know as he was the most senior partner. ...Tom said Mike must be left alone, he is attention seeking. You did not feel comfortable with that response. (You were) On your break so went to PDR (Partners Dining Room), sat with Mike and Ali. Mike was trying to count his breathing and you asked him to turn phone over and help to calm down. ... You had an arm round his shoulder. Talking about Cornwall to help him calm down. Tom opened the door glared at you and gestured to you with his thumb and mouthed to get out. When you went out, Tom said quite aggressively "Why are you there, I told you to ignore him".

- 4.54. Asked, "What were Tom's exact words, tone of voice, body language?"

“His words were needed to ignore Mike, he said it quite quietly, it was in a ‘roll of the eye manner’, he is just attention seeking. He seemed quite cross when you saw him next in the PDR. The conversation in the corridor was quite heated as you were trying to justify why you were there. He was adamant that Mike should be left on his own. Tom gave the impression that Mike was attention seeking. Mike seemed genuinely distressed at that time.”

- 4.55. Melanie Metcalf did not find Tom Philips remarks to be appropriate or helpful.

*Ms Gray’s investigation: Alison Poole*

- 4.56. Alison Poole gave a similar account of the distress Mr Blakeborough had been in but hadn’t seen the earlier conversation on the shop floor (285),

“Coming upstairs at the end of your shift about 8.20 pm saw Mike bending over against the wall head in his hands, he was obviously in great distress. Thought he had some really bad news. He had his phone in his hand. Asked Mike what had happened. He was breathless, he was looking at his phone and he referred to his heart rate being too high and his breathing. Was asking him what he needed. He said “one thing is bad enough two is just too much.... Realised he was having a panic attack. Thought someone needs to know about this, did not think he was safe to be left. He clearly very distressed, never seen him like that before.” (285)

- 4.57. She said Mike had told her afterwards, when thanking her, that he had had a difficult day, Tom had asked him for something to be done and got upset about something that had not been done – Mike got very worried.

*Mrs Gray’s investigation: Tom Philip*

- 4.58. Tom Philip was interviewed and again referred to an explosive response to a normal question, such as “Where are we with the current list, do you need any help?” (286/7). It was over the top loud, almost aggressive. He remembered that Mr Blakeborough had said words to the effect “I’m not in a good place, can’t deal with this now, can’t take this all in.” He thought Mr Blakeborough was upset. He said he did not relate his distress to his mental health (287). If he had, he said he would have got some help.

- 4.59. He explained that he thought Melanie wasn’t helping by being there, thinking Mr Blakeborough needed time to think. He denied saying that Mr Blakeborough was attention seeking but had thought that it would be easier for him to calm down on his own. He didn’t recall a heated conversation with Melanie. He had gone back to Mr Blakeborough after Melanie had left, and said he was fine after about 20 minutes. He didn’t describe the acute distress that Melanie and Alison Poole described or that Mr Blakeborough had his head down, fearing to faint.

- 4.60. Others were interviewed about general state of affairs and working relationships in the store. Nicola Griffiths-Lumb hadn’t been interviewed, and had by now left the partnership.

*Return to work*

- 4.61. Mr Blakeborough remained off sick until May. While still waiting for the outcome, he heard from Alice Clements that Mr Philip had been moved to the Chipping Sodbury branch (ws 30)
- 4.62. On 21/05/18, Alice Clements referred Mr Blakeborough to the Partnership Health Service. It was also agreed that he would work 2 days per week instead of 4. The only adjustment recommended by the health professional was a phased return to work, and that was implemented.
- 4.63. The notes produced of the telephone consultation following that referral record,
- “Has mainly been off this long due to grievance process, awaiting outcome for the appeal currently. Manager who Mike took grievance out against has gone to another branch for 6 month secondment.”
- 4.64. That information came from Mr Blakeborough, so at that point, he knew that the absence of Mr Philip in Chipping Sodbury was temporary.
- 4.65. On 27/05/18, Mr Blakeborough returned to work knowing that Tom Philip had been moved for the time being. Alice Clements carried out the return to work meeting. There was no request at the back-to-work meeting to have different working hours from Tom Philip (ws 25), but Mr Blakeborough did express apprehension about working in the same building as him. Ms Clements recommended that Mr Blakeborough have a Tailored Adjustment Plan but Mr Blakeborough still resisted that. (25 AC ws). He was still waiting for the appeal outcome and was returning to work hoping for a positive result.

*The outcome of the appeal*

- 4.66. On 8/06/18, Ms Gray issued her determination. She rejected the appeal in an 8 page letter (290). She acknowledges that Mr Blakeborough was upset on 30/11/17 but had not found evidence that Mr Philip’s behaviour was inappropriate or that he bullied or harassed him (317).
- 4.67. She concluded that Mr Brumby had conducted a full investigation and had justified his preference for Mr Philip’s account of events. She found Mr Philip’s account on her interview to be consistent and sufficiently detailed. He was adamant that he had not demonstrated any anger towards Mr Blakeborough. He hadn’t ignored Mr Blakeborough saying “I’m not ok” nor had he judged that Mr Blakeborough’s medical condition was exacerbated by his conversation with him. He had later learned that Mr Blakeborough was “in some distress” and had intended to leave him some time alone to recover. She found no bullying or in appropriate behaviour.
- 4.68. She had made some wider enquiries of staff not present or involved with the issues on 30/11/17). There had been references to some unhappiness with his management style and another grievance against him. She goes on,

“Through no fault of his own, other than being the longest serving and sometimes sole manager at Melksham who has been required to deliver some difficult messages on behalf of the business and as a manager who manages poor performance, Tom has acquired an unfair reputation in my view as a result of an ongoing campaign of rumours spread by Partners who have chosen to unfairly represent situations to pass the blame to Tom from themselves. I have discussed my findings at length with Alice who has assured me that this

inappropriate culture in pockets of the branch will be addressed. Whilst I have found no evidence to support your belief that Tom's conduct was inappropriate .... Tom has recognised that his intentions are not always perceived as he intended and he was keen to take on board this feedback"

- 4.69. That account appears to link the claimant's complaint with the "ongoing campaign of rumours" unfairly spread by partners.
- 4.70. She categorises Tom's actions as management interventions. She considers that Mr Blakeborough had not explained enough about his condition.

"It seems that Tom is under criticism for not fully understanding the impact of your condition when you have not shared how it impacts you."

- 4.71. She strongly recommended (318) that he write a Tailored Adjustment Plan, to ensure his managers were fully apprised of his needs in order to support him appropriately.
- 4.72. The appeal outcome was long delayed and it is not clear why. More than three months passed from the appeal hearing in London to the issue of the report.
- 4.73. Mr Blakeborough decided to pursue his challenge using ACAS and if necessary a Tribunal.
- 4.74. He rejected a Tailored Adjustment Plan because he felt his health had been blamed for his reaction to the incident, had provided a convenient explanation without questioning the manager's involvement and because he only needed reasonable conduct towards him.

"No, everyone is entitled to be spoken to fairly, sensitively and what was needed only was not to bully me, that would have had to be the agreement."

"Do you accept that your condition makes you more vulnerable? To negative feedback?"

"Only if the feedback is given to me in a hostile, angry, physically hostile environment, that will absolutely trigger me to have problems."

"It is usually a pride to me that I am able to manage my mental health and live my life... don't see how a TAP could possibly have helped unless it set out that a manager would not be hostile, shouting threats.." (oral evidence)

*June to August 2018: first ET1*

- 4.75. On 17/07/18, Mr Blakeborough lodged his first discrimination claim, saying that the incident of 30/11/17 caused a panic attack and led to a major depressive episode with an absence of five months. The manager concerned was aware of his mental health problems. A key witness was not interviewed, but the inference drawn that her prior discussions with him had contributed to the panic attack. The reliance on a Tailored Action Plan reflected a view that his health was the problem not the manager's conduct. The CCTV footage had not been seen, had been allowed to be wiped and its existence denied. The appeal investigation had been conflated with a different investigation (8).
- 4.76. At some stage, he was reminded that Tom Philip was only temporarily at Chipping Sodbury until October – he says in his witness statement that he hadn't known that, but he himself mentioned it to the Clinical Case Manger before his return to work, so he had initially known. (ws33 and p194).

