EMPLOYMENT TRIBUNALS

Claimant: **Mr D Gregson**

Respondent: **United Response**

Heard at: **Leeds**
On: **9-13 September 2019, 20-22 and (deliberations only) 24 January 2020**

Before: **Employment Judge Maidment**
Members: **Mr PR Kent**
Mrs G Tipton

Representation
Claimant: **Ms F Almazedi, Solicitor**
Respondent: **Miss B Clayton, Counsel**

RESERVED JUDGMENT

1. The Claimant's complaint of unfair dismissal is well founded and succeeds. The matter will be listed for a hearing to determine remedy with a time estimate of one day.

2. The Claimant's complaints of direct disability discrimination and victimisation fail and are dismissed.

3. The Claimant's complaint of sex discrimination is dismissed upon his earlier withdrawal of it.

REASONS

Issues

1. The Claimant brings a claim of unfair dismissal where the Respondent puts forward that the potentially fair reason for that dismissal was one related to capability i.e. long-term ill-health. Alternatively, it seeks to rely on some other substantial reason such as to justify dismissal stemming from the Claimant's inability to carry out his job without adjustments.

2. The Claimant also brings complaints of disability discrimination. It is accepted by the Respondent that the Claimant was at all material times a disabled person by reason of him suffering from autism.

3. The complaints of disability discrimination are of direct discrimination where it is said that stereotypical assumptions were made about the effect of autism on the Claimant's ability to work. Secondly, the Claimant was not permitted to return to work after 23 February 2018 permanently or on a phased return despite recommendations that he was fit to do so with adjustments. Thirdly, the Respondent imposed additional conditions on his return to work which could not be met (and which were not necessary to ameliorate the disadvantages caused to him by his suffering from autism).

4. The Claimant brings a complaint of victimisation reliant on an earlier Employment Tribunal claim made alleging sex discrimination in 2017. He says that, because of that protected act, he was detrimentally treated in the Respondent's refusal to allow him to return to Highgate Park. There is no complaint of victimisation in respect of the Claimant's dismissal. The Claimant will, however, seek to link this detriment to his dismissal in terms of a continuing course of conduct in circumstances where the Respondent maintains that this complaint has been brought out of time. The Tribunal emphasised that the Tribunal would wish to hear any evidence the Claimant wished to advance in support of a just and equitable extension of time should this complaint ultimately be found to have been brought outside the primary time limit.

5. No time points were ultimately pursued on behalf of the Respondent. It was recognised that the victimisation complaint as recorded at the earlier Preliminary Hearing referred to a continuing refusal to allow the Claimant to return to work at Highgate Park up to indeed the capability appeal outcome. The direct discrimination claims also asserted a continuing alleged stereotypical assumption that prevented the Claimant's return to the workplace up to and including the capability appeal.

6. The Claimant had brought a claim of direct sex discrimination and, in particular, that he was less favourably treated in his return to work. He referred to a colleague, Claire Mackay who, in contrast to him, he says, was supported back into work and allowed to state that she would not work with the Claimant at Highgate Park with the effect that he could not move back to that workplace. It is said that the Claimant would have been more favourably treated if female and/or had Ms Mackay been male. This complaint had been withdrawn on 15 August 2019 and the Claimant accepted that judgment would be issued dismissing that claim on its withdrawal.

Evidence

7. The Tribunal had before it an agreed bundle of documents numbering approximately 800 pages. The Claimant produced further additional bundles in 3 volumes containing, in the main, documentation which had been produced by the Respondent to him pursuant to a data subject access request. The documents in those bundles were not indexed and there were differences in the format of the 3 sets of bundles presented to

the Tribunal and for the witness table. As with any documentation the Tribunal was being asked to look at, the parties were told of the need to draw the Tribunal's attention to the relevant documents where they were not already cross-referenced in the written witness statements. The Tribunal was clear that it would not be conducting a separate review of each individual page of the various bundles.

8. Some documents were added to the bundle without objection during the hearing including a log of conversations the Claimant had had with an employment support advisor, Tania Carass.

9. Having briefly clarified the issues with the parties, the Tribunal took some time to privately reading into the witness statements exchanged. This meant that when each witness came to give his/her evidence he/she could do so by simply confirming the contents of the statement and then, subject to any brief supplementary questions, be open to be cross-examined on it. The Tribunal heard firstly from one of the Respondent's Service Managers, Susanna Harrison, compelled to attend the Tribunal pursuant to a witness order obtained by the Claimant. She gave evidence with reference to a written statement which she had prepared for herself and she was then subjected to open questioning on behalf of the Claimant in respect of its contents. The Tribunal then, on behalf of the Respondent, heard from Mr Rob Cawthron, Area Manager, Mrs Claire Dodds Smith, Senior Area Manager, Ms Emma-Jayne Agar, Senior Area Manager and Ms Julia Casserly, Divisional Director for the North Division. The Claimant then gave evidence on his own behalf. He also referred the Tribunal for its consideration to statements prepared by Fran Springfield, Clinical Nurse Specialist and Kate Leggett of a charity called Open Country. Since they were not in attendance to be cross-examined only reduced weight could be given to their evidence.

10. Having considered all relevant evidence, the Tribunal makes the following findings of fact.

Facts

11. The Claimant commenced employment with the Respondent as a support worker on 4 July 2011. The Respondent had a number of sites in the North Yorkshire area and around Leeds. The Claimant could be required to move location on a temporary or permanent basis.

12. The Claimant was one of a team of carers based at Highgate Park. The residents ("people we support") there were severely disabled with very limited mobility/limb movement and severe to moderate learning disabilities, including communication difficulties. Some individuals were only able to communicate by basic body movements. They were vulnerable and at high risk in respect of every aspect of their life including the possibility of accidents, medical incidents such as epileptic seizures, the risk of choking, the need for modified diets and their complete reliance on members of staff. With such residents there was a high risk of abuse/neglect, including financial and sexual. The residents were unable to explain if they were in pain.

13. The minimum staff ratio was 2 members of staff to the full complement of 4 Highgate Park residents, but with the need for one-to-one care when

any residents were out in the community. Even with only 3 residents, there were typically 3 support workers on days and 2 or 3 on nights. Highgate Park had housed 4 people we support until October 2016 and then 3 until 21 December 2017 when a new resident arrived. Ms Harrison worked at the office on site at least 3 days each week during daytime hours. There were as at 21 January 2018 8 support workers, including the Claimant, plus 2 vacant positions and 5 senior support workers at Highgate Park. The service could also call upon 5 relief workers. Senior Support workers took more responsibility for administrative tasks and the staff rota than support workers but otherwise carried out similar tasks. In the past support workers had been able, if they wished, to become recognised as senior support workers. This had ceased but existing senior support workers retained their titles. It was not uncommon for support staff to act as shift leaders even when senior support staff were working on the same shift. Each person we support had a designated key worker. At various times the Claimant had served as key worker for all 3 of the Highgate Park residents.

14. The Claimant had a clean employment record and good attendance record despite suffering from the longstanding conditions of anxiety, depression and Obsessive Compulsive Disorder of which the Respondent was aware. There was no awareness that the Claimant also suffered from autism, which was only diagnosed in late 2017. The Claimant came across to the Tribunal as intelligent and articulate and thorough although prone to excessive elaboration and detail in his answers to questions. He was honest in his recollection of events and clearly always put the people we support and their dignity at the forefront of his considerations.

15. Staff who had been pregnant had had their roles adjusted or the Respondent looked to move them to services with less manual handling. The Respondent had employed an epileptic carer but with no changes to their working arrangements as the condition was controlled by medication. Any epileptic prone to seizures would not be allowed to lone work.

16. The Respondent had a capability policy which provided for an informal stage. Consideration would be given to whether poor performance might be related to ill health or disability and, if so, whether reasonable adjustments might be made, including changing duties. A Performance Improvement Plan might be developed.

17. In November 2016 the Claimant's line manager, Susie Harrison, Service Manager at the Highgate service in which the Claimant worked, raised concerns with her superior, Claire Dodds Smith, an Area Manager at that time, about the Claimant's performance. She was concerned about the Claimant's well-being and the risk of accidental harm he posed to people we support. The Claimant met with Ms A Sinclair, Senior Support Worker to discuss these concerns on 18 November 2016. The Claimant described this as a constructive meeting where he accepted an element of over keenness on his part.

18. Ms Harrison met with the Claimant on 13 December 2016 to discuss concerns she received from members of the team about him not being himself and that he appeared stressed. The Claimant explained that he

was going through a difficult personal period, but he said he did not wish to take time off work and wanted to keep busy at work as a distraction. Ms Harrison suggested to him that some of his duties be restricted to alleviate some of the stress he was experiencing at work and the Claimant confirmed he was happy with that. The Claimant said that Ms Harrison was supportive at this meeting. He said that he anticipated that the restrictions would be temporary.

19. The restrictions agreed were that overtime was only to be worked if authorised either by Ms Harrison or senior support workers and that the Claimant was to ensure that he had regular days off and did not work long shifts. The Claimant would not work during any shift as shift leader. The Claimant was not to administer medication, drive vehicles or deal with finances either relating to people we support or petty cash at Highgate Park. He could take money with him to spend on trips out with people we support, if someone else signed out the cash withdrawal. As regards the restriction on not driving (this related to a large adapted vehicle), the Claimant was said to have had a couple of prangs and near misses (which the Claimant disputed). There had been an incident where he had got lost when driving in Leeds. The Claimant still had some health and safety responsibilities including ensuring that staff driver insurance cover was up to date. A risk assessment was agreed reflecting these restrictions and other staff were made aware of it.

20. Ms Harrison met with the Claimant 4 January 2017 to review the risk assessment, having been informed that the Claimant had not been complying with the restrictions on his duties in that he had been administering medication, handling monies and leading shifts. She explained that the restrictions been put in place to support him at work. She explained that the Claimant's colleagues had raised concerns about him not appearing well, but also that he was not listening, was awkward and was trying to do more than was being asked of him. As a result, she referred the Claimant to occupational health. Reference was made to the Claimant being responsible for flooding in a bathroom and to a prior occasion when he had lost train tickets and when the Claimant had lost £45 out of petty cash – a sum the Claimant subsequently reimbursed from his own money. The Claimant did not see this referral.

21. The Claimant met with Ms Sinclair again on 5 January 2017. He was reminded to ensure that he followed the risk assessment and that it was a positive measure to support him through a difficult time and to ensure the people we support were safe. The Claimant accepted that he had been praised by Ms Sinclair as a valuable team member and as regards his handovers. They had a further one to one meeting at which the Claimant was again reminded to keep to the risk assessment.

22. A report was produced from occupational health dated 24 January 2017. This confirmed the Claimant conditions of OCD, anxiety and depression noting that his sleep was variable and disruptive and that he was taking medication to assist with his sleeping. The report confirmed that it was "wise to reduces responsibilities" and that the Claimant "is likely to be more vulnerable to stressors in the workplace than those who do not have his mental health issues".

23. In February 2017 an altercation took place between the Claimant and Claire Mackay, a support worker who worked predominantly on nights. The Claimant raised concerns about seeing Ms Mackay at work thereafter and, as a consequence, the Claimant was temporarily redeployed to another service, St Albans house, from 6 March 2017. That site was chosen as there was a vacant post on days and it was considered to be within a reasonable distance of the Claimant's home, on the Wetherby side of Leeds. There were no vacancies elsewhere working nights so that the Respondent did not consider that Ms Mackay could be moved instead of the Claimant. In addition, it was felt that the St Albans service could support the restrictions imposed by the Claimant's risk assessment. Ms Harrison said that the work of the carers there was of a similar type to that carried out at Highgate Park. The Claimant was happy to agree to the move at the time, did not express the view that Ms Mackay should have been moved from Highgate Park and did not suggest any alternative solutions.

