EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Mr D Barrow		**Kellog Brown & Root (UK) Limited**

Heard at: London South Employment Tribunal
On: 21, 22, 23, 25, 28 & 29 September and 2 October 2020
In Chambers on 12 and 13 November 2020

Before: Employment Judge Hyams-Parish
Members: Ms J Jerram and Ms G Mitchell

Representation:
For the Claimant: Ms L Bone (Counsel)
For the Respondent: Ms S Tharoo (Counsel)

RESERVED JUDGMENT

1. The claim of unfair dismissal (s.98 ERA) is well founded and succeeds.

2. The claim of direct disability discrimination (s.13 EQA) fails and is dismissed.

3. The claim of disability related harassment (s.26 EQA) is well founded and succeeds to the extent set out below.

4. The claim of unfavourable treatment for something arising in consequence of disability (s.15 EQA) is well founded and succeeds to the extent set out below.

5. The claim of failing to make reasonable adjustments (s.20 EQA) fails and is

dismissed.

6. The claim of victimisation (s.27 EQA) fails and is dismissed.

REASONS

Claims and Issues

1. By a claim form presented to the Tribunal on 11 October 2018, the Claimant brings claims of unfair dismissal and disability discrimination against the Respondent.

2. The following claims and issues were agreed at the outset of the hearing[1]:

A. Unfair dismissal (s.98 Employment Rights Act 1996 ("ERA"))

i. Did the Respondent genuinely believe that the Claimant had caused a breakdown in trust and confidence justifying his dismissal for some other substantial reason?

ii. Did the Respondent have reasonable grounds for that belief?

iii. At the time of forming that belief had the Respondent carried out as much investigation as was reasonable?

iv. Was the dismissal procedurally fair?

v. Did dismissal fall within a band of reasonable responses?

vi. Should there be a *Polkey* reduction of the compensatory award?

vii. Should there be a reduction of compensation on the grounds of contributory fault?

B. Knowledge of disability (s.6 Equality Act 2010 ("EQA"))

i. When did the Respondent know, or ought reasonably to have known, that the Claimant was a disabled person within the meaning of s.6 EQA?

C. Direct disability discrimination (s.13 EQA)

i. Did the Respondent treat the Claimant less favourably than it treated,

[1] These have been taken from the list of issues agreed and given to the Tribunal on the first day of the hearing, but with some tidying up and some unnecessary drafting deleted.

or would have treated others (in this case, a hypothetical comparator)? The less favourable treatment relied on is as follows:

a. The treatment of the Claimant during the meeting of 6 December 2017, including stating to the Claimant that he was going to be dismissed and without any reason;

b. The Claimant's exclusion from the workplace;

c. The humiliating treatment of the Claimant in escorting him from the office in full view of colleagues and subordinates;

d. Refusal and/or failure to use the contractual disciplinary and/or capability procedures;

e. Grading the Claimant as "*usually meets expectations*" in his performance review;

f. Failure to pay the Claimant a bonus under the LTI and under the STI in March 2018;

g. Criticism of the Claimant for not being able to attend the meetings convened for 15 March and 23 April 2018;

h. The arrangements for the meeting with Mr Simmonite, including inviting the Claimant to meetings during his chemotherapy treatment;

i. Reliance on the Claimant's behaviour under the effect of medication in considering the decision to dismiss;

j. Not giving due account for the Claimant's disability and treatment in making the decision to dismiss;

k. Refusal and/or failure to engage with the Claimant's allegations of unfair treatment and discrimination;

l. The unfair treatment of the Claimant as set out at paragraphs 94-100 of the Amended Particulars of Claim;

m. The decision to dismiss the Claimant;

n. Failure to consider the Claimant's appeal in a reasonable period;

o. Failure to take into account the impact of its unfair and/or discriminatory treatment on the Claimant in making the

decision to dismiss him and/or to dismiss his grievance and/or to dismiss his grievance appeal; and

p. The email of Andrew Barrie of 6 December 2017 to the team in which Mr Barrie breached the Claimant's confidence and made offensive and humiliating remarks.

ii. If the Tribunal finds that the Claimant was treated less favourably, was it because of disability?

D. Harassment

i. Did the Respondent engage in the following unwanted conduct:

a. The treatment of the Claimant during the meeting of 6 December 2017, including stating to the Claimant that he was going to be dismissed and without any reason;

b. The Claimant's exclusion from the workplace;

c. The humiliating treatment of the Claimant in escorting him from the office in full view of colleagues and subordinates;

d. Refusal and/or failure to use the contractual disciplinary and/or capability procedures;

e. Grading the Claimant as "*usually meets expectations*" in his performance;

f. Failure to pay the Claimant a bonus under the LTI and under the STI in March 2018;

g. Criticism of the Claimant for not being able to attend the meetings convened for 15 March and 23 April 2018;

h. The arrangements for the meeting with Mr Simmonite, including inviting the Claimant to meetings during his chemotherapy treatment;

i. Reliance on the Claimant's behaviour under the effect of medication in considering the decision to dismiss;

j. Not giving due account for the Claimant's disability and treatment in making the decision to dismiss;

k. Refusal and/or failure to engage with the Claimant's allegations of unfair treatment and discrimination;

l. The unfair treatment of the Claimant as set out at paragraphs 94-100 of the Amended Particulars of Claim;

m. The decision to dismiss the Claimant;

n. Failure to consider the Claimant's appeal in a reasonable period;

o. Failure to take into account the impact of its unfair and/or discriminatory treatment on the Claimant in making the decision to dismiss him and/or to dismiss his grievance and/or to dismiss his grievance appeal; and

p. The email of Andrew Barrie of 6 December 2017 to the team in which Mr Barrie breached the Claimant's confidence and made offensive and humiliating remarks.

ii. Was the above unwanted conduct related to disability?

iii. Did the unwanted conduct have the purpose or effect of violating the Claimant's dignity and/or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? If it had the above effect, was it reasonable for it to have had that effect?