4.77. On 23/07/18, Mr Blakeborough asked if he could change his working hours so that he would work only on Sunday, in order to avoid working with Mr Philip (Ms Clements ws para 29. The application was not formally made, as required, on Partnerlink. There was a discussion about Mr Philip, who was still due to return to the Melksham branch in January 2019. She couldn't guarantee that the two would not have to work together. There was also no basis on which action could be taken against Tom given that he had not been found to be at fault in the grievance or the appeal. A Tailored Action Plan was recommended again but refused. Mr Blakeborough remained anxious about working with Mr Philip,

"I did not feel I could continue on if it meant Tom and me working together... I was petrified of Tom, I couldn't face him, that is what that conversation was about." (oral evidence)

- 4.78. He was allowed to go home early because he was upset. He saw his GP, he became self-harming.
- 4.79. Ms Clements does not recall learning about his self-harming conduct, but she did make a further health referral on 6/08/18.
- 4.80. On 9/08/18, Partnership Health Services confirmed Mr Blakeborough to be dealing with an anxiety state and he was referred to Rehabworks, the counselling service (335).

*Informal Meeting 20/08/18*

- 4.81. Mr Blakeborough had asked people about being witnesses for him in the Tribunal proceedings or to give him witness statements. One refused, because of the anxiety and stress of the situation. Others had said maybe. He had approached them again for an answer.
- 4.82. Carolyn reported to Alice Clements that Mr Blakeborough had approached Karen and Becca. Melanie had been approached by Nicola Griffiths-Lumb on Mr Blakeborough's behalf.
- 4.83. Becca had been seen to be upset by Alice Clements who asked her about it.
- 4.84. Alison had sought advice about a similar approach.
- 4.85. It was the manner of asking as well as the request itself that had caused concern.
- 4.86. Ms Clements called Mike in for an "informal interview". He had been aware of Ms Clements speaking to Becca, so he was half-expecting a meeting.
- 4.87. The effect of it being an informal interview was that he was not given notice and he was not given the chance to have someone with him.
- 4.88. Another manager was present when he entered, as notetaker.
- 4.89. The meeting began with Alice Clements describing it as an informal discussion. It didn't open with a request for Mr Blakeborough to explain what had happened or with an account of the issue brought to Ms Clements. She told him he was well within his rights to ask for witness statements but it needed to be in his own time, or other partners' break time and he needed to think about how he made other partners feel.
- 4.90. Mr Blakeborough found the situation very difficult, uncomfortable, provocative, and said that the meeting was "Not okay". He left quickly, fearing a panic attack. He left work immediately and returned home feeling suicidal.
- 4.91. He had a phone call from Rehabworks who helped him through his feelings and helped him to create a safety plan, a copy of which was lodged at his GP office.

- 4.92. Mr Blakeborough remained off work sick throughout the remainder of his employment. Sick notes were provided but he avoided contact from work.

*Letters leading to Resignation*

- 4.93. On 30/09/18, Mr Blakeborough wrote by email to Alice Clements (363):  
“Due to the unwillingness of John Lewis to take seriously my complaints against Tom Philip and the flawed process used to investigate him and due to your own unwillingness to take steps to prevent crossover of my working hours with Tom Philip, I feel I am left with few options.  
I would like to offer one last chance for this situation to be made right. If I receive no indication of adjustments that would enable me to return to the store by Monday 8th October, I will resign from my position at the store and add a claim of constructive dismissal to the existing legal action against John Lewis plc.  
It is highly disappointing that the company has so far been unwilling to do the right thing and chosen to risk breaking the law rather than deal with the ongoing, inappropriate behaviour of a manager and even actively try to cover up for him, instead of treating my disability as a scapegoat.  
I am sorry it has come to this and I do not wish to (do) this. I will miss Waitrose Melksham dearly but I refuse to stay in an unsafe working environment and be punished and victimised for trying to do the right thing and protect myself and others who have suffered similar behaviour.”
- 4.94. By return, on 30/09/18, Alice Clements replied, saying that the actions he had complained of had been held to be management interventions. She acknowledged how he felt about working alongside Tom in future. She offered mediation. She told him that Tom would not coming back to the branch until January 2019. There had been a further, third, referral to Partnership Health Services and adjustments recommended would be considered.
- 4.95. By a letter sent by email dated 5/10/18, Mr Blakeborough explained how badly let down he felt by the dismissal of his complaints against Mr Philips, reminding Ms Clements the case was going to the Tribunal. He also set out the impact on him, and his suicidal ideation and self harm.
- 4.96. He set out two adjustments that he wanted to enable him to return to work: for Mr Philip not to return to the Melksham branch and for mediation between himself and Alice Clement. If those changes were not made pending the Tribunal hearing, he would not be returning to work. If matters could not be agreed, he would resign and claim constructive dismissal (367).
- 4.97. The preliminary hearing for the Tribunal was listed for 23/10/18.
- 4.98. Alice Clement replied on 5/10/18. She reiterated that Tom Philip would be working elsewhere until January, when he would return to Melksham,  
  
“In the meantime, there are many options available to help with your return to work and, in due course, working in the same branch as Tom, including mediation which is often very successful in repairing working relationships.”
- 4.99. She agreed to mediation with him for herself, but did not agree that Tom Philip would be moved permanently elsewhere.
- 4.100. Mr Blakeborough resigned on 15/10/18, giving notice taking effect on 29/10/18 (373).



- 4.101. On 17/10/18, Mr Blakeborough wrote that he had resigned as on 15/10/18, because she was unable to make “a reasonable change which would have allowed me to return to work”. He had accepted employment elsewhere and was bringing a claim of constructive dismissal. He thanked the staff he worked with and Alice Clement herself, for her support prior to the August events, when she “suddenly changed to a strict punisher as a result of my legitimate legal Claim against the John Lewis Partnership.” (375)
- 4.102. On 23/10/18, Mr Blakeborough’s second claim was lodged on the grounds of unfair constructive dismissal and disability discrimination (31).

## 5. Law

### *Unfair Dismissal*

- 5.1. Section 98(1) of the Employment Rights Act 1996 (“ERA 1996”) sets out:

“In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.”

- 5.2. It is for the employer to satisfy the Tribunal as to the reason for the dismissal.
- 5.3. If the employer fails to establish that the reason for the dismissal was an acceptable one, the tribunal must find the dismissal unfair.

### *Constructive Dismissal*

- 5.4. A termination of the contract by the employee will constitute a dismissal within section 95(1)(c) of the ERA 1996 if he or she is entitled to so terminate it because of the employer's conduct. That is a constructive dismissal.
- 5.5. In order for the employee to be able to claim constructive dismissal, four conditions must be met:
- i) There must be a breach of contract by the employer.
  - ii) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. A repudiatory breach of contract is a significant breach, going to the root of the contract (*Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221.
  - iii) The employee must leave in response to the breach and not for some other, unconnected reason.
  - iv) The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise he or she may be deemed to have waived the breach and agreed to the variation of the contract or affirmed it.

- 5.6. Employment contracts contain an implied term of mutual trust and confidence. The parties to the contract will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust which should exist between employer and employee (*Malik v BCCI SA (in liq)* [1998] AC 20).
- 5.7. It is not simply about unreasonableness or unfairness. The question is whether the conduct complained of was likely to destroy or seriously damage the relationship of trust and confidence.
- 5.8. The general principles of contract law applicable to a repudiation of contract are that if one party commits a repudiatory breach of the contract, the other party can choose either to affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses: if he once affirms the contract, his right to accept the repudiation is at an end, but the election to affirm is not required within any specific period.
- 5.9. Delaying too long or, by conduct, indicating acceptance of the change, can point to affirmation. It is not simply a matter of time, in isolation. In *WE Cox Toner (International) Ltd v Crook*, [1981] IRLR 443, it is established that mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation. Simply continued working and the receipt of wages points towards affirmation. Nevertheless, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation.
- 5.10. A complaint may be based on the conduct of a fellow employee, even though that employee would not have had the authority to dismiss the complainant.
- 5.11. A constructive dismissal is not necessarily unfair. In determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the *Malik* test above applies; if acceptance of that breach entitles the employee to leave, he has been constructively dismissed; it is open to the employer to show that such dismissal was for a potentially fair reason and if he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, substantively and procedurally, fell within the range of reasonable responses.

