EMPLOYMENT TRIBUNALS

Claimant: **Mr James Bennett**

Respondent: **Mitac Europe Ltd.**

Heard at: **Cardiff on 9,10,11 and 12 December 2019. Deliberations : 12 December and 10 February 2020.**

Before: **Employment Judge Hargrove and Members Mrs Maureen Waters and Mr Chris Tansley.**

Representation
Claimant: **Mr S Jackson, Solicitor,**
Respondents: **Mr S Keen of Counsel.**

RESERVED JUDGMENT AND REASONS.

The unanimous Judgment of the Tribunal is as follows:

1. The claimant's claim of associative direct discrimination in respect of his dismissal on the grounds of the protected characteristic of the disability of Stuart Balaam is not well-founded.

REASONS

1. The claimant was employed by the respondent as UK sales manager B2C (business to consumer) from 19 March 2018 until his dismissal on one week's notice at a meeting on the 5 September 2018, allegedly for failing the six month probationary period.The claimant presented his claim to the Watford tribunal on 29 January 2019.
2. The claimant did not have sufficient length of service to claim unfair dismissal. He claims that he was dismissed as an act of associative discrimination on the grounds of the disability of his line manager, Stuart Balaam, (SB), who had been appointed by the respondent as sales and

marketing director for the UK and Benelux on 1 March 2018, and he was also dismissed on the 5 September 2018, allegedly for failing the extended probationary period. On 19 April 2018 SB had been admitted to hospital with a suspected heart attack. It subsequently transpired that he had Kidney cancer, which required the removal of a kidney on 12 September 2018, after his dismissal.

3. SB subsequently brought his own claim of discriminatory dismissal on grounds of his disability in the Cardiff employment tribunal on 29 October 2018. Cancer is deemed to be a disability under paragraph 6 of schedule 1 to the EQA 2010. SB's claims were based on three grounds under the EQA, direct discrimination under section 13, discrimination arising from disability contrary to section 15, and failure to make reasonable adjustments under Sections20-21.
4. Mr Bennett's claim was then transferred to the Cardiff tribunal and combined with SB's claims to be heard together. Subsequently, in July 2019, SB's claim was settled on confidential terms. Notwithstanding the settlement, SB gave evidence on behalf of the claimant, together with the claimant, at the substantive hearing in Cardiff of this claimant's case.
5. Wilfried Bosscher, (WB) the Respondent's business partner in Europe, gave evidence for the respondent as to the circumstances of the dismissals. There was a bundle of some 330 pages of documents, to which additions were made during the hearing including, importantly, organisation charts showing the personnel in place during the claimant and SB's employment in 2018, chart A; on first October 2018, immediately after the dismissals, Chart B, and in November 2019, following a series of redundancies of the UK workforce in that year, chart C.
6. **Overview of the issues.**
   What is particular to this claim is that the claimant does not rely upon his own disability as being the or a reason for his dismissal, but that of SB. It has been established at least since Coleman v Attridge Law, 2008 ICR page 1128 ECJ, that a claimant is entitled to rely upon the disability of another, in certain limited circumstances, called associative disability discrimination. The basis for such a claim is not only the ECJ judgement in Coleman, but also the provisions in section 13 (1) of EQA which provides: –
   "A person (A) discriminates against another (B) if, because of a protected characteristic, A treat B less favourably than A treats or would treat others".
   The provision refers to treatment on grounds of a protected characteristic, including disability, not on grounds of the claimant's disability, although the EQA does not expressly refer to associative discrimination. For this reason associative disability discrimination only applies to claims of direct discrimination under section 13, and to harassment under section 26, where the unwanted conduct again has to refer to a protected characteristic, not merely that of the claimant. It does not apply to claims of discrimination arising from disability under section 15 or indirect discrimination, or failure to make reasonable adjustments, since the latter types of claim only apply to and protect an employee who is himself disabled. It is well established that the concept of associative discrimination most commonly applies to employees who have a close family relationship, or responsibility for a family member with a disability. It is not however confined to such relationships.See paragraphs 3.18 to 3.20 of the EHRC code of practice on employment 2011. It is noteworthy that the claimant's original claim form sought to rely upon a section 15 as well as a section 13 associative disability

discrimination claim, but he subsequently abandoned the section 15 claim, no doubt recognising that it was doomed to failure.
The essential issues specific to this claimant's claim, taking into account the burden of proof provisions in section 136 of the EQA, are as follows: –
(1) Does the claimant prove facts from which the employment tribunal could reasonably conclude that the claimant was treated less favourably in respect of his dismissal because of SB's disability and his association with SB? In this connection, there are disputes as to the identity of a hypothetical comparator, by reference to section 23, which materially provides: –
"(1). On a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.
(2). The circumstances relating to a case include a persons abilities if –
(a) on a comparison for the purposes of section 13, the protected characteristic is disability;
(b) on a comparison for the purposes of section 14, one of the protected characteristics in the combination is disability".

