Case No: 3324888/2017
3331200/2018
3304181/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Andrew Bickers	**v**	**Mears Ltd**

Heard at: Watford **On:** 2-10 September 2019

Before: Employment Judge Bedeau
Mrs I Sood
Mrs C Baggs

Appearances:

For the Claimant: Mr S Martins, Legal Executive
For the Respondent: Ms N Owen, Counsel

JUDGMENT having been sent to the parties on 16 September 2019 and reasons having been requested by the respondent on 24 September 2019, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By claim forms presented to the tribunal on 28 May 2017, the claimant alleged detriment contrary to s.44(1) Employment Rights Act 1996 in relation to health and safety issues. He also referred to not being paid his full pay while on sick leave. In his second claim form presented on 22 February 2018, he alleged inadequate support being given to him and asserted that the respondent had harassed him having failed to make reasonable adjustments, discriminated against him for a reason arising in consequence of his disability, and that he had been victimised.

2. In the third and final claim form presented on 7 July 2018, he claimed unfair dismissal and s.15 discrimination arising in consequence of disability. To these claims the respondent has denied liability and raised issues in relation to the claimant's claimed disability and knowledge of it. In respect of the unfair dismissal claim, it asserted that he was dismissed for some other substantial reason.

The issues

3. The parties have agreed a revised list of the claims and issues and has

referred the tribunal to the Scott Schedules set out on pages 132-139, 147A-C of the joint bundle. These are produced at the end of this judgment.

The evidence

4. We heard evidence given by the respondent's witnesses: Mr Damon Ellis, regional Operations Manager; Ms Trudy Hillman, Human Resources Advisor, Mr Neil Owen, Branch Manager; and Ms Caroline Evelyn Peacock, Operations Director. The claimant gave evidence. In addition to the oral evidence the tribunal was referred to two lever-arch bundles of documents comprising in excess of 984 pages.

Findings of fact

5. Having considered the oral evidence as well as the documentary evidence, the tribunal made the following material findings of fact.

6. It had not been challenged that the respondent's core business is the provision of repairs and maintenance services to social housing, performing such services on behalf of social housing landlords.

7. On 17 March 2008, the claimant commenced employment with the respondent and sometime in 2013, he was promoted to the position of electrical quality supervisor, based at the respondent's Welwyn Garden City premises. His duties were as set out in the job specification. It stated that he was to be the face of the company in the tenant's home and the first point of contact. He had to effectively manage his time to complete all jobs to a high specification; to assess and plan all works and be aware of all materials necessary to complete the job; to accurately record and document work activities; provide customer response forms and be fully aware of the high levels of customer service the respondent provided. He was responsible for personal health and safety and for those affected by his actions or omissions.

8. In relation to his continuing suitability as an electrician, he was required to be assessed by the Electrical Council, the NICEIC.

9. He was contractually entitled to sick pay of 10 full weeks' pay as he worked over five years but less than 10 years. His employment with the respondent covered the few days short of 10 years. He had periods of sickness absence and concerns were raised about his workload having been managed by the respondent's managers. He asserted that his heavy workload led to periods of sickness absence. He was off work from February to May 2015 and again from 8-11 July 2016. A further period from 15-17 November 2016, in which the fit note described fever, not sleeping, stress, a fast heart rate, not thinking straight. On 18 November 2016 he returned to work, but on 28 November he was signed off for a period of a month having been diagnosed as suffering from work related stress.

10. Over a week later, on 7 December 2016, he raised a grievance alleging breach of the duty of care, failure to have a safe system of work, no

reasonable support and asked that there be implemented reasonable adjustments to assist him in carrying out his work. He stated that he wanted correspondence with him to be dealt with by email.

11. We noted that in his correspondence with the respondent, particularly human resources, as in his grievance, they are replete with references to various statutory provisions. It was clear to us and he said it in evidence, that he had been taking legal advice regarding his employment position.

12. His grievance was acknowledged by Ms Trudy Waugh, human resources adviser, who summarised his concerns in her response on 4 January 2017. Two days later he submitted a further fit note in which he was signed off from work for four weeks to 3 February 2017, the diagnosis being stress-related illness. On 20 January 2017, he cancelled meetings with the respondent as his doctor stated that his attendance at work would be injurious to his health.

13. Following the receipt of the fit note on 25 January 2017, Ms Waugh wrote to the claimant inviting him to a separate welfare and grievance meetings on 18 May 2017. She stated in relation to the welfare meeting:

> "The purpose of the meeting will be to discuss your current health status and see how we can assist you in returning to work. Furthermore, it will give us chance to catch up following your absence and address any other issues you may have regarding your health and wellbeing.
>
> This will be an informal meeting and therefore, at this moment in time, it currently sits outside the formal stages of the ill health absence management policy and procedure. Should it be likely that your absence may become sustained for an indefinite period, we may need to instigate the formal process."

14. In relation to the grievance she wrote:

> "I can confirm the grievance meeting has been arranged and is to be held after your welfare meeting at 11am. The purpose of this meeting is to enable you to explain your grievance, offer ways in which you think it could be resolved and to assist us in reaching a decision based on evidence available at the time or as collated through further investigation.
>
> The meeting will be conducted by the nominated grievance manager, which is Damon Ellis, regional operations manager and the further confidential notetaker will be present.
>
> Please note that you have the right to attend this meeting with a work colleague or trade union representative."

15. On 31 January 2017, she wrote to the claimant in which she acknowledged that he was not well enough for a face-to-face meeting and suggested that his case should be referred to occupational health. In her view it was important to have a face-to-face meeting with him. Initially the claimant objected to the occupational health referral, but on 22 February, he gave his permission. We find that at some point in time in February, not clearly defined, he went on statutory sick pay. This would be in accordance with the respondent's sick pay policy as by that date he had exhausted his 10

weeks' full pay entitlement.

16. On 6 February he wrote to Ms Waugh alleging that he had been placed on statutory sick pay and that it was detrimental to him as he was suffering from anxiety and he quoted s.44(1) of the Employment Rights Act in relation to health and safety detriment. He further asserted that the respondent had failed to implement reasonable adjustments. We make this observation that the request by an employee who is on sick leave that reasonable adjustments should be made in the workplace has little significance as there is no duty on the employer to embark on reasonable adjustments while an employee is on long term sickness absence. The purpose of reasonable adjustments is to ameliorate or to remove altogether the disadvantages the employee, who is classed as disabled, is likely to suffer while at work.

17. On 24 February 2017, Ms Waugh made her referral to occupational health. In question 7 of the form she asked of the occupational health doctor: "Should the Equality Act be applicable and were there any advice the occupational health doctor could give?" Further questions were asked of the doctor. On 28 February 2017, a further fit note was sent to the respondent stating that the claimant was unfit for work due to stress related illness and that he was unfit for the period from 28 February to 17 March 2017.

18. On 5 March the claimant lodged a further grievance in which he asserted that the respondent had failed to implement reasonable adjustments to allow him to return to work and that the whole process of reasonable adjustments was taking too long. He stated that while on statutory sick pay, he was at a financial disadvantage and, by inference, wanted to return to work to be paid his full pay. He further claimed that there had been a delay in addressing his initial grievance and referred again to discriminatory treatment based on his disability.