#### *Direct Discrimination*

- 5.12. Direct discrimination is provided for under the Equality Act 2010 ("EA 2010") by section 13(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."
- 5.13. By section 39(2) of the EA 2010,

'An employer (A) must not discriminate against an employee of A's (B)  
(a) as to B's terms of employment;

- (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
- (c) by subjecting B to any other detriment.'

5.14. Detriment does not require a physical or economic consequence; it is sufficient that a reasonable person might take the view that they have been disadvantaged:

"Detriment exists if a reasonable worker would, or might, take the view that the treatment accorded to her had in all the circumstances been to her detriment. It is not necessary to demonstrate some physical or economic consequence."  
(Shamoon v Chief Constable of RUC [2003] IRLR 285 HL)

5.15. As the Equality Act Statutory Code of Practice on Employment ("the Code of Practice"), explains, at paragraph 3.5:

'It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated – or would have treated – another person.'

5.16. Actual or constructive knowledge of the disability by the managers concerned is required in a claim for direct disability discrimination (Gallop v Newport City Council [2013] EWCA Civ 1583 and Morgan v Armadillo Managed Services Ltd, [2014] UKEAT/0567/12).

#### *The comparator*

5.17. Essential to the consideration of less favourable treatment is the question of comparison.

5.18. By section 23 of the EA 2010,

"On a comparison of cases for the purposes of sections 13, 14 and 19, there must be no material difference between the circumstances relating to each case."

5.19. This is dealt with in particular by the Code of Practice at paragraphs 3.22 on.

5.20. The other approach is to say but for the relevant protected characteristic, would the claimant have been treated in this way? That may be helpful in identifying a hypothetical comparator (Code of Practice, 3.27).

#### *Failure to make reasonable adjustments*

5.21. The EA 2010, by section 39(5), imposes a duty on employers to make reasonable adjustments.

5.22. The duty is set out at section 20 of the EA 2010.

5.23. The duty comprises three requirements. The first is where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. The second relates to where a physical feature puts the disabled person at a substantial disadvantage,

making the same comparison, to take such steps as it is reasonable to have to take to avoid that disadvantage. The third, in similar terms relates to the provision of an auxiliary aid.

- 5.24. A failure to comply with any of those requirements is a failure to make reasonable adjustments. By section 21(1) and (2), “A discriminates against a disabled person if A fails to comply with that duty in relation to that person”.
- 5.25. The duty does not arise where A did not know and could not reasonably be expected to know that B has a disability and is likely to be placed at the disadvantage referred to – that is the effect of schedule 8, paragraph 20, as amended, to the EA 2010. However, the employer must do all they can reasonably be expected to do to find out whether a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. So, knowing of a condition such as dyslexia, the employer has a duty to do what it reasonably can to establish the effects of that and so avoid the risk of a substantial disadvantage arising.
- 5.26. No like for like comparator is required – the comparison may be between those who could do the job and the disabled person. As explained in *Royal Bank of Scotland v Ashton* ([2011] ICR 632), the tribunal must identify the non-disabled comparator or comparators. That may be a straightforward exercise,

“In many cases, the facts will speak for themselves and the identity of the non disabled comparators will be clearly discernible from the provision, criterion or practice found to be in play.” *Fareham College Corporation v Walters* ([2009] IRLR 991)

- 5.27. There is no onus on the disabled worker to suggest what adjustments ought to be made. It is good practice for employers to ask. If the disabled person does make suggestions, the employer should consider whether such adjustments would help overcome the substantial disadvantage and whether they are reasonable. (Code of Practice para 6.24)
- 5.28. It is a good starting point for an employer to conduct a proper assessment, in consultation with the disabled person concerned, of what reasonable adjustments may be required. ... It is advisable to agree any proposed adjustments with the disabled worker in question before they are made. (Code of Practice para 6.32.)
- 5.29. In considering whether there has been a failure to make reasonable adjustments, the tribunal must identify the step or steps it is reasonable to take to avoid the disadvantage – the question is the nature of the step, not the assessment of the mental process concerned. (*Royal Bank of Scotland v Ashton*, op cit).
- 5.30. The PCP should identify the feature which actually causes the disadvantage and exclude that which is aimed at alleviating the disadvantage.
- 5.31. The process for the Tribunal therefore is to identify:
- (a) the employer’s provision, criterion or practice which causes the claimant’s disadvantage
  - (b) the identity of the persons who are not disabled with whom comparison is made
  - (c) the nature and extent of the substantial disadvantage suffered by the employee
  - (d) what step or steps it is reasonable for the employer to have to take to avoid the disadvantage (*General Dynamics Information Technology Ltd v Carranza* [2015] IRLR 43).

- 5.32. The Tribunal must identify all of those in order to judge whether the proposed adjustment is reasonable. It must identify the nature and extent of the substantial disadvantage suffered by the claimant, including, if applicable, any cumulative disadvantage, say, from both provisions applied and physical features. In the absence of that, it is not possible to identify the adjustments that are reasonable to prevent the disadvantage. There is no need to find that the adjustment would have prevented the adverse effects. The Tribunal is entitled to find that the adjustment proposed was a reasonable option with a not unreasonable chance of success. (*The Environment Agency v Rowan* [2008] IRLR 20).
- 5.33. Assessing the reasonableness of any particular step, relevant factors will be how effective it will be in preventing the substantial disadvantage, how practicable it is, how much it will cost and how disruptive it may be, the size and resources of the employer and the nature of the business. It may also be relevant that external resources are available to help provide adjustments.
- 5.34. Failure to make a reasonable adjustment cannot be justified, but only reasonable steps fall within the duty. Whether or not adjustments were reasonable in the circumstances is to be determined by the employment tribunal objectively, (*HM Land Registry v Wakefield* [2009] All E R 205 (EAT)).
- 5.35. The duty does not arise where A did not know and could not reasonably be expected to know that B has a disability and is likely to be placed at the disadvantage referred to – that is the effect of schedule 8, paragraph 20, as amended, to the EA 2010. However, the employer must do all they can reasonably be expected to do to find out whether a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. So, knowing of a condition such as dyslexia, the employer has a duty to do what it reasonably can to establish the effects of that and so the risk of a substantial disadvantage arising.
- 5.36. In *Wilcox v Birmingham CAB Services Ltd* [2011] Eq:R.S810, the EAT took the view that unless the employer had actual or constructive knowledge of the disability, the question of substantial disadvantage did not arise. An employer will be taken to have the requisite knowledge provided that they are aware of the impairment and its consequences. There is no need for them to be aware of the specific diagnosis (*Jennings v Barts and the London NHS Trust* [2013] Eq:R 326 EAT. If an agent or employee knows in that capacity of a worker's disability, the employer will not usually be able to claim that they do not know, see para 6.21 of the Code.
- 5.37. 4.25 No like for like comparator is required – the comparison may be between those who could do the job and the disabled person. As explained in *Royal Bank of Scotland v Ashton* ([2011] ICR 632), the tribunal must identify the non-disabled comparator or comparators. That may be a straightforward exercise,

“In many cases, the facts will speak for themselves and the identity of the non disabled comparators will be clearly discernible from the provision, criterion or practice found to be in play.” *Fareham College Corporation v Walters* ([2009] IRLR 991)

- 5.38. There is no onus on the disabled worker to suggest what adjustments ought to be made. It is good practice for employers to ask. If the disabled person does make suggestions, the employer should consider whether such adjustments would help overcome the substantial disadvantage and whether they are reasonable. (Code of Practice para 6.24).