Mr Keen for the respondent has referred us to Owen v AMEC Foster Wheeler Energy Ltd 2019 EWCA 822 , and cases cited therein. Mr Jackson referred us to Amnesty International V Ahmed 2009 IRLR Page 884, James V Eastleigh Borough Council 1990 IRLR Page 228 and O'Neill V Governors of Saint Thomas More Roman Catholic Voluntary Aided Upper School 1996 I RLR 372, and others. We will return to this issue later, but it is common ground that causation is established if the prohibited ground had a material influence on the decision to dismiss; and that discrimination may be conscious or subconscious. A benign motive does not excuse direct discrimination. See eg. Nagarajan v London Regional Transport 1999 ICR 877, and Amnesty International (supra).
(2). If the claimant overcomes the initial hurdle above, the burden shifts to the respondent to prove that the prohibited ground had nothing whatsoever to do with the decision to dismiss. In this case it is material that Mr Bosscher was not the decision maker in relation to the dismissals of either SB or the claimant, or the redundancies which followed. This was a Senior director based in Taiwan, Steve Chang (SC), who has not given evidence or provided a witness statement, but was in regular direct and indirect contact with Mr Bosscher, and there are a series of contemporaneous emails to and from him.
(3). If direct discrimination is proved, the next stage required consideration of remedy, including any claim for loss of earnings. In this connection the tribunal had to apply the Polkey test, the burden of proving which fell on the respondent : – what are the chances that, absent discrimination, dismissal would have occurred in any event, and, if so, when? All other remedies issues are reserved to another hearing if the claimant were to succeed.

7. **Chronology of main events.**
We make some preliminary findings of fact but do not come to any conclusions as to the principal issues at this stage.

7.1. The respondent is the European subsidiary of the Mitac group based in Taiwan. Prior to 2018 there was a poor record of sales of consumer electronic products in Europe with high staff turnover. It was decided to recruit a sales manager and a marketing manager. SB was one of the applicants. He was interviewed by Neil Mercer (NM), UK operations Director, Mary Rutter, (MR), HR

manager Europe, who retired in July 2018 and WB took over her post, and Michelle Hueng (MH), (EU business head based in Taipei to whom SB subsequently reported). MH reported to Steve Chang, (SC), Mio Global President in Taipei. MH attended by video link. The short to medium objective was to triple sales revenue growth over 3 years. It was considered that SB's experience merited his appointment to the enhanced role of sales director. He was offered the job in that capacity and started on the 1st of March 2018.

7.2. SB was asked to appoint a UK sales manager. He had previously worked with the claimant, who was an accounts manager under him from 2009 and he had employed the claimant in 2012 to 2013 in his previous business. In December 2017 the claimant was made redundant from his previous employment. SB contacted the claimant and an interview was arranged with SB and MR. He was offered and accepted the post of sales manager UK by a letter dated the 14th 2018 at page 68. The letter identified a gross annual salary of £55,000 plus a car allowance. "You will also be entitled to commission of £20,000 per annum paid quarterly in arrears against KPIs and targets. This will be guaranteed for the first six months. Your employment will be subject to a normal six month probationary period." SB's appointment letter is not in the bundle, but we assume there were similar commission provisions.

7.3. The claimant's service agreement is at pages 69 to 96. It identifies a start date of the 19th of March.

7.4. We accept that SB was instructed to concentrate on rebuilding the UK market, and not Benelux. He conducted an analysis of the market and presented a report to senior management in Taipei on 12th of April 2018, attended also by the claimant. There is a section headed targets 2018 to 2021 (the three-year period) at pages 125 to 130 showing marginal improvements before taking off in mid 2018, and a similar projection for the Cyclo Satnav market.

7.5. It is of some significance that on the 17th of April 2018 MR emailed MH in Taipei on the subject matter of KPIs and bonus payments to SB, who was to be paid one month for the first quarter guaranteed."We also need the KPIs for Q2 for SB… It is important that these are set before the end of this month as we are already one month into Q2". This was before any issues about SB's health had arisen.

7.6. SB was admitted to hospital on the evening of the 18th of April with chest pains and a suspected heart attack. On the 19th of April he emailed WB, MR, NM and MH. He stated that it was not a heart attack but angina was not ruled out, and they were keeping him in overnight as he had high blood pressure and they were worried about his kidney function. See page 135. Steve Chang's response on 20th of April to an email from MH was: "It's a pity and we need to pay higher attention on personnel issue, we cannot continue changing sales and fail to deliver result." (sic). See page 138.

7.7. On the 21st of April SP emailed further stating that he had been released from hospital.

"After suffering what the paramedics believed was a possible heart attack I underwent various tests. They have found that I was suffering from extremely high blood pressure (which is now being controlled) and have found a growth on one of my kidneys. At present they can only guess what this growth may be and as such I will need to undergo a biopsy to see what the gross growth is and if the doctors find something sinister I will need to undergo treatment from there. Of course I have two kidneys so this may slow me down but won't keep me down". He indicated an intention to return to work as usual in the meantime.

