EMPLOYMENT TRIBUNALS

Claimant ***Respondent***
Mr N Hallam Cooper Tire and Rubber Europe Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NORTH SHIELDS ON 2-5 December 2019
EMPLOYMENT JUDGE GARNON Members Ms. L Jackson and Mr. T A Denholm
Appearances
For Claimant in person
For Respondent: Mr. S Roberts of Counsel

JUDGMENT

The claims are not well founded and are dismissed

REASONS (bold print is our emphasis and italics are quotations)

1. Introduction and Issues

1.1. The claim, presented on 24 December 2018, is of three forms of unlawful conduct under the Equality Act 2010 (EqA): discrimination under s15, harassment and victimisation, all connected to the protected characteristic of disability. On 4 April 2019 Employment Judge Johnson ordered the claimant to give the further particulars. He did so making seven allegations. In his claim form, he had included "direct discrimination" and "failure to make reasonable adjustments" but did not refer to either in his Schedule of claims. Those two headings are not pursued.

1.2. On 7 June the respondent conceded disability, and Mr Roberts confirmed today knowledge, at the time of allegations 2 to 7 but not 1. At a preliminary hearing Employment Judge Garnon conducted on 7 October he said allegations 6 and 7 would have required an amendment, and he could not see the Tribunal listing an contested application to amend and preserving the original trial date. After taking time to consider, the claimant decided to rely only on allegations 1-5.

1.3. Allegation 1 is of s. 15 discrimination. **Sick pay** for absence arising from alleged disability beyond the contractual period for full pay was paid **at half rate** in December 2017. The claimant says the respondent has extended the full pay period in other cases but did not do so for him. The claim is out of time but the claimant says he did not discover why he was not paid in full until he was furnished with documents after a Subject Access Request (SAR) on 2 November 2018. On that basis, it **may be** just and equitable to extend the time limit. The respondent does not

admit he was disabled at the time. If he was, it denies it was aware, or ought reasonably to have been aware , he was then disabled.

1.4. Allegation 2 is of victimisation, the detriment alleged being an **email referring to claimant dated 24 September 2018**. The claimant says his then manager Mr Mitchell had formed the view the claimant would do a protected act. The respondent denies he did, denies the email is a detriment and, if it was, denies that caused the detriment.

1.5. Allegation 3 is of s. 15 **discrimination and/or harassment** during a **telephone call from Mr Mitchell on 28 September 2018**. The "something " arising in consequence of his disability was his non attendance at a sales meeting due to him having a anxiety attack. The respondent denies the call amounted to any proscribed conduct within s 26(1) EqA 2010. It denies the conversation constituted conduct proscribed by s 15 EqA 2010. In any event, it will say the conversation was a proportionate means of achieving a legitimate aim.

1.6. Allegation 4 is of **victimisation**, the protected act being his raising a grievance on 28 September. The detriment is being **refused on 30 November 2018 a lieu day** he requested for work done on 21 October. The respondent says the initial refusal was not because the claimant had done a protected act. The day in lieu was subsequently agreed.

1.7. Allegation 5 is of **s15 discrimination and/or victimisation** the unfavourable treatment being **treating absence from a sales meeting as sick days**, when he was working from home. The respondent denies doing so was because of something arising in consequence of disability, alternatively says it was a proportionate means of achieving a legitimate aim. It denies it was because of any protected act. The two days were subsequently treated as working days.

1.8. The factual issues are evident from the above summary and the legal issues will be better understood by the claimant after we set out the relevant law, from our conclusions.

2. **Relevant Law**

2.1. Section 6 of the EqA includes:
(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.*
(2) A reference to a disabled person is a reference to a person who has a disability.
Section 212 defines "substantial" as " more than minor or trivial"

2.2. Schedule 1 has effect and includes
(1) The effect of an impairment is long-term if—
(a) it has lasted for at least 12 months,
(b) it is likely to last for at least 12 months, or
(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.
5(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—
(a) measures are being taken to treat or correct it, and
(b) but for that, it would be likely to have that effect.
"Measures" can include medication or other treatment. SCA Packaging –v-Boyle held "likely to " means "could well happen".

2.3. Vicary v British Telecom and Hill v Clacton Family Trust, held the decision as to whether a person is disabled is one for the Tribunal to make and not for any medical expert. In J-v-DLA Piper 2010 IRLR 936 Underhill P explained the difference between alleged " clinical" depression and a reaction to adverse circumstances, and said in paragraph 42 of his judgment

We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most laypeople, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, … a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for twelve months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common-sense observation that such reactions are not normally long-lived.

2.4. In Richmond Adult Community College v McDougall, the Court of Appeal decision resolved a tension between two cases, Latchman v Reed Business Information Systems and Greenwood v British Airways. Latchman held the determination of the question of disability where there is a recurring effect or a disputed long term effect should be done by putting oneself back in the position at the time of the acts of discrimination complained of and asking what a properly informed person with medical advice would have predicted at that time. Greenwood had indicated one could have the benefit of hindsight in effect and look at what had happened since the acts complained of. Latchman was correct

2.5. Section 15 EqA says
(*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.

2.6. Under s 15(2) the respondent will avoid liability if it shows it did not know, and could not reasonably have been expected to know, the claimant had a disability. Gallop-v-Newport Council held an employer cannot unquestioningly rely on medical advice the employee is not disabled. However, it must have actual or constructive knowledge of more than symptoms of poor mental health as explained by Eady J in A Ltd-v-Z 2019 IRLR 952. City of York Council-v-Grossett held the respondent does not have to know the "something" arose in consequence of the disability.

2.7. The duty to make reasonable adjustments as defined in section 20 is not pleaded in this case but may be indirectly relevant as explained in 2.9 below. It only arises where the employer has actual or constructive knowledge of the adverse effects too, as explained in Secretary of State for Work and Pensions –v-Alam. Ridout v TC Group [1998] IRLR 628 was a reasonable adjustments case where Morison P said : "*We accept what Counsel for the appellant was saying that Tribunals should be careful not to impose on disabled people … a duty to 'harp on' about their disability … On the other hand, a balance must be struck. .. It would be wrong if, merely to protect themselves from liability, the employers … were to ask a number of questions .. **People must be taken very much on the basis of how they present themselves".***

2.8. Section 15 applies if the "reason why" the treatment was afforded was "something" arising in consequence of disability. There may be a "chain" of causes eg because the claimant is disabled he behaved in a certain way and because it was perceived he might do so again, he was treated unfavourably. In Basildon & Thurrock NHS Trust v Weerasinghe [2016] ICR 305 Langstaff P adopted a two-stage approach first, there must be something arising in consequence of the disability; secondly, the unfavourable treatment must be "because of" that "something". Simler P. (as she then was) elaborated on this approach in Pnaiser-v-NHS England 2016 IRLR 170

2.9. In claims under s. 15 we often hear respondents say they cannot possibly be discriminating if they treat the claimant at the same as everybody else. This is a misconception. Unlike direct discrimination under s13, s15 does not require **less** favourable treatment than would be given to others, but both require a causal link between the treatment and the disability. The other form of prohibited conduct unique to the protected characteristic of disability is the duty to make adjustments under sections 20-21 .

