



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Michael Stevens

**Respondent:** Secretary of State for Education

**Heard at:** Salford

**On:** 6-9 October 2020

**Before:** Employment Judge Leach  
Mrs M Conlon  
Ms A Berkeley-Hill

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr J Hurd, Counsel

# JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim for unfair (constructive) dismissal fails and is dismissed.
2. The claimant's claim for direct discrimination (protected characteristic of sexual orientation) is withdrawn by the claimant and is dismissed.
3. The claimant's claim for victimisation contrary to section 27 Equality Act 2010 is withdrawn by the claimant and is dismissed.
4. The claimant's claim for indirect discrimination (protected characteristic disability) fails and is dismissed.
5. The claimant's claim for harassment related to disability (contrary to section 26 Equality Act 2010) fails and is dismissed.

# REASONS

## A. Introduction

1. This case concerns a formal disciplinary warning that was given to the claimant on 29 March 2019, and actions and decisions taken in the period leading up to this warning.
2. The claimant was employed by the respondent for just over two years. However, he has a long career history in the Civil Service, dating back to 2002. He is currently employed by the Scottish Government as a senior accountant.
3. The claimant handed in his notice on the same day that he was informed he had been provided with a formal warning. He claims that he was constructively dismissed.
4. The claimant also raises a number of claims under the Equality Act 2010.
5. The complaints and issues are more fully set out below.

## B. Hearing

6. The hearing took place in one of the Nightingale Courts – at a room in the Lowry Theatre building in Salford. We spent the morning of day one reading in to the case. We were provided with a file of relevant documents with page numbers up to 511. Reference to page numbers below are references to this file.
7. The claimant provided his evidence on the afternoon of day one and on day two.
8. The respondent's witnesses provided evidence on days three and four. We also heard the parties' submissions on the afternoon of day four. Mr Hurd provided us with a skeleton argument and submissions document at the start of the hearing. The claimant provided us with his submissions document on day four.
9. The parties observed social distancing requirements and we thank all those attending for their conduct throughout the hearing.

## C. The Complaints and Issues

10. These were identified and clarified at a preliminary hearing on 6 January 2020 and set out in an appendix to the case management orders and sent to the parties. They are repeated below:-

### ***Constructive Unfair Dismissal***

1. *Was the respondent in breach of the claimant's employment contract? The claimant contends that the respondent was in breach of the duty of trust and confidence. Amongst other things he relies upon the first written warning imposed upon him in the*

*context of the Civil Service pillars of honesty and integrity, which he says was called into question. He also relies upon the way in which the respondent conducted the proceedings, the time taken for such proceedings, and the related matters alleged as discrimination below.*

2. *If so, did the respondent's breach of contract amount to:*
  - (1) *A fundamental breach of contract; and/or*
  - (2) *A repudiatory breach of contract; and/or*
  - (3) *A course of conduct culminating in a "last straw" which amounted to a repudiatory breach of contract? The last straw relied upon is the imposition of a first written warning.*
3. *If so, did the claimant resign in response to any alleged fundamental and/or repudiatory breach of contract by the respondent?*

**Disability**

4. *Was the claimant a disabled person in accordance with section 6 of the Equality Act 2010 at the relevant time? The disability relied upon is adjustment reaction and psychological issues. The relevant time is 6 December 2018 to 28 April 2019.*
5. *If so, did the respondent have actual or constructive knowledge of the claimant's disability during or at the relevant time?*

**Indirect discrimination in relation to disability (section 19 Equality Act 2010)**

6. *Did the respondent apply to the claimant a provision, criterion or practice ("PCP")? The PCPs relied upon are:*
  - (1) *Having three consideration points for the same incident in relation to the loss of equipment (allegedly being when lost; when recovered; and when it was determined that investigation/action was required);*
  - (2) *Having a long drawn out process which lasted for nine months in relation to the lost equipment.*
7. *Did the respondent apply the PCP to persons with whom the claimant does not share the characteristic?*
8. *Did the PCP put persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom the claimant does not share it?*
9. *Did the PCP put the claimant at a disadvantage?*
10. *Can the respondent show that the PCP is a proportionate means of achieving a legitimate aim?*

**Harassment related to disability (section 26 Equality Act 2010)**

11. *The harassment upon which the claimant relies is what he alleges were excessive telephone calls made whilst he was absent on grounds of ill health. Did the respondent engage in that conduct?*

12. *If so, was that conduct unwanted?*
13. *If so, did it relate to the claimant's disability?*
14. *Did the conduct have the purpose or the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?*

**Direct discrimination because of sexual orientation (section 13 Equality Act 2010)**

15. *Did the respondent treat the claimant less favourably because of his sexual orientation when, and/or in the way which, it applied its policy in respect of missing assets?*
16. *The claimant will rely upon a hypothetical comparator. The claimant alleges that the respondent's approach to, and/or the outcome of, missing assets was different/changed when it was identified that the assets had been lost from a gay bar (the claimant alleges that he was told that the respondent did not think it was appropriate for him to have work assets in that environment).*

**Victimisation (section 27 Equality Act 2010)**

17. *Did the claimant's appeal letter of 1 April 2019 amount to a protected act as defined by section 27(2) of the Equality Act 2010?*
18. *Did the respondent subject the claimant to a detriment because he had done that protected act? The detriment relied upon is the manner of the announcement of the claimant's departure and, in particular, the message sent to the team about the claimant's departure by Mr Dickinson. The claimant contrasts the message sent about his departure with that which had previously been sent about the departure of Mr Jack Xenon by Mr Dickinson. The Tribunal will need to determine whether this was a detriment and/or whether it was on the grounds that the claimant had done a protected act.*

**Jurisdiction**

19. *Were all of the claimant's discrimination, harassment and victimisation complaints presented within the time limits set out within section 123 of the Equality Act 2010? The respondent asserts any treatment which occurred before 12 April 2019 is out of time.*
20. *If not, whether time should be extended on a just and equitable basis.*

**Remedy**

21. *If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy, and in particular if the claimant is awarded compensation and/or damages will decide how much should be awarded. Relevant to remedy will include: consideration of whether the respondent unreasonably failed to comply with the ACAS Code of Practice on Discipline and Grievance Procedures and, if so, whether it would be just and equitable in the circumstances to increase any award.*

11. On day three of the hearing, the claimant informed us that he no longer wished to pursue the claims of sexual orientation discrimination.

12. On day four, the claimant withdrew his claim of victimisation.

13. These claims are dismissed on the claimant's withdrawal.

#### **D. Findings of Fact**

14. The claimant started working for the respondent in April 2018. He was initially based in Sheffield but not long after he started, he relocated to the respondent's Manchester offices at Piccadilly Gate.

15. Shortly after this relocation his department held a training day in Manchester. In the documents it is sometimes called an away day. It took place on 24 July 2018. It was a large event, attended by a few hundred employees of the first respondent, from various locations.