19. The occupational health report dated 3 April 2017, was sent to Ms Waugh. This is an important document as it is relied on by the claimant. The report was prepared by Dr J Aldegather, who wrote that the claimant had said to her that he had been medically certified off work since 28 November 2016 with symptoms of significant anxiety and depression as a result of experiencing increased perceived stress at work and he provided the details of his work. She asked him to complete the hospital and depression questionnaire and this showed anxiety and depression responses in the abnormal range. In relation to his history, the doctor noted that he denied he had ever suffered from anxiety and depression symptoms in the past and also denied any other significant medical history. In relation to her clinical examination of him, she wrote:

> "Andrew Bickers appeared unwell today. His attire was disheveled, he was unshaven and looked depressed. His mood and effect were both flat. His speech was subdued and his eye contact poor. These were all clinical signs highly suggestive of significant depression being present."

20. In relation to her opinion and recommendation, she stated:

> "In my opinion, based on today's assessment, Andrew Bickers is not fit to return to

> work in any capacity at the present time. From the history that he has given you, it appears that his condition has been caused by issues at work that lead to increased perceived stress. The Health and Safety Executive have detailed six management standards that lead to increased perceived stress at work and I believe that at least three of these are in play in this particular case including increased demands expected of Andrew Bickers, his perception of lack of support from his employers and change in management/working conditions occurring all the time. In my opinion, only when these issues have been adequately investigated and addressed can Andrew Bickers consider a return to work. I advised him today to try and meet his employers as soon as possible to discuss the issues, taking along with him a representative."

21. The doctor was asked: "Is there anything they or we could do to aid a quick return?" Her response was, "His employers could aid Andrew Bicker's quick return to work by investigating the six management standards that the HSE believe lead to increased stress at work." She further stated that from her assessment, the claimant has anxiety symptoms which prevented him from meeting with his employers.

22. In our view having regard to what the claimant said to Dr Aldegather that he had not previously suffered from depression or had a significant medical history, and having completed the questionnaire and determined that his anxiety and depression responses were in the abnormal range; that his concerns were work related, Dr Aldegather, by omission, did not write that the claimant came under the provisions of the Equality Act 2010, as a disabled person but that the work related issues should be addressed by the respondent. He was not, at that time, in a fit state to return to work.

23. With these factors in mind and taking into account that the claimant was not expected to be suffering or would suffer from depression or anxiety or stress for a period of twelve months, it was clear from reading the report that, in the doctor's view, he did not come within the provisions of the Equality Act. His mental condition was capable of being resolved as they were work related and that the issues should be addressed by the respondent.

24. On 18 May 2017, the claimant attended the scheduled welfare meeting with his representative, Mr Ron McKay. Mr John Henry, Regional Health and Safety Manager, conducted the meeting and a note taker was present. A stress, anxiety and depression questionnaire was completed by the claimant. Mr McKay said during the meeting that the claimant had been overworked for the previous two years and that had led to him have a mental illness. He worked hard with his branch manager, duty manager and compliance manager and requested from them support but this was all to no avail. He said the claimant was prescribed anxiety tablets, followed by anti-depressant medication. He attended a six weeks' cognitive behavioural therapy course and was due to start one-to-one counselling. He asserted that the claimant was left to fester without any support.

25. The absence review meeting immediately followed the welfare meeting during which the claimant's fit notes and absences were discussed. In answer to a question, Mr McKay said that the claimant believed that he was covered under the Equality Act 2010 and suggested another meeting to discuss a return to work programme. It was agreed that Mr Henry would be

the claimant's point of contact.

26. On 28 May 2017, the claimant presented his first claim form to the tribunal alleging health and safety detriment. Two days later, Mr Henry sent him by email, his outcome letter in which he summarised their discussion at the meeting on 18 May. He referred to the organisation, Mears Assist, as it provides counselling and support to the respondent's employees. He noted in his email that the claimant's current fit note was due to expire on 1 June 2017.

27. On 31 May the claimant responded to the outcome letter challenging the content of it as well as the accuracy of the notes. He referred again to discrimination arising in consequence of his disability. He stated that he would have to discuss the content of the letter with his union representative and lawyer and would like to attend the respondent's premises to discuss his return to work.

28. On 8 June the grievance meeting was held. It was initially delayed to accommodate the claimant's union representative. Mr Damon Ellis conducted the meeting. Mr Simon Rogerson, Contracts Manager, and the claimant's line manager was present and took notes. Mr McKay represented the claimant. A prepared statement was read out by him. He requested that there be a risk assessment in accordance with the respondent's policies. Although brief notes were taken at the meeting, it is clear that they discussed a proposed return to work plan prepared by human resources. We accept that at that stage the plan had not been finally agreed by the claimant and his advisors. The claimant requested that a copy of the plan be emailed to him for his review prior to an agreement.

29. On 7 June he sent an email setting out the history of his treatment. Although his fit note had expired on 1 June, he asked for 10 days' leave which was granted. A further fit note dated 13 June was sent to the respondent in which the diagnosis was depression. It stated that the claimant was unfit to return to work from 1-18 June 2017. It is clear to us, and we do find, that the claimant at that point in time, was looking to returning to work on a phased return basis. It was agreed that he would return to work on Monday 19 June 2017.

30. On Friday 16 June, Ms Waugh emailed him the phased return to work plan which set out a phased return period of six weeks. It was expected that by the seventh week the claimant would be on normal duties working normal hours. In the plan the claimant was warned by Ms Waugh of the possibility of the respondent's formal sickness absence procedure being invoked. She wrote:

> "Throughout this return to work Damon will be monitoring the situation with you and we have every confidence that your return will prove to be a success from both sides. However, in the unlikely event that either you decide the demands of the role are too great, or the company deems that you are unable to perform the role sufficiently either party reserves the right to re-address the situation. This may include amending your contractual hours; finding you a suitable role as an alternative; or as a last resort, to

terminate your contract on the grounds of capability."

31. The claimant returned to work on 19 June and attended a return to work interview with Mr Ellis. Notes were taken. It was acknowledged that the reason for his absence was depression. The completed return to work form asked whether the claimant felt that he had fully recovered from his illness and was fit to return to work. The response was "No". It was noted that the claimant's work during his absence and during the phased return, was shared between two Quality Supervisors, Mr Ian King and Mr Jamie Hayes.

32. The form also asked whether there was anything the claimant would like to talk about, and the reply was workload due to ongoing illness and that he needed full support. He gave a similar response to the question whether he felt that there was anything the respondent could do to support him. Apart from full support and reasonable adjustments, he stated regular meetings and a look at his workload.

33. We are satisfied that the fit note covering the claimant's return to work stated depression but that he could engage in amended duties. This seems to be at odds with his statement during the meeting in which he replied that he did not feel that he was fully fit to return.

34. We find that at that time the backlog of work had virtually been cleared and that Mr Ellis left it up to the claimant to decide on the work he was capable of doing. The claimant told us that during the initial two weeks of his return he "tagged along" with other electricians who visited various sites. This was to familiarise himself with the work.

35. He worked on 19 June for about four hours and was off the following Tuesday and Wednesday of that week. On the Wednesday 21 June, he emailed Ms Waugh stating that having seen his one-to-one counsellor during which they discussed the phased return to work plan, it was the counsellor's view that the phased period was short and suggested that it should be increased by a further two weeks to eight weeks. The claimant agreed and suggested that he return to full duties by the ninth week of the proposed phased return. He stated that he had been diagnosed as suffering from anxiety, stress related disorder, as well as depression. He asked that the respondent, namely Ms Waugh, confirm that there was in place reasonable adjustments. He quoted again various legal provisions. He also asked that there be a referral to occupational health in order to assist the respondent and him in determining the reasonable adjustments to be implemented and that there be a proper assessment of his impairment. He wanted assistance in performing his duties; that some of his duties be removed; that he be given more time to undertake his duties; that he be given reasonable support as he felt stressed or anxious; and that there be regular stress tests. He asserted the following:

"I am of the opinion that the company is setting me up to fail in the return to my previous role, in such that at present there are two persons performing my role/duties and given that I have been medically diagnosed with depression for which there was a causative link by the excessive pressure and workload demands I had endured that management expected to undertake then clearly the demands of my role have/are too

great for one person."

