RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr C Watson**

Respondent: **Financial Ombudsman Service Limited**

Heard at: **East London Hearing Centre**

On: **22, 23, 24 May 2019 and 19 June 2019**

Before: **Employment Judge Russell**

Members: **Mrs K Freeman**
Mr D Ross

Representation
Claimant: **In person**
Respondent: **Mr R Hignett (Counsel)**

RESERVED JUDGMENT

(1) The claim of constructive unfair dismissal fails and is dismissed.

(2) All claims of disability discrimination fail and are dismissed.

(3) The claim of victimisation fails and is dismissed.

(4) The claim of unauthorised deduction from wages fails and is dismissed.

REASONS

1 By a claim form presented on 17 July 2018 the Claimant brings complaints of constructive unfair dismissal, disability discrimination, sex discrimination and for unpaid wages. The Respondent resists all claims.

2 At a Preliminary Hearing on 15 October 2018, the sex discrimination claim was withdrawn and the issues were agreed as follows:

Constructive unfair dismissal

2.1 Did the Respondent conduct itself, without reasonable and proper cause, in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the Claimant? The Claimant relies upon the following conduct:

(a) May or June 2017: Mr Farmer (the Claimant's line manager) falsely stated that he had met with the Claimant to discuss a customer complaint.

(b) 8 August 2017: the Claimant was required to be absent from work (suspended) until Occupational Health approved his return.

(c) Around 12 September 2017: Mr Wightman refused the Claimant's request for a formal investigation of the allegations against Mr Farmer.

(d) Between August 2017 and 22 September 2017: the Respondent required the Claimant to pay a fee in order to access his employee file, then sent him an electronic version in an unreadable format and, after the intervention of his MP, sent the Claimant a paper copy which was not personally addressed to him by name.

(e) Late September 2017: Ms Sasha Chaudhri and Ms Tania Diggines improperly denied breach of data protection requirements in respect of the employee file.

(f) 27 November 2017: the Claimant was refused permission to record a grievance hearing and was told that he would be subject to disciplinary action if he did record it.

(g) Late 2017: HR deliberately communicating with the Claimant at the end of the day in order to increase the Claimant's anxiety.

(h) 5 January 2018: grievance outcome which made unwarranted 'recommendations' about the Claimant's communication style, tone and language and instructed him to make no further complaints and not to go to the information Commissioner's office.

(i) From 15 January 2018 unwarranted and untrue complaints about the Claimant's performance, including singling him out where all in short-term lending division has cases outstanding but the Claimant was the only person disciplined.

(j) 19 February 2018: Ms Sloan's recommendation that there should be a formal disciplinary hearing whilst deceitfully maintaining that she did not know the potential consequences of the investigation and doing so in order to avoid paying company sick pay.

(k) 19 February 2018: the meeting with Ms Sloan was deliberately scheduled for that date in order to create a mental breakdown on the part of the Claimant and/or to provoke evidence of gross misconduct.

(l) 1 March 2018 Claimant's grievance against Ms Sloan was improperly considered at the same time as the disciplinary hearing, rather than as a separate procedure which should have been heard first.

(m) 5 March 2018, Mr Ian Smith ostracised the Claimant upon his return to work by moving him from the ninth floor to the fourth floor, away from his short-term lending team, and requiring him to find his own desk.

(n) 15 March 2018: Mr Steve Dickey (hearing the grievance and disciplinary) changed the allegations from competence to behaviour.

(o) 21 March 2018 providing the Claimant with only a redacted copy of feedback from Ms Lisa Lowe given in November 2017.

2.2 Did the Claimant affirm the contract of employment before resigning? He Claimant resigned on notice given on 29 March 2018 and relies upon (n) and (o) above as the last straw(s).

2.3 Did the Claimant resign in response to the Respondent's conduct?

2.4 If the Claimant was dismissed, was the reason or principal reason a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA"); and, if so, was the dismissal fair or unfair in accordance with ERA section 98(4)?

2.5 If the Claimant was unfairly dismissed and the remedy is compensation, should there be any reduction:

(a) to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed (**Polkey**); and/or

(b) because the Claimant had by blameworthy or culpable actions, caused or contributed to dismissal to any extent.

Disability

2.6 Was the Claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of the mental impairment(s) of anxiety and depression?

Section 26 EQA: harassment related to disability

2.7 Did the Respondent engage in the conduct set out at paragraphs 2.1 (d), (e), (f), (g), (i), (j), (k), (m), (n) and (o) and/or the following additional conduct:

(i) 4 April 2018: Ms Sloan and Ms Chaudhri denied the Claimant the right to a witness at a meeting and/or prevented him from leaving when he wished to do so.

(ii) 25 April 2018: Mr J Upsdale (HR) threatened the Claimant with further action if he released his recording of the events on 4 April 2018.

2.8 If so, was the conduct unwanted and did it relate to the Claimant's disability?

2.9 Did the conduct have the purpose or (taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable 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?

Section 15, EQA: discrimination arising from disability

2.10 Did the Respondent treat the Claimant unfavourably in the following ways?

(a) 8 August 2017: the Claimant was required to be absent from work (suspended) until Occupational Health approved his return.

(b) 19 February 2018: Ms Sloan's recommendation that there should be a formal disciplinary hearing whilst deceitfully maintaining that she did not know the potential consequences of the investigation and doing so in order to avoid paying company sick pay.

2.11 If so, was it because of something arising in consequence of disability? The Claimant relies upon (a) concern about his mental health in August 2017 and (b) his need for sickness absence in 19 February 2018.

2.12 If so, was it a proportionate means of achieving a legitimate aim?

2.13 Alternatively, has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had the disability?

Reasonable adjustments: EQA, sections 20 & 21

2.14 Did the Respondent apply the following provision, criterion or practice: (a) the requirement to pay £10 for a Subject Access Request to obtain copies of an employment file; and/or (b) a policy not permitting the recording of internal hearings?

2.15 Did any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time?

2.16 If so, did the Respondent know or could it reasonably have been expected to know the Claimant was likely to be placed at any such disadvantage?

2.17 If so, were there reasonable steps that were not taken that could have been taken by the Respondent to avoid any such disadvantage? The Claimant says that the Respondent should have waived the fee to access his file from the outset and/or permitted him to record his grievance hearing.

Section 27 EQA: victimisation

2.18 Did the Claimant do a protected act on: (a) 1 February 2018, when he alleged that Ms Sloan was victimising him; and/or (b) 1 March 2018, when he made the same allegation in his grievance against Ms Sloan?

2.19 Did the Respondent subject the Claimant to a detriment as identified at paragraphs 2.1(m) to (o) and/or the email from Mr Upsdale on 25 April 2018, because of a protected act?

Unauthorised deductions, s.13 ERA

2.20 Did the Respondent fail to pay the Claimant in full in respect of his sick pay for his absence in February 2018?

3 At the outset of the hearing, the Respondent conceded that the Claimant was disabled by reason of the mental impairment of depression for the relevant period from May 2017 until April 2018. At the conclusion of the hearing, the Respondent also conceded that the Claimant was disabled by reason of anxiety for the same period. It did not concede knowledge in respect of either disability. At the conclusion of the hearing, the Claimant withdrew the allegation that he had done a protected act on 1 February 2018.

4 The Claimant attended the first day of the hearing without a written witness statement. He told the Tribunal that he had produced a statement and had sent it to the Respondent in compliance with earlier case management orders. The Respondent denied receipt of any statement from the Claimant. Upon checking his email account on his mobile phone, the Claimant was unable to find either the email to which the statement was said to be attached or a copy of the statement itself. The Claimant told the Tribunal that he had it saved on a flash drive at home. The Tribunal decided that it would start reading the evidence and documents and adjourn for the day so that the Claimant could go home, find a copy of his witness statement and send it again.

5 On attending the second day of the hearing, the Claimant had still not been able to find a copy of his witness statement. The Claimant proposed to rely upon the contents of his claim form, an email sent to Mr Banham dated 12 September 2017 setting out his concerns about events to that date and generally upon the contents of the documents in the bundle. The Respondent did not object and the Tribunal agreed that this was an appropriate and proportionate way forward. The Tribunal also told the parties that it would treat as his evidence the contents of an impact statement provided in support of his disability claim. The Tribunal heard evidence on behalf of the Claimant given by Ms Andrea Moss. The Claimant produced a written statement from Mr Niall McEvoy but as this was not signed and Mr McEvoy did not attend to give oral evidence, the Tribunal attached little weight to its contents.

6 For the Respondent, the Tribunal heard evidence from Mr Steven Dickie (Ombudsman Manager), Ms Linda Sloan (Team of Manager), Mr Ian Smith (Head of

Casework), Ms Kelly Thompson (Head of HR Support), Mr John Upsdale (Employee Relations Partner) and Mr John Wightman (Ombudsman Leader). We were provided with an agreed bundle of documents and read those pages to which we were taken in evidence.

Findings of Fact

7 The Respondent is a public body which settles individual disputes between consumers and businesses that provide financial services. The Claimant commenced employment with the Respondent on 18 June 2012. From January 2017 he was managed by Mr Steven Farmer. The Respondent conducts annual appraisals for its employees. The Claimant was unhappy that on 25 April 2017, Mr Farmer had given him an appraisal rating of meeting expectations.

8 On 4 May 2017 the Claimant challenged this appraisal rating on grounds that Mr Farmer had breached the appraisal procedure as he did not review the Claimant's appraisal information and had gone to internal consistency meetings without full knowledge of the Claimant's work. The grievance was heard by Mr Fox. By letter dated 4 July 2017, the grievance was not upheld. Mr Fox acknowledged some failure to follow process by Mr Farmer but he considered that it had no impact on the appraisal rating. The Claimant was upset and appealed against this decision.

9 On 24 July 2017, the Claimant raised a further complaint alleging that Mr Farmer had forged a company document by recording a meeting with the Claimant to discuss a customer complaint when no such meeting had taken place. In a series of emails sent to HR, the Claimant said that he would take his complaint to his MP and that he felt that he was being ostracised. The Claimant also raised concerns with Mr Wightman about the handling of his grievance stating, in several emails sent in early August 2017, that he intended to take legal advice and would be absent from the office. The tone of the Claimant's emails suggested that he was experiencing considerable stress and Mr Wightman was aware of a recent tragic event in the Claimant's home life.

