Case Number: 2201903/2019

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr A Edge		William Hill plc

Heard at: London Central Employment

On: 5, 6, 7, 10, 11, 12 February 2020

Before: Employment Judge Adkin
Ms C Ihnatowicz
Mr S Soskin

Representations

For the Claimant: Claimant in person, supported by Ms R Power
For the Respondent: Ms T Hand (Counsel)

JUDGMENT

1. The Respondent constructively unfairly dismissed the Claimant pursuant to sections 95 and 98 of the Employment Rights Act 1996. The Respondent is to pay the Claimant the following sums:
    a. A basic award of £665.40.
    b. A compensatory award to be determined at the resumed remedy hearing.
2. The claim for a failure to make reasonable adjustments pursuant to section 20 – 21 of the Equality Act 2010 succeeds in relation to the withholding sick pay issue (issue 16(b)(iii). The remaining elements fail.
3. The claim for disability harassment pursuant to section 26 of the Equality Act 2010 succeeds in relation to Ms Y's comment about using Autism as a way of getting out of things (issue 17(b)). The remaining elements fail.

4. The claims for direct sex discrimination and sex harassment fail.
5. The Respondent is ordered to pay the Claimant £4,000 for injury to feeling and interest at 8% from 15 January 2019.

REASONS

1. Further to an oral judgment and reasons given on 12 February, the Claimant requested written reasons.

2. By a claim presented on 16 May 2019 the Claimant presented claims of constructive unfair dismissal and disability discrimination.

The Issues

3. The Agreed issues are attached as an appendix.

Anonymisation Order

4. This case contains references to two female employees who made allegations that might amount at the very least to sexual misconduct, although it has not been necessary to make findings on whether these allegations occurred or not, since these allegations are essentially 'background' to the Claimant's claim. Neither gave evidence to the Tribunal. It is unclear to the Tribunal whether they are even aware of the existence of these proceedings. We were invited by the Respondent to consider anonymisation orders.

5. Rule 50 provides

> *50.—(1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.*
>
> *(2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.*
>
> *(3) Such orders may include—*
>
> *(b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record.*

6. We have reminded ourselves of the importance of public justice. We have concluded however that would be **appropriate to protect the identities of these two complainants by anonymisation under rule 50(3)(b), and so order**.

7. Accordingly they are referred to as Z and Y in these written reasons.

Evidence

8. The Tribunal has been referred to a bundle of documents containing some 289 pages.

9. The Tribunal heard evidence from the Claimant.

10. For the Respondent the Tribunal heard evidence from Mr Graham Lowe, Ms Tracey Eyles, Ms Sue Knight and Ms Leisa Byers.

11. Much of the chronology in this matter was not disputed. All witnesses did their best to recall material events. Where it has been necessary to resolve disputes of fact, we have found no difficulty in accepting the Claimant's evidence. His recollection of events was clear, straightforward and detailed and not 'slanted' to his own advantage. We noticed that a couple of the Respondent witnesses quite naturally deferred to his recollection in their oral evidence.

The Facts

12. The Tribunal has been assisted by an agreed chronology of facts which we are grateful for and which we have adopted and added our own additional findings of fact where relevant.

13. On 31 January 2017 the Claimant commenced employment with the Respondent.

14. In the period early to mid-2017 the Claimant advised his manager Mr Graham Lowe that he suffered with autism. He did not request any reasonable adjustments.

15. At the time material to the claim, Claimant was working as a relief manager within a "cluster" of several shops under the management of Mr Lowe in an area East of the centre of Manchester.

29 November 2018 incidents

16. On 29 November 2018 the Claimant was working in the Denton betting office as a relief manager in the absence of the usual manager Mr Rob Waugh. Friction developed between the Claimant and Ms Z over (among other things) her cash handling procedures and her failure to follow his instruction about waiting before paying out a customer. The Claimant left the office and called Mr Lowe to complain about Ms Z's performance and what he described as 'security breaches', which were characterised more accurately during the Tribunal hearing as 'cash management breaches' to do with procedures regarding the handling of cash.

17. On the same day Ms Z called Mr Lowe to complain about the Claimant.

18. Mr Lowe spoke to Mr Waugh by telephone about the argument. Mr Waugh was the regular manager of the Denton store, who had been contacted on his day off by Ms Z.

19. Mr Waugh visited the site. Ms Z mentioned to Mr Waugh that the Claimant had made an inappropriate comment toward her. He told her to raise a grievance if she wished to take it further.

20. Mr Waugh called Mr Lowe to update him on the argument. He mentioned that Ms Z had stated that the Claimant had made lewd comments towards her but he said that things were fine between the Claimant and Ms Z upon him leaving.

21. After speaking to Mr Waugh, Ms Z came back into the office. The Claimant says and we accept that her attitude toward him appeared to change. She now appeared to be in a good mood, she apologised to him and gave him a hug.

Ms Z's grievance & Claimant's suspension

22. On or around 1 December 2018 Ms Z asked to see Mr Lowe as she wished to put in a grievance against the Claimant. No specifics details were given to Mr Lowe at this stage.

23. On 6 December 2018 Mr Lowe met with Ms Z who explained her grievance and the alleged incident that had taken place on 29 November 2018. She said that he refused a request for pens and slips and when she asked him why, he said that he wanted her to bend over and get them herself and that it would be better than masturbating over her Instagram picture. She also alleged that he had on previous occasions made inappropriate and offensive comments, such has referring to her as blonde or stupid, saying that she didn't know where Scunthorpe was and commenting that she had no backside. She said that it was only the comment on 29 November that was 'sexual' in nature.

24. The Tribunal is not required to make a finding as to whether these words were said, nor as to the truth of Ms Z's allegations. This is not one of the issues to be determined. We have not in any event heard live evidence from Ms Z.

25. On 10 December 2018 Mr Lowe took advice from Graham Moores, Area Manager, as to how to proceed. Mr Lowe had been away for the weekend and this was the first opportunity he had to speak to Mr Moores.

26. On 12 December 2018 Mr Lowe met with the Claimant to discuss the allegation while he was working in the Dukinfield shop. The Claimant denied the allegation and suggested that Ms Z's motivation for making these allegations was a dispute between the two of them about how to pay out a customer, which become heated, in which she had not followed his direction as a manager.

27. The Claimant was suspended by Mr Lowe pending an investigation.

Claimant's concerns about Ms Z

28. The Claimant raised concerns to Mr Lowe about Ms Z's alleged poor performance and alleged security breaches. Specifically he said that she had (i) wrongly paid out on a losing betting slip; (ii) gone into his till to change out of it or to place bets on it, in breach of procedure; (iii) paid £130 out of his till, after which he found that the till was £10 down with the result that the Claimant had to speak to a customer who agreed that she had overpaid him; and (iv) failed to respect his decision as a manager to ask a customer to wait 15 minutes before paying out a £150 win on a gaming machine. Following this last incident he asked her to cash her till, sign off and leave the premises.

29. Mr Lowe considered that there was no breach of company procedure which required investigation. The Tribunal finds this surprising given the nature of the matters being raised by the Claimant.

30. In oral evidence to the Tribunal Mr Lowe said that he did not appreciate on the 29 November 2018 all of the cash management concerns detailed in the Claimant's witness statement detailed (i)-(iv) above. He did however say that he accepted that the Claimant had raised the matter of Ms Z taking £130 out of his till and that this did require investigation and that he did investigate informally by speaking to her. This is not detailed in his witness statement. If he did speak to Ms Z, this was not anything sufficient to amount to an investigation. As to mentioning this discussion to the Claimant that he had spoken to Ms Z, he said it had never entered his head.

31. No notes were provided to the Claimant or suspension letter on the day of suspension.

Delay

32. On 17 December 2018 the Claimant contacted the Respondent's HR Department to find out what was happening with his case as he had not had any contact.

33. On 18 December 2018 the fact finding passed to Mr Chris Lane, Business Performance Manager. Mr Lowe emailed the Claimant to confirm that Mr Lane would lead the investigation.