36. Ms Waugh replied to the claimant's email on 22 June in which she wrote:

> "In order for us to ensure that we are fully up to speed on any medical advice you receive, please can I request that you provide us with a copy of the advice of your Wellbeing Counsellor, as well as any other information that you believe may assist us in supporting you.
>
> With regards to your other request I would like to confirm that we will consider any risk assessments, discussions on your workload and duties, plus the support available to you as part of the return to work process. It is Damon's intention that all of these elements will be discussed with you throughout your eight week phased return to work and any steps that are required will be agreed prior to you returning to your normal working hours in week 9. Damon will make arrangements to meet with you on a weekly basis to discuss this in more detail so that we are all clear on what actions are required in order for you to receive the support and assistance required to continue to carry out your duties.
>
> I would like to take this opportunity to reassure you that it is not the company's intention to set you up to fail, as you state in your email, and to confirm to you that we are committed to working with you closely to ensure that you are fully supported during your phased return and that after you have returned to your normal duties. It is in our interest to have an open dialogue on this.
>
> I note that you have made a number of assertions regarding a disability and reasonable adjustments. I would like to confirm that at present we have no medical evidence to indicate that this is the case and that you are disabled. We also have no evidence of such a diagnosis being made by your GP. Again, should you have any medical information that may be relevant to these issues please can you provide this. In connection with this, you have raised a number of matters that relate to your grievance. I would like to confirm that I am not ignoring these points but these will be dealt with as part of the formal grievance process and would like to confirm that I have responded to your other email in reference to your grievance outcome.
>
> If you have any questions about this email please do not hesitate to contact me."

37. She told us in evidence, and we do find as fact, that her role as a human resources advisor, is to advise her managers. She did not have line management responsibility over the claimant but did liaise with Mr Ellis to be updated on the claimant's progress.

38. On 28 June 2017, Mr Ellis sent his grievance outcome to the claimant. At that time, he was managing the claimant's return to work although the claimant's direct line manager was Mr Rogerson. In relation to the grievance, he partially upheld one aspect of it, namely the excessive workload. The others he did not find in the claimant's favour. It is a detailed document covering several pages, addressing all of the points the claimant raised. The claimant was informed that if he wished to appeal, he should contact Ms Waugh within five working days.

39. On the same day, 28 June, the claimant's fit note was submitted confirming that he was fit for work but to engage in amended duties for a further period of eight weeks.

40. He wrote to Ms Waugh on 3 July expressing his intention to appeal the grievance outcome but that the five days' time limit adversely discriminated against him because of his disabilities. He requested up to 17 July to submit his appeal and this was granted by Ms Waugh, although she did not accept that he was disabled. His grounds of appeal were submitted on 17 July challenging Mr Ellis' outcome. He asserted that he did not have any regular one-to-one meetings with Mr Ellis. Mr Ellis wrote to Ms Waugh on 17 July stating, and we do find as fact, that during the first week commencing 19 June 2017, he met with the claimant. He also met with him in the second week, commencing 26 June. He further stated that he was due to meet with the claimant on 17 July to discuss matters arising from the previous week. We, therefore, find that there were meetings in the first two weeks and on 17 July 2017. We further find that there would have been informal discussions between the two of them as Mr Ellis' office was some fifteen feet or about four or five metres away from the claimant's desk. They were brief and were invariably about what the claimant would be doing on that day. We, however, find that they were not sit down discussions about the phased return to work plan and no notes were taken of these meetings.

41. The claimant returned to normal hours from 14 August 2017. At no time did either Mr Ellis or Mr Rogerson had a formal meeting with him to review his progress in light of the amended eight weeks phased return to work plan. Mr Ellis was on leave on 11 to 29 August and the claimant had been on leave earlier, but we were of the view that that should not have prevented either Mr Ellis or Mr Rogerson from meeting with the claimant to discuss his progress.

42. On 5 September the appeal meeting was held. The claimant went through his employment history and workload. He asserted that there was no risk assessment. He wanted recognition of his experience; a guarantee of job security; and compensation for the loss of earnings while on sick leave. He was told in relation to the last matter by Mr Gareth McManus, Group Health and Safety Solicitor, that compensation was not possible under the respondent's grievance process.

43. On 13 September 2017, the claimant emailed Ms Waugh complaining about the lack of weekly meetings since 19 June and the lack of support. He alleged that the company was setting himself up to fail and that it was failing in its duty of care towards him.

44. Of note, Mr Ellis met with him on 21 September 2017. Unbeknown to Mr Ellis that meeting was covertly recorded by the claimant without either his knowledge or approval, but he took brief notes. In relation to the transcript produced of the meeting by the claimant, the claimant was asked by Mr Ellis about his work. He replied that it was okay but had to re-read documents a couple of times. Some days he would not have to and could just fly through the documents. He said that he was happy to carry out the electrical checks as he was starting them and that if he had any problems, he would discuss them with Mr Ellis. He mentioned that he was working with the

respondent's new computer system, Mears Contract's Management, MCM, and was familiarising himself with it. He was asked whether there was anything he was not getting or felt that he needed. He said if there were any difficulties that he would speak to Mr Ellis. He would not know of the difficulties until he started doing his job properly. Mr Ellis noted that they had agreed to meet every Monday which was not a problem for the claimant.

45. Further in the meeting the claimant said that he was full of embarrassment and shame when he considered approaching Mr Ellis. Mr Ellis asked "How has that affected you. You can tell me how it has affected you but I don't think you can tell whoever you like." The claimant's reply was that sometimes it did not always had that effect on him. Mr Ellis reassured him that he could approach him at any time he needed to and later said this, "Can I have five minutes, just come and talk to me, if you feel it's, whatever it is, whatever the situation, and please don't think. I fucked up by not meeting you on a weekly basis, right don't put that in, don't quote me on that, I'm the type of guy that it's, just come and see with anything." The claimant agreed and again he was reassured by Mr Ellis that he could approach him. He asked why the policy and procedure not followed in the first place, to which Mr Ellis replied that they were not followed. Again, they agreed to meet every Monday.

46. On 15 September, 2 October, 1 November 2017, Mr Ellis had meetings with the claimant which were recorded covertly by the claimant.

47. We find that Mr Ellis was not only the manager of the Welwyn Garden City branch but was actively engaged in closing down the Northampton branch which required his attendance there. Consequently, he was not always available during working hours at Welwyn Garden City. This restricted the opportunities available to meet with the claimant. We, however, have noted that when on leave he did not tell the claimant who would be managing him under the phased return to work or indeed following the phased return to work.

48. On 6 November, Mr Jamie Hayes, Electrical Quality Surveyor, expressed concerns that the claimant was not able to cope with his duties because of the problems he was experiencing in accessing the respondent's computer system. He stated that the claimant, in order to carry out his work, needed to use the respondent's MCM computer system.

49. The claimant had been absent from work for some time prior to his return to work. We find that where an employee has been absent for an appreciable time their log-in details following their return to work, has to be changed by those in the respondent's IT department. When the claimant's details were changed, he had difficulty in both accessing and in using the respondent's system. Mr Ellis did not lend a hand in escalating matters to IT to get it resolved as soon as possible. We do, however, find that the respondent's IT department is a central department, not only dealing with the Welwyn Garden City branch, but other branches as well.

