EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107459/2017

Held in Glasgow on 13, 14, 15, 16 and 21 May 2019

Employment Judge	**L Wiseman**
Tribunal Member	**H Boyd**
Tribunal Member	**P O'Donnell**

Mr P O'Connor	**Claimant** **In Person**
HM Revenue and Customs	**Respondent** **Represented by:** **Ms P Macaulay - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided to dismiss the claim.

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 18 December 2017 asserting he had been unfairly dismissed and harassed and discriminated against because of religion and belief and perceived disability.

2. The respondent entered a response admitting the claimant had been dismissed for reasons of capability, but denying the dismissal was unfair and denying the allegations of harassment and discrimination.

3. A number of case management preliminary hearings were held which identified the claims as follows:

    - a complaint of direct discrimination in terms of section 13 Equality Act where it was alleged the respondent had treated

the claimant less favourably because of his Christian religion or belief. The alleged less favourable treatment was as set out in an email from the claimant to the tribunal dated 14 May 2018;

- a complaint of direct discrimination in terms of section 13 Equality Act where it was alleged the respondent had treated the claimant less favourably because it perceived him to be a disabled person. The alleged less favourable treatment was as set out in an email from the claimant to the tribunal dated 18 May 2018;

- a complaint of harassment in terms of section 26 Equality Act where it was alleged the respondent had harassed the claimant because of his religion or belief or his perceived disability. The alleged acts of harassment were as set out in the Agenda completed by the claimant prior to the preliminary hearing on the 9 April 2018 and

- unfair dismissal in terms of section 98 Employment Rights Act.

4. We heard evidence from the claimant and Ms Emma Jennings, Risk Assessor, who had been the claimant's line manager at the time of these events; Mr Jim Cairney, Business Unit Head for Risk and Intelligence Service, who was Ms Jennings' mentor; Mr Ronald Martin, Senior Manager, who reviewed the claimant's absence and recommended the case be referred to a decision maker and Mr Keith Henry, Senior Operations Manager, who took the decision to dismiss.

5. We were also referred to a folder of documents prepared by the parties. We, on the basis of the evidence made the following material findings in fact. We wish to make clear that the findings in fact reflect (i) the evidence accepted by the tribunal and (ii) the evidence which we consider to be relevant to the legal issues we have to determine. The findings in fact do not reflect everything said by the parties.

Findings in fact

6. The claimant commenced employment with the respondent on the 9 August 1999 as a Security Guard. He was subsequently promoted to the post of Administrative Officer in January 2017 working within the Risk and Intelligence Service.

7. The training to be undertaken for work in the Risk and Intelligence Service is extensive. The respondent had no concerns regarding the claimant's performance in the role: he was up to date with his training and passing the tests.

8. The claimant initially reported to Ms Siobhan McCusker, his line manager within Risk and Intelligence Services. Ms McCusker met with the claimant in January 2017 to inform him she was happy with his work and his progress. The claimant was advised, during the discussion, that he should "tone it down" in respect of his discussions regarding his pilgrimages to Medjugorje and what he had experienced there. Ms McCusker wanted the claimant to focus on his work. The claimant advised Ms McCusker that she should get baptised so she could be a godparent to her nephew. The claimant also offered to pay for Ms McCusker to visit Medjugorje because she suffered from chronic pain and he believed there was a chance she could be cured of her condition.

9. In March 2017 Ms Jennings took over from Ms McCusker as the claimant's line manager. Ms Jennings made all employees aware of a Showcase event in April 2017 where all departments show off what they do, and seminars and wellbeing sessions are available. Attendance at the event was voluntary. The claimant attended an event aimed at using forms of meditation to destress. The claimant told Ms Jennings he was not pleased a Buddha had been shown on a screen at the end of the event because it offended his Christian beliefs. The comment was made in passing to Ms Jennings and she took no action in respect of it.

10. In May 2017, Ms Jennings spoke with the claimant's mentor and understood the claimant was picking up the work well, but doubted his own ability. Ms Jennings had noticed the claimant appeared a bit down/stressed and anxious and so she decided to have a chat with him. Ms Jennings invited the claimant

to meet with her on 5 May in the “tranquil/quiet room” so she could show this to the claimant and also be away from the busy work area.

11. Ms Jennings told the claimant she was concerned about him because he appeared to be a bit down, and she asked if anything could be done to help him. The claimant spoke freely about a range of matters including his childhood and the subsequent death of his parents and how he had previously suffered from anxiety and depression. He also discussed his visits to Medjugorje and the things he had experienced.

12. The claimant also expressed his views on abortion and challenged Ms Jennings when she expressed her view that a woman had the right to choose.

13. Ms Jennings told the claimant about the Workplace Wellness service which provided confidential services, including counselling, for employees. The claimant told Ms Jennings he did not want to contact them.

14. Ms Jennings concluded the meeting and the claimant returned to his desk. Ms Jennings felt very concerned for the claimant because his anxiety and agitation had increased during the meeting.

15. Ms Jennings spoke with Mr Cairney who was a Senior Manager and her mentor. She informed Mr Cairney of her discussion with the claimant and asked his advice on what she should do.

16. Mr Cairney and Ms Jennings met with the claimant again on the 5th May. Mr Cairney, who has undertaken mental health awareness training, noted the claimant was very agitated and very intense. The claimant reiterated what he had experienced whilst in Medjugorje, and showed Mr Cairney photographs and a video to support what he was saying.

17. Mr Cairney asked Ms Jennings to obtain the telephone number for Workplace Wellness, and this was provided to the claimant. Mr Cairney and Ms Jennings left the room whilst the claimant made the phone call. They were very concerned for the claimant who had, in his discussions with them, been referring to depression and paranoia. Mr Cairney did not, during the meeting

on 5 May, threaten the claimant that if he did not get help for himself they would be having a different discussion.

18. The claimant appeared even more agitated after the phone call with Workplace Wellness because he had not found them to be helpful. He was jittery and jumpy and repeating his experiences from Medjugorje over and over again.

19. The claimant agreed to make an appointment with his GP, and he agreed Ms Jennings could make a referral to occupational health for a report.

20. Ms Jennings and Mr Cairney decided the claimant should go home, take a long weekend, and return to work on Tuesday 9 May.

21. The claimant collected his belongings and walked with Mr Cairney down to the security barrier to exit the building. Mr Cairney asked the claimant to return his security pass.

22. The claimant attended for work on 9 May and met with Ms Jennings and Mr Cairney. They found him to be very agitated and Mr Cairney formed the opinion the claimant was having a panic attack. The claimant told Ms Jennings and Mr Cairney that he had not eaten over the weekend and only left the house to attend Mass.

23. The claimant had spoken to Workplace Wellness again but felt they were not receptive to him talking about what he had experienced at Medjugorje. The claimant spoke at length to Ms Jennings and Mr Cairney about his time in Medjugorje and he also spoke about Satan appearing on his work computer and the need to bring in holy water to put over his computer.

24. Ms Jennings and Mr Cairney agreed the claimant should go home and take the rest of the week off. The claimant was to contact Ms Jennings after he had seen his GP.

25. The claimant saw his GP on the 10 May. He phoned Ms Jennings to advise he had not found the visit helpful because his GP was Hindu and did not believe what he had experienced in Medjugorje. The GP had told the claimant

he thought he was hallucinating. The GP had prescribed him Fluoxetine (an antidepressant) and was going to review him in two weeks.

26. The claimant was signed off work for two weeks with anxiety and depression.

27. Ms Jennings made arrangements for a double length face-to-face occupational health meeting to take place on the 23 May. The referral form (page 291) completed by Ms Jennings included the following information:

"Paul is experiencing stress, anxiety, depression, agitation, panic attacks and paranoia. All linked with both his personal and work life. Paul has spoken about seeing visions/apparitions, demons and has had messages/threats from Satan. Paul is very agitated and believes the devil is out to get him. Paul has visited the pilgrim site of Medgujorge where he says he has witnessed people die and many other apparitions which in turn he admits he is having trouble processing and is putting his mind into "overload". He has also admitted he has wiped all contacts from his telephone and keeps in contact with no-one. Outside of work he has no contact with any family or friends. He has also recently stated he fears he is being stalked by a woman but could give no more details."

28. The occupational health provider (page 285) asked Ms Jennings to ensure someone accompanied the claimant to the appointment to provide support and aid understanding.

29. Ms Jennings asked the claimant if he would like her to come with him to the appointment. The claimant agreed. Mr Cairney drove Ms Jennings and the claimant to the appointment in Edinburgh, and Ms Jennings accompanied the claimant into the meeting with Dr McElearney.

30. An occupational health report was produced (page 198). The report stated it had been *"pretty obvious"* the claimant had a number of features of severe mental ill health and that he was mildly psychotic (that is, some of his beliefs were not founded in reality). The doctor also believed the claimant demonstrated paranoia and he had pressure of speech and thought. The doctor confirmed the claimant needed to be assessed by the Community

Mental Health team, and that his medicine needed to be reviewed and an antipsychotic added. The prognosis was that there was every possibility the claimant would, with the right medication, recover sufficiently to enable him to return to work but in order for that to happen the claimant had to engage with the plan for recovery. The report confirmed the doctor had written to the claimant's GP.

31. The doctor confirmed there were no reasonable adjustments which could be made to enable the claimant to return to work. The claimant was currently unfit for work.

32. The doctor wrote to the claimant's GP (page 200) and referred to being told of a history of hallucination, paranoia and pressure of thought and speech. The doctor confirmed he had suggested to the claimant that he see the Community Mental Health team.

33. The claimant's GP arranged for the claimant to be seen by the Community Mental Health team in July 2017, and a report from Dr McGowan, Locum Speciality Doctor in Psychiatry was produced at page 214. The report confirmed no formal diagnosis, a reduction of Fluoxetine from two per day to one per day and a follow up appointment in 6 months' time. The report detailed the information provided by the claimant to the doctor, which included seeing the image of the Virgin Mary whilst at Medjugorje and seeing his own face in the clouds which he believed was a special message to him to improve his lifestyle. The report noted the claimant did not sound grandiose when talking about this and stressed this was his own belief and that he understood most people would not believe him and consider him to be mentally ill.

34. The doctor's impression was that whilst the claimant described unusual experiences, she did not illicit any delusions of reference, grandiosity or paranoia. The doctor could not diagnose him with religious delusional disorder and did not consider his functioning disturbed by his belief. The doctor could not illicit any signs of depression during the interview and questioned why Fluoxetine had been prescribed for the claimant. The report concluded by

confirming the doctor intended to see the claimant again in six months' time and, provided his mental health was stable, she planned to discharge him.

35. A copy of this report was not ever provided by the claimant to the respondent, despite requests made by Ms Jennings and others for it to be produced.

36. The claimant continued to be absent from work because of anxiety and depression, and continued to provide the respondent with fit notes from the GP.

37. Ms Jennings, in terms of the respondent's attendance policy, kept in contact with the claimant by weekly telephone calls. Ms Jennings' notes of these phone calls were produced at pages 178 – 197. Ms Jennings noted a phone call on the 30 May in which the claimant told her he had not told the psychiatrist about Mary and the other things he had seen. She noted he had also spoken at length about the Virgin Mary, about smelling roses before she appeared and how he was fearful she would appear at the flat. He also referred again to Ms McCusker and told Ms Jennings that he was worried about her because she needed to get baptised and go to Medjugorje to get the help she required. Ms Jennings noted the claimant got increasingly louder during the call and more agitated.