34. During the period 18 December 2018 - 4 January 2019 there was no contact between the investigator Chris Lane and the Claimant.

35. On 19 December 2018 Mr Lowe sent a letter to the Claimant to confirm that he was suspended (the letter was dated 17 December 2018 due to an error). This letter contained the following:

> *"While you are suspended from work you should not attend any of the Company's premises and you must not contact any of the Company's customers, suppliers or employees, except for your Colleague Forum/trade union representative for the purpose of obtaining advice."*

36. On 30 December 2018 there were emails between the Claimant and Mr Lowe regarding the investigation. Mr Lowe told the Claimant to speak with Mr Lane.

37. The Claimant informed Mr Lowe that the current process was affecting his mental health state in an email on 30 December at 00:42:

> *"Hi Graham. Further to my last email which was over week ago. I would like to ask where I stand with my suspension. I have had no contact via email, phone, text or letters. It has been over 18 days since my suspension and over 13 days since my last contact via email from yourself. My letter of suspension was dated 17th December but was actually sent on 19 December. I was told via email by yourself in 18 December that the matter had been passed to another BPM but yet still no contact. As you have been made aware of a number of occasions that I suffer from asbergers syndrome, I feel that this suspension is seriously taking its toll on mental state. I have asked in a previous email on long have will my suspension last that I was not informed. I feel that this stage that I have no other choice to raise the matter forward in writing via this email to yourself that I wish to have a meeting to discuss the matter further. If you are unwilling then I doubt I feel I may have to take the matter in hand further then [sic] yourself."*

38. Mr Lowe's reply was

> *"Chris Lane is now the investigation manager and his email address is ... So i would suggest you contact Chris with your concerns over the length of time and the toll this is taking on you.*
>
> *I can't give you a timescale of how long your suspension will last. What i can say is when your investigation meeting takes place depending on the outcome of that meeting, if no further action is required you will return to work with immediate affect. [sic] if the outcome is that the case is passed to a disciplinary hearing you would remain on paid suspension untill the disciplinary meeting taking place.*
>
> *I deeply sympathise with the toll this is taking out of you and wish sincerely your well-being going forward."*

39. Mr Lowe accepts that he knew about the Claimant's disability before these events.

40. Mr Lowe then had very little to do with the Claimant until the mediation in April 2019 at which he apologised for the lack of support he had provided during this stressful period. Mr Lowe's evidence to the Tribunal was similarly candid and contrite. He accepted that he had failed to support the Claimant during this stressful time.

41. Mr Lowe said that he passed on information about the Claimant's disability to Mr Lane. Mr Lane denies this.

Investigation

42. On 4 January 2019 Mr Lane hand delivered a letter to the Claimant to attend an investigation meeting on 10 January 2019.

43. Notwithstanding that the Respondent's disciplinary policy does not contain a right to be accompanied, this letter [103] said:

> *"As you are currently suspended from work it is expected that you will attend at the time and date provided. If you do not attend the investigatory meeting that has been arranged, without good reason, your pay will be withheld until such time as you attempt a rearranged meeting. This is in accordance with Company Procedure.*
>
> *...*
>
> *If you do wish to be accompanied at this meeting please let me know who will be attending with you at least 24 hours in advance."*

44. On 7 January 2019 there were emails between the Claimant and Mr Lane regarding the Claimant's bringing a companion.

45. On 9 January 2019 late in the evening the Claimant's companion advised the Claimant that he would be unable to attend the investigation as he was stuck in London. The Claimant did not notify Mr Lane.

46. On 10 January 2019 the investigation meeting with the Claimant took place. This was suspended due to the Claimant's companion not turning up. The Claimant wished to be accompanied. The Claimant was given two choices. Either a) delay the meeting without pay (as the Respondent said that he had no right to be accompanied to investigation); or b) carry on with the investigation that day unaccompanied. The Claimant asked to delay the meeting because he felt he needed a companion for health reasons.

47. During this meeting the Claimant told Mr Lane that he had Asperger's/autism and told him that he needed someone as I got confused. Mr Lane said that this information had not been passed onto him. The Claimant replied that it was "Vital that you should [have] known". He also said that he suffered from "anxiety and "panic" which is why he wanted a witness to calm him down. He said that he didn't understand emotions.

48. There was an email exchange between the Claimant and Mr Lane after this meeting on 10 January:

    48.1. Claimant [15:15] I have read the discipline section of the employee handbook you gave me today. I have found a piece of information that has been given incorrectly. This is a quote from the employee handbook 'gap where the chosen companion is unavailable on the day scheduled for the meeting the meeting will be rescheduled, provided that you can propose an alternative time within five working days of the scheduled date'. Also I was not informed about the one-day non-payment for the investigation to

be delayed until tomorrow which was proposed by yourself please could you advise on the comments. In line with the disability equality act I felt having a witness was only fair and scheduling a day later with no pain I feel it is unfair. As you made aware of my disability I feel being unpaid for a one day delay to the investigation as a punishment. I would just like treated fairly."

48.2. Mr Lane [5:50]… "As for the unpaid suspension I have read the notes again, which you have signed it clearly states "at this point we wish to continue however, if you don't want to go forward you won't be paid until the meeting" this is in line with company policy and was suggested by the HR Department. Effectively you made the choice to either continue with the investigation today and or delay it and go on to unpaid suspension. You chose the latter."

48.3. Claimant [5:57]… "Hi Chris. I was given 3 options by yourself. Carry on today. Move until 3 o'clock tomorrow or Delay proceedings and carry on being suspended without pay. You never mentioned not being paid moving the investigation tomorrow. As I am currently suspended pending an investigation, the investigation has not actually started. You cannot suspend me without pain I have seeked advice on this and this is the advice I have been given through a union rep and through William Hill it's self"

Reconvened investigation meeting

49. On the following day, 11 January 2019 the investigation meeting with the Claimant reconvened. The Tribunal find that the Claimant felt pressurised to resume this meeting without a companion due to the way that the Respondent's policy had been reported to him.

50. During this investigation meeting the Claimant alleged for the first time that Ms Z had told him "I don't take orders from someone with cock & balls". He said that Rob Waugh witnessed this.

51. During this meeting the Claimant explained was aware of his disability. The individuals he mentioned were Graham Lowe (BPM); Leisa Byers (Regional Manager); Graham Moores (Area Manager); Dan Turner (Former BPM); HR (Christopher).

52. This investigation meeting adjourned so that Mr Lane could gather further information.

53. The Claimant raised his concerns about Ms Z. He was informed that his allegation about her were separate to this investigation.

54. Mr Lane interviewed other employees. At an investigation meeting with Rob Waugh, he said "I've heard how he talks about woman – a bit pervy" [131]. There are no follow up questions by Mr Lane to understand what if anything is the basis for this opinion. Mr Waugh categorically denied hearing Ms Z make the alleged comment about "cock and balls"

Ms Y

55. Mr Lane also interviewed Ms Y. It seems that Ms Z had spoken to Ms Y about the Claimant in the context of "buddy" calls. These are regular telephone calls made during the hours of operation between the Respondent's neighbouring offices as a security device. Ms Z had not been told that the content of the investigation was to be kept confidential.

56. Ms Y described her relationship with the Claimant as "love/hate". She said he had messaged her outside of work a few times. She said he had sent her a message containing an image of a condom with a caption "this is what girls want inside them – my dick". She said this was offensive rather than amusing. She said that she just ignored these messages.

57. In the agreed bundle at page 88 of the bundle a different, partly indistinct WhatsApp which reads "Arthur … I am adding your facebook pictures to my wank bank". According to the index this was sent on 17 March 2018 but the recipient is indistinct.

58. Ms Y's final comment was:

> *"There have been many more comments made and I believe the uses his autism for an excuse."*

59. She was not asked to substantiate either that many more comments have been made or to justify why she said that he used his autism as an excuse.