We are minded to find that from this date the respondent was on notice that the diagnosis might be cancer, but there were a number of other conditions he had at

the time, including high blood pressure, which would not have automatically constituted disability under paragraph 6 in Schedule 1 to the Act. In fact, a medical report dated the 5th of April 2019 (well after the events in question) gives a history indicating that following an ultrasound and CT scan, a diagnosis of suspected left-sided kidney cancer was made on the 1 May. On 3 July a biopsy was recommended which took place on the 18 July and the results confirmed cancer on the 7 of August 2019. There is an issue as to when the respondent had the requisite knowledge of disability, but it was no later than 7 August, when the claimant notified the respondent by email. See paragraph 7.17 below.

7.8.Returning to the chronology, on 22 April MR emailed SB sympathetically, providing information about life insurance cover and assuring support. on 23rd of April SB emailed indicating that Maxine Walker should be appointed business development manager for Dash-cams, a Mio product of Mitac, which was to be sold direct to manufacturers, and not to High Street retailers.

7.9. On 10th of May SB emailed to MH in Taipei a projected H2 budget indicating volume of sales and revenue on a monthly basis for the second half of 2018. He described it as “quite a punt”. MH responded on the same day

> “I do understand what you said below, however, we will need to come out. some mitigation plan –, this is the mission for us – seniors.
> I will not say that we will have breakthrough in the UK immediately for sure! However, while we are establishing our foundation, anything else that you will ask team to hunt for some extra incremental incomes? ….. Who will be the one to look after all those? I did do need you to put all these in mind since we do need a solid mitigation plan.”

7.10. In a weekly report dated the 22nd of May MH emailed to Mr Chang a report on the EU May performance divided into BNL (Benelux), CEE (central and eastern Europe), and the UK with the following introduction:

> “ So far May does not look well, apart from losing UK, BNL is also showing the challenge”. The figures for the UK sector show a very substantial shortfall between the budgeted sales and the actual sales, and the budgeted revenue (€274,468) and the actual revenue (€12,754), representing only 5% of what was expected.

This was not copied to SB.

7.11. There was a prearranged meeting between SB and MH in Amsterdam on 23rd of May, ostensibly to discuss the Benelux market. The uncontradicted evidence of SB is that he shared his health concerns with her including that at a hospital appointment on the 21st of May, It was expected that he would need a kidney removal and dialysis. He claims that the meeting was then cut short and that thereafter MH treated him differently, in particular at their weekly telephone calls.

7.12. In early June there was an exchange of emails concerning the inventory (stock in hand to meet expected sales). Erin Chang, an HR manager in Taipei, was expressing concerns at the size of the inventory, to which SP responded that MH and SC had high expectations which could not be met unless stock was available.

7.13. The subject of KPIs to be set for the three months June to September for the claimant and SB himself was raised by MH with SB in an email of 7 June (pages 195-196). Also on 7 June WB texted SB suggesting a meeting to discuss KPIs to take place on the 13th of June (page 170). There follows a chain of 15 emails between MH and SB from 13 June to 25 June (working backwards from 195 to 184). MH starts by using the figures in SB’s H2 budget of 10 May at paragraph 7.9 above. SB challenges the targets and the KPI weightings. There is some negotiation at the end of which , on 25 June MH sends out a final version at page

184. At paragraph 58 of his witness statement SB states that he agreed only with reluctance. It is pointed out that the bonus had been guaranteed for both himself and the claimant for the first 6 months, which expired on 1 September in SB's case, and mid September in the claimant's case; that the KPIs were only discussed after the beginning of the June to September quarter, and there is an issue as to the purpose and need for KPIs for this period. On 26 June SB copied the claimant with his specific KPIs, to which the claimant responded on the 27th of June requesting that it be documented that he felt that the numbers were very ambitious, but if he received the support from the business he would be working towards exceeding "these challenging numbers". See page 200.

7.14. SB and the claimant were not copied into email exchanges between MR and WB on the one hand and NM , and Erin Chang, Taipei HR Manager, on the other, which took place in the period 11-14 June – pages 175-180. It is clear from the contents that there had been a communication from Taipei, probably from MH, which raised the topic of the removal of SB and, possibly also some or all of the UK sales team. WB agrees in paragraph 14-15 of his witness statement, that the company's management in Taipei were "considering the termination of SB's employment due to their concerns over his performance ". We comment at this stage that we found WB to be an honest and reliable witness of what followed, up to, and including the dismissals. It is clear from MR's email of 12 June that she was advising management of the dangers of dismissing SB because of his health or sickness on the basis that it would 'definitely' be discriminatory, but it could be done legally on one week's notice in the first 6 months 'as long as there is a valid reason, eg. a change of direction of sales'. The email also raised issues about what was to happen to the rest of the team. WB emailed to similar effect on 12 June to SC . Significantly, he advised the setting of KPIs as the " only way of handling such a delicate situation from the legal point of view". WB also responded to questions about employees entitlement to sick pay, and, having spoken to the respondent's solicitor, on the question of extending a probationary period. This must have pertained to SB, whose probationary period was due to end on 1 September . It was after this exchange that the KPIs were set, but it is important to note that KPIs had been mentioned in April, before SB fell ill, and the topic had been raised by MH again on 7 June, albeit only 4 days before the discussions described in this subparagraph.