38. Ms Jennings spoke with HR regarding the terms of the respondent's attendance policy which specifies a 28 day review meeting should take place. Ms Jennings raised this with HR because there were concerns regarding the claimant's erratic behaviour. It was agreed that in circumstances where there was weekly contact by telephone, and the claimant was engaged with this, that there was no requirement to meet for the 28 day review.

39. Ms Jennings spoke with the claimant again on the 16 June. She noted (page 181) the claimant told her he was terrified and was sleeping with the light on because he was fearful that someone or something was after him. He referred to the supernatural and how he could not control it and that scared him. He was searching photographs again to check for demons and had spotted more that he had not seen previously. The claimant also referred to a member of staff who was a Freemason and whom he believed should be exorcised

because he was full of evil. He also made reference to two women from Portcullis House that he thought were beautiful and that one had persuaded him to visit the Carffin Grotto.

40. Ms Jennings spoke to her manager Mr Robert Milne after this phone call with the claimant because the claimant sounded so fearful and she was concerned for him. Mr Milne decided, based on all of the information from Ms Jennings, that there was a risk the claimant would make contact with Ms McCusker. Mr Milne prepared a Threat Assessment document (page 206) which noted that whilst the claimant *"had not done anything yet or made any specific threats, we need to remain vigilant as we are unsure how his behaviours will escalate and manifest themselves. It was agreed that at present we are currently taking all the precautionary measures possible."*

41. The document also recorded that staff were to be reminded generally about threat and personal safety.

42. The Police were notified the claimant may be a vulnerable person. The Police visited the claimant and reported back to the respondent that he *appeared "a bit eccentric"* but no more than that. They logged the claimant on the vulnerable person data base.

43. Ms Jennings' notes of phone calls with the claimant included the following points:

- 23 June – the claimant referred to Ms McCusker again and that he wanted to get her healed and would pay for her to go to Medjugorje.
- 26 June – the claimant told Ms Jennings he had been in Edinburgh and whilst there he had passed a Mosque, become angry regarding a poster and defaced it. He also referred again to demons that were after him.
- 10 July – the claimant told Ms Jennings his medication had been reduced and he was feeling better because he was not so high and jittery.

- 24 July - the claimant told Ms Jennings he had been to see the psychiatrist but had not told her everything in case he was committed. The claimant again spoke about Medjugorje and the experience of his face appearing to him in the clouds.
- 11 August – the claimant wished Ms Jennings had never asked him if he was alright because if he had been left alone none of this would have come out.

44. Ms Jennings spoke with the occupational health doctor on the 15 August and a note of that discussion was produced at page 218. Ms Jennings referred to Dr McElearney's report where he had suggested that if the claimant engaged in the recovery plan he could be back at work within 3 months, but if he did not engage with it, it could be 12 – 18 months, if at all, before he could return to work. Ms Jennings updated Dr McElearney on the respondent's view that the claimant had not started treatment and was currently unfit for work. Dr McElearney noted the claimant was completely unreliable and not to be trusted. The doctor was of the opinion the claimant needed to be sectioned because he posed a danger to himself and others. He confirmed the claimant was covered by the Equality Act but that there were no possible reasonable adjustments to be made for someone suffering from psychosis.

45. Mr Cairney spoke with the claimant by telephone on the 5 September in Ms Jennings' absence. The claimant told Mr Cairney that the psychiatrist had confirmed there was nothing wrong with him and that he was suffering from anxiety caused by his Medjugorje experiences. The claimant confirmed he was fit to return to work although the GP had signed him off work for another 2 weeks because he was to slowly come off the medication. Mr Cairney canvassed with the claimant the need for a further occupational health report before any return to work.

46. On the 15 September Ms Jennings happened to meet the claimant in a shop during her lunch hour. The claimant smelled of alcohol and told Ms Jennings he had consumed two bottles of whisky. Ms Jennings asked how he was and the claimant responded that she was asking too many questions and sounding like the psychiatrist.

47. Ms Jennings and the claimant left the shop and chatted for a couple of minutes outside. The claimant started again to tell Ms Jennings about seeing his face in the clouds. The claimant was becoming agitated and shouting, and because of that the food which he was eating was spitting out of his mouth on to Ms Jennings. The claimant asked Ms Jennings not to tell Mr Cairney that she had seen him drunk, but Ms Jennings told him she would need to tell Mr Cairney. The claimant was at this point shouting about Ms Jennings being too official, too HMRC and he was getting closer and closer to her face. At one point the claimant called Ms Jennings Ms McCusker.

48. Ms Jennings felt threatened and intimidated: she walked away with the claimant shouting after her *"decide for Christ"*. Ms Jennings was scared by what had happened so she went into another shop, phoned Mr Cairney and asked him to come and meet her and accompany her back to the office. Ms Jennings reported the incident to the Police when she returned to the office.

49. Ms Jennings was signed off work for two weeks following this incident and is still receiving counselling. Ms Jennings agreed with Mr Milne that she would take a sideways step out of line management into her current role.

50. Ms Jennings filed a complaint (page 222) regarding the claimant's conduct on the 15 September, and during some of the keeping in touch phone calls.

51. Mr Cairney spoke with HR on the 19 September (page 228) to provide an update regarding the incident and discuss the way forward. Mr Cairney agreed with HR the terms of a letter to be sent to the claimant informing him to refrain from contacting Ms Jennings and, if he contacted the office, to speak with Mr Gordon Baillie or Mr Ronald Martin. Mr Cairney also agreed with HR that, with regard to the claimant's continuing absence, the case should be referred to a decision-maker.

52. Mr Ronald Martin was asked by Mr Cairney to review the claimant's attendance. He considered the keeping in touch notes prepared by Ms Jennings (pages 178 – 197); the occupational health report (page 198); Ms Jennings' note of her discussion with Dr McElearney on the 15 August (page 218) and the claimant's absence record (page 176). Mr Martin, when

reviewing the information, noted a pattern with the claimant whereby he would indicate a fitness to return to work but submit a further sick line. Mr Martin recommended (page 232) the absence could not continue to be supported because the occupational health report suggested the claimant's illness was so serious that there was an expectation the claimant may not be able to return to work.

53. Mr Martin wrote to the claimant on the 20 September (page 234) to inform him that he had been asked to review his case. Mr Martin noted the claimant was unlikely to be able to return to work within a reasonable length of time and, having considered all of the facts, he had decided to refer the case to a decision-maker to decide whether the claimant should be dismissed or demoted or whether his sickness absence could continue to be supported.

54. Mr Martin was not aware of any potential disciplinary case against the claimant involving the complaint made by Ms Jennings.

55. Mr Keith Henry was appointed the decision-maker in this case. He wrote to the claimant on the 21 September (page 236) inviting him to attend a meeting to discuss the ongoing absence and explain the situation or raise any points he felt should be considered.

56. Mr Henry met with the claimant and his trade union representative, Mr McLernon, on the 28 September. A note of the meeting was produced at page 238. Mr Henry's remit at the meeting was to review the case, consider whether the respondent's processes and procedures had been followed, consider whether there was any sign of a return to work within a reasonable timescale, consider whether the absence could continue to be supported by the business and to consider whether any further information was required.

57. Mr Henry was provided with a copy of Mr Martin's recommendation; Mr Cairney's note of his phone call with HR; Ms Jennings' keeping in touch notes; the occupational health report and the sick notes.

58. The claimant told Mr Henry he had come off his medication but he still did not feel 100% and was still feeling anxious and did not answer his door. The

medication had had a detrimental impact on him: he described that he had taken on *"the personality of Alf Garnett"*. Mr Henry knew from Mr Cairney's note of the telephone call on the 5 September that the claimant had been to see a psychiatrist, and so he enquired about this. The claimant told Mr Henry that the report was inconclusive. Mr Henry pressed the claimant for details of the report, but the claimant did not provide any. The claimant told Mr Henry he needed more time, and he handed over an 8 week sick line from his GP.

59. The claimant's trade union representative told Mr Henry that the claimant's illness had been caused by an incident that he had witnessed which had mentally scarred him, and that the claimant acknowledged that he was not currently fit for work.

60. Mr Henry wrote to the claimant on the 3 October 2017 (page 252) to confirm he had decided to terminate the claimant's employment because he was satisfied the claimant would not be fit to return to work within a reasonable timescale, and that there were no adjustments which could be made by the business to facilitate a return to work due to the claimant's condition. Mr Henry, in reaching his decision, took into account the length of the absence; the fact the claimant presented an 8 week sick line; there was no indication when the claimant may be fit to return to work; the occupational health report and the fact the claimant's absence was having an impact on the business.

61. The respondent operates a Compensation for Dismissal scheme which provides compensation to employees who are dismissed through no fault of their own. Mr Henry, as the decision-maker, was required to complete the documentation regarding this scheme and make a recommendation regarding the level of compensation to be paid. Mr Henry recommended the claimant be paid 100% compensation in circumstances where the claimant had complied with the attendance management process.

62. The claimant was paid 12 weeks' notice and his employment ended on the 2nd January 2018. The claimant was paid the sum of £25,674 compensation from the Compensation for Dismissal scheme.

63. The claimant did not appeal against the decision to terminate his employment.

64. Mr Henry was, as a senior manager, aware generally of the incident on the 15 September. This incident did not influence Mr Henry's decision to dismiss the claimant. Mr Henry was solely considering the issue of the claimant's continuing absence.

Credibility and notes on the evidence

65. The claimant invited the Tribunal to believe the following version of events:

(i) When he moved to the Administrative Officer post he had been trained by Janice who was Mr Cairney's partner and who is now his wife. He and Janice talked about holidays and the claimant revealed to Janice that he had been on trips to Medjugorje and what he had experienced whilst there. The claimant believed Janice had told Mr Cairney about this and that Mr Cairney had instructed Ms McCusker to tell him to tone it down and focus on his work. The claimant ignored this and continued to talk about Medjugorje and he felt Ms McCusker had been disappointed with him. The claimant accepted he had told Ms McCusker to get baptised and accepted he knew Ms McCusker suffered from chronic pain and, as a charitable act, he had offered to pay for her to visit Medjugorje because there was a chance she could be cured of her condition.

(ii) Ms Jennings had taken over as line manager when Ms McCusker left. The claimant had told Ms Jennings that a team member was not talking to him and this was causing him crippling anxiety and impacting on his performance. Ms Jennings had not done anything constructive to address the situation.

(iii) The claimant believed it had been compulsory to attend the Showcase event in April 2017. He attended a workshop which focussed on using forms of meditation to destress. The claimant described that meditation was against his Christian belief system and he had objected to a Buddha being displayed on a screen. He had informed Ms Jennings of this and she had had no response to his objection. The claimant believed this encounter, along with his conversations with her

regarding Medjugorje, were the basis for a premediated plan by management, spearheaded by Mr Cairney, to dismiss him.

(iv) At the meeting on the 5 May, Ms Jennings had asked about mental health issues and insinuated he was suffering from serious depression. The claimant told Ms Jennings he sometimes got depressed but no more than the average person, and when he got down he prayed the rosary and visited the pilgrimage site at Medjugorje. The discussion had somehow got on to abortion.