Claimant's grievance

60. On 14 January 2019 Claimant raised a grievance about the way the investigation and fact find were conducted.

61. On 15 January 2019 the investigation meeting with the Claimant reconvened. Mr Lane confirmed that he recommended the matter be forwarded to a disciplinary hearing. The language he used to explain this decision is somewhat curious in that he said that he believed 'beyond reasonable doubt' (i.e. to the criminal standard of proof) that the alleged comment had been made on 29 November 2018.

62. The Claimant again asked Mr Lane about his complaint against Ms Z. He was informed that his complaint was separate to this investigation.

Disciplinary process

63. On 18 January 2019 Ms Alison Zlupko sent a letter to the Claimant to attend a disciplinary hearing. The letter had no contact details for the Claimant to get in touch with Ms Zlupko.

64. On 23 January 2019 Ms Tracey Eyles spoke to the Claimant to confirm that she would move the disciplinary forward and arranged to see him on 29 January 2019. Ms Eyles provided the Claimant with names and telephone numbers of two

Colleague Forum Representatives not in his area whom he could consider bringing to the disciplinary hearing.

65. The Claimant advised her that he had autism.

66. On 27 January 2019 Ms Eyles wrote to the Claimant to advise him that she would lead the disciplinary and to provide a new date.

67. On 29 January 2019 the disciplinary hearing took place with the Claimant led by Ms Eyles. The Claimant briefly discussed 'issues' with Ms Z from the day in question as background. The hearing was adjourned to allow Ms Eyles to conduct further investigations.

68. Ms Eyles provided the Claimant with details of the employee assistance support helpline.

69. On 1 February 2019 Ms Eyles conducted further investigation meetings with Mr Lowe, Ms Z (in which she reiterated her earlier allegations and denied C's counter-allegations), Mr Waugh and Ms Y.

70. On 1 February Ms Y said that she "didn't hear anything sexual until I heard about [Ms Z]".

71. Mr Waugh was asked to justify his comment about the Claimant being "pervy". He said that the claimant went a step too far and "come across to me like a bit creepy". He gave on example of when the Claimant had telephoned him to ask him if he had "shagged [Ms Y] yet". Mr Waugh's view was this was the sort of thing that would have been said at school.

Disciplinary outcome

72. The disciplinary hearing recovened on 5 February 2019. The Claimant was informed that his suspension was lifted and he was being reinstated with no sanction. He was given the rest of the week off (authorised paid leave) to think about what he wanted to do next. Ms Eyles offered a full apology. The Claimant says that he considered that this was her personal apology. We accept the Respondent's position that if she was offering an apology must be on behalf of the Respondent. Given her role up to this point we cannot see what Ms Eyles would personally be apologising for.

73. She told him during this meeting that there were learning points for BPMs (i.e. Mr Lane and Mr Lowe) she them but that this would not be further discussed with Mr Edge himself.

74. At the conclusion of the meeting on 5 February 2019 there was a discussion about Mr Edge's future options. There was a discussion about moving cluster (i.e. a grouping of shops) to South Manchester, which fell under Mrs Eyles' responsibility. Mrs Eyles told the Claimant that he could consider staying in his present cluster.

75. Mrs Eyles positively flagged up to Mr Edge that he might "feel the need" to raise a further grievance.

76. Mrs Eyles' reasoning to the Tribunal for taking no action in the disciplinary was not that she had found that the Claimant had committed no untoward conduct at all, but rather that a combination of delay and missed opportunities to gather evidence in the investigation, together with some doubts about one of the complainant's conduct led her to this decision. In her witness statement at paragraphs 70 – 73 states as follows:

> *"70 After taking into account all of the evidence and Mr Edge's representations, whilst I believed that some sort of comment was likely made, I formed a genuine belief that the allegations against him were not well founded.*
>
> *71 The main reasons for my findings were:*
>
> *71.1 Whilst I felt it likely that some comments were made, there was no evidence of what was said exactly, and the comments reported could have been taken out of context. Allegations were made by both Ms Z and later on Mr Edge. It seemed that Ms Z did not like being told what to do, and Mr Edge had a 'black and white' mindset. Therefore, they clashed.*
>
> *71.2 I also took particular note of the fact that Ms Z hugged Mr Edge at the end of the day. I thought this to be highly unusual if Mr Edge had made offensive and sexual comments.*
>
> *71.3 I found no evidence that Mr Edge had been treated less favourably due to his sex and/or because of his autism as he has alleged. I felt that there were errors along the way, but these had not been because Mr Edge was male or because he suffered with autism. They were genuine human error. An investigation had been commenced due to serious allegations of inappropriate comments. I was satisfied that no matter who had allegedly made the comments, the allegation required investigation.*
>
> *72 I also noted that:*
>
> *72.1 The concerns were not raised with Mr Edge at the time, and the first that he heard about them was on 12 December 2018 (some 13 days after the alleged event). I did not, however, feel that there was any malice here and there were genuine human errors.*
>
> *72.2 I felt that there had been no urgency to the investigation. Again, I did not feel that there was any malice here: it was genuine human error. However, it had led to a longer than usual suspension and CCTV being lost (it is generally deleted after 2-3 weeks unless downloaded for a particular reason).*
>
> *72.3 Communication with Mr Edge during his suspension could have been better. However, this was a result of Mr Lowe not understanding the policy and was in no sense intentional or malicious.*
>
> *72.4 At no point during the process was Mr Edge's salary deducted.*

> *72.5 The comments made by Ms Y and Mr Waugh were personal opinions given as part of an investigation process. They both said that these were things that they had never escalated to anyone.*
>
> *73 As a result of the above, I considered that a sanction should not be applied and Mr Edge should be put back into the business."*

77. On 14 February 2019 Ms Eyles wrote to the Claimant to confirm her decision, confirming that no further action would be taken at this time. Notwithstanding the content of her witness statement which was equivocal about the Claimant's guilt, at the time she made no suggestion to the Claimant that some sort of comment had been made or that C's conduct had been blameworthy.

78. During February 2019 it is agreed between the parties the Claimant often contacted Ms Eyles. She was plainly and appropriately supportive and sympathetic. She had around this time assumed responsibility for the area in which the Claimant worked, in addition to her own adjacent area of South Manchester.

Grievance investigation

79. On 28 February 2019 there was a grievance meeting with the Claimant led by Sue Knight. The Claimant briefly discussed his concerns about Ms Z from November 2018 as background.

80. The Claimant was signed off sick. The agreed bundle contains a duplicate copy of a sick note from the Claimant for the period 18 February 2019 to 1 April 2019.

81. On 14 March 2019 Ms Knight wrote to the Claimant by email to update him on the grievance. Ms Knight confirmed she would be able to give the Claimant her decision by close of business the following day.

82. In fact it was on 18.03.2019 that Ms Knight wrote to the Claimant confirming her decision to partially upheld her grievance (the letter was dated 11.03.2019). This letter read:

> *"I have decided that your grievance will be upheld in some, but not all respects, therefore the grievance is partially upheld. The reason for this decision is that*
>
> *– Some of your points raised around the length of suspension, contact from various members of the Line tea,, and how your invest [investigation] was conducted have already been addressed by TraceyEyles AM Area 31. This included a full re-invest been conducted, which resulted in No further Action to be taken. I am also aware that the has been a full verbal apology given to you by Tracey Eyles around these issues and that you have accepted that apology.*
>
> *– I believe the timescales waiting for an outcome at the investigator's meeting to be acceptable. This case was, and is, a complex matter. If the BPM's conducting the meeting had not attempted to cover all*

possible outcomes then I do not feel they would have been doing their duty as investigating officers.

– I do believe that the lack of privacy you brought up at our meeting, which occurred in your first invest is an issue. This was not acceptable and I will be putting provisions in place to ensure this does not happen again.

– Again, the lack of information supplied to you is not acceptable and as a Company we have an open and honest policy and I do not believe this has been adhered to. Again, provisions will be put in place to ensure this does not happen moving forward.

– I believe that the lack of communications between Graham Lowe and Chris Lane regarding your mental health issues was unacceptable stop when an issue is being dealt with, all facts that have a relevance to the case should be passed onto whoever is taking over. I will take this up with the BPM's concern and ensure that there is exposure to all facts in the future.