10 Mr Wightman met the Claimant and Miss Moss on 7 August 2017. Mr Wightman sought to be supportive but the Claimant said that he did not consider that a referral to Occupational Health would be helpful or that he would be interested in possible external mediation. Mr Wightman thought that the Claimant looked physically unwell and very unhappy and believed that he was not ready to return to work. After a short adjournment, Mr Wightman agreed that the Claimant's absence to date should be regarded as compassionate leave and agreed to look at whether a transfer would be feasible. There was no discussion or agreement about how long the compassionate leave would last.

11 On 8 August 2017, Mr Wightman emailed the Claimant recording their agreement that the Claimant would send him a list of his issues, Mr Wightman would then make internal enquiries and come back to him with a progress update. The email also included the following:

> **"2 – My duty of care**
>
> **Since we talked, I've given a lot of thought to the fact that I have a duty of care to you – and to our customers and staff – to make sure that you're able to be at work without feeling undue stress. From our conversation yesterday, my feeling is that it would be sensible for you to take a little more time out of the office as compassionate leave**

> **because it's important to me that you have the space to come to terms with the difficult events at home last week.**
>
> **And when you do come back to work, I want to make sure that we're able to support you in the best possible way. That's why I've asked our HR team to arrange for you to see a BUPA specialist.**
>
> **Once I'm satisfied that all the right kind of support is in place for you, we'll make plans for you to return to work. I heard that you did not want to return to work in PB01 and that's something we'll try to accommodate. But it isn't always straightforward to transfer staff from one division to another, particularly when it involves working different products. And, should we decide that moving is the best thing to do, we'll need to make sure that you and your new manager are fully supported."**

12 Mr Wightman's evidence to the Tribunal was that he thought that compassionate leave was the right thing to do as, for his own well-being, the Claimant should not have been at work. Mr Wightman was aware that the Claimant had previous absence problems and had demonstrated a reluctance to provide medical records relating to his anxiety. Mr Wightman wanted an Occupational Health report in order to identify the support required and a framework to put it in place. The Tribunal considered Mr Wightman to be an impressive and reliable witness; we accepted as truthful his evidence that compassionate leave was intended to support the Claimant whilst enabling the Respondent to obtain the specialist occupational health information it required to do so.

13 On 10 August 2017, the Claimant emailed Mr Wightman setting out the background to his concerns and asking why he had to move rather than middle management. The Claimant asked for the reasons for the Occupational Health referral, saying that his added stress had been caused by dishonesty and management failings. In this email, the Claimant did not object to being placed on compassionate leave. In his reply, Mr Wightman explained that the Occupational Health referral was to provide the best support; he had sensed the Claimant's anger and frustration at the meeting and wanted to ensure that this would not increase his pressure on his return to work and referred to the difficult events in the Claimant's personal life.

14 The Claimant attended an appointment with Occupational Health on 25 August 2017. The report produced the same day confirmed that the Claimant believed that his concerns had not been addressed appropriately and that this had caused him stress. The report also referred to previous treatment for mental health problems and a particularly difficult time the beginning of February 2016 confirming that the Claimant had received counselling and medication but had required no other assistance. In conclusion, there was no specific evidence that the Claimant should not be at work undertaking normal duties but a transfer would be advantageous as the Claimant perceived his working relationship with his manager to be compromised. The report was provided to the Respondent on or around 8 September 2017 and Mr Wightman contacted the Claimant the same day to say that they would welcome him back to work the following week.

15 During the Claimant's absence, Mr Wightman undertook an informal investigation into the Claimant's concerns in his grievance process and relationship with Mr Farmer. This included seeking information from the Claimant himself. In connection with the meeting Mr Wightman said that he understood why the Claimant was frustrated by Mr Farmer's action and that Mr Farmer had been taken an administrative short cut. He therefore spoke to Mr Farmer about the importance of ensuring that records were

accurate. This informal fact gathering exercise is supported by contemporaneous emails and we accepted as truthful the evidence of Mr Wightman.

16 Whilst still off work, on 31 August 2017 the Claimant asked for a paper copy of his employee file staff handbook and his contract of employment within the next five working days. At 5.14pm on 4 September 2017, Ms Walakira, a HR business partner, replied that while they were happy to provide an email copy of the personnel file copy at no cost but if the Claimant required a hard copy he would have to make a formal subject access request and there would be a £10 cost. The Claimant replied stating that he was not required to make such a request in order to obtain his employee file and contract requiring a hard copy by 8 September 2017 and that if he did not receive it, he would commence legal proceedings against Ms Walakira and the Respondent. Ms Walakira replied saying that they were unable to comply with the request within the suggested time line due to restricted resources but they would aim to do so by no later than close of business on 12 September 2017. Contemporaneous emails again show that the Respondent's HR team were taking steps to locate the file and ensure that it was up to date before being provided to the Claimant. It refers to the Occupational Health referral containing sensitive information but that the Claimant should be able to see that information. It is clear to the Tribunal that the Respondent was handling the request for the personnel file in a proper manner.

17 On 8 September 2017, Mr Wightman sent a lengthy email to the Claimant confirming that he was now able to return to work, that his manager would change from Mr Farmer to Ms Sloan, staying in the same business area but with clear objectives and development areas to be agreed. Mr Wightman provided a summary of his conclusions on the Claimant's concerns, hoping that a line could be drawn and that the Claimant was looking forward to coming back to work with a new manager. The Tribunal accepts Mr Wightman's evidence that he chose Ms Sloan to be the Claimant's new line manager as she was experienced in managing employees with mental health difficulties. In cross-examination, the Claimant asked Mr Wightman why he had not been transferred to a different business area. This was not part of the list of issues, but in any event the Tribunal accepted Mr Wightman's evidence that a move would have required further training whereas better support could be provided if the Claimant remained working in an area where he knew the product very well.

18 The Claimant's reply to Mr Wightman's email was short to the point of being curt, saying that he had involved his local MP and that he regarded the Respondent's action as "incredulous". Mr Wightman's reply was polite and positive. The Claimant's response was that he would not return to work in his existing product area, that he had made an official complaint about his manager falsifying documents which Mr Wightman said he was investigating but where there had been no minuted meeting with him nor any outcome letter. On balance, and having regard to the contemporaneous documents, the Tribunal finds that this was the first time that the Claimant referred to an official or formal complaint.

19 Mr Wightman replied in a long email on 12 September 2017, explaining that he had given a lot of thought to the Claimant's return to work arrangements to provide the right support and goodwill. Mr Wightman countered the Claimant's assertion that he had made an official complaint about Mr Farmer, stating that the Claimant had previously confirmed that he had raised no formal complaint. Mr Wightman explained the steps taken in his investigation, set out his conclusion that Mr Farmer had intended to hold the meeting with the Claimant but had logged it on the system before, rather than after, it had

taken place. This was the administrative "short cut" referred to in the earlier email. Mr Wightman accepted that Mr Farmer could have been more careful and confirmed that he had spoken to him and was satisfied that he was aware of the need to keep accurate and up to date records.

20 The Claimant replied, repeating his dissatisfaction that there was no change of business area, about Mr Farmer, the proposal to set clear objectives and complaining that there was a rush to get him back to work before HR provided him with a copy of his employee file and contract of employment. The tone of the Claimant's email is in contrast to the positive and supportive tone used by Mr Wightman. The Claimant alleged that there was a breach of his contract of employment, accused Mr Wightman of attempting to reintroduce him to an uncomfortable environment in the hope that he would not return or would resign shortly thereafter and referring to a process of constructive dismissal. The Tribunal finds that objectively considered the Claimant was wrong: far from trying to secure his resignation, Mr Wightman was making considerable efforts to enable the Claimant's return to work in a supportive environment in a genuine desire to enable him to move forward from his dissatisfaction with Mr Farmer.

21 The Claimant attended a return to work interview with Mr Wightman on 13 September 2017. The Claimant again raised his complaints about Mr Farmer. Ms Moss, who was present, could not remember whether the Claimant asked at this meeting for a formal investigation. Mr Wightman explained, again, what he had done and his conclusions. Ms Sloan told the Claimant that she wanted to put any previous grievances behind them and that she regarded his as a competent adjudicator starting in her team with "a clean slate". Although the Claimant evidently disagreed, Mr Wightman and Ms Sloan regarded the Claimant's earlier complaints as being considered and concluded, they were looking to the future and not the past.

22 On 11 September 2017, at about 5.30pm, Ms Walakira sent the Claimant three emails: one with a copy of his personal file and contract, the next with the password to open the documents and the third apologising that security restrictions prevented the use of passwords. Ms Walakira offered to resend the file without the password or send it to his work email. About 10 minutes later, the Claimant replied by email with his expectation that a paper copy of his file and contract be delivered to his home address by close of business the following day.

23 On 12 September 2017, at 4.21pm, Ms Walakira again sent the personal file and contract to the Claimant by email. The Claimant replied at 4.32pm in the following terms:

> "**Angela**
>
> **I am incredulous not only have you failed to follow a request in the time scale provided you have shown that you are incapable of reading a simple instruction. I requested this information to be sent in writing.**
>
> **You have sent these documents in a format I think you know won't open. I want these documents in writing before the close of business today.**
>
> **I have informed my local MP of your unwillingness to provide these documents in writing and will now be taking the matter further**."

24 At 6.04pm, Ms Walakira responded. Her email is professional and courteous in

tone. Ms Walakira was sorry that the Claimant had been unable to open the documents sent by email and proposed three options: by email to a work address; a formal request by way of subject access request upon payment of £10; or hard copy to the Claimant's home address within 48 hours if he paid the cost of printing and the courier. Ms Walakira was advised the following day that the Claimant had repeated his request for a hard copy of the documents. Accordingly, she asked HR support to print the documents and ask the Claimant whether he wanted to collect them or have them sent to his home address.

25 The Claimant sought the assistance of his MP who wrote on his behalf to the Respondent on 18 September 2017. One of the concerns raised by the Claimant was his belief that he had been required to submit a subject access request to get a copy of his employment contract and employee file. The Claimant also sent an email on 18 September 2017 complaining that he had still not received a copy of the contract and file and requiring it by close of business that day.

26 On or around 22 September 2017, the Respondent sent the Claimant paper copies of his personal file and contract to his home address. It was picked up by his wife. Photographs of the envelope show the correct address but not the name of the Claimant. There was some minor damage to the top right-hand corner and left-hand corner of the envelope although this appears to be creasing and bending and there is no visible sign that the envelope had been opened. The Claimant emailed the Respondent on 25 September 2017 complaining that they had sent the documents "**randomly without even addressing it**", he wanted some sort of reparation and would be reporting this data protection breach to the Information Commissioner's Office. The Tribunal finds that the Claimant's email is inaccurate; the documents had not been sent "randomly" but in an envelope correctly addressed to the Claimant's flat albeit with the omission of his name.