- 5.39. It is a good starting point for an employer to conduct a proper assessment, in consultation with the disabled person concerned, for what reasonable adjustments may be required. ... It is advisable to agree any proposed adjustments with the disabled worker in question before they are made (Code of Practice para 6.32).
- 5.40. There must be at least a prospect, a possibility, that the proposed adjustments would succeed but not more (Cumbrian Probation Board v Collingwood [2008] UKEAT/0079/08, paragraph 50; Leeds Teaching Hospital NHS Trust v Foster [2011] EQLR 1075, paragraph 17; North Lancs Teaching Primary Care Trust v Howorth UKEAT/0294/13.)
- 5.41. Assessing the reasonableness of any particular step, relevant factors will be how effective it will be in preventing the substantial disadvantage, how practicable it is, how much it will cost and how disruptive it may be, the size and resources of the employer and the nature of the business. It may also be relevant that external resources are available to help provide adjustments.
- 5.42. Whether or not adjustments were reasonable in the circumstances will be determined by the employment tribunal objectively (Morse v Witshire CC [1998] IRLR 352 and HM Land Registry v Wakefield [2009] All E R 205 (EAT))
- 5.43. Failure to make a reasonable adjustment cannot be justified, but only reasonable steps fall within the duty.

#### *Harassment*

- 5.44. By section 26(1) of the EA 2010,  
“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.”
- 5.45. In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must, by section 26(4), 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.”
- 5.46. Harassment is discussed in Chapter 7 of the Code of Practice. Paragraph 7.8 explains that,
- “The word ‘unwanted’ means essentially the same as ‘unwelcome’ or ‘uninvited’. ‘Unwanted’ does not mean express objection must be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment.”

- 5.47. Paragraph 7.9 explains that “related to” has a broad meaning, in that the conduct does not have to be “because of” the protected characteristic.
- 5.48. Section 26(4) is more fully discussed at paragraph 7.18 of the Code. The perception of the worker is a subjective question and depends on how the worker regards the treatment.
- 5.49. In paragraph 15 of *Richmond Pharmacology v Dhaliwal* 2009 [IRLR] 336, the nature of harassment is explored in similar terms:

“The proscribed consequences are, of their nature, concerned with the feelings of the putative victim; that is, the victim must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created. That can, if you like, be described as introducing a “subjective” element; but overall the criterion is objective because what the tribunal is required to consider is whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. ....It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence....”

### *Victimisation*

- 5.1. Section 27(1) of the EA 2010 provides that:

“A person (A) victimises another person (B) if A subjects B to a detriment because –  
B does a protected act . . .”

- 5.2. A protected act includes bringing proceedings under the Act: s 27(2). There is no concept of less favourable treatment as such in this formulation of the wrong. However, if a tribunal finds that the reason for particular conduct adverse to an employee is victimisation, there is implicit in that conclusion a finding that but for having taken the protected act, the employee would have been treated more favourably.

### *Burden of proof*

- 5.3. By section 136(2) and (3) of the EA 2010, the test in respect of the burden of proof is set out:

“(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.’

- 5.4. The switching of the burden of proof is simply set out in the Code at para 15.34:

“If a claimant has proved facts from which a tribunal could conclude that there has been an unlawful act, then the burden of proof shifts to the respondent. To successfully defend a claim, the respondent will have to prove, on balance of

probability, that they did not act unlawfully. If the respondent's explanation is inadequate or unsatisfactory, the tribunal must find that the act was unlawful."

- 5.5. For the burden of proof to shift, the claimant must show facts sufficient – without the explanation referred to – to enable the tribunal to find discrimination. The Barton guidelines as amended in the Igen case (Igen v Wong, 2005 IRLR 258 CA), remain the basis for applying the law notwithstanding the re-enactment of discrimination legislation in the 2010 Act. It is those guidelines that establish the two-stage test,

"The first stage requires the complainant to prove facts from which the ET could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld (Peter Gibson LJ, para 17, Igen)

- 5.6. We are referred to Hewage v Grampian Health Board [2012] UKSC 37, which approves at the highest level the application of the Barton/Igen guidelines to cases under the Equality Act. At paragraph 33, Lord Hope, on the burden of proof provisions, says,

"They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence..."

- 5.7. In Laing and Manchester City Council and others, 2006 IRLR 748, the correct approach in relation to the two stage test is discussed,

"No doubt in most cases it will be sensible for a tribunal formally to analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case.... (para 73)

The focus of the tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race (*or other*) discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a tribunal to say, in effect, 'there is a nice question as to whether the burden has shifted, but we are satisfied here that even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race'.

- 5.8. The nub of the question remains why the claimant was treated as he or she was:

"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination." (Madarassy v Nomura International plc) 2007 IRLR 246).



- 5.9. The presence of discrimination is almost always a matter of inference rather than direct proof – even after the change in the burden of proof, it is still for a claimant to establish matters from which the presence of discrimination could be inferred, before any burden passes to his or her employer.
- 5.10. In drawing inferences, an uncritical belief in credibility is insufficient' as Sedley LJ pointed out in *Anya v University of Oxford* 2001 IRLR 377 CA (paragraph 25) it may be very difficult to say whether a witness is telling the truth or not. Where there is a conflict of evidence, reference to the objective facts and documents, to the likely motives of a witness and the overall probabilities can give a court very great assistance in ascertaining the truth.

### *Time Limits*

- 5.11. Section 123 of the Equality Act sets out the period within which proceedings are to be brought.
- 5.12. Proceedings on a complaint within section 120 may not be brought after the end of:
- (a) the period of 3 months starting with the date of the act to which the complaint relates or
  - b) such other period as the employment tribunal thinks just and equitable.
- 5.13. For the purposes of that section, “conduct extending over a period is to be treated as done at the end of the period; failure to do something is to be treated as occurring when the person in question decided on it.” (s123(4)).
- 5.14. We were referred to *Hendricks v Metropolitan Police Commissioner* [2002] EWCA Civ 1686, in particular paragraphs 51 and 52, exploring continuing acts and concluding simply,
- “The question is whether there is an act extending over a period as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed.”
- 5.15. The time limits set are extended by section 140B of the Equality Act to facilitate conciliation before the institution of proceedings.

## **6. Reasons**

### *Analysis*

- 6.1. The agreed list of issues specifically requires the Tribunal to make findings in relation to 30/11/17, the rejection of the grievance, the rejection of the appeal and the meeting of 20/08/17, for the purposes of direct discrimination, harassment and victimisation together with the questions raised in relation to failure to make adjustments and constructive dismissal.

### *What happened on 30/11?*

- 6.2. The nub of this is that there are two conflicting and irreconcilable accounts. The employer preferred Mr Philip’s evidence. We prefer Mr Blakeborough’s.
- 6.3. Mr Philip relies on an immediate explosive reaction by Mr Blakeborough to his own reasonable enquiry about the reductions bin, followed by a severe panic attack.
- 6.4. There are difficulties with that explanation. We have no evidence that Mr Blakeborough’s conduct was otherwise aggressive or volatile. There is little by way of history for that or for a panic attack. Mr Blakeborough does not have a track record of panic attacks in the course of his duties. He tells us of becoming a key holder, taking a role in training, enjoying a job he was managing and progressing in. He tells us he is proud of the way he manages his anxiety condition.