(v) The claimant subsequently met with Mr Cairney and Ms Jennings on the 5 May, and Mr Cairney had asked the claimant if he was taking medication. Mr Cairney told the claimant he was a trained counsellor and knew the claimant was in denial. Mr Cairney told the claimant that if he did not get help for himself, then they were going to have a different conversation. The claimant protested that he was not mentally ill. The claimant felt he was questioned relentlessly about his mental health and so spoke candidly about his experiences in Medjugorje.

(vi) The claimant believed he was given an ultimatum to make contact with Workplace Wellness, and was forced to call them. He was also asked to hand back his security swipe pass.

(vii) The claimant made an appointment with his GP because he had been told to do so by Ms Jennings.

(viii) The claimant met with Ms Jennings and Mr Cairney again on the 9th May. He was feeling very anxious and upset, and felt he could not protest about what was happening because of the threat of dismissal if he was not seen to get help for himself. The claimant felt there was nothing he could do but comply with their demands. Mr Cairney instructed the claimant to take sick leave until further notice.

(ix) The claimant visited his GP on the 10th May, and told the doctor he had been threatened with dismissal if he did not get help for himself.

The claimant confided in his doctor about his experiences at Medjugorje and believed that because of the supernatural content the GP prescribed a high dose of Fluoxetine. The claimant took the medication because of the threat made by Mr Cairney regarding his job.

(x) The claimant protested about going to see the occupational health doctor but was told he could not return to work until he had seen him. His request to travel alone was denied.

(xi) On the 23 May, during the car journey to Edinburgh, the claimant told Mr Cairney of the history of Medjugorje and being present at apparitions of the Virgin Mary and on each occasion he had seen demonic possessions which were well documented on the internet. He did not mention about demons following him or what they would do to Mr Cairney or Ms Jennings.

(xii) The claimant felt very uncomfortable and agitated during the meeting with the occupational health doctor because of the effects of the medication. He felt really high. The claimant asserted that when he first mentioned the Virgin Mary the doctor had chuckled, which had upset him.

(xiii) The claimant believed the consultation had only lasted 20 minutes. He felt he could not be honest because Ms Jennings was present and would have reported back to Mr Cairney what had been said. The claimant blamed the doctor's refusal to allow him to return to work on the referral form which Ms Jennings had completed and which had referred to him seeing demons and apparitions and other untruths.

(xiv) The claimant had been contacted by the Police regarding comments that he was going to take Ms McCusker to Medgujorge. He was really anxious that he was going to be charged and in an attempt to prevent this, he told the Police that he was suffering from depression. The Police took no further action. The claimant believed the respondent

had deliberately lied to the Police by saying he was suffering from psychosis.

(xv) The claimant visited the psychiatrist on the 21 July 2017 and told her he was taking the antidepressants even though he did not believe he was depressed, because he had been threatened by Mr Cairney that he would lose his job if he did not get help for himself. The claimant told the psychiatrist of his experiences in Medgujorge and showed her the photographs.

(xvi) The claimant told Mr Cairney on the 5 September that he had his permission to obtain the psychiatrist's report. The claimant also told Mr Cairney that he believed the reason why he had got a sign from the Virgin Mary was because he was not fulfilling his obligations to her. The claimant believed this caused the respondent to decide he should not be permitted to return to work.

(xvii) The claimant accepted he met Ms Jennings in a shop on the 15 September. They exchanged pleasantries and he told her about the psychiatrist's report and other amazing things he had witnessed in Medgujorge. He said to her *"Decide for Christ for Medjugorje is the truth"*. Ms Jennings told the claimant she would have to report it, and he responded that she was too official.

(xviii) The claimant, prior to meeting Mr Henry, met with his trade union representative. Mr McLernon told the claimant he had gained access to the claimant's files, and that all of the telephone conversations with Ms Jennings and Mr Cairney had been recorded; that the occupational health report had said the claimant was psychotic and dangerous and that at a meeting with Ms Jennings and Mr Cairney he had been told that if the claimant returned to work he would be dismissed. The trade union representative had told the claimant that no-one would believe his version of events because he was mentally ill. Mr McLernon told the claimant that at the meeting with Mr Henry he should make out he was ill, and go for the 100% compensation payment.

(xix) At the meeting with Mr Henry the claimant, when asked about his health, made out he was unwell and told Mr Henry the findings of the psychiatrist were inconclusive.

(xx) The claimant did not appeal Mr Henry's decision because of the threat of dismissal if he returned to work.

66. We accepted the claimant, in giving his evidence, told us what he believed had happened. The claimant's version of events was at odds with what the respondent's witnesses told the tribunal. In those circumstances the tribunal has to decide who it believed and explain why it preferred certain evidence. We, in any dispute between the evidence of the claimant and the respondent's witnesses, preferred the evidence of the respondent's witnesses. We preferred the evidence of the respondent's witnesses because we found them to be credible, reliable, honest and straightforward. In contrast, and whilst we accepted the claimant's evidence reflected what he believed, we were not at all convinced his evidence reflected the reality of what had happened.

67. There were certain themes which the claimant repeated throughout the hearing. One theme was that he had been "allowed" to retain a building pass which would have given him access to various buildings. He questioned why the respondent allowed him to keep the pass if they truly believed he was mentally ill. The claimant reasoned that this "proved" he was not mentally ill because if he had been, he would not have been allowed to retain it.

68. A second theme was that if the respondent had believed him to be mentally ill, they would not have invited him to meet with Mr Henry. The claimant again reasoned this "proved" he was not mentally ill.

69. The claimant repeatedly referred to Ms Jennings' notes of telephone calls as *"covert recordings"*. We acknowledge the use of the term "covert" meant the claimant was not aware Ms Jennings was making a note of the discussion, but the notes were neither covert nor were they recordings of the discussions. Ms Jennings had a practice, as was usual within the respondent's organisation, of noting what was discussed during a phone call or a meeting

with an employee. The notes are not, and were never meant to be, a transcript of the conversation: the notes are Ms Jennings record of what was discussed.

70. The claimant attacked the credibility and reliability of the notes and insisted they had been "doctored" and amended to suit the respondent's case. We considered there was no basis for that attack. Ms Jennings, in response to questions from the claimant, time and again said that if words/phrases were used in her notes it was because the claimant had said them. We accepted Ms Jennings' evidence regarding this matter and we accepted her notes accurately reflected what she understood the claimant had been telling her in these discussions.

71. The claimant also invited the tribunal to find Ms Jennings' account of what occurred on the 15 September to be a "sob story" concocted to blackmail the claimant into accepting dismissal and the compensatory payment rather than return to work. The claimant placed great weight on the fact that when describing the incident to the tribunal Ms Jennings told us the claimant had been eating a macaroni pie and when he became angry and shouted, crumbs from his mouth had been spat out and landed on her. This was the first time Ms Jennings had mentioned a macaroni pie and the claimant considered this proved her version of events was concocted.

72. We preferred Ms Jennings' version of events. The claimant may very well not have realised the impact his behaviour had on Ms Jennings, but we accepted she had been scared by what happened. The fact Ms Jennings had to telephone Mr Cairney to meet her and walk her back to the office supported her evidence regarding the impact the incident had on her.

73. The claimant insisted Mr Cairney had made a threat that unless the claimant got help for himself they would be having a different conversation. The claimant interpreted this as meaning his job was at risk unless he sought help. The claimant also sought to argue that he had visited the GP, taken medication, attended at occupational health and at the psychiatrist all against his will and only because of this threat.

74. We found as a matter of fact that Mr Cairney did not tell the claimant that he had to get help for himself or they would be having a different conversation: he did not threaten the claimant. Mr Cairney accepted he and Ms Jennings were of the opinion the claimant needed help and were keen for him to get it, but nothing was forced on the claimant.

75. We also accepted Mr Cairney's evidence that he and his partner (now wife) do not discuss work when they are at home. Mr Cairney explained to the tribunal that it was not appropriate to discuss work matters and to make life easier, he and his wife had agreed a rule to that effect.

76. There was no dispute regarding the fact the psychiatrist's report was not provided to the respondent. The claimant explained that he had not wanted to post it in to the respondent because it would be opened by security guards who knew him. The claimant did not explain why he had not handed in a copy for Mr Cairney or taken a copy of it to the meeting with Mr Henry.

77. The claimant argued that he had expected the respondent to seek a copy of the report from his GP. We accepted Mr Henry's position that it was the claimant's report and open to him to bring it to the meeting, but he had not done so. Mr Henry questioned the claimant about the report and accepted the claimant's position that the report was inconclusive.

78. The claimant named an actual comparator, Brian McFarlane, in respect of his complaint of discrimination because of religion or belief. The claimant told the tribunal that Mr McFarlane used foul language at a meeting but no action had been taken against him. The claimant did not tell the tribunal what Mr McFarlane was alleged to have said. The claimant asked Mr Cairney about Mr McFarlane, but Mr Cairney had no knowledge of the individual and he questioned whether the claimant had the correct name.

79. There was reference during Mr Henry's evidence that on the 15 September another employee (Carol Hindman) reported an encounter with the claimant. Mr Henry did not know the specifics of the incident, only that this happened in addition to Ms Jennings' incident with the claimant that day. We have not

included this in our findings in fact because the incident was not investigated and was not relied upon in reaching the decision to dismiss.

Claimant's submissions

80. The claimant submitted he had done nothing wrong and that he had been compliant with every request made of him. He had been accused of being mentally ill and had tried to convince his employer this was not true. He had been threatened with loss of his job if he did not get help for himself.

81. The claimant believed he had been treated less favourably when the respondent (i) told him he was not allowed to speak about his religious belief system; (ii) being taken from his desk against his will on 5 May 2017 to a room and thoroughly questioned about his mental health; (iii) being taken for a second time that day to be questioned in a more hostile manner by two managers, culminating in a threat being made that he was to get help for himself or be dismissed and (iv) being labelled as having an obsession with the Virgin Mary.

82. The claimant identified Brian McFarlane as a comparator and told the tribunal that Mr McFarlane had used foul language during a meeting and no action had been taken against him.

83. The claimant submitted he had been treated less favourably than a hypothetical comparator would have been and he referred to other colleagues being allowed to speak about any subject they wished without fear of being threatened. The claimant asserted there was a pervasive, entrenched liberal and predominant secular belief system prevailing in the workplace.

84. The claimant believed he had been treated less favourably because of his religion or belief because his belief system was not a popular subject matter, particularly when talking about miracles which proved the existence of God.

85. The claimant submitted the respondent treated him less favourably when they perceived him to be a disabled person. The less favourable treatment occurred when the respondent used fear and intimidation by using a trade union representative to inform the claimant that if he appealed the decision to

dismiss and started back at work then the respondent was going to dismiss him and he would have no reference. The claimant referred to emails he had sent to his trade union representative at pages 254 and 256. The claimant believed these emails proved there was a perception by the respondent that he was mentally ill because the respondent was determined he was not going to return to work despite knowing there was a psychiatrist's report clearing him to return to work. The claimant further believed the respondent did not want him to return to work because they perceived him to be mentally ill and this was based in part on him telling the respondent that he had received a sign from the Virgin Mary.