16. The training day finished at about 3.30pm. A large number of attendees then went for a drink before making their way home. Some colleagues stayed longer and socialised in to the evening. By about 7.30pm a group, including the claimant, had made its way to the Britons' Protection, a pub on Great Bridgewater Street in Manchester.

17. The claimant and some colleagues stayed there for over 3 hours. Some left at 10.37pm (the timing is accurate as it was recorded on the phone of one of the claimant's colleagues). The claimant and 2 colleagues staying a little later. The claimant claims that they left the Britons' Protection at about 10.45pm. By this stage, the claimant was drunk. We provide further comment on this finding below.

18. At some stage after the claimant left the Britons' Protection, he and 2 other colleagues went to a late night venue called G.A.Y. There has been some dispute about whether this venue was in the nature of a pub/bar or a club. We find that it was a venue that was open until 4am. We also find that the claimant went there late in the evening – not before 11pm – to continue his night out.

19. The next day the claimant realised that he had lost his bag at some stage during the previous night. He could not recall the last time he had been in possession of his bag. The bag contained various items belonging to the respondent including a laptop/tablet device (we refer to this below as the laptop) and the claimant's work pass, enabling access to the respondent's building.

20. The claimant has provided various accounts on the extent to which he was intoxicated. We find as follows:-

- a. The claimant had been in various pubs, drinking from shortly after 3.30pm to about 11.00pm.
- b. The claimant is someone who normally takes care of his bag when in public. He gave evidence, which we accept, that he would usually wrap the bag strap around his leg when sitting down in a public place so that he cannot go anywhere without it.

- c. On this occasion, the claimant not only left his bag unattended and left a venue without it, he also could not remember which venue he had left it in.
- d. The claimant could not remember that he had picked his bag up at one venue and walked with it to another venue.
- e. The claimant himself admitted that he was drunk. (at a meeting on 6 December 2018) The claimant has provided differing accounts on different occasions including at this Tribunal. However, we find that his account on 6 December 2018 was the accurate one as far as the issue of inebriation is concerned.

21. The claimant's evidence at the Tribunal was that he cannot have been "too drunk" as bar staff were still willing to serve him. We have considered this but attach little importance to it. We do not find that the claimant was so drunk that bar staff and/or security staff at any of the venues attended by the claimant were required to intervene. He was however drunk as we note above.

The claimant's report of the loss of assets following the night of 24 July 2018

22. The claimant contacted his manager, Stephen Robinson (SR) by email at 09.17 on the morning of 25 July.

*"We talked previously about me potentially taking a day's [flexi] to bring down my excess figure. Any chance that could be today? With the washing machine situation, I could really use the time to go home to get this sorted. I'll still dial in for the team meeting today and put that down on my flexi, but would appreciate flexing off for the rest of the day."*

23. The claimant did not mention his losses at this stage. His request for a day off work was granted.

24. The claimant spent some time on that day looking for his bag. The claimant visited the Britons Protection and G.A.Y. He did not provide his contact details to either of the venues he attended. He also called at the respondent's office at Piccadilly Gate to ask whether his bag had been handed in. Whilst there, he did not report it as lost. He simply made an enquiry at the front desk and left. The claimant did not report his lost building pass either at that stage.

25. The claimant contacted SR by phone at 4.45pm that day to tell him he had lost the respondent's assets. SR was not available and so did not pick up the message until later that evening and was unable to speak with the claimant until the following day.

26. In the phone call on 26 July 2018, the claimant told SR that he was not sure whether he had lost the bag or it had been stolen. He told SR that he had gone for a couple of drinks with colleagues following the training day which was when the bag went missing.

27. We find that SR believed that the claimant had taken his bag, containing the assets, with him when going for a couple of drinks after the training day. Whilst the claimant did not make any specific reference in this call to timings, the amount of time he had been out before the bag was taken or the amount of alcohol consumed, we find that the claimant knowingly gave the impression that this was a drink immediately after the event with colleagues rather than a late night out.

28. In the same call, SR asked the claimant whether the loss had been reported to IT or security. It had not and the claimant was instructed to do this.

29. SR also reported the incident to his line manager, Julian Dickinson (JD") who responded quickly by contacting the claimant personally. We find that JD made clear to the claimant that he must prioritise the reporting of a loss/theft and that he followed his discussion up with 2 emails – one of which was to provide a link to the security incident report and another to emphasise the need to ensure that the pass to the building was disabled as a priority.

30. The claimant provided the following detail in the internal on line report to the respondent's IT security team:-

*"I had attended an away day for work, taking my tablet as I considered I might go to the office to work afterwards. As I'm new to the team I hadn't expected people to go out for a social event afterwards (my previous team wasn't big on social events). During the course of this the bag I had with me which contained my tablet and headset along with a few personal items; I've kept it under my seat with the strap wrapped about my leg. At some point, whether after visiting the bathroom I think I've forgotten I had the bag with me, as I don't normally take it out, and I've left without it. Having since retraced my steps and contacted all the places I'd been nothing has been handed in and I've been unable to find it. There were no work documents with my computer and I do not write down my username or passwords."*

31. In response to the request *"please state the Date and time of incident"* the claimant provided this information: *"24/07/2018 19:30"*

32. In response to the question: *"Where did the incident occur?"* the claimant answered, *"Last known sight of my bag in which the tablet etc was situated, was on Great Bridgewater Street, Manchester."* The Britons' Protection is situated on Great Bridgewater Street.

33. This online report was completed by the claimant at 10.37 am on 26 July 2018 (pages 225-7)

34. The claimant also provided an external report to "Report My Loss" (a lost property reporting service) which included information consistent with the details above.

35. That SR told the claimant to report the loss but did not see the report until a later date

Actions of the respondent's managers

36. SR informed his line manager Julian Dickinson ("JD") who contacted a relevant HR manager for guidance as well as the respondent's IT security team.

37. There was some delay, due in part to SR's annual leave.

38. SR and JD received advice that it was for individual managers to decide whether the particular circumstances meant that disciplinary action might be taken. The advice provided is well summarised in the following extract from the email from IT security dated 30 August 2018.

*"In the past our practice has been to leave the consideration of disciplinary action to line managers to explore, with HR if necessary, from their own judgment of the circumstances that have occurred and in the light of previous behaviour. So, for example, loss of a building pass might be seen as an unfortunate incident. However the loss of several might give rise to a charge of negligent behaviour."*

*"In the same way the theft of a laptop in isolation may be just an unfortunate event. However if the individual suffered the theft due to their own lack of care and attention when in a public place and has a history of similar careless behaviour, perhaps there are grounds for a serious discussion, if not more."*

39. Based on this advice, JD decided that it was not appropriate to issue a formal written warning but first wanted to check the claimant's file to understand whether other similar incidents had occurred. He also made a recommendation to his own line manager (Mr Graham ("AG")) in an email of 3 September 2018, as follows:

*"I consider we should advise Mike in writing that we have considered and will not be issuing a formal warning on this occasion but re-emphasise the advice already provided to take care to prevent a recurrence. I think the note should reflect the importance of immediately notifying his LM chain if there is a similar incident and following the appropriate protocol without delay something Mike failed to do on this occasion."*

40. No other records of similar incidents were found and the wording of a letter was approved by 18 September 2018, consistent with JD's recommendations noted above.