- 6.5. There had been one incident some time earlier when again in the context of a reprimand by Mr Philip, Mr Blakeborough had suffered a panic reaction, and again in that account, he suggests that Mr Philip was deliberately trying to frighten him, to stress to him the seriousness of a mistake in selling goods before the official opening time. That doesn't point to a regular problem. The respondent does not rely on panic attacks being a recurrent feature.
- 6.6. Mr Philip's account of an immediate explosive overreaction wasn't echoed in any witness statement. No other witness spoke of Mr Blakeborough shouting.
- 6.7. Mr Philip acknowledged eventually that he himself had made a number of comments and gestures – pointing at items - before that response. So his word "immediate" has to be qualified.
- 6.8. Two witnesses directly refer to a tense conversation on the shop floor with Mr Philip saying that something was "not acceptable", a conversation inappropriate in the shop and in public. Melanie refers to him being angrier than she had ever seen him. Although Ms Gray reported that that related to the "heated" discussion outside the Partners Dining Room when Mr Philip remonstrated with Melanie for remaining with Mr Blakeborough against his instructions, according to the record of the interview with her, it was an account given in the context of the shop floor discussion and we are satisfied that it was describing that incident not the later events – not that it strengthens the respondent's case for Mr Philip to be displaying anger with Melanie when she had been helping and supporting Mr Blakeborough as a first aider.
- 6.9. There are difficulties with Mr Philip's explanations as to what happened in the Partners Dining Room. Why did he order Melanie out of the room and then remain with Mr Blakeborough himself?
- 6.10. Alison Poole and Melanie Metcalfe had described a severe panic attack. Melanie was supporting Mr Blakeborough. She is a first aider. Mr Blakeborough was calming down. She had established a rapport. It is odd then to insist that she leave.
- 6.11. Mr Philip's justification for doing so was to give Mr Blakeborough some space to calm down, on the basis that he needed to be alone – but he didn't then leave him alone.
- 6.12. Given what had happened, it was unmistakable that whatever the trigger for the panic attack, Mr Philip had been part of it. In those circumstances, it is odd for him to insist on being alone with Mr Blakeborough. A reasonable response would have been to let others help Mr Blakeborough through it.
- 6.13. Melanie reported frankly insensitive and unsympathetic remarks from Mr Philip, more than once – that she should ignore Mr Blakeborough, and that Mr Blakeborough was attention seeking. They echo Mr Blakeborough's own account that Mr Philip told him that his mental health was "not his problem".
- 6.14. Mr Philip had made a remark to Mr Brumby to the effect that he did not link what was happening to Mr Blakeborough's mental health. When that was put to him, he said that was in relation to the incident on the shop floor, not the incident when Mr Blakeborough was experiencing a panic attack or recovering from it. But Mr Philip made the same comment to Ruth Gray, plainly in the context of the period in the Partners Dining Room (287).

"I remember my thought was that he probably needed time to think, would not have said he was attention seeking. After cashed up did not want Mel to sit with him as needed some space to think. If (I) thought for a second that this was related to his mental health would have got some support."

- 6.15. This was seen by others to be a severe panic attack, memorably so. The accounts of Melanie and Alison to Mr Brumby and to Ms Gray are consistent as to the severity of the panic attack and the dismissive way that Mr Philip dealt with it.
- 6.16. Mr Philip was dismissive of Mr Blakeborough's mental health problems. He minimised what Mr Blakeborough describes as his most serious panic attack at work, as someone who generally managed his anxiety well.
- 6.17. All of that points to a failure to acknowledge – perhaps also a failure to understand – the nature of an anxiety condition and a severe panic attack.
- 6.18. We don't find Mr Philip's account of the events of 30/11 to be reliable. It is consistent with his presentation of the matter that he dismissed the evidence of a severe panic attack and of his role in causing it.
- 6.19. It is Mr Blakeborough's case that on that Mr Philip's conduct had been similarly responsible for his bad reaction on the earlier occasion – the Sunday trading incident - and that he had explained to him at that time the way his health impacted him. He refers to a very specific discussion (ws para 11) in which he explained in detail the nature of his Generalised Anxiety Disorder (GAD), and says that an agreement was reached between them that if Mr Philip needed to reprimand, it would be in a logical and non-threatening manner.
- 6.20. Mr Philip does not recall that conversation other than in general and briefly, and says he thought he had been told that the condition was Obsessive Compulsive Disorder (OCD) not GAD. He also doesn't accept that there was a conversation on 30/11/17 between him and Nicola Griffiths-Lumb, in which she tells us she explained that she had had to give Mr Blakeborough the news that he had gone from very good to good, so he was feeling a bit upset. She tells us that Tom Philip agreed that this could be a delicate issue and that Mr Blakeborough would need tact and supportive handling. She later told Mr Blakeborough of that conversation with Mr Philip. She was very clear that all the managers were aware of Mr Blakeborough's mental health.
- 6.21. So we have two witnesses saying Mr Philip had good knowledge of the mental health condition. Against that, we have Mr Philip himself minimising it on the day and denying more than a general knowledge.
- 6.22. While Mr Philip has not denied knowing that Mr Blakeborough had an anxiety condition, we accept the evidence from Mr Blakeborough and Ms Griffiths-Lumb's that he had had specific discussions with them about it and its impact on Mr Blakeborough.
- 6.23. Mr Blakeborough should not have faced a difficulty again with Mr Philip's manner.
- 6.24. A TAP would not have made any difference, given the discussion and agreement as to how to go forward they then had. As Mr Blakeborough says, he was only seeking courteous treatment.
- 6.25. In summary, a severe panic attack at work was uncharacteristic for Mr Blakeborough, in spite of a longstanding anxiety condition; witness accounts are of an exchange that was critical of him, public and embarrassing, taking place in earshot of staff and customers; there is evidence of Mr Philip being angry both at the time and later, when anger was not appropriate; Mr Philip did not deal appropriately with the panic attack – with comments that he belittled it, while sending away the supportive first aider and remaining alone with Mr Blakeborough.
- 6.26. His account does not impress as reliable
- 6.27. It makes more sense of events that Mr Philip did indeed challenge Mr Blakeborough with some vigour over the reduced goods bays. That would be

consistent with the distress Mr Blakeborough experienced and with the uncharacteristic and severe panic attack.

- 6.28. We therefore prefer Mr Blakeborough's account of events.
- 6.29. It is hard to see why either Mr Brumby or Ms Gray decided that there was no evidence that Mr Philip had acted in a manner that was harassing or bullying. Mr Brumby didn't ask the right questions, but Ms Gray's investigation was more thorough; yet she attached no weight to the evidence in relation to Mr Philip's conduct, instead again placing the emphasis on Mr Blakeborough's disability.

*30/11/18 in relation to direct discrimination*

- 6.1. The claimant relies on the following acts by Tom Phillip on 30 November 2017 as being less favourable treatment because of his disability by reference to a hypothetical non-disabled comparator;

- (i) Summoning the Claimant aggressively by tannoy;
- (ii) Belittling the Claimant in front of colleagues and customers;
- (iii) Being unnecessarily angry with the Claimant;
- (iv) Aggressively holding items in front of the Claimant's face in a way that someone might rebuke a child;
- (v) Speaking over the Claimant, preventing him from defending himself;
- (vi) Failing to heed the Claimant's requests for him to stop;
- (vii) Following the Claimant telling him that he was not okay, gesticulating to the products and telling that the Claimant that they, not him, was his problem;
- (viii) In the Partner Dining Room, preventing others from assisting the Claimant;
- (ix) Imposed himself upon the Claimant such that he had to pretend that he was okay and was then able to leave his presence.

- 6.2. We accept that there was bullying behaviour on 30/11/18 by Mr Philip.
- 6.3. In terms of the issues we accept 9(ii) to (ix) as reflecting what happened. They are all supported by Mr Blakeborough's evidence for there is sufficient corroboration.
- 6.4. We don't accept 9(i).
- 6.5. We accept that Mr Blakeborough was summoned by tannoy. We don't accept that it was aggressive. Witnesses agree they heard a tannoy, but nobody else commented on the manner and it is unlikely that a public announcement was anything other than businesslike. Mr Blakeborough has told us that he was already anxious because he had seen Mr Philip going through items in the reduced bays in an angry manner. We understand that he may have felt the announcement to be aggressive but it is likely to have been simply crisp.
- 6.6. Was this less favourable treatment because of disability by reference to a hypothetical comparator who was not disabled?
- 6.7. We have heard that there were other grievances and less formal complaints and unhappiness about Mr Philip's manner and conduct. Those emerge clearly from the interviews, in particular those carried out by Ruth Gray. Mr Philip is seen as the enforcer, he tackles difficult people management problems and is not afraid to do so. He presented as someone used to exercising authority. Mr Blakeborough himself refers to his concern for other staff, given his own fear of Mr Philip.
- 6.8. Nothing in the account of the incident on 30/11 points at the incident occurring as a response to Mr Blakeborough's disability. What it points to is a management concern about products not being sold, to the detriment of the store. (It also flags up conflicting

instructions and priorities, but that is not the issue). We find that Mr Philip was annoyed at the failure to sell the goods in the reduced bays and dealt with Mr Blakeborough as he would have dealt with anyone else he saw as responsible for it. He has authority, he is used to using it, he was angry, he behaved in a bullying manner, but that was the way he worked. It was not in response to disability.