86. The claimant submitted there had been collaboration between the respondent and the trade union: if not, he questioned how the trade union knew about the threat of dismissal for misconduct. The claimant asserted the respondent knew he did not commit the alleged act of aggression on Ms Jennings because if they had believed it they would not have allowed him access to the building to meet with Mr Henry.

87. The claimant believed the occupational health report had been tampered with.

88. The second alleged act of less favourable treatment was receiving a letter from Mr Cairney barring him from the office because of the false accusations made by Ms Jennings on the 15 September. This letter was sent because the respondent perceived the claimant to be mentally ill. The perception was based on the claimant having told Mr Cairney on the 5th September that he had received a sign from the Virgin Mary. Mr Cairney however knew the psychiatrist report had cleared him to return to work. This could not have been welcome news for Mr Cairney because he was determined to have the claimant dismissed. The chance meeting with Ms Jennings on the 15 September gave the respondent an opportunity to blackmail him into accepting the compensation dismissal payment or face dismissal if he dared to return to work.

89. The claimant believed he had been treated less favourably than a hypothetical comparator because if someone else had called Mr Cairney to tell him they

had been cleared to return to work they would not have been treated with the suspicion that they continued to be mentally ill.

90. The claimant submitted the acts of harassment were (i) being told not to discuss his experiences at Medjugorje. He explained that Mr Cairney had an interest in the claimant not discussing his religious beliefs because he was about to get married to his second wife. The claimant believed he had been instructed not to talk about his experiences at Medjugorje because of the supernatural content of what he was saying. (ii) The claimant was told by Ms McCusker that if he continued to talk about Medjugorje he would be in big trouble. The claimant continued to talk about it because he knew his manager was wrong to tell him to stop. (iii) He was accused by Ms Jennings and Mr Cairney of having depression, and threatened with dismissal if he did not comply with their instructions. (iv) The claimant believed he was working in a hostile environment because of his religious belief system.

91. These matters created a hostile or offensive environment because the claimant's belief system is not a social trendy subject matter and any discussions about religion are generally taboo.

92. The claimant submitted his dismissal was unfair because the respondent was well aware of the psychiatrist report clearing the claimant to return to work. In those circumstances there must have been an ulterior motive for dismissing him.

Respondent's submissions

93. Ms Macaulay set out a number of agreed findings of fact and a list of disputed facts. Ms Macaulay invited the tribunal to prefer the evidence of the respondent's witnesses where facts were disputed.

94. Ms Macaulay set out the statutory basis of the claims being brought by the claimant and then addressed the application of the law to the facts.

95. Ms Macaulay referred the tribunal to the case of **Chief Constable of Norfolk v Coffey UKEAT/0260/16** regarding perception of disability, and in particular to paragraphs 20 – 26 and 41 – 50. Ms Macaulay acknowledged this case

was unusual because the claimant argued he was not disabled, but the occupational health report said he was. Furthermore, the claimant had been in receipt of Disability Living Allowance after his dismissal. The respondent's position on whether the claimant was a disabled person was neutral.

96. Ms Macaulay submitted no evidence had been provided by the claimant regarding his comparator Mr McFarlane and any statement made by him. She submitted the claimant had not done enough to show a prima facie case of direct discrimination. The claimant had asked Mr Cairney about Mr McFarlane, but Mr Cairney had not known of him. Mr Cairney's evidence was that the working environment with Risk and Intelligence Service was different from that in the contact centre or security because it was a quiet environment which recognised the need for focus on the work being carried out.

97. There was no dispute regarding the fact Ms McCusker did tell the claimant to tone it down, and to focus on his work. The claimant believed this had happened because Janice, who was Mr Cairney's partner at the time, must have told Mr Cairney about what the claimant was saying about his experiences at Medgujorge, and Mr Cairney must have told Ms McCusker to tell the claimant to tone it down. Mr Cairney denied this and explained to the tribunal that he and his wife have a rule about not discussing work issues at home.

98. There was no dispute regarding the fact the claimant had informed Ms Jennings about the Buddha image at the Showcase event. Ms Jennings had considered the exchange to be innocuous at the time, and there was no evidence to support the claimant's assertion that this exchange had fostered resentment or ill will on the part of Ms Jennings.

99. There was no dispute regarding the fact Ms Jennings made notes following her meetings and telephone conversations with the claimant. This is standard procedure for the respondent, and, it was submitted, entirely normal for most employers to keep a note of contact with an employee during absence. Ms Macaulay submitted this was not an act of harassment or less favourable treatment, and an actual or hypothetical comparator would have been treated

in the same way. Ms Macaulay referred the tribunal to the **Pemberton v Inwood 2018 EWCA Civ 564** case and in particular to paragraphs 75, 76 and 88 of the Judgment.

100. Ms Macaulay invited the tribunal to accept the notes made by Ms Jennings: they were made contemporaneously and sought to capture the main points of the lengthy and numerous discussions she had with the claimant. They were not fabricated or exaggerated. Ms Jennings had been a credible and straightforward witness. In contrast to this the claimant was often selective in what he could remember and frequently blamed the taking of medication to explain why he had made a particular statement. Ms Macaulay invited the tribunal not to accept this explanation in circumstances where the dates demonstrated the claimant had just started taking the medication and it would be surprising if it had had the effect the claimant described. The claimant also sought to distance himself from incidents which did not show him in a good light: for example, defacing the poster in Edinburgh.

101. Ms Macaulay reminded the tribunal that Ms Jennings' position when dealing with the claimant was that she had not been concerned about the content of what he said, but about the fact of the claimant's continual repetition of certain points, the increasing agitation and the negative impact this was having on him. Ms Macaulay submitted the respondent had rightly been concerned about the claimant.

102. The respondent accepted it suggested to the claimant that he contact Workplace Wellness, and Ms Jennings gave the claimant the number to contact. The claimant was not instructed to make contact. The respondent would have treated any other employee about whom they were concerned in this way.

103. The claimant alleged he was "escorted" from the building and that this constituted harassment on grounds of his religion or belief and because it related to his mental health. The respondent's position was that it did not escort the claimant from the building. Mr Cairney's evidence was that he waited outside the door of the general office whilst the claimant collected his

belongings, and then walked with the claimant to the exit and discreetly swiped his card to allow the claimant to exit. This was all done to keep matters low key and discreet.

104. Ms Macaulay noted that much had been made about the removal of the security pass. Mr Cairney recovered the claimant's security pass. He was not aware the claimant retained a "building pass".

105. The claimant maintained that Mr Cairney had threatened him that if he did not get help, he would be dismissed. The claimant relied on a note of his discussion with Workplace Wellness and the psychiatrist's report, where he had explained this and had it noted, as "proof" of the threat. Ms Macaulay submitted limited weight should be placed on these documents because they record what the claimant said at the time. In any event both Ms Jennings and Mr Cairney denied any threat and their evidence should be preferred.

106. The respondent rejected the claimant's suggestion that he was forced to attend an occupational health appointment with Mr Cairney and Ms Jennings. The claimant made it clear to Ms Jennings that he had no-one else that he could call upon to attend with him and he showed her his phone to demonstrate that he had deleted all of his contacts other than his GP.

107. The claimant agreed to Ms Jennings accompanying him during the consultation and Ms Jennings' evidence on this point should be preferred to that of the claimant. Ms Macaulay also invited the tribunal to find (i) the appointment lasted at least 45 minutes, and not the 20 minutes as suggested by the claimant and (ii) Dr McElearney did not chuckle. No reference was made to this allegation at the time and this cast doubt on the issue subsequently raised by the claimant.

108. Ms Jennings accepted she shared her concerns regarding the claimant in terms of his own safety and that of Ms McCusker with Mr Milne. A threat assessment was undertaken and contact was made with the Police. The tribunal was invited to accept Ms Jennings' evidence that it was not the religious content of what the claimant expressed, but the continued reference to Ms McCusker and taking her away which caused her to raise this. Ms

Macaulay submitted this was not an act of harassment or less favourable treatment: the respondent found itself in an unusual and difficult situation and sought to act appropriately.

109. Ms Macaulay invited the tribunal to accept Ms Jennings' evidence of the incident on the 15 September: it was clear she had been genuinely shaken by the encounter. The incident was not fabricated by Ms Jennings to try to bring about the claimant's dismissal. Ms Jennings continues to attend counselling because of this incident. She reported the matter to the Police: the fact the Police did not visit the claimant does not undermine Ms Jennings' account of the incident.

110. The claimant made repeated reference in his evidence to a concerted effort by the respondent to have his employment terminated. Ms Macaulay submitted this simply was not the case. Mr Cairney and Ms Jennings were not the villains of the peace: they had genuine concerns regarding the claimant's state of health and sought to offer support and advice as appropriate.

111. The respondent had genuine concerns the claimant would not be honest with his treating physicians. These concerns were based on numerous statements made by the claimant to Ms Jennings that he would not tell them the full story for fear of being sectioned. Ms Macaulay submitted the claimant had sought to downplay this by stating he was open and honest with the psychiatrist, but in a note made by Ms Jennings after a discussion with the claimant the day after his appointment with the psychiatrist, she noted the claimant had said he had not disclosed everything to the psychiatrist. It can also be noted from the psychiatrist report that no mention was made of the claimant being frightened, cutting off contact with others, checking his food for contaminants or that he wanted a colleague to visit Medgujorge.

112. Ms Macaulay submitted the psychiatrist report did not, as the claimant repeatedly stated, "clear [him] for work". The claimant accepted he was still suffering from anxiety, and he continued to be signed off as unfit for work by his GP.

113. Ms Macaulay invited the tribunal to accept Ms Jennings' evidence that she asked the claimant for the report, but it was not provided. The claimant knew the respondent wanted to see the report and he could have handed it in or brought a copy of it to the meeting with Mr Henry.

114. The claimant suggested there was collusion between the respondent and his trade union, and he relied on two emails to "prove" this. Ms Macaulay invited the tribunal to have regard to the fact the emails are the claimant's emails, setting out his position and accordingly little weight could be attached to them. In any event the emails demonstrate the claimant was told of a "risk" of dismissal if he returned to work, rather than it being the foregone conclusion he spoke of during his evidence.

115. Ms Macaulay submitted the claimant was under the misapprehension he was dismissed for being psychotic. That is not the case. The claimant had been absent for five months and continued to be signed off as unfit for work because of anxiety and depression. The claimant told Mr Henry that he was not fit for work and provided a fit note for another 8 weeks. Mr Henry determined on this basis that the claimant's absence could no longer be supported.

116. The claimant asked the tribunal to accept he presented a false picture of ill health to Mr Henry because that is what he had been told to do by his trade union. However, it was submitted there was no indication of this at the meeting with Mr Henry, who had to make his decision based on the information at the time.

117. The reason for dismissal was capability in terms of section 98(2)(a) Employment Rights Act. Ms Macaulay referred to the case of **Wilson v Post Office 2000 IRLR 834** at paragraph 61 and **Ridge v HM Land Registry 2014 UKEAT/0485/12** and submitted that what was at the forefront of the respondent's mind when they dismissed the claimant was his health and when he might be in a position to return to work, if at all.