41. It was intended that SR would send this letter to the claimant but he has explained that his workload and time away from the office meant that he did not get round to reviewing and sending it. The letter was not sent.

42. There is some dispute about exactly what was said to the claimant following this incident. The claimant claims that SR told him that these things happen and there was nothing for him (the claimant) to worry about.

43. We find that SR did make some comment designed to help the claimant but that he did not tell the claimant there was nothing to worry about. Our impression of SR, from the emails and from hearing his evidence, that he is quite cautious in his



approach to people management issues. He seeks reassurance from others before taking action. We find that is what he did here and although he would have said words such as “its happened and there’s nothing you can do about it now, but make sure its reported” he would not have given the claimant assurance that there was nothing to worry about. It was not long after this that he did in fact query whether further action was required.

#### The recovery of the claimant’s lost bag and assets

44. On 26 September 2018, an employee of G.A.Y. contacted the respondent’s IT team to report that they had found a bag containing a laptop. This call was logged with the following detail:-

*“Found in G.A.Y. club Manchester 63 Richmond Street, Manchester M1 3WB  
Ross Preston called from club reporting it.”*

45. The IT team then contacted the claimant to inform him that the laptop had been found. The claimant attended at G.A.Y to collect his bag containing the laptop.

46. One of the issues in dispute was whether the G.A.Y venue was a nightclub or a pub. The term used to describe the venue is largely irrelevant. However, it is significant in one respect that we note below. We find that it was the employee from G.A.Y who provided details of the venue and described it as a “club.”

47. The IT team did not contact SR or any other manager about the recovery of the assets. The claimant informed SR it had been found but without further details.

#### The second loss/theft

48. On 31 October 2018, the claimant’s work mobile phone and personal mobile phone were stolen from him. The claimant has provided an account (which the respondent concluded was accurate following the disciplinary process) which we summarise below:-

- a. he had been walking home from a social event that evening when a man approached him in a street, pretended he knew him and gave him a hug.
- b. The claimant later found that his work and personal mobile phones were missing and believed that they were taken from his pockets by the man who hugged him. The theft was reported to the police.
- c. The claimant did not realise until later the next day (1 November 2018) that his phones were missing.
- d. On the morning of 1 November 2018, the claimant woke with a migraine headache and so contacted his line manager to say that he was too ill to attend work. The claimant had an iPad next to his bed and emailed SR using that device. As his iPad was close to him, he did not require his phone to make this contact – so did not look for it at that stage. He decided that email contact was sufficient and there was no need to phone.

- e. He then went back to sleep and did not discover his phones had gone until the afternoon of 1 November. The claimant did not inform the respondent until 2 November that his phone had gone missing because, he says, he was unable to do so.
- f. His flat did not have a landline phone and so he had been unable to phone. He could have sent an email from his iPad but wanted to speak to his manager rather than send an email. He could not submit a report to IT that he had lost his phone because he was unable to log on to the respondent's IT systems.

49. Unknown to the claimant, SR had been trying to contact the claimant on the morning of 1 November 2018. SR had called the claimant and left a message. Of course the claimant did not have his phone and therefore did not receive the message. When SR received the email from the claimant (the one sent by the claimant from his iPad) he responded on the following terms:

*“Hi Mike, thanks for letting me know. I tried to call a couple of times on your works/home mobile but it went to answer phone. Appreciate you have struggled to make a call with the migraine but if you could drop me a text as soon as possible in the future... it's just so that I know everything is OK. Hope you're feeling better soon.”*

#### Steps taken by the respondent after the second incident

50. This second incident had some impact on the claimant's application for frontier worker status (see below). It is evident from emails in the bundle that the claimant's line management did query with HR and with IT security whether there was cause for concern that might affect the application. We find that this was an appropriate line of enquiry. We have no criticisms of this

51. The second incident also made SR query whether the first incident should be dealt with informally. SR received further details from the respondent's IT security team about the first incident. The details were not provided to SR until 27 November 2018. On receiving the details. SR did not just receive the details of the report of loss provided by claimant, but also details about the return of the bag and contents; in other words the record of the call from the G.A.Y venue as noted above.

52. Having received this further information SR decided that it was appropriate to consider the incidents of loss further.

53. We find that SR decided to consider matters further because of:-

- a. The second incident – being the theft of the work mobile phone.
- b. The information provided on the IT report. SR had not seen this information before. The version of events provided by this second report differed significantly from the information that C had provided to SR at the end of July 2018.

The respondent's formal disciplinary process and events leading up to it.

54. SR held an informal fact-finding meeting with the claimant on 6 December 2018 (pages 252/3). In this meeting SR asked a number of questions of the claimant's versions of events of both incidents. He specifically raised a concern about the honesty of the claimant's reporting of the first incident. He told the claimant that he needed to consider the next steps and that he would update the claimant. The claimant also informed SR of some significant personal issues he was dealing with at that time; that members of his family had recently been diagnosed with cancer; that the claimant had also had a recent cancer scare; that his Grandma was very unwell; that he was extremely lonely following his move to Manchester and that his partner had confided in the claimant about suicidal thoughts.

55. Following that meeting, SR contacted the HR team for advice. A decision was taken to proceed with a formal disciplinary investigation. A letter was drafted by HR, the terms of which were based on a precedent used by the respondent. These standard terms included the following details which the respondent calls its Fair Processing Notice" ("Notice"):

*"Because there is a possibility that the disciplinary process you are undergoing could lead to your dismissal, I need to give you some information about the Cabinet Office Internal Fraud Database (IFD). The misconduct alleged against you appears to fall within the definition of internal fraud. The full definition is as follows:*

*Dishonest or fraudulent conduct, in the course of employment in the civil service, with a view to gain for the employee or another person.*

*If, as a result of the disciplinary process I conclude that you have committed misconduct involving fraud or dishonesty and that dismissal is the appropriate sanction, your details will be sent to the Cabinet office for inclusion on their IFD.....*

*I am giving you information about the IFD at this stage so that you are fully aware of the possible consequences of the current process, but obviously this does not mean that I have come to any conclusion yet about alleged misconduct or what the appropriate sanction be if the misconduct were proven."*

56. We find as follows in relation to the Notice:-

- a. SR was himself concerned about providing the claimant with a letter which included the terms of the Notice, particularly given what the claimant had told him about the various personal issues he was dealing with at the time. SR raised a query in an email to his manager JD about a precedent he had been provided:-

*"It states the manager should decide to include/delete the fair processing notice depending upon the circumstances of the case. It's a strange one as it then goes on to say about fraud (which this isn't) and honesty (which this potentially falls under in part)....I was planning on deleting the*

*sentence that states “The misconduct alleged against you appears to fall within the Cabinet office definition of internal fraud” and leave the rest..... does this seem okay to you?”*

- b. We find that there were at this stage concerns about potential dishonesty; about the reporting of the first incident and about the circumstances of the second incident. The claimant’s version of events surrounding his loss of the respondent’s mobile phone was ultimately accepted as true. However, it is not a straightforward explanation. It was reasonable for the respondent to interrogate the matter further, particularly in the light of the information then received questioning the claimant’s honesty in relation to the first incident. We find these were the reasons why the Notice was included in the letter to the claimant and not deleted.
- c. SR was sensitive to the fact that the claimant was in low mood as he had described and that the terms of the letter of 18 December 2018 would be unwelcome and may be upsetting. Although he worked in Darlington (whereas the claimant was based in Manchester) SR made a special point of attending at the Manchester office so that he could see the claimant personally when providing him with the letter.