24. At a meeting with Ms Harrison on 1 March 2017 it was confirmed that the Claimant's restrictions remained in place, in line with occupational health advice. The Claimant described himself as at this stage having a good relationship with Ms Harrison. The Claimant's evidence was that she said that she wanted him back. Whilst this point was not put to her when she gave her evidence, she did describe the move to the St Alban's service as temporary. Whilst at St Alban's, despite the Claimant's risk assessment continuing in place, he was requested to and worked some overtime hours. He was also asked to work a sleep over shift.

25. The Claimant commenced a period of absence due to sickness in April 2017. A disciplinary process, however, continued in respect of the altercation between the Claimant and Ms Mackay. Following a disciplinary hearing, the Claimant was given a first written warning. Ms Mackay received a similar level of warning after her own separate hearing. The disciplinary panel also decided that the Claimant should remain working at the St Albans service on a permanent basis.

26. The Claimant appealed that decision by letter of 3 May 2017. His appeal was heard by Mrs Dodds Smith on 25 May. This was the first occasion Mrs Dodds Smith had met the Claimant. She decided to overturn the decision to relocate the Claimant in the light of a report provided from Mental Health Services dated 17 May 2017 which set out difficulties he would have with working there on a permanent basis. The Claimant explained to Mrs Dodds Smith that he felt suicidal and was taking medication for his anxiety as and when required.

27. Mrs Dodds Smith met with the Claimant and Ms Harrison on 6 June to discuss his move back to Highgate Park and the support he would need. She, at that point, became aware of the restrictions put in place on his duties. It was agreed that the Claimant would be referred again to occupational health for advice upon what was needed to support him in an effective return to work.

28. Occupational health provided their report on 22 June 2017 saying that the Claimant was now fit to return to work at Highgate Park, but working no

sleep overs or waking nights. Indeed, he returned to work at that service on 27 June 2017.

29. On 29 June 2017, Ms Harrison emailed Mrs Dodds Smith setting out concern she had about the limitations of the occupational health advice, the Claimant's fragile mental state and fitness to undertake work supporting vulnerable adults as well as the impact this was having on her health and the rest of the team at Highgate Park. She felt that occupational health had not taken on board the seriousness of the Claimant's mental health issues. The Claimant's view was that this change in attitude related to Ms Mackay and the Claimant's incident with her creating hostility amongst staff. The service manager at St Albans, Charlotte Atherton, had thought he was able to do the work there. In an email from Ms Harrison to Mrs Dodds Smith and Jayne Hackett of human resources of 18 May 2017, she said that on reflection the Claimant had a valid point about a return to Highgate Park.

30. As a result, Mrs Dodds Smith and Ms Gerry Neale, a Senior Support Worker, met with the Claimant again on 3 July 2017 to review and update the risk assessment which had been in place from March 2017 to ensure it was suitable going forward. Mrs Dodds Smith advised the Claimant that the restrictions in the previous risk assessment would remain in place. He was not to administer medication, not to drive, not to do finances, not to be shift leader and was to work only his allocated shifts (no overtime, sleepover shifts or waking night shifts). It was agreed that the Claimant's working hours be limited to those between 9am – 5pm. He was not to attend work outside those hours so that he could be assured that he would not come into contact with Ms Mackay who worked nights (finishing at 7am) and in circumstances where there was still an expectation that there be a form of mediation between them. That ultimately ended on 19 July when Ms Mackay said that she would not take part in a mediation. Mrs Dodds Smith stressed to the Claimant the importance of sticking to the risk assessment and he confirmed that he understood. The Claimant was told to speak to the Service Manager or a senior support worker if asked to do anything outside the scope of the risk assessment. The assessment was then updated and emailed to the Claimant with a copy of the notes of the meeting. It was Mrs Dodds Smith's intention to meet with the Claimant again on 18 July 2017 to check on his progress.

31. However, on 12 July 2017 Ms Neale emailed Mrs Dodds Smith to report that the Claimant was not following the agreed risk assessment. He had been instructed to stick to a 9am start time, but on his first shift back had arrived at 8am. He had also put a message in the communication book saying that he could cover additional shifts but with the need for authorisation, despite being told that any additional hours had to be authorised in advance. Mrs Dodds Smith was concerned that he appeared to be having difficulties in understanding and following simple management instructions. The Claimant was adamant before the Tribunal that he was not trying to make a point or manipulate the risk assessment – he was informing staff that he was willing to work more hours but couldn't do so without authorisation. The Claimant said that he had wanted to get into work a little earlier than his usual start time for a proper handover and was concerned about travel delays due to the Great

Yorkshire Show. He had expected to get in around 8.30pm but his bus had been quicker than expected and got him there a little earlier.

32. Mrs Dodds Smith and Ms Harrison met with the Claimant again as planned on 18 July. This was a team meeting day, not one of the Claimant's ordinary shifts. Mrs Dodds Smith went through the concerns reported by Ms Neale. She referred to him coming into work an hour early than his starting time (on a previous occasion Ms Mackay had stayed beyond 7am due to staff sickness and the Claimant had met her) and writing in the home's communication book that he was happy to pick up overtime shifts in August. This had been on the Claimant's first day back at work and it caused Mrs Dodds Smith to wonder whether the Claimant was looking for loopholes or was deliberately failing to follow instructions. The Claimant was again advised that he must stick to the risk assessment as any failure to do so would indicate that he was not able to follow management instructions and safely fulfil his role.

33. The Claimant asked if he could brush the teeth of people we support, otherwise the restriction on administering medication would prevent him from undertaking this basic element of personal care – toothpaste is classed as medication. Mrs Dodds Smith agreed to amend the risk assessment to allow him to carry out this task. However, she was concerned that the Claimant did not appear to understand that this would only be possible if another support worker actually put the toothpaste on the brush. She was also concerned that the Claimant had told his colleagues at Highgate Park that he was to do all personal care tasks when this is not what had been agreed and would be an unfair burden on him. The Claimant had said he had been asked by others to work overtime, but Mrs Dodds Smith told him to say he couldn't if any requests were made.

34. The Claimant was emailed the minutes of this meeting on 19 July and it was confirmed that the next risk assessment review would take place on 10 August 2017.

35. However, on 19 July 2017 Ms Harrison reported to Mrs Dodds Smith that the Claimant had failed to follow an instruction regarding the handling of a cheque. The Claimant had asked a colleague, Ellie, about the need to bank a cheque for one of the people we support. He had been told to speak to Ms Harrison who had been in her office at Highgate park all day, but the Claimant had not done so. He had taken the cheque from the cash tin and gone out with the person we support together with the cheque. The Claimant told the Tribunal that he had wanted to speak to Ms Harrison, but her office door was shut during the morning and she was in meetings. He was worried about the cheque expiry date. He took the person we support out to lunch forgetting at first to telephone Ms Harrison about the cheque, but then remembering to do so when he went to the bank. He asked Ms Harrison what he should do with the cheque and was told not to bank it but to return to the home with it, which he then did. With hindsight he accepted he should not have taken the cheque out, but was concerned about the expiry date. Mrs Dodds Smith decided to deal with this after she returned from an imminent period of annual leave and

advised Ms Harrison that if the Claimant breached any other aspects of his risk assessment, she should contact Sue Hall, Area Manager, as consideration might need to be given to the Claimant's suspension.

36. Ms Harrison was then made aware by Simon Taylor that the Claimant had offered to work overtime at the Manor Road service in contravention of his risk assessment on 21 July. The Claimant told the Tribunal that he had told Mr Taylor that he needed authorisation and he had said that he could not do the extra hours. The Claimant was aware that the risk assessment might be departed from in emergency situations and he was unsure whether Manor Road's need for staff (apparently they were desperate) was one such emergency. He was concerned about the welfare of the people we support. Ms Harrison sought advice from Sue Hall, on 24 July. She recommended that the Claimant be suspended from his duties pending a disciplinary investigation into repeated failure to follow instructions to comply with the risk assessment. Ms Hall said that this was not a health issue as the Claimant had been assessed as fit to work. Ms Harrison met with the Claimant on 25 July to confirm the decision to suspend him which was set out also in writing in a letter of that date and emailed to the Claimant on 27 July. The specific concerns were not notified to the Claimant at this point. The Claimant says he was just told that there had been lots of complaints about him. The Claimant was given the telephone number of a confidential staff counselling service.

37. On 31 July the Claimant raised a grievance against Ms Harrison alleging sex discrimination. The grievance was investigated by Sue Hall, but was not upheld. It was, however, found that the Claimant had worked outside his risk assessment at St Albans on management instructions. The Claimant appealed the outcome with the appeal outcome (upholding the grievance decision) given on 23 November 2017. In the meantime, the Claimant had brought Tribunal proceedings alleging sex discrimination in Ms Harrison's handling of him on 17 October 2017.

38. Whilst the internal grievance process was being dealt with, the disciplinary case against the Claimant was put on hold.

39. A referral to occupational health was prepared on 7 September 2017 by Ms Harrison (although never sent) which referred to the Claimant appearing to manipulate and challenge elements of the risk assessment. Ms Dodds Smith when questioned on this said that there were points where she was not sure why the Claimant was not following instructions i.e. whether he did not understand them or was always looking for loopholes. At this point, she referred to the Respondent not having the autism diagnosis and the conditions of OCD and depression were all they had to go on. She saw more clearly now what the Claimants difficulties were after the autism diagnosis. For instance, previously had she had seen the Claimant confusion regarding brushing the teeth of people we serve as him challenging the risk assessment. Now she could understand more why he was raising such points.

40. However, that process then recommenced in December 2017. Mrs Dodds Smith was interviewed by the appointed investigator on 20 December 2017 and signed off the record of her interview on 1 February 2018. She

referred to an additional issue of the Claimant booking a holiday for a person we support.

41. At the time she was interviewed she conceded that she was aware of the Tribunal claim. She had become aware that it involved allegations of sex discrimination, but was not sure when. She said that she probably knew there was a discrimination complaint.

42. She disagreed when put in cross examination that she was ramping up the level of criticism against the Claimant. She said she had come to the Claimant's case with a fresh mind, but in time he had breached management instructions. She was concerned and did feel as if he was looking for loopholes. She found herself regularly discussing the adjustments with the Claimant and did not know what else to do. He was not following instructions. She feared that he would make a massive mistake and injure the people we support if she allowed the continued failures to follow instructions. She couldn't put people at risk and said that any staff member would face disciplinary action if they couldn't follow basic instructions. If her tone had changed it was due to concerns with the continuing breaches. She described the Claimant as intelligent, caring and kind but that team members had reported breaches which had in fact occurred – she was not looking to find fault in the Claimant. The Claimant might have appeared to understand the investigator's, Ms Melia's, questions of him but there was a reality of continuing breaches of the risk assessment when the Claimant was at work.

43. On 11 January 2018 the Claimant advised Mrs Dodds Smith that he had been diagnosed with autism and sent her a copy of the assessment report. With the Claimant's approval she shared that with the disciplinary investigator, Anna Melia. She finalised her disciplinary investigation report on 16 January. This recommended that the matter proceed to a disciplinary hearing. This made no reference to the issue of the Claimant booking a holiday or relating to medication.