2.10. In Archibald-v-Fife Council , Lady Hale said of the latter :
57. It is common ground that the Act entails a measure of positive discrimination, in the sense that employers are required to take steps to help disabled people which they are not required to take for others. It is also common ground that employers are only required to take those steps which in all the circumstances it is reasonable for them to have to take.
58. … The control mechanism lies in the fact that the employer is only required to take such steps as it is reasonable for them to have to take. They are not expected to do the impossible.

2.11. "A proportionate means of achieving a legitimate aim" formerly known as justification was explained by Pill LJ in Hardys and Hanson plc-v-Lax. Archibald was a case under the Disability Discrimination Act 1995 (DDA) which provided that if an employer wished to " justify" disability related discrimination (the closest equivalent to s15), it had first to have complied with the duty to make reasonable adjustments. The EqA does not expressly say that, but it is logically impossible to justify s15 discrimination unless the employer has first made reasonable adjustments. This view was confirmed in Griffiths –v-DWP by Elias LJ who said of sections 15, 19 and 20:
22 Section 15(1) would mean the dismissal of an employee for absences which are disability-related would amount to unfavourable treatment arising in consequence of disability and would therefore require justification.
26. .., it is perfectly possible for a single act of the employer, not amounting to direct discrimination, to constitute a breach of each of the other three forms. An employer who

dismisses a disabled employee without making a reasonable adjustment which would have enabled the employee to remain in employment - say allowing him to work part-time - will necessarily have infringed the duty to make adjustments, but in addition the act of dismissal will surely constitute an act of discrimination arising out of disability. The dismissal will be for a reason related to disability and if a potentially reasonable adjustment which might have allowed the employee to remain in employment has not been made, the dismissal will not be justified.

2.13. The DDA gave examples of steps an employer may need to take in order to comply with a duty to make reasonable adjustments including "*providing supervision or other support*". The steps are not in the EqA but live on in the EHRC Code of Practice.
17.52 The employer's duty to make reasonable adjustments continues throughout the disabled worker's employment (see Chapter 6). It is good practice for an employer to encourage disabled workers to discuss their disability so that any reasonable adjustments can be put in place. Disabled workers may be reluctant to disclose their impairment and the Act does not impose any obligation on them to do so. An employer can help overcome any concerns a disabled worker may have in this regard by explaining the reasons why information is being requested (that is, to consider reasonable adjustments).

2.14. Section 40 includes
(1) An employer (A) must not, in relation to employment by A, harass a person (B)—
(a) who is an employee of A's;

Section 26 includes
(1) A person (A) harasses another (B) if—
(a) A engages in unwanted ***conduct related to*** *a relevant protected characteristic, and*
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

2.15. The relevant protected characteristics include disability. Before harassment was a separate statutory tort, if a person engaged in conduct towards another which was **related to** a protected characteristic but did not do so **because of** it, there was no discrimination, see Porcelli –v- Strathclyde Council . On a literal reading, the link is now only between the protected characteristic and the conduct. Non-purposive harassment does not require proof of **why** the respondent acted as it did to establish liability, provided the unwanted conduct relates to a protected characteristic and it reasonably has the proscribed effect .

2.16. Section 212(1) includes *"detriment" does not… include conduct which amounts to harassment.* So if conduct which is related to disability creates a hostile environment but also causes detriment within s.15 or 27, s 40 is infringed, not s.39. The IDS Handbook "Discrimination at Work" says section 26 includes everything which used to be direct discrimination **as well as** conduct related to a protected characteristic but not done because of it. Our Employment Judge

has never been convinced by this. In Bakkali-v- Greater Manchester Buses Slade J said" ***It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant.*** *However, "related to" such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader enquiry. In my judgment the change in the statutory ingredients of harassment requires a more intense focus on the context of the offending words or behaviour".*

2.17. It is the emboldened words we question, in that we have often seen such cases. A manager who dislikes black people may make the life of a black employee a misery without saying or doing anything overtly "racist". We think "the reason why" the alleged discriminator acted as he did and whether the conduct itself relates to the protected characteristic should be kept separate. When conduct is both because of a protected characteristic and related to it, in the sense of making reference to that characteristic, s212 says it is harassment contrary to s40. But if there is no reference to the protected characteristic in the conduct itself, we believe it should be found to be detriment contrary to s39. Both are unlawful and the remedy is the same.

2.18. Section 27 of the EqA says
(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) A or another person has contravened ***this Act.***

2.19. There are four protected acts but twelve situations covered by this section. To each act must be applied that A believes B has done, or may do one. Section 39 (4) then says

An employer (A) must not victimise an employee of A's (B)—

(d) by subjecting B to any other detriment.

2.20. Some employers dislike employees who complain but this will only amount to victimisation if the employee has raised, or is thought to be likely to raise, issues of discrimination, not unfair of otherwise unlawful treatment. The actual. perceived or anticipated protected act must be at least in part the cause of the detriment. In Chief Constable of West Yorkshire-v-Khan Lord Nicholls said "*Employers, acting honestly and reasonably, ought to be able to take steps to preserve their position in pending discrimination proceedings without laying themselves open to a charge of victimisation."* However, if the employer takes steps against the claimant which he would not otherwise take in order to discredit him in retaliation for having made a complaint or as a deterrent against making a further one which the employer anticipates he will, that is victimisation. It does not matter the employer or his agent is not consciously motivated by a desire to retaliate or deter, subconscious motivation will suffice .

2.21. 'Detriment' means anything which the individual concerned might reasonably consider puts him at a disadvantage. In De Souza v Automobile Association 1986 ICR 514 , Lord Justice May said the question is to be considered 'from the point of view of the victim. If his opinion the

treatment was to his detriment is a reasonable one to hold, that ought to suffice. This was approved in Shamoon v Royal Ulster Constabulary

2.22. Section 109 governs liability of employers
(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.
(3) It does not matter whether that thing is done with the employer's … knowledge or approval.