– The impact this has had on your mental health is of utmost concern to us. As discussed at our meeting. I would like to put together a referral to our Health Management team to ensure we have everything in place to support you at work."

83. While the grievance was described as being "partially upheld" in reality it was substantially upheld in the Claimant's favour. Ms Knight admitted in her evidence to the Tribunal that the Claimant had specifically raised concerns about the effect on his reputation, which had she had not dealt with in the grievance outcome.

Grievance Appeal

84. On 20 March 2019 the Claimant appealed against the grievance outcome.

85. Leisa Byers dealt with the grievance appeal. She wrote to the Claimant on 21 March 2019 to ask for his grounds of appeal to be set out more clearly.

86. By an email dated 24 March 2019 the Claimant confirmed to Ms Byers that he wished for all points of his grievance to be looked at again as he was unsatisfied with the outcome. He wrote:

"I feel no one is being held accountable for their actions leading to my suspension and during my suspension. The outcomes concluded are mainly precautions will be out in place are very unsatisfactory. Security measures have been breached and had not been dealt with at all even after the person making the [complaint] fully admitted [them] in an interview with Tracey Eyles. The fact that I have received no apologies from the people that have put me through such a terrible time even after discussing with Graham Lowe I was mentally not coping and he ignored them and no outcome has come out of this. As I said before I would like all the points looked at. I am not satisfied that some points are not being

upheld because Tracey Eyles has supposedly dealt with them. I do not feel this point have been dealt with at all."

87. On 25 March 2019 the Claimant submitted another sick note.

88. On 26 March 2019 Ms Byers wrote to the Claimant to acknowledge his grounds and to invite him to an appeal meeting.

89. The Grievance appeal meeting with the Claimant led by Ms Byers took place on 2 April 2019.

90. Ms Byers conducted an investigation interview with Ms Knight.

Grievance Appeal Outcome (oral)

91. On 8 April 2019 the Claimant and Ms Byers met in the afternoon for Ms Byers to discuss the grievance appeal outcome.

92. The Claimant again asked about his complaint against Ms Z. He was advised that this was not part of his grievance or appeal, and that in future he must bring such issues to the Respondent's attention immediately to allow an investigation to be made (it had not been raised until he was investigated). The Tribunal considers however that the Claimant had raised his concerns on the day they occurred 29 November 2018. Ms Byers told the Tribunal that she had only learned that the Claimant had raised security (i.e. cash management) matters on the day during the course of this Tribunal hearing.

93. The Claimant says that Ms Byers "gave him her findings and justified everything Sue Knight had said and … basically informed me precautions would be put in place so it did not happen again". The Claimant plainly found this difficult to reconcile with the disciplinary outcome from Ms Ayles which he saw as exonerating him.

Mediation

94. Also on 8 April 2019 there was a mediation meeting between Mr Lowe and the Claimant led by Ms Eyles. The nature of this mediation was a workplace mediation rather than a without prejudice mediation of a dispute. Mr Lowe considered that the principal reason for the mediation was in order for him to apologise. We have not been provided with notes of the mediation meeting Mrs Eyles accept that that she may have made some "bullet point" notes of actions on an A4 pad but maintains that she will have shredded these, which the Tribunal finds somewhat surprising. Mr Lowe did apologise to the Claimant at this meeting.

95. The Claimant was offered three options. First, to move cluster to Mrs Eyles' area of South Manchester. The second option was to move to Cheetham, a particular shop within the Claimant's existing cluster. This second option was not attractive to the Claimant because it was a very quiet shop with a low volume of bets. The Tribunal learned during the course of the hearing that this shop has since closed.

96. The third option was to remain in his present cluster, although the Claimant understood from earlier conversations that he would not be working with the complainants (i.e. Ms Z and Ms Y). Mr Lowe also had this assumption although does not recall this being explicitly discussed at the mediation.

97. Mrs Eyles, suggested that the mediation was not conclusive as to the question of contact with the complainants on the basis that if the Claimant would return to his original cluster the details had not yet been worked out. The Claimant was expressly invited to challenge Mrs Eyles if he disagreed with this, and did not challenge her.

98. We find however that the Claimant was reasonably assuming, based on his discussions with Mrs Eyles, and Ms Byers on that day that it was the intention of the Respondent that he would not be working directly with the complainants.

99. At the mediation with Mr Lowe, he told the Claimant it was Ms Y that told him about the altercation with Ms Z, which contradicted what the Claimant had understood had happened.

100. The Claimant asked Mr Lowe why his compliant against Ms Y was never looked into, despite this being raised first and before her allegations on 29 November. Mr Lowe told him that was because HR advised him because it was a female making the claim that comes first, which the Claimant found shocking. The Claimant says that nothing Mr Lowe said helped him feel like he could go back and work for the Respondent. Mr Lowe admitted that he should have told Ms Z to keep the investigation confidential. He admitted that this had been a learning curve for him.

101. On 9 April 2019 Ms Byers spoke with Ms Eyles regarding the Claimant and what support was being offered.

Resignation

102. On 9 April at 17:02 the Claimant tendered his resignation with immediate effect. His short email of resignation read as follows:

> *"Hello Tracey.*
>
> *This is my resignation letter to informing you of my decision to resign from William Hill effective immediately. I feel my position has been made untenable.*
>
> *Arthur"*

103. The Claimant's evidence in relation to his reasons for resigning was given in his witness statement as follows

> *"After the mediation I made my mind up that my position at William Hill had clearly become untenable. I had no support when needed so how would I off got support in the future. Everyone on the cluster knew about my case and it had destroyed my working relationship with people inside*

> *of work. Why should I have been the example for people to take a learning curve for but no one be held accountable for there actions. It felt like they didn't care and wanted to just get over it. I still had thousands of questions to ask but not one person wanted to hear or answer them! On that basis for my mental health I decided to leave the company".*

Grievance Appeal Outcome (written)

104. On 10 April 2019 Ms Byers wrote to the Claimant to set out the decision of the grievance appeal, which she had discussed with him orally on 8 April 2019. The outcome was to partially upheld his grievance appeal.

105. Ms Eyles wrote to the Claimant to arrange a meeting to discuss his resignation. The Claimant did not reply.

THE LAW

Constructive dismissal

106. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is taken to be dismissed by his employer if "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".

107. It is established law that (i) conduct giving rise to a constructive dismissal must involve a fundamental breach (or breaches) of contract by the employer; (ii) the breach(es) must be an effective cause of the employee's resignation; and (ii) the employee must not, by his or her conduct, have affirmed the contract before resigning.

108. In considering the question of constructive dismissal the primary focus is on the employer's conduct, not the employee's reaction to it.

109. What amounts to a serious breach is to be judged objectively not by the subjective view of the employee.

110. Merely unreasonable conduct is not sufficient to amount to a serious breach (*Bournemouth University Higher Education Corporation v Buckland* 2010 ICR 908 CA).

111. *Fundamental breach* - in this case the Claimant claims breach of the implied term that the employer should not, without reasonable and proper cause, conduct itself in a way that is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence that exists between an employee and her employer (*Malik v Bank of Credit and Commerce International SA* [1997] ICR 606, per Lord Steyn 621)).

112. It is irrelevant that the employer does not intend to damage this relationship, provided that the effect of the employer's conduct, judged sensibly and reasonably, is such that the employee cannot be expected to put up with it (*Woods – v- Car Services (Peterborough) Limited)* [1981] ICR 666. It is the impact of the employer's behaviour (assessed objectively) on the employee that is significant - not the intention of the employer (*Malik*).

113. It is not however enough to show that the employer has behaved unreasonably although "reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach" (*Buckland)*.

114. *Buckland* made clear that attempts to make amends by an employer do not undo a fundamental breach and if an employee chooses to reject the offer to make amends and resign they can still do so. It is open to an innocent employee to waive or accept the breach such that the employee relation continues (per Sedley LJ).