57. Ruth Bancroft, senior finance business partner, was appointed to carry out an investigation. The timeline is as follows:-

- a. 02 January 2019. RB wrote to claimant to invite to meeting;
- b. 07 January 2019 – fact finding meeting with Claimant and RB;
- c. 10 January 2019 - fact finding meeting RB and SR;
- d. 10-21 January 2019 - Claimant on annual leave;
- e. 24 January 2019. Claimant too anxious to return to work following annual leave - First day of sickness absence;
- f. 5 February 2019. RB provided first version of investigation report. following which a decision was taken that a further witness needed to be interviewed;
- g. 18 February 2019 further witness (Kate Smaldon) interviewed;
- h. 20 February 2019- C returned from sickness absence;
- i. 12 March 2019, RB provided final report;
- j. 25 March 2019, disciplinary hearing held.

The respondent’s contact during the claimant’s sickness absence.

58. The claimant was absent due to sickness for 4 weeks. In this period SR contacted the claimant on 7 occasions. There were also some exchanges of emails/texts. In summary:-

- a. 25 January 2019 – first call from SR to find out how the claimant was and to discuss a referral to occupational health. The claimant agreed the referral. SR told the claimant to turn his work phone off and that he would call again a few days later to see how he was.
- b. 28 January 2019. SR called again there was a discussion and claimant informed SR that he was looking at options of moving to Scotland.
- c. 31 January 2019, SR called and left message. The claimant responded by text to update SR.
- d. 5 February 2019, claimant sent a text to inform SR he had a further doctor appointment and that he had not had a response from the respondent's employee assist programme. SR then called the claimant and they had a discussion including about the lack of support from employee assist. SR asked the claimant if he would consider escalating that concern.
- e. 7 February. SR had received a further fit note from the claimant's doctor. He called the claimant who informed SR further about potential move to Scotland and they discussed a couple of vacancies. Claimant told SR he had decided not to escalate matters in relation to lack of support from Employee assist scheme. He was sourcing support via his GP.
- f. 12 February 2019, SR called the claimant. They discussed the fact that claimant had received an OH appointment, that there were not updates regarding the investigation and the claimant's intended move to Scotland.
- g. 15 February 2019, further telephone conversation with claimant and SR. They discussed the claimants job applications in Scotland and his concern that he may have made a misleading statement on an application. It had asked him about outstanding disciplinary action and he had answered that there was none. He had done so because the investigation was ongoing. SR provided assurances to the claimant about this and that he would pick up with HR.

59. We find that the telephone calls were between two professional public servants who both conducted themselves appropriately. We find the claimant was comfortable enough to talk openly with SR about the treatment he was receiving and his plans to move to Scotland. We also find that SR had genuine concerns about the claimant's well-being. Sometimes, as an Employment Tribunal, we see communications between an employee and employer during a period of sickness, where there is little or no respect between the 2 and/or where the line manager is simply following process but without any commitment to a pastoral element of a management role. That was not the position here.

The respondent's decision to provide the claimant with a formal warning

60. The disciplinary hearing was chaired by SR. In summary:-
- a. SR decided that the claimant had not been dishonest in either incident;
  - b. SR accepted the claimant's version of events in relation to the second incident and that the 2 mobile phones had been stolen by a stranger who hugged the claimant as they passed in a street;
  - c. SR decided that the claimant had not taken reasonable care of the respondent's laptop when out late at night on 24 July 2018;
  - d. SR decided that the claimant failed to report the loss accurately in a timely manner.

61. SR summarised the reasons for his decision in his witness statement and we accept his evidence:

*"To summarise my decision, I considered there were 2 incidents of assets loss in a relatively short time frame and whilst this was regrettable, I felt the circumstances were worthy of a formal disciplinary sanction as the claimant had failed to demonstrate taking reasonable care of the respondent's assets. I did not consider it was acceptable or reasonable for the respondent's assets to be lost (particularly having regard to the sensitive nature of the data and the security threat posed) albeit I acknowledged the claimant was not entirely at fault (his phone had been stolen). I was satisfied the claimant now understood the importance of reporting and he accepted he would have done some things differently. I could not be satisfied on the evidence the claimant had been dishonest in his reporting and therefore felt a first written warning for misconduct was found in all the circumstances."*

62. The letter also informed the claimant that he was not eligible to apply for an internal or cross government vacancy whilst the warning was live (the warning was for 12 months).

63. There was some confusion about whether the findings just related to the first incident or to both. Having considered SR's evidence, we find that the failure to take reasonable care of the respondent's assets only related to the first incident; the delays in reporting related to both. However, the wording of the Warning Letter (see below) could have been clearer about this.

64. The respondent wrote to the claimant on 29 March 2019, notifying him that he had been issued with a first formal warning ("Warning Letter") (pages 331-1).

65. The claimant's response was to hand in his notice of resignation which he did by email on that same day. The email is timed at 10.10am. Two days later on 31 March 2019, the claimant provided a formal notice of appeal against the disciplinary warning.

The claimant's resignation letter

66. The letter is at pages 332-3. By this time and as noted below, the claimant had already made it known that he was planning to return to Scotland (the claimant grew up in Fife and his grandmother – who was very poorly - still lived there). The claimant had applied for a number of roles in Scotland and it is apparent from the terms of the letter that he expected to be successful in his applications to at least one of them. For example, he stated “For my own mental wellbeing I feel I cannot wait a further 12 months for expiration of a warning in which to move back home.” We find from this sentence and other parts of the letter that he did not expect the ban on cross government vacancies to apply to roles that he had already applied for before the warning was in place.

67. The claimant also stated that he felt that he had been put in an impossible position of requiring to resign his employment. The final paragraph of the resignation letter is set out below:-

*“I understand this is a regrettable situation but I have tried tirelessly to learn my lessons from the away day 8 months ago. To put things in place to prevent re-occurrence. I have also tried to be a team player and model employee in assisting the team pick up workload and reporting during periods of leave by senior colleagues during our busiest periods. However I now feel I have been left with no alternative option but to take these actions.”*

#### The Appeal

68. The claimant’s appeal letter is dated 31 March 2019. The appeal was heard on 12 April 2019 and the claimant was informed of the outcome by letter dated 20 May 2019. His appeal was unsuccessful.