2.23. Section 136 says ("court" includes an employment tribunal).
(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.

2.24. Reversal of the burden of proof is explained in Igen-v- Wong Madarassy –v- Nomura International and Ladele-v-London Borough of Islington 2001 IRLR 377 .The Supreme Court said in Hewage-v- Grampian Health Board where the tribunal can make clear findings as to primary fact and draw clear inferences it is rarely necessary to refer to s136. Ayodele-v- Citylink confirmed the starting point remains that it is for the claimant to prove on the balance of probabilities facts from which the tribunal **could** conclude, in the absence of an adequate explanation, the respondent has committed a pleaded act of discrimination against the claimant which is unlawful. If he does not prove such facts he will fail. If he does, it is then for the respondent to prove on the balance of probabilities it did not .

2.25. In any s15 discrimination or victimisation case, the key question is the" reason why" the treatment was afforded to the claimant. The House of Lords made plain in Glasgow City Council –v- Zafar unreasonableness of treatment does not show why something was done ,neither does incompetence, see Quereshi-v- London Borough of Newham. In Ladele, Elias P gave at paragraphs 29-41 a pellucid overview we need not repeat. As explained in Anya-v-University of Oxford,where there is no "obvious" discrimination or victimisation evidence may still point to sub-conscious discrimination. Further, that we find a witness credible and of integrity does not mean he cannot have been influenced by proscribed considerations. Where there is no credible non-discriminatory explanation for unreasonable behaviour, there may well be sufficient to infer discrimination. As Sedley L.J. said in Anya a finding a person may have behaved equally badly to others should not be based on the theoretical possibility he might, but on evidence that he does .

2.26. Section 120 confers jurisdiction on Employment Tribunals. Section 123 says :
(1) 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.

2.27. If a claim is out of time then the Tribunal have the power to consider it only if it is just and equitable to do so. The guidelines on exercising that discretion are best described in British Coal Corporation v Keeble [1997] IRLR 336. The length of and reasons for the delay, whether the claimant was being advised at the time and if so by whom and the extent to which the quality of the evidence is impaired by the passage of time are all relevant considerations. Anya held we

may look at " background" evidence pointing towards or away from discriminatory reasons even if the event itself would, as a claim, be out of time and even if it is not one of the claims " pleaded"

3. Findings of Fact

3.1. We heard the claimant, his wife Beverley Hallam and, for the respondent, Mr Graham Mitchell , at all relevant times the UK and Western Europe Sales Director, and Ms Sarah Knight of HR. We had a large agreed bundle of documents.

3.2. Nathan Hallam, started employment with the respondent in July 2014 and remains employed to date. He is a member of the Professional Footballers Association (PFA). Prior to June 2017, he never had any long term mental health issues.

3.3. On **Thursday 22 June 2017** he was required by his then line manager Tony Shaw to attend what he was told would be a "business meeting" in Birmingham. When the claimant arrived, Mr Shaw said he had a stomach problem and needed to go to the toilet. This was not the true reason he left the claimant alone. He was gone for about 45 minutes and on returning, told the claimant to follow him to a pre booked room for a disciplinary meeting with Ms Celia Clayton, the respondent's HR Manager. He had no notification of what was to be discussed, no opportunity to be represented and could not defend himself. The meeting lasted for around 45 minutes, Several allegations were made and he was asked to leave the room for 5 minutes whilst Ms Clayton decided what action was going to take place. Upon leaving, he sat in the hotel lobby and had an anxiety attack. He struggled to compose himself and required more time when asked to return to the room for Ms Clayton's decision. Upon returning, he was issued a Formal Verbal Warning.

3.4. An email at page 94aa shows this was a planned ambush. Mr Shaw on 19 June emailed Ms Clayton to say he had asked the claimant to a business meeting at 9 am and the claimant was not expecting her to be there. She was to arrive later. The concerns raised were to do with the claimant's expenses and general administration not being completed on time, his growing of the new fleet business , keeping a shared database called "Roo" up to date and target achievement for the ATS accounts. Mr Mitchell knew of this meeting. The claimant's success in running his area, everything north of a line drawn across the country roughly through Warwick, was **not** a concern. It was all about his administrative performance. We fully agree the way in which this was handled was far short of acceptable employment practice, even if there were valid concerns.

3.5. In the following days, the claimant struggled to process what had happened. He felt it was wrong, unfair and struggled to sleep, something he had never had a problem with in the past. As the weeks passed, he declined into early signs of depression. He was getting married to his long term partner on 21 July 2017, followed by a holiday with their 3 children. He enjoyed the wedding day but on holiday found it hard to engage with his wife and children, his sleep was poor and he did not want to get out of bed.

3.6. Mrs Hallam says he had always been outgoing, confident and sociable, but noticeably changed midway through 2017 following the meeting on 22 June. He seemed to be in a world of his own, disengaging himself and not full of conversation like he once was. She thought it would resolve itself, but he continued struggling to sleep and had no "*get up and go*".

3.7. He returned to work on 7 August 2017, to the UK Sales Meeting in Liverpool. He could not participate in social events and was returning early to his hotel room. For the first time ever, he felt nervous and uncomfortable in the company of others. Over the coming weeks, his symptoms became worse, with flash backs to the disciplinary meeting. Getting through the working day was becoming almost impossible. On Tuesday 3 October, he called Mr Shaw to tell him he was feeling depressed and needed to take some time off. He was signed off work by his GP. On the same day, he raised a grievance sent to Gavin Champion, the HR Director. He wanted Ms Clayton's heavy handed behaviour to be acknowledged as unacceptable, and an apology.

3.8. Mr Champion concluded in his grievance findings letter dated Wednesday 3 November 2017, the process could have been handled better but could not see sufficient grounds to remove the warning completely. He reduced it to a stage 1 warning. The claimant saw this as "*a huge kick in the teeth*". It compounded his already frail mental state.

3.9. On Friday 5 November, he appealed the grievance findings. The claimant could not understand why Mr Champion did not escalate the appeal to the relevant individual. He also received emails from Ms Knight in HR asking if he would like to speak to her. He just wanted his appeal dealt with in a timely manner and to get an apology.