115. A finding of discrimination does not automatically lead to the conclusion that there has been a fundamental breach (*Amnesty International v Ahmed* 2009 ICR 1450, EAT, per Underhill P at para 71), however as Underhill P observed:

> *"Of course in many if not most cases conduct which is proscribed under the anti-discrimination legislation will be of such a character that it will also give rise to a breach of the trust and confidence term; but it will not automatically be so. The question which the tribunal must assess in each case is whether the actual conduct in question, irrespective of whether it constitutes unlawful discrimination, is a breach of the term defined in Malik"*

116. The Respondent referred the Tribunal to the decision of the Employment Appeal Tribunal in the case of *Assamoi v Spirit Pub Company (Services) Ltd* (UKEAT/0050/11/LA) in particular paragraphs 25, 36, 37 and 40. In that decision HHJ Pugsley discusses some of the implications of *Buckland*, including emphasising the ability of an employee to accept the breach. In that case it was argued on appeal that the Tribunal had, impermissibly, concluded that bad behaviour by one of S's managers had been "cured" by the subsequent emollient approach of two others [paragraph 38]. The EAT found that this mischaracterised the decision and in fact the Tribunal had simply concluded that the initial bad behaviour was not enough to amount to a repudiatory breach.

117. Paragraph 37 gives this hypothetical example:

> *"37. If, for example, in a large industrial undertaking an employee called John Smith were to be given notice of a disciplinary hearing concerning a sexual assault perpetrated by him on a female employee, and it later transpired that due to an administrative mix-up the letter should have been sent to another employee of the same name, would the recipient of the first letter, sent in error, be entitled to say there had been a breach of an implied term, albeit that as soon as he had taken up the*

> *matter there was a profuse apology and an acceptance that the recipient of the letter was wholly innocent of any such inappropriate behaviour? It might be that the most cursory enquiries by the employer would have revealed that the recipient of the letter did not work on the same site or in the same section as the female employee concerned and may indeed have never met her. In those circumstances, we venture to suggest that an Employment Tribunal would consider that the employer's prompt apology for the mistake and the removal of the apprehension that the recipient of any such letter would undoubtedly have, might well be said to have prevented such a breach. However, if the employer had not acted to check the protests of the innocent employee and allowed the matter to drag on before finally accepting the mistake must have been made by them, then different considerations might apply."*

118. *Last straw* - the final act on the part of an employer where the breach is said to be cumulative based on a number of actions (i.e. the "last straw"), has to contribute something to the breach (*Omilaju v Waltham Forest London Borough Council* 2005 ICR 481, CA). It does not have to be of the same character as the earlier acts, and nor does it necessarily have to constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act or utterly trivial act on the part of the employer cannot be a final straw:

119. *Cause of the resignation* – if a fundamental breach is established the next issue is whether the breach was an effective cause of the resignation, or to put it another whether the breach played a part in the dismissal (*Nottingham County Council v Meikle and Abbey Cars Ltd v Ford* EAT 0472/07).

120. In *United First Partners Research – v – Carreras* 2008 EWCA Civ 1493 the Court of Appeal held that where an employee has mixed reasons for resigning, the resignation would constitute a constructive dismissal if the repudiatory breach relied on was at least a substantial part of those reasons.

Disability discrimination

121. *Discrimination* - the Tribunal has considered guidance on the burden of proof in discrimination cases, in particular as referred to by the Claimant *Nagarajan v London Regional Transport* [1999] IRLR 572, *Madarassy v Nomura International plc* [2007] IRLR 246 CA, *Ayodele v Citylink Ltd* [2017] EWCA Civ 1913. In *Hewage v Grampian Health Board* [2012] ICR 1054, SC in which Lord Hope endorsed the following guidance given by Underhill P in *Martin v Devonshires Solicitors* 2011 ICR 352, EAT:

> *"'the burden of proof provisions in discrimination cases… are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination — generally, that is, facts about the respondent's motivation… they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law'.*

122. *Harassment* - in *Richmond Pharmacology v Dhaliwal* [2009] ICR 724 the EAT (Underhill, P) emphasised both the subjective and objective elements of a claim of harassment under section 26. There is a minimum threshold and following guidance was given at paragraph 22:

> *"it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase"*

CONCLUSIONS

CONSTRUCTIVE UNFAIR DISMISSAL

123. (**Issue 1**) Was the Claimant constructively dismissed by way of the Claimant's resignation on 9 April 2019?

124. We have concluded that he was constructively dismissed, based on our conclusions below under:

124.1. (2c & 2o) delay in the investigation;

124.2. (2e) Mr Lowe's comments at the mediation;

124.3. (2g & 2r) failure to investigate the Claimant's allegations into Ms Z;

124.4. (2j) failure to tell Ms Z to keep the investigation confidential;

124.5. (2k) failure to conduct the investigation fairly and obtain relevant evidence;

124.6. (2n) failure to provide updates and timeline;

124.7. (2p & 16b(iii)) withholding pay when the claimant's companion could not accompany him to investigation (which we found was a failure to make reasonable adjustments under sections 20-21 of the Equality Act 2010).

125. (**Issue 2**) Did the Respondent breach any express term of the Claimant's contract of employment? The Claimant relies on the following:

126. (**2a**) Ms Y made a comment that the Claimant used his autism as a way of "getting out of things".

127. This was a comment made and minuted in an investigation meeting on 14 January 2019 (page 132). This was a management decision, but rather a comment made by a junior employee during the course of an investigation meeting. We do not consider that it is appropriate to impute this comment to the Respondent when looking at a potential breach of the implied term of trust and confidence. We do find how that this this was *disability harassment*, see further below.

128. (**2b**) The Respondent relied upon the statement of Ms Y.

129. It seems likely that this reliance related to her allegation of a sexual comment in a WhatsApp message, which we infer he treated as supporting evidence for Ms Z's complaint not the comment about autism. We are surprised that the investigator Mr Lane concluded that the outcome was 'beyond reasonable doubt' [137] given that this appears to determine the matter to the criminal standard of proof. We do not consider however that this contributed to a fundamental breach of contract.

130. (**2c**) The Claimant was suspended for 13 weeks with no reasonable evidence to justify it.

131. We accept the Respondent submission that this overstates the matter and that in fact the suspension lasted for 7 weeks and 6 days. It is right to say that the Claimant did not return to work at all for a further two months.

132. There was evidence to potentially justify a suspension. However, we consider that there is no adequate justification for the Claimant's lengthy suspension, especially given that he had chased Human Resources on 17 December 2018 and then raised his concern about the length of the suspension and the effect on his mental health in the context of his disability in very clear terms on 30 December 2018. The Claimant nevertheless remained suspended until 5 February 2019.

133. We conclude that the delay did contribute something to the fundamental breach.

134. (**2d**) The Respondent failed to provide appropriate redress or remedy for the Claimant's grievance.

135. What the Respondent did provide was an apology and also outcomes to the grievance and the grievance appeal both of which acknowledged failings on the part of the Respondent. There were learning points which were communicated to the BPMs and this was told to the Claimant by Tracy Eyles in a meeting on 5 February. There was apparently coaching with the BPMs although this would not have been communicated to the Claimant. When asked in Tribunal what he was looking for the Claimant used the word 'retribution'. He felt that actions should have been taken against Christopher Lane and also the two complainants. Later in cross examination he conceded that the original complaint should not expect disciplinary action. He did consider that action should have been taken for security breaches (i.e. cash management breaches) against Ms Z.

136. Whilst we would expect some action to be taken the Tribunal does not accept that the Claimant was entitled to a particular outcome for these individuals nor to be informed of the detail of it.

137. Given this we do not consider that this is part of the breach.

138. (**2e**) The Respondent justified its treatment of the Claimant on the basis that Ms Z was a woman.

139. We have set out the unchallenged evidence of the Claimant and that he asked him why the complaint against Ms Z was never looked into even though he made his complaint first and on the day and that Graham Lowe's reply was that HR had advised him because it was a female making a claim that comes first and that he

was shocked. This may have been, we accept an unguarded remark by Mr Lowe. We accept the Claimant's evidence that he found this comment shocking and understand why he found it shocking.