E. Discrimination arising from disability

i. Has the Respondent treated the Claimant unfavourably for something arising in consequence of his Disability contrary to s. 15 EQA? The Claimant alleges that the Respondent has taken into account the Claimant's conduct while affected by the symptoms of his disability and/or the medication taken to treat his disability. The Claimant relies on the following acts of unfavourable treatment:

a. The treatment of the Claimant during the meeting of 6 December 2017, including stating to the Claimant that he was going to be dismissed and without any reason;

b. The Claimant's exclusion from the workplace;

c. The humiliating treatment of the Claimant in escorting him from the office in full view of colleagues and subordinates;

d. Refusal and/or failure to use the contractual disciplinary and/or capability procedures;

e. Grading the Claimant as "*usually meets expectations*" in his performance review;

f. Failure to pay the Claimant a bonus under the LTI and under the STI in March 2018;

g. Criticism of the Claimant for not being able to attend the meetings convened for 15 March and 23 April;

h. The arrangements for the meeting with Mr Simmonite, including inviting the Claimant to meetings during his chemotherapy treatment;

i. Reliance on the Claimant's behaviour under the effect of medication in considering the decision to dismiss;

j. Not giving due account for the Claimant's disability and treatment in making the decision to dismiss;

k. The decision to dismiss the Claimant;

l. The unfair treatment of the Claimant as set out in the Amended Particulars of Claim at paragraphs 94-100;

m. Failure to take into account the impact of its unfair and/or discriminatory treatment on the Claimant in making the decision to dismiss him and/or to dismiss his grievance and/or to dismiss his grievance appeal; and

n. The email of Andrew Barrie of 6 December 2017 to the team in which Mr Barrie breached the Claimant's confidence and made offensive and humiliating remarks.

ii. In relation to the unfavourable treatment set out at paragraphs D(i)(a)-(f) and D(i)(i)-(m) the Claimant relies on the following as the "something arising":

a. the symptoms of his disability in that he suffered itchy skin and consequent difficulty concentrating, stress and distress; and/or

b. The symptoms of his steroid medication in that he experienced agitation, mania, overflowing emotion, lowered inhibition and diminished self-control.

iii. In relation to the unfavourable treatment set out at paragraphs D(i)(g) and (h) the Claimant relies on the symptoms of his disability and/or

chemotherapy treatment which included the symptoms set out at D(ii)(a) and tiredness, nausea and headaches. The Claimant also relies on the fact that he had to attend chemotherapy and other medical appointments.

iv. In relation to each matter set out at paragraph D(i)(a)-(n) was this a proportionate means of achieving a legitimate aim?

v. The Respondent contends that the legitimate aim was "*conducting and managing relationships between senior staff for the purposes of ensuring the effective running and management of Government Services*".

F. Failure to make reasonable adjustments

i. Did the Respondent apply the following PCPs to the Claimant?

   a. The stressful nature of the job including the requirement to work long hours and/or to travel within the UK and internationally to client and project locations;

   b. The requirement that the Claimant continue in his role without a stress risk assessment;

   c. The requirement that the Claimant initiate and/or progress the consideration of occupational health recommendations and/or appropriate adjustments;

   d. The requirement that dissatisfaction be expressed in temperate language and/or a moderated tone and/or without personal criticism of the Claimant;

   e. The requirement to attend meetings while the Claimant was too sick to attend work; and

   f. The practice of inviting the Claimant to meetings at short notice and/or only granting his request for a postponed meeting at short notice.

ii. Did each or any of the PCPs set out at paragraph E(i)(a)-(f) place the Claimant at a substantial disadvantage compared to persons who are not disabled?

iii. Did the Respondent fail to make the following adjustments which the Claimant considers reasonable:

   a. Adoption of the recommendations in the Occupational Health

("OH") Report;

b. Measures to alleviate stress in the role;

c. Taking into account in its evaluations of the Claimant, including the decision to dismiss, the fact that he was suffering cancer and the side effects of any medication;

d. Permitting the Claimant to take sick leave without having to attend meetings to discuss his potential dismissal;

e. Adjustment to the Claimant's role or redeployment or change in line management;

f. Proper notice of the meeting with Mr Simmonite and other hearings, and the convening of those meetings at a reasonable time.

G. Victimisation

i. Did the Respondent subject the Claimant to the following detriment?

a. the Respondent decided that, regardless of the outcome of the grievance appeal process and/or the investigations pursuant to the grievance appeal including any investigatory steps not yet taken, it would not re-employ or re-engage the Claimant.

ii. Did the Respondent subject the Claimant to the above detriment because he did the following protected acts?

a. Letter of 9 February 2018;

b. The Claimant's written submissions presented to Mr Simmonite following the investigatory meeting on 30 April 2018 dated 4 and 8 May 2018;

c. The grievance of 20 April 2018 and addendum of 29 May 2018;

d. The grievance appeal;

e. The Claimant's appeal against dismissal; and

f. The Claimant's contact with ACAS and the start of conciliation.

Practical matters

3. This case was conducted using the HMCTS video conferencing platform called CVP. This is because at the time of this hearing, there were only a limited number of "in person" hearings that could be accommodated at the Tribunal hearing centre.