3.10. Mr Mitchell is an accountant by training. He confirms the claimant had no significant sickness absence prior to October 2017. He was not aware the claimant had a mental health condition until he submitted a fit note dated 5 October 2017 for "*work related stress*" (page 268). The respondent's standard practice is to refer all employees absent for stress to Occupational Health (OH) which the claimant was in October 2017 (pages 270-272). OH assessed him on 1 November 2017 and said he was "*nervous", "on edge"* had "*low motivation*" (pages 287-290) and was suffering from "*stress with anxiety*" and "*low mood features*". The prognosis was 3-4 weeks treatment would be effective and he would be able to return to work with a plan for reduced travel for 2-3 weeks and fortnightly stress reviews for the first 6 weeks. He should be able to "*give regular and effective service in the future*". They did not need to see him for a further review, unless his return to work was significantly delayed or rehabilitation problematic. Prior to this, the respondent had not received any report from a medical professional.

3.11. Mr Mitchell had a conference call with Mr Shaw and Ms Clayton in November 2017 to discuss the OH report (pages 98-100). Mr Mitchell suggested a return to a week of administrative tasks at home, a second and third week of smaller journeys to local sites. Ms Clayton advised on how to complete a risk assessment. After the meeting, Mr Mitchell and Ms Knight set out their thoughts on how to ease the claimant back to work (pages 306-309).

3.12. The claimant submitted a further fit note dated 2 November 2017 for "*work related stress*" (page 295). At a grievance appeal meeting with Mr Luis Ceneviz, the Managing Director, on **Friday 17 November** at head office in Melksham, Wiltshire. The claimant, accompanied by Ian Harris, a trade union representative, told Mr Ceneviz of the impact on his mental health.

3.13. On the same day in the HR office he discussed sick pay with Ms Knight. Based on his length of service, the claimant was entitled to 8 weeks' full pay and 20 weeks' half pay during sick absence. His entitlement to full pay ended on 30 November 2017. Stella Purewall, Payroll

Manager, wrote to him on 8 November 2017 to inform him though he may not have received that. He knew he was going to be off longer than 8 weeks . He was told individuals with serious long term illnesses had in the past been given continuation of full pay. We fully accept Ms Knight's evidence extended sick pay is a rare exception usually given to people with long term illness such as cancer. On one occasion it was given to a person with depression who wanted to return to work earlier than OH advised. The respondent normally views extending sick pay as a disincentive for the employee to make efforts to return to work. Ms Knight does not recall this meeting well. The claimant accepts he did not tell her he was about to start 3 weeks residential treatment in Liphook, Surrey, paid for by the PFA, to help treat his depression and anxiety.

3.14. On **Monday 20 November** he attended the residential treatment centre. Unbeknown to him at the time, because he was incommunicado there, on **Friday 24 November 2017**, Mr Ceneviz, helped by Ms Knight's advice, upheld his appeal, recognised the wrongdoing and fully apologised for the psychological damage.

3.15. The claimant emailed Ms Knight on 14 December 2017 to say he was in residential treatment (page 297). He left the treatment programme on Friday 15 December 2017 feeling positive about moving forward. That morning, he received a call from his wife saying the salary paid into their bank was noticeably low. Ms Knight spoke to him on the phone on 15 December 2017 (page 101). Upon request he sent an email to her asking why he had not been paid **commission** which he thought was the reason for the shortfall. She said she would investigate. She and Mr Mitchell were surprised the claimant needed residential treatment.

3.16. The claimant had been paid his commission but been placed on half pay. By email he requested that be reconsidered. The decision was not to give full pay. He felt that was unfair, because the respondent was the root cause of his absence. His statement says " *my positivity was wiped away*" .

3.17. Mr Mitchell's statement says
I had a conference call in November 2017 with Mr Shaw and Ms Clayton I asked Ms Clayton whether the Claimant's transfer to half sick pay should be overridden in this situation, because I had not dealt with any employees on long-term sickness absence before and didn't know the company's procedure on this. Ms Clayton confirmed that the company's procedure was to transfer employees to half sick pay at the end of the time specified in the contract of employment.

The Claimant asked the Respondent to reconsider its position on transferring him to half pay. Ms Knight sent me an email on 15 December 2017 which says the Claimant …felt it was unfair because the Respondent was to blame for his sickness absence.

I did not agree that the Respondent should make an exception to its position on company sick pay. I was concerned that continuing to pay full pay would not encourage the Claimant to return to work. I was keen to resolve the issues the Claimant had with the Respondent so that we could work together going forwards. I thought there was more chance of resolving things if the Claimant returned to work and I thought there was more chance of him returning to work if his pay was reduced in line with his contractual entitlements.

I understand that the Claimant was unhappy about this decision. I received an email from Ms Knight on 18 December 2017 (page 114) following a call she had with the Claimant where he stated that he would be complaining to Luis Ceneviz, Managing Director, and going to the Employment Tribunal if he wasn't paid full sick pay for his entire sickness absence.

3.18. The claimant submitted a further fit note dated 18 December 2017 stating "*work related stress*". In **November 2018** a response to an SAR included an email trail page 107 -109**.** On 15 December 2017 at 13:57 Ms Knight emailed Mr Champion Ms Clayton and Mr Mitchell saying she had told the claimant he was now on half pay and he was not happy with that because he believed the company was to blame for his current absence. At 14:20 Mr Mitchell emailed her
Thanks for the update Sarah
If we put up to full pay he will be off longer. The pay situation will focus his mind and speed up the resolution in my opinion.
We conceded on the bonus for October paid in December. We need to agree bonus payment and in my opinion that is not a given

Ms Knight replied at 14:24 that she agreed. However at 14:32 Ms Clayton emailed Mr Mitchell and Ms Knight copied to Mr Champion:
I agree with Graham's comments.
In addition you suggest it is only Nathan's belief that the company is to blame for his absence-do we have clear evidence that the company is to blame given we have not undertaken the personal stress risk assessment yet
if we go against company sick pay policy on this occasion would that not by default confirm that the company agrees with Nathan's belief (paving the way for a potential constructive dismissal claim)
if we do have clear evidence of the company is to blame for his absence that I am unaware of then please let me know.
Gavin-Thoughts?

Ms Clayton was not anticipating a claim under the EqA, rather, and rightly, she thought, as did Ms Knight judging by her manuscript note at page 102, the claimant could allege a breach of the implied term of mutual trust and confidence in the way the June meeting had been handled, resign in response and claim constructive dismissal. He did not.