140. We do find that this contributed something to the breach.

141. (**2f**) The Respondent suspended the Claimant in relation to Ms Z's comment.

142. We do not find that this was surprising it is only the length of the suspension not the fact of suspension that was a concern. We do not find this contributed to the breach.

143. (**2g**) The Respondent failed to investigate the Claimant's allegations into Ms Z.

144. The Claimant has an understandable sense of grievance about this matter his allegations (raised first) have essentially been lost and the significance of his concerns minimised. We found that the Claimant was a reliable witness and not prone to exaggeration. It is unfortunate that this was not done and we do consider that this added something further to the unfairness caused in general by the delay. We consider further that there was not a question about the Claimant's competence. Mr Lowe acknowledged that he was a good manager.

145. We consider that given that the Claimant believed and communicated that there had been a breach of cash management procedure this was not without foundation and required investigation. The Claimant's allegations did not lead to any meaningful investigation. This did contribute something to the fundamental breach.

146. (**2h**) The Claimant's colleague Rob Waugh made a statement calling the Claimant a pervert.

147. Mr Waugh was a manager of the Denton and it is clear that the comment made in the investigation was 'a bit pervy' rather than a pervert. This was an opinion that is offered by an employee during the investigation. On balance we do not consider that this contributed to a breach.

148. (**2i**) The Respondent relied upon the comment by Mr Waugh.

149. It is difficult for us to determine exactly what Mr Lane relied upon in deciding the matter should be a disciplinary, on balance we do not consider that this contributed to the breach.

150. (**2j**) The Claimant was required to maintain confidentiality during the investigation but Ms Z was permitted to discuss the matter.

151. It was implicit although not explicit to the Claimant that he should keep this matter confidential, the letter at page 96 meant that he could not in practical terms speak to members of the Respondent workforce. We cannot find in the Respondent's policy documents a suggestion that these sought of investigations should be kept confidential. In any event it is accepted by Mr Lowe that Ms Z was not told that she needed to keep the matter confidential which we find surprising. This is acknowledged as part of the grievance outcome.

152. We do not find that this would amount to a breach in isolation but we do consider that this contributes something to the breach which we have found cumulatively.

153. (**2k**) The Respondent failed to conduct the investigation fairly including a failure to obtain relevant evidence such as CCTV.

154. It is correct to say the Claimant was told that there was no audio for the CCTV, nevertheless the Claimant articulated during the course of the investigation on 15 January, [page 135] the benefit that CCTV might bring. He said that there were two things that the CCTV might show. First Ms Z's body language towards him. If he had made an inappropriate sexually explicit comment there is a real possibility that Ms Z might at least have betrayed some sort of reaction. Second, in respect of his further complaint of her going into the Claimant's till without reason. We consider that this argument has some merit and if it was not possible to obtain the CCTV footage the Claimant should have at least been told this at an early stage.

155. We consider that this did contribute something to the breach.

156. Allegations (**2l**) and (**2m**) fell away at the commencement of the hearing.

157. Allegation (**2n**) the Respondent failed to provide the Claimant with updates and a timeline during the investigation.

158. The matter was allowed to drift from the suspension on 12 December 2018. The Claimant chased on 17 December 2018 in response to which contact was made but he was given no detail, the Claimant then chased again on 30 December and was told on that date by Mr Lowe on that date I can't give you a timeline of how long it will last. The Claimant was left in limbo over the whole of the Christmas period. It was only 4 January that the Claimant received some clarity as to next steps in the investigation.

159. We find that the lack of update or timeline during this period added something to the breach.

160. (**2o**) The Respondent failed to eliminate unnecessary pauses and delays in the investigation process.

161. We consider that this is essentially a repetition of allegations of delay above, but we do accept that the length of delay in this case has contributed to the breach.

162. (**2p**) The Respondent withholds pay from employees who do not attend meetings when their companions cannot accompany them.

163. The effect of this was in reality to deny the Claimant having someone to accompany him in the meeting of 11 January 2019 because he was concerned about a length of delay causing him to lose pay. We consider that this did contribute something to the breach. [This is also found to be a failure to make reasonable adjustments below].

164. (**2q**) The Respondent does not postpone relevant meetings when accompanying colleagues cannot attend.

165. We do not consider this allegation adds anything new to allegation (2p) above.

166. (**2r**) The Respondent did not investigate the Claimant's complaint against Ms Z about the security breach.

167. It is clear from the evidence of Mr Lowe that there was no formal investigation. We consider this was not a mere counter allegation being raised by the Claimant and on the face of it there was something to investigate we are surprised this was not done given it related to cash management. We consider that this has contributed something to the breach.

168. (**2s**) The Respondent did not provide the Claimant with a copy of the investigation meeting notes with Graham Lowe.

169. The policy was to provide notes 48 hours before the next meeting and this appears to have been received by the Claimant before the time of disciplinary. We consider that this is no more than a minor procedural hiccup, it did not contribute to a breach of contract.

170. (**2t**) The Respondent denied the Claimant access to the Employee Handbook.

171. This document was available to the Claimant on the intranet and in any event Mr Lane sent him the disciplinary part of the policy. We find that this did not contribute to the breach

172. (**Issue 3 & 4**) In conclusion therefore, we find that the events we have made out did cumulatively amount to a serious or repudiatory breach of the implied term of trust and confidence.

173. (**Issue 5**) Was that such behaviour to permit the Claimant to resign and claim constructive dismissal?

174. Yes in view of our findings above.

175. (**Issue 6**) If there was a repudiatory breach did the Claimant affirm contract of employment and waive that breach.

176. The Respondent submits that he did. In submissions the Respondent's Counsel made reference to the case of *Assamoi v Spirit Pub Company (Services) Limited (formerly known as Pub Punch Co Limited)* appeal number UKEAT/0050/11/LA we have considered the paragraphs that have been referred to in this judgment and accept the proposition that the innocent party experiencing a breach may accept the breach and continue working. Our finding in this case however is that the Claimant raised his grievance on 14 January 2019 and then appealed the outcome which was not resolved until the informal notice of the outcome on 8 April.

177. In essence the Claimant was either in a grievance process or a grievance appeal process for the whole of that period and at no stage could it be said that the Claimant had affirmed the contract as the grievance was his protest.

178. While we note that significant steps were made (principally by Ms Eyles) to remedy matters, following *Buckland* this could not cure a fundamental breach.

179. (**Issue 7**) Did the Claimant resign because of any such repudiatory contract.

180. Yes, we find that the timing of his resignation immediately after the grievance appeal outcome makes this clear.

Fairness

181. (**Issues 8 & 9**) If the Claimant was dismissed was that dismissal unfair?

182. It is generally difficult for an employer to realistically claim that a constructive unfair dismissal is fair, given that there is no process. It is not clear to the Tribunal on what basis it would be said that the dismissal was fair given that the Respondent in this case had not found him to be guilty of conduct such as to reasonably impose the sanction of dismissal.

DISABILITY DISCRIMINATION CLAIMS

183. It is conceded the Claimant suffers with Autism and that this is a disability.

Direct disability discrimination

184. (**Issue 11**) the Claimant is relying on a hypothetical comparator, we considered that this would have to be an employee facing equivalent allegations who had themselves made allegations but did not have a disability.

185. (**Issue 12**) did the Respondent treat the Claimant less favourably on the hypothetical comparator would be treated, the Claimant relies on the following:

186. (**12a**) Ms Y made a comment that the Claimant uses Autism as a way of getting out of things.

187. An action cannot be both direct discrimination and harassment we have dealt with this allegation under *harassment* below.

188. (**12b**) The Respondent relied upon or read out the statement of Ms Y.

189. We have considered this allegation carefully but on balance have decided that it was not less favourable treatment to the Claimant. He was entitled to hear everything that Ms Y had said because that might have been to his advantage. This is not an act of discrimination.

190. (**12c**) The Claimant was suspended for thirteen weeks with no reason to justify it.