4. During the hearing the following witnesses gave evidence:

Name	Role	Job title
Andrew Barrie	Claimant's line Manager	SLT Leader Senior Vice President, Government Services, Europe Middle East Africa Region (GS EMEA)
David Barrow	Claimant	SLT Member, Head of Programme Management/PMC Projects
Sid Brettell		SLT Member, HR Director (employed by KBR until 2019)
David Gibson	Grievance Chair Reported to Martin Simmonite	Project Director, Hydrocarbon Services
Elliott Seymour	Grievance Appeal Chair (Reported indirectly to Andrew Barrie)	HR Director, Aspire Defence Services Ltd (employed by KBR until 2020)
Martin Simmonite	Investigating Officer Dismissing Officer	Senior Vice President, Hydrocarbon Services
Ken Robertson	Reported to Claimant	Director Business Development (i.e. Sales), Programme Management/PMC

Tim Rosbrook		HR Director, EMEA Region
John Savidge	Reported to Claimant	Director Operations, Programme Management/PMC

5. Other persons mentioned in the case were as follows:

Name	Role	Job title
Jay Ibrahim	Supervisor of Andrew Barrie and Tim Rosbrook	President, EMEA Region
Emma Barbeira	HR Report to Martin Simmonite	HR Manager, Hydrocarbon Services
Tim Barber*[2]		SLT Member, Head of Advisory / KBRwyle EMEA
Karen Barker		Senior Proposal Specialist, GS EMEA
James Barrett*		SLT Member, Accounting & Finance Director (employed by KBR until end July 2020)
Stuart Bradie	Supervisor of Jay Ibrahim	CEO KBR Inc
Richard Card		SLT Member, Vice President, Head of Defence and Government Projects
Susana Chambers		Deputy HR Director, GS EMEA

[2] The Respondent had proposed to call the witnesses in this table marked with an (*) but the Tribunal decided not to hear their evidence for the reasons provided at the hearing and set out at paragraphs 9-18 below.

Edward Gay*		Project Manager, ESN/ESMCP
Jon Gould*		Vice President, Business Development, GS EMEA
Mark Meffan*		SLT Member, Vice President, Head of Ventures
Martin Nelhams	In-house HR lawyer	Senior Counsel, KBR Law Department (Retired in January 2020; thereafter, he is employed on a casual basis)
Stephen Peet	Dismissal Appeal Chair	Senior Vice President, Technology & Consulting (employed until 2019)
Cheryl Willis	Reported to Claimant	Administrator, Programme Management/PMC
Andrew Wood		Principal HR Generalist

6. The parties had agreed a bundle of documents consisting of 1568 pages to which the Tribunal was referred throughout the hearing. References to numbers in square brackets in this judgment are references to page numbers in the agreed bundle.

7. There being insufficient time for the Tribunal to give its decision at the hearing, the parties were informed that judgment would be reserved.

Preliminary matters

8. On the first day of the hearing the Tribunal was informed by Ms Tharoo that the Respondent proposed to call thirteen witnesses to give evidence, significantly more than the Tribunal had been told at a previous case management hearing when the date for this hearing was fixed. Ms Bone objected to five of those witnesses giving evidence (those marked with an

asterisk in the table at paragraph 5 above) primarily because of their relevance to the issues in the case. They were members of the Senior Leadership Team who were essentially being called to give evidence, Ms Bone argued, to comment on the Claimants performance and his relationship with colleagues. Ms Tharoo submitted that the witnesses were required to prove contributory fault and to defend certain discrimination claims.

9. From the Tribunal's perspective, a significant concern was that there would be insufficient time to conclude the case with fourteen witnesses and would result in the case going part-heard. With the difficulties with long waiting times for cases to be listed for hearing, there was a concern about when this case could resume if it went part heard.

10. The Tribunal took the opportunity to look back at the file and, in particular, what had been agreed at previous case management hearings. The Tribunal noted that there had been a case management hearing before Employment Judge Davies in May 2019 when the Respondent was represented by Ms Ellliott (in-house solicitor) and the Claimant by Counsel, Mr Palmer. At that hearing the Respondent said it would be calling seven witnesses. In addition to the Claimant, that would make eight witnesses in total, and on that basis, a listing of seven days was agreed.

11. The case was subsequently listed for a case management hearing on 25 March 2020 before Employment Judge Morton when the Claimant was represented by Ms Bone, and the Respondent by in-house solicitor, Ms Wilson. The Respondent applied to add a defence of justification to the s.15 EQA claim; in addition they sought to add capability as a reason for dismissal, as an alternative to its drafted ground, a breakdown in trust and confidence (SOSR). The order further stated "*It also seeks to establish this argument by calling 10 additional witnesses, bringing its total number of witnesses to 17*". Paragraphs 13-15 of the Order read (noting that we assume references to Ms Vine actually mean Ms Wilson) [sic]:

> ***The Claimant objects to this amendment on the basis that it changes the basis of the grounds of resistance by introducing a defence that the Respondent omitted to plead at an earlier stage. The defence of objective justification will also, the Claimant submits, put him to the disadvantage of having to take advice on a new element in the Respondent' case. Ms Bone also submitted that the Respondent was incorrect in saying that it would not be relying on different facts in pleading a defence of objective justification. The defence would have to be grounded in factual material and the application introduced uncertainty, particularly given the passage of time.***
>
> ***It seemed to me that in fact the Respondent was quite explicitly relying on matters it had already set out in its grounds of resistance and arguing that these matters formed the basis of an additional defence to the claim under s15. This was analogous to the Claimant's application to plead some of the matters set out in his particulars claim as acts of***

> ***harassment as well as direct discrimination. Just as the balance of prejudice on the Claimant's application to amend fell in favour of allowing the amendment, on this aspect of the Respondent's amendment application the balance of prejudice points to allowing the amendment. The Respondent would be prejudiced by being prevented from advancing the defence set out in the statute, when the factual basis for it doing so is already, by its own account, set out in paragraphs 9-12, 47 and 56 of the grounds of resistance. That being the case the prejudice to the Claimant is limited and the prejudice to the Respondent of refusing the application outweighs it. I allow the Respondent's amendment to introduce new paragraphs 57 and 58 into its grounds of resistance.***
>
> ***The second application to amend is more problematic as it seeks to change the whole basis of the Respondent's defence by alleging that the Claimant was dismissed for poor performance or incapability. According to Ms Vine the documentary evidence shows that the Claimant had for example not delivered any new work for 18 months prior to his dismissal and he was failing to deliver new business whilst being under pressure to do so. There were, she says, meetings with him about his objectives and that the Respondent had formed the view that the Claimant was trying to divert attention away from his failure to deliver. The Tribunal, she submitted, would be assisted in ascertaining the real reason for dismissal if it allowed the amendment.***