118. Ms Macaulay submitted that in considering the reasonableness of the decision to dismiss, the tribunal should have regard to the nature of the

employee's illness, the prospects of the employee returning to work, the need for the employer to have the work done, the effect of the absence on the rest of the workforce, the extent to which the employee was made aware of the position; the employee's length of service and for how long the respondent could be expected to keep the claimant's job open for (**BS v Dundee City Council 2013 CSIH 91**).

119. Ms Macaulay invited the tribunal to have regard to what the claimant told Mr Henry at the time of the meeting, and not what the claimant now said.

120. Ms Macaulay submitted the **Burchell** test had been satisfied and that any reasonable employer considering the information which Mr Henry had, would be acting reasonably in dismissing an employee with notice. The dismissal was procedurally fair and the claimant had chosen not to appeal the decision.

121. Ms Macaulay invited the tribunal to dismiss the claim. However, if the tribunal found for the claimant on any aspect of his claim, it was submitted the fact of the claimant having received a compensation payment of £25,67.25 should be taken into account, and any compensation should be reduced because the claimant failed to mitigate his losses.

Discussion and Decision

Direct discrimination because of religion or belief

122. The claimant brought a claim of direct discrimination alleging he had been treated less favourably because of religion or belief. We had regard firstly to the terms of section 13 of the Equality Act which provide:

"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."

123. A person bringing a complaint of direct discrimination must demonstrate:-

- s/he has been treated less favourably in comparison to an actual or hypothetical comparator and
- that the reason for the less favourable treatment was because of (in this case) religion or belief.

124. The claimant was asked to provide additional information to clarify the allegations of less favourable treatment. He provided that information in a document attached to an email dated 14 May 2018, as follows:

- the claimant was told by Ms McCusker to “tone it down”;
- he complained to Ms Jennings about a Buddha being shown on a screen at the Showcase event;
- on the 5 May 2017 the issue of abortion had been discussed with Ms Jennings and this had fostered a feeling of hostility towards the claimant and his religion;
- Ms Jennings’ notes of phone calls with the claimant note him as having an obsession with the Virgin Mary;
- in the phone call with Mr Cairney on the 5 September the claimant told Mr Cairney that in Medjugorje his face had appeared in the form of a cloud at the exact time the Virgin Mary had appeared. The cloud first changed into a love heart and then into his face. The claimant told Mr Cairney this sign was a reminder from the Virgin Mary that he was not fulfilling his obligation of what was being asked of him. Mr Cairney must have thought the claimant crazy;
- the meeting with Ms Jennings on the 15 September gave the respondent an opportunity to dismiss him by telling lies to the Police, in circumstances where all the claimant had said was “decide for Christ”.
- he had been forced to attend a psychiatrist because of his religious experience and
- whilst on medication it had been morally repugnant and discriminatory to judge his character.

125. The claimant, in his submission to the tribunal, also relied on the meetings on the 5 May as being less favourable treatment.

126. The key to establishing direct discrimination is the comparative exercise. Section 23 Equality Act makes clear that there must be no material difference between the circumstances relating to each case when determining whether

the claimant has been treated less favourably than a comparator. In other words, in order for a valid comparison to be made, like must be compared with like.

127. We also had regard to the Explanatory Notes to the Act which summarise that the comparator may be an actual or hypothetical person who does not share the claimant's protected characteristic and is in not materially different circumstances from him.

128. We decided it would be appropriate to consider each alleged instance of less favourable treatment, and decide whether there was less favourable treatment and if so, the reason for it.

129. The first allegation of less favourable treatment related to the claimant being told by Ms McCusker to tone it down. We noted there was no dispute regarding the fact Ms McCusker did tell the claimant to tone it down, although we found as a matter of fact that Ms McCusker told the claimant to tone it down and focus on his work.

130. The claimant sought to compare his treatment to that of an actual and a hypothetical comparator. The actual comparator was Brian McFarlane. The claimant told the tribunal that Mr McFarlane had used inappropriate language in the workplace but no action had been taken against him. The claimant did not provide any details of the inappropriate language, but there was no suggestion the inappropriate language related to religion or belief.

131. The claimant also did not provide any evidence to inform the tribunal whether Mr McFarlane was someone who shared the claimant's protected characteristic or not.

132. We concluded, for these reasons, that a comparison of the claimant's treatment with that of Mr McFarlane could not be described as comparing like with like because Mr McFarlane was not making comments regarding religion or religious experiences and we do not know whether Mr McFarlane shared the claimant's protected characteristic or not. We accordingly concluded the

claimant was not able to demonstrate he had been treated less favourably than Mr McFarlane.

133. The claimant also relied on a hypothetical comparator. The tribunal must construct a hypothetical comparator and, in doing so, we considered the hypothetical comparator would be an employee who was not of the Catholic faith, but who had spoken of his/her faith and experiences in the same, or a similar way, to the claimant.

134. We asked ourselves whether, if a hypothetical comparator had been talking a lot whilst at work about their religious experiences, they would have been told to tone it down. We accepted that what Ms McCusker asked the claimant to do was to tone it down and focus on his work. We also accepted the environment within Risk and Intelligence Services is one of quiet and calm because of the nature of work being undertaken. We considered that against that background, an employee constantly talking would be an issue. We concluded a hypothetical comparator, acting as the claimant had, would have been spoken to by the line manager and asked to tone it down, and focus on their work. This is a legitimate and reasonable management instruction. There was no suggestion the claimant could continue talking but not about religion. The instruction was clear: tone it down and focus on the work rather than focusing on chatting.

135. The claimant invited the tribunal to accept that Mr Cairney's wife (Janice) had told Mr Cairney about the claimant talking about his religious experiences and Mr Cairney had instructed Ms McCusker to tell the claimant to keep quiet. The claimant suggested Mr Cairney did this because he was going to marry for a second time. We preferred Mr Cairney's evidence regarding this matter, and found as a matter of fact that Mr Cairney did not instruct Ms McCusker to tell the claimant to tone it down.

136. We concluded, with regard to the first allegation of less favourable treatment, that the claimant was not treated less favourably than Mr McFarlane was, or a hypothetical comparator would have been.

137. The second allegation of less favourable treatment concerned a complaint to Ms Jennings regarding a Buddha being shown on a screen at the Showcase event, and Ms Jennings failure to act on the complaint. We found as a matter of fact that the claimant made a comment in passing to Ms Jennings about the Buddha on the screen: there was no complaint.

138. We accepted a hypothetical comparator not of the claimant's religious belief may also have been offended by this if they had understood they were attending a non-religious event. We concluded however that a hypothetical comparator commenting to Ms Jennings about this, would have received the same response from her: they would have been treated in the same way as the claimant. We say that because the comment made by the claimant was a passing comment and not a complaint, and Ms Jennings would have treated any other passing comment in the same way.

139. We concluded for these reasons that the claimant had not been treated less favourably than a hypothetical comparator would have been in the same or similar circumstances.

140. The third allegation concerned the claimant's discussion with Ms Jennings regarding abortion and the claimant's belief that this caused Ms Jennings to feel hostile towards him and his religion. We noted there was no dispute regarding the fact a discussion did take place and Ms Jennings and the claimant expressed different views on the subject of abortion. We accepted Ms Jennings' evidence that she was not surprised to hear the claimant's views: she knew the claimant was of the Catholic faith and his views accorded with the Church's stance on this. Ms Jennings is also of the Catholic faith.

141. The claimant alleged this difference of opinion caused Ms Jennings to feel hostile towards him and his faith. We considered that an alleged feeling of hostility cannot, of itself, amount to less favourable treatment. The hostility would need to result in some action, decision or inaction for there to have been less favourable treatment. The claimant did go on to allege that Ms Jennings took certain action because of this hostility, and we deal with that below. We concluded, however, that in respect of the third allegation of less

favourable treatment that an alleged feeling of hostility could not, without more, amount to less favourable treatment.

142. The fourth allegation of less favourable treatment was that Ms Jennings' notes of phone calls noted him as having an obsession with the Virgin Mary. We noted there was no dispute regarding the fact Ms Jennings took notes of all phone calls and meetings with the claimant. We accepted her evidence that she noted down her understanding of what the claimant told her. There was reference in the notes to the claimant having an obsession with the Virgin Mary.

143. We concluded the reference to the claimant having an obsession with the Virgin Mary was not less favourable treatment. We reached that conclusion because we were entirely satisfied that Ms Jennings would have noted telephone conversations with a hypothetical comparator in the same way, and that those notes would have recorded the main points made by the hypothetical comparator. We say that because if it is the practice in the respondent organisation, for mangers to make notes of meetings and phone calls with employees. Further, we considered it a matter of good practice for such notes to be kept in the context of the attendance management process.

144. The fifth allegation of less favourable treatment concerned the phone call with Mr Cairney on the 5 September when the claimant told Mr Cairney that in Medjugorje his face had appeared in a cloud at the exact time the Virgin Mary had appeared. The claimant was of the opinion that Mr Cairney must have thought him "crazy" because of what he had described.

145. Mr Cairney was asked about this in cross examination and rejected the suggestion he had thought the claimant crazy. Mr Cairney noted the term "crazy" was the claimant's language and not a term he would use. We accepted Mr Cairney's evidence and found as a matter of fact Mr Cairney did not think the claimant "crazy". The position of Mr Cairney and Ms Jennings was very much that what the claimant described was what he believed and it was not for them to test it or challenge it or doubt it. The issue for them was very much the claimant's behaviour: the claimant's continual repetition of

events in Medjugorje, his increasing agitation, deletion of his contacts (the claimant could not give the respondent a name/number for next of kin), his apparent isolation and Ms Jennings' view that the claimant had experienced something which had scared him.

146. We had regard to the case of **HM Land Registry v Grant 2011 ICR 1390** where it was held that the fact an employee believed something was less favourable treatment did not of itself establish that there had been less favourable treatment.

147. We accepted that having someone think you are crazy could amount to less favourable treatment, but that was not the situation in this case because we accepted Mr Cairney did not think the claimant was crazy. We decided, for this reason, that this allegation did not amount to less favourable treatment.

148. The sixth allegation of less favourable treatment related to the meeting with Ms Jennings on the 15 September and the claimant's assertion that this had given the respondent an opportunity to dismiss him by telling lies to the Police. The claimant asserted Ms Jennings had made up the incident. We could not accept this suggestion because we preferred the evidence of Ms Jennings. We found as a matter of fact the claimant shouted at Ms Jennings and invaded her personal space by coming too close to her face whilst shouting at her. Ms Jennings was scared by the encounter. Ms Jennings lodged an internal complaint with the respondent and also reported the matter to the Police.

149. We were entirely satisfied that if a hypothetical comparator had acted in the same or a similar manner to the claimant, he would have been treated in the same way by the respondent. We say that because the respondent would have acted in the exercise of their duty of care to Ms Jennings and other employees concerned. We concluded for this reason that the claimant had not been treated less favourably.

150. The seventh allegation of less favourable treatment concerned an allegation that the claimant had been forced to attend a psychiatrist. We could not accept that he was "forced" to do this. The referral to the psychiatrist came from the claimant's GP. This was not something the respondent could control or

influence. The claimant attended of his own free will. We concluded this was not an instance of less favourable treatment.