191. As has been clarified above the suspension was in fact seven weeks and six days. We do not consider that the Claimant has satisfied the initial burden of proof on him to establish that this was a directly discriminatory act (i.e. we do not consider per Madarassy, based on the evidence that a Tribunal could reasonable conclude that because he was disabled the Respondent suspended the Claimant for this period).

192. (**12d**) The Respondent failed to provide appropriate redress or remedy.

193. The grievance and grievance appeal were substantially held in the Claimant's favour. We do not consider it would be appropriate that a hypothetical comparator would receive detail of the outcome received by other employees. We do not consider a Tribunal could reasonably conclude that this is because of a disability and accordingly the burden of proof is not satisfied in this case.

194. (**12e**) This fell away at the preliminary discussion.

195. (**12f**) The Respondent constructively unfairly dismissed the Claimant.

196. We have not found that the constructive dismissal was an act of direct disability discrimination.

Failure to make reasonable adjustments

197. This is a claim under s.20 and s.21 of the Equality Act.

198. The Respondent raised a time point about PCPs 3 and 4 which was not in the list of issues but it does as said by the Respondent go directly to jurisdiction.

199. The Respondent we find is correct to submit that these PCPs are out of time. However, we do note that if the Claimant had put in an ACAS certificate on 10 April instead of 16 April it would be in time so it is only marginally out of time.

200. It is quite clear from judicial authority and in particular recent authority in the Court of Appeal that there is a very wide discretion for a Tribunal (*Abertawe Bro Morgannwg University Local Health Board v Morgan* 2018 ICR 1194, CA).

201. We consider that it would be just and equitable to extend time in this matter, given all of the circumstances and including the following matters:

    201.1. There have been delays in the internal process the Claimant raised a grievance and a grievance appeal.

    201.2. The Respondent has been aware of material events throughout this period.

    201.3. The Respondent has been able to respond fully to the allegations which were documented as a result of the grievance and grievance appeal processes.

    201.4. We consider looking at the matter overall that there is an absence of prejudice to the Respondent in dealing with this allegation and there would be prejudice to the Claimant if we did not consider it.

    201.5. We have taken account of the fact that throughout the Claimant was not represented and also has a disability.

202. (**Issue 14(a)(i)**) PCP1 the Respondent investigates complaints slowly

203. We been referred by the Respondent in submissions in the case of *Ishola v Transport for London* [2020] EWCA Civ 112, which confirms that one off events

are not necessarily provisions criteria or practices (i.e. PCP's) and they need to be examined carefully to see whether it could be said that they are likely to be continuing. The first allegation 14(a)(i) is that the Respondent investigates complaints slowly. While it is the case that this complaint in circumstances of this case was investigated slowly we do not consider we have evidence from which we could conclude that there was an ongoing practice of investigating complaints slowly. We accept the Respondent's submission following *Ishola* that this PCP cannot succeed.

204. (**Issue 14(a)(ii)**) PCP2 it takes thirteen weeks to conclude an investigation process.

205. Similarly, and really for the same reasons as for PCP1 we conclude following *Ishola* we do not have evidence that this is a general practice of taking thirteen weeks to conclude an investigation process. This allegation therefore cannot succeed.

206. (**Issue 14(a)(iii) & 14(b)**) PCP 3 the Respondent withholds employees pay if they do not attend investigation meetings when their accompany colleagues or representatives cannot attend.

207. In the case of this claim we note that Chris Lane set out to the Claimant on 10 January that if you do not want to go forward you will not be paid until the meeting and that this is in line with company policy and was suggested by the HR department. It seems therefore that this is a policy or practice. We find that this PCP is established.

208. (**Issue 14(a)(iv)**) PCP 4 the Respondent requires employees to attend investigation meetings when their accompanying colleagues are unavailable at short notice.

209. We do not consider that this is the policy, we consider the policy is that if a Claimant delays he will not get paid so really that falls under PCP 3 and we do not consider that PCP 4 has been established.

210. (**Issue 14(c)**) Did the PCPs place the Claimant at a substantial disadvantage?

211. The Claimant states he is likely to suffer from depression, panic attacks and extreme anxiety more than people who have Autism. We accept the evidence that the Claimant gave in the internal process where he says I have Asperger's and I need someone present as I get confused, that is at page 110. We accept also that he said he felt uncomfortable without a witness present which is page 141.

212. Although the Tribunal is plainly focusing on events at the material time we do note that the Claimant had or was accompanied during the large part of this hearing by Ms Power who attended and visibly provided reassurance and support in this formal setting.

213. Based on the contemporaneous evidence we can see that the Claimant did require support, we conclude therefore that he did suffer a substantial disadvantage in not being accompanied at the meeting.

214. (**Issue 14(d)(vi)**) This falls away as the PCP to which it relates has already fallen away.

215. (**Issue 14(d)(vii)&(viii)**) the Claimant had difficulty controlling panic and anger without a supported person and is less able to participate fully in meetings and he became confused by simple questions when under pressure, we consider that these are really no more than additional facets of 14(d)(v) above which is that he suffers a disadvantage if he does not have someone present with him.

216. (**Issue 15**) Did the Respondent know or if not could it have reasonably have expected to know the PCP alleged placed the Claimant under substantial disadvantage?

217. We consider that the Claimant told the Respondent in the meeting on 10 January 2018 quite clearly what the substantial disadvantage was.

218. (**Issue 16b(iii)**) Did the Respondent make reasonable adjustments, we consider that the Respondent did not make a reasonable adjustment?

219. The adjustment we consider should have been made was not withholding pay from employees who do not attend meetings when their companions cannot accompany them, we consider that this adjustment was reasonable, was not made and could and should have been made in the circumstances of this case.

220. The other contended for adjustments (i), (ii) and (iv) fall away in view of our findings above.

221. (**Issue 16c**) If so what difference if any did the failure to make adjustment make?

222. The Claimant attended on 11 January without being accompanied which made the experience more stressful and placed him at a disadvantage in answering the allegation.

Harassment relating to disability (section 26 EqA 2010)

223. (**Issue 17(a)**) did the Respondent engage in unwanted conduct relating to the Claimant's disability for the purposes of the Equality Act?

224. Ms Y made a comment that "the Claimant uses Autism as a way of getting out of things". We find this comment was said in the course of an investigation meeting. It was minuted.

225. Considering the initial burden of proof on the Claimant: it is unwanted conduct; it was related to the Claimant's disability because it refers to Autism. We find it did not need to be face to face. It did have the effect of creating an offensive and hostile environment at the point that it became apparent to the Claimant.

226. We have not had the benefit of hearing Y give oral evidence and she has not been called as a witness. We have considered whether the content of Ms Y's interview on 1 February with Ms Eyles provides some explanation and in fact on page 172 she said that the Claimant would say stuff "they can't sack me I have Autism". We

have considered very carefully whether this might in fact amount to an explanation for the comments that were made by Ms Y. We have found this point in particular quite difficult to resolve. However, we have considered also the fact that in concluding the disciplinary hearing Ms Eyles at paragraph 41 of her witness statement considered that Ms Y had not provided any examples to support this comment about Autism during the investigation.

227. We have noted the apparent inconsistency between Ms Y's comments on the timing of when she had detected inappropriate 'sexual' communication from the Claimant. On 1 February 2019 [172] she told Ms Eyles that did not hear anything 'sexual' from the Claimant until she heard about Ms Z. Two weeks earlier, on 14 January 2019 she told Mr Lane that the Claimant had sent her a message which was sexually explicit. We understood this to be the 'wank bank' message apparently sent in March 2018 [88]. If this was the WhatsApp message she was relying on (the reproduction of the copy we have is indistinct and it is impossible to read the name of the recipient), she *had* received a 'sexual' message from the Claimant significantly before events involving Ms Z in November 2018 and her comment on 1 February 2019 was untrue.

228. On balance, we are not satisfied by the explanation that is put forward in Ms Y's subsequent interview. We do not consider that the Respondent has demonstrated that no lawful act has occurred. We consider therefore that this did amount to an act of harassment relating to the Claimant's disability.

229. (**Issue 17(b)**) The Respondent relied upon or read out the statement of Ms Y.