12. Delivering her reasons for refusing the application to amend, Employment Judge Morton said as follows at paragraphs 18-20 [sic]:

> ***….It seems to me that no reason has been demonstrated that adequately explains why the Respondent is seeking to fundamentally change the nature of its case well over a year after serving its grounds of resistance. I agree with Ms Bone that the implications for the Claimant if I were to allow the amendment are very serious. If allowed the amendment would mean that the Claimant's entire understanding of why his dismissal was unfair would have to be revisited. He would also be required to answer to a case that had never been put to him during his employment. It is not the Respondent's case that a capability or performance management process was followed. In my judgment that amounts to very substantial prejudice, particularly at this late stage in the history of the case.***
>
> ***There is a further matter arising from the way in which the Respondent proposes to advance its revised case. Ms Vine has indicated that as a result of her enquiries into the Claimant's performance history she now intends to call 12 additional witnesses to prove the Respondent's case that the Claimant was a poor performer in his role. Despite Ms Vine's submission that the evidence of each of these witnesses would be "brief" the addition of 12 witnesses to the seven discussed at the previous case management hearing in May 2019 would inevitably mean the postponement of a hearing that has been listed for over a year and would push the hearing date well into 2021. That is some three years after the Claimant's dismissal. That too amounts to very substantial prejudice to the Claimant and would not in my judgment be in accordance with the overriding objective in Rule 2.***
>
> ***It is clear to me that all of the relevant factors point away from allowing the Respondent's amendment. The nature of the amendment seems to***

> ***me to be tantamount to trying to rewrite history after the event; the timing of it has not been adequately explained by the Respondent and the effect of it would be to prejudice the Claimant very severely by requiring him to reappraise entirely his understanding of his employer's reason for dismissing him as well as requiring a postponement of the case. If, as Ms Bone submitted, the Claimant's health has already deteriorated as a result of delays in bringing the case to trial, the prejudicial effect of any postponement will be amplified. The prejudice to the Claimant of accepting this application clearly outweighs the prejudice to the Respondent of refusing it.***

13. At this hearing, Ms Bone argued that by introducing the additional five witnesses, the Respondent was attempting to do what it had failed to achieve at the above case management hearing; it was attempting to prove that the Claimant was not capable, in circumstances where that was not the pleaded reason for dismissal.

14. Having considered the evidence of the five witnesses, the Tribunal was not satisfied or convinced of their relevance to the issues which the Tribunal needed to determine. There would be evidence before the Tribunal, from other witnesses, from which the Tribunal would be capable of making an assessment of contributory fault, if appropriate. In relation to the discrimination claims, the Tribunal could not see their relevance at all. The Tribunal took the view that these witnesses had been asked, after the event, what they thought of the Claimant, and it is clear from their statements that their views were not positive.

15. Whilst the Tribunal was mindful of the need to take care when deciding to deprive a party of being able to call a witness, rule 41 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 clearly states that the Tribunal may "*regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective*". In this case, the Tribunal was very much alive, as is said above, to the point that allowing the additional witnesses would inevitably mean the case going part-heard. Either that, or cutting down the time to cross examine other witnesses, which the Tribunal did not think appropriate. As it happens, the Tribunal required the representatives to agree to a rigid timetable in order that the case could finish with the witnesses that the Tribunal did hear from. There was insufficient time available for the Tribunal to deliberate or deliver a decision at the hearing.

16. In reaching its decision to disallow the additional witness evidence, the Tribunal took account of the Claimant's deteriorating health. His cancer had progressed to stage 4, which meant that he had a limited time to live. The stress of this case continuing over an extended period of time would not have been good for him.

17. For reasons relating to relevance, and all the other reasons provided above,

including weighing the balance of prejudice, the Tribunal refused to allow the Respondent to call the additional five witnesses.

18. The Tribunal did make clear to Ms tharoo that if there was a factual dispute relevant to the issues in the case, which became apparent during the hearing, and required the evidence from one of the witnesses the Tribunal had disallowed, it would hear a renewed application in relation to that witness only. As it happens, no application was made.

19. Other preliminary matters discussed at the hearing related to without prejudice correspondence and a sensitive matter which was contained in one of the Respondent's witness statements. These matters were resolved by agreement between the parties.

Findings of fact

20. The following findings of fact were reached by the Tribunal, on the balance of probabilities, having considered all the evidence given by witnesses during the hearing, together with the documents referred to. The Tribunal was presented with a large amount of evidence, some of which the Tribunal did not consider to be directly relevant to the issues in this case. Accordingly, the Tribunal has only made findings of fact relevant to the issues it needs to determine.

21. Where the Tribunal's findings in relation to a disputed fact reflect one party's evidence, it is because the Tribunal preferred the evidence of that party over the other.

Background

22. The Respondent's US parent company is a large, sophisticated, high technology company working in the areas of Government Services (mainly defence related), Energy Services (mainly oil & gas related) and General Infrastructure (mainly in the Middle East). Headquartered in Houston, Texas, the company is active on all five continents but with the most significant presence in North America, UK, Middle East and Australia. The Company employs approximately 38,000 people worldwide (including joint ventures), with over 1,000 based in the UK. At the time of the Claimant's dismissal, the Respondent was divided into three main divisions: (1) Government Services; (2) Energy Services; and (3) Technology.

23. The Claimant first started working for the Respondent (then known as Brown & Root (UK) Ltd) as a graduate trainee on 1 September 1980. He left the company for a two year period in August 2000 and then rejoined the company again on 20 March 2002. At the time of his dismissal he had been employed by the Respondent for just over 36 years, the majority of his working life.