3.19. The claimant returned to work on Tuesday 2 January 2018 and would report directly to Mr Mitchell, He met with Ms Knight and Mr Mitchell on 9 January to discuss a plan moving forward with a clean slate for everybody. Mr Mitchell's statement says
*" **As part of the outcome of a grievance from the Claimant against Mr Shaw in 2017** I became the Claimant's new line manager in January 2018. I wanted to meet with him on his return from sickness absence so we could ensure that his concerns were resolved. The Claimant raised the issue of sick pay again in this meeting, saying that it had caused him hardship and he felt very strongly about it. He said he would have to raise another grievance if he didn't get paid full pay. I said I would speak to Mr Ceneviz myself.*
I discussed this issue with the management team, which included Mr Ceneviz. As a result, the Respondent agreed to pay the Claimant full sick pay in excess of his contractual entitlement in order to allow the Claimant to return to work with a clean slate following his grievance."

3.20. Mr Mitchell accepted at first when asked by our Employment Judge that having to manage the claimant directly from his position UK and Western Europe Sales Director was the "*last thing he needed*" .He qualified that by saying it was not exactly the last thing but it was not easy or appropriate for him as a director with responsibility for Great Britain and Scandinavia to be managing somebody in charge of certain types of account in the northern half of Great Britain. He carried out a stress risk assessment with Ms Knight on 22 February 2018. The claimant said he was feeling "generally fine" (pages 311-312).

3.21. Mr Mitchell knew in 2017 from Mr Shaw the concerns about the claimant's performance were not completing administrative tasks in a timely manner, including submitting his expenses, dealing with a driving violation, a bus lane fine he did not notify to the company causing a bailiff to turn up at their premises, and his customer meetings involving significantly more travel than one would expect. He says
When I took over the Claimant's line management in January 2018, I put in place steps to try to improve the Claimant's performance on administrative tasks. This involved setting a clear structure of what I expected from him and Mr Shaw, and a system for tracking their progress. These were agreed at a meeting with both Mr Shaw and the Claimant in January 2018. We had regular weekly calls to discuss their progress and the Claimant reported that he was comfortable with the new system. I also spoke to the Claimant about his planning of meetings and offered advice on how to arrange these to reduce his travel time to be more efficient to the business.
In March 2018, I took over some additional responsibilities to my role when my line manager was promoted. I had to shift my focus to my new responsibilities. I had put in a heavy investment of two to three months with Mr Shaw and the Claimant to set them up properly. They just needed to continue with the structures I had put in place and they could contact me if they needed to.

3.22. Mr Mitchell's contact with the claimant became much less. The claimant felt he was speaking to everybody else in the team, inviting them to social events and Industry Award Ceremonies, of which the claimant knew nothing. He felt he was not trusted around customers any longer. We accept this was a genuine perception but the reality is Mr Mitchell lived in Exeter and worked in Melksham , Mr Shaw lived in Southampton and the claimant was out on a limb living in Tynemouth and covering an area which would rarely take him south of Birmingham. We accept he was not being deliberately neglected or abandoned, but that is how he felt.

3.23. The claimant was assessed again by OH on 18 May 2018 who reported on the same date he said his "*mental health has improved*", his workload was "*manageable*" and his "*work issues have now been resolved*". They reported he had "*sleep issues*" and "*struggled to 'get going' in the morning*". The respondent paid for some counselling. Mr Mitchell thought giving him freedom to start late and work from home as much as possible was all he needed. We accept that was a reasonable view based on how the claimant presented himself. When he told OH Mr Mitchell's silence and non- inclusion in work events was affecting his mental health, that was not included in their report but they suggested he ask Mr Mitchell for a face to face meeting, quoting the claimant's statement "*with a strongly worded email highlighting the importance of the meeting, backed up with a quiet word from Ms Knight*". The claimant emailed Mr Mitchell on 3 September 2018 (page 139-140). It is not strongly worded. His health is mentioned close to the end of the email. Subtle hints would understandably not appear important to Mr Mitchell when he read them.

3.24. A meeting took place in Mr Mitchells office in Melksham on **Wednesday 12 September 2018**. The claimant says his main goal was to furnish Mr Mitchell with a better understanding of his mental health, but Mr Mitchell had no interest in what he had to say and " *there was no empathy shown"*. He says he was "*lambasted"* about his work. He had made the 600 mile round trip in the hope of addressing and moving forward with some issues affecting his health. Instead, he left the meeting feeling humiliated.

3.25. In contrast, Mr Mitchell's statement says they talked through his health concerns and "*put together some **constructive** steps to address these*". Mr Mitchell agreed there had not been enough communication since his role changed in March 2018, said he would hold a monthly meeting and the claimant should call if there was something urgent he wanted to discuss. He summarised the points in one of two emails of 15 September 2018 (page 143-144). It is a 2 page business-like email addressing mainly tangible steps. In tone and content, it shows the claimant's need for support and empathy was not something Mr Mitchell was able to understand.

3.26. The claimant's evidence is that within 10 minutes of the meeting starting Mr Mitchell had switched on his laptop and started raising criticisms. He was turning the tables on the claimant. Mr Mitchell's statement says after much more than 10 minutes he thought it would be good to discuss current workload and opportunities so checked his laptop to see what prospects were in the pipeline and found the claimant had not updated "Roo" since March 2018. The word he uses is he" ***challenged*** him during the meeting and in a separate email on 15 September (page 148) "*reminding him of the need to carry out these tasks*" Our word would be **rebuked** him. He sent a similar email to Mr Shaw too, save that Mr Shaw did not have any problem with his expenses. Mr Mitchell said in oral evidence Mr Shaw replied acknowledging he had not kept systems up-to-date and promising to do so in future. That is the response he expects from a subordinate. The claimant was not happy he had raised performance concerns, and in an email of 20 September at 15:53 said Mr Mitchell's of the 15th was an attempt to deflect from the real issues and it was disrespectful to bring up such points in what should have been a meeting to discuss his concerns. The claimant made a point by point response including protesting about problems with his laptop.

3.27. Mr Mitchell says he did not know why the claimant seemed unable to complete administrative tasks in a timely manner and why he was travelling to excess. He had previously been informed by a member of the Sales Team the claimant had his own business scouting for football teams and wondered whether this might explain the excessive travel and he might be organising work meetings to fit his own business. He did a search on Companies House and found the claimant was a director of another company. He sent an email to Ms Clayton on 24 September 2018 at 16:47 (page 159) saying

" *I have just seen that Nathan is a director of another business…*
We have in the past suspected Nathan of using nights away or scheduling travel to suit scouting needs commitments
Not sure if or how I can use this but it is worth noting I think".

He never raised it with the claimant or anyone else. He says "*I was not victimising the Claimant, I was just acting as his manager*". He copied to Ms Clayton an email he had sent to the claimant saying he was in no way attempting to deflect from the real issues.