44. In an email of 5 February 2018 from Gerry Neale to Ms Harrison, Ms Neale said: "Another thought that the decision makers need to consider. If he should return to Highgate they are only considering him and no one else. You and Claire have said you will leave, members of the team will no doubt consider this, what about the people we support…" Ms Harrison also received an email of 20 February 2018 from Simon Taylor reminding her of earlier incidents and stating that in respect of risk assessments he believed the Claimant "had a point to prove [i.e. that he was capable] and would achieve this at any cost"

45. The Claimant's disciplinary hearing took place on 23 February 2018 chaired by Mr Rob Cawthron, Area Manager based in Newcastle and with no management responsibility for the Claimant. He was aware that the Claimant had made an employment Tribunal claim, but did not know what type of claim was being brought or what it related to. He was unaware of any allegation of sex discrimination. Mrs Dodds Smith said that she had not discussed the Tribunal claim with him. He was aware that the Claimant had disclosed that he was suffering from autism, but had not seen any autism assessment. He asked for a copy to be made for him at the disciplinary hearing.

46. The Claimant was represented at the hearing by Mr Adrian Judd of his trade union. Prior to the start of the substantive hearing, Mr Cawthron asked the Claimant to complete a literacy test explaining the purpose was to better understand any potential underlying issues as to why he may not have been following management instructions and to give the panel potential pointers as to where the Claimant could be assisted. Mr Cawthron wanted to gain an understanding of the Claimant's difficulties in the context of him not easily following instructions – it was unrelated to the autism diagnosis. The test was given to Mr Cawthron by HR – it was one which had been previously used generally as part of a recruitment exercise to gain an understanding of reading and writing skills. The Claimant was told that if he did not wish to do the test, it would not be held against him. Neither the Claimant nor his representative raised objections and the test was completed within around 20 minutes. The Claimant attained a score of 5 out of a possible 9. Mr Cawthron drew no specific conclusion from that, but thought that it raised an area for additional investigation. It was not the cornerstone of his decision, but one of many tools to help aid how the Respondent could support the Claimant. It was put to Mr Cawthron that in an email to Ms Jayne Hackett of human resources on 24 August 2018, he had responded that the reason for his decision not to return the Claimant to work was the diagnosis of autism and the literacy test. He explained to the Tribunal that this was sometime after his involvement and when he responded to Ms Hackett he was going off his memory with no paperwork in front of him. He said there was a need to properly assess the Claimant with his autism taken into account in a positive way.

47. The Claimant explained that the holiday he had booked was agreed at a team meeting held by Ms Harrison. He had carried out such a task previously, making the booking, filling out an advance purchase form required under the Respondent's finance policy and paying a deposit. Again, however, this was not an issue which Ms Melia had thought ought to be pursued against the Claimant. It is noted that she had interviewed Ms Harrison as part of her investigation.

48. Having considered the evidence before him and listened to the representations made, Mr Cawthron adjourned the hearing for a brief period of around 18 minutes and reconvened it with his determination that the allegations against the Claimant were not upheld. He concluded that the offences were "not serious offences". Whilst the investigation had disclosed that there were issues regarding the Claimant's ability to follow the risk assessment and management instructions, Mr Cawthron was conscious of the Claimant's recent diagnosis of autism and that this could be relevant to the difficulties he was having it work. On that basis, he decided the best course of action would be to further consider the Claimant's autism and what adjustments could be made to assist him before then considering if there was a suitable service that could accommodate the adjustments the Claimant needed. Whilst he did not consider the concerns raised to be minor in nature, as was put to him in cross-examination, he did not consider them to be a disciplinary matter in the light of the Claimant's impairments. He recognised that people with autism did have difficulty in following instructions and where there were autistic staff, a system of clear instructions could be put in place. The

consequence of the Claimant raising his autism at the hearing, was that the Respondent would look at the possibility of adjustments to help him. Mr Cawthron considered that the Claimant had raised his autism to give validity to his explanations for his behaviour. He rejected the proposition that he was making any assumptions – the Claimant's diagnosis gave him reasonable grounds to think again. It was agreed between him and the Claimant's representative that they would look at how the Claimant might be supported. He considered that the Claimant wanted his autism to be taken into account. He understood the Claimant to be accepting that he had some difficulty in following/interpreting instructions. He came to no conclusion himself that the Claimant was incapable of doing so. The Respondent was prepared to start from the beginning.

49. To allow some time for these adjustments to be considered and put in place, he determined that the Claimant should be placed on what he termed as "gardening leave". Mr Cawthron explained to the Tribunal that by this term he meant that the Claimant was on "special leave" but said that he had explained to the Claimant that he was no longer suspended and would remain on full pay whilst further enquiries were made about a safe return to work. Mr Cawthron did not consider it appropriate for the Claimant to return to work at this point given the concerns he had regarding the Claimant's ability to follow instructions and potential consequences for his safety and the safety of people we support. He felt that the Claimant was struggling to understand and follow the risk assessment and there were some grey areas that the Claimant did not fully understand despite numerous attempts to explain the risk assessment to him.

50. Mr Cawthron told the Claimant that the Respondent had to decide how to support him effectively for him to do his job which included trying to find a service that supported his needs. Careful consideration would need to be given to reasonable adjustments that could allow the Claimant to support people safely. They would, therefore, have to find a suitable service. However, it was not certain that such a service existed and, if it didn't, then the Respondent would need to take a different course of action with advice from human resources. Ms Carolyn Palmer, who sat on the panel with Mr Cawthron, sought to confirm that the Claimant understood that Mr Cawthron had said that the Claimant would not be able to return to Highgate Park. As reflected in the outcome letter, he believed that the service at Highgate Park was unable to make the adjustments to accommodate the Claimant's needs and to keep himself and the people we support safe.

51. Mr Cawthron said that he had no knowledge of the nature of Highgate Park. He was not ruling out an eventual return of the Claimant to work there. He was unaware of any friction amongst staff there although he assumed that if the Claimant had not been following instructions, that would be likely to cause friction between staff.

52. Mr Cawthron wrote to the Claimant on 26 February to confirm the outcome of the disciplinary hearing. The Claimant responded praising the way in which the meeting had been conducted and praising the support he had had from Emma Bailey.

53. Ms Emma Bailey had been subsequently appointed to provide the Claimant with support and Mrs Dodds Smith used her to pass information onto the Claimant and receive his feedback. She understood that Ms Bailey called the Claimant weekly and recalled that the Claimant had described her as a fantastic support.

54. The Claimant sent an email to the Respondent on 26 February seeking that he be reinstated at Highgate Park.

55. In terms of chronology the Tribunal notes that the previous Tribunal complaint of sex discrimination was dismissed upon its withdrawal on 5 March 2018.

56. On 7 March, Mrs Dodds Smith met with the Claimant to discuss the recommendations flowing from the disciplinary process. The Claimant was adamant that although the disciplinary decision was that he would not be able to return to work at Highgate Park, he did not want to work in another service role and only wanted to be reinstated to his support worker role at the Highgate service. However, the Claimant agreed to be seen further by occupational health for an up-to-date opinion.

57. It was put to Mrs Dodds Smith that she was unhappy that the Claimant had made the Tribunal complaint and that this influenced her decision-making. She said that she was not unhappy. She was concerned at how the Claimant felt and that Ms Harrison was upset at the accusations. It did give her cause to consider whether they were at the point where relationships had broken down. She said that the Claimant regularly brought things to her which suggested he did not trust the Respondent and its managers/his colleagues. Whilst the Claimant was saying that he would work back at Highgate Park she was trying to balance that against the fact that he would then speak about Ms Mackay and Ms Harrison all the time. When he had received documents pursuant to a subject access request, it was evident that 2 senior support workers had raised concerns which she felt he viewed negatively. She felt the Claimant had lost trust in Ms Harrison, the two senior support workers and others at Highgate Park. While she tried to support a return to work, staff were saying that they couldn't support the Claimant because he was a risk. The Claimant on the other hand was saying that he did not pose a risk.

58. An occupational health referral was completed dated 9 March. Within this Mrs Dodds Smith included concerns regarding an apparent inability of the Claimant to follow verbal instructions, that he would not be able to undertake lone working, whether he could safely manage complex and multifactorial issues (such as an emergency situation), his ability to communicate effectively with colleagues and the vulnerable adults that he was employed to support, his judgement and ability to manage conflict. She expressed the view that it would be impossible to continue to support the Claimant in his role at Highgate Park as "through experience it has been judged to be unsafe for our vulnerable service users and the level of direct support required for David personally is too great to be operationally sustainable and compatible with safe and adequate service delivery for service users." When put to the Claimant that Ms Smith was not making assumptions relating to his autism but seeking advice on his

individual situation, the Claimant said that she was negative in her view about his abilities.

59. Mrs Dodds Smith looked to see if there were any alternative roles including administrative roles and those which did not involve direct care of vulnerable adults, but there was nothing suitable available.

60. Occupational health reverted to Mrs Dodds Smith suggesting a different form of referral and that the best way forward was to obtain a report from the Claimant's treating consultant in order to better inform the occupational health assessment.

61. On 8 May 2018 the Claimant sent an email to a multi-recipient email address of the Respondent which was viewed by Mrs Dodds Smith as offensive and intimidating in nature. This was in the context that the Claimant having been warned about the tone and content of his email communications in the past. She felt that he had still failed to follow instructions to desist from sending such emails. In the email the Claimant said that he took "huge offence at being discarded. I WILL take Claire Mackay or loss of earnings. What you need to do is not ignore me (yes I'm sure it's all so good there).… Please apply the same rules to me as you do all other staff. Ok thank you time to change!!!!". Julia Casserly, Divisional Director for the North Division, emailed the Claimant on 11 May 2018 to advise that the communication was unacceptable and in breach of the Respondent's code of conduct. Mrs Dodds Smith prepared a letter to suspend the Claimant and to initiate disciplinary action in respect of this email, but the Claimant explained that he had sent the email by mistake such that Mrs Dodds Smith decided to take no further action. The Claimant emailed Ms Casserly on 11 May agreeing with her earlier communication and apologising saying that he had never intended to send the email.

62. On 10 May 2018 Mrs Dodds Smith had received a copy of a letter from the Claimant's GP regarding his fitness to work which had been sent to occupational health. She was concerned that this did not answer the specific concerns she had regarding him working in Highgate Park.

63. Occupational health's Dr Lygo received a report from the Claimant's consultant, Dr Hickson, dated 20 June - this was not shared with the Respondent. Occupational health provided then provided a further report dated 2 July 2018 which summarised the treating consultant's opinion. The Claimant was said now to be in a better position to cope with his previously diagnosed psychological problems. As regards the new autism diagnosis the Claimant was highly motivated to better understand his difficulties. There was now an awareness and an opportunity to address this problem such that through increased understanding and improved self-management there was now a prospect for its impact to diminish with time.

64. The Claimant wrote by letter of 15 July offering explanations for previous issues, particularly criticisms made about the Claimant booking a holiday and paying a deposit on 3 February 2017 for the holiday of a person we support.

65. Mrs Dodds Smith submitted a further occupational referral that was agreed with the Claimant on 25 July. This resulted in the receipt of a report dated 9 August, but only received on 14 August. This concluded that the Claimant was fit to continue in his current role. It gave no advice on adjustments which might be needed to allow him to do so safely. It was said that he would need clear and unambiguous instructions, might misread some situations and "is likely to have implications for future work performance, attendance and/or safety due to the nature of his condition".