24. By 1989, the Respondent had identified the Claimant's potential to become a future senior leader and supported him to undertake a combined MBA/MSc in Project Management at Cranfield University on a fully paid basis. The Claimant passed the highly competitive admissions exam, worked hard during a one-year full-time sabbatical and graduated in the upper second quartile. The Claimant left in August 2000 because there were insufficient career development opportunities for him at that time. During this period, he worked for a US-owned competitor firm until the Respondent head-hunted him to re-join the company in a more senior role which the Claimant accepted.

25. After re-joining the Respondent in 2002 the Claimant progressed through a series of senior Director level positions, for different divisions, in bid management, project management and supervisory management, to the role he held before being dismissed, Head of Programme Management for the Government Services ("GS") division in the Europe, Africa, Middle East ("EMEA") region.

26. Given the size of its workforce and nature of its project management activities, the Respondent had a comprehensive and industry-recognised set of policies and operating procedures known as the "KBR Management System". These procedures are one of the principal intellectual property assets used to win and deliver the continuous cycle of new contracts necessary to sustain the business. The Claimant and his fellow managers were fully trained and well-versed in the procedures, involving refreshers from time to time, because they were intrinsic to everything that the Respondent did and what it represented as being demonstrative of its core values.

27. A sub-set of the KBR Management System covered all aspects relevant to hiring, managing, retaining and terminating employees. The umbrella procedures were applicable across all countries globally but, where appropriate, the subsidiary procedures are customised to meet the requirements of the relevant employment legislation particular to each individual country.

28. GS EMEA was led by Andrew Barrie and he was supported by a Senior Leadership Team (SLT) of 11 managers, including the Claimant. The Programme Management/PMC (Project Management Consulting or Contracting) subdivision was led by the Claimant and he was supported by three managers and an Administrator. The GS EMEA HR functional group was led by Sid Brettell.

29. In January 2016, the Claimant was appointed Director of Programme Management/PMC with responsibility for a $33m turnover and $5.3m profit of a sub-division of the overall GS EMEA business unit. Programme/PMC

was defined as a distinct profit and loss centre but, due to the way responsibilities were arranged, this did not include financial responsibility for the full life cycle of activities under its control. In particular, the budget for bidding new projects was held centrally for the whole GS EMEA business, and not included within each sub-unit. Programme Management/PMC activities comprised a portfolio of capital investment and infrastructure contracts where the Respondent's staff were typically deployed at a client or project location as a discrete group or part of an integrated team. Contracts and staff deployments were mainly undertaken in the UK and Middle East, but sometimes in other countries.

30. As a sub-business unit leader, the Claimant's primary responsibility and overarching annual objective was to meet or exceed the financial plan for the calendar year. This was successfully achieved in 2016 and, by November 2017, was forecast to be on track for that year. Further responsibilities related to strategy, business development/sales, bidding (on a shared basis), staff resourcing and HSSE (health/ safety/ security/ environment). The practical requirements for each area were set out annually in a balanced set of personal objectives recorded and tracked in the comprehensive company-wide AIM (AlignImprove-Manage) performance management, talent and reward database system [164].

31. In January 2017, the Claimant was promoted from Level 70 to 75, as defined in the company-wide organisation structure [265]. No UK-based role-specific job description was provided or agreed with the Claimant and the only formal definition of his role was therefore based on the global “Job Capsule” system by default. These Job Capsules represented families of job roles according to functional activity type such as project management, engineering, operations, administration, sales etc. The Claimant was promoted from XOPM70 (Senior Manager, Operations) to EEPC75 (Project Director EPC) and, as such, his job definition was shifted more to the supervision of construction projects compared with his previous general operations designation.

32. On being promoted in January 2017, the Claimant was not given any salary uplift beyond a standard 4% allocated for the previous year’s performance combined with a routine “*market related*” adjustment [271A].

33. Some time later, it became apparent to the Claimant, when looking at the Respondent's OrgPublisher organisation database, that his job capsule had in fact been changed to the higher level of EEPC80. This designation was important as an indicator of stature and seniority, and was more in keeping with being a member of the SLT. The Claimant was concerned and unhappy that he had not been informed of this, given an amended contract of employment, or provided with an appropriate salary adjustment beyond that received for the adjustment to EEPC75. The reason for this is explained in an email to Jay Ibrahim on 5 January 2017 in which Mr Barrie wrote [277]:

"*I do not intend to give them an additional pay uplift beyond that which has gone through the Annual Merit Review process. I would like to be able to give them the letter with 2017 pay increase at the same time as the job capsule change – else if we time dislocate them – they will expect more pay for the promotion.*"

34. At the beginning of April 2017, Mr Barrie gave the Claimant an enrolment letter for the 2017 STL/LTI bonus scheme in person, as was the custom [294]. He explained that, even though he had been unsuccessful in gaining approval for the Claimant's promotion to Vice President (level 90 in the organisation structure), he had secured participation in the STI/LTI bonus scheme at the same higher percentages as for Vice President. The Claimant took this as a welcome and helpful gesture which he was grateful for. The Claimant thanked Mr Barrie for this. It was of course only a "*potential benefit*" because it was contingent on a number of factors relating to company, business unit and individual performance.

35. At the above meeting the Claimant enquired of Mr Barrie why he had not been successful in gaining approval for the Claimant's promotion to Vice President, in circumstances where Mr Barrie knew it was important to the Claimant. Mr Barrie informed the Claimant that it was because the company had been assimilating and aligning new staff from a large acquisition made recently in the US and there were "*too many Vice Presidents already*" as a consequence of the increased number from the acquisition. He said a block had been put on any new VP level promotions globally for the foreseeable future to allow time for natural wastage to bring the numbers back down. He further explained that, in order to provide an alternative promotion option, the company had brought into use the previously dormant and unused level 80, and the Claimant had been assigned to that. The Claimant asked why he had not been successful in gaining approval for his promotion to VP one year previously (in January 2016) when the Claimant was appointed to his current role, but Mr Barrie indicated that it had been blocked by Andrew Pringle (the previous head of GS EMEA who had retired when Mr Barrie took over) who had said he didn't want Mr Barrie to promote the Claimant to Vice President because the Claimant was "*not an ex-military man*" as Mr Pringle was.