3.28. The response from Mr Mitchell to the claimant on 24 September shows his replies in red effectively saying none of the problems he had reported, such as IT difficulties, were unique to him and he expected the claimant to surmount them. In response to the claimant having suggested his approach was aggressive he says" *My approach is in no way aggressive. I have raised some factual issues with you that you need to address promptly as referred to above. We will continue to support you in your role, as outlined in my email to you following our meeting. However clear expectations have been set in relation to matters such as the shared drive, Sales I and expenses and these need to be complied with. This is the case regardless of the fact that our meeting was to discuss the points you had previously raised*."

3.29. The claimant had asserted his depression started back in 2017 caused by " *unwarranted actions within work"*. Mr Mitchell's response to that is "*I do not think it is helpful to refer back to 2017 although I have to say for completeness that I do not agree with your comments about "unwarranted actions*". in oral evidence to us he accepted what had happened in 2017 was done in an unwarranted way but was warranted action. He finishes " *The only reason for doing this is to ensure you are meeting the requirements of your role in these respects . You are not being singled out or treated differently to anyone else. The matters that I have raised with you should not be difficult to address.*" .

3.30. On Monday 24 September 2018, the claimant had travelled to Melksham for a two day Sales Meeting .Mr Mitchell's reply by email was sent at 16:48. The claimant spent the evening with colleagues so did not open it until about 21:30 when he got back to his hotel room. Upon reading it, he found it so hurtful, it caused a serious anxiety attack. The claimant could not settle, managed to fall asleep in the early hours only to wake a few hours later with an anxiety attack He was in no fit state to be around colleagues. As the anxiety and depressive state lifted, he was able to carry out some work from his hotel room. He emailed Mr Mitchell on the morning of 25 September saying he had had "*a very bad night with illness"* and would not be at the meeting (page 168). Mr Mitchell thought he had a stomach bug or hangover so replied he should see how he felt the following day and attend the second day if he felt up to it.

3.31. The claimant notified Ms Knight in more detail and asked her to inform Mr Mitchell because the claimant knew his outlook email is always in view to the audience at sales meetings and did not want emails referring to his health to be seen by others. Later that day he spoke to OH who "agreed" when he said he would be better at home. He took the next flight from Bristol, on 25 September 2018 having sent an email to Ms Knight at 16:08 (page 320) saying he had extremely high levels of anxiety overnight and in the morning. On 26 September he worked from home.

3.32. On Friday 28 September, the claimant, while in his home office doing administrative tasks, received a call from Mr Mitchell. As with all calls he took it on loud speaker and his wife heard it. Mr Mitchell questioned his absence on 25th and 26th and the claimant said he worked in his hotel room on 25 September until 3pm, then travelled home and worked from there on 26 September. The claimant says " *There was no empathy shown or help offered*". Mr Mitchell could not understand how he was well enough to work on 25th after a "very bad night with illness" and "extremely high levels of anxiety". He told him the only work he was required to do on those days was to attend the sales meeting. If he had realised, after travelling home, he was well enough to work on 26th he should have dialled into the meeting. The claimant replied in his 4 yrs with the

company, no absentee had joined the sales meeting by conference call, and he stressed he was not in a fit enough state of mind to engage with people. He says Mr Mitchell's tone got more ***"aggressive"*** .Mr Mitchell said the days in question would be recorded as sick days and ended the call abruptly stating he would be consulting with HR.

3.33. Mr Mitchell says
We disagreed on the call, but neither of us raised our voices and I did not say anything inappropriate to the Claimant. ***I'm not sure why the Claimant says I was not compassionate****. I thought* ***I was fair*** *on the call, given the Claimant said he was working and was not off sick.*
I have never had to deal with this kind of situation before. However, if another employee who reported to me told me they were sick on the morning of a sales meeting, did not advise me they were flying home, did not advise me they were not attending the second day of the meeting, and then claimed to have worked for the 2 days, I would call them to discuss this. I did not treat the Claimant any differently to how I would treat another employee in this situation.

3.34. Mrs Hallam heard Mr Mitchell on loud speaker whom she says "*quizzed"* the claimant ***"in a confrontational manner"*** . The claimant was being talked over not allowed to respond and Mr Mitchell asked how he could he be expected to manage other sales staff if the claimant just left without prior permission. Mr Mitchell agrees this was said. After this call, Mrs Hallam says the claimant was "visibly upset" . The claimant says he felt *deflated, degraded, humiliated* ".

3.35. The claimant raised a grievance that day which included a complaint about this phone call . A grievance meeting took place on **Tuesday 23 October 2018** with Mr Jaap Van Wessum (General Manager of Cooper Tire Europe and Investigating Officer), Mr Steve Saunders (a Unite Trade Union Representative) and Ms Donna Lacey (Taking Notes). Mr Van Wessum assured him the investigation would be thorough and impartial, but the claimant felt there were early signs he would defend Mr Mitchell which left the impression the grievance was likely to be a waste of time. On Wednesday 28 November 2018 the grievance outcome was received from Mr Van Wessum. The claimant said at the grievance meeting OH **advised** him to travel home but they confirmed in an email on 2 October 2018 he had already decided to (page 327). Mr Van Wessum concluded it was reasonable for Mr Mitchell to call the claimant to discuss why he had not attended and reasonable to suggest he could have dialled in if he was fit to work (page 217). Later, the respondent agreed to process the 2 days absence as work days. confirmed by email on 10 December 2018. On 4 December 2018 the claimant appealed the grievance findings.

3.36. The respondent's policy provides that if an employee works on a weekend, it is at the discretion of the manager to decide whether a day off in lieu is granted. Mr Mitchell's practice was to grant a lieu day only if an employee **had been requested** to work at the weekend.

3.37. In October 2018, some African customers came to the UK. The manager in charge of Africa could not come with them so he asked Mr Mitchell to make them welcome. Mr Mitchell arranged for them to attend an American football match on Sunday 21 October 2018 and a football match on Monday 22 October 2018. He arranged for three other members of the sales and marketing team, Mike Emmett, Rachel Deacon and Chi Razeto, to entertain the clients during the day on Sunday, the clients would entertain themselves on the Sunday evening and the claimant would entertain the clients on the Monday from 12 noon. The claimant agrees all this

and says he made arrangements to stay near Birmingham on the Sunday night so he could get to London by noon on Monday. Mr Mitchell was at the time on holiday.