66. Mrs Dodds Smith considered the report to be about the Claimant's health rather than his continued employment. Dr Lygo, she said, was a specialist, but one who did not understand the nature of the Respondent's activities.

67. She said that she was not clear from the report what support the Claimant needed and she did not know what else to do. She had sat down with the Claimant before the referral and the Claimant had said that he was well and did not need adjustments. She however had concerns that he was not following instructions and she wanted guidance on how those might be framed.

68. Mrs Dodds Smith emailed occupational health on 14 August with a list of questions by way of clarification. These were reviewed by Dr Lygo. He then set out in response a number of approaches that he considered were likely to be helpful in the management of an employee affected by autism. He set out aspects of the advice given by the national Autism Society on their website. They were referred to as a potential souce of advice. Mrs Dodds Smith's concerns remained the same regarding the Claimant being unable to understand and follow instructions. She noted that Dr Lygo had said that to some extent those difficulties were likely to continue and that he recognised that "the ultimate situation has to be safe, sustainable and reasonable and these needs are irreducible."

69. Mrs Dodds Smith was referred to an email from Jayne Hackett to her HR colleagues dated 13 July, stating that providing the Claimant consented to the occupational health process "then we can progress our capability process." Mrs Dodds Smith told the Tribunal that she had no idea what the email from Jayne Hackett was about. The email did not come from her and she had not made any decision. It was her decision to progress the matter to a capability meeting. It was not her decision to terminate his employment. The capability meeting was part of a process and she thought that the Claimant ought to be put on a performance process as he wasn't performing.

70. During September 2018 Mrs Dodds Smith prepared a spreadsheet of the 9 different service locations operated by the Respondent in the Leeds and Harrogate area setting out the type of service, whether there were vacancies, areas of risk and stating her views and reasons in the final column as to whether the Claimant could work in that service. She considered that none of the services were suitable workplaces for the Claimant.

71. It was confirmed by the Claimant to the Tribunal that the only locations he thought he could potentially work from were Highgate Park, St Albans and

potentially Dalby house as he understood that a vacancy has arisen there later. The evidence is not, however, of any vacancy in that service.

72. Mrs Dodds Smith said that the service at Highgate Park had changed with an extra person support in place. In addition, there was not such a stable grouping of staff and agency staff were used at times. There had been a fundamental change in the workload for the staff there. Previously they had been overstaffed with an empty bed, but now there was someone new to support and the pace of work had increased. She was not, however, saying that for that reason alone the Claimant could not work there. He needed a buddy. She agreed however that there had been four residents there when the Claimant had previously worked at Highgate Park.

73. By letter of 18 September 2018 she invited the Claimant to a formal stage 2 capability meeting to take place on 25 September. The purpose of the meeting was to discuss the occupational health report, gain an understanding of what reasonable adjustments were required and could be made and to review the services within the area in order to make a decision regarding the Claimant's future employment.

74. Mrs Dodds Smith prepared some notes in advance of the hearing of issues to be considered. Under a heading of other concerns to discuss she noted a number of matters including the Claimant's Tribunal claim which caused her concern that the Claimant did not trust the Respondent. She also referred to a risk of further litigation and cost employing the Claimant. She also arranged for an individual within the Respondent who had a qualification in autism, Carolyn Palmer, who had also sat on the previous disciplinary panel with Mr Cawthron, to be present at the hearing in an advisory capacity.

75. Mrs Dodds Smith was taken to a comment that colleagues including management did not want to work with the Claimant. She replied that relationships had completely broken down between management and staff. The Claimant had seen what staff had put in their emails about the Claimant. She feared he would go back with those issues in his mind and with the staff aware potentially of a continuing breakdown in relationships. There was a risk of an unstable service if people left. There was a risk of further grievances. Despite what the Claimant said, the evidence was that he couldn't move on as illustrated by him bringing out a folder at the meeting containing information about Mrs Mackay. He produced a police letter about her. Mrs Dodds Smith asked if she had been convicted of any offence, but the Claimant said that she had not. What he said suggested that he would still have issues. There had been other relationship breakdowns before. The Claimant had an earlier dispute with a volunteer. Ms Harrison said that every time she tried to deal with issues, a grievance from the Claimant resulted.

76. This was relevant to any adjustments. Relationships had broken all the way through. It was clear that a breakdown and lack of trust existed and continued. She said that this was clear from Ms Harrison, Ms Mackay, Simon Taylor, a senior support worker and another Gerry Neale, who had raised concerns. She accepted that Mr Taylor and Ms Neale had worked

with the Claimant for years but said that the situation they were in at that point was that the Claimant had read their emails about him and was unhappy. The Claimant was saying he felt supported but was raising problems at the same time. Relationships broke down when he did not like what they were saying - she felt that was something for a future capability panel to consider. She confirmed that she had never put to the Claimant the issue of staff not wishing to work with him before. She discussed staff relationships and the Claimant' view was that they were fine. However, his actions suggested the opposite to be true. She referred again to him bringing in the folder of issues he had with Ms Mackay.

77. Mrs Dodds Smith said that she had spoken to the Claimant about professional boundaries before, but it was difficult to talk to him about relationship issues because he got very upset. Sometimes she tried not to be too harsh. The Claimant had previously sent an email to the whole staff team about the incident with Ms Mackay.

78. Mrs Dodds Smith said in evidence that she was not saying that there was any relationship difficulties with the people we support where the Claimant's dealings had been professional and he showed himself to be caring, compassionate and kind.

79. It was suggested that it was not appropriate to refer to the cost and worry of the Tribunal claims. Mrs Dodds Smith said this something for a capability panel to consider. The Respondent had followed procedures and at times the Claimant had done things such as a subject access request which had had an impact on how the Respondent worked. She had no problem with being challenged, but the Claimant threatened the Respondent regularly, her and Ms Harrison, including in correspondence.

80. She felt that the Claimant had struggled to answer some of the questions at the hearing from the outset. He said that he understood the purpose of the meeting, but she was not sure that he had.

81. During the hearing adjustments required to support the Claimant in any role that he worked were identified. These included the need for a well-being plan – a joint plan prepared in conjunction with a supervisor to discuss what the Claimant needed in place to reduce the risk of any relapse and to enable supervisors to recognise any early warning signs in order to protect both the Claimant and the service users.

82. One-to-one meetings to take place every two weeks were requested by the Claimant at the meeting and Mrs Dodds Smith was happy to accommodate this.

83. Finance was to be removed from his role. Mrs Dodds Smith considered this to be necessary as the Claimant had advised that he was vulnerable in respect of his finances as he had been financially exploited previously – this was a reference to an issue with a former employee occurring outside the workplace. She saw the Claimant's admission of this to be a positive step. The service users were vulnerable to the risk of financial abuse and again to protect the Claimant and the people we support he would not be asked to complete any task directly or indirectly linked to

finance. She said it was very easy to remove the Claimant from these duties.

84. As was identified by occupational health, clear instructions had to be given to the Claimant and it was discussed and agreed with the Claimant that he would be assisted with communication of instructions and clarification of complex tasks by a buddy. The Claimant was the first to raise the benefit of him having a buddy.

85. It was also requested by the Claimant that a task list be drawn up for each shift. Again, Mrs Dodds Smith was happy to accommodate this with the buddy providing assistance with the drawing up of the task list. Essentially this was to be a detailed breakdown of each task required to be undertaken during the shift.

86. The Claimant also requested time at the start of each shift to read updates and documentation. Again, Mrs Dodds Smith was happy to accommodate this.

87. It was discussed and agreed with the Claimant that support would be provided to deal with understanding relationships and professional boundaries. It was agreed that the Claimant would be assisted in this by the buddy.

88. Occupational health had recommended that a structured environment was required and it was clarified with the Claimant that this had to be an environment he was familiar with. Highgate Park was identified as the location which would provide him with the highest level of structure. This was also the service closest to his home and the one where he had indicated that he wished to remain. However, Mrs Dodds Smith considered that the service had changed since the Claimant last worked there as there was an additional person now present who required support which had increased significantly staff workloads. She considered that it was apparent from the Claimant's time working in this service, that it was not possible to provide the adjustments required to meet his communication needs. Therefore, he could not work in this service without a buddy.

89. The Claimant was not to be required to lone work at any time. Mrs Dodds Smith considered it would be too great a risk as it would not be possible to provide the structure and support that had been identified as required by the Claimant if he worked alone on a shift.

90. There would be no sleep ins or shift working as again this would not enable the necessary structure do be provided and sleep in shifts also placed the Claimant at risk of having to lone work at times.

91. It was agreed that the Claimant's medication would need to be stored in a locked location to ensure that there was no risk of the people we support mistakenly consuming it. In addition, if the Claimant needed to take his medication whilst at work, he would immediately notify his manager or buddy and remove himself from active support.

92. As already stated, the Claimant had been the first person to raise the possibility of a buddy i.e. someone able to work closely with him on a one-to-one basis. Mrs Dodds Smith considered that this was necessary to ensure a safe system of work for the Claimant and the people we support and that the Claimant would have to be paired with a buddy to assist him in coaching him whilst he was on shift, ensuring that he had processed the information communicated to him, working with him when considering professional boundaries, supporting him in stressful situations, developing the daily task list, supporting him to understand processes, working with him to deter him from undertaking work where an adjustment was in place for him not to do a particular task, to be available when he was at work and to understand him and his needs.

93. The Claimant emailed Mrs Dodds Smith on 27 September expressing his thanks and appreciation to the panel.

94. Her conclusion, having adjourned the meeting, was that the buddy had to be one person who would need to support the Claimant with most of his duties and would have to be with him all the time whilst he was at work. She considered whether a shift leader or one of the support workers could provide help and support to the Claimant, instead of a buddy, but considered that this had been tried before and had not worked as illustrated by the cheque issue on 19 July 2017. Other staff on shift were generally busy and could not provide the close one-to-one support that the Claimant required without compromising standards of care and safety. She also considered whether ad hoc support from another support worker on shift might work but was concerned that, as the Claimant did not recognise that he needed advice and support, he would not seek it out when it was required. Whilst the Claimant was saying that he would benefit from a buddy, the evidence was that when working on shift he did not follow and use available advice and support. Mrs Dodds commented that what he said and meant were not always the same.

95. At Highgate Park Ms Harrison worked four days per week and there might at times be in addition only a shift leader and the Claimant working at the house. When put to Mrs Dodds Smith that it was an exaggeration to say that there needed to be someone with the Claimant all the time, she said that the job changed through the day and they could have crises or employees not turning up. Staff were busy and couldn't always provide any support.

96. Mrs Dodds Smith considered that the risk of not having this form of one-to-one support in place for the Claimant was huge, for example if there was a medication error that could be life threatening to the people we support. However, she did not consider it to be a reasonable adjustment to provide a buddy due to the potential confusion/distress that would be caused to the people we support and their families and the additional costs to the service, which she considered would be unreasonable. There was only one person at Highgate Park who was not deprived of their liberty in terms of mental capacity. As a result, the Respondent would have had to have approached families about the Claimant's needs and the need to bring in more support for him. They would have been worried that someone who was not competent was caring for their relative. A

buddy would hear confidential information. The people we support wouldn't understand the role of a buddy.

97. Having determined adjustments which would be needed to be made to the Claimant's role in order to ensure that he could return to work, she went on to consider which of the services in the Leeds/Harrogate area could accommodate the adjustments that would need to be made. She concluded that none of the services were suitable and could support the adjustments the Claimant required. The Claimant could not fulfil any other role and no suitable roles were vacant.