27 An internal investigation by Ms Bend, an employee relations partner, concluded that the Claimant's personal data had been protected in that it was not unauthorised, unlawful, lost, damaged or destroyed as it had been received at the correct address although it could have been opened by another person in the household. Ms Bend made three recommendations designed to prevent any similar future mistakes. Ms Bend sought advice about steps required to inform the Information Commissioner's Office. On 28 September 2017, Ms Chaudhri (ER and HR Policy Manager) wrote to the Claimant apologising for the error and inviting him to a meeting to discuss the investigation. Ms Chaudhri also apologised for any delays and inconvenience caused.

28 The meeting took place on 4 October 2017 and the Claimant was accompanied by Ms Moss. The Claimant was offered a formal apology but was still extremely unhappy and looking for "resolution", by which he meant financial compensation. Ms Moss' evidence was that the Respondent expressly accepted that there had been a non-reportable data protection breach. The Claimant admitted that this had been said in the meeting but maintained nonetheless that the Respondent had denied that there had been any data protection breach. In many parts of his evidence, the Tribunal did not consider the Claimant to be a reliable witness. This was one clear example where despite the contemporaneous documents showing an apology and acknowledgement of error, the evidence of his own witness and even his own admission, the Claimant maintained a case which was not plausible and not credible. The Claimant's subjective belief in his critical view of the Respondent overall rendered him unable to see matters objectively.

29 On 18 October 2017, at 4.15pm, Ms Diggines (HR Manager) sent an email to the

Claimant which was apologetic and conciliatory in tone. Ms Diggines apologised for the distress caused and the delay in replying, agreed that the enquiry had not been dealt with as well as it could and that there had been no thought about the impact upon the Claimant. Ms Diggines accepted that the process had not been fully explained nor had it been followed. In particular, the Respondent had failed to make clear that the Claimant could have collected a hard copy from HR or had it sent by courier to his home. Ms Diggines concluded that their handling the matter was just not good enough and sought to reassure the Claimant that action would be taken to update the HR team on correct process for future requests.

30 The Claimant was not satisfied with Ms Diggines' apology and, at 4.28pm, replied as follows:

> **"Tania**
>
> **Can I ask is that it?**
>
> **Is that your resolution to this whole charade? If I were a consumer you would be bending over backwards. In my original complaint I told you I expected to be remunerated (the same as we would do with any consumer), so I will take this opportunity again to remind you this is a dispute resolution business and as of yet you have not even approached a resolution.**
>
> **I will expect your proposed resolution in writing by 10.am Friday 20 October 2017."**

31 Despite the abrasive tone of the Claimant's email, Ms Diggines' email in response sent on 19 October 2017 at 12.43pm read:

> **"Christopher**
>
> **I'm sorry that you're disappointed in my response to your complaint about our service. I've looked into it for you and carried out a thorough investigation.**
>
> **I've apologised to you for the poor service you received and Sasha apologised to you when we met. I also followed up with a full explanation by email where I explained our process which has been tightened up.**
>
> **I acknowledged that you have been inconvenienced and felt this incident to be upsetting. I note you expected to be remunerated but that is not something we'd do in this situation.**
>
> **Once again, please accept my apologies for the distress you've been caused and rest assured we will do things differently moving forward.**
>
> **Best wishes**
> **Tania."**

32 Some nine minutes later, the Claimant sent an email which read:

> **"Tania**
>
> **You are either a liar or severely mistaken in the running of this organisation.**
>
> **Through my time at the Ombudsman service I have witnessed on many occasions consumers being remunerated because we failed to provide the service standard required.**

> **You have still failed to state a resolution and say what you are going to do to put the situation correct for me.**
>
> **Additionally you have failed to provide me with details to take the matter further internally. I think it is about time that you stopped believing that I am beneath you and can be treated like dirt. I am firmly of the opinion that you are creating a situation which would lead to constructive dismissal. I will be doing a freedom of information request and if I find one consumer that has been awarded any payment for distress and inconvenience I will be demanding that everyone involved in this charade of a cover up to be dismissed.**"

33 In his evidence to the Tribunal, the Claimant maintained that the tone of this email was acceptable in the circumstances. The Tribunal disagree. Whether or not the Respondent would compensate a consumer in response to poor service, the Claimant was complaining not in the capacity of a consumer but as an employee. To fail to appreciate the distinction and to call Ms Diggines a liar and suggest that she was trying to create a constructive dismissal, in the context of her calm and measured communications, was not appropriate. The Tribunal finds it unsurprising that the Claimant's emails were brought to the attention of Ms Sloan and Mr Wightman who were asked to speak to him.

34 The Claimant made a complaint to the Information Commissioner's Office on 15 March 2018. On 22 June 2018, the Information Commissioner stated that on the basis of the information provided by the Claimant, there may have been a breach of the Data Protection Act but that there was no obligation to send everything by recorded delivery and no further action would be taken.

35 At no time in his contemporaneous emails did the Claimant express concern that HR were communicating with him after 3pm, which he defines in this claim as being late in the day. The Tribunal accepted Ms Thompson's evidence that HR were trying to comply with the Claimant's requests for a reply with very short deadlines and this tended to be at the end of the day as they were engaged in meetings earlier in the day.

36 Throughout this time, and despite the Claimant's repeated desire to transfer to another business area, Ms Sloan worked hard to establish a good working relationship with the Claimant. In an email to HR on 23 October 2017, Ms Sloan understood the Claimant's sense of grievance at being offered only an apology and not compensation for the failure to include his name on the envelope. Ms Sloan was generally supportive of the Claimant's work in her team whilst appreciating that he suffers high levels of stress and anxiety and that his complaints may be a way to reduce his stress by gaining some control.

37 On 24 October 2017, Mr Wightman sent the Claimant an email with the subject "thank you". In it, he told the Claimant that Ms Sloan had provided really positive feedback about the Claimant's work and the way that he had slotted into her team. Mr Wightman thanked the Claimant for engaging positively with Ms Sloan and her feedback since his return to work. Mr Wightman said that he was encouraged that the Claimant's ongoing issues with HR about his incorrectly posted file were not getting in the way of his work or relationship with Ms Sloan.

38 The following day, the Claimant sent an email to Mr Wightman complaining that he had found his email insulting and demeaning as it suggested that the Claimant was a troublemaker, unable to take feedback or get on with colleagues. The Claimant then listed his criticisms of Mr Farmer and Mr Wightman in trenchant terms before concluding:

> **"They say a man can be judged by the company he keeps. Well in this I know I keep the company of some of the hardest working and most professional adjudicators in the service who strive in difficult conditions to move the business forward and deliver the best possible service to all our consumers. I wonder can you say the same about the managers you work with?"**

The Tribunal considers the language and tone of the Claimant's email, to a manager two levels of seniority above him, to be remarkable. Mr Wightman's email could not be read by a reasonable employee as anything other than an attempt to give praise and encouragement.

39 The Tribunal finds that Mr Wightman's reply to the Claimant demonstrated great courtesy and patience. He said that he was sorry that the Claimant felt that way and assured him that the email was meant with good intentions and without any hidden agenda.

40 The Claimant notified Ms Sloan that he would not be at work as he was going to see a solicitor in light of the behaviour of HR and Mr Wightman's email. Ms Sloan agreed, even offering to change his working hours to avoid using up his last remaining day of holiday entitlement. In emails to Mr Wightman, Ms Sloan described the Claimant as being extremely angry and rather agitated. The Tribunal accepts Ms Sloan's evidence that she was trying to support the Claimant and help him to move forward from his previous grievances but that the Claimant was reluctant to do so. Ms Sloan's evidence was consistent with practical support which she provided, including agreeing to manage the Claimant's absence levels informally even where they had reached the threshold for a formal attendance improvement plan.

41 On 8 November 2017, the Claimant raised a formal grievance against Ms Diggines accusing her amongst other things of deliberately treating his complaint as an employee relations complaint to bypass reporting to the ICO, lying that the service does not provide compensation to employees or consumers and breaking confidentiality by involving Ms Sloan. Ms Follett, an interim employee relations manager, was appointed to deal with it.

42 The Claimant was invited to a grievance hearing on 30 November 2017. In an email sent on 27 November 2017 at 12.07pm, the Claimant informed the Respondent that he would be recording the meeting for posterity and because previous notes had been a disgrace. Ms Follett replied at 3.02pm saying that recording the meeting was not part of the process and would only be considered if there was a medical reason for making the request. Since the Respondent was not aware of any medical reason, she asked that he did not record the meeting. The Claimant replied at 3.49pm:

> **"Susan**
>
> **Let me be clear here. I am legally entitled to record this meeting and I will be recording the meeting the only obligation I have is to inform you I am recording the meeting so consider yourself informed.**
>
> **If either yourself of Constance is uncomfortable with being recorded then by all means feel free to have yourself replaced."**

43 In her reply to this email, sent at 5.57pm, Ms Follett referred the Claimant to the Dignity at Work policy and asked him to be respectfully aware that his comments were unhelpful and offensive, asking that he moderate his tone and language and repeating that the meeting could not be recorded. The Claimant's response, sent at 6.30pm, was to say that Ms Follett's comments were an attempt at bullying and a malicious falsehood. The Claimant said that his solicitor had said that he was legally entitled to record the meeting and that a person who does not want to be in a recorded meeting should ask to be removed. The Claimant objected to the sharing of information with Ms Sloan and formally requested the removal of Ms Follett whom he described as obstructive and rude.

44 On 28 November 2017, Ms Chaudhri, as a more senior manager, intervened to tell the Claimant that he was not permitted to record the meeting and also expressed concern about the tone of his correspondence which would be fed back to Ms Sloan. Her email was sent at 3.22pm. The Claimant replied at 3.47pm, saying that he would not attend the meeting, referring to what he described as constant intimidation and attempted bullying, and making sarcastic comments congratulating the Respondent for materially harming his health. There were further similar email exchanges between the Claimant and Ms Chaudhri on 29 November 2017 (between 4.47pm and 5.43pm) and 30 November 2017 (3.54pm to 4.28pm). The Claimant was warned that breach of the instruction not to record could potentially be a disciplinary matter. At no stage during these email exchanges did the Claimant suggest that he needed to record the meeting because of his disability. Nor did the Claimant express concern that emails were being sent after 3pm, as he does now in this claim.