50. On 13 November there was a further covert recording of the meeting by the claimant between him and Mr Ellis.

51. The claimant wrote to his line manager, Mr Rogerson, on 23 November again highlighting his problems in dealing with the computer issue.

52. On 30 November, he again wrote to Mr Rogerson, who at the time was proposing to give him additional work, but stressed that as the claimant was still experiencing issues in relation to his use of the respondent's computer system, the additional work would be detrimental to him. As a consequence, Mr Rogerson decided not to pursue that matter any further and the additional work was not given to the claimant.

53. We further find that by December 2017 and thereafter, the main issues with the claimant's work were the problems he was experiencing with IT.

54. The claimant was referred to occupational health on 22 November.

55. He was due to have his annual NICEIC assessment as an Electrical Quality Surveyor, but it was postponed in early November 2017 for health reasons. It was rescheduled to take place on 1 December, but the claimant stated that he was not up to speed and was not ready to be assessed. The respondent needed him to pass the assessment to carry out his duties. In order to get clarity, occupational health was asked whether he was able to perform his duties.

Occupational health report dated 12 December 2017

56. Dr Aldegather submitted a report dated 12 December 2017, in which she specifically answered the question whether the claimant was covered under the Equality Act 2010. She confirmed that he was and that he was fit to continue to work but there was evidence that he was not fit enough to assume the full range of duties expected of him because of his ongoing clinical anxiety and depression. By March of 2018 he would have improved enough to be involved in the next scheduled NICEIC assessment. His impairment may be permanent anxiety/depression and that he was in receipt of appropriate medical support and treatment.

57. On the issue of the NICEIC assessment, we find that it was deferred to 1 March 2018.

Covert recording on 21 September 2017

58. In early January 2018 following disclosure of documents as part of the first employment tribunal proceedings, the respondent received a copy of a transcript of the recording of the meeting held on 21 September 2017, entitled "covert recording" which was a description given to it by the claimant's legal advisers. Ms Waugh, upon receipt of it, considered the fact of the recording a serious matter that required an investigation. She approached Mr John Tarrant, South 1 Supervisor, to conduct the investigation and on 12 January 2018, the claimant was written to by Ms Waugh who invited him to attend an investigation meeting with Ms Tarrant on 15 January. The allegation was "Conduct which undermines the trust that exists between the company

and the employee". The basis of the allegation was that "On 21 September 2017, you made a covert recording of a meeting with Damon Ellis, general manager, without his permission and without his knowledge." Enclosed with the letter was a copy of the respondent's disciplinary policy.

59. In the disciplinary policy it gives a non-exhaustive list of examples of what constitutes gross misconduct. The list includes "any conduct which undermines the trust that exists between the company and the employee."

60. Notes were taken of the meeting with Mr Tarrant in which the claimant said that there was nothing in the employee handbook that prohibited him from recording meetings. He was asked whether he had permission to record the meeting. He replied that he did not need permission. He was asked whether he believed it was right to record someone without telling them and again he repeated that there was nothing in the handbook that prevented him from doing so. He was asked whether he had made recordings of other meetings, he replied "I can't recall to be honest. Stress level through the roof due to this meeting so not feeling clever at the moment. Given my depression and anxiety levels have sky rocketed, having problems recollecting properly."

61. He was asked whether from memory he could recall only one recording, he responded, "As I have stated I'm having problems remembering due to panic levels and anxiety levels caused by this meeting." He was asked why he recorded the meeting, he replied that notes of meeting with managers including Mr Ellis, were inaccurate and a breach of trust. Not a true reflection of the outcome. He was asked "What have you done with the recordings". He said "..business has a copy it's in the company hands". He was then asked how he sent them. He said that he was unable to discuss it. He was asked whether he was aware of the seriousness of recording meetings. His response was for Mr Tarrant to show him in the handbook where it was prohibited, and he had nothing else to say. He was asked whether he had anything else he would like to add. He said that he felt that the meeting was discriminatory and amounted to harassment as a result of his disability. He referred to his anxiety levels which he said had gone through the roof and felt that he was going to have another panic attack. He requested that the meeting be closed and that he be provided with a copy of the notes. At that point Mr Tarrant decided to have a break and said to the claimant that he would let him know whether he needed to speak to him further. The claimant said that he may leave work as he was feeling unwell. He was later asked whether he needed a representative but said that it was too late.

62. Having had his investigative meeting with the claimant Mr Tarrant decided that the matter should proceed to a disciplinary hearing as the claimant had admitted recording a meeting and that there was the possibility that there were other covert recordings by him. He was of the view that the allegations amounted to gross misconduct.

63. The claimant did not attend work on 16 January and informed Mr Ellis and Mr Rogerson that he was feeling unwell. A joint decision was taken by Mr Tarrant and Ms Waugh that he be suspended on full pay pending the outcome of disciplinary proceedings. On 24 January 2018, the claimant was invited to a disciplinary hearing scheduled to take place on 1 February.

The allegations were the same as set out in the invitation to the investigation meeting but Ms Waugh, who had changed her name to Ms Hillman, informed the claimant about one possible outcome being the termination of his employment and that he had the right to be accompanied by either a work colleague or a trade union representative. The meeting did not proceed as scheduled on 1 February but did take place on 7 February 2018.

Disciplinary hearing on 2 February 2018

64. It was chaired by Mr Neil Owen, general manager. Ms Anna Kimberley, human resources business partner, was also present to advise Mr Owen. The claimant attended and was accompanied by Mr Peter Falvey, Union Convenor. Notes were taken. Again, the claimant repeated his position that there was no prohibition against recording meetings as it was not stated in the respondent's policies and procedures. In response to the question why he had recorded the meeting, the claimant said that he did it out of fear "the reason being the company are out to sack me. The minutes of other meetings are clearly misleading and inaccurate and I done it to preserve the situation. I choose to record the back to work programme meetings one-to-one. I believe Damon Ellis is a liar." He was asked in what context. He replied that what they were going to provide never materialised. He said that Mr Ellis was aware of his disability, panic attacks, stress, anxiety and depression. He was asked about his next legal case, his response was that he did not feel he should talk about it.

65. Mr Owen then asked this question, "Lack of distrust from the business?" The claimant's response was "Previous managers, HR, line manager (Damon Ellis), Jamie Theonix, Keith Le Galliene, Karen Bennett, Bally Mann, Paul Steer, Compliance Manager, Vic Oddy, Stephen Gammon, aware of my situation, promised me everything, promised me help, as they were aware I was not coping. Help on[in] my role, but will not go into detail."

66. He was asked by Mr Owen whether he felt let down by management, by the branch and whether he felt from someone else's point of view, undermined by engaging in a covert recording. He put to the claimant that if he had a back to work meeting with him but it was recorded, he would consider that as the claimant "tripping" him up by recording the meeting when he was trying to help him. He would feel let down. The claimant replied "Take on board how you feel but explained how let down by previous management and the company and done it to preserve the situation. I have more recordings and they are in the hands of the lawyer."

67. Mr Owen told the claimant that he was not going to give a decision that day. The claimant repeated that he was crying for help and was shouting from the rooftop, but it all went unheard. He said he worked his way up over the previous nine or ten years and since 2014, his work had quadrupled. He was asked whether he was satisfied that he had said everything he wanted to say, to which he replied "Yes".

68. What we have noted from the notes of the meeting was that the claimant did not say that he recorded covertly the meeting on 21 September and

other meetings because of his inability to recall what was said. He admitted to having more recordings which were in the hands of his lawyers. It appeared to us that the meetings were recorded in order strengthen any future claims he may have against the respondent.