98. Mrs Dodds Smith prepared an outcome letter sent to the Claimant on 9 October 2018 advising him of the decision that the matter be referred to the next stage under the capability policy (where there would be a determination regarding his future employment) and reflecting the above.

99. The Claimant submitted an appeal against this outcome on 12 October 2018 and made a formal complaint against Mrs Dodds Smith. He further submitted a grievance alleging breaches of the Equality Act 2010 by letter of 17 October 2018. He said that he did not doubt Mrs Dodds Smith's integrity and did not see this as a "personal grievance".

100. The Respondent replied explaining that there was no appeal at this stage and that the contents of his grievance letter were already being considered as part of the ongoing capability process.

101. The Claimant withdrew his grievance against Mrs Dodds Smith on 8 November 2018. The Claimant acknowledged that there was nothing malicious in Mrs Dodds Smith's decision making. He said that he was now clear (having received documents pursuant to his subject access request that he had not been returned to Highgate Park (by Mr Cawthron), not because the views of his colleagues, but because of his autism and the literacy test he had undertaken (see paragraph 46 above). When suggested to the Claimant that he seemed to accept that the refusal to return him to Highgate Park was not an act of victimisation, he said that he was trying to be positive and that it was only clear that he was not being victimised when he had a conversation with Ms Hackett and on her reassurance which he had no reason to challenge.

102. Ms Agar, Senior Area Manager, was asked by Ms Casserly to chair the final stage 3 capability hearing. She had not worked with the Claimant before and had no management responsibility for anyone involved, as she worked in a different area. She was unaware of the substance of the Claimant's previous Tribunal claim, albeit aware there had been one given the reference to it in Mrs Dodds Smith's outcome letter. The hearing took place on 30 November with Mrs Dodds Smith presenting the management case and the Claimant attended with his union representative, Mr Mark Jessop and Tania Carass, Supported Employment Officer. It was put to her in cross examination that the Claimant's earlier correspondence, appealing against the formal capability meeting decision, showed that he was not clear about the process. She received confirmation, however, from the Claimant at the meeting that he knew what it was about.

103. The Claimant had requested in advance the chance to undertake a further literacy test to the one that he had completed previously. Everyone left the room for 30 minutes whilst this was completed. The test was one which had been used as part of the ordinary recruitment process with scenarios aimed at replicating situations which a support worker might come across at work. The Claimant failed to reach the benchmark score of 11 marks, scoring 7 out of 15. Ms Agar's evidence was that this result had no impact on her decision/ did not influence it greatly. The Claimant was already in the Respondent's employment and had passed a selection process.

104. It was put to Ms Agar that the incidents held against the Claimant were of a minor nature. She disagreed. the flood caused from a bathroom had been costly and disruptive. There had been genuine errors in cash handling, but the Respondent had procedures which the Claimant had not followed. She felt there were safeguarding concerns. There had been adjustments in place, yet these concerns had still arisen. She agreed that these predated the Claimant's autism diagnosis, but they occurred nevertheless with adjustments in place and an awareness of mental health issues affecting the Claimant. The diagnosis was an explanation of why the Claimant's failings had occurred.

105. When put to Ms Agar that the Claimant was saying that he understood autism and had become more self-aware, she said that she took this as a positive, but she needed to look at how they could physically get the Claimant back to work. She needed to consider the risks to vulnerable adults, balancing the Claimant's needs with people we support, bearing in mind that the Claimant had been off for a considerable time and there had been changes in the service.

106. Each of the proposed adjustments were discussed in turn. The Claimant was in favour of a phased return and Ms Agar suggested a supernumerary period of 6 weeks rather than the usual 4 weeks in order to reduce the pressure on him, which he welcomed. The Claimant was happy to be involved in putting together a well-being plan. Ms Agar agreed with the suggestion of one-to-one meetings every two weeks.

107. On discussing the removal of finance from the Claimant's role, the Claimant felt that this restriction should not be permanent. Ms Agar's view was that at the start he should not complete any financial tasks, but that this could be kept under review. The duration of the restriction would be subject to his progress. She considered that finance was a significant part of a support worker's role and could limit the Claimant taking people we support out and about on his own as he could not pay for activities. The Tribunal notes that this had not previously been a restriction placed on the Claimant.

108. It was identified that clear instructions were required to be given to the Claimant and he would be assisted with the communication of instructions and clarification of complex tasks by a buddy. The Claimant advised that as any situation changed during the course of a day, verbal instructions would be fine, but Ms Agar was not convinced as the Claimant accepted that he had failed to follow verbal instructions previously.

109. Ms Agar considered that standard day-to-day tasks could be broken down into their component parts quite well. However, that would be less straightforward with unexpected things that the support worker might be required to do. It was considered that the Claimant said he needed predictability and structure, but this could not be guaranteed given the nature and needs of the people we support.

110. Ms Agar thought that it would be sensible for him to have time at the start of each day to read updates and documents.

111. She felt that in terms of dealing with his understanding of relationships and professional boundaries, the buddy would help the Claimant communicate his needs to the team. However, if the people we support asked for help in managing their personal relationships, she felt the Claimant would struggle given that he struggled with his own personal relationships.

112. In terms of requiring a structured environment, she noted that Highgate Park had been identified as the location which would provide him with the highest level of structure. It was also the service closest to the Claimant's home and the one where he wished to remain. However, the service was ruled out as being a suitable place as it could not accommodate the adjustments that he required. Also, the service had been through a lot of changes since the Claimant last worked there and the Claimant had previously struggled to adapt to a new environment. Other locations were considered, but were not suitable as the level of support required could not be provided there.

113. She considered that lone working was not possible in the Claimant's case so that the Respondent would need extra staff on shift alongside the Claimant at all times. A restriction on sleep -ins and shift working had also to be applied.

114. Ms Agar was concerned about the antidepressant medication the Claimant took and the effect it would have on him if he needed to take it whilst at work. It was agreed that the medication would need to be stored in a locked location and that, if he needed to take it at work, he would need to immediately notify his manager or buddy and remove himself from active support. The Claimant said at the meeting that at that point in time he was not taking the medication. However, she was concerned that he might need to in the future.

115. Ms Agar agreed with Mrs Dodds Smith's assessment in terms of the need for a buddy and in particular, that "it's almost as if DG needs a support worker". Although the Claimant did not agree that he needed someone to work with him full-time, many of the adjustments considered necessary at the stage 2 meeting and at Ms Agar's own meeting had previously been in place for the Claimant for some time under earlier risk assessments, but high-risk near misses and actual incidents had still occurred which put employees and people we support at risk. She was concerned that the scope of the adjustments that had been in place before and were still necessary, would negatively impact on the people we support and also put undue pressure on the Claimant's colleagues due to them having to divert their attention away from their own duties to

complete tasks he was unable to or to spend additional time explaining instructions or requests to him. Existing support workers were considered not to be able to provide the necessary support to the Claimant – agency staff might be on duty whereas support needed to be consistent. Also, this was a busy service and where support workers would be even busier if they had to cover for the Claimant not being able to administer medication or deal with finance matters. Whilst permanent staff would have had training on handling people with autism, the same could not be said of all agency staff.

116. Ms Agar's understanding was that the Claimant required effectively a job coach, rather than someone available or present for the Claimant from time to time. She thought that was also the understanding of Tania Carass. She said that she thought that initially they needed someone in place as a job coach on the Claimant's return to work.

117. Ms Agar did not investigate the guidance potentially available from the National Autism Society which occupational health had pointed to.

118. Therefore, she felt that a full-time buddy was an essential adjustment due to the vulnerability of the people we support and the fact that there was a consideration as to whether the Claimant was capable of undertaking a number of key duties of the support worker role.

119. Enquiries were made after the hearing by Tania Carass and she reported that there was a possibility that the Claimant could receive funding for the support required. The Claimant said that she was supportive of the provision of a buddy as part of an "autism in the workplace" scheme However, this was not guaranteed and so the Respondent would then be faced with having to meet the costs of the additional one-to-one support for the Claimant for an unspecified duration to enable him to provide the necessary support to people we support. It is noted that Ms Carass had been positive about the possibilities of assistance, explaining the application process and that "support in the workplace is something they could offer". but that in an email chain, Ms Jo Carnachan of HR had commented: "So no guarantees". However, Ms Agar said that the decision that the Claimant's employment could not be sustained was not based on a lack of funding. It was based on the impact on the people we support. There would be a need to ensure that the presence of the buddy would be in the best interests of the people we support with reference to their specific needs and vulnerabilities, their wishes and those of their families and advice from other professionals involved in their care. Ms Agar had concerns that the presence of the buddy would give the impression to colleagues and family members that the Claimant was not up to the job and there would also be the potential to de-skill the people we support if they went on to develop a reliance on two members of staff instead of the usual one. For a job coach to go in, there would be a need to determine whether the people we support had the capacity to consent to that person's presence. That was unlikely. This would then lead to a "best interests" decision involving the families, social workers and health professionals of all 4 people we support at Highgate Park on an individual level. Ms Agar had an email from Simon Taylor to Ms Harrison dated 20 February 2018, supplied by the Claimant which referenced a family's concerns. She did not look into the specifics further

and said she did not give this great weight. She accepted that the Claimant had also given her positive evidence of his performance at work.

120. Ms Agar adjourned the meeting and took some time to consider her decision. She noted from the supervision records and appraisals that there were recurring themes in terms of communication difficulties and failures to follow instructions. She felt it was clear that the Claimant had had the benefit of extensive support from a number of line managers over a long period but had consistently failed to follow the risk assessments and restrictions that had been put in place to support him since December 2016.

121. On 14 December 2018, the Claimant sent Ms Agar 2 emails containing a number of attachments which he wanted her to consider. On 17 December he sent a further email attaching additional documents. While she did not consider many of these to be relevant, she did review all of them and took them into account prior to making a decision.

122. Her view was that although individually the adjustments that were necessary (with the exception of the buddy) to ensure the safety of the Claimant, his colleagues and people we support might be considered reasonable, collectively they were not. That was because they removed too many of the responsibilities from the Claimant's role as a support worker, the Respondent did not know how long they needed to be in place, they would impact negatively on the Respondent's service delivery and additional costs would be incurred which might result in the Respondent running its services at a loss.

123. In any event, the feasibility and success of the adjustments all hinged, Ms Agar considered, on the Claimant been provided with a buddy. The specific adjustment of a buddy was not reasonable on the basis of the aforementioned considerations. There were no other suitable vacant roles at that time.

124. Ms Agar therefore decided that the Claimant's employment should be terminated on the grounds of capability with immediate effect on 19 December 2018. She sent him a letter setting out the reasons for decision on that date.

125. The Claimant emailed Ms Casserly on 21 December appealing her decision.. Within that he complained of an unfairness of the sanction in comparison to other staff, procedural concerns, that evidence had not been properly considered and that new evidence had come to light. He sent a further email on 22 December adding that he felt he had been victimised by Mrs Dodds Smith as a result of complaints he had raised under the Equality Act 2010.

126. On 27 December the Claimant was invited to attend an appeal hearing on 14 January. The Claimant then submitted further details of his grounds of appeal to Ms Casserly on 2 January 2019.