45 Throughout this latest dispute with HR, Ms Sloan attempted to be supportive of the Claimant and to encourage him to focus upon his work. This is demonstrated in contemporaneous emails in which she praised his work and encouraged him to focus on his health. It was also demonstrated by her response to the Claimant's mid-year review completed in late November 2017. In this, the Claimant repeated at length his complaints and made allegations of bullying and intimidation by senior managers in HR, accusing the Respondent of brushing senior management misconduct under the carpet. Ms Sloan asked whether he really wanted to include those comments and suggested that he comment on the great work that he had been doing over the last four months and positive things he could write about instead. The Claimant insisted that he was happy with the document as it was.

46 On 15 December 2017 another team manager, Ms Lowe, complained to Ms Sloan that she had felt uncomfortable with the way the Claimant spoke to her in a case discussion meeting. Ms Lowe said that the Claimant was not interested in listening to what she had to say and, whilst she understood that adjudicators can get passionate about feedback, she found him aggressive, confrontational and argumentative in his tone and language. It was not the way she expected to be talked to or treated by another employee. In cross-examination, the Claimant denied shouting or being confrontational although he admitted telling Ms Lowe that she did not know what she was doing.

47 Due to the Claimant's refusal to attend unless permitted to record, the grievance meeting chaired by Ms Constance Chinhengo proceeded in his absence. Ms Chinhengo did not uphold the grievance and set out her reasons in a letter dated 5 January 2018. The letter also contained four recommendations. First, the matters raised were now concluded. Second, no further complaint about the matters raised in the grievance would be taken forwarded outside of the appeal process. Third, the Claimant should work with

his manager to put these issues behind him and move on. Fourth, consideration be given as to the tone, style and content of the Claimant's communication with colleagues during the grievance process and whether further action was necessary. The recommendations did not say that the Claimant could not pursue a complaint with the Information Commissioner's Office. The Claimant was advised of his right to appeal which he duly exercised. The appeal was considered by Mr Stride-Noble. The Claimant again refused to attend a meeting. By letter dated 7 February 2018, the appeal was not upheld.

48 On the 15 January 2018, Ms Sloan sent the Claimant an email advising him that she was reviewing the team's cases to identify any which appeared not to be progressing. She listed ten of the Claimant's cases and asked that he reply by email with a few comments on each by way of update on their progress. The Tribunal accepted as truthful and reliable Ms Sloan's evidence that she was required by her manager to produce a report of case progression in her team as part of her own performance review. This is consistent with her explanations to the Claimant in contemporaneous emails and a chronology of events produced at the time. As a result, she reviewed the caseload for all six case workers in her team and the same email was sent to four members of the team who had cases with apparent delays. We also accepted Ms Sloan's evidence that the other three case workers responded by email with two to three lines of information about their cases as this is consistent with what she told the Claimant in discussions about the request at the time.

49 Shortly after sending her email to the Claimant, but before receiving a reply, Ms Sloan emailed Mr Ian Smith asking for advice on how to deal with the lack of progress on some of the Claimant's cases. She asked: *"***as nothing has been done since they have been allocated on 25/09 and 27/10 do you think he should be taken to a disciplinary for this? Obviously I am waiting to hear what he has to say but I feel there is too many for too long to just do a PIP. Are you aware of anyone else in the division that has not progressed cases and if so what have we done"**. This is consistent with Ms Sloan's genuine concern about lack of progress on these cases. The Tribunal does not consider her request for advice or the reference to possible disciplinary action sinister, rather Ms Sloan was seeking to ensure that she dealt with the Claimant in a manner consistent with other employees in a similar situation. Mr Smith's advice was to wait and hear the Claimant's explanation before deciding what to do.

50 The Claimant replied on 17 January 2018. He provided no information at all for five of the ten cases, for the other five cases the information was scant, for example "been chased" or "will be assessed before end of week". The Claimant said that the rest would be done by the end of the week or start of the following week. Ms Sloan was not satisfied and asked the Claimant for the reasons why these cases had not progressed. At a meeting on 18 January 2018, for which there is a file note prepared by Ms Sloan, the Claimant said that it was HR's fault as he had been distracted from work and was spending his evenings corresponding with his lawyer and MP. Ms Sloan described the Claimant as being very aggressive towards her in the meeting, at one stage raising his voice so loudly that Mr Smith heard in the next room. The Claimant told Ms Sloan that if she took any action about the cases, he would see her in court. Ms Sloan's note also records that the Claimant was not speaking to her or the rest of the team unless they spoke to him. Ms Sloan was an impressive witness and we accepted her evidence that the file note was accurate as credible and reliable.

51 Following the meeting, Ms Sloan again asked the Claimant to provide written confirmation of the reasons for delay. The Claimant ignored her first email and, in his reply

to her follow up email, suggested that the request for written confirmation was victimisation and asked which part of the employee handbook covers "reasonable management request".

52 Ms Sloan's evidence is that she met the Claimant again on 24 January 2018. As set out in a contemporaneous file note, Ms Sloan explained to the Claimant that everybody else had updated her in writing. The Claimant said he did not care about other people; he did not think that Ms Sloan's behaviour was reasonable when he had given a verbal explanation. At the meeting, the Claimant continued to refuse to provide a written explanation of the reasons for the delay but agreed to provide a written update of the work now undertaken to progress the cases. The Claimant denies that this meeting took place.

53 On 25 January 2018, the Claimant complained that he felt unwell at work but refused to leave the office unless allowed to take annual leave rather than sickness leave. Mr Wightman believed that using annual leave for sickness was undesirable as it reduced the Respondent's ability to support ill-health and deprived the Claimant of leave when in good health, nevertheless he agreed on this occasion as he considered that it was the only way that the Claimant would take the time and space to recuperate from his illness.

54 Ms Sloan's evidence was that at a one-to-one meeting on 1 February 2018, she again discussed the Claimant's performance with him. In the bundle is a file note which Ms Sloan says was produced contemporaneously. Ms Sloan's chronology produced as part of the investigation also refers to there being such a meeting. Ms Sloan's evidence is that the Claimant again suggested that delays in his work were being caused by the time he needed to spend on HR issues. Ms Sloan said that he would be invited to an investigatory meeting to discuss why the cases had not progressed and if the Claimant did not give satisfactory reasons for the lack of progress, she would have to consider next steps. The Claimant said that Ms Sloan was victimising him. Ms Sloan disagreed stating that she had asked that everyone with a case load provide the same update. Ms Sloan's file note describes the Claimant as angry and aggressive in the meeting. The Claimant denies that this meeting took place.

55 On 2 February 2018, the Claimant did not attend work, telling Ms Sloan that he needed to see a solicitor but would not take the day as holiday as the Respondent was obliged to give him the time off.

56 The investigation meeting was held on 5 February 2018, the Claimant was accompanied by Ms Mustafa and notes were taken by Mr Buss. As before, the Claimant was asked for the reasons for lack of progress on certain cases and, as before, the Claimant accused Ms Sloan of victimising, bullying and intimidating him. The Claimant said that he had already provided an explanation on 18 January 2018 and 2 February 2018 and was not willing to do it again. This is consistent with the Claimant's position in the meeting and in cross-examination at this hearing that Ms Sloan was at fault for not writing down his verbal explanations. Ms Sloan referred to the earlier verbal explanations that it was HR's fault. The Claimant denied that he had said this but then declined the opportunity to clarify his position. In her evidence, Ms Sloan described the meeting as difficult, with the Claimant becoming very angry, leaning forward in his chair and making his points quite aggressively. This is consistent with the notes produced by Mr Buss which tend to show the Claimant as argumentative and confrontational, repeatedly challenging Ms Sloan's right to request a short, written update on the reasons for delay.

57 Whilst the Claimant denies that there were meetings on 24 January 2018 or 1 February 2018, the Tribunal prefers the evidence of Ms Sloan. The Claimant's position in the investigation meeting was that there had been a discussion about delay on 2 February 2018. He was not at work that day. It is more credible that he is referring to the discussion the day before. The file notes are detailed and have the ring of truth and it is not plausible that they are an entire fabrication as the Claimant's case would suggest. Until withdrawn during his closing submissions, the Claimant's case was that during this meeting he had complained that Ms Sloan was victimising him and that this amounted to a protected act. On balance, we find that the discussions took place and that the file notes are an accurate record of those discussions.

58 The Claimant was absent from work on 9, 12 and 13 to 16 February 2018 due to bereavement. Ms Sloan was aware of the reason for absence. As part of her investigation, she had reviewed the Claimant's un-progressed cases and was concerned that several of them involved vulnerable consumers trapped in debt by numerous short-term loans and in need of swift resolution of their cases. Ms Sloan considered the Claimant's mental health but did not believe that this provided a good reason for his failure to provide written updates on his delayed cases.

59 Ms Sloan met with the Claimant when he returned to work on 19 February 2018. After checking on his well-being and that of his wife, Ms Sloan told the Claimant that as a result of her investigation she had decided to pass the matter to a manager who would decide what the next step should be. Ms Sloan's evidence, supported by her file note and email to Ms Donkor in employee relations both of the same date, was that she was trying to explain to the Claimant that her role was to pass the investigation to a hearing manager and it would be for them to decide whether there needed to be a disciplinary hearing as that was not her decision to make. The Claimant reacted aggressively, raising his voice to such an extent that Mr Whitman could hear from outside the room and thought it necessary to enter the room.

60 Mr Whitman's evidence corroborated that of Ms Sloan, he could hear the Claimant's raised voice, saw that he was red in the face, gesticulating and banging his finger on the table so much that Mr Whitman went in and told the Claimant that his behaviour was not appropriate and remained in the room for the rest of the meeting. The Claimant denies that he shouted although he accepts that he was upset and extremely emotional and that Mr Whitman intervened in the meeting. The Claimant was particularly upset that Ms Sloan would not tell him what the next steps were and what the outcomes would be. The Tribunal found Ms Sloan and Mr Whitman's evidence to be reliable, supported by contemporaneous documents such as Ms Sloan's email to the Claimant on 20 February 2018. It is also consistent with the manner in which the Claimant had presented in previous meetings. On balance, we find that the meeting occurred as described by Ms Sloan and Mr Whitman.