#### Other aspects of the respondent’s management of the claimant.

69. Other issues were raised by the claimant in his evidence. In summary:-

- a. The claimant was hoping at one stage to become a “frontier worker” living in Barcelona, working at home on Mondays and Fridays and travelling to Manchester midweek. Having heard and read the evidence about this matter, we have no criticism of the respondent’s handling of the claimant’s queries and application for this change in working arrangement. The 2 incidents raised some concerns and questions in relation to this application but we find that these were reasonable and handled professionally.
- b. There were some concerns about the level of pay being received by the claimant, a qualified accountant. However this was an issue affecting a large number of employees, not just the claimant. The issue was being investigated but the issue was far from straightforward and was taking some time.

70. We do not find that these matters are relevant to any of the complaints. However we have no criticism of the way that the respondent handled them.

### The claimant's search for alternative employment

71. SR gave evidence that, during his meeting with the claimant on 6 December 2018, the claimant had indicated that he was considering a move to Scotland. The claimant disagreed. His evidence was that he did not raise a potential move to Scotland during this meeting. The claimant's version is supported by SR's own contemporaneous notes of this meeting. We prefer the claimant's evidence on this point. We find that the claimant did tell SR that he (the claimant) was lonely in Manchester but did not tell him at this stage that he was looking to move back to Scotland.

72. We find that it was in January 2019 that the claimant decided to apply for roles in Scotland. The claimant was on holiday in Scotland during January which helped him reach his decision to try to make the move. He was lonely in Manchester, clearly the disciplinary process weighed heavily on his mind, as did the health and wellbeing of his family. The claimant then identified and applied for a number of roles in Scotland and was soon successful, securing a senior finance role with the Scottish government.

73. The claimant was formally offered a role with the Scottish Government by letter dated 3 April 2019, just a few days after his letter of resignation. In their evidence, the respondent's managers (particularly JD and the appeals officer Paul Hadfield) queried whether in fact, the claimant would have been informed of the offer, by telephone before then and crucially before he handed in his notice of resignation. The claimant provided evidence that he was not aware of the offer until 3 April. We find as follows:-

- a. Prior to 29 March 2019, the claimant had attended interviews for a number of posts with the Scottish Government; some less senior and some more senior.
- b. Whilst he had not received a formal offer of employment by 29 March 2019, he was by that date confident that he would secure one of these posts.
- c. He had, by that date, made up his mind to relocate from Manchester to Scotland.

### Respondent's Policies

74. The claimant was bound by the Civil Service Code. This includes the following:

- (1) "Honesty" for the purpose of the Code is defined as being "truthful and open";
- (2) "Integrity" is defined as putting the obligations of public service above your own interests;



- (3) “Standards of behaviour” for the purpose of the Code include a requirement to “always act in a way that is professional and that deserves and retains the confidence with whom you have dealings”;
  - (4) A requirement to fulfil your duties and obligations responsibly;
  - (5) A requirement to set out facts and relevant issues truthfully and correct any errors as soon as possible;
  - (6) A requirement not to deceive or knowingly mislead ministers, Parliament or others;
  - (7) A requirement to accurately present options and facts;
  - (8) A requirement not to ignore inconvenient facts or relevant considerations when providing advice or making decisions.
75. The respondent’s disciplinary policy and process includes the following:

- (1) In cases of alleged or suspected minor misconduct it may be possible for the line manager or someone in the management chain to deal with the issue informally;
- (2) When an incident comes to light an initial assessment should take place to decide how a situation should be dealt with and managers are required to contact “CSHR Casework Service” for help and support;
- (3) Where a decision is taken that there should be a formal disciplinary process than a decision maker needs to be appointed:

*“This could be the line manager but in some cases this is not appropriate and the person making the decision could be outside the line management chain as they should be impartial and independent”.*

Also:

*“A manager should not deal with the matter if they are or could reasonably be perceived as being somehow implicated, being biased, having a personal interest in the outcome of the case.”*

76. Under the heading “Timings”, the policy says this:

*“This can be an extremely difficult time for everyone involved. It is important that matters are dealt with promptly and without unreasonable delay. Exceptionally there may be delays in progressing matters due to the complexity or circumstances of the case. All steps should be taken as soon as reasonably practical. If the case is delayed the reasons for this should be recorded and kept in line with the recordkeeping process. Decision makers should keep in contact with the subject of any disciplinary action to let them know if there are delays in progressing their case.”*

77. The disciplinary procedure includes a flowchart called "Process Overview". This indicates that when a decision has been taken that alleged misconduct can be dealt with informally and informal action is taken, then the matter is concluded at that stage.

78. The claimant relied on this provision, noting that as a decision had been taken initially not to take formal action, the issues in relation to the first incident should never have been taken further. We find the "Process Overview" flowchart to be a summary. Generally that will be the position. However, there will be circumstances where additional information comes to light which makes it reasonable to revisit an issue. That is what happened in this case. The fact that a process overview flowchart does not expressly refer to exceptions does not mean that the respondent was prevented in to looking further at the issue.

#### Acceptable Use Policy: Devices

79. This policy includes the following:

- (1) "Staff must take all reasonable care to prevent the loss, damage or theft of their device". This includes securing the stylus pen in a safe place, securing the device during the working day and locking away the device (or taking it home) at the end of the working day. Failure to do so may result in disciplinary action as set out in the records Management and IT Security Policies".
- (2) "If the device or any accessories are lost or stolen you should immediately log an incident in My Service Desk and then carry out all reasonable practical checks to find or retrieve the device. If the device has been stolen you must obtain a crime number from the police."

#### Mental impairment

80. The claimant claims that he has a disability, within the meaning of section 6 of the Equality Act 2010. The respondent denies that the claimant has a disability that he is disabled and it is necessary therefore that we make findings of fact about he claimant's health. The claimant claims that he has a mental impairment which he describes as an adjustment reaction and psychological issues.

81. In support of his claim that he has a disability, the claimant has provided an impact statement (pages 432 to 437), a psychiatric assessment report from February 2015 (pages 438 2442) ("Report"), some recent GP records and some historical medical records dating back to the claimant's childhood. We have also seen an occupational health report dated 13 February 2019.