3.38. On Saturday Mr Mitchell's PA Ms Deacon told the claimant there was a spare ticket for the American football match and a spare room already paid for at the Hilton hotel in Wembley. He cancelled the Birmingham hotel which saved the respondent money and decided to travel to London on the Sunday .He would not have claimed to have been working had he done nothing more than he planned , which was to arrive at around midday, have a rest after a long drive which started at 6 am, go to the American football match and return to rest. As he arrived at the Hilton at about 1130 he received a text from Mr Emmett, who is senior to him, saying he and the other two were running late . He asked the claimant if he would do him the favour of meeting the African clients and taking them to the stadium. He did so, the other three got there just in time for the football match and left shortly after it finished . They had never planned to stay at the Hilton. The claimant says Mr Emmett **asked** him to entertain the African guests that evening and charge the expense to Mr Emmett's budget code. The claimant not wanting to abandon the African clients stayed with them all evening, getting to bed after 11pm. The following day he met with them again at about midday took them to an evening football match, and the following day travelled to meet with Mr Van Wessen. Mr Mitchell did not know any of this happened and says had he known the claimant was going to attend the match on the Sunday he would not have arranged for Mr Emmett, Ms Deacon and Ms Razeto to do so which would have reduced costs.

3.37. On 29 November 2018, the claimant emailed Ms Deacon to book 13 December as a day's holiday and 14th lieu day for working unexpectedly on 21 October 2018 from about 12:00 to 23:30 to entertain African clients. Not all the facts would have been known to Ms Deacon, but some were. Mr Mitchell did not appear from his statement to have taken the rudimentary step of checking whether Mr Emmett did ask the claimant to work before refusing the claimant's request for a lieu day which he did on 30 November. In oral evidence he assured he walked two doors down the corridor and spoke to Mr Emmett who said he had not told the claimant to stay with the guests all evening. Mr Mitchell says his decision was in no way influenced by the claimant bringing a grievance, he just implemented policy on days off in lieu as he would to all employees he managed. Mr Van Wessum decided in January 2019 to grant the lieu day but on a different set of facts and for different reasons .

3.38. Mr Mitchell does not accept he knew the claimant had planned to fly off to Dubai on Thursday 13 December 2018 for a long weekend . We accept he did not know even if he could have found out. The claimant felt Mr Mitchell did everything he could to deny a lieu day and says "*It was clear at this point, Mr Mitchell was hell bent on making things hard and determined to show he would not bow down to grievances* ". We accept that is his genuine view but we do not agree. Mr Mitchell did what he would have anyway, grievance or not.

3.39. Mr Mitchell granted permission for the claimant to raise the issue with Mr Van Wessum, The claimant sent him an email on 12 December 2018. Mr Van Wessum on 20 December refused to deal with the issue and suggested the claimant approach Mr Mitchell again to work the dispute out. The claimant felt Mr Van Wessum was prepared to turn a blind eye to Mr Mitchell, who was "*bulletproof*"

3.40. During the lieu day dispute, the claimant was finding it extremely hard to cope mentally . He contacted Ms Knight who was by this stage his “go to person”, who suggested he take some time off work. Ms Purewall in payroll revealed Mr Mitchell had contacted her some time ago to register 2 days sick going back to the September sales meeting. The claimant felt was another attempt by him to cause the claimant detriment. When there is any sickness related absence, the claimant says it is a strict requirement for a line manager to complete a return to work document which was never done, so Mr Mitchell went out of his way to bypass procedure, showing how determined he was to penalise the claimant for complaining . Again, we accept that is his genuine view but we do not agree. Mr Mitchell did what he would have anyway, grievance or not.

3.41. The claimant decided to get through the last couple of weeks before the Christmas break and use the time off to try and deal with the downturn in his health. Around mid-January 2019, the sales team where asked to attend a telephone conference call. Mr Mitchell said he was leaving the business. It was a massive relief for the claimant. who started to feel he could really move forward. With Mr Mitchell gone, and the lieu day issue dealt with, the claimant believed the respondent expected he would drop his grievance appeal. He requested it went ahead as he sought acknowledgement of how Mr Mitchell had treated him . The claimant’s anxiety levels were high, he was not sleeping and visited his GP who signed him off work. The appeal was dealt with by Mr Ceneviz who, by letter on 6 February 2019, concluded no unfavourable treatment had taken place under Mr Mitchell. His decision was final.

3.42. On the claimant’s return to work, a meeting was set up with his new line manager Mr Brian Sprott who said he was not in a position to understand what he was experiencing from a mental health perspective, but did make it very clear, the claimant was an important member of his sales team, and **he was there to support him** in any way he could and **check on his wellbeing**, He was still experiencing daily challenges with mental health, but having somebody there who was trying to help, went a very long way making him *able to smile again.*

4. Conclusions

4.1. Chapman-v-Simon precludes the tribunal finding acts which are not “pleaded” which means included in the claim or further particulars. Office of National Statistics–v-Ali held each type of discrimination is separate from the others and must be pleaded. Because .it is necessary to identify both the act and type of discrimination relied upon, some claimants plead too many permutations rather than risk not pleading one to which the evidence may lead. This claimant is to be commended for being selective. We would not wish the claimant to think he has put his case in the wrong way because whichever way he put it, he would run into different, but equally insurmountable, difficulties. For example, the s20/21 duty to make reasonable adjustments requires **practical** steps such as permitting him to start work late after a bad night’s sleep, which the respondent took. It is our duty to assist an unrepresented claimant to the extent necessary to put him on an equal footing with a respondent represented by experienced barrister. We have looked at the facts and law alert to any way in which he could succeed in any of his claims, but have found none. We do believe his evidence and that his perceptions are genuine.

4.2. What we have recorded in paragraphs 3.5 -3.8 above, we have often heard consultant psychiatrists describe as classic symptoms of depressive illness. Events which would make a

person with no such illness temporarily annoyed or irritated appear to a depressed person as hugely significant and a bad reflection on themselves. However, at the time of the act complained of in allegation 1, sick pay at half rate , it is unlikely the claimant was disabled on the test set out in paragraph 2.4 above because it would not then have been predictable his condition would last for as long as it genuinely has. It would have been more debilitating had it not been for the treatment he received at the end of 2017, but by the spring of 2018 it was predicted by OH he would be recovered and no longer need medication. The deep depression into which he had fallen as a result of the appalling treatment he received in 2017 was not likely to recur. Indeed but for what happened in the summer of 2017 he would probably have recovered completely within 12 months. Even if we are wrong about that, there is no way the respondent could have known he was disabled at the time his sick pay dropped so the section 15(2) defence is fully made out. The claim is also out of time and we accept the arguments put by Mr Roberts it would not be just and equitable to extend time . We prefer to dismiss a claim on its merits than only time bar. This claim fails on all levels.