7.15. On 25th of June SP emailed MH with an update as to his medical condition anticipating a three day spell in hospital following an operation followed by two weeks with no travel when he should be well enough to work from his laptop, and six weeks when he could not drive. SP also asked for an advance of £1500 on his bonus due at the end of August for his wedding, which was agreed by MH.

7.16. From 28- 30th of July there was an exchange of emails between WB and MH concerning SB's probationary period, which was due for review before 1 September. WB was aware that SB was (then) due to go into hospital in August for an operation, and wanted the matter resolved before then. MH's initial response was to allow SB to pass his probation, a factor being that Maxine Stalker had recently resigned. It is clear from her email at p. 212 that SB's dismissal ("release") was still under consideration whether or not it was decided to allow him to pass probation, the cost to the respondent being the same, as she understood it. WB responded in some detail on 30 June (211), again mentioning the risks of a discrimination claim in either event, and pointing out that if the claimant were allowed to pass his probationary period, he would be entitled to receive 3 months notice, or required to give the same notice, which would give time to find a replacement. He recommended that SB be allowed to pass. MH responded on the same day agreeing, but said she would have to refer it to SC , who would only

be available on 9-10 August. However, it was referred to him on that day, and he responded:
“Stuart’s probation should be an independent issue. Please do not mix up issues. The only matter thing is his performance, does he meet our expectation to build up a viable UK business? Please must get my final approval of Stuart’s probation result .“ (sic).
7.17. On 7 August SP emailed MH, WB and MR confirming the diagnosis of cancer and that he would need an operation to remove it.
7.18.On 10 August WB emailed SB to notify that the claimant’s probationary period was due to be reviewed before the 19th of September, and asking for his input on his performance and contribution to the team before he, SB, went into hospital. There is no evidence of any written response from SB to that email concerning his view of the claimant’s performance. SB claims at paragraph 78-79 that he spoke to MH weekly, and that he expressed to her that he was “very happy with what Jame was doing”. This is not corroborated by the contents of the contemporaneous exchange of emails between MH and WB on 15 August described at paragraph 7.20 below.
7.19. SB notified MH on 15th of August that he would be going into hospital on the 12th of September.
7.20. On 15th of August there was a string of emails commencing with MH‘s email timed at 2:59 am (English time) to WB and MR (who was still working beyond her leaving date)– Page 221, a lengthy response from WB at 4:36 pm, which raised two specific questions about the claimant’s performance (pages 219 to 220), and MH’s reply at 10:30 pm (also page 219). The contents are not complimentary of the claimant’s performance. MH identified 3 options; (1) release (dismissal), (2) extend probation, and (3) pass probation. She went for option three, but on the basis that they would need someone to “keep the ball in the air“, presumably a reference to the period when SB would be off for his operation. SB notified on 16th August that he expected to be in hospital for up to 1 week, and that it would take two weeks thereafter to recover, although he would be able to do some work on his laptop.
7.21. In a weekly report to SC on 17 August, MH proposed that despite poor performance, SB and the claimant should be allowed to pass probation; that while SB was absent the claimant was the one and only candidate they had to keep the business running; that clear KPIs should be set for both in Q4; that they would have a clearer idea about how SB was able to work after surgery, suggesting that he should focus on high street retailers, and the claimant should then be released.
7.22. There was then a substantial change in the respondent’s position notified by MH to WB, NM andMR in an email dated 24th August at page 251, following a meeting with SC in Taipei on 23rd of August. This notified a conclusion to change the UK business by closing the High Street channel and focusing purely on the car channel. This would involve the closure of the positions of country director (SB) and the High Street sales manager (the claimant) “by 31st August“. At that time, The respondent was recruiting for the BDM car channel manager position, the previous occupant having resigned. To make matters more complicated, it had come to WB’s attention that SB had allegedly made sexist remarks about being in favour of appointing a female “With a pretty face“ to the role of BDM manager. SB did not see this email until the tribunal disclosure process took place; the allegation was never put to him at the time; and he adamantly denies the allegation as being a complete misinterpretation.
WB provided lengthy advice on the current position in an email of 25 August at page 250, having again taken advice from the solicitor. That email is significant.

7.23. A further change in position occurred at the end of August. Both Halfords and Dixons, the High Street retailers, had, It was clearly WB's understanding as of 31 August agreed to extend the range of the respondent's products sold in store and online. There was then an exchange of emails on 30 August between MH and SC in Taipei (Pages 262 to 263). MH urged that SB be allowed to pass the probationary period to allow the High Street opportunity to develop during Q4; and if it did not, the option still remained open to close the respondent's High Street Business. She also recommended that the claimant should only be kept on for the time being. It appears that SC preferred the option of extending the probationary period. WB explained this latest proposal in an email to NM on 31st August (page 265).
7.24. 31 August 2019 was the last day of SB's probationary period and unless a review took place on that day, it would be difficult to extend it. WB wrote to SB (page 264) inviting him to a meeting "to discuss your probationary period" to take place with M H on 5 September. It was stated that the probationary period could be extended for a further three months under the contract.
SP wrote a strenuous letter of objection on the 1st of September see page 276. He was clearly expecting that his probationary period would be passed.