36. Up to the end of 2016, the Claimant consistently received ratings of 3 (Successfully Meets Expectations) and SU (Surpasses Expectations) being the two upper ratings normally awarded for good performance. This culminated in Mr Barrie, writing on the Claimant's 2016 performance appraisal that he had: "*stood up GS EMEA's PMC team and navigated the transition of responsibility very well and in an excellent collaborative manner with other GS EMEA staff. He is now responsible for a sizeable and important portfolio of projects. David has responsibility to grow this important part of the GS EMEA business and ought to be appropriately recognised equitably with his peer group and hence I have recommended*

promotion" [162]. The Claimant said in evidence that the above standard of performance continued into 2017 and that he was proud of his continuing achievements and eager to discuss them at his annual review meeting.

37. The Tribunal accepts that as a consequence of the Claimant's consistently good performance, he was enrolled in annual senior management incentive schemes as a result of which he was awarded shares and future share options.

38. The Claimant has a long working relationship with Mr Barrie. They have known each other since 2003 and started working together in 2004 when they were both involved in bidding for a contract. Mr Barrie became the Claimant's line manager in 2014 when Mr Barrie asked him to join GS EMEA following a decision to close the business unit the Claimant had been working in. From the start of 2014 and into 2015, the Claimant found it challenging to navigate his transition because he had lost the formally designated role and responsibilities he had had in the previous three years as leader of the Power business unit for the UK and Middle East region. In this position he had responsibility for a group of staff and all of the elements of a sub-business unit including financial profit & loss, strategy, business development, operations, supervision, resourcing, health and safety etc. In contrast, when he joined GS EMEA and was working for Mr Barrie, he was in a standalone role doing whatever he was asked to do without any continuing or defined responsibility, and no direct reports. Mr Barrie suggested he be patient and said if he helped GS EMEA to become successful in its diversification ambitions, then he could again look forward to taking on responsibilities similar to those he had enjoyed previously.

39. The Claimant responded to Mr Barrie's counsel to be patient and allowed time for the GS EMEA organisation to grow and evolve in a way that would provide a defined role commensurate with his skills and experience. He was successful in leading the winning of new work, most notably with AREVA for nuclear power plant troubleshooting in Finland, and with EdF for selected PMC services at Hinkley Point C nuclear power station. Mr Barrie was pleased with progress and, by late November 2015 decided he would reconfigure his division to create a new Programme Management/PMC subdivision responsible for non-defence contracts and asked the Claimant to lead it. The distinction of "*non-defence contracts*" was important because a significant area of activity at the time, and anticipated future growth, was in providing services to the Civil part of UK Government in contrast to the substantial workload GS EMEA already delivered for the Ministry of Defence.

40. In his evidence, Mr Barrie described a constructive working relationship with the Claimant and said that he had a good professional respect for him. He described the Claimant has being a challenging person by nature, referring to him having "*disruptive and challenging behaviours*". The Tribunal's own

assessment of the Claimant is that he was hugely ambitious and driven and was not afraid of saying what he wanted or making clear the direction where he wanted to head within the company. The Tribunal finds that at that level of seniority in the company, senior managers were encouraged to be open and challenging. The Tribunal accepts that the Claimant was "*challenging*" but not in a negative sense. The Tribunal heard from a number of witnesses, who like the Claimant, were not afraid to speak their minds and the Tribunal does not doubt that there was lively debate at senior management level on a whole range of issues. The Tribunal's view, having considered the evidence, is that the current picture of the Claimant being a disruptive influence in a negative sense, has been much more about supporting the case that was defended at this Tribunal rather than what was genuinely felt by the Respondent. Looking at the documentary evidence, it could not find support for the view that the Claimant's behaviour was troubling and concerning to the Respondent at the time – as opposed to now pointing to events which are used to support the Respondent's case which caused no concern or difficulty at the time for the Respondent.

Events leading to dismissal

41. On 1 September 2017, the Claimant went to see his GP about an increasingly worrying skin redness and itchiness mainly affecting his torso and upper arms and legs. It had built up gradually over several months, but by July 2017 it had become more noticeable, and the Claimant booked an appointment as soon as he could on return from holiday in August. Because the Claimant's condition had worsened over time, he was quite distressed and irritable with the distraction caused by the itchiness, as well as his red outward appearance. The Claimant was prescribed Ketoconazole anti-fungal cream, E45 anti-inflammatory cream and the GP suggested he also try antihistamine tablets to help.

42. On Monday 4 September 2017, the Claimant was invited to a meeting with Mr Barrie. In the email invite, Mr Barrie stated the subject of the meeting was "*AIM Review/PMC Sales Update*" [318]. In his evidence, Mr Barrie said the purpose of the meeting was to confront the Claimant following a meeting which Mr Barrie had had with the Claimant's team during which Mr Barrie had concluded that the Claimant had been negative to his team members about the business and had sought to undermine decisions of the SLT. In response to some emails about the timing of the meeting, Mr Barrie said in his witness statement:

> ***I was losing my patience and I replied to David at 09:50 and I underlined the word "today" as I was intent on meeting David that day: "David – Please find a time that suits you today. Thanks, Andrew" [page 319]. I wanted to speak with him urgently. I was frustrated that this conversation about David's performance had been delayed so long, partially as a consequence of our respective holidays, but I sense David was also trying to put off for as long as possible a difficult conversation***

that he knew was coming.