69. Mr Owen told the tribunal that he had a discussion with the HR adviser and an outcome letter was drafted. He had read it and agreed with the content, but it was "pp'd" by Ms Waugh and sent to the claimant dated 13 February 2018. This is an important document and the salient part of it we now recite. Mr Owen wrote:

> "On 21 September 2017, you made a covert recording of your meeting with Damon Ellis, general manager, without his permission and without his knowledge. As confirmed by you during the meeting, this is not an isolated incident and you have made several recordings of this nature.
>
> The above matter was discussed in detail and you were given every opportunity to provide any information and an explanation in relation to your actions. You explained that you trusted nobody within the Welwyn branch and said that the recordings were done out of fear. You believe that the company were intending to terminate your employment so you recorded conversations to preserve the situation. I have taken on board your comments, regarding your service to date along with the evidence available to me. I believe these allegations are to be regarded as serious misconduct which would normally warrant a final written warning. However, given the seriousness of your actions and the fact that you do not trust the management structure within the Welwyn branch, I believe that your position has become untenable and the relationship between yourself and Mears has become unsustainable. As a result, I write to confirm that your employment with Mears will terminate on the basis of some other substantial reason (SOSR).
>
> You are entitled to ten weeks' notice of your contract of employment. Your employment will therefore terminate on 24 April 2018. At this stage you will not be required to attend work during your notice period and in accordance with your contract of employment we revoke the expressed term requiring you to serve your notice on garden leave. The effect of this is that you remain a current employee throughout your notice period, and save for the requirement to attend work, (unless advised otherwise), all other terms and conditions of employment will apply.
>
> During the interview in ten weeks, we will send the vacancy list to you, by email, on a weekly basis for the duration of your notice period to enable you to review the most up to date vacancies. If there are any suitable vacancies within Mears Ltd please contact Lorraine Beasley, recruitment manager, with the reference number and she will reply to you with additional details ie job descriptions and salary to apply accordingly."

70. The claimant was advised of his right to appeal against the decision within five working days.

71. We make the following findings in relation to the meeting. Although the claimant did during the investigation interview refer to breach of trust, it was Mr Owen who said the words, "lack of distrust" in response to what the claimant said that, historically, various individuals had promised him support but the support never materialised.

72. Mr Owen did not speak to Mr Ellis but during Mr Ellis' evidence before us he

said the recording of the meeting on 21 September, was indeed a serious breach of trust but the relationship between him and the claimant was not beyond repair. Mr Owen did not speak to Mr Ellis in order to ascertain whether or not the relationship between the claimant and the respondent generally had broken down, was untenable or unsustainable. He did not speak to human resources and to the individuals the claimant named in support of his assertion that he did not have trust in the business. Their meeting lasted some 20 minutes. The claimant's performance was not an issue.

73. As we have already found, the problem for the claimant by that stage was having access to relevant materials from the respondent's computer system.

74. Mr Owen said that he felt that the covert recording was not gross misconduct but that it was immoral and that he had taken into account the fact that the claimant had referred to Mr Ellis, a liar.

75. These are our concerns about the conduct of the meeting between the claimant and Mr Owen.

The appeal

76. The claimant appealed on 20 February 2018 setting out 10 matters. In the final paragraph he wrote:

> "Because of the way the company has treated me, I can no longer face any member of the company to obviate a mental breakdown, I prefer that the appeal process be conducted by written correspondence."

77. The last paragraph is of significance because the claimant wrote that he wanted the appeal process to be dealt with by way of written correspondence. In earlier correspondence he stated that he wanted some issues to be addressed by correspondence. What he said in evidence to this tribunal was that he was not saying that Ms Caroline Peacock, Operations Director, who conducted the appeal, should only correspond with him in relation to her appeal outcome.

78. Ms Peacock told us she spoke to Mr Ellis but did not speak to the individuals named by the claimant during the disciplinary hearing. No notes were taken of her discussion with Mr Ellis. She did not speak to the claimant to get an account from him of the issues arising out of her conduct of the appeal or indeed in relation to his grounds of appeal because she construed the last paragraph in his grounds of appeal as stating that she could only correspond in relation to her outcome. There was, therefore, no opportunity afforded to the claimant to reply to any matters of concern to Ms Peacock or to what Mr Ellis had said to her.

79. Mr Rogerson, the claimant's line manager, and Mr Owen were not spoken to by her. Mr Rogerson was not approached regarding his relationship with the claimant. We also note that this is a case in which the respondent dismissed the claimant for some other substantial reason as the relationship

between him, the branch, and the respondent generally, had irretrievably broken down, yet we note that Mr Owen and Ms Peacock allowed the claimant the opportunity of applying for vacant positions. Had he been successful, he would have been retained by the respondent. In our view this is inconsistent with the decision taken by both of them that the relationship between the claimant and the respondent had irretrievably broken down.

80. In Ms Peacock's outcome letter dated 6 April 2018, she stated on more than one occasion, that she was unable to elicit a response from the claimant because she had interpreted his grounds of appeal as not allowing her to do so but only with reference to her outcome. She did not disturb the findings and conclusions of Mr Owen. Her role, she told us, was to review his decision. She did not appreciate that there were serious investigational failings on the part of Mr Owen.

81. The respondent commissioned a psychological report on the claimant, which was completed on 5 March 2018 by Ms Sharon Beattie, Occupational Psychologist. In it she stated that the claimant was suffering from a disability since 28 November 2016 and considered it reasonable to assume the respondent was aware of the impairment. Neither Mr Owen nor Ms Peacock read this report at the time they came to their decision.

82. Those are the tribunal's material findings of fact.

Submissions

83. We have taken into account the submissions by both Mr Martins, on behalf of the claimant, and by Ms Owen on behalf of the respondent. We have also considered the relevant law in relation to the claims. We do not intend to repeat their submissions herein having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. In addition, we have taken into account the case of Dunn v Secretary of State for Justice and Another [2018] EWCA Civ 1998 referred to us by Ms Owen.

The law

84. The Section 6 and Schedule 1 of the Equality Act 2010, "EqA." defines disability. Section 6 provides;

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

85. Section 212(1) EqA defines substantial as "more than minor or trivial." The effect of any medical treatment is discounted, schedule 1(5)(1) and where a sight impairment is correctable by wearing spectacles or contact lenses, it is not treated as having a substantial adverse effect on the person's ability to carry out normal day-to-day activities, schedule 1(5)(3).

86. Under section 6(5) EqA, the Secretary of State has issued Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011), which an Employment Tribunal must take into account as "it thinks is relevant."

87. The material time at which to assess the disability is at the time of the alleged discriminatory act, Cruickshank v VAW Motorcast Ltd [2002] IRLR 24

88. In Appendix 1 to the Equality and Human Rights Commission, Employment: Statutory Code of Practice, paragraph 8, with reference to "substantial adverse effect" states,

> "A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people."

89. The time taken to perform an activity must be considered when deciding whether there is a substantial effect, Banaszczyk v Booker Ltd [2016] IRLR 273.

90. In relation to discrimination arising in consequence of disability, section 15 provides,

> "(1) A person (A) discriminates against a disabled person (B) if --
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

91. In paragraph 5.7, Equality and Human Rights Commission Code of Practice on Employment (2011), unfavourable treatment means being put at a disadvantage. This will include, for example, having been refused a job; denied a work opportunity; and dismissal from employment, paragraph 5.7.

92. In paragraph 4.9 it states the following,

> " 'Disadvantage' is not defined by the Act. It could include denial of an opportunity of choice, deterrence, rejection or exclusion. The courts have found that 'detriment', a similar concept, was something that a reasonable person would complain about - so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker could reasonably say that they would have preferred to be treated differently."