7.25. It was clearly WB's understanding as of 31 August that the plan was to extend the probationary period by three months in both cases. This is reflected in WB's letter to a series of senior managers in UK and Taipei. In particular WB recognise that SB had health issues "which have possibly influenced his performance as a reason (after liaising with our solicitor)) for extending the probationary period by a further three months to give SB more time to prove himself. With this in mind, as became clear only in WB's evidence to the tribunal, he was first instructed by MH to prepare a draft script for the 5 September meeting which would put into effect the extension. See page 293.
This was still the position when WB emailed NM on 2 September (page 292). He advised that MH should complete the KPI sheet for Q3 from June 2018, obviously omitting September's figures, which were not yet known.
7.26. A volte face then took place on the respondent's part. The first clue to it is in SC's response to WB's email of 31 August, dated 3 September and timed at 2:06 am English time. This was addressed to WB, MH and NM as follows:
"Sadly, to say that I am very disappointed how we handle this situation. We should never be in the position of no choice left but to extend his probation period due to performance review which wasn't done when it should be. I shared many my concern/disappointment to Melinda/Erin on Friday night. I find time to speak to Michelle/Neil as well… We really cannot manage our business in this way." (sic).
Subsequent to that email, on 3 or 4 September, WB received a telephone call from MH instructing him to prepare instead a dismissal script. This is at page 305 of the bundle. In consequence both SP and JB attended the meeting with with NM and WB present and MH by video, and both were dismissed with immediate effect. It was noted that MH was also to be dismissed at the end of September. See notes at pages 307-309. It is clear from the notes that the subject KPI results for both were raised during the meeting, but it is not evident that they were discussed or shown to SB or the claimant. SB asserted that he was being pushed out of the business because of his illness. See the opening statement from MH at page 307. The dismissal letters of the same date at pages 310 to 311 cited as a reason "poor performance".
7.27. By way of response, SB wrote on 6 September pages 312-314 rejecting the respondent's reason for dismissal; claiming that the KPIs had been set up for him to fail; that MH was fully aware of his cancer and knew that he was stressed and

suffered with severe fatigue every afternoon; and that Mitac had failed to make adjustments, including to sales targets, contrary to the Disability Discrimination Act. He also stated that the notification was given only one week before he was due for major surgery (12 September) and the company was aware that he would need ongoing treatment and would not be able to perform his full duties for several weeks, and would not be able to travel. He claimed it was direct discrimination. The claimant wrote on 7 September – page 318. He too asserted that the initial KPIs had been unfairly set and that the current quarter was incomplete, and did not include September, and asked for copies of the documents to which MH "meant to refer" in the meeting. He claimed that he had been dismissed because of his association with SB and because of SB's health. WB responded on 10 September denying the assertions and enclosed a copy of the KPI targets unspecified to SB. His response to the claimant of the same date enclosed a copy of the actual figures for the claimant for July/ August with a projection for September (see page 324). The figure claimed was 60.3 percent of target.

That concludes the chronology up to the dismissal of the claimant, but events relevant to the outcome of the case occurred thereafter which we will set in our conclusions.

8.Conclusion on knowledge of disability, and further discussion of legal issues.

8.1. Date of knowledge of disability.

It was important to identify within the chronology the date upon which the respondent was fixed with knowledge that the claimant's diagnosis was cancer. This is because an employer does not directly discriminate against an employee because of disability unless it has knowledge of the diagnosis. We have been referred by Mr Keane for the respondent to passages in the statutory Guidance on matters to be taken into account in determining questions relating to the definition of disability of 2011, which provides the following at paragraph A9:

"The Act states that a person who has cancer… is a disabled person. This means that the person is protected by the Act effectively from the point of diagnosis. "

There is similar guidance in paragraph B 21.

The EHRC code of practice provides: –

"2.18. Cancer, HIV infection, and Multiple Sclerosis are deemed disabilities under the Act from the point of diagnosis. In some circumstances people who have a slight impairment are automatically treated under the act as being a disabled."

The position must be contrasted with an impairment which is not a deemed disability where an employer is fixed with knowledge or deemed knowledge from the surrounding circumstances if they are aware of all of the constituent parts of the test in section 6 and schedule 1 to the Act. We accept that an employer may be liable if it perceives that the claimant is disabled, even if in fact he is not, but that has not been raised as an issue in this case. (See now Chief Constable of Norfolk v Coffey 2020 ICR p.145). We have found at paragraph 7.7 above that it is likely that the respondent was aware from 21 April that the diagnosis might be cancer, but there were number of other conditions it could have been which may or may not have satisfied the constituent parts of the definition in Section 6. For these reasons, we are not satisfied that SB had the relevant knowledge until 7 August. That finding does not mean that actions had not been planned by the respondent before that date to deal with the situation if a diagnosis were subsequently made.

8.2. Associative discrimination, the identification of direct discrimination, and an appropriate actual or hyperthetical comparator.

These are the core issues upon which we had detailed written and oral submissions from the parties. We record that we initially asked the parties to address us upon the basis that we were to find that the respondent had directly discriminated against SB in respect of his dismissal. Having read and heard the submissions we recognised that this issue too was moot. We did however consider that if it were established that the respondent had directly discriminated against SB, it would make it more likely that the respondent would have discriminated against the claimant because of SB's disability. The contrary could also apply.