151. The eighth allegation of less favourable treatment concerned the meetings on the 5 May with Ms Jennings and Mr Cairney, and the claimant's belief that he had been threatened by Mr Cairney that if he did not get help he would be dismissed. The claimant's position was that he had been forced by Ms Jennings and Mr Cairney to seek help in circumstances where he did not believe he needed help, and he had gone along with the suggestions made by Ms Jennings and Mr Cairney because if he failed to do so he would lose his job.

152. The claimant clearly formed the belief that he was being told by Mr Cairney that he had to seek help or he and Mr Cairney would be having a different discussion – that is, a discussion about dismissal. The fact the claimant formed that belief was supported by the fact he told Workplace Wellness and the psychiatrist this.

153. Mr Cairney accepted the claimant had been encouraged to seek help and support, but denied there had been any threat of dismissal if the claimant failed to do so. Mr Cairney was supported in his position by Ms Jennings. We accepted their evidence and found as a matter of fact that no "threat" of dismissal was made.

154. We next considered the events of the 5 May. We found as a matter of fact that Ms Jennings approached the claimant on 5 May out of concern for his welfare. There was no dispute regarding the fact the claimant gave a detailed account during that meeting of previous depression and anxiety and of his visits to Medjugorje and what he had experienced there. We accepted Ms Jennings' evidence that the claimant grew increasingly agitated, and she spoke with Mr Cairney for advice regarding how to deal with the situation. There was no dispute regarding the fact the claimant was advised to speak to Workplace Wellness; make an appointment with his GP and take some days off.

155. We considered how a hypothetical comparator would have been treated in the same or similar circumstances. We noted all of the respondent's witnesses referred on several occasions to the duty of care owed to employees. We formed the impression from the evidence that there is a proactive approach by the respondent to this matter: there is a quiet room at work, there is Workplace Wellness and there was reference to time off being allowed. We considered Ms Jennings' meeting with the claimant on the 5th May was an example of this proactive approach. The claimant was a relatively new employee, undergoing training and who appeared to need some reassurance and support. We concluded Ms Jennings could not be faulted for approaching the claimant in those circumstances. We further concluded that a hypothetical comparator who did not share the claimant's protected characteristic, but who was in the same or similar circumstances to the claimant, would have been treated in the same way. We reached that conclusion having had regard to the proactive approach of the employer to these issues.

156. We concluded, for the reasons set out above, that a hypothetical comparator, acting in the same way as the claimant that day, would have been treated in the same way. The respondent has a duty of care towards its employees, and we considered Ms Jennings and Mr Cairney were acting in accordance with that duty when they spoke with the claimant, and would have acted in accordance with that duty when dealing with a hypothetical comparator employee.

157. We took a step back from the allegations referred to by the claimant to consider the crux of this case which was the claimant's belief that the respondent had acted as it did because he disclosed his religious experiences in Medjugorje. We could not accept that suggestion for a number of reasons. Firstly, because we preferred the evidence of Ms Jennings and Mr Cairney regarding what happened on 5 May and the reasons why they acted as they did. Secondly, we accepted the issue for Ms Jennings and Mr Cairney was the way in which the claimant was acting rather than the religious content of what he was saying. We considered we were supported in that view by the

fact the claimant was initially sent home on the 5th May and told to take a few days off before returning to work. We considered that if the respondent's issue had been with the religious content of what the claimant had told them, the respondent would not have adopted such a supportive approach. Thirdly, the claimant was in need of support and assistance: he was in a highly agitated and anxious state. Fourthly, we accepted, as set out above, that the respondent has a proactive approach to their duty of care to employees and their actions accorded with that.

158. We were entirely satisfied Ms Jennings and Mr Cairney acted as they did because they believed the claimant needed some support. We were further satisfied that a hypothetical comparator, acting as the claimant had acted, would have been treated in the same way by Ms Jennings and Mr Cairney. We say that for the reasons set out in the above paragraph.

159. We, in conclusion, decided to dismiss this complaint because the claimant has not been able to show he was treated less favourably than an actual comparator was, or a hypothetical comparator would have been. We should make clear that even if the claimant had been able to show less favourable treatment, we would not have found this happened because of the claimant's religion. We say that because (accepting the evidence of Ms Jennings and Mr Cairney) we were entirely satisfied the respondent acted out of concern for the claimant because of the way he was acting and not because of the religious content of what he was saying.

Direct discrimination (perceived disability)

160. The claimant brought a claim that he had been treated less favourably by the respondent because they had perceived him to be a disabled person. We noted there was no dispute regarding the fact section 13 Equality Act is wide enough to encompass perceived disability. The claimant's position was that he was not a disabled person and he relied on the psychiatrist's report to support that position.

161. We, in considering this claim, firstly had regard to the alleged acts of less favourable treatment, which the claimant had identified in a document

attached to an email dated 12 June. Two acts were relied upon: (i) the respondent used fear and intimidation tactics by using a trade union representative to inform the claimant that if he appealed the decision to dismiss and started back at work then the respondent would sack him with no reference and no compensation and (ii) the claimant received a letter barring him from the office because of false accusations made up by Ms Jennings.

162. We next had regard to section 6 of the Equality Act which sets out the definition of disability, and provides that a person has a disability if s/he has a physical or mental impairment and the impairment has a substantial and long term adverse effect on his/her ability to carry out normal day to day activities.

163. We also had regard to section 23 of the Equality Act regarding the comparison to be made for the purposes of a claim of direct discrimination. Section 23(1) states *that "on a comparison of cases for the purposes of section 13 .. or 19, there must be no material difference between the circumstances relating to each case."* Section 23(2) makes specific provision for cases involving disability and states *"The circumstances relating to a case include a person's abilities if on a comparison for the purposes of section 13, the protected characteristic is disability .."*.

164. We then turned to consider the issue of whether the respondent perceived the claimant to be a disabled person. We had regard to the case of **J v DLA Piper UK LLP 2010 IRLR 936** where some of the potential difficulties with the issue of perceived disability were highlighted. It was stated:

"What the putative discriminator perceives will not always be clearly identifiable as "disability". If the perceived disability is, say, blindness, there may be no problem: a blind person is necessarily disabled. But many physical or mental conditions which may attract adverse treatment do not necessarily amount to disabilities, either because they are not necessarily sufficiently serious or because they are not necessarily long term. If a manager discriminates against an employee because he believes her to have a broken leg, or because he believes her to be "depressed", the question whether the effects of the perceived injury, or of the perceived depression, are likely to last

more or less than 12 months may never enter his thinking, consciously or unconsciously (nor indeed, in the case of perceived depression, may it be clear what he understands by the term). In such a case, on what basis can he be said to be discriminating "on the ground of" the employee's perceived disability?"

165. We noted that in order for an employer to have perceived someone as disabled they must have wrongly supposed that all of the elements of the definition of disabled person (section 6 of the Equality Act) were satisfied. We considered there could be no dispute regarding the fact the respondent considered the claimant had a mental impairment. The claimant was signed off as unfit for work because of anxiety/depression, and he told Ms Jennings and Mr Cairney he had previously suffered from these conditions. In addition to this Ms Jennings and Mr Cairney offered the claimant advice regarding Workplace Wellness and getting a GP appointment because they considered he was in need of support. They also ensured the referral to occupational health was a double length face to face appointment.

166. We next asked ourselves whether Ms Jennings and/or Mr Cairney thought the mental impairment had a substantial adverse effect on the claimant's ability to carry out normal day to day activities. We noted Ms Jennings and Mr Cairney could see for themselves the agitated state in which the claimant presented on the 5th and 9th May. Ms Jennings also had insight through the conversations she had with the claimant when keeping-in-touch phone calls were made. The claimant told Ms Jennings repeatedly about his experiences in Medjugorje, and that he was fasting, only leaving the house to go to Mass and having little/no contact with family and friends.

167. Ms Jennings' notes of her phone calls with the claimant demonstrated the many and varied things raised by the claimant during these phone calls, including the Virgin Mary, demons and the fact he felt Ms McCusker should go to Medgujorge to try to get cured. We considered the evidence demonstrated the respondent was concerned about the claimant's mental health, but there was nothing to suggest the respondent applied its mind to

whether the effects of the mental impairment had a substantial adverse effect on the claimant's ability to carry out normal day to day activities.

168. We noted with regard to the issue of "long term" that the claimant referred to having had a depressive episode some years previously, and Mr Cairney was aware illnesses which were recurring could be covered by the Equality Act. The respondent also had the benefit of the occupational health report which referred to recovery within 3 months being possible if the claimant engaged with the right services, but taking as long as 12 – 18 months, if at all, if he did not do so. The respondent knew, as at the date of dismissal, that the 3 month time scale had passed. We inferred from this that the respondent believed the impairment and its effect would be long term.

169. We, in addition to the above, had regard to the fact the respondent had the occupational health report in May 2017. Ms Jennings had, in the referral to occupational health, asked about the issue of reasonable adjustments. The doctor advised there were no reasonable adjustments because the claimant was not fit to be at work.

170. The occupational health doctor, in his discussion with Ms Jennings on the 15 August, also made reference to the claimant being covered by the Equality Act.

171. The respondent also received fit notes from the claimant's GP during the period May to September 2017, which confirmed the claimant was not fit for work because of anxiety/depression.

172. We, having had regard to all of the above points, concluded the respondent did perceive the claimant to be a disabled person. The medical evidence available to the respondent confirmed the claimant had anxiety/depression, and the occupational health report confirmed the impairment may be of a more serious nature. It was difficult to determine whether the respondent had applied its mind to the issue of whether the impairment was having a substantial adverse effect on the claimant's ability to carry out normal day to day activities, but we considered that overall, and on balance, and taking into

account the medical evidence, the respondent perceived the claimant to be a disabled person.

173. We must now determine whether the respondent treated the claimant less favourably because they perceived him to be a disabled person. The first alleged act of less favourable treatment was that the respondent used fear and intimidation tactics by using a trade union representative to inform the claimant that if he appealed the decision to dismiss and started back at work, the respondent would sack him with no reference and no compensation.

174. The claimant's position was that the respondent had conspired with the trade union to force the claimant into the position of agreeing with Mr Henry for fear of being dismissed without compensation if he returned to work. The respondent's witnesses denied the allegation of conspiring with the trade union. We accepted their evidence.

175. We were entirely satisfied the respondent did not use "fear and intimidation tactics" with the claimant. There were two separate matters which required to be addressed: (i) the claimant's long term and ongoing sickness absence and (ii) the complaint made by Ms Jennings following the incident on the 15 September. The respondent's Compensation Scheme provides compensation for employees who lose their job through no fault of their own. The scheme makes clear that there is no compensatory payment made to employees who are dismissed for conduct issues. Accordingly, the reality of the situation facing the claimant was that if the respondent dismissed him because there was no sign of a return to work within a reasonable timeframe, a compensatory payment could be made. If however the claimant returned to work, he may face a disciplinary investigation and hearing, which may result in his dismissal with no compensation because he would not have been eligible for compensation following a dismissal for misconduct.