82. The Report was commissioned by the claimant himself at a time when he was not engaged in any internal employment dispute or litigation with his employer. There is reference to employment issues in the Report but this is a reference to the claimant's unhappiness with his employment at that time, not a dispute. It is clear to us, from the content the report, that the claimant was candid with the psychiatrist and we find that the claimant's history as described in the report is true. In summary:–

- a. The report details a difficult childhood which included some traumatic incidents;
- b. The report notes the claimant's difficulties in managing alcohol, including comments that it was 'a coping mechanism and a way of escape'; that "when he was intoxicated he would be out of control, aggressive and not able to recall what had happened";
- c. The report's conclusion is:

*"My impression of Mr Stevens was that he had symptoms which were suggestive of an adjustment reaction to the current stressors that he currently faces with regards to his relationships and employment issues. This has led him feeling low in mood. However there are some longer term unresolved psychological issues which need further tension. These relate to primarily problems in his formative years which has led to him lacking self-confidence and led to problems with his relationships. It appears that he has also demonstrated harmful use of alcohol which appears to be a way of managing his social difficulties."*

*"I would advise Mr Stevens to consider registering with local alcohol services to seek advice to manage some of his harmful use of alcohol and some psycho education. I have also advised that he requires some longer term psychological intervention. He would benefit from a psychological formulation with ongoing psychological talking therapy."*

83. We had no evidence that the claimant acted on the recommendations of the psychiatrist.

84. The claimant's GP notes indicate that he was newly registered with a GP practice in December 2018 when a new patient questionnaire and other relevant records were created and stored (page 456). The claimant had no involvement with a GP for some years before then.

85. The GP records note that on 24 January 2019 he presented as suffering from stress at work. And in March 2019 he was referred to a psychological wellbeing practitioner as he was still presenting as suffering from stress at work.

86. The records show the following entry on 5 April 2019:

*"Seen by member of primary care team. Session No 3. Michael described improvement with his mood, stated that he resigned from his job and managed to secure a senior post in Scotland. Reported feeling pleased with it and being positive for the future. Michael will move to Scotland this month and feels that he no longer requires our service. We've agreed to discharge him from 6 Degrees. Substance misuse – remains unchanged. Medication – remains unchanged. Risk – strongly denied any current thoughts of self-harm, suicidal ideation or harm to others. Treatment plan – to discharge from 6 Degrees."*

87. The claimant provided a disability impact statement as required by Case Management Orders in this case. The report includes the following details:

- a. Following a move to Manchester in 2003 he still found it difficult to socialise, using alcohol to provide him with what he terms “fake confidence”. The Report records the claimant as having described his happiest memories as being in Manchester.
- b. Over the following decade he had various appointments with mental health nurses and multiple periods of counselling. We note that there are no records of these appointments and, further, no mention of them in the Report.
- c. One of his longest term friends talked of the claimant “bottling up” feelings and that where a number of significant events occur over a relatively short period of time the claimant either “blows up” or breaks down.
- d. That the claimant has been lonely for periods of his life including on his return to Manchester shortly before the relevant events in this case.
- e. That at around the time that he provided his impact statement, he was dealing with family issues particularly the poor health of close relatives.

88. Under the heading “effect on day to day activities” the claimant notes:-

- a. That it is difficult to describe the effects his mental health has on his day to day activities.
- b. Some days he can be fine and bright and breezy and on others he is “followed by a big black cloud and want[s] to burst into tears for no reason.
- c. At times he feels he only exists for work and during those times he stats that he has often wondered what the point of his being here is. It is clear to us that here, the claimant is referring to suicide.
- d. The hardest thing he finds to deal with is one of almost constant overthinking.
- e. In relation to work he says this:

*“work is normally the one constant in my life. The one thing I am in control of. I’m good at what I do. And I’m usually okay at keeping work and home life separate. However to keep my interest I always go for a complex job role. On occasions when I am going through a particularly challenging time, my head can be all over the place. I’ll struggle to concentrate.”*

- f. That the hardest issues for him is that every aspect of the tribunal claim “makes me want to be physically sick”

89. We do not accept all that the claimant says in his impact statement. For example we note that his reference to suicide in his impact statement is different to that recorded in his GP records from March 2019. There is no reference to it in the Report either.

90. We were also provided with an occupational health report dated 13 February 2019. This report includes the following:-

*“Mr Stevens is absent due to anxiety. He has developed some psychological symptoms which appear to have arisen in response to his perceptions of issues within his employment. I do not think he has a serious mental health problem; rather he is displaying a response to a situation that has put him under strain.”*

91. We understand that this report followed a telephone appointment with the report’s author, Kay Barnes, who the report describes as an “Occupational Health Adviser.” Whilst we commend the speed with which the report was obtained, as the appointment was an initial telephone one and appears not to have been carried out by a medical professional, we have applied little weight to it in reaching our decision.

92. We are required to make findings of fact in relation to the claimant’s health in order that we can determine whether the claimant has a disability for the purposes of section 6 EqA. Our findings are of course based only on the information we have been provided with. The findings relate to the relevant period – being in the months leading up to the termination of the claimant’s employment with the respondent. They are as follows:-

- a. We accept the conclusions of the Report and as noted at paragraph 82 above.
- b. The claimant was required to deal with a number of traumatic episodes when he was a child. These have resulted in some unresolved psychological issues as identified by the Report.
- c. These unresolved issues do not impact on the claimant’s life to the extent that he has sought further assistance with them, even though they were identified in 2015.
- d. The claimant is prone to low moods, melancholy. He has also had periods in his life when he has been lonely.
- e. The claimant has been adversely affected by him having to address severe illness in those close to him.
- f. The claimant has also been adversely affected by having to deal with the internal disciplinary process.

- g. The issues of family illness and the internal proceedings will have had a short-term impact on the claimant's ability to carry out day to day activities and were the cause of his sickness absence in January and February 2019. Although the claimant was required to continue to handle both issues, their impact on him diminished over a relatively short period of time so that he was (1) able to return to work and (2) discharged from the wellbeing support provided by 6 degrees.

## **E. The Law**

### Constructive and unfair dismissal

93. The claimant claims (1) that his resignation amounted to a constructive dismissal and (2) that this dismissal was unfair under s98 of the Employment Rights Act 1996.

94. Dismissal for the purposes of s98 includes the circumstances stated at s95(1)(c).

*“.....an employee is dismissed by his employer if.....the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.”*

95. In considering the issue of constructive dismissal, an Employment Tribunal is required to consider the terms of the contractual relationship, whether any contractual term has been breached and, if so, whether the breach amounts to a fundamental breach of the contract (*Western Excavating (ECC) Limited v. Sharp* [1978] QC 761).

96. It is an implied term of every employment contract that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (see for example *Malik v. BCCI* [1997] IRLR 462\_at paras 53 and 54). I refer to this term as “the Implied Term.”

97. In considering the Implied Term, Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Limited* [1981] ICR 666, said that the tribunal must “*look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.*”

98. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a “last straw” incident, even though the “last straw” is not, by itself, a breach of contract: *Lewis v Motorworld Garages Limited* 1986 ICR 157 CA.

99. In the judgment of the court of appeal in *Omilaju v Waltham Forest London Borough Council* 2005 1 All ER 75. Dyson LJ stated as follows in relation to the last straw.