61 The Claimant commenced a further period of sickness absence that day. The Claimant's case is that Ms Sloan chose to tell him that the investigation would proceed on the day of his return to work deliberately in order to create a mental breakdown and/or provoke evidence of gross misconduct and also to avoid paying company sick pay. The Tribunal did not find this plausible. Ms Sloan had been supportive of the Claimant's health and even in her email 20 February 2018, she encouraged him to seek support and provided him with the contact details for Carefirst and BUPA. Ms Sloan was not acting out of malice but a genuine need to understand the reason for delays on some of the

Claimant's cases. The Claimant had failed to comply with what the Tribunal finds was a reasonable management requested and made clear that he had no intention of complying in the future. This was the reason why Ms Sloan needed to pass the matter to a more senior manager to consider disciplinary action and the Claimant needed to be informed. The Tribunal does not consider it significant that it was on the day that he returned to work rather than, say, the following day.

62 Clause 9 of the Claimant's contract of employment provided that when absent due to illness or incapacity, he may be entitled to occupational sick pay in accordance with the sickness absence policy. That policy provides that an employee will be paid statutory sick pay where they are going through disciplinary proceedings for any reason. The Respondent's disciplinary policy sets out the various steps of the formal process, these include investigation.

63 By a letter of 21 February 2018, the Claimant was invited to a disciplinary hearing to discuss two allegations of misconduct: first, failure to progress cases in line with the requirements of the role; and second, failure to comply with a reasonable management instruction. The Claimant accepted that it was clear from this date that he was subject to a disciplinary process. The Tribunal does not accept that the Claimant could reasonably have thought that these initial allegations were about his competence when they were clearly expressed to relate to his conduct. A copy of Ms Sloan's investigation report and the relevant emails and notes of meetings were sent to the Claimant. The Claimant was advised that the outcome could result in a disciplinary warning. The disciplinary was to be heard by Mr Steven Dickie.

64 By email dated 1 March 2018, the Claimant raised a grievance against Ms Sloan for victimisation and failure to follow internal disciplinary procedures. He asked that his sick pay be reinstated and asked for alternative reporting arrangements upon his return to work on 5 March 2018 as it would be a breach of contract to require him to return to an uncomfortable working environment in Ms Sloan's team. Ms Donkor, an employee relations partner, informed the Claimant that the grievance and disciplinary matters would be dealt with at the same time given the significant overlap. The Claimant considered this a breach of the ACAS Code and Guidance.

65 The Claimant returned to work on 5 March 2018 and met Mr Ian Smith who was aware that the Claimant had problems with anxiety and had been off work as a result. Mr Smith agreed that the Claimant did not have to sit with his previous team. The Claimant's case at this hearing is that he expected the move to be for the first day only. Notes of the meeting confirm that he was happy to be seated with a different team on a different floor and there is no suggestion that it was for one day only. This is not what he had said in his original email. Nor when Mr Smith contacted him the following day to say that the manager had agreed the Claimant could continue to sit with the other team until told otherwise and that he (Mr Smith) would act as his line manager, did the Claimant complain. In evidence, the Claimant accepted that he did not subsequently tell Mr Smith that he was unhappy. Even if mistaken, Mr Smith genuinely believed that he was doing what the Claimant wanted and seating him away from his previous team.

66 The disciplinary hearing took place on 6 March 2018, it lasted an hour and half and the Claimant was accompanied by Ms Moss. The Claimant referred to his anxiety and the effect of his dispute with HR which, he said, required him to finish his work by 3pm in order to deal with emails he expected from HR after that time. The Claimant repeated

his concern that he was being victimised and discriminated against as he was the only case handler asked to provide his explanations in writing. The Claimant referred to a double standard whereby he was being disciplined whereas Mr Farmer had not been. He alleged that Ms Sloan had not followed the disciplinary process and he said that he believed that he was entitled to company sick pay as he had not been part of a formal disciplinary process until after his doctor had signed him off sick.

67 Mr Dickie interviewed Mr Whitman and Ms Sloan. During the interview with Ms Sloan, there was a reference to a comment which the Claimant may have made to another female employee. The Claimant strongly disputed making any such comment. The Tribunal did not consider it necessary to decide this dispute as it was not relevant to any of the issues before us.

68 As a result of his further interviews, Mr Dickie became aware of the earlier concerns expressed about the Claimant's conduct by Ms Sloan and HR but which had not been included in the investigation pack. Mr Dickie decided that it was necessary to investigate these further and he interviewed Ms Lowe, Mr Smith and Mr Buss. Based on these interviews, Mr Dickie was concerned that the Claimant's conduct on each of those occasions was inappropriate and, upon advice from Employee Relations, decided to expand the scope of the disciplinary proceedings to cover those further allegations. The Claimant was informed of the new allegation by a letter dated 15 March 2018 and invited to a further meeting. The new allegation was that on several occasions he had failed to communicate with colleagues in a manner that is appropriate or in line with the Respondent's expectations. An appendix listed the occasions of concern as the Claimant's email to Mr Wightman on 25 October 2017, his behaviour to Ms Lowe on 14 December 2017 behaviour to Ms Lowe; and his behaviour to Ms Sloan on 18 January 2018, 5 February 2018 and 19 February 2018. The letter advised that if upheld, the allegation could result in a disciplinary warning or dismissal. The Claimant requested, and was permitted, annual leave in order to seek legal advice about the new allegations.

69 The Claimant was provided with the written feedback produced by Ms Lowe which had been discussed on 14 December 2017. The Claimant was unhappy that the entire document had not been disclosed. Ms Lowe confirmed that only the first questions related to the Claimant's work done on the case. The Claimant had previously seen the full document and indeed a copy was available at Tribunal. The Tribunal agrees that the fourth and fifth questions were not relevant to the allegation relating to his conduct to Ms Lowe at the meeting.

70 By email dated 29 March 2018, the Claimant resigned. The email is not a conventional letter of resignation, instead the Claimant purported to invite the members of the Respondent's non-executive board and executive team to a meeting at 2pm on 3 April 2018 to disclose corporate bullying and manipulation amongst middle management in conjunction with HR within the Financial Ombudsman Service. Items listed referred to the previous complaints about Mr Farmer's falsification of documents, Mr Wightman's inaction, the redacted Lowe feedback and Ms Sloan "misleading" him about the disciplinary process. The date and time given in the email was that of the Claimant's reconvened disciplinary hearing with Mr Dickie.

71 In reply to the Claimant's email that same day, Ms Donkor said that the Respondent did not wish him to resign in haste and encouraged him to consider over the weekend if resigning were the right thing to do. If he did resign, the disciplinary hearing

would be cancelled. Whatever his decision, the grievance would still be heard as the allegations of bullying were and would be taken seriously. She asked that the Claimant did not email the entire executive team and board in future correspondence.

72 On 3 April 2018, the Claimant ignored Ms Donkor's instruction and emailed the executive team and board to confirm that he wished to resign and repeated both his complaints and invitation to attend the meeting due to take place that day.

73 The meeting with Mr Dickie proceeded as planned at 2pm; the Claimant attended, the non-executive board and executive team did not. The meeting lasted about an hour and a half and the Claimant had a full opportunity to discuss his concerns, which were as set out extensively above.

74 The Claimant attended work on 4 April 2018. The Respondent decided it was preferable in the circumstances that he be put on garden leave. The Claimant was working in a meeting room on the 11th floor. He refused to meet Ms Sloan as he had not been given 48 hours' notice in order to get a witness. Ms Sloan explained that this was not a formal meeting. The Claimant insisted that he must be given 48 hours' notice. Ms Sloan returned to the 11th floor with Ms Chaudhri. A photograph of the meeting room was in the Tribunal bundle. It is very small, with glass walls and doors.

75 In a contemporaneous file note, Ms Chaudhri says that they knocked on the glass door, the Claimant stood up and began fiddling with his phone. Ms Chaudhri records that the Claimant again refused to meet them, saying that they were making him feel uncomfortable by blocking his way. Ms Chaudhri states that she made sure that the door remained open and stood aside from the entrance whilst trying to explain to the Claimant that he was going to be put on garden leave. She says that the Claimant then walked towards the door, out of the room and towards the canteen with Ms Chaudhri and Ms Sloan following him explaining that they were simply trying to plan out the next few weeks. The Claimant refused to come back into the room and said he would need to call his solicitor. Ms Chaudhri said that they would wait five to ten minutes to allow him to do so and calm down. They then waited for the Claimant to return. The Claimant informed them that he had spoken to his solicitor and that he would go on garden leave. He refused to discuss a handover and required a letter confirming it. Ms Chaudhri describes the Claimant as becoming agitated, eventually the letter was produced and the Claimant left. Ms Sloan's evidence at this Tribunal was consistent with that of Ms Chaudhri; neither she nor Ms Chaudhri had any physical contact with the Claimant, they only wanted to talk to him about garden leave and, as the Claimant seemed anxious, they had tried to make it as comfortable as possible.

76 The Claimant's evidence is that he was held against his will in an office by the two managers without a witness. The Claimant recorded the interaction on his phone and the Tribunal had the opportunity to listen to that recording. On it, the Claimant repeatedly stated that the women were stopping him from leaving, that he had not had notice of the meeting, that he was not comfortable and wanted to see a solicitor. The Claimant told Ms Sloan and Ms Chaudhri that he was recording the incident. He did not raise his voice but appears on the recording to be agitated. The responses of Ms Sloan and Ms Chaudhri on the recording suggest genuine bewilderment as they repeatedly attempted to explain that the Claimant was being put on garden leave. Neither Ms Sloan nor Ms Chaudhri raised their voice as they tried to speak to the Claimant and they expressed concern that he was agitated.

77 On balance, and having had the opportunity to consider the full recording and the tone of voices used, the Tribunal prefers the evidence of Ms Sloan as corroborated by Ms Chaudhri's contemporaneous file note. We find that both women knew that they were being recorded. Although the Claimant says that the door is being blocked, the responses of Ms Sloan and Ms Chaudhri are not consistent with his description of events. It seemed to the Tribunal that the Claimant's comments were being made for the purpose of the recording to use in evidence in any subsequent litigation rather than being an accurate reflection of what was actually happening. It is implausible that, having come to the meeting room to put him on garden leave, Ms Sloan and Ms Chaudhri would in fact block his exit from the room.