176. The claimant did not appeal against the decision to dismiss him. He referred to two emails to his trade union representative and it is helpful to have regard to these emails. On the 5th October (page 254) the claimant emailed Mr McLernon to *confirm "I will not be making an appeal. I'm just accepting it. I'm*

just glad to put all this crap behind me and move on with my life. I really do want to return to work but as you have said, they will probably dismiss me at some point, even though I have done nothing wrong. …". The claimant sent a further email on the 6th October (page 256) stating *"It's pointless going through the appeal process as I can't risk the chance of being dismissed at some point. If that was the outcome I would be without compensation, no reference, no job and ultimately no future. I'd be crazy to go through with it. I value your good judgment on this one..".*

177. We accepted the claimant's evidence (supported by these emails) that he was advised by the trade union not to appeal against the decision to dismiss. The reason for that advice was the risk to the compensatory payment should the appeal be successful and the claimant return to work. The emails demonstrated the claimant accepted the advice at the time and thanked his trade union representative for his "good judgment on this one".

178. We further noted the emails make clear the claimant understood there was a risk he would be dismissed if he returned: it was not a foregone conclusion as he endeavoured to portray at this hearing.

179. We acknowledged the claimant was keen to return to work. The claimant insisted the psychiatric report *"cleared him to return to work"*. This statement did not correctly reflect the terms of the psychiatric report. The report (page 214) made clear the claimant was referred to the Community Mental Health team "with a query of him being psychotic". The report confirmed the claimant had described his unusual experiences whilst at Medgujorge and stated: *"I could not illicit any delusions of reference, grandiosity or paranoia."* The doctor confirmed that at present she could not diagnose him with religious delusional disorder, and could not illicit any signs of depression during the interview. The report concluded with the doctor stating she intended to see the claimant again in six months and providing his mental health was stable, she planned to discharge him.

180. The report from occupational health had referred to the claimant being "mildly psychotic". The psychiatric report undermined that diagnosis. The psychiatric

report did not clear the claimant to return to work: he was still signed off by his GP as being unfit for work.

181. We, in conclusion, found there was no less favourable treatment as alleged by the claimant because the factual basis of the allegation was not shown to be correct.

182. We should state that if we had been required to consider whether the claimant had been treated less favourably than a hypothetical comparator without his perceived disability would have been, then we would have been entirely satisfied they would have been treated in the same way. We say that because it would be in the interests of an employee facing dismissal to be given advice about the reality of the situation they faced, and to receive as much compensation as possible and for the trade union to give advice to their member about these matters.

183. We should further make clear that if the claimant had shown that he had been treated less favourably, we would have had to determine whether that less favourable treatment occurred because of the perceived disability. We would have been entirely satisfied the less favourable treatment did not occur because of the perceived disability. We say that because the reason the claimant was made aware of the risk of dismissal should he return to work, was because if the respondent ultimately dismissed the claimant for reasons of misconduct, he would not receive a compensatory payment.

184. The second allegation of less favourable treatment concerned the letter sent to the claimant barring him from the office because of false accusations made by Ms Jennings. The letter (page 226) was sent by Mr Cairney and was in the following terms: *" ..Can you note from immediate effect that you refrain from contacting Emma Jennings by telephone/text or in written form. If you are required to contact the office by telephone can you contact Gordon Baillie or Ronnie Martin. Any written correspondence including Fit for Work notes from your GP should now be posted to this office, marked for the attention of Gordon Baillie who will undertake management responsibility for you at this*

time. There will no longer be a requirement for you to attend the Office (Portcullis House) to submit any correspondence/Fit notes."

185. We could not accept this letter "barred" the claimant from the office. We considered we were supported in this view by the fact the claimant was invited to attend a meeting with Mr Henry in Portcullis House. The letter did advise the claimant not to contact Ms Jennings and to post in any further Fit for Work notes. We were satisfied a hypothetical comparator without the claimant's perceived disability, but in the same or similar circumstances, would have been treated in the same way. We say that because we were satisfied a hypothetical comparator involved in a similar incident with their line manager would have been treated in the same way because the respondent has a duty of care to its employees and this would extend to removing contact with an employee who had caused their line manager to feel scared and intimidated.

186. We should confirm that if the claimant had shown there was less favourable treatment, we would have been satisfied the less favourable treatment did not occur because of the perceived disability. We say that because the reason for the letter being sent to the claimant was because he had caused fear and alarm for Ms Jennings and not because the respondent perceived the claimant to be disabled.

187. We, in conclusion, and for the reasons set out above, decided to dismiss the claim of direct discrimination because of perceived disability.

Harassment

188. The claimant brought a claim of harassment in terms of section 26 of the Equality Act. That section provides that:-

"A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic and,

(b) the conduct has the purpose or effect of –

(i) violating B's dignity or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

189. The claimant set out the alleged acts of harassment in the Agenda completed for the first case management preliminary hearing in April 2018. The alleged acts were:-

- at the end of April 2017 I was escorted to a room by my line manager Emma Jennings, inside waiting for me was Jim Cairney. I was in the room with both managers who thoroughly questioned me about my mental health. I denied having any mental health problems. I was then informed by Jim Cairney I would lose my job if I wasn't seen to get help for myself. It was then I informed them of my experiences on pilgrimages.
- At the end of April 2017 my pass was taken from me and then escorted out of the building by Jim Cairney.
- 8 May I was forced to take medication because Jim Cairney said I had to be seen in getting help for myself. The medication had a detrimental effect on my mental and physical health.
- May 2017 I was taken to occupational health by Jim Cairney and Emma Jennings against my wishes.
- July 2017 my employer made an unjustified phone call to the police. I received a phone call from the police to report to the nearest police station. I believe this was orchestrated by Ms Jennings.
- Phone conversations were covertly written down, filed and put on my record by Ms Jennings.
- 20 September I received a letter from Jim Cairney saying I wasn't to come near the building and was not to make contact with Ms Jennings.

190. The claimant argued these alleged acts of harassment related to his religion or belief, or because the respondent perceived him to be disabled. He considered the alleged acts had the purpose or effect of violating his dignity.

191. There are three essential elements to a harassment claim, and they are:

(i) unwanted conduct;

(ii) that has the proscribed purpose and

(iii) which relates to a relevant protected characteristic.

192. We firstly had regard to the issue of whether the conduct was unwanted. We noted the Equality and Human Rights Commission's Code of Practice on Employment notes that unwanted conduct can include a wide range of behaviour. We made the following observations regarding the acts of harassment alleged by the claimant:-

- There was no dispute regarding the fact the claimant was invited by Ms Jennings to meet with herself and Mr Cairney. This happened on the 5 May 2017. We preferred the respondent's version of this meeting, and we could not accept the claimant was "escorted" to the meeting; or "questioned thoroughly about his mental health" or that he was threatened by Mr Cairney that he would lose his job if he did not get help for himself.
- There was no dispute Mr Cairney asked the claimant for his security pass. We accepted Mr Cairney's evidence that the claimant was not "escorted" from the building.
- There was no dispute regarding the fact the claimant visited his GP and was prescribed medication. We could not accept the claimant was "forced" to take the medication because of the "threat" made by Mr Cairney.
- There was no dispute regarding the fact the claimant did visit occupational health, and was driven there by Mr Cairney, and accompanied by Ms Jennings into the appointment. We preferred the evidence of Ms Jennings and Mr Cairney and could not accept the claimant was taken to occupational health against his wishes.
- There was no dispute regarding the fact the respondent did make contact with the Police regarding the claimant's repeated reference to taking Ms McCusker to Medgujorge.
- There was no dispute regarding the fact Ms Jennings did make notes of phone calls with the claimant.

- There was no dispute regarding the fact the claimant did receive a letter from Mr Cairney advising him not to make contact with Ms Jennings and to post future Fit for Work notes rather than deliver them. The claimant was not told "not to come near" the building.

193. We accepted the claimant's evidence at this hearing was that all of those acts were unwanted (even though the claimant may have agreed to them at the time).

194. We next considered whether those acts had the purpose or effect of violating the claimant's dignity or creating a hostile (etc) working environment. In deciding whether the conduct has this effect, each of the following points must be taken into account:

- the perception of the claimant;
- the other circumstances of the case and
- whether it is reasonable for the conduct to have that effect.

195. This means the tribunal must look at the effect the conduct of the alleged harasser has on the claimant, and must also ask whether it was reasonable for the claimant to claim that the alleged harasser's conduct had that effect. The Employment and Human Rights Employment Code notes that the other circumstances which may be considered may include the circumstances of the claimant, such as his health, including mental health and mental capacity.

196. The claimant's perception of the alleged acts of harassment can be seen in the way in which he has described the acts. The claimant referred to being "escorted", being "threatened" by Mr Cairney with losing his job and being "forced" to do things. The claimant blamed the respondent entirely for creating a situation which led to his dismissal.

197. We asked whether it was reasonable for the claimant to claim the alleged harasser's conduct had that effect. We, in considering this matter, had regard to the following points. Firstly, there was a very good reason for Ms Jennings asking to meet informally with the claimant, and that was because she was concerned for his wellbeing in circumstances where he appeared anxious. Ms

Jennings was a new manager, and the claimant was newly appointed to the post and undergoing training. We considered Ms Jennings' approach to be within the usual practice to be expected of a manager.

198. Ms Jennings' discussion with the claimant led her to ask him to meet with her and Mr Cairney shortly after the first informal meeting. This meeting was prompted by the fact Ms Jennings was even more concerned about the claimant following their initial discussion, and for that reason, she involved Mr Cairney.

199. We preferred the evidence of Ms Jennings (supported by the notes of the meeting she made at the time) and Mr Cairney and we could not accept the claimant was escorted to the meeting; nor that he was thoroughly questioned about his mental health, or threatened by Mr Cairney. It was a feature of their evidence that they both described the claimant as having spoken freely about his experiences at Medjugorje at that meeting.

200. We have referred above to the fact Mr Cairney did ask the claimant for his security pass prior to letting him out of the building. We did not accept the claimant's suggestion he had been escorted from the building. We again considered the removal of a security pass to be standard practice in the circumstances.

201. Secondly, we did not accept the claimant's evidence that he was forced to take medication. There was no dispute regarding the fact the claimant was advised to make an appointment with his GP, and he duly did so, and attended on the 10 May. The respondent had no influence over the GP's diagnosis or the prescribing of medication. We considered it reasonable to infer that the GP diagnosed the claimant with anxiety/depression because that was his/her medical opinion; and prescribed antidepressant medication because that was what s/he considered was necessary. The claimant was not "forced" to take medication.

202. Thirdly, we accepted the evidence of Ms Jennings that she spoke to the claimant about being accompanied to the occupational health consultation and, when the claimant told her he had no-one to call on for this, she

suggested she could accompany him if he wanted her to do so. The claimant agreed. Ms Jennings checked with the claimant on several occasions if he was still content for her to be there, and he confirmed he was. There was no evidence the claimant was taken against his will to the occupational health appointment: there was no evidence to suggest he would have preferred to travel alone to the appointment.

203. Fourthly, Ms Jennings reported to Mr Milne that she was concerned about the claimant's repeated reference to taking Ms McCusker to Medgujorge. A threat assessment was completed by Mr Milne, and the Police were made aware the claimant could be a vulnerable person. We acknowledged that not all employers would have reacted in this way, but this has to be balanced against the fact that many employers are (and are required to be) sensitive to risk and how they react to it. We were satisfied the Threat Assessment and contact with the Police was a reasonable response in the circumstances which included the fact the respondent had an occupational health report indicating the claimant displayed a number of features of severe mental ill health and that he was mildly psychotic.