*“A final straw, not in itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase “an act in a series” in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach although what it adds may be relatively insignificant.”*

100. The recent Court of Appeal decision in *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833 (“Kaur”) commented on the last straw doctrine. The judgment included guidance to Employment Tribunals deciding on constructive dismissal claims. At paragraph 55 of the judgment, Underhill LJ states:-

*“In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:*

- (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?*
- (2) Has he or she affirmed the contract since that act?*
- (3) If not, was that act (or omission) by itself a repudiatory breach of contract?*
- (4) If not, was it nevertheless a part (applying the approach explained in [LB Waltham Forest v. Omilaju [2005] ICR 481] of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the [implied term of trust and confidence]? .....*
- (5) Did the employee resign in response (or partly in response) to that breach?*

*None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy.”*

101. Once repudiatory breach of contract has been established, it is necessary to consider the part it played in the claimant’s decision to resign. The following passage from the judgment of the Court of Appeal in *Nottinghamshire County Council v. Meikle* [2004] IRLR 703, is helpful.

*33. It has been held by the EAT in Jones v Sirl and Son (Furnishers) Ltd [1997] IRLR 493 that in constructive dismissal cases the repudiatory breach by the employer need not be the sole cause of the employee’s resignation. The EAT there pointed out that there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of contract and that the employee may*

*leave because of both those breaches and another factor, such as the availability of another job. It suggested that the test to be applied was whether the breach or breaches were the 'effective cause' of the resignation. I see the attractions of that approach, but there are dangers in getting drawn too far into questions about the employee's motives. It must be remembered that we are dealing here with a contractual relationship, and constructive dismissal is a form of termination of contract by a repudiation by one party which is accepted by the other: see the Western Excavating case. The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation.*

102. In the event that an Employment Tribunal decides that the termination of a claimant's employment falls within s95(1) the employer must show the reason for dismissal and that the reason for dismissal was a potentially fair one under s98(1) and (2) ERA. In a constructive dismissal claim, the reason for dismissal is the reason why the employer breached the contract of employment (*Berriman v. Delabole Slate Limited [1985] IRLR 305* at para 12).

103. A delay in resigning may indicate that the employee has affirmed the contract, so losing the right to claim constructive dismissal. In *TE Western Excavating case*, Lord Denning stated that the employee '*must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged*'.

104. The more recent case of *Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908, CA*, confirmed this although in his judgment Jacob LJ noted the requirement for Tribunals to review the particular facts of a case very carefully before deciding whether the employee has affirmed the contract.

*Next, a word about affirmation in the context of employment contracts. When an employer commits a repudiatory breach there is naturally enormous pressure put on the employee. If he or she just ups and goes they have no job and the uncomfortable prospect of having to claim damages and unfair dismissal. If he or she stays there is a risk that they will be taken to have affirmed. Ideally a wronged employee who stays on for a bit whilst he or she considered their position would say so expressly. But even that would be difficult and it is not realistic to suppose it will happen very often. For that reason the law looks carefully at the facts before deciding whether there has really been an affirmation. (Para 54)*

### Equality Act claims

105. The claimant makes claims under the Equality Act 2010 (EqA), relying on the protected characteristic of disability. As noted above, those claims relying on the protected characteristic of sexual orientation have been withdrawn.

106. Legislation and commentary relating to the claims brought is set out below.



s19 EqA. Indirect discrimination

- (1) *A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
- (2) *For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
- (a) *A applies, or would apply, it to persons with whom B does not share the characteristic,*
  - (b) *it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
  - (c) *it puts, or would put, B at that disadvantage, and*
  - (d) *A cannot show it to be a proportionate means of achieving a legitimate aim.*

s26 EQA Harassment

- (1) A person (A) harasses another (B) if—
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
  - (b) the conduct has the purpose or effect of—
    - (i) violating B's dignity, or
    - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

*(26(2) and (3) not relevant.*

- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
- (a) the perception of B;
  - (b) the other circumstances of the case;
  - (c) whether it is reasonable for the conduct to have that effect.

107. In *Grant v. HM Land Registry* 2011 IRLR748 (“Grant”) the Court of Appeal noted that it was not every unwanted act or comment based on a protected characteristic that would give rise to a valid claim under s26. The judgment (at paragraph 47) includes the following comment on the wording of s26:

*“Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.”*

108. In *GMB v. Henderson* (2017) IRLR 340, the Court of Appeal noted that the element of purpose under s26(1) (b) and whether the conduct complained of is related to a protected characteristic would require *“a consideration of the mental processes of the potential harasser”* (at paragraph 7 of the judgment).

### Disability

109. Section 6 EqA provides as follows:-

- (1) A person (P) has a disability if –
  - (a) P has a physical or mental impairment, and
  - (b) The impairment has a substantial and long term adverse effect on P’s ability to carry out normal day to day activities.

110. Schedule one to the EqA, provides that “long term” is either at least 12 months, or likely to be at least 12 months or is likely to last for the rest of the affected person’s life.

111. The case of *J v. DLA Piper UK* [2010] ICR 1052 considered the question of depression and mental impairments. Paragraph 42 of the judgment is set out below:-

*“The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal ..... between 2 states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways but will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness – or, if you prefer, a mental condition – which is conveniently referred to as “clinical depression” and is unquestionably an impairment within the meaning of the Act. The 2<sup>nd</sup> is not characterised as a mental condition all but simply as a reaction to adverse circumstances (such as problems at work) or – if the jargon may be forgiven – adverse life events. We daresay that the value or validity of that distinction could be questioned at the level of deep theory and even if it is accepted in principle the borderline between the 2 states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians..... And which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals and most late use such terms as “depression” (clinical or otherwise) “anxiety” and “stress.” Fortunately however we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long term effect requirement. If as we recommend..... a tribunal starts by considering the adverse effect issue and finds that the claimant’s ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in*

*most cases be likely to conclude that he or she was indeed suffering clinical depression rather than simply a reaction to adverse circumstances: it is a commonsense observation that such reactions are not normally long lived.*

### Time Limits

112. Section 123 EqA provides that complaints may not be brought after the end of 3 months *“starting with the date of the act to which the complaint relates”* (s123(1)(a) EqA. This is modified by section 140B – providing for early conciliation.

113. Section 123(3)(a) notes that conduct extending over a period of time is to be treated as done at the end of the period.

114. Section 123(1)(b) provides that claims may be considered out of time, provided that the claim is presented within *“such other period as the employment tribunal thinks just and equitable.”*

115. The case of Robertson v Bexley Community Centre 2003 IRLR 434 noting the following passages from this Court of Appeal judgment:-

*“if the claim is out of time there is no jurisdiction to consider it unless the tribunal considers it is just and equitable in the circumstances to do so.”* (para 23)

*“...the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of discretion is the exception rather than the rule.”* (para 25 of the judgment)

116. The EqA itself does not set out what Tribunals should take in to account when considering whether a claim, which is presented out of time, has been presented within a period which it thinks is just and equitable. We note the following:-

a. British Coal v. Keeble EAT 496/96 in which the EAT advised, when considering whether to allow an extension of time on just and equitable grounds, adopting as a checklist the factors referred to in s33 of the Limitation Act 1980. These are listed below:-

- the length of and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected by the delay;
- the extent to which the party sued had co-operated with any requests for information.
- the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action.
- the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

- b. Rathakrishnan v Pizza Express (Restaurants) Ltd 2016 ICR 283, EAT. This case noted that the issue of the balance of prejudice and the potential merits of the (in that case) reasonable adjustments claim were relevant considerations to whether to grant an extension of time.