78 A hearing with Mr Sceeny took place on 17 April 2018 to discuss the matters raised in the Claimant's resignation email. The Claimant attended with Ms Moss and Mr Upsdale took notes. The hearing lasted 1 hour 35 minutes and covered the complaints previously raised by the Claimant. In the hearing, the Claimant made clear that he disagreed with the requirement to provide a written update on his delayed cases, referring to the words "reasonable management" request as being the same as bullying. Mr Sceeny interviewed Ms Sloan, Ms Chaudhri and Mr Wightman; Mr Upsdale took notes of the interviews. Each denied any wrongdoing, providing reasons for their actions consistent with our findings of fact above.

79 On 24 April 2018 the Claimant expressed concern about the purpose and conduct of the meeting. At the conclusion of his email, the Claimant said that he intended to put on-line the recording of the events on 4 April 2018. In his reply on 25 April 2018, Mr Upsdale erroneously stated that neither Ms Chaudhri nor Ms Sloan had been made aware that the Claimant was recording. Mr Upsdale correctly stated that neither had given permission to make the recording and he told the Claimant that did not have the permission to share the recording on any forum. Mr Upsdale told the Claimant that to do so would be regarded as gross misconduct and that the ultimatum about putting it on-line was a potential criminal offence which may be referred to the police. We find that this was a serious matter and it was appropriate to tell the Claimant not to put the recording on the internet.

Law

Discrimination

80 Section 15 of the Equality Act 2010 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."**

81 There is no need for the Claimant to show less favourable treatment than a non-disabled comparator, simply 'unfavourable' treatment caused by something which arises in consequence of the disability. It is necessary to identify the "something" and establish

that it arose in consequence of the disability.

82 At paragraph 33 of her Judgment in **Pnaiser v NHS England and another** UKEAT/0137/15, Simler J (then President of the EAT) reviewed the earlier authorities and set out the proper approach as follows:

(1) Identify any unfavourable treatment and by whom.

(2) Determine what was the reason for that treatment, focusing on the conscious and subconscious motivation of the alleged discriminator. As with direct discrimination, the "something" need not be the sole or principal reason but must be an effective reason. Motive is irrelevant.

(3) Was such an effective reason or cause "something arising in consequence of disability"? This may involve more than one link and therefore more than one relevant consequence of disability may require consideration. Whether something can properly be said to arise in consequence of disability is a question of fact to be assessed robustly in each case. The more links in the chain between disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(4) This stage of the causation test is an objective question. It does not depend on the subjective thought processes of the alleged discriminator.

(5) The knowledge required is of the disability and does not extend to a requirement of knowledge that the "something" is a consequence of that disability.

(6) It does not matter precisely in which order these questions are addressed.

83 Objective justification requires the employer to establish a legitimate aim and then for the Tribunal to balance the proportionality of the steps taken and the discriminatory impact upon the employee. This will include consideration of the appropriateness and (reasonable) necessity of the means chosen, **Homer v Chief Constable West Yorkshire Police** [2012] ICR 704, SC. The employer does not have to show that no other steps were possible and the tribunal must have regard to its business needs.

84 Section 20 of the Equality Act 2010 provides that:

> **"20 Duty to make adjustments**
>
> **(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
>
> **(2) The duty comprises the following three requirements.**
>
> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."**

85 Where, as here, the employer is alleged to be in breach of the duty to make reasonable adjustments imposed by section 20(3) of the 2010 Act, the Tribunal should identify (1) the PCP(s) applied, (2) the identity of the persons who are not disabled in comparison with whom comparison is made, and (3) the nature and extent of the substantial disadvantage suffered by the employee, **Environment Agency v Rowan** [2008] IRLR 20 at paragraphs 26-27 (Judge Serota QC).

86 Having done so, the Tribunal must consider and identify what (if any) step it is objectively reasonable for the employer to have to take to avoid the disadvantage. The aim of the duty is to remove or at least ameliorate the substantial disadvantage so that the disabled person may remain in the workplace. The potential adjustment need only have *a* prospect of alleviating disadvantage and there is no need to show that it would have been completely effective or even that there was a good or real prospect of it being so.

87 An employer is not under a duty to make reasonable adjustments unless it knows (actually or ought reasonably to have known) both that the employee was disabled and that the employee was likely to be placed at a substantial disadvantage by a PCP because of that disability.

88 Harassment is defined in section 26 of the Equality Act 2010 as follows:

> **"(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."**

89 In **Richmond Pharmacology v Dhaliwal** UKEAT/0458/08/CEA, the EAT provided guidance to the effect that an Employment Tribunal deciding harassment claims should consider in turn: (i) the alleged conduct, (ii) whether it was unwanted, (iii) its purpose or effect and (iv) whether it related to a protected characteristic. As to effect in particular, at paragraph 15, the EAT made clear the importance of the element of reasonableness, having regard to all of the relevant circumstances, including context and in appropriate cases whether the conduct was intended to have that effect.

90 Considering specifically the requirements of s.26, Underhill LJ held that in considering whether any conduct had the proscribed effect, the Tribunal must consider both the subjective perception of the complainant and whether it was objectively reasonable for conduct to be regarded as having that effect, **Pemberton v Inwood** [2018] EWCA Civ 564.

91 Section 27 of the Equality Act 2010 prohibits victimisation. The Claimant does not need to show a comparator but he must prove that he did a protected act and that he was subjected to a detriment because he had done that protected act. As with direct discrimination, it is not necessary for the Claimant to show conscious motivation, it is sufficient that the protected characteristic or protected act had a significant influence on the outcome.

92 In considering the burden of proof, we referred to s.136 Equality Act 2010 and the guidance set out in the case of **Igen Ltd v Wong** [2005] IRLR 258, CA as approved in **Madarassy v Nomura International Plc** [2007] IRLR 246, CA. This guidance reminds us that it is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of unlawful discrimination. The outcome at this stage of the analysis will usually depend upon what inferences it is proper to draw from the primary facts found by the Tribunal. Where the Claimant has proved such facts, the burden of proof moves and it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the prohibited ground.

Constructive Dismissal

93 Section 95(1)(c) ERA provides that a dismissal occurs if the employee terminates the contract under which they are employed (with or without notice) in circumstances in which they are entitled to do so by reason of the employer's conduct. Whether the employee was entitled to resign by reason of the employer's conduct must be determined in accordance with the law of contract. In essence, whether the conduct of the employer amounts to a fundamental breach going to the root of the contract or which shows that the employer no longer intended to be bound by one or more of the essential terms of the contract, **Western Excavating Ltd v Sharp** [1978] IRLR 27 CA.

94 The term of the contract which is breached may be an express term or it may be an implied one. In this case, the Claimant relies upon breach of the implied term of trust and confidence. This requires that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. The employee bears the burden of identifying the term and satisfying the tribunal that it has been breached to the extent identified above.

95 The question of fundamental breach is not to be judged by reference to a range of reasonable responses, **Buckland v Bournemouth University Higher Education Corp** [2010] IRLR 445, CA. The tribunal must consider both the conduct of the employer and its effect upon the contract, rather than what the employer intended. In so doing, we must look at the circumstances objectively, that is from the perspective of a reasonable person in the claimant's position.

96 In **Tullett Prebon Plc v BGC Brokers LLP** [2010] EWHC 484 QB, Jack J stated at paragraph 81 that the conduct must be so damaging that the employee should not be expected to continue to work for the employer and that:

> "**Conduct, which is mildly or moderately objectionable, will not do. The conduct must go to the heart of the relationship. To show some damage to the relationship is not enough**."

97 The employee may rely upon a single sufficiently serious breach or upon a series of actions which, even if not fundamental in their own right, when taken cumulatively evidence an intention not to be bound by the relevant term and therefore the contract. This is sometimes referred to as the "last straw" situation. This last straw need not itself be repudiatory, or even a breach of contract at all, but it must add something to the overall conduct, **Waltham Forest London Borough Council –v- Omilaju** [2005] IRLR 35.

98 In **Kaur v Leeds Teaching Hospitals NHS Trust** [2018] EWCA Civ 978, at paragraph 55, Underhill LJ suggested that in a constructive dismissal claim it is normally sufficient for a Tribunal to ask itself the following questions:

> (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, her resignation?
>
> (2) Has he affirmed the contract since that act?
>
> (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
>
> (4) If not, was it nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the **Malik** term? (If it was, there is no need for any separate consideration of a possible previous affirmation).
>
> (5) Did the employee resign in response (or partly in response) to that breach?

99 The employee must prove that the breach of contract was an effective cause of the resignation. The breach need not be the sole or principal reason, but it must at least be a substantial part of those reasons, **United First Partners Research v Carreras** [2018] EWCA Civ 323.

100 In deciding whether an employee has affirmed the contract, passage of time will be a relevant factor but the question is essentially one of conduct, **Chindove v Morrisons Supermarkets Ltd** UKEAT/0201/13.

Conclusions

Constructive dismissal

101 The first matter relied upon by the Claimant was the alleged falsification by Mr Farmer of a meeting to discuss a customer complaint. This was the subject of the complaint raised by the Claimant on 24 July 2017. Although not a formal investigation, this was looked into by Mr Wightman in the summer of 2017. Mr Wightman found that there had been an administrative short cut in that Mr Farmer had entered on the Respondent's system the details of a meeting with he intended to have with the Claimant but which had not in fact yet taken place. Based upon these findings of fact, we accept that the first act alleged to amount to a breach of the implied term did take place. This was not good practice and the Respondent has shown no reasonable and proper cause for Mr Farmer's actions.

102 The Claimant was absent from work from 8 August 2017 at the instruction of Mr Wightman. The Claimant was required to see Occupational Health. The Claimant was

not suspended but placed on compassionate leave although the Tribunal accepts that he was not permitted to return until the Occupational Health report was received and confirmed that he was fit to do so. The Tribunal has found that Mr Wightman was concerned about the Claimant's health and whether he was fit for work. This was a reasonable concern given the way in which the Claimant had presented at the meeting on 7 August 2017. As referred to in his email the following day, Mr Wightman was concerned to ensure that the Respondent met its duty of care to an employee and could put in place any support which Occupational Health may consider appropriate. In the circumstances, there was reasonable and proper cause for the Claimant's imposed absence during this period.