127. At the hearing, the Claimant was able to make representations under each of his grounds of appeal. He felt that he had been dismissed on capability grounds, whereas other members of staff with disabilities had

not been, referring to the circumstances of Ms Mackay in relation to the altercation they had had at work in February 2017. Ms Casserly was however satisfied that every effort had been made to support the Claimant, yet the necessary adjustments needed to ensure the safe delivery of his role could not be accommodated. She did not find Ms Mackay's situation to be comparable to that of the Claimant.

128. As regards procedural concerns, the Claimant raised that he had felt isolated by lack of contact from managers and colleagues and that there was a jump to the formal capability procedure without an opportunity to deal with the issues raised informally. He considered that Mrs Dodds Smith had been biased in her approach and influenced by others. It did not cross Ms Casserly's mind that Mrs Dodds Smith might be seeking to victimise the Claimant, not least for raising grievances and complaints, and/or might be wanting him to be removed from the Respondent. She described Mrs Dodds Smith as, in her view, an authentic and caring person. In any event, she was not the decision maker. Ms Agar made the decision to terminate the Claimant's employment and Ms Casserly viewed her as "very impartial". Whilst Mrs Dodds Smith, it was accepted, noted concerns in her outcome letter about the Claimant raising complaints, Ms Casserly concluded that the process was focused on the Claimant's ability to do the job. The relevance of the raising of those concerns about the Claimant was, for her, that he did not trust the Respondent. Ms Casserly rejected the suggestion that the Claimant's earlier raising of an Employment Tribunal complaint had any influence on her own decision.

129. Ms Casserly considered that appropriate management support had been in place and the length of the process had been caused by the number of processes the Claimant had been subject to from July 2017 onwards. There did appear to be, to her, a jump to the formal stage 2 capability meeting, but she felt that the history of supervision records showed that the Claimant had received support under informal processes to improve his performance over time. She had reviewed one-to-one supervision meetings the Claimant had attended and noted that a number of positives were recorded, but also concerns about the Claimant overstepping boundaries or extending the remit of a particular task. It was also permitted within the Respondent's process to go straight to the formal stage, although she did not feel that this was what had happened in the Claimant's case. She thought that the history of the matter was of reasonable adjustments having been made to assist the Claimant.

130. The Claimant said that he had worked outside his risk assessment on a number of occasions and this had been sanctioned by senior colleagues. He felt this had not been taken into account. Ms Casserly accepted that there had been emergency situations where deviating from the risk assessment had been necessary and had been sanctioned. However, she felt that this did not account for the occasions when the Claimant failed to follow the risk assessment. Therefore, this did not diminish or outweigh the very real concerns the Respondent had about the Claimant being unable to follow instructions in order to work safely.

131. The Claimant said that he had a call log of his contact with the Employment Advisory Service which in his view showed that he would always seek advice, not do things on his own (this was said to be in

relation to his financial duties). He also produced a chronology which he said he had prepared on the advice of ACAS. Ms Casserly's view was that this did not address the real issue which was that the Claimant was impaired in his ability to fully comprehend, interpret and apply advice which amounted to a risk to health and safety which the Respondent could not manage due to the significant support that would need to be in place to address this.

132. The more recent events in the Claimant's employment told her that the Claimant found it difficult not to become a shift leader. She acknowledged that there was no doubt about the Claimant's enthusiasm for the work he did and his care for the people we support. However, there were concerns that the Claimant continued to make judgements which put himself and the people we support at risk. To mitigate the risk the Respondent was willing to put reasonable adjustments in place, but the cumulative effect of this was not something which could be sustained. The autism diagnosis was informative as to the reasons why the Claimant might have struggled, but there was the theme, throughout his employment, of the Claimant not following protocol/instructions.

133. Ms Casserly accepted that no one had come to harm as a result, but she considered that there was the potential for that and the Respondent was accountable, knowing the risks which it was thought the Claimant posed, if anything did occur. She refuted the suggestion that she had made a stereotypical assumption of the Claimant as someone suffering from autism, saying that she appreciated that the Respondent had to consider everyone's individual circumstances and how the condition impacted on the Claimant as an individual. Whilst the Claimant had suggested that he would benefit from a buddy, his idea of what that would entail was different from the view reached by the Respondent. He did not see it as being such an intense involvement. He had in his mind someone to be on-call if needed, for instance, to provide clarification. However, in Ms Casserly's view, there was an impetuosity in the Claimant's actions, for instance in him taking a cheque out of the tin and offering to do other shifts, which indicated that they were not the type of matters where the Claimant would think to seek advice first. There would be too much extra responsibility on the Claimant's fellow workers for them to perform the role and the Claimant's demands could potentially be a distraction which could lead to the risk of those of workers losing focus on their own tasks.

134. Ms Casserly explained that for her a job coach was someone who would support an individual into the workplace and work with the team to educate and support them to understand the individual's needs. Their involvement would gradually be phased out as the individual grew more confident. In contrast a buddy was a one-to-one support whilst the employee is at work. It could be support by telephone or by attending specific meetings, but in the Claimant's circumstances it would have to be a one-to-one physical presence. If a buddy or job coach was to be put into one of the Respondent's services there needed to be a best interests process conducted for each of the 4 people we support at the (Highgate) service. This contrasted with the situation where someone might come into the home on a one-off basis to deal with a particular issue involving a particular person we support. In such a case, the best interests process would only be required for that one resident.

135. For Ms Casserly, the provision of a buddy was the one adjustment which couldn't be made in isolation. However, looking at the sum of all the adjustments, the Claimant's continued employment was unsustainable. When suggested that the provision of a buddy might help the Claimant to have more insight into his own behaviour and result in an improvement in the way he worked, Ms Casserly said that her understanding was that the buddy, if it could have been accommodated, would have been reviewed but she foresaw that they were looking at a period of around six months to ensure a safe reintroduction of the Claimant into the workplace. Even then, there still was a concern about having to go through best interests processes with all of the people we support.

136. She assumed that if Access to Work had been able to provide any assistance, it would not have been a full-time person or funding for such a person. That was her own judgement based on her own experience, in particular regarding two employees she had worked with who had sight impairments. She accepted the she had not explored the possibility. She considered that she understood what the National Autistic Society recommended were those matters already reflected in the occupational health report. She agreed, however, that the expertise within the Respondent and its managers was more in terms of how they supported people we support with autism rather than managing an autistic employee in the workplace. She described that another arm of the Respondent's business was to provide job coaches. She accepted that people within it might have been able to provide some input to the Claimant's situation, but those job coaches were contracted to look after employees in external organisations, particularly within local authorities and trusts who contracted with the Respondent for the provision of those services. The local authority in which the Claimant was employed was not one of those which contracted with the Respondent.

137. When put to her that the diagnosis of autism might make it easier for managers and colleagues to understand the Claimant's behaviour and reactions to certain situations, Ms Casserly said that managers and colleagues had talked to the Claimant about how he would prefer communication. He had expressed a preference for written communication but he had still breached the Respondent's procedures. She was not sure that the knowledge of the Claimant suffering from autism would have made a difference. She considered that the cumulative adjustments required could not be considered sustainable including on a temporary trial basis.

138. The 'best interests' procedure was a significant barrier to the Claimant's return to work and she also had to think of CQC requirements in that the Respondent had to engage skilled and fit employees. When put to her that the reaction of families might depend on how the situation was explained to them, she said that she was not a family member and no one knew how they would react to the need for someone to help a support worker to provide support to their relative.

139. When asked in re-examination why the Respondent had not started the best interests process for the provision of a buddy or work coach, she said it was because the decision had been made to dismiss the Claimant.

However, she had the authority to overturn that decision if that is what she had felt appropriate.

140. Ms Casserly rejected the Claimant's appeal and set out the basis for that decision in a letter to the Claimant dated 24 January 2020.

Applicable law

141. In a claim of ordinary unfair dismissal, it is for the employer to show the reason for dismissal and that it was a potentially fair reason. One such potentially fair reason for dismissal is a reason related to capability pursuant to Section 98(2)(a). This is the reason relied upon by the Respondent, albeit with some other substantial reason such as to justify dismissal pleaded in the alternative. The Tribunal is referred to **Alidair Ltd v Taylor 1978 ICR 445** – it is sufficient that the employer honestly believes on reasonable grounds that the employee is incapable. If the Respondent shows a potentially fair reason for dismissal, the Tribunal shall determine whether dismissal was fair or unfair in accordance with Section 98(4) of the Employment Rights Act 1996 ("ERA"), which provides:-

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

142. Classically in cases of ill health related capability a Tribunal will consider whether reasonable medical evidence was obtained, the degree of consultation with the employee and the possibility of alternative employment or changes to the employee's role. The Tribunal must not substitute its own view as to what decision it would have reached in particular circumstances. The Tribunal has to determine whether the employer's decision to dismiss the employee fell within a band of reasonable responses that a reasonable employer in these circumstances might have adopted. It is recognised that this test applies both to the decision to dismiss and to the procedure by which that decision is reached.

143. A dismissal, however, may be unfair if there has been a breach of procedure which the Tribunal considers as sufficient to render the decision to dismiss unreasonable. The Tribunal must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 in capability cases of poor performance but the basic principles of fairness are still relevant in long-term ill health capability cases.

144. If there is such a defect sufficient to render dismissal unfair, the Tribunal must then, pursuant to the case of **Polkey v A E Dayton Services Ltd [1998] ICR 142** determine whether and, if so, to what degree of likelihood the employee would still have dismissed in any event had a proper procedure been followed. If there was a 100% chance that the employee would have been dismissed fairly in any event had a fair procedure been followed, then such reduction may be made to any compensatory award. The principle established in the case of **Polkey** applies widely and beyond purely procedural defects.

145. In addition, the Tribunal shall reduce any compensation to the extent it is just and equitable to do so with reference to any blameworthy conduct of the Claimant and its contribution to his dismissal – ERA Section 123(6).

146. Under Section 122(2) of the ERA any basic award may also be reduced when it is just and equitable to do so on the ground of any conduct on the employee's part that occurred prior to the dismissal.

147. The Claimant complains of direct disability discrimination. In the Equality Act 2010 direct discrimination is defined in Section 13(1) which provides: *"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

148. Section 23 provides that on a comparison of cases for the purpose of Section 13 *"there must be no material difference between the circumstances relating to each case".*

149. The Act deals with the burden of proof at Section 136(2) as follows:-

> *"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the court must hold that the contravention occurred.*
> *(3)But subsection (2) does not apply if A shows that A did not contravene the provisions".*

150. In **Igen v Wong [2005] ICR 935** guidance was given on the operation of the burden of proof provisions in the preceding discrimination legislation (particularly on the Tribunal's scope for inferring discrimination) albeit with the caveat that this is not a substitute for the statutory language. The Tribunal also takes note of the case of **Madarassy v Nomura International Plc [2007] ICR 867**.

151. It is permissible for the Tribunal to consider the explanations of the Respondent at the stage of deciding whether a prima facie case is made out (see also **Laing v Manchester CC IRLR 748**). Langstaff J in **Birmingham CC v Millwood 2012 EqLR 910** commented that unaccepted explanations may be sufficient to cause the shifting of the burden of proof. At this second stage the employer must show on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of the protected characteristic. At this stage the Tribunal is simply concerned with the reason the employer acted as it did.