4.3. As for allegation 2 the email was not **because** the claimant had complained of any act of **discrimination** or it was anticipated he would. He had complained about unfairness but as we explained during the hearing the law does deal with unfairness during employment. If there were an actual or anticipated protected act, although the email did not come to the claimant's knowledge until much later, it could be seen as putting him at a disadvantage. We believe Mr Mitchell did see conflict looming and that he may have to justify criticising the claimant's excessive mileage .Such action is , as in the case of Khan, merely protecting the respondent's position in anticipation of future conflict.

4.4. Allegations 3 and 5 go together. We accept the claimant did leave the sales conference because he could not face his colleagues , especially Mr Mitchell after the email he sent on 24 September. It did cause an anxiety attack. His absence from the sales conference was therefore something arising in consequence of his disability. Treating his absence as sick days was unfavourable. However, Mr Mitchell did not do that **because** of his absence or **because** the claimant had done or Mr Mitchell anticipated he would do a protected act. For Mr Mitchell if the claimant was not fit to be doing what he had been instructed to do, he should not have been doing any work other than as agreed by Mr Mitchell, and treating the days as sick absence was an axiomatic consequence of that view.

4.5. The only reason Mr Mitchell telephoned him on 28 September was to find out in detail why he had not attended on 26th as Ms Knight had not passed to Mr Mitchell a full explanation of why the claimant decided to go home. That is how Mr Mitchell would have treated any subordinate who had left without his permission. The claimant did not have advice from OH to go home although we accept that having discussed matters with the very helpful OH nurse his conclusion was home was the best place for him. Finding out why the claimant had left, was a legitimate aim, and "quizzing" him a proportionate means of achieving it.

4.6. The phone call on 28 September does not satisfy the statutory definition of harassment for two reasons. First it does not have any conduct which relates to disability . Secondly, we accept Mr Mitchell did not have the purpose proscribed by s26(1) (b) and **in the other circumstances,**

though it was the claimant's subjective perception, it was not reasonable for the phone call, during which Mr Mitchell did speak over him but did not shout or threaten, to have that effect.

4.7. We spent most time deliberating allegation 4. There is actually very little conflict on the facts apart from whether Mr Emmett asked the claimant to look after the people in the evening. We believe he probably did because we have no evidence directly from him to the contrary. The events of 21 October spoke volumes about the claimant's personality and that of Mr Mitchell. On three occasions in cross examination the claimant asked Mr Mitchell if he accepted the African clients were "*important*" to which he replied "*All clients are important*". These had come from South Africa, Algeria and Morocco, the respondent paying for their flights, hotel, events tickets and accompanied transport to and from the event venue. The claimant said he had done a *"meet and greet*" role on Sunday and would be with them again on Monday. Mr Mitchell said all he was asked to do on Sunday by Mr Emmett was meet then and take them to the stadium. It was not his task to *"meet and greet"* . Having done what he did and staying in the same hotel as them, the claimant would not have left the African clients on their own in the evening . Authorisation or not he would have looked after them so they felt "*important*" and welcome. To do otherwise would, in the claimant's view, be rude. That is not the way Mr Mitchell thought, the original plan was they would look after themselves in the evening, and the fact the claimant was in the same hotel should not change that. He should have said "good night" and gone to bed.

4.8. It was the claimant who told us Mr Mitchell " *was an accountant by training*" implying he conforms to a stereotype of a person coming to management from an accountancy background of wanting everything "done by the book". Mr Mitchell had done what he told his African counterpart he would, no less and no more. When our Employment Judge asked Ms Knight whether Mr Mitchell was a stickler for proper administrative process, she smiled and gave a little laugh, clearly showing she thought he was. In contrast, the claimant conforms to the stereotypical salesperson doing whatever it takes to keep clients happy. Both approaches are needed for a successful business, but in our view what lies at the heart of this case is that neither of them can understand the other's point of view without thinking he has some ulterior reason, such as victimisation, for doing what is to that person natural behaviour. Thus the claimant may well have been driving what Mr Mitchell called " *crazy miles*" over his huge geographical area just to keep in personal touch with clients, while Mr Mitchell thought he must have some other reason. We do not say one of them was right and the other wrong. Their personalities were incompatible so each saw in the other motivations which did not exist.

4.8. It must be said Mr Mitchell's thinking on the lieu day request was reasonably influenced by the fact the claimant did not make the request until 29 November. The claimant drew to our attention an email in 2016 where Mr Shaw, on behalf of himself and the claimant, logged two lieu days with Mr Mitchell's PA in respect of a weekend of football entertainment on the 11&12 September and did so on 14th. It was only when Mrs Hallam found a last-minute flight to Dubai that the claimant asked for a lieu day. We are completely satisfied by Mr Mitchell's explanation no actual or anticipated protected act caused him to do anything he would not have done anyway.

4.9. The real problem in 2018 arose during the summer months when Mr Mitchell having set up a system for the claimant to run the Northern region almost autonomously provided he kept his shared drive and expenses up to date etc left him to his own devices. That is why the claimant

repeatedly said he did not resent being “managed” by Mr Mitchell but he was not being. That reveals their two different ways of interpreting the word “managed “. For Mr Mitchell it means giving instructions which he then expects to be followed. For the claimant it means ,in the words of the DDA providing supervision or support. Striking a balance between micromanagement and leaving someone unsupported and unsupervised is difficult in all circumstances but particularly so if the subordinate has mental health problems. If the question for us was whether Mr Mitchell would benefit from training in managing disability generally and specifically mental health our answer would be would “ Yes”. That can be said of many managers. We find he is not overly strict or vengeful in any way just very busy and a little inflexible. He freely admitted that in the summer months due to his other commitments he “took his eye off the ball” and did not keep in touch with the claimant as regularly as he should have done. That is what caused them to have a severe difference of opinion on 12 September. Had Mr Mitchell not been diverted on to other matters during the summer he would have picked up the claimant’s failure to do his administration on time much earlier than he did and the problem would have been metaphorically “nipped in the bud”.

4.10. That is not the case we have to decide. None of the claimant’s claims succeed. Now that he has a manager who, on his own evidence, does understand mental health issues we are confident closure of this matter will enable him to continue in employment happily and we wish him every success in doing so.

Employment Judge Garnon

Signed on 6 December 2019