- 6.9. There is no pattern of such conduct by Mr Philip towards Mr Blakeborough other than the single earlier incident over the early sale of goods before formal opening hours. There again there had been what Mr Philip saw as an immediate over-reaction to a management request, but which Mr Blakeborough reports as deliberately aggressive and threatening, intended to scare him out of making a similar mistake in future. Both incidents illustrate Mr Philip's management style, and are not evidence of a response to disability.
- 6.10. There is evidence, both from Mr Blakeborough and from the appeal investigation of others finding Mr Philip's management style overly robust and difficult.
- 6.11. Has the claimant proved primary facts from which the Tribunal could conclude that the Respondent discriminated because of the claimant's disability?
- 6.12. We do not so find. The facts do not point to discrimination because of disability.
- 6.13. If however we are wrong in our analysis and the burden of proof has shifted, then we are satisfied that the Respondent has shown an explanation independent of discrimination.

*Mr Brumby's report and the rejection of the grievance*

- 6.14. Mr Brumby commenced his investigation of the grievance in December 2017. Until he spoke to Karen Gregory on 18/01/18, his questions were about Mr Blakeborough's distress and upset. He was not asking what had happened on the shop floor.
- 6.15. It is suggested that asking a question about Mr Blakeborough's distress would naturally have led people to talk about what had earlier happened on the shop floor. We don't accept that. Questions needed to be expressly asked. Mr Brumby didn't give the witnesses the right starting point so they didn't give a full account.
- 6.16. When he did get information about what had happened on the shop floor, from Karen Godfrey, he was told that Mr Philip had said something was "unacceptable" and that the conversation was embarrassing to Mr Blakeborough. At that point, follow up questions were needed but the conversation ceased and the comments were rejected or ignored in his evaluation.
- 6.17. Mr Blakeborough's case is that if he had not had the General Anxiety Disorder condition, the whole investigation would have taken a different course. Instead of being asked about his distress and the panic attack, witnesses would have been asked what had happened.
- 6.18. Having heard Mr Brumby's account, we agree. This was an investigation taking the wrong direction. There was little or no investigation of the shop floor incident that the grievance was about.
- 6.19. That is why the outcome was the recommendation of a Tailored Adjustment Plan.
- 6.20. Mr Blakeborough is clear that he did not need that adjustment. He could cope with normal conversation and feedback. What he could not cope with was bullying conduct and raised voices. To meet his difficulty by suggesting a Tailored Adjustment

Plan made the problem his illness not Mr Philip's behaviour. That was his view and we agree.

- 6.21. The standard of investigation required for a grievance is not more than is reasonably required. There will always be gaps. But Mr Brumby proceeded on a hypothesis that the panic attack was caused by the earlier meeting and the regrading to "good" from "very good", and Tom Philip simply spoke to Mr Blakeborough at the wrong time. That could have been put to Mr Blakeborough to comment on, in the interests of fairness.
- 6.22. There were two witnesses to Mr Blakeborough's earlier state of mind, Nicola Griffiths-Lumb and Victoria Clayton. Nicola was not interviewed and Victoria was not asked.
- 6.23. The central question remained, why was there a severe panic attack when Mr Blakeborough has managed his condition well before.

#### CCTV.

- 6.24. There was a significant conflict of evidence between Mr Philip and Mr Blakeborough.
- 6.25. Given the extent of the conflict over what actually happened on the shop floor, it was quite clearly helpful and appropriate for the CCTV footage to be viewed, in the interests of resolving the conflict over Mr Philip's body language and gestures, Mr Blakeborough's "explosion" and whether there were other witnesses available. That applies even if the CCTV did not record sound.
- 6.26. CCTV footage was mentioned in the grievance hearing. We have the note-takers notes and Mr Brumby's own notes which are of course closely similar. The note taker notes Ms Griffiths-Lumb referring to the CCTV, and Mr Brumby saying "excellent". That exchange is missing from Mr Brumby's notes nor does he remember it.
- 6.27. When interviewed by Ruth Gray, Mr Brumby said that there was no CCTV footage. In his witness statement he agrees he did not look at it, and gives various reasons for why it would not have been helpful– that it was unnecessary, given that he could ask the witnesses direct questions, that it was contrary to policy to view it and that it wouldn't have included audio. One problem with that account is of course that he did not ask the witnesses direct questions.
- 6.28. It didn't help him to say that Mr Blakeborough had not asked him to look at it, since we are satisfied from the note and from hearing from her that Mrs Griffiths-Lumb had expressly drawn it to his attention during the grievance hearing.
- 6.29. Mr Brumby told us at the hearing for the first time that he relied on other policy guidance available online and given to him on the telephone about viewing CCTV footage.
- 6.30. That policy guidance was produced at the hearing.
- 6.31. There may be a conflict between the policy set out in the Partnership Handbook and the document headed Security of Partner Personal Data Standard. However, it is clear that individuals are entitled to see footage of themselves. Mr Blakeborough could have been given guidance that he could view it. He could also give consent for others to view it. So could Mr Philip – and had either resisted, that itself might have spoken volumes.
- 6.32. In the interests of thoroughness and transparency, the CCTV footage should have been viewed; nor is that precluded by policy.

- 6.33. Nothing explains why Mr Brumby gave different answers at each stage. In particular, we don't understand why his initial response to Ms Gray was that there were no cameras. This is an area near the tills and it would be unexpected for this area to be excluded from CCTV supervision.

*Ms Gray's report and the rejection of the appeal*

- 6.34. Ms Gray conducted a very much fuller investigation than Mr Brumby. She asked searching and intelligent questions, filling in the obvious gaps in Mr Brumby's enquiry.
- 6.35. What is surprising on reading it is how little difference the additional evidence she obtained made. She reached the same conclusion as Mr Brumby, in spite of having compelling accounts of the distress Mr Blakeborough was in and better evidence of what had actually happened on the shop floor to provoke that response. In spite of the increasingly stark conflicts in the evidence, she preferred Mr Philip's account.
- 6.36. It was put to her that Melanie had said of the incident on the shop floor that she had never seen Mr Philip so angry. In her notes, that comes in the context of the shop floor incident (para 15). She replied that it was actually in relation to the discussion about why Melanie should not stay with Mr Blakeborough, in the Partner's Dining Room. Whenever it took place, if Mr Philip was so angry, it was inappropriate and it suggests the loss of control and perspective that Mr Blakeborough complains of.
- 6.37. Mr Brumby saw the problem as the illness, not the conduct of Mr Philip. Mrs Gray did the same. Both saw the disability as the problem.

*What is the effect of that analysis?*

- 6.38. It is altogether more likely than not that Mr Philip did behave in a bullying manner to Mr Blakeborough on 30/11/17 and that that triggered the severe panic attack, one Mr Blakeborough describes as the worst he had had at work. It is uncharacteristic and otherwise unexplained.
- 6.39. We are clear that Mr Brumby investigated the disability not the incident. That is why he failed to ask questions about what happened on the shop floor and why he dismissed the grievance but recommended a Tailored Adjustment Plan. If he had been dealing with a complainant who did not have a disability, or that disability, he would have investigated the grievance not the complainant. It was because of the disability that he acted as he did.
- 6.40. We are also clear that Ruth Gray, with more evidence, ignored the evidence pointing to Mr Philip having behaved inappropriately. Her conclusions do not square with the evidence that she had. She too accepted Mr Philip's denials and in recommending a Tailored Adjustment Plan, put the blame for what had happened on Mr Blakeborough's illness.
- 6.41. We cannot accept her reasons for finding "no evidence for bullying or harassment". It lacks explanation save that it is a response to the disability. We equally cannot accept her excusing Mr Philip on the basis that he did not know of the nature or impact of the anxiety condition – she had the grievance statement that Mr Blakeborough had prepared that outlined the conversation he had had with Mr Philip in the one previous incident when his anxiety had been a problem at work (123) and his comments at the appeal hearing (272). She had acknowledgement from Mr Philip that there had been a discussion at that time with Mr Blakeborough about his mental



health (294). We have better evidence of what Mr Philip knew, having heard from Nicola Griffiths-Lumb but Ms Gray's suggestion that Mr Philip could not be blamed for not fully understanding the impact of Mr Blakeborough's condition is not one we find sustainable (295).