43. There is no written record of this meeting but the Tribunal accepts that both discussed the Claimant's progress and success in winning new work in 2017. During the meeting, the Claimant referred to an Excel spreadsheet listing prospects and explained the status of each in summary. The Claimant highlighted particular challenges and obstacles to the goals relating to new business, particularly as they were already in September. Mr Barrie said to the Claimant "*If consulting is the only way you can win new client work in 2017, then you had better get on with it quickly and pursue consulting*". This meeting was the only occasion, apart from when the objectives were set, where the Claimant's AIM objectives were discussed. During this meeting, Mr Barrie did not mention his conversation with the Claimant's team or follow up the meeting in writing.

44. By 19 September 2017, the Claimant had become increasingly concerned about his skin condition as the creams he had been given were having no beneficial effect. He therefore telephoned his GP in order to get a referral to a private skin specialist.

45. On 25 September 2017, Tim Rosbrook commenced employment with the Respondent as a new regional HR Director, hired to deal with international requirements and to act as senior support to Sid Brettell, the GS EMEA HR Director, in light of his impending retirement from the Respondent.

46. On 20 September 2017, in response to Mr Barrie's concerns raised at the 4 September meeting, the Claimant sent an updated version of the Programme Management/PMC sales pursuits [320]. It had been modified from the previous version to show more clearly what could be won in 2017 or, if later, what the timescale was likely to be. It also showed specific actions, the level of effort required and identified different skill types.

47. On 21 September 2017, Mr Barrie replied to the Claimant suggesting a meeting to go through the spreadsheet. The Claimant asked his secretary to liaise with Mr Barrie's secretary to arrange a meeting. However the message the Claimant received back from his secretary was that it was proving to be difficult due to Mr Barrie's work schedule and diary.

48. On 4 October 2017, the Claimant attended an appointment with a skin specialist, Dr Steventon. He assessed the Claimant's condition and concluded the redness and itchiness could be due to acute Urticaria (hives) caused by a virus, as indicated by the sore throat and fever combined with reactive lymphocytes. Unfortunately, although the lymphocytes could also be an indicator of cancer, the potential for early diagnosis was masked by the viral infection. The Claimant was given a prescription of strong anti-inflammatory pills and steroid skin cream.

49. On Friday 20 October 2017, the Claimant visited Mr Barrie for a short, unscheduled 20 minute discussion. The Claimant updated Mr Barrie on current priority activities but his main purpose was to convey the effect that recent organisation changes and budget allocation were having on his Programme Management/PMC group, i.e. shrinking its scope and remit. The Claimant described some specific concerns he had and explained that because the recent organisational changes represented a direction of travel that worked against the Claimant's group, the Claimant was feeling "demotivated and demoralised" by the cumulative effect and their implications for the future. The Claimant describes this conversation, and the Tribunal accepts, as an open, honest and frank conversation about his concerns and how the reorganizational changes were affecting him.

50. Mr Barrie dismissed the concerns and took the conversation in another direction saying he had been wondering whether he should ask the Claimant to do another job such as "*Head of Consulting*". The Claimant said in evidence he was somewhat flattered, but also wrong-footed, and said that this was a job he could easily imagine himself doing by virtue of his skills and practical experience. However, the Claimant knew that the Respondent had been headhunting for a suitable lead person with specific attributes such as (i) an up-to-date network of clients with consulting needs and (ii) access to colleagues who may be interested to join the company, by following their leader. In contrast, the Claimant had not recently been involved in full-time client-facing consulting activity and there would therefore be a delay for him to develop such networks to the required level to achieve meaningful growth. Contrary to subsequent references in 2018 Mr Barrie did not express any concerns about the Claimant's potential nor about their trust and confidence in each other. On the contrary, he suggested the Claimant might do another important job. The Tribunal accepts that Mr Barrie made no comments, nor raised any concerns, about the Claimant's relationships with the leadership team or his direct reports, the Claimant's views towards him, his views about the Respondent or his relationships with others, either internal or external. Although relatively short, the whole discussion was conducted in a calm and measured way. In bringing the meeting to an end, Mr Barrie concluded by saying "*I don't know what another job might be, but perhaps you would like to think about it*." This was the last occasion the Claimant discussed the organisation or his job role on a one-to-one basis with Mr Barrie, other than at his AIM annual review meeting on 30 November 2017.

51. At the SLT meeting on 16 October 2017, Mr Barrie told those present "*where relevant for the Middle East*" that they should expect individual invitations from Tim Rosbrook to meet him. Mr Barrie said that the meetings were to discuss recruitment, employment terms and related matters for staff in the Middle East and more widely in the region, where relevant to the individual managers. At the Claimant's meeting with Mr Rosbrook on 31 October 2017, the Claimant opened the conversation by saying: "*I understand from*

Andrew Barrie's update at the recent SLT meeting that you want to discuss recruitment, employment terms and related matters for staff in the Middle East" to which Mr Rosbrook said that he wanted to use the meeting to "*catch up*". The Claimant offered to show Mr Rosbrook some up-to-date PowerPoint slides used for strategy meetings and other purposes, but Mr Rosbrook said that would not be necessary and that he just wanted a chat. The meeting lasted 30-45 minutes and covered a number of topics which the Claimant summarised in an email back to Mr Rosbrook two hours later [353A]. The purpose of the email was not to tell Mr Rosbrook what they had discussed, but to provide a succinct means to advise Mr Barrie that an unexpected discussion had taken place with Mr Rosbrook at which he had been invited to address matters under Mr Barrie's jurisdiction. The Claimant said in evidence that contrary to what was being alleged by the Respondent, this email demonstrated support and loyalty to Mr Barrie as his line manager. During the meeting, Mr Rosbrook gave no hint of any problem with the Claimant's performance or his relationship with Mr Barrie.