230. We reiterate our earlier view about this. Although this comment was read out in the investigation meeting we did not consider that it would be appropriate for Mr Lane to effectively edit the evidence of Ms Y. Some of Ms Y's evidence might have assisted the Claimant in making his defence. Considering all of the circumstances we do not consider that this repetition of the comment should be treated as objectively amounting to harassment.

Direct Sex Discrimination

231. (**Issue 20**) The Claimant relies upon Ms Z as a named comparator.

232. We do not consider that Ms Z's circumstances could be described as the same or not materially different. Her complaint about the Claimant was that he was making sexually inappropriate comments to her as a junior employee and by implication making those comments inappropriately objectifying her sexually.

233. The initial complaint about Ms Z relating to cash management procedures in circumstances where the Claimant and she had plainly fallen out, the later complaint about 'cock and balls' was a counterclaim which if true we consider smacked of insubordination rather something akin to sexual harassment. There is also the difference in power and position between them which affects the nature of these allegations. If we consider a hypothetical comparator for the claim of direct sex discrimination this would be a female manager accused of making an inappropriate sexual comment to a junior employee.

234. (**Issue 21**), did the Respondent treat the Claimant less favourably than the comparator was or would have been treated? The Claimant relies on the following:

235. (**Issue 21a**) The Respondent suspended him in relation to Ms Z's compliant. Our conclusion is that a hypothetical female manager would have been suspended in the equivalent circumstances, we do not consider that this is a discriminatory act. We do not find that this is direct sex discrimination.

236. (**Issue 21b**) The Respondent failed to investigate the Claimant's allegations into Ms Z.

237. There are two elements to this, there is the cash management and management instructions allegation relating to 29 November 2018. We consider that this was not properly investigated but we consider that this was because this was overtaken by events and it was the subsequent harassment allegations made by Ms Z that the Respondent focused on. We consider that similar treatment would have occurred had the Claimant been female. As to the 'cock and balls' allegation this was a counterclaim raised in response to a serious allegation. The nature of this allegation was different to the allegation made against the Claimant. This was an allegation of rude language cited to substantiate his contention which that she was insubordinate. If true, while it does contain a reference to genitalia these are not referenced in a sexual context. Again, we consider that a female manager would have been treated similarly in similar circumstances. We do not find that this is direct sex discrimination.

238. (**Issue 21c**) Mr Waugh made a statement calling the Claimant a pervert.

239. The actual comment made was "a bit pervy". We accept that this is a comment that is unlikely to have been made about a woman, given that this is a term generally only applied to men. However we do not consider 'but for' causation is the correct way to approach this part of the claim.

240. We find the reason why this comment was made was based on Mr Waugh's observations about a comment that he said had been made to him "have you slept with Ms Z" which he substantiated with this specific example. That was the reason for the comment being made. We consider it was this background not because the Claimant was a man. We do not find that this is direct sex discrimination.

241. (**Issue 21d**) The Respondent relied upon the comment by Mr Waugh.

242. We do not consider that there is sufficient evidence from which we could reasonably conclude that this is a discriminatory act. This does not succeed.

243. (**Issue 21e**) The Claimant was required to maintain confidentiality during the investigation but Ms Z was permitted to discuss the matter.

244. Mr Lowe admitted that Ms Z was not told to keep the matter in confidence. The Claimant was not told himself to keep the matter confidential explicitly. He inferred the requirement of confidentiality from the content of the letter of suspension. We do not consider however that a female manager would have been treated in a different way.

245. (**Issue 21f**) The Respondent failed to conduct the investigation fairly including a failure to obtain relevant evidence such as CCTV.

246. We do not consider a that female manager would have been treated in a different way. While the Claimant was suspended for a lengthy period of time with no reasonable evidence to justify it, again we conclude that a female manager facing such allegations might expect to be treated in the same way. We do not have sufficient evidence from which we can conclude that sex is the reason.

247. (**Issue 21h**) The Respondent failed to provide appropriate redress or remedy.

248. We do not consider that a female manager would have received different treatment.

249. (**Issue 21i**) The Respondent justified its treatment of the Claimant on the basis that Ms Z was a woman.

250. This allegation we found more difficult. We have found that Mr Lowe made a remark to this effect and this comment has caused us some disquiet. [Indeed we found that this contributed to a repudiatory breach of contract].

251. Ultimately however the reference to sex is to the complainant's sex i.e. the fact that Ms Z was a woman, rather than the Claimant's sex i.e. the fact that he is a man. We consider that this could have been a complaint about a female manager harassing a female complainant. In any event we do not consider that the Claimant's sex was the reason why and this claim does not succeed.

252. (**Issue 21k**) That the Respondent unfairly dismissed the Claimant.

253. We do not find that this was a directly discriminatory unfair dismissal because of the Claimant's sex.

Direct sex harassment

254. Each of the allegations above is relied upon in the alternative as being direct sex harassment.

255. (**Issue 23**) We accept that the allegations set out as Issue 21 above did amount to unwanted conduct from the Claimant's subjective point of view.

256. We find however that in each case the necessary connection to the Claimant's sex as a man is missing. Our reasoning is similar to that in the direct sex discrimination claim. The test is "related to sex". We do not find that any of the conduct complained of related to the Claimant being a man.

257. If we are wrong about that, we do not find that it would be reasonable, for him to treat the conduct alleged as amounting to harassment on the grounds of being a man (i.e. we do not find that any of the conduct, objectively, amounts to harassment related to the Claimant being a man).

REMEDY

258. Subsequent to giving judgment there was insufficient time to deal with all matters relating to remedy since this would require us to hear evidence and submissions.

259. We considered which elements of remedy we could deal with in the short time we had to narrow the issues in dispute between the parties.

Basic Award

260. We established that the basic award in this case is as per the counter schedule by the Respondent that was produced at the hearing and is **£665.40**.

Injury to feeling

261. The next discrete issue we had time to deal with is the '*injury to feeling*' relating to the successful reasonable adjustments claims and the harassment claim relating to disability. We heard submissions from the parties and spent some time contemplating what the appropriate award is.

262. We accepted the Respondent's submission that this is a lower 'Vento' band case (per *Vento v Chief Constable of West Yorkshire Police (No.2)* 2003 ICR 318, CA). We also accepted Ms Hand's submission that it should not be set at a level which amounts to a punishment for matters that fall outside of the scope of these two claims.

263. Considering the matter carefully we consider that viewed cumulatively this award should be at the lower end of the lower band of vento which now ranges between £900 and £8,800 and considering the conduct of Ms Y we note that she repeats the allegation or something similar in a subsequent meeting.

264. We consider that this is a serious matter given that it is raised in disciplinary context and we note that the Claimant first hears about it for the first time on 15 January 2019, again in a disciplinary context where he is facing potential gross misconduct allegations.

265. In respect of the 'failure to make reasonable adjustment' in respect of the pay and someone accompanying the Claimant the exacerbating factors we consider are that the Claimant raised in terms on 10 January 2019 that a difficulty was caused by him due to his disability and not being accompanied. He followed that up in correspondence on the same day make a clear reference to his disability and the Equality Act. Mr Lane took HR advice. He ought to have taken account of the disability or at least ought to have been advised to take account of the disability and did not, for that reason we consider that this is the worse of the two allegations.

266. We do not consider it is appropriate to make separate awards the injury to feeling awards are made in a fairly broad brush way we consider that the appropriate award is **£4,000** which falls at the lower end of the lower band of the vento guidelines, to that interest we are obliged to look under the regulations as to an award of interest and consider that the appropriate award is to award interest at 8% from 15 January 2019.

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

1. Remedy hearing

1.1 By 26.2.20 the Respondent is to provide to the Claimant a completed counter-schedule.
1.2 By 12.3.20 Parties to write to the Tribunal confirming whether the remedy hearing listed on 19.3.20 is still required.
1.3 1 day remedy hearing listed for **Thursday 19 March 2020**.

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Employment Judge Adkin

Date 13th March 2020

JUDGMENT SENT TO THE PARTIES ON

16th March 2020

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FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.