- 6.42. She goes on to urge a Tailored Adjustment Plan, as Alice Clements later did.
- 6.43. It is easy to think it was wrong to refuse a Tailored Adjustment Plan. Why would that not help? Mr Blakeborough makes the telling point that he has managed 20 years in the retail industry without needing that as an adjustment. He worries every day. He manages the condition. He copes, provided that he is not exposed to bullying conduct. He should not need a Tailored Adjustment Plan to cope with bullying conduct – everyone is entitled to expect courtesy at work.
- 6.44. It also needs to be said that a Tailored Adjustment Plan is in the end a procedural step. We have ample evidence that the managers here knew Mr Blakeborough's condition. Nicola Griffiths-Lumb told us that mental health problems were discussed and Mr Blakeborough's condition was well known. We have found that Mr Philip knew of it, so did Alice Clement. Courteous and careful management should not have depended on whether or not there was a Tailored Adjustment Plan.
- 6.45. We find that the rejection of the grievance and of the appeal was direct discrimination. A hypothetical comparator who was in Mr Blakeborough's position but not disabled – even someone who had for some other reason, some vulnerability - would have been treated differently. It was the specific focus on the disability, on the anxiety condition, that was the reason for the difference in treatment. Mr Brumby was more concerned about the panic attack in his investigation and conclusions. He did not investigate the incident on the shop floor. That was directly because of the disability. Had the grievance been lodged by a comparator without Mr Blakeborough's anxiety condition, the incident about which he complained would have been investigated. Equally, with Ms Gray, despite the new evidence she obtained, what she gave weight to was Mr Blakeborough's disability rather than the concerning evidence as to what had taken place on the shop floor. He was less favourably treated because of disability.

*The meeting of 20/8/19 – Alice Clement*

- 6.46. Mr Blakeborough trusted Alice Clement and found her highly supportive. She kept in close touch with him and spent a lot of time with him. We found her to be clear, professional, well-intentioned and supportive.
- 6.47. The relationship soured immediately when she called him in to an "Informal Partner Meeting"
- 6.48. As a policy, that is a very difficult procedure. The individual is called in without notice, to what may be presented as informal, but which can, and here did include an independent note taker. That is unsettling. The individual does not know why they are being called into a meeting which has the trappings of formality. They do not have the opportunity to have someone with them. They have no opportunity to prepare.
- 6.49. All of those things are difficult for anyone. It is easy to see why, while the employer sees this as neutral and informal, staff see it as the first step in a disciplinary process, That is a reasonable view.
- 6.50. It is a particularly unsettling process for someone with Mr Blakeborough's anxieties, and the more so at that time, given that he had returned from prolonged sickness absence on the grounds of anxiety, depression and stress.

- 6.51. However well-intentioned and supportive, and albeit that she was following guidance as to the steps to take to address a genuine management situation, the use of that meeting format to call Mr Blakeborough in on his own and without advance warning was ill-advised. It had profound consequences.
- 6.52. It was the more difficult in that the meeting apparently started with a challenge to his behaviour, without open questions.
- 6.53. Mr Blakeborough was not able to cope, he left, and he never returned.

*The meeting of 20/08/18 and direct discrimination*

- 6.54. The claimant relies on the following treatment as direct discrimination.

“The decision by Alice Clements to hold a meeting with the Claimant on 8 August 2018, which the Claimant contends was “an attempt to scare him away from pursuing legal action, using his generalised anxiety disorder as a tool to harm him.”” *(the date has since been corrected to 20/08/18)*

- 6.55. We accept that Ms Clements was advised to hold that meeting, and the conduct of it was consistent with John Lewis policy. It was, to her, normal practice.
- 6.56. It was ill-advised. To call him in without notice or forewarning as to what it was about, without a companion, with another manager there, so that there was immediate formality, and so that he was immediately outnumbered, was setting up a situation highly provocative of anxiety. A defensive reaction was not unexpected. He was already intensely anxious.
- 6.57. Ms Clements had received complaints about Mr Blakeborough approaching staff for witness statements. She took advice. She acted consistently with the advice she was given and her understanding of the policy. Her evidence is that sometimes she has a notetaker and sometimes not, according to whether or not she is worried about being distracted.
- 6.58. We are satisfied that Ms Clements would have done the same with a hypothetical comparator, particularly one bringing proceedings. This course of action was not taken because of Mr Blakeborough’s disability. It arises from bad advice and poor procedure.
- 6.59. Nor do we accept that this was an attempt to scare him away from pursuing legal action using his generalised anxiety disorder as a tool to harm him. Ms Clements had been wholly supportive to him prior to that. This was a major turning point in their relationship, a point at which he lost his trust in her, but we do not find evidence that she had taken a course of action directed at causing him harm, or even to deter him from legal action; nor would that be in any way consistent with her conduct towards him in general.
- 6.60. We do not find direct discrimination in respect of the meeting of 20/08/18.

*Victimisation*

- 6.61. In relation to victimisation, the claimant relies again on the meeting of 20/08/18, the claimant having issued a grievance and brought proceedings under the Equality Act.
- 6.62. The detriment relied on is,

“The decision by Alice Clements to hold a meeting with the Claimant on 8 (20) August 2018, which the Claimant contends was “an attempt to scare him away from pursuing legal action, using his generalised anxiety disorder as a tool to harm him.”

- 6.63. A detriment must be more than reasonable and normal steps taken in the course of managing an employee. But the conduct of internal procedures can amount to a 'detriment' (even if proper conduct would not have altered the outcome).
- 6.64. There is no requirement for a comparator. But it is useful to explore what the detriment was in the context of normal management. Any other employee could have faced the informal procedure that is complained of. From the employee's point of view, this does not equate to having a quiet word to resolve a problem.
- 6.65. Added to that is this particular individual's vulnerability.
- 6.66. This is our analysis.
- 6.67. Because the claimant has taken protected acts, bringing proceedings and bringing a grievance the situation requires the utmost care.
- 6.68. In addition, asking for witness statements or witness support was a protected act, an act done in connection with proceedings under the Equality Act.
- 6.69. The step taken by Ms Clements – calling him to an informal meeting - was a step in the usual range of procedures open to management. It was not seen as a disciplinary step, it was a way of addressing the complaints made about the way that staff were approached.
- 6.70. We accept that Ms Clements followed the guidance she was given.
- 6.71. We accept that she was personally well intentioned and had been very supportive towards him.
- 6.72. We accept that she followed what are normal John Lewis procedures.
- 6.73. But the procedure itself is a poor one, inappropriate in this context.
- 6.74. Mr Blakeborough has a disability which in this circumstance required added care.
- 6.75. Of course, the employer is entitled to manage, and here there were complaints of the approaches he was making causing concern and anxiety.
- 6.76. But in calling him in to that unexpected and somewhat formal interview, he was faced with a situation he could not cope with.
- 6.77. However, we must have regard to the specific wording of the issue we are asked to address.
- 6.78. If we were asked to decide that the manner in which the meeting was conducted was a detriment, we would so find. But what we are asked to decide is that calling the meeting was a detriment. That goes too far. A meeting was justified.
- 6.79. It is then said that the meeting was an attempt to scare him away from pursuing legal action, or a use of his generalised anxiety as a tool to harm him.
- 6.80. That too goes too far. This was an attempt at management given complaints from other staff.
- 6.81. We do not have evidence to support the issue raised as drawn.
- 6.82. We don't find victimisation in the terms that we are asked to find it.

*Failure to make reasonable adjustments*

- 6.83. The Claimant relies on the following, as set out in the issues, 13 - 17:

13. Did the Respondent apply the following provision, criteria or practice (PCPs):

- To work a shift pattern which caused him to be in contact with the protagonist who caused/exacerbated his disability;
- Failing to allow flexibility in the shift pattern to avoid the Claimant meeting Mr Philip at work.