103 As set out in our findings of fact above, the Claimant did not mention a formal complaint until his email on 12 September 2017. On 8 August 2017, Mr Wightman had proposed that the Claimant give him a list of his concerns, he would make internal enquiries and provide a progress update. The Claimant apparently agreed to this approach because he provided the list requested. Mr Wightman then undertook his informal investigation, reached conclusions and notified the Claimant. Mr Wightman also took practical steps to address the Claimant's concerns with the change of line management. This was an appropriate and supportive response by Mr Wightman. When Mr Wightman did not give the response which the Claimant wanted, he claimed that it had been a request for a formal investigation which it was not. Mr Wightman did refuse then to undertake a formal investigation because he believed that the issue had been considered and concluded and, as the Claimant had been moved to Ms Sloan's management, he was looking to the future and not the past. The Claimant was clearly unhappy on 12 September 2017 but he returned to work on 13 September 2017 and his focus then moved to his dispute with HR. His complaint about the lack of formal investigation was only raised again towards the end of his employment. Whilst he could have agreed to a formal investigation, the Tribunal conclude that there was reasonable and proper cause for Mr Wightman to refuse to do so.

104 For the reasons set out in our findings of fact, the Claimant was not required to pay £10 to access his employee file. This was an option initially offered if he wished to obtain a hard copy. At all times, the Respondent offered to provide an electronic copy free of charge. On 11 and 12 September 2017, the Claimant was sent electronic copies of the documents which he had requested. He was not able to open them due to IT restrictions on passwords. The Claimant raised the problem and was immediately offered the option of having them sent to a work email where he could print them or a copy sent to his home by courier upon payment of the costs. By 13 September 2017, Ms Walakira had taken steps to get HR support to print the documents and ask the Claimant if he wanted to collect them or have them sent home. There was no further reference to any charge. The documents were then sent by post on 22 September 2017. This was not due to the intervention of the Claimant's MP as steps were already afoot to have the documents sent before the MP's letter was received. The envelope enclosing the documents did not include the Claimant's name in the address.

105 The tone of the Claimant's email correspondence with Ms Walakira throughout this period could in our view be described as terse at best and even rude. Nevertheless, Ms Walakira maintained a positive and polite tone in responding to the Claimant and explaining why his unreasonably short deadlines could not be achieved. The Claimant first requested his file on 31 August 2017 and it was provided in paper form by 22 September 2017 after he failed to agree to any of the proposed alternatives. The

Respondent is a public body and it is reasonable and proper that it should seek to reduce cost by offering documents in electronic form. The delay was not undue and the administrative error, whilst clearly unfortunate, is not of a sort to amount to or even contribute to serious harm or destruction of the implied term of trust and confidence.

106 Insofar as the Claimant's case is that Ms Diggines and Ms Chaudhri denied breach of data protection requirements, he is wrong. The error was admitted and apologies swiftly offered. Ms Moss expressly accepted on 4 October 2017 that there had been a data protection breach, albeit one which was non-reportable. The Claimant's real source of discontent appears to be that he was not offered financial compensation as a service user. The Respondent was not required in our view to offer financial compensation to an employee in such circumstances and handled the situation appropriately and in a manner which no reasonable, objective employee could conclude amounted to a breach of the implied term of trust and confidence. The Tribunal had regard to the tone and content of the Claimant's emails to Ms Diggines during this period. We find them to be indicative of his approach to the employment relationship more generally. The Claimant regarded the failure to include his name on the envelope as a major issue; the Respondent considered it a minor error for which it apologised. The Claimant was not prepared to accept any resolution other than that which he required. Instead, he escalated the issue and became confrontational in email correspondence. His reaction was objectively disproportionate.

107 The Claimant was refused permission to record a grievance hearing. This was because he had not given any medical reason for recording a meeting at which he could be accompanied by a colleague who could take notes and where the Respondent would have a note taker. Some employers will permit routine recording of meetings, some will not. This Respondent was entitled in the circumstances to refuse to permit recording and the failure to agree with an employee's persistent insistence that it be recorded is not capable of amounting or contributing to a breach of trust and confidence. Moreover, the reference to possible disciplinary action arose only when the Claimant indicated an intention to record the meeting in breach of the instruction not to do so. The Claimant's conduct in his emails surrounding this dispute were inappropriate and evidenced an unwillingness to obey a reasonable management instruction. In the circumstances, there was reasonable and proper cause to warn him of the possible consequences of his conduct. As evidenced in connection with the requirement to provide short, written explanations of delay on some of his cases, the Claimant does not recognise the concept of a reasonable management instruction and even suggests that it is an act of bullying where it requires him to do something which he does not wish to do. The law, however, does recognise the concept and it is appropriate and proper for a manager to give an instruction and, so long as reasonable, expect the employee to comply. This was just such a situation.

108 As for the timing of communications from HR, the Tribunal has set out in our findings of fact the times at which emails were sent. Some were sent earlier in the day but it is correct that most were sent after 3pm. This was still during the course of the ordinary working day and it is notable that the Claimant would generally reply within a very short time period and without expressing concern about the timing of the communication. The Tribunal have accepted the evidence of Ms Thompson that emails would be sent towards the end of the day because HR representatives or managers had been engaged in meeting earlier in the day and that HR were trying to comply with the Claimant's requirement for a reply within a very short deadline. Absent any complaint from the

Claimant, HR had no reason to think that emails sent between 3pm and 6pm could be regarded as inappropriate by an objectively reasonable employee in the Claimant's position.

109 The grievance recommendation made by Ms Chinhengo on 5 January 2018 were not unwarranted given the Claimant's tone in his emails to HR and his managers. Some of these have been quoted in our findings of fact. The Tribunal had particular regard to the Claimant's peremptory tone suggesting a lack of respect for his colleagues and the ease with which the Claimant accused Ms Walakira's responses as being incredulous, Ms Diggines of being a liar, involved in a cover up and who should be dismissed and that Ms Follett and Ms Chinhengo should feel free to have themselves replaced from the grievance because they disagreed with his request to record the grievance hearing. Each of those named responded in a manner which was measured, calm and polite. The Claimant demonstrated a lack of objective insight into the appropriateness of his emails both whilst employed and at this Tribunal hearing. There was no instruction not to go to the Information Commissioners' Office. The recommendations of Ms Chinhengo were made with reasonable and proper cause.

110 For reasons set out above, the Tribunal has not accepted that there were unwarranted and untrue complaints about the Claimant's performance from 15 January 2018. On a review of all members of her team, Ms Sloan found a number of cases which had not been progressed. Her concerns about delay on some of the Claimant's cases were genuine and supported by the evidence that nothing had been done for considerable periods of time. The Claimant's case is that he was being singled out by Ms Sloan in January by her requirement to provide written explanations of his work. The Tribunal disagrees. Each employee with cases showing lack of progress was asked to provide a short, written explanation. The other employees complied, the Claimant did not. The Claimant was not singled out by Ms Sloan.

111 For the reasons given above, Ms Sloan had demonstrated a supportive management style and enjoyed a good working relationship with the Claimant until the end of December 2017. She offered time if the Claimant was anxious or distressed, sought to focus him upon his work rather than his disputes with HR and did not take action on his sickness when she could have done. This was not a manager trying to criticise the Claimant unduly or cause him difficulties; the very opposite is true. The Tribunal finds that Ms Sloan gave the Claimant every possible chance despite at times his difficult behaviour. Her request for a written update was perfectly normal and innocuous; it was a reasonable management request made with reasonable and proper cause.

112 The Claimant was not disciplined because of his performance or delay on the ten cases listed but because of the obstructive and inappropriate way in which he subsequently responded to a request for a written explanation for the delay. Similarly, the Tribunal does not accept that Ms Sloan deceitfully pretended not to know the potential consequences of a disciplinary process or that this was done to deprive the Claimant of company sick pay. Ms Sloan was the investigating officer, not the disciplinary officer. It was for her to decide whether there was a case to answer on the evidence available and for another manager to decide whether there should be a disciplinary hearing and, if so, at the end of that hearing to decide upon the appropriate outcome. In her meeting with the Claimant, Ms Sloan sought to explain this distinction. Ms Sloan's decision to pass the investigation report to another manager to make that decision was based upon her genuine conclusions about the Claimant's conduct in response to her request for a written

explanation for the lack of progress on some cases. The Tribunal concludes that it had nothing at all to do with a desire to deprive the Claimant of sick pay, not least as the decision was conveyed at a time when the Claimant had returned to work.

113 Nor, for the same reasons, does the Tribunal accept that Ms Sloan deliberately scheduled the meeting on 19 February 2018 to cause the Claimant to suffer a mental breakdown or commit an act of gross misconduct. The investigation had concluded and the decision needed to be given to the Claimant, who was fit to return to work. That is reasonable and proper cause.

114 The Tribunal considered that it is generally better to deal with a grievance and a disciplinary separately as, even if the factual basis is the same for each, the perspective is not. A grievance looks at concerns which the employee has raised about the manager and decides whether there is substance to them. A disciplinary looks at concerns which management have raised about the employee and decides whether there is substance to them. The findings of one may inform the other but the procedures are distinct. This is not, however, an inalienable rule and the fact that an employer could have handled things differently and even better is not necessarily the same as a breach of the implied term of trust and confidence. In deciding this issue, we thought carefully about the position of the objectively reasonable employee in the Claimant's position and whether the decision to hear his grievance at the same time as the disciplinary hearing was more than mildly or moderately objectionable. We conclude that whilst it is capable of contributing to a breach of the implied term, if other acts are also proved to establish cumulative effect, it is not sufficient in itself to go to the heart of the relationship.

115 The Claimant asked to be moved to a different floor, away from his own team, both before and upon his return to work. He did not tell Mr Smith that it was for one day only. When the move was confirmed the next day, the Claimant did not object. Given that the Claimant had described a return to Ms Sloan's team as a potential breach of contract, there was reasonable and proper cause for the move lasting for more than one day. This was not an act of ostracism, even if the Claimant had on occasions to find his own desk. Mr Smith genuinely believed that he was doing what the Claimant wanted.

116 The additional disciplinary allegation added by Mr Dickie was one of misconduct. The original allegations were also of misconduct. There was no change from competence to behaviour and the Claimant could not reasonably have believed this to be the case given the clear wording of the original disciplinary invitation letter. The allegations were new insofar as Ms Sloan had not included them in her investigation, a point which undermines the Claimant's case that she was acting maliciously or trying to manufacture a case against him. Ms Sloan tried to make allowances for the Claimant's anxiety and depression, she was not looking for an opportunity to have him disciplined or dismissed. However, there were serious questions raised by the Claimant's conduct on several occasions and towards several colleagues who had referred to him as being aggressive. The Respondent owes a duty of care to all employees and there was reasonable and proper cause to add the additional allegations for consideration at a disciplinary hearing.