204. Fifthly, Ms Jennings made notes of the phone calls with the claimant. The majority of the phone calls took place as part of the respondent's attendance management procedure. We accepted the noting of phone calls was standard practice in the respondent's organisation. We also accepted Ms Jennings' evidence that she noted what was said by the claimant, so if particular words were used in her notes, it was because the claimant had said this and not because she had made it up.

205. Sixthly, the letter was sent to the claimant following an incident with Ms Jennings on the 15 September, which resulted in Ms Jennings making a complaint and reporting the matter to the Police. Ms Jennings had a period of two weeks absence following the incident and requested she no longer manage the claimant. The respondent, in the letter, notified the claimant of the name of the alternative managers.

206. We also had regard to other circumstances which included the fact the respondent formed the impression, on 5 and 9 May, that the claimant was anxious and agitated and in need of help. Their impression was confirmed when the occupational health report was received which stated the claimant had *"a number of features of severe mental ill health .. and was mildly psychotic".*

207. We concluded, having had regard to all of the above points, that whilst the claimant may have perceived the alleged acts as harassment, it was not reasonable for him to believe the conduct had the effect of violating his dignity or creating a hostile (etc) environment. We say that because the claimant's version of the alleged acts could not be entirely accepted, and because the reality of what occurred was masked and misunderstood by the claimant because of his state of anxiety and agitation.

208. We should state that even if we had found there was unwanted conduct which had the effect of violating the claimant's dignity or creating a hostile (etc) environment, we would not have found that was related to the protected characteristics of religion or belief, or perceived disability. We say this because we accepted the evidence of Ms Jennings and Mr Cairney that their concern was not about what the claimant was saying in terms of his religious experiences, but the constant repetition of these experiences and the increasing anxiety and agitation.

209. We dismissed the claim of harassment.

Unfair dismissal

210. We had regard to the terms of section 98 Employment Rights Act which provides that:-

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal and

(b) that it is either a reason falling within subsection (2), or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(a) relates to the capability .. of the employee for performing work of the kind which he was employed by the employer to do .

(4) 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) –

(a) depends on 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

(b) shall be determined in accordance with equity and the substantial merits of the case.

211. The first issue for this tribunal to consider is whether the respondent has shown the reason for the dismissal. The respondent admitted dismissing the claimant and asserted the reason for the dismissal was capability in circumstances where the claimant was not fit for work and there was no indication he would be fit to return within a reasonable timescale. The claimant challenged this and asserted he had been dismissed because the employer believed him to be suffering from psychosis based on his pilgrimage experiences in Medjugorje.

212. We concluded, for the reasons set out below, that the respondent did not dismiss the claimant because they believed him to be suffering from psychosis. The respondent dismissed the claimant for the potentially fair reason of capability in terms of section 98(2)(a) above. We must now continue to determine whether dismissal for that reason was fair or unfair.

213. We referred to the case of **East Lindsey District Council v Daubney 1977 ICR 566** where it was stated by the EAT that: *"Unless there are wholly exceptional circumstances, before an employee is dismissed on the grounds of ill health it is necessary that he should be consulted and the matter discussed with him and that in one way or another steps should be taken by the employer to discover the true medical position."*

214. We had regard to the fact that at the time when Mr Henry met with the claimant on the 28 September, the respondent via Ms Jennings had kept in contact with the claimant during his absence. Ms Jennings kept in weekly telephone contact with the claimant throughout the period of his sickness absence. The phone calls were an opportunity to understand from the claimant how he was feeling and be updated regarding GP appointments. The respondent did modify its attendance management procedure to remove the need for a 28 day face-to-face review. The claimant made no complaint about this, and we accepted this was a reasonable decision (within the band of reasonable responses) in the circumstances.

215. The respondent advised the claimant about Workplace Wellness and understood from him that he had made contact with them, although he had not found them helpful because he did not feel he could talk to them about his experiences at Medgujorge. The respondent also advised the claimant to make an appointment with his GP, and they obtained his consent to make a referral to occupational health for a report.

216. The respondent did not receive a report from the claimant's GP. They did receive the Fit for Work notes provided by the GP to the claimant, which confirmed he was not fit for work because of anxiety/depression. The claimant also informed Ms Jennings that the GP had prescribed Fluoxetine.

217. The respondent had also obtained an occupational health report prepared after a 45-minute consultation with the claimant. The report confirmed it had been *"pretty obvious"* during the consultation that the claimant had *"a number of features of severe mental ill health, and that he was mildly psychotic".* The report described the claimant as "acutely unwell" and that he needed to be

assessed by the Community Mental Health team. It confirmed the claimant was not fit for work. The doctor described there being two possible outcomes in terms of prognosis, depending on whether the claimant engaged with the help offered: if he did engage, he may return to work in three months; if he did not engage he may return to work in 12 – 18 months, if at all.

218. The Consultant Occupational Health Physician wrote to the claimant's GP, confirming that during the consultation he had noted a history of hallucination, paranoia and pressure of thought and speech. He also explained that he had informed the claimant of the need to see the Community Mental Health team.

219. The occupational health doctor did not see the claimant again, but he spoke with Ms Jennings on the 15 August. Ms Jennings advised him the claimant had not, as far as she was aware, been placed on anti-psychotic drugs, and that there were further concerns regarding his behaviour. The doctor advised that the claimant was "completely unreliable" and not to trust anything he says. The doctor thought the claimant should be sectioned because he was a danger to himself and others.

220. We considered whether the respondent ought to have obtained an up-to-date occupational health report. Mr Henry acknowledged this would have been usual but HR had confirmed ill health retirement was not an option in this case and therefore obtaining a further report was not necessary. Mr Henry was, in any event, satisfied, there was ample evidence that the claimant was not fit to return to work in the foreseeable future.

221. We, in addition to this, also took into account the fact the respondent did not trust the claimant to tell a consulting physician the whole account of what he had experienced or what he was feeling. The claimant made many references, in his discussions with Ms Jennings, to not wanting, or not feeling able, to disclose all of the information for fear of what might be thought of him. There were many references in the claimant's evidence to not wanting to speak about the full extent of his experiences at Medjugorje because he would be *"locked up/sectioned"*. We accepted Ms Jennings held that view because of what the claimant had told her. This was supported by her discussion with

the occupational health physician when he told her that *"we are unable to trust anything he tells us"*. We considered this belief, together with the fact there were still serious concerns regarding the claimant's health, influenced the respondent's decision not to instruct a further occupational health report.

222. The respondent did not have a copy of the psychiatric report, and we considered whether this was a flaw in their procedure. The claimant was referred to the Community Mental Health team through his GP. A report dated 21 July 2017 was prepared and, we assume, sent to the claimant's GP. The claimant told Ms Jennings about the psychiatric report, and she asked him to provide a copy. He did not do so.

223. Mr Henry was aware there was a psychiatric report, but he did not request the claimant to produce a copy of it for two reasons. Firstly, Mr Henry took the view the report was the claimant's document and if he wanted to provide a copy of the report to the respondent he could have done so, or brought it to the meeting to be discussed. Secondly, Mr Henry adopted the approach, in the absence of the report being produced, of asking the claimant about the report. The claimant told Mr Henry the report was *"inconclusive"*. Mr Henry asked the claimant *"what the inconclusive report actually said"* but the claimant did not reply to that question except to say that he had to return for a follow up appointment in a few months. Mr Henry concluded, based on these points, that he did not need to seek a copy of the psychiatric report.

224. There was no dispute regarding the fact the claimant provided Mr Henry with an 8-week fit note at the commencement of the meeting. Mr Henry acknowledged the claimant said he wanted to go back to work but felt he needed more time. The claimant also told Mr Henry that he was still feeling anxious and did not answer his door. Mr McLernon, the claimant's trade union representative, told Mr Henry the claimant's illness had been caused by an incident that he had witnessed that had mentally scarred him and that he was able to acknowledge that he was not currently fit to attend work.

225. We concluded, having had regard to the above points, that the respondent kept in touch with the claimant throughout the period of his absence, and

informed him when the decision had been made to refer his case to a decision maker. The respondent considered the medical evidence, and we accepted the decision of the respondent not to seek another occupational health report or a copy of the psychiatric report was, in the circumstances of this case and for the reasons set out above, a decision which fell within the band of reasonable responses: it was a reasonable decision for the respondent to take.

226. We were referred to the case of **BS v Dundee City Council 2013 CSIH 91** where it was said that a key factor to consider is how long an employer can be expected to wait for an employee to return to work. A number of points which it may be relevant to consider were set out:

(i) the availability of temporary cover (and its cost) – the nature of work in the Risk and Intelligence Service, and the fact the claimant was carrying out training, meant temporary cover was neither appropriate nor available;

(ii) the fact the employee has exhausted sick pay – the claimant had not yet exhausted sick pay (the terms of which are six months full pay and six months half pay);

(iii) the administrative costs that might be incurred by keeping the employee on the books – the claimant would have been entitled to sick pay (as above) and holidays;

(iv) the size of the organisation – the respondent is a very large organisation but we accepted the respondent's submission that it may put limits on the amount of time their employees can remain off sick if there is no prospect of a return within a reasonable timescale.

227. We, in addition to the above points, had regard to the fact that whilst the claimant repeatedly told the respondent he was keen to return to work, he was never in a position to do so. The claimant's GP, who reviewed him regularly in order to assess his fitness for work, confirmed he was not fit for work and Mr Henry was given an 8 week sick note at the start of the meeting to review the claimant's situation.

228. We also had regard to the fact this was not a case where reasonable adjustments could have assisted a return to work. Equally, it was not a case where alternative employment could be a consideration.

229. The claimant's trade union representative did invite Mr Henry to have regard to the fact the claimant had a lengthy period of service with the respondent and had had a good attendance record up to the point of this absence. Mr Henry took those points into account and also noted the claimant had done what was asked of him in terms of the respondent's attendance procedure. These factors however did not mitigate against the fact the claimant had been absent from work for a period of 5 months, had a current sick note for 2 months, and no indication when he may be fit to return to work.

230. We concluded, having had regard to all of the above factors, that this is not a case where the respondent could have been expected to wait any longer. We say that because there was no indication the claimant would be fit to return to work within a reasonable period of time.

231. The claimant invited the tribunal to accept that he had, essentially, played along with the idea he was not fit to return to work because he had been told to do so by his trade union representative in order to obtain a compensatory payment. We considered two points arise from this: firstly, Mr Henry could only make his decision based on the information before him, which included what the claimant told him. Secondly, the claimant's position that he was fit to return to work was undermined by the fact he provided Mr Henry with a fit note saying he was not fit for work and would not be fit for a period of 8 weeks.

232. The issue for this tribunal to determine is not whether we would have dismissed the claimant, but whether the decision of the respondent to dismiss the claimant was fair or unfair in the circumstances. We must decide whether the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. The band of reasonable responses recognises that different employers may react differently and whilst one employer might have dismissed the employee, another employer might not.

However, it is only if it could be said that no reasonable employer would have dismissed the employee, that the dismissal will be unfair.

233. We have set out above all of the factors we have considered. We, having had regard to all of those factors, decided the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. The decision to dismiss was fair.

234. We decided to dismiss the claim in its entirety.

Employment Judge:	L Wiseman
Date of Judgement:	28 June 2019
Entered in Register,	
Copied to Parties:	01 July 2019