152. The Tribunal refers to the case of **Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** for guidance as to how the Tribunal should apply what is effectively a two stage test. The Supreme Court in **Hewage v Grampian Health Board [2012] UKSC 37** also made clear that it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

153. Pursuant to section 27 of the Equality Act 2010:

> *"(1) A person (A) victimises another person (B) if A subjects B to a detriment because –*
>
> *B does a protected act; …."*
>
> Sub-paragraph (2) of this section provides:
>
> *"Each of the following is a protected act –*
>
> *bringing proceedings under this Act; .. "*

154. In this case there is no dispute that the Claimant indeed did a protected act by his bringing of previous Employment Tribunal proceedings where it was alleged that he had been unlawfully discriminated against because of sex.

155. To succeed in a complaint of victimisation, the detriment must be "because" of the protected act. There is an initial burden on the Claimant to prove facts from which the Tribunal could conclude, in the absence of any other explanation, that the Respondent has contravened Section 27. The burden then passes to the Respondent to prove that discrimination did not occur. If the Respondent is unable to do so, the Tribunal is obliged to uphold the discrimination claim.

156. For guidance, the Tribunal considers the statement of Lord Nicholls in **Nagarajan –v- London Regional Transport [1999] IRLR 572** where he stated at paragraphs 18 and 19:

> *"Thus far I have been considering the position under s.1(1)(a). I can see no reason to apply a different approach to s.2. "On [racial] grounds" in s.1(1)(a) and "by reason that" in s.2(1) are interchangeable expressions in this context. The key question under s.2 is the same as under s.1(1)(a): Why did the complainant receive less favourable treatment? The considerations mentioned above regarding direct discrimination under s.1(1)(a) are correspondingly appropriate under s.2. If the answer to this question is that the discriminator treated the person victimised less favourably by reason of his having done one of the acts ("protected acts") listed in s.2(1), the case falls within the section. It does so even if the discriminator did not consciously realise that, for example, he was prejudiced because the job applicant had previously brought claims against him under the Act…. Although victimisation has a ring of conscious targeting this is an insufficient basis for excluding cases of unrecognised prejudice from the scope of s.2. Such an exclusion would partially undermine the protection s.2 seeks to give those who have sought to rely on the Act or been involved in the operation of the Act in other ways.*
>
> *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 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, an 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. Read in context, that was the industrial Tribunal's finding in the present case. The Tribunal found that the interviewers were "consciously or subconsciously influenced by the fact that the applicant had previously brought Tribunal proceedings against the Respondent"."*

157. In the **Khan** case Lord Nicholls put forward that the "by reason that" element *"does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective" cause. Sometimes it may apply a "but for" approach. For the reasons I sought to explain in* ***Nagarajan –v- London Regional Transport****, a causation exercise of this type is not required either by section 1(1)(a) or section 2. 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 is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."*

158. Applying the legal principles to the facts, the Tribunal reaches the following conclusions.

Conclusions

159. The Tribunal deals firstly with the claim of unfair dismissal. The Respondent has shown that the Claimant was dismissed for a reason relating to capability. The Respondent genuinely took the view that the Claimant was not able to safely and efficiently carry out his full role as a support worker, that those elements of the role remaining which he was capable of carrying out did not enable him to sustain his employment and that the necessary changes to his role and assistance, which he would require to perform it, went beyond what could reasonably be provided to him.

160. The key consideration in this case is whether then dismissal, in all the circumstances, fell within the band of reasonable responses.

161. The Claimant had a previous good record in terms of performance and attendance in circumstances where he must at those times have been suffering from autism, albeit undiagnosed until January 2018. The Claimant is clearly intelligent, articulate and thorough. The Tribunal has been told by witnesses from the Respondent and it is evident in reviews undertaken within the Respondent, that he was always a kind and caring support worker to the people we support. Ms A Sinclair, a Senior Support Worker, had previously described the Claimant as a valuable team member.

162. The Claimant was moved away from Highgate Park to the St Albans service because of concerns regarding relationship issues with Claire Mackay, who was to remain at Highgate Park. There is no evidence of problems with the Claimant's performance whilst he was at St Albans. Management there asked him to work outside his risk assessment which clearly, on the Claimant's evidence, did not assist him in his appreciation of the limitations to be placed on him in the performance of his duties. It does, however, illustrate how he was viewed at St Albans. The move of the Claimant to St Albans was intended to be temporary and the type of work involved and the nature of the people we support there was not dissimilar from what was involved at Highgate Park.

163. After the Claimant's return to Highgate Park the Claimant did act in a way which genuinely and reasonably caused the Respondent concern in terms of his likely adherence to risk assessments. However, it is noted that this consisted of the Claimant on two occasions offering to do additional hours on the basis that he was clear (and made it clear) that he required authorisation before being able to do so. There was one occasion where he took a cheque off the premises, but where he realised he needed and did try to get authority. He only went into town with the person we support and the cheque when he was unable to get that authority, believing the situation was urgent. He then rang Ms Harrison from the bank seeking authority before doing anything with the cheque. There was one instance where the Claimant had arrived for work around one hour

early and one where he had queried whether he could brush the teeth of people we support in circumstances where toothpaste was regarded within the service as a form of medication. Mr Cawthron, who was charged with considering these departures from management instructions as a disciplinary issue, concluded that these were not, to his mind, to be seen as serious offences. However, he considered that there needed to be a deeper consideration of the Claimant's abilities.

164. In terms of those abilities, the Claimant had been allowed to make a holiday booking and had retained an element of health and safety responsibility in respect of ensuring that the register of insured drivers was properly maintained. He had not been prevented from taking people we support out into the community on his own and was able to take with him money to spend on activities. The major part of the Claimant's day as a support worker was involved in various aspects of personal care for the people we support. That was certainly something the Claimant was always trusted to do where his concern for the dignity of the people we support was evident to all those who worked with and/or managed him.

165. That is the reality of the situation in terms of the Claimant's abilities in the period prior to his effective suspension and a review of his capability in terms of him continuing in the support worker role.

166. As already referred to, the Claimant suffering from autism was not new and would have been a lifelong impairment. The Respondent now was in a position to evaluate the Claimant in the light of knowledge of this diagnosis. Following a referral to occupational health the view was expressed by them that the Claimant now had an awareness of his condition and his other mental health impairments had improved.

167. A long list of potential adjustments was put to the Respondent and indeed the Respondent at the first formal capability meeting, at the capability dismissal meeting and at the appeal went through this list and considered that all of these could have been implemented if it was not for the view that the Claimant needed and a full-time buddy.

168. Even without such a buddy, the list of adjustments constituted a detailed and comprehensive package of support which was regarded by the Claimant and the Respondent as helpful to the Claimant. The Claimant's role as a support worker would have been a diminished one, but the Respondent had been willing and able previously to continue with his employment despite his inability to carry out the full range of duties. Some of the measures to put in place were relatively basic and straightforward. The Claimant was never, however, given the opportunity to see how he might perform with those measures and support mechanisms in place.

169. The provision of a buddy was the Claimant's initial idea. The Respondent interpreted that as someone who would work alongside the Claimant and monitor him in each of his individual work tasks. The Claimant, however, was asking for someone he could go to if he had queries or needed clarification. There was no reasonable basis for the Respondent concluding that for the Claimant to sustain his employment he would be required to be quite so closely monitored.

170. In any event, the Respondent did not act reasonably in failing to explore a number of options which might have allowed for the provision of its concept of a buddy to work with the Claimant. This was in circumstances where there was no attempt to ascertain what type of person might be available to act as a form of job coach including in circumstances where a separate arm of the Respondent's own business involved the provision of job coaches to assist clients' employees. Whilst those individuals might have performed their roles under funding arrangements typically from local authorities, they might potentially have been diverted from work under their primary contract or at the very least have provided knowledge and guidance to the Respondent in terms of what might have been available to assist the Claimant. The Respondent did not explore this internal resource at all. No reasonable employer would have completely ignored this resource.

171. Nor was the Respondent prepared to explore what was actually available through Access to Work in terms of external funding for an outside job coach. Ms Carass certainly thought that and told the Respondent that some degree of help was likely to be available, but again the Respondent did not seek to explore this and was unreasonable in the negative conclusion it reached that there were no guarantees of assistance and that was to be as far as the Respondent's exploration of external assistance through Access to Work went. Ms Casserly assumed that they could not get a full-time person to assist through Access to Work, but that was based on a couple of past experiences with quite different employees. She did not consider it necessary to fully explore what Access to Work could do in the Claimant's case.

172. Indeed, that was in circumstances where Ms Casserly expressed the view to the Tribunal that she only ever saw the provision of some form of buddy/job coach as temporary, running for a period of around 6 months before a review. There was a recognition that the Claimant's risk assessment might be reviewed if he could show progress – clearly the Respondent was not ruling out that with assistance, he might improve.

173. The Respondent unreasonably failed to explore possible solutions (advice and assistance) available through the National Autistic Society, despite been signposted in that direction by the occupational health physician. There was a belief (not on reasonable grounds) that nothing else would come from that and that occupational health had listed out all the types of help which might be available, but, again, the Respondent did not look sufficiently deeply into the assistance which might be provided, as it ought reasonably to have done. The Respondent's experience within the service was more in dealing with people we support with autism, not in working with someone with autism and how to most effectively communicate with such an employee.

174. In any event, the position reached by the Respondent in these proceedings was that there was in actual fact no bar in terms of cost to the provision of a workplace coach/buddy. Had they thought that a buddy might reasonably have been provided to the Claimant the Respondent would have borne the cost.

175. The impediment then to this form of assistance being provided to the Claimant was said to be the need to carry out a 'best interests' assessment of the people we support at Highgate Park which would involve discussion with the people we support, their family, social workers and relevant healthcare professionals. The Tribunal can accept that this was not a straightforward process but the Respondent dismissed it out of hand. It was unwilling to start to talk to the people we support and their families. Again, this was in the context of the Claimant being universally accepted to be a good carer, with no consideration of the degree of involvement a job coach would have in the Claimant's role and in circumstances where it is not seriously suggested that any job coach would need to become involved in matters of personal care which might be intrusive and liable to infringe on the dignity of the people we support. Personal care formed the bulk of the Claimant's duties. The evidence before the Respondent was not that the Claimant posed a significant risk of harm to residents. There was no evidence of medication errors and indeed in the toothpaste example, rather an acute awareness on the Claimant's part as to what might constitute medication. The Respondent's approach to risk must be viewed against the Claimant's employment history and whilst the Respondent was clearly justified in taking the most cautious of approaches, a conclusion that the Claimant posed such a risk that his employment had to end was not one which a reasonable employer in all the circumstances could reach. There was no reasonable basis for saying that a best interests exercise was not practicable and would not ultimately result in an element of additional support for the Claimant which might help in sustaining his employment. There was no reasonable basis for a conclusion that the best interests exercise, however it might be explained and conducted, would be disturbing to the people we support and their families, such as to justify not engaging with it.

176. Fundamentally, at the point the Claimant's employment was terminated the Respondent now knew why the Claimant behaved as he did and the Claimant himself now had a greater insight into what his condition was and how it might affect his behaviour. He was demonstrating a willingness and interest in understanding his condition. Other colleagues could reasonably have been given that similar insight and if necessary given an element of training in terms of working with an autistic colleague, albeit those individuals were in the main already trained in the care of people we support who suffered from autism. The Respondent could not reasonably rely on the incidents which had occurred in the past in terms of the Claimant's difficulties in following management instructions when those had occurred without an understanding (including the Claimant's own understanding) of how his autism impacted upon his thought processes and decision-making. As Ms Harrison told the Tribunal, if she had known that the Claimant was autistic, his actions would have made more sense to her.