117 The Claimant was provided on 21 March 2018 with a redacted copy of the feedback given by Ms Lowe on 14 December 2017 (not November 2017 as incorrectly dated in the list of issues). The redaction was only to remove the case number and the two questions which were not relevant to the allegations of misconduct made against the Claimant. This was reasonable and proper cause for the redaction.

118 Having considered each of the matters relied upon as founding a breach of the implied term of trust and confidence, the Tribunal have found only that the acts of Mr Farmer (issue 2.1a) and the decision to consider the grievance and disciplinary together (issue 2.1l) were without reasonable and proper cause. Looking again at these two matters, the Tribunal does not consider that the cumulative effect is to destroy or seriously damage the relationship of trust and confidence. At worst, it is conduct which is mildly objectionable. It is not of a quality which a reasonable employee in the Claimant's position could objectively consider amounted to a breach of the implied term of trust and confidence. As there was no breach of contract, the claim for constructive dismissal fails.

Disability Discrimination

119 The Respondent has conceded that the Claimant was disabled by reason of depression and anxiety at all material times between May 2017 and April 2018. Knowledge is not conceded. The Occupational Health report provided in September 2017 informed the Respondent that the Claimant had previous treatment for mental health problems and had a particularly difficult time in February 2016, also that he had received counselling and medication. The reason for the referral was Mr Wightman's concern about the Claimant's mental health at the meeting on 8 August 2017. Ms Sloan was chosen as his new line manager because of her experience in managing employees with mental health issues. Ms Sloan made significant attempts to support the Claimant because she was aware of the effect upon him of his stress, anxiety and depression. Actual knowledge is not required by the statute, it is sufficient that an employer ought reasonably to have known that an employee is disabled. In the circumstances of this case, we find that the Respondent ought reasonably to have known that the Claimant was disabled from receipt of the Occupational Health report on or around 8 September 2017.

120 The conduct said to be acts of harassment are those at paragraphs 2.1(d)(e)(f)(g)(i)(j)(k)(m)(n) and (o) as well as the conduct of Ms Sloan and Ms Chaudhri on 4 April 2018 and Mr Upsdale's threat on 25 April 2018. The Tribunal has not accepted the factual premise of paragraphs 2.1(d)(e)(g)(i)(j)(k)(m) and (n). The conduct alleged by the Claimant in these paragraphs did not occur as a matter of fact. By contrast, the Tribunal has found that the Claimant was refused permission to record the grievance hearing and told that he would be subject to disciplinary action if he did so and that he was provided with a redacted copy of Ms Lowe's feedback on 21 March 2018. Both were unwanted by the Claimant and he subjectively perceived them to have the effect described in section 26(1)(b).

121 For the claim to succeed, however, that conduct must have been related to the Claimant's disability and it must be reasonable for the conduct to have the proscribed effect in the circumstances of the case. The refusal of permission to record the grievance hearing was because the Respondent did not believe it to be necessary or desirable. The Claimant could be accompanied and take his own note, the Respondent would also have a note taker. The reference to disciplinary action was because the Claimant was threatening to ignore what we have found to be a reasonable management instruction. The Claimant did not say that he needed the hearing recorded because of his disability. The reason for the Respondent's conduct in both respects was entirely unrelated to the Claimant's disability. Similarly, the redaction of Ms Lowe's feedback was because the information removed was not relevant to the disciplinary allegation. The reason for the Respondent's conduct was also entirely unrelated to the Claimant's disability.

122 The Tribunal preferred the evidence of the Respondent as to what happened on 4 April 2018. The Claimant was not denied the right to a witness, nor was he prevented from leaving when he wished to do so. It was not necessary for Ms Sloan or Ms Chaudhri to give the Claimant 48 hours' notice of a simple communication that he was being placed on garden leave and he had no right to be accompanied. The Claimant was able to leave the room, as indeed he did, despite what he said for the purpose of the recording. The Claimant has not proved that the conduct relied upon on 4 April 2018 occurred as described in the issues. Moreover, the decision to place the Claimant on garden leave after he had indicated his desire to resign and the wish to inform him personally of that decision could not reasonably be regarded as having the proscribed effect.

123 The final alleged act of harassment was Mr Upsdale's email sent on 25 April 2018. The Tribunal found that the Claimant's threat to put the recording on-line was a serious matter and that it was appropriate to tell him not to do so. The reference to a potential criminal offence was heavy-handed but the Claimant's behaviour was unpredictable and he appeared determined not to comply with ordinary management instructions (for example, Ms Donkor's instruction that he should not copy in the executive team and non-executive board). The Tribunal accepts that the threat was unwanted and intimidating but conclude that it had nothing to do with the Claimant's disability and was entirely caused by the Claimant's conduct. For these reasons, the harassment claim fails and is dismissed.

124 In the section 15 claim, the Claimant relies on two acts of unfavourable treatment: being suspended from 8 August 2017 until Occupational Health approved his return and Ms Sloan's recommendation on 19 February 2018. For reasons set out in our findings of fact, the Tribunal have not accepted that the Claimant was suspended. He was put on compassionate leave in circumstances where there was genuine concern about his fitness to be at work and good reason for Mr Wightman having that concern. The absence was to enable the Respondent to obtain the appropriate advice to support the Claimant and born of a desire to comply with its duty of care. In such circumstances, the Tribunal conclude that his period of compassionate leave was not an act of unfavourable treatment. Even if it were, the decision was to achieve a legitimate aim and it was proportionate. The Claimant was paid in full throughout and the use of compassionate leave ensured that it was not recorded as sickness absence and therefore would not be relevant when considering absence levels and attendance monitoring.

125 As for Ms Sloan's conduct on 19 February 2018, the Tribunal have not accepted that Ms Sloan's recommendation that there should be a formal disciplinary hearing was improper nor have we found that she deceitfully maintained that she did not know the potential consequences of her decision. The recommendation that the investigation report be passed to another manager to consider whether there should be a disciplinary hearing was not taken to avoid paying sick pay but because of the Claimant's conduct in response to a request for brief written reasons for a lack of progress on some of his cases. Whilst the recommendation was unfavourable in the sense that it meant that there may be a disciplinary hearing, the "something" relied upon was the Claimant's need for sickness absence on 19 February 2018. That "something" was not any part of the conscious or subconscious motivation of Ms Sloan in making her recommendation. The section 15 claim fails and is dismissed.

126 The first PCP relied upon in the reasonable adjustments claim is said to be a

requirement to pay £10 for a subject access request to obtain copies of an employment file. This PCP was not in fact applied by the Respondent. On 4 September 2017, in the first HR email following the Claimant's request for his employment file, HR made clear that he was entitled to provision of an electronic copy via email at no cost. The issue was that the Claimant insisted upon receiving a hard copy. This is consistent with Ms Walakira's attempts to send the employment file by email on 11 and 12 September 2017, all without charge. When the technical difficulties with the password came to light, Ms Walakira offered three alternatives only one of which required a SAR and payment of £10. On 13 September 2017, she asked HR support to print the documents for the Claimant to decide whether to collect them or have them sent to him at home. The documents were sent in the post and without charge on 22 September 2017. For these reasons, the Tribunal does not accept that the first PCP was in fact applied to the Claimant.

127 The second PCP was applied, as the Respondent accepted, as there was a policy of not permitting employees to record internal hearings. However, as was made clear to the Claimant at the time, there was an exception to the general policy where there were medical reasons for recording. In other words, the PCP would not place a disabled employee at a substantial disadvantage because the policy would be relaxed to avoid that very disadvantage. Despite being told this, the Claimant did not at any stage claim that he had a medical reason for recording the meeting instead asserting repeatedly that it was his legal right to record even where the Respondent disagreed. Alternatively, and for the same reason, the Respondent could not reasonably be expected to know that the Claimant was likely to be placed at a substantial disadvantage by reason of his disability. The claim of failure to make reasonable adjustments fails and is dismissed.

128 The first protected act identified in the issues on the victimisation claim was said to have been made during the meeting between the Claimant and Ms Sloan on 1 February 2018. The Claimant was adamant in cross-examination that there was no discussion on 1 February 2018, or on any day, in the terms set out in the file note prepared by Ms Sloan which records his complaint that she was victimising him. The Claimant subsequently withdrew his assertion that there was a protected act on 1 February 2018. The Claimant's grievance submitted on 1 Mach 2018 is agreed to be a protected act.

129 The detriments relied upon are those at paragraph 2.1(m) to (o) and the email sent by Mr Upsdale on 25 April 2018. For reasons set out above, the Tribunal has not accepted that the Claimant was ostracised by Mr Smith upon his return to work nor that Mr Dickie changed the disciplinary allegations from competence to behaviour. As for the redacted Lowe feedback, we repeat our findings of fact and conclusions above under the other claims. The reason for redaction was entirely due to the relevance of the evidence to the disciplinary allegations, it had nothing whatsoever to do with the Claimant's complaint that Ms Sloan had victimised him. Similarly, with regard to Mr Upsdale's email, the threat of further action and/or a possible criminal offence was in no way caused by the Claimant's grievance against Ms Sloan or his complaint that she had victimised him. The email was entirely because the Claimant had made a recording of the events on 4 April 2018 without the permission of Ms Sloan or Ms Chaudhri and was threatening to put it on-line. The recording was made in the context of the decision to put him on garden leave and was entirely unrelated to his grievance complaints. The victimisation claim fails and is dismissed.

Unauthorised deduction from wages

130 In order to succeed, the Claimant needs to prove that he was entitled to be paid company sick pay in respect of his absence in February 2018. The entitlement to company sick pay set out at clause 9 of the Claimant's contract of employment was expressly made subject to the sickness absence policy. That policy provides that an employee will be paid statutory sick pay where they are going through disciplinary proceedings for any reason. The Respondent's disciplinary policy sets out the various steps of the formal process, these include investigation. Ms Sloan's investigation started on 5 February 2018 when the Claimant attended an investigation meeting. By the meeting on 19 February 2018, before the Claimant went sick again, the investigation had concluded and the Claimant was told that the investigation report would be passed to another manager to decide whether there should be a disciplinary hearing. In other words, although there had been no invitation to a disciplinary hearing when the Claimant went sick on 19 February 2018, there was an ongoing formal disciplinary process by reason of the investigation. As such, the Claimant was not contractually entitled to receive company sick pay and there was no unauthorised deduction from his wages.

131 For the reasons set out above, therefore, all claims fail and are dismissed.

Employment Judge Russell

19 December 2019