93. In the case of Pnaiser v NHS England [2016] IRLR 170, the EAT, Mrs Justice Simler DBE, held that the "something" that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant or more than trivial, influence on the unfavourable treatment and amount to an effective reason for or cause of it. A tribunal should not fall into the trap of substituting motive for causation in deciding whether the burden has shifted. A tribunal must, first,

identify whether there was unfavourable treatment and by whom in the respects relied on by the claimant. Secondly, the tribunal must determine what caused the treatment or what was the reason for it. An examination of the conscious and unconscious thought processes of the alleged discriminator will be required. Thirdly, motive is irrelevant as the focus is on the reason or cause of the treatment of the claimant. Fourthly, whether the reason or cause of it was something arising in consequence of the claimant's disability. The causation test is an objective question and does not depend on the thought processes of the alleged discriminator. Fifthly, the knowledge required in section 15(2) is of the disability.

94. A similar approach was taken in the case of City of York Council v Grosset UKEAT/0015/16 relying on the guidance in Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305, Langstaff P.

95. In determining justification, an Employment Tribunal is required to make its own judgment as to whether, on a fair and detailed analysis of working practices and business considerations involved, a discriminatory practice was reasonably necessary and not apply a range of reasonable responses approach, Hardy & Hansons plc v Lax [2005] ICR 1565.

96. Harassment is defined in section 26 EqA as;

> "26 Harassment
>
> (1) A person (A) harasses another (B) if-
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of-
> (i) violating B's dignity, or
> (ii) creating and intimidating, hostile, degrading, humiliating or offensive environment for B"

97. In deciding whether the conduct has the particular effect, regard must be had to the perception of B; other circumstances of the case; and whether it is reasonable for the conduct to have that effect, section 26(4).

98. In this regard guidance has been given by Underhill P, as he then was, in case of Richmond Pharmacology v Dhaliwal [2009] ICR 724, set out the approach to adopt when considering a harassment claim although it was with reference to section 3A(1) Race Relations Act 1976. The EAT held that the claimant had to show that:

(1) the respondent had engaged in unwanted conduct;

(2) the conduct had the purpose or effect of violating his or her dignity or of creating an adverse environment;

(3) the conduct was on one of the prohibited grounds;

(4) a respondent might be liable on the basis that the effect of his conduct had produced the proscribed consequences even if that was not his purpose, however, the respondent should not be held liable merely because his conduct had the effect of producing a proscribed consequence, unless it was also reasonable, adopting an objective test, for that consequence to have occurred; and

(5) it is for the tribunal to make a factual assessment, having regard to all the relevant circumstances, including the context of the conduct in question, as to whether it was reasonable for the claimant to have felt that their dignity had been violated, or an adverse environment created.

99. Whether the conduct relates to disability "will require consideration of the mental processes of the putative harasser", Underhill LJ, GMB v Henderson [2016] EWCA Civ 1049.

100. Section 98(1) Employment Rights Act 1996 ("ERA"), provides that it is for the employer to show what was the reason for dismissing the employee. Dismissal for "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held", is a potentially fair reason, s.98(1)(b). Whether the dismissal is fair or unfair having regard to the reason shown by the employer, the tribunal must have regard to the provisions of s.98(4) which provides:

> "Where the employer has fulfilled the requirements of subsection (1), and the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employees undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

Conclusion

Disability

101. In relation to the issue of disability, the claimant relies on stress, anxiety and depression. There is not much dispute between the parties on his disability. The issue is knowledge. Although the occupational health report dated 3 April 2017, referred to depression, as we have already found, it was work-related. The claimant did not say to Dr Aldegather that he had a history of depression. In the doctor's view the work-related issues were capable of being resolved and there was no evidence that it was likely to last at least twelve months. The respondent did not have knowledge from that report that the claimant was covered under the section 6, Equality Act 2010. It did have knowledge from 12 December 2017 following receipt of the second occupational health report because, by then, the claimant had been suffering in the way described for over a year. He was, therefore, covered under the Act. Although there was the concession that he was disabled from 28 November 2016, the respondent's knowledge of it, the tribunal finds, was from 12 December 2017.

Discrimination arising from disability

102. It follows from this that matters relied upon by the claimant prior to that date cannot be substantiated as part of his disability claims. However, in relation

to the claims as set out in the Scott Schedule and in the agreed list of issues, as regards discrimination arising from disability, the claimant referred to the failure to undertake a risk assessment; not being supported; not having regular one-to-one meetings; not chasing up his IT issues; and not following the occupational health recommendations. The problem here is what was the something arising? It cannot be stress and anxiety as those are aspects of the claimant's disability.

103. If he is relying on stress and anxiety as the something arising, we agree with Ms Owen's submissions that it is a claim of direct disability discrimination. It was not until submissions we were told in answer to questions put by the tribunal to Mr Martins, that the something arising was what was said by the claimant during the meeting on 21 September 2017, that being he felt ashamed and embarrassed to approach Mr Ellis. If that be the case, was Mr Ellis aware of it? He would only have become aware of it from 21 September. Any acts relied on between that date up to 12 December 2017, would have to be disregarded.

104. The claimant has not established that Mr Ellis was aware of the something arising and/or that formed part of the alleged failures or the reason for the failures. Equally, no evidence was adduced purporting to show that Ms Waugh was aware of the shame and embarrassment the claimant experienced in approaching Mr Ellis or indeed possibly her. From the evidence, it did not appear that he was ashamed and/or embarrassed to approach her. He had corresponded with her. His embarrassment and shame were not in the mind of Ms Waugh in relation to any of the alleged failures.

105. Those matters as set out in the Scott Schedule and in the agreed list of issues, we have come to the conclusion are not well-founded and are dismissed.

106. In relation to the dismissal of the claimant being discrimination arising in consequence of disability, here the claimant relies as the "something arising", on his poor memory to explain the covert recording on 21 September 2017. Was that a factor in the mind of Mr Owen? What the claimant said to Mr Owen was that the notes were inaccurate and that there was a breach of trust. He was unable to recall whether he had made any other recordings covertly. He also said that he recorded out of fear that the respondent was about to dismiss him and accused Mr Ellis of being a liar. We were not convinced that he had demonstrated the something arising. He did not say that the reason why he had engaged in covert recordings was because of his inability to recall what was said at meetings at which he had been present. Not having disclosed that, Mr Owen was not aware of it. He was not aware that that was the "something arising". We have come to the conclusion that this further claim of discrimination arising in consequence of the claimant's disability, is not well founded.

<u>Harassment related to disability</u>

107. In relation to harassment related to disability, the claimant referred to a

backlog of work but when he returned to work there was no backlog as we have found as the work was done in his absence by two Electrical Quality Surveyors. Mr Ellis gave the claimant the discretion to determine the sort of work he could do and was not under any pressure from him.

108. The IT problems experienced by the claimant, we have found, could have been escalated by Mr Ellis. A risk assessment could have been undertaken by the respondent in relation to the claimant's work. The question, however, to be answered is whether those matters were related to the claimant's disability? Taken in context, Mr Ellis allowed the claimant to decide the work he could do and did meet with him in the first two weeks following his return. He also met with him on 7 July. The claimant was provided with support from Mr Hayes, who was also under the management of Mr Ellis. Mr Ellis was engaged in closing the Northampton branch and could only have been aware of the claimant's disability on or after 12 December 2017. Taking all of these matters into account we have come to the conclusion that the alleged unwanted conduct on behalf of the named individuals were not related to the claimant's disability and but may, in our view, be the consequence of negligence or an oversight on the part of Mr Ellis and/or Ms Waugh in failing to provide the claimant with the necessary support. The allegations of unwanted conduct were not related to the claimant's disability.