As to the associative element of the claim, we note that discrimination on grounds of the protected characteristic of another had been recognised by the appellate courts long before Coleman v Attridge. Two examples given by Mr Keane were Applin v Race Relations Board 1973 2 WLR 395 (injunction obtained against two members of the National Front for attempting to persuade foster parents not to take in non-white homeless children) and Showboat entertainment Centre Ltd v Owens 1984 ICR 65 (white employee dismissed for refusing to carry out an instruction to exclude black customers was directly discriminated against because of race). See also English V Thomas Sanderson Blinds 2009 ICR 543. (taunting a non gay person with homophobic abuse amounts to harassment related to sexual orientation). On this basis, it is possible to envisage circumstances where someone could succeed in a claim for direct discrimination under the current definition in section 13 if treated less favourably because of the protected characteristic of another even if there was no association between that person and the other. This would be consistent with the wide terms of the decisive passage in the judgement of the CJEU in Coleman:

"Where it is established that an employee such as that in the present case suffers direct discrimination on grounds of disability, an interpretation of Directive 2000/78 limiting its application only to people who are themselves disabled is liable to deprive that Directive of an important element of its effectiveness and to reduce the protection it is intended to guarantee…"

The following passages in the ECHR code are instructive:

3.18."It is direct discrimination if an employer treats a worker less favourably because of the worker's association with another person who has a protected characteristic…"

3.19."Discrimination by association can occur in various ways – for example, where the worker has a relationship of parent son or daughter, partner, carer or friend of someone with a protected characteristic. The association with the other person need not be a permanent one".

3.20."Direct discrimination because of a protected characteristic could also occur if a worker is treated less favourably because they campaign to help someone with a particular protected characteristic (PC) or refused to act in a way that would disadvantage a person or people who have (or whom the employer believed to have) the characteristic. The provisions of the Act on instructing, causing or inducing discrimination may also be relevant here".

What the examples demonstrate is that the treatment of the associate must have been because of the association. What is exceptional about the present case is that the person with the PC (SB) was also employed by the respondent and was also treated in the same way as the claimant at the same time. Mr Jackson for the claimant at paragraphs 23 to 25 of his closing submissions submits that the conclusions to be drawn are obvious. But the reasons for the treatment he urges us to accept are not obvious. Mr Keane submits that none of the facts of the claimed association between the claimant and SP suggest that the disability formed part of the reason for the treatment of the claimant – see paragraph 24 of his submissions.

During closing oral submissions the tribunal asked for assistance with the identification of a hypothetical comparator. Mr Keane conceded in paragraph 8 of his written submissions that applying a comparator test when a third-party's disability is relied upon is not straightforward. That is an understatement. However Mr Keane referred us to Owen v Amec Foster (supra), which we found helpful. Mr Jackson submitted that the appropriate hypothetical comparator was someone "whose circumstances (including his performance) were the same as the claimants, but whose treatment was not caused by the link connected with SB's disability." He also relied upon an actual comparator, Chloe Lara, who circumstances we will describe in detail later. We did not consider that the hypothetical comparator posited by Mr Jackson was sufficiently detailed, not least because the description did not include the employer's expectation of future performance, (but which depends upon whether or not the tribunal accepts that was a reason or one of the reasons for the claimants treatment.).

The tribunal posited the hypothetical example of a team of two circus acrobats, one of whom suffers a serious injury amounting to a disability and is dismissed. Would the dismissal of the other constitute associative discrimination? Mr Keane conceded that, subject to further factual findings, it could be. It is to be noted however that the association between the two acrobats as part of the team would be much more evident than that in the present case and therefore more likely to have influenced the decision.

Mr Jackson does not now rely upon the 'but for' (SB's disability) test as being the appropriate test. Both representatives accept that the significant influence test in Nagarajan is the appropriate test. The essential question is what were the reasons, conscious or subconscious for the treatment of the claimant? This apparently simple question has however been the subject of considerable appellate attention. In date order we considered the following passages in the various judgements: –

(1) Lord Nicholl's judgement at pages 884D to 886F in Nagarajan. In particular we noted the following passage at page 884E: –

"I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make up. Moreover, we do not always recognise our own prejudices many people are unable or unwilling to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn."

And the well-known passage at page 886E: –

"Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: – discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, and important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome discrimination is made out".

(2) Lord Nicholl's judgement at paragraph 29 in Chief constable of West Yorkshire police V Khan 2001 WLR page 830. See in particular the following passage:

" The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously was his reason? Unlike causation, this a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."

(3). The judgement of Underhill P in Amnesty International v Ahmed 2009 IRLR Page 888, where at paragraphs 29 to 30 the passages from the above judgements are cited. We also considered paragraphs 34 to 38. The significance of that passage is that it recognises the distinction between two types of case: – what are described as the James V Eastleigh Borough Council cases, where the treatment is inherently based on the protected characteristic, and where the but for test is sufficient, (for example the application of the criterion of different retirement ages for men and women in James); and theNagarajan type cases, where it is necessary to consider the mental processes, conscious or subconscious, of the alleged discriminator. This case is a Nagarajan type case.