## F. Our Conclusions

117. We deal with the jurisdiction issue first.

- *Were all of the claimant's discrimination, harassment and victimisation complaints presented within the time limits set out within section 123 of the Equality Act 2010? The respondent asserts any treatment which occurred before 12 April 2019 is out of time.*
- *If not, whether time should be extended on a just and equitable basis.*

118. The direct discrimination and victimisation claims have been withdrawn.

119. The indirect discrimination claim and harassment claims are out of time. Both form part of the sequence of events which led to the disciplinary decision. Further, evidence has been provided on the issues by both parties. Neither party had an issue with recollection.

120. In relation to the harassment claim, a helpful documented note of calls was kept at or around the time that the calls were made.

121. Having regard to the test and the guidance in the caselaw above, we have decided that it is just and equitable to extend time and to allow the indirect discrimination and harassment claims to be brought.

### **Constructive Unfair Dismissal**

- *Was the respondent in breach of the claimant's employment contract? The claimant contends that the respondent was in breach of the duty of trust and confidence. Amongst other things he relies upon the first written warning imposed upon him in the context of the Civil Service pillars of honesty and integrity, which he says was called into question. He also relies upon the way in which the respondent conducted the proceedings, the time taken for such proceedings, and the related matters alleged as discrimination below.*
- *If so, did the respondent's breach of contract amount to:*
  - (2) *A fundamental breach of contract; and/or*
  - (3) *A repudiatory breach of contract; and/or*
  - (4) *A course of conduct culminating in a "last straw" which amounted to a repudiatory breach of contract? The last straw relied upon is the imposition of a first written warning.*
- *If so, did the claimant resign in response to any alleged fundamental and/or repudiatory breach of contract by the respondent?*

122. Answering the questions put by Underhill LJ in Kaur:-

- a. The issuing of the first formal warning was the last incident. We have no criticism of the decision to impose a first written warning on the claimant. The claimant was not truthful and open about the

circumstances in which the laptop was lost in the first incident. Further, the claimant did not take reasonable care of the laptop in the first incident. Those were the reasons why the first written warning was given.

- b. The claimant did not reaffirm the contract since then. Whilst he worked his notice period, he communicated his decision to resign straight after receiving the warning and made clear that he considered he had no choice.
- c. The warning was not a fundamental breach of contract.
- d. The warning was not a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence?

123. In relation to our finding under d above:-

- a. We find that the respondent's decision to take formal action was reasonable even though, prior to then, the decision had been taken to deal with the first incident on an informal basis.
- b. The Fair Processing Notice provided at or near the start of the formal disciplinary process was a harsh message. It is intended to make very clear to an employee the potential seriousness of the allegations. We are sympathetic to SR's reticence about issuing the whole of the Notice. However, we also note at that stage that, in addition to the concerns about the claimant's honesty when reporting the first incident, his explanation as to the theft in the second incident was still under consideration. Ultimately that explanation was accepted but it had not, as at December 2019, been accepted. It was to be the subject of an investigation. Taking all of this into account we have no criticism of the Fair Processing Notice being issued.
- c. While the claimant notes a period of some eight months, it was only once the second incident had occurred and further information in relation to the first incident had been received at the end of November that the respondent was sufficiently informed to decide whether or not formal action should proceed. As to the process from there, ideally it would have taken less time. We note particularly a delay between the first report and the final report. However, these delays were not so significant as to amount to a breach of contract at all (fundamental or otherwise)

124. Our conclusion therefore is that there were not circumstances in which the employee was entitled to terminate his employment without notice by reason of the respondent's conduct.

***Disability***

- *Was the claimant a disabled person in accordance with section 6 of the Equality Act 2010 at the relevant time? The disability relied upon is adjustment reaction and psychological issues. The relevant time is 6 December 2018 to 28 April 2019.*
- *If so, did the respondent have actual or constructive knowledge of the claimant's disability during or at the relevant time?*

125. We have set out above our findings of fact in relation to the claimant's claimed mental impairment. Based on the information before us, we do not find that the claimant had a mental impairment which had a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. We accept there have been periods in the claimant's life when he has had very difficult issues to deal with. One of those times was at the end of 2018 and beginning of 2019 when the claimant faced a formal disciplinary procedure. It is also apparent that there are some unresolved psychological issues as identified in 2015 but we find that these do not have a substantial adverse impact on the claimant's ability to carry out normal day-to-day activities.

126. Whilst we have reached the decision that the claimant was not disabled at the relevant time, having heard the evidence in relation to the allegations of indirect discrimination and harassment, we have gone on to comment on these below.

***Indirect discrimination in relation to disability (section 19 Equality Act 2010)***

- *Did the respondent apply to the claimant a provision, criterion or practice ("PCP")? The PCPs relied upon are:*
  - (3) *Having three consideration points for the same incident in relation to the loss of equipment (allegedly being when lost; when recovered; and when it was determined that investigation/action was required);*
  - (4) *Having a long drawn out process which lasted for nine months in relation to the lost equipment.*
- *Did the respondent apply the PCP to persons with whom the claimant does not share the characteristic?*
- *Did the PCP put persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom the claimant does not share it?*
- *Did the PCP put the claimant at a disadvantage?*
- *Can the respondent show that the PCP is a proportionate means of achieving a legitimate aim?*

127. We do not find that the respondent applied the PCPs upon which the claimant has relied.

128. The respondent did not have a PCP of three consideration points for the same incident in relation to the loss of equipment. Generally an issue of suspected misconduct will only be considered once in accordance with the respondent's disciplinary policy. Here was an exception. Matters particularly took a turn when the claimant's line manager learned of the information provided on recovery of the lost item.

129. We do not find that the respondent had a PCP of applying a long, drawn out process. The respondent's PCP is as set out in its policy above. The timings in this case were due to the circumstances as set out in our findings of fact. The disciplinary process itself lasted from 18 December 2018 to 29 March 2019 (excepting the appeal).

***Harassment related to disability (section 26 Equality Act 2010)***

- *The harassment upon which the claimant relies is what he alleges were excessive telephone calls made whilst he was absent on grounds of ill health. Did the respondent engage in that conduct?*
- *If so, was that conduct unwanted?*
- *If so, did it relate to the claimant's disability?*
- *Did the conduct have the purpose or the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?*

130. We have set out our findings in relation to the telephone calls made with the claimant whilst he was absent due to sickness. We have no criticism of SR in relation to these. Further, even if seven calls over a four week period could be considered excessive, this falls a long way short of harassment for the purposes of section 26 EqA, having regard to the Judgment in Grant noted above.

Employment Judge Leach

Date 13 November 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON  
19 November 2020

FOR THE TRIBUNAL OFFICE

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