Unfair dismissal

109. In relation to the claimant's unfair dismissal claim, we have made findings in relation to the inadequate investigation. We have found that there was little evidence in support of the conclusion Mr Owen came to that the relationship with the branch and with Mears was untenable and unsustainable. His conclusion was based, in our view, on the response to a question he had put to the claimant about lack of trust in the business. He did not appreciate the context in which the claimant's reply was given. It was historical. He did not question Mr Ellis or the other managers. He focused was on the claimant's answer to his alleged distrust question. He believed that the claimant's action was morally wrong and took into account the fact that the claimant had accused his manager, Mr Ellis, of being a liar but did not question Mr Ellis about that accusation and whether it would have affected their relationship.

110. Ms Peacock, in her review of the decision to dismiss at the appeal stage, did not consider these apparent and obvious failures. She did not relay to the claimant the content of her discussion with Mr Ellis. In her outcome letter, she referred to her being unable to discuss matters with the claimant because of what he had stated in his grounds of appeal about corresponding with him but, as we have found, the claimant was not saying that the respondent could not correspond with him in relation to the appeal process. In fact, quite the reverse. He wanted the respondent to liaise with him during the appeal process.

111. We have come to the conclusion that with these significant failings the claimant's dismissal was unfair. There is very limited evidence to support

the conclusions came to by Mr Owen and Ms Peacock.

112. In relation to whether or not had a proper procedure been followed, the claimant would have been dismissed in any event? Here we cannot come to such a conclusion because of the significant failings on the part of Mr Owen and Ms Peacock. It renders the assessment difficult and is pure speculation whether the application of a proper procedure would have made no difference to the outcome.

113. However, in relation to conduct, we do take into account the judgment in the case of Phoenix House Ltd v Tatiana Stopman UKEAT/0284/17/00. This is a judgment that was discussed during this hearing. In it the Employment Appeal Tribunal acknowledged that it was now common practice for individuals to record meetings. This is because of the widespread use of mobile phones. In the absence of issues of entrapment, the employee should raise with the employer or should discuss with the employer, whether he or she could record a meeting. Failure to do so, stated the Employment Appeal Tribunal, would generally amount to misconduct.

114. The claimant not only secretly recorded the meeting on 21 September but other meetings as well. He had not sought permission to do so and having regard to the basic and compensatory awards, we do take his misconduct into account. We apply section 123(6) ERA 1996. There was culpable and blameworthy conduct on his part, Nelson v BBC (No.2) 1980 ICR 110, judgment of the Court of Appeal. He was, however, fearful for his job and had concerns about whether he could rely on the statements given by his managers about supporting him. Taking these matters into account, we have come to the conclusion that we will reduce the assessment of the basic and compensatory awards by 20%.

Compensation

115. The tribunal heard evidence from the claimant in relation to his current and future losses. The parties were able to agree on a number of matters. The claimant is entitled to the basic award. On full entitlement this is £6,604 less 20%, £1,320.80, gives the figure of £5,283.20 which is the figure we award him in relation to the basic award.

116. With regard to the loss of statutory rights, the parties initially agreed £350.00 but that now is seen as not reflective of current the trend in Employment Tribunals' judgments. Indeed, the guide issued some time ago by a previous President of the Employment Tribunals, His Honour Judge G Meeran, was to suggest that the tribunal should take into account the unfairly dismissed employee's gross weekly pay, but that was only a guide and not a practice direction. Taking into account the claimant's length of service with the respondent, which was close to 10 years, we have decided to award him for the loss of his statutory rights, the sum of £500.

117. In relation to his loss of earnings to date, from the accounts he has submitted we find that he worked on a self-employed basis as a labourer with a company called Armada Property Group, "Armada", from 4 June

2018 until 23 August 2019. This was work he secured through the assistance of a friend. The claimant worked for Armada for 64 weeks. His net monthly earnings were £2,364.90. His weekly pay was £545.75. He earned during his work with Armada over the 64-weeks period, £34,928.00. This has to be deducted from the agreed figure of £36,542.88, being his loss from 24 April 2018 to 10 September 2019, a period of 72 weeks. That gives the figure of £1,614.88 net.

118. In relation to future loss, this has caused some debate. The claimant told us that during his work with Armada, he did not apply for any work. We have seen, however, a list of job vacancies he considered and some of the vacancies included work as an Electrical QS; as an electrician; and work unrelated to the electrical industry, such as full-time/part-time administrator, site supervisor, and repairs administrator. He told us that he did not apply for any job as an EQS because he did not have the confidence. He also told us that he had discovered that from January this year, in order to work as a qualified NICEIC electrician or EQS, he would need to undertake and satisfy 18 of the Council's wiring requirements as well as the assessment. The wiring requirements would require him, at the very least, to take a one-day course at a cost of about £130.00 and the electrical NICEIC course of £1,300. The 18 wiring conditions which were introduced in January this year, will become effective from January 2020.

119. The claimant was informed on 9 August 2019, by the Armada that the work that he was doing and the work the company was doing on three of its sites were due to come to an end on 23 August 2019. Notwithstanding that notice, he did not apply for any positions we were referred to. He made reference to these impending tribunal proceedings, but in many ways these tribunal proceedings would have helped him as he would have been able to demonstrate that he made further attempts at mitigating his losses. The reality is that apart from applying for the job with the Armada in June 2018, he made no further applications for employment. Although he referred to lack of confidence, that does not feature in the psychological report dated 5 March 2018, nor does it feature in a later medical report from his doctor's surgery.

120. We have come to the conclusion that it was possible for the claimant to have applied for work if he was seriously going to re-engage himself in the electrical field or in other positions. If he was anxious to again use his knowledge and skills as an electrician, it was important for him to have embarked on that process as soon as possible. Our conclusion is that it would be just and equitable to limit compensation up to today's date and not award future loss which the respondent would be required to pay when the claimant had not demonstrated, from medical evidence, a lack of confidence in re-engaging in the work of an electrician or an EQS.

121. With regard to the figures, in relation to loss of earnings to date, 20% of £1,614.88 is £1,291.90. This is added to the basic award of £5,283.20, which is £6,575.10. We add the loss of statutory rights which we have assessed at £500.00 less 20%, £100, adds £400 to £6,575.10, which is £6,975.10. That is the compensation we order the respondent should pay

to the claimant for having been unfairly dismissed. This is the judgment of this tribunal.

122. We set out below the agreed list of the legal and factual issues in dispute and the Scott Schedules with the respondent's responses, as referred to in paragraph 3 above.

The Agreed list of issues

1. Unfair dismissal

   (i) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was some other substantial reason s.98(1)(b).

   (ii) If so, was the dismissal fair or unfair in accordance with ERA s.98(4)?

Remedy for unfair dismissal

   (iii) If the claimant was unfairly dismissed and the remedy is compensation (as it is in this case):

      a. If the dismissal was procedurally unfair what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed/have been dismissed in time anyway? See Polkey v AE Dayton Services Limited [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825;

      b. Would it be just and equitable to reduce the amount of the claimant's basic award because of blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2) and if so to what extent?

      c. Did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent and, if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award pursuant to ERA s.123(6)?

      d. Should there be any further reduction to account for the claimant's failure to mitigate losses incurred?

      e. Did either party unreasonably fail to comply with a relevant ACAS Code or Practice? If so, would it be just and equitable in all the circumstances to increase any compensatory award and if so by what percentage up to a maximum of 25% (pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("Section 207A")?