(4). The judgement of Singh LJ in Owen V AMEC Foster, particularly at paragraphs 63 to 78. The facts. The claimant was disabled with multiple serious impairments including double below knee amputations, Type II diabetes, hypertension, kidney disease, ischaemic heart disease and morbid obesity. He was employed as a chemical engineer and transferred to AMAC following a merger in 2014. In 2015 he worked as a member of a team designing a project for a hydrocarbon processing facility in Saudi Arabia. In 2016, in a second phase of the project, an assignment was planned to commence in 2016 which required a part of the team to be based in Dubai. In late 2015 the claimant's line manager notified him that he was wanted as part of that team. There were substantial references to occupational health in order to assess the claimant's fitness to undertake the assignment. The latest report indicated that there was a risk to the claimant's health because of his medical conditions but it was left to the respondent to decide whether to send the claimant on the assignment. The respondent notified the claimant that he could not undertake the assignment. The claimant then presented claims of direct discrimination, indirect discrimination and failure to make reasonable adjustments. Notably, in view of the outcome of the litigation, the claimant did not make a claim of discrimination arising from disability under section 15 of the Act. Each of the claims were dismissed by the tribunal and the decision were upheld by the EAT and the Court of Appeal. Using a hypothetical comparator with the characteristics of a person without a disability who had been assessed by a medical practitioner as being at high risk of being sent on the assignment, the Tribunal rejected the claim of direct discrimination because of the claimant's disability. The focus of the appeal in Court of Appeal was that the reasons contained in the medical assessment were indissociable from the facts constituting the claimant's particular disability , and that the the Tribunal had impermissibly ascribed characteristics to the comparator. The Court of Appeal at paragraph 63 cited with approval the following from the EAT judgement:

"The EAT went on to say that simply establishing a causal connection between the disability and the treatment complained of was insufficient to found a claim for direct discrimination on grounds of disability. If someone else with a medical illness or injury of the same gravity as the claimant but not having his or her particular disability would have been treated no more favourably, direct discrimination will not have been established".

The Court of Appeal went on to cite with approval a passage from the judgement of Mummery LJ in Stockton-on-Tees Borough Council v Aylott concerning the identity of a comparator for direct discrimination claims:

" As the identity of the comparator for direct discrimination must focus upon a person who does not have the particular disability, that disability must, as directed in section 3A5 (now replaced by section 23 of the EQA), be omitted from the circumstances of the comparator. In other respects the circumstances of the claimant and the comparator must be the same "or not materially different". The claimant's abilities… must be attributed to the comparator".
The Court of Appeal went on to approve the employment tribunal's choice of hypothetical comparator. It rejected the claimant's dissociation argument. It noted that the claim should have been brought under section 15 of the Act, where no comparator is required. It also noted that there is a distinction between treatment accorded to a person because of their health, and their ability to to do a job. See paragraphs 77-78 of the Judgment.

9.**Further findings of fact and conclusions.**
The factual basis for the claimant's claim may be shortly summarised as follows: –
9.1. The timing of the setting of the KPIs, the level at which they were set and the manner in which the performance both of SB and of the claimant's work was assessed demonstrated that the setting of KPIs was a sham, the intention being to set up SB and the claimant to fail in order to justify the dismissal of SB, thereby concealing the real reason, his disability, and of the claimant, the latter being associated with SB.
9.2.There was a difference in treatment between that that accorded to the claimant and SB and that accorded to Chloe Lara.
9.3.These were facts from which a tribunal could reasonably conclude that the treatment of the claimant was because of SB's disability.
9.4.The respondent had failed to discharge the burden of proving that the claimant's dismissal had nothing to do SB's disability, not least because the respondent had not called SC, the supposed decision maker, to give evidence.
9.5. Taking these points in turn, we are satisfied that the subject of KPIs was raised by the respondent on the 17th of April 2018, before SB had the breakdown in his health. The assessment of performance by means of KPIs is not unusual in the case of a salesforce with commission based pay. It was amply demonstrated to the tribunal that the respondent was particularly concerned to increase sales of the products from a low base. The fact that the claimant and SB's bonus was guaranteed for the first six months did not mean that they were exempt from assessment of performance within that period.
9.6.The level of the KPIs was set in part at least in response to SB's projected sales targets over a three-year period, which had given earlier, and which projected an upturn from mid 2018.
9.7.The emails from MH described paragraphs 7.9 and 7.10 of the chronology, in May 2018 demonstrate particular concerns about the sales performance within the UK sector at an early stage."Losing UK" is a reference to the poor sales performance and we do not draw any inference that it was related to SB's state of health.We accept that the targets set for the KPIs in June were ambitious or challenging, but they were not significantly disputed by SB, who eventually accepted them after they have been exchanges of emails between him and MH, in the course of which, MH compromised to SB's benefit. See paragraph 7.13.
9.8. It is clear that from mid June 2018 the respondent was contemplating dismissing SB "due to his performance". This was before the claimant's diagnosis of cancer.
9.9. From the 12th of June onwards MR and then WB were expressing concerns to Taipei that the treatment of SP could be considered as discriminatory – obviously on the grounds that SP might be disabled. It was being emphasised that