177. In all the circumstances the Respondent's decision to terminate the Claimant's employment fell outside the responses open to a reasonable employer. The Claimant's complaint of unfair dismissal succeeds.

178. The Tribunal does not regard the procedure adopted by the Respondent which led to his dismissal as in itself rendering dismissal unfair. Whilst the Claimant was not taken through an informal review

process under the capability policy, he was aware from numerous meetings that there were concerns about his performance and how he might rectify them. The intervention of the disciplinary process and Mr Cawthron's reasonable conclusion that this was not a matter of conduct but of capability, which now had to be assessed, meant that the Respondent had little realistic option but to commence its capability process at a more advanced stage. There was by then already a need to assess whether the Claimant could remain in employment against a background of apparent breaches of management instructions and after the Claimant had been required to work under risk assessments which had been fully explained to him. Giving the Claimant warnings would not have been helpful nor made a difference. The process took a long time, but with reasonable cause.

179. There is no basis in this case for a reduction of the Claimant's compensatory award pursuant to the principles set out in the case of **Polkey**. Had the Respondent acted within a band of reasonable responses, the Claimant's employment might have been preserved and there is no basis evidentially for the Tribunal to conclude that this would have been for a temporary period only and/or that the Claimant would have been at some future point unable to fulfil his duties or be subject to further legitimate considerations of dismissal. There is no basis upon which the Tribunal could conclude that relationships had irretrievably broken down or were irreparable, particularly given the knowledge now of the Claimant's condition and how it might impact on his behaviour. It is not argued on behalf of the Respondent that the Claimant by his own conduct contributed to his dismissal or that any conduct prior to dismissal ought to have the effect of reducing his basic award entitlement.

180. The Claimant also complains of direct disability discrimination. Those claims are based on the Respondent having made a stereotypical assumption in respect of his autism diagnosis and having sought to terminate his employment because he was autistic, regardless of how it might have affected him or how the effects might have been alleviated.

181. These complaints must, however, on the Tribunal's findings fail. The Respondent had reached a view that the Claimant might not be capable of fulfilling his duties and that his employment might be terminated at a stage prior to the autism diagnosis. It is only shortly before Mr Cawthron's hearing that there was an awareness of the autism diagnosis and that had the effect of preventing the Claimant's potential dismissal on the grounds of misconduct rather than hastening it. Given the diagnosis, Mr Cawthron thought that the breaches of management instructions should not be categorised as misconduct. The Claimant's autism might be an explanation and effective excuse for the Claimant's actions.

182. Clearly, the Respondent was concerned about the Claimant's behaviours. Those behaviours may well have arisen from the Claimant's mental health impairment. Indeed, the Respondent did consider at length and in detail the Claimant's performance and behaviour at work, seeking occupational health advice/guidance and seeking to identify what adjustments might be made to the Claimant's duties to allow him to continue in the Respondent's employment. The decision to dismiss may

have been unreasonable, as is found by the Tribunal, but it was not a knee-jerk reaction to an autism diagnosis.

183. Dealing with the Claimant's specific complaints, the Tribunal does not find that the Respondent made assumptions, stereotypical or otherwise, about the effects of the Claimant's autism upon his ability to work. The Respondent recognised that the Claimant's behaviours may arise out of his autism or that his autism might provide at least some explanation for his behaviour and reactions to situations. This indeed was the Claimant's own view and the reason why he presented his autism diagnosis to Mr Cawthron. However, it then sought evidence of how the Claimant might be affected and made its decisions regarding the Claimant's future on the basis of an assessment of the Claimant's abilities rather than on the basis of any assumption. Again, the Claimant recognised that the diagnosis of autism had given him a greater insight into his reaction to situations and he sought to persuade the Respondent that is employment could be maintained with appropriate adjustments.

184. The Claimant complains of unlawful direct discrimination in the Respondent not permitting him to return to work after 23 February 2018 either permanently or on a phased return despite recommendations that he was fit to do so with adjustments such as a phased return. Again, the Respondent's determination at all stages of the capability process was that, whilst a significant number of adjustments could be made, the package of those which it was willing and able to implement, was not sufficient to allow the Claimant to continue in his support worker role. Whether or not adjustments could reasonably be made, was a question for the Respondent as employer rather than something which could be determined by occupational health or any other medical practitioner without the same depth of knowledge of the working environment. The Respondent's decision was not because of the Claimant's disability, but because of its genuine assessment of the Claimant's abilities and its conclusion that all of the adjustments necessary to enable it to have just confidence in the Claimant's ability to work safely could not reasonably be made. There is no basis upon which the Tribunal could infer that the Respondent's decision would have been any different had the Claimant been in similar circumstances in terms of his abilities but without the diagnosis of autism. Had the Respondent considered that the adjustments it believed necessary could have been made, then the Claimant would have returned to work and there is no evidence that the Respondent would have been averse to this being on a phased basis. Ms Agar was prepared to allow for an extended phased period. Indeed, there was a recognition that the Claimant's progress, if he did return to work, would be kept under review with the possibility of relaxations of the risk assessment in the future.

185. The Claimant finally complains of the Respondent imposing additional conditions and requirements upon allowing him to return to work which were not in fact necessary to ameliorate any disadvantages of his autism and which could not be met. Again, the Respondent's decision-making at all stages flowed from its genuine belief regarding the Claimant's abilities and its own inability to provide the full package of adjustments it genuinely thought to be necessary to allow a safe and sustainable return to work. This was based upon its own assessment of

risk and appropriate steps to be taken in terms of obtaining outside assistance, not on the Claimant suffering from autism.

186. The Claimant's final complaint is of victimisation in circumstances where it is accepted that he had carried out a protected act by his bringing of earlier Employment Tribunal proceedings alleging sex discrimination. It is then said that the Respondent's refusal from the point of Mr Cawthron's decision to the point of the capability appeal outcome was because the Claimant had brought those proceedings.

187. The Tribunal notes the steps taken by the Respondent in respect of concerns regarding the Claimant's performance prior to the protected act. In November 2016 Ms Harrison raised concerns about the Claimant and with effect from 13 December 2016 restrictions on his duties were put in place. By 4 January 2017 Ms Harrison believe that the Claimant was not complying. Disciplinary action was taken against the Claimant arising out of the incident in February with Ms Mackay and he was moved to the St Albans service. The Claimant appealed that decision and the outcome from the meeting on 25 May was that he could go back to work at Highgate Park. On 29 June Ms Harrison raised concerns regarding the fitness of the Claimant and the impact on her and her team commenting that occupational health did not fully understand the difficulties the Claimant presented. The Claimant's view was that the Respondent's change in attitude towards him ultimately preventing his return to Highgate Park was related to Ms Mackay and her creation of hostility amongst staff.

188. By 18 July the Claimant had returned to Highgate Park and already Mrs Dodds-Smith considered that the Claimant was looking for loopholes and might be deliberately failing to follow instructions. The issue of the taking of the cheque arose on 19 July and of the Claimant offering to work overtime on 21 July. They led to the Claimant's suspension and a disciplinary investigation. Ms Harrison prepared an occupational health referral which was not ultimately sent dated 7 September where she referred to a belief that the Claimant was open to manipulate the risk assessment.

189. The Claimant did not bring Employment Tribunal proceedings, the protected act relied upon, until 17 October 2017. The concerns expressed about the Claimant's performance abilities in the investigation meeting, including by Mrs Dodds-Smith, predated the Tribunal complaint.

190. The first decision-making in the process was by Mr Cawthron, who knew about the existence of Tribunal proceedings albeit not the detail of them nor that a complaint of sex discrimination was made. Mr Cawthron it must be noted did not regard the Claimant's offences as serious or issues of conduct which ought to result in disciplinary action. His decision-making suggests independence on his part and a desire to understand the Claimant's impairments rather than a desire to keep him away from work.

191. It was his decision that the Claimant should not return to work at Highgate Park and this arose out of his conclusion that the Claimant had not been able to work there without concerns arising in terms of his compliance with the risk assessments. He considered that there was a

need to find a suitable service for the Claimant, albeit he did not rule out that the Claimant would ever return to Highgate Park. He was unaware of any specific friction between employees and the Tribunal concludes that his decision-making was based on the perceived need to assess the Claimant's health and explore any adjustments which might enable him to return to work. The Claimant himself accepted that Mr Cawthron's decision had nothing to do with the attitude of others, but arose out of the autism diagnosis, he said, and the Claimant's performance in the literacy test. The Tribunal is satisfied of the non-discriminatory reason for Mr Cawthron's decision-making and concludes that it was in no sense influenced by Claimant having brought Employment Tribunal proceedings.

192. It is then to be noted that those proceedings were ended by the Claimant's withdrawal of them on 5 March 2018.

193. The next decision maker involved then was Mrs Dodds-Smith. It is noted that the allegations of sex discrimination were not against her and there is no basis in evidence for concluding that she was simply minded in her decision-making to support her subordinate manager, Ms Harrison, who had been accused of discrimination. It is noted that Mrs Dodds-Smith did not seek to discipline the Claimant regarding the potentially offensive email he sent on 8 May 2018. She did initiate occupational health involvement and again concerns she had now about the Claimant's abilities had been evident and predated his bringing of Tribunal proceedings. The evidence is of her completing a detailed and genuine analysis of the services within the Respondent's local operation.

194. There is reference in her notes prior to the capability hearing which she conducted to the Claimant's Tribunal claim which caused her concern that the Claimant did not trust the Respondent and concerning the risk of further litigation and cost in employing the Claimant. The Tribunal accepts her evidence that this was part of her setting out of all potentially relevant issues, but that ultimately her decision to refer the Claimant to a capability hearing at which dismissal might be considered was because of her view of the Claimant abilities and the difficulty in accommodating him and sustaining his employment due to difficulties he had arising out of his mental health impairment. She believed that any decision maker should have all of the background before them.

195. The context of her comments was that the Claimant was not an individual who would accept decisions and, on the evidence, he found it difficult to move on wishing to re-raise the issue with Ms Mackay when that had been dealt with. The Claimant had shown a propensity to raise grievances, make subject access requests and to intimate that further action might be taken by him if he did not get the solution he wished. By now the Claimant had seen emails from his colleagues disparaging of him which did genuinely to Mrs Dodds-Smith's suggest that those individuals might not wish to work with the Claimant and that the Claimant would return to the workplace with those issues at the forefront of his own mind. She believed that there had been a breakdown in relationships.

196. However, the capability meeting she conducted and the decision she made constituted a genuine assessment of the Claimant's ability and

available adjustments. Again, her decision-making was not influenced by the Claimant having brought a Tribunal application. The Claimant himself had reached a position whereby he did not doubt Ms Dodds-Smith's integrity and did not see the grievance he pursued against her as being "personal". He did not think that her decision-making was malicious and motivated by his having pursued Tribunal proceedings.

197. The subsequent decisions to terminate the Claimant's employment made by Ms Agar and to uphold that decision on appeal made by Ms Casserly were by individuals more removed from the subject matter of the protected act and the Claimant has not been able to point to evidence from which the Tribunal could conclude that their decisions were influenced by the protected act. Indeed, the weight of evidence is of them again considering in detail the Claimant's abilities and adjustments which might be made to allow a return to work. Their conclusions might ultimately have been negative from the Claimant's point of view, but they were genuine assessments with the decision makers having genuine concerns about the Claimant returning to a support worker role at Highgate Park or indeed elsewhere.

198. The Claimant's complaints of direct disability discrimination and victimisation must therefore fail.

Employment Judge Maidment

Date 14 February 2020