14. Did the Respondent apply these PCPs to the Claimant?  
15. If yes, did these PCPs place the Claimant at a substantial disadvantage when compared with people who did not have the Claimant's disability?  
16. Did the Respondent know, or could it reasonably have been expected to know, that these PCPs placed or were likely to place the Claimant at the substantial disadvantage in question?  
17. Would it have been reasonable for the Respondent to take steps in order to avoid the substantial disadvantage in question? The Claimant contends the following adjustments should have been made and maintained (and were not):

- a. That the Claimant be allowed to work on Sundays only, it being a day upon which Tom Phillip had said he did not wish to work.

- 6.84. Our analysis is this.  
6.85. Mr Philip was away from the branch from May to September. He was due to return in January. Mr Blakeborough put his claims in in July and October. At the period that Mr Blakeborough complains of, those PCPs were not in place or applied to him, nor was he at a substantial disadvantage in having to work with Mr Philip.  
6.86. He had been offered the opportunity to apply for a shift change to Sundays only but had not pursued the application, having reservations that it would secure him from having to see Mr Philip.  
6.87. Because he didn't make the application, it was not formally considered.  
6.88. He had asked orally for that change in late July. Even at the date of his resignation in October, there was more than two months before Mr Philip was expected to return. There was time for adjustments to be considered. Alice Clements had made a health referral and agreed that adjustments would be considered on hearing the outcome.  
6.89. The change he actually requested in his resignation letter was that Mr Philip should not return to the Melksham branch. That was not outright refused. Alice Clement said

"I note your comments regarding working with Tom Philip in future, which is why I am keen to assist with a resolution. Tom is working in a different branch until January 2019 when he will return to his role at Waitrose Melksham. However, in the meantime, there are many options available to help you with your return to work, and in due course, working in the same branch as Tom, including mediation which is often very successful in repairing working relationships."

- 6.90. The response to that was a resignation, on the basis that the employer had refused a reasonable change which would have allowed Mr Blakeborough to return to work.  
6.91. The situation he feared might have arisen later, but the period from summer to autumn was a window when solutions could be explored. One solution was of course

that Mr Philip might not return as actually happened – that could not predicted but it shows that the passage of time might offer possibilities or solutions.

- 6.92. We do not find a failure to make reasonable adjustments. The PCPs complained of were not applied to the claimant at the time we are considering. There was a willingness to consider adjustments and in the event, the one the claimant particularly sought became unnecessary.

### *Harassment*

- 6.93. Based on what has been said above, we do not find Mr Philip's conduct towards Mr Blakeborough to have been harassment related to the claimant's disability, nor is that claim made in time; it is an isolated incident and not part of a continuing act.
- 6.94. The handling of the meeting on 20/08/18 was misguided, but the conduct of it was not related to the claimant's disability.

### *Constructive Dismissal*

- 6.95. We are satisfied that the failures in handling the grievance and the appeal, which were serious failures in handling a legitimate grievance in the context of disability, placed the respondent in breach of the implied term of trust and confidence in the contract. That was a breach that went to the safety of Mr Blakeborough at work, which continued to be his reservation about returning to work.
- 6.96. He did return to work, given that Mr Philip was not there. But he was still waiting for the outcome of the appeal. There was justification for not raising the question of Tom Philips at the back to work meeting beyond expressing his discomfort over it. Mr Philip was not due to return for some months.
- 6.97. The return to work was on 27/05/18. The appeal outcome was on 08/06/18.
- 6.98. At the meeting around 23/07/18, a long meeting, Mr Blakeborough was quite clear that he had anxiety about working alongside Tom. Ms Clements was well aware of that. She was saying that there was no basis on which she could exclude Tom from the branch. It was then that Mr Blakeborough spoke to her about changing his hours so that he could avoid working with Tom, hoping to work on a Sunday when Tom preferred not to work. She could not offer guarantees.
- 6.99. At that point, Mr Blakeborough was faced with the reality that the employer could not protect him from contact with Mr Philip.
- 6.100. At the meeting of 20/08/19. Mr Blakeborough felt he was punished for pursuing his legitimate complaint. He walked out, in profound distress, and suffered a significant reaction.
- 6.101. He had minimal contact thereafter with the respondent before resigning in late October. He did not return to work.
- 6.102. He continued to seek a solution that prevented him from having to work alongside Mr Philip.
- 6.103. As at October 2018, Mr Philip was not at Melksham, Ms Clements was open to consider adjustments to avoid overlap between them so far as practicable - but the offer fell short of excluding Mr Philip from the branch. She was doing what she could to resolve the situation and make it possible for him to return to work. What she could

not reasonably achieve was Mr Philip's exclusion from Melksham. Given the outcome of the grievance and the appeal, that was not an option she could agree or that the employer could readily insist on or be expected to see as necessary.

- 6.104. Had the failings in relation to the appeal and the grievance not occurred, had the respondent decided instead that Mr Philip had conducted himself in a bullying manner, consideration of shift changes and/or mediation would have followed swiftly, and we do not exclude that arrangements might have led to Mr Philips leaving the branch.
- 6.105. Mr Blakeborough had returned to work for three months. He was willing to return again. His continuing difficulty was with Mr Philip. For him it was a serious issue of health and safety at work. That – a serious issue of health and safety - is of course what bullying conduct creates.
- 6.106. He resigned, faced with the expectation that he would have to work with Mr Philip again, as set out in the correspondence.
- 6.107. There are two ways of looking at this.
- 6.108. At the point of resignation, Mr Blakeborough was not required to work with Mr Philip and there was a willingness to look at adjustments which would have included mediation and could have included shift adjustments. He resigned unreasonably at a time when his prime condition was already met. He could not justify resigning at a time when Mr Philip was not even there.
- 6.109. Against that, the respondent was now in a position where it might not be able to protect him, not having recognised the bullying.
- 6.110. Mr Blakeborough's opening request had been for Tom Philip to have mental health training and perhaps some training on bullying (86). Ten months later, he felt unable to work alongside him, and he was saying that by 23/07/18. His condition had deteriorated as shown by his response to the meeting of 20/08/18 and his attitude had firmed up.
- 6.111. We have identified repudiatory breaches in the failings over the grievance and appeal. The effect of that was far-reaching, in that the employer was unable to address the arrangements that were needed to protect Mr Blakeborough from bullying.
- 6.112. The dismissal of the grievance and the appeal – 9/12/17 and 08/06/18 – were some months behind Mr Blakeborough when he resigned in October.
- 6.113. A repudiatory breach cannot be "cured" by the contract breaker. Once the employer has committed a breach of contract which is so serious that it entitles the innocent party to walk away from it, that party has a clear choice to affirm or leave. (Buckland v Bournemouth University [2010] IRLR 445, CA)
- 6.114. While Mr Blakeborough returned to work, he did so only while he knew that Mr Philip was not there. The issue of his personal safety remained. We don't need to spell it out perhaps, but an anxiety condition, with suicidal thoughts is a serious condition. By failing to deal with the bullying, the respondent was now in a position where it might not be able to protect him if Mr Philip returned.
- 6.115. There was no affirmation here.
- 6.116. Mr Blakeborough resigned in response to the breaches of contract, not having affirmed the contract, because he was fearful for his safety. The company knew that. He was entitled to resign. This is constructive dismissal.

#### *Summary and Jurisdiction*

- 6.117. The claimant succeeds in his claim of constructive dismissal and on two counts of direct disability discrimination.
- 6.118. The first claim went in on 17/07/18. The ACAS dates are 11/06/18 for the notice of intention to claim and 11/07/18 for the conciliation certificate.
- 6.119. The second claim was made on 23/10/18.
- 6.120. No point arises in relation to the timing of the claims in relation to constructive dismissal.
- 6.121. The first claim was in time in respect of the dismissal of the appeal on 8/06/18.
- 6.122. The dismissal of the grievance by Mr Brumby on 9/02/18 would be out of time if we considered that it was not a continuing act.
- 6.123. We are satisfied that the dismissal of the grievance and the dismissal of the appeal reflect a continuing state of affairs. Both reflect a response to the disability. They reflect the same error, in seeing the disability as the issue rather than the conduct of Mr Philip.
- 6.124. All the claims are in time.

Employment Judge Street

Date: 5 November 2019

Reasons sent to parties: 7 November 2019

FOR THE TRIBUNAL OFFICE