his removal could only be on the grounds of his performance. WB's email of 12th of June was an impetus for the setting of KPIs .
9.10. What took place from the 12th of June onwards demonstrates that the respondent had under consideration a number of options: 1. The closure of the UK High Street channel – sales to High Street sales outlets - in which the claimant was particularly involved. This would involve the dismissal of SB and the claimant. 2. The extension of probation. 3. The passing of probation. MH and WB were closely involved in the email exchanges with Taipei, and in advising senior management, MH and WB. SC's email dated the 10th of August demonstrates that he was concerned about SB's performance. In mid August MH was recommending that both should be allowed to pass probation. However by 23rd of August the respondent was proposing to close the High Street channel – the area in which the claimant in particular worked– and focusing on the car channel (this involves the sale of the respondent's product direct to car manufacturers in the UK rather than to the retail sector). The dismissal of SB and JB was clearly under consideration at this stage. See paragraph 7.21 above. However, by the end of August WB was recommending that they both be retained because of the Halfords and Dixons opportunity, and therefore allowed to pass the probationary period, with a review of performance at the end of Q4, whereas SC preferred the option of extending the probationary period.This was the state of play when SB was called to a meeting on 5 September. There was a change of mind on the part of SC, who now wanted both to be dismissed, and the closure of the High Street Channel was clearly in contemplation. This is documented in SC's email of 3 September cited at 7.21 above. We had to decide whether this treatment was because of SB's disability or because of a genuine belief that both his and the claimant's performance was poor. We accept that there were facts from which we could reasonably conclude that it was at least because of SB's disability, or something to do with it, and we recognise that the absence of direct evidence from SC could lead us to a finding that the respondent had failed to exclude direct discrimination. However, we are satisfied from the totality of the evidence that the reason for SB's dismissal was due to a perception of poor performance. There are two principal reasons for that conclusion. First the evidence available at the time which tended to corroborate poor performance, and secondly the communications between WB and MH and SC. None of SC's emails show evidence that he was taking into account SB's cancer per se, although we do find it probable that in considering SB's performance he did not make allowances for the possible effects of the cancer in contributing to SB's poor past performance, but did consider that the treatment and possible continuing effects would impact on his future performance. This was not direct discrimination, but would have been unfavourable treatment because of something arising from disability under Section 15, which would have had to have been justified. It also gives rise to a claim of a failure to make reasonable adjustments. This never arose because his claims were settled. We note that SB specifically raised this point in his post dismissal letter. Finally, we note also that MH was also dismissed for poor performance. There is no suggestion that she had an associative relationship with SB.
Returning now to deal specifically with the reason or reasons for the claimant's dismissal, we repeat the comments about his poor performance set out above. We note that the latest sales performance for July August with a projection for September, provided by MH at the beginning of September, showed a figure of 60.3%. These were the figures which MH "meant to refer to" as stated in the claimant's post dismissal letter of 7 September. We accept that this was a bona fide assessment which was however the subject of some criticism during the tribunal hearing.There is then to consider that the latest figures for Chloe Lara

showed a figure of 68%, still below the target of 70%, but she was not dismissed. We find that there were two reasons for the difference in treatment. First, she was much closer to the target than the claimant. Secondly, and in any event, she was not assigned to the sales department but to the marketing department based at Gatwick, which was not then scheduled for closure, but was in July the next year, a point at which we find that the claimant would certainly have been dismissed, possibly on six months notice, as an alternative Polkey finding. As to the claimant's performance, we found the exchange of emails between MH and WB on 15th August 2018, referred to at paragraph 7.20 above, particularly revealing. The exchange appears to have been instigated by the claimant's expenses claims which revealed a low number of sales visits. In addition, MH had discussed the claimant's performance with SB and it does not appear that SB was complimentary. SB disputed this in his evidence, but he did not reply at the time to an email enquiry from MH as to his views on the claimant's probationary period to the contrary. WB in his lengthy reply, confirms his concerns about the claimant's performance in the context of advising that the claimant's probationary period should be extended for three months as a backup for SB in his absence undergoing treatment. He acknowledges that the claimant's performance was "not good enough for passing it". MH responded to questions from WB concerning her view of the claimant's performance, and her responses are revealing. This is contemporaneous evidence as to the respondent's opinion of the claimant's performance, which was endorsed by WB, whom we regarded as a witness upon him we could rely, he having no personal reason for distorting the truth in the respondent's favour. He too is under notice of dismissal for redundancy.

In summary, we conclude that the claimant was not dismissed because of SB''s particular disability but in consequence of his poor performance and of the respondent's perception that he was not competent to do the job in particular but not confined to the period of SB's absence during treatment. The evidence that the claimant was dismissed because of his relationship with SB is also extremely weak. There is no evidence from the contemporaneous emails that he was being treated as he was because of a relationship other than that of someone who worked in the same sales team under the direction of SB.

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Employment Judge Hargrove

Date 15 February 2020.

JUDGMENT & REASONS SENT TO THE PARTIES ON 17 February 2020

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FOR THE TRIBUNAL OFFICE