2. Equality Act, Section 15, Discrimination arising from disability

(iv) Has the respondent treated the claimant unfavourably as a consequence of:

a. Failing to provide the claimant with a risk assessment or support at work; and/or
b. Dismissing the claimant on 13 February 2018 with effect from 24 April 2018?

(v) Does (a) and/or (b) amount to unfavourable treatment in accordance with section 15 of the Equality Act 2010 (the Act)?

(vi) Can the respondent objectively justify its actions in accordance with section 15(2) of the Act?

3. Equality Act, Section 26, Harassment related to disability

(vii) Did the respondent fail to offer the claimant support or adjust his tools to enable him to carry out his duties? The claimant states that this support was offered on 7 June 2018 by Trudy Waugh but did not take place.

(viii) If so, was that conduct unwanted?

(ix) If so, did it relate to the protected characteristic of disability?

(x) Did the conduct have the purpose of (taking into account the claimant's perception, the other circumstances of the case and whether for the conduct to have that effect) the effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Remedy for successful Equality Act claim

(xi) If the claimant success, in whole or in part, the tribunal will be concerned with issues of remedy, and, in particular if the claimant is awarded compensation and/or damages will decide how much should be awarded. The claimant has requested compensation. In establishing what, if any, compensation and/or damages is due the tribunal should consider;

a. If it is possible that the claimant would still have been dismissed at some relevant stage even if there had been no discrimination? What reduction if any should be made to any award as a result?

b. Did the respondent unreasonably fail to comply with a relevant ACAS Code of Practice? If so, would it be just and equitable in all the circumstances to increase any compensatory award and if so by what percentage up to a maximum of 25% pursuant to section 207A?

c. Did the claimant unreasonably fail to comply with a relevant ACAS Code of Practice? If so, would it be just and equitable in all the circumstances to decrease any compensatory award and if so by what percentage up to a maximum of 25% pursuant to section 207A?

d. What, if any, injury to feelings award is due in accordance with the appropriate Vento band?

The Scott Schedules

Claim One: Harassment – Section 26 Equality Act 2010					
Act/Conduct complained of	Date(s) of act/conduct complained of	Person(s) responsible for the act/conduct complained of and which of the respondents are said to be liable for each act complained of	Explain the effect of the conduct complained of on the claimant	Set out which of the disabilities relied on by the claimant	Details of all facts relied on in support of the contention that the act/conduct complained of related to disability
On returning from long term sick leave in June 2017 at my RTW interview with Damon Ellis, I made it clear that I was not 100% fit but could carry out my duties with support. However, despite me putting DE on notice of my health, I was required to process numerous bac logs of test certificates for the respondent's properties. I was not 100% fit and struggled to cope.	June 2017-April 2018	Damon Ellis and Simon Rogerson and Trudy Waugh.	My anxiety heightened, I was confused and frustrated over the deliberate lack of active support from my managers and their expectation that I would be competent to complete all of the test certs backlog without adequate support.	Depression and anxiety.	DE and ST were aware of my depression, such that Trudy Waugh sent me an email on 22 June 2017 offering me support which was not forthcoming.

The respondent accepts that harassment has a wide scope and covers matters which relate to the relevant protected characteristics, in this case disability.

The respondent understands that the claimant has identified Ms Waugh as the harasser.

Ms Waugh was the Mears HR Advisor assigned to the claimant's return to work process (and other employment matters). Ms Waugh is based in the respondent's Head Office in Gloucester and sits within the central HR Team. Ms Waugh was allocated the claimant's work related matters through the respondent's centralised HR function called Service Now.

The respondent understands there was significant email traffic between the claimant and Ms Waugh during the month of June 2017. The respondent has viewed all emails during this time. The emails that Ms Waugh sent during this time related to the claimant's return to work and on 7 June 2017 Ms Waugh (acting as the liaison) confirmed to the claimant that Mr Ellis could meet with the claimant on 8 June 2017 for a return to work meeting. When the claimant did not respond Ms Waugh chased him for his attendance. Following these emails and the return to work meeting that the claimant had with Mr Ellis (not Ms Waugh) Ms Waugh acted as liaison for agreeing the claimant's phased return to work programme which was confirmed on 16 June 2017.The claimant then returned to work on 19June 2017 on the basis of the program me agreed.

The email traffic was purely as a result of Ms Waugh facilitating the claimant's return to work in Welwyn Garden City. It is clear that the purpose of Ms Waugh's email is not violation of the claimant's dignity or the creation of an environment containing harassment and nor was that the effect of the email. The purpose was for Ms Waugh to facilitate the claimant's return to work by acting as a liaison between and employee and his direct line manager.

The test as to whether conduct has the relevant effect is not subjective, that is to say the conduct is not treated as harassment and violating the claimant's dignity merely because the claimant believes it does. The Tribunals have said that it must be conduct which could reasonably be considered as having that effect. The email traffic was purely as a result of Ms Waugh facilitating the claimant's return to work in Welwyn Garden City and would not reasonably be construed as harassment.

We understand the claimant's perception of the conduct is relevant, however it is clear that the claimant is not saying that he did not want the email(s) from Ms Waugh, only that the support Ms Waugh offered was then allegedly not forthcoming.

The intention of Ms Waugh (and the others) is also relevant in determining whether the conduct could reasonably be considered to be a violation of dignity, it is also clear that this was not the intention of Ms Waugh, or anyone else. The email was an extension of support. It is the respondent's position that the conduct relied upon by the claimant has harassment is not reasonable.

Claimant's Scott Schedule

A summary of what happened	When and where it happened	Who was present on behalf of the respondent	The basis upon which the claimant complains that the event was an act of disability
A. Discrimination arising from disability – Sections 15(1)(a)(b) Equality Act 2010			
1. Failure (Mr Ellis) to provide risk assessments or support at work (Mr Ellis , Ms Waugh)	It happened at the workplace (Welwyn Garden City Branch) and via an email.	Mr Ellis	I suffered unfavourable treatment by the lack of support and guidance required to perform my duties. I suffered unfavourable treatment when I realised that I was not risk assessed on my ability to manage to carry out my duties. I was not adequately

			supported by Damon Ellis or Jamie Hayes.
			The OH recommendations were not engaged or implemented by the respondent. On balance I realised that the unfavourable treatment described above was because of that something depression and anxiety related disorder. That it would have been a proportionate means of achieving a legitimate aim for TW to have removed the disadvantage I suffered by observing and properly implanting all the adjustments she raised in her email to me together with the OH's recommendations.
2. Dismissal on 13 February 2018 effective from 24 April 2018 (by reason of SOSR)	I was informed by letter of my termination.	Neil Owen	My dismissal was an act of unfavourable treatment arising from that something heightened anxiety and stress together with the level of medication that causes me to suffer a lack of self-confidence, fear, self-doubt and trust amongst persons around me which was the symptoms behind my conduct of 27 September 2017 – covert recordings and other periods. I covertly recorded meetings. That said, it would have been a proportionate means of achieving a legitimate aim for TW and the respondent to have removed the disadvantage I suffered by engaging adjustments as early as 2015-2017, when I put them on notice of my work issues by observing and properly implementing all of the adjustments TW raised in her email to me together with the OH's recommendations.
3. Failure to offer me	This was offered (via email) on 22 June 2017	The email was sent by Trudy	I was assured that support would be provided upon my

support and adjustment tools to carry out my duties.	whilst the claimant was at work.	Waugh.	return from sick leave which amounted to unwanted treatment which caused me to feel worthless and denigrated because I trusted the HR officer.

_____
Employment Judge Bedeau

Date: …20 December 2019…….

Judgment sent to the parties on

.....

.....
For the Tribunal office