52. On 1 November 2017, the Claimant went to see Dr Steventon (the skin specialist) to be treated further for his skin condition which was deteriorating rapidly and had started to affect the Claimant's ability to concentrate at work. The Claimant's skin had become increasingly red and itchy and was described by Dr Steventon as "*widespread erythrodermic eczema which is rampant*" [1350]. Because the less aggressive treatments had proved unsuccessful, Dr Steventon prescribed a two-week course of the strong oral steroid, Prednisolone. The Claimant started the course of prednisolone on 2 November 2017.

53. By Monday 6 November 2017, the Prednisolone had built up in the Claimant's system and started to affect his behaviour. He was hyperactive and energetic, and had difficulty sitting quietly to concentrate on things when needed. His secretary, Cheryl Willis, became quite concerned for his welfare and said many times during the week that he should calm down and take things easier.

54. During the week commencing 6 November 2017, the Claimant asked Mr Brettell what had been processed on the company's systems regarding his promotion at the start of 2017 as he wanted to check if it had been implemented as intended by Mr Barrie. The prompt for his enquiry was a discrepancy between the job capsule shown in the annual employment contract amendment letter Mr Barrie handed to him at the time (raising the Claimant from XOPM70 to EEPC75) compared with what was shown on the OrgPublisher organisation structure database (EEPC80). In response, Mr Brettel gave him a paper copy of the approval for his promotion [280]. The Claimant read it whilst with Mr Brettel and became angry because it appeared to say the reason for his promotion was to make him look more senior compared with John Savidge who was already on the grade level above (EEPC75). The Claimant told Mr Brettell that it was a cynical

justification for promotion, especially as he had received no promotion related pay adjustment. The Claimant said he felt abused to be "*promoted*" without a commensurate pay increase because promotions were such an infrequent event and was therefore a valuable adjustment opportunity wasted. On 9 November 2018 the Claimant sent an email to Mr Brettell summarising what they had discussed [369A].

55. By Saturday 11 November 2017, the Claimant's emotions and state of mind were highly influenced by the prednisolone which, after over 10 days of treatment, was at maximum effect. The Claimant had been thinking about his meeting with Mr Brettell; for him it reinforced a feeling of being "*victimised, treated unfairly and undervalued*" by Mr Barrie. The Claimant said in his witness statement that "*his head was like a pressure cooker with all my emotions overflowing and I resolved to send Andrew an email by the end of the day to explain how I felt*". He said he knew it was unwise to send any kind of "*difficult*" email in haste, but he was in such an agitated state of mind that he was unable to exercise his usual professional logic or self-control. He resolved to send the email by the end of the day and he worked late into the night to finish it. At the time, the Claimant considered it important to send the email to Mr Barrie before the strategy and business planning meetings that were scheduled to start in the US the following Monday.

56. The Claimant sent Mr Barrie the email on Sunday 12 November 2017 at 01:26 in the morning, copied to Mr Brettel. The email included the following extract [sic]:

> ***The timing of this email is not "smart" or "clever" but the content has unfortunately become overdue and urgently necessary to communicate from my point of view. Whilst inconvenient when you are travelling, recent events have heightened my awareness of the issues and the fact that you are presenting to the Executive next week a strategy and plan for 2018 in which I may be identified to play a relevant part.***
>
> ***The main message I must convey is that I do not wish to continue in the working environment that has developed during 2017 without there being a meaningful change in circumstances. The situation has become "unfair" in an HR sense and "abusive" for me in a personal sense. Recent developments have made me openly angry and you may now be aware that I have unfortunately subjected Sid Brettell to an animated description during several lengthy conversations over the last two days. I apologise to Sid for having to deal with that but my behaviour is consistent and, whilst constrained within acceptable professional bounds, my deteriorating attitude is affecting my relationships with other staff to the detriment of all.***

57. The email continued for three pages and ended with the following [sic]:

> ***There are several other areas where I can elaborate in further detail but, in order to transmit this message in a timely and professional manner prior to your travel, I will conclude with just a summary of the***

considerable number of issues that cause me to feel unable to continue with the status quo:

1. ***Under compensated compared with my peers and the market.***

2. ***Under graded compared with the role and responsibilities I fulfil and by comparison with directly relevant peers.***

3. ***Under recognised for the contributions I have made within my job role, outside my job role, and cumulatively over two periods of employment spanning 35 years***

4. ***Denied meaningful promotion for three years despite the merit of promotion being mutually agreed and recorded.***

5. ***Compromised by the cynical use of a new job capsule as a meaningless substitute and organisational "alignment" mechanism.***

6. ***Disadvantaged by the assignment of others to the new Level 80 peer group where they have also become disenfranchised and will need to be taken into account.***

7. ***Constrained by the re-assignment to others, without consultation, of two main organisational areas, Strategic and Advisory, being part of my function and capability, and suited to assisting my own career development through job role growth.***

8. ***Prevented from representing the Company fully, both internally and externally, in a way commensurate with my otherwise valued KBR experience, due to the lack of status conferred.***

9. ***Demotivated by absorbing two other recent and serious adverse issues involving (i) removal of job role without commensurate replacement creating a Constructive Dismissal situation and (ii) removal of LTI benefits on an inequitable basis.***

10. ***Disillusioned by polite and reasonable verbal and written representations being turned down over an extended period of time.***

58. On 12 November 2017 at 23.42, Mr Barrie forwarded the Claimant's email to Mr Rosbrook and Mr Brettell with the following message [sic]:

Gents

Would appreciate your advice and assistance drafting a response to this. I think this is a pre cursor to his AIM review which would point out that he has failed to achieve the AIM objectives set for him. He is seemingly building a case for some sort of tribunal/constructive dismissal. Sid - would appreciate if you can fill Tim in on some of the background.

As I am in the US this week would appreciate your guidance on a holding response.

Thanks,

59. On 13 November 2017 at 00:53, the Claimant sent an email to Mr Brettell, copying it to Mr Barrie, saying the following [sic]:

> ***Sid,***
>
> ***Following my email to Andrew Barrie yesterday, I realise you may be concerned to deal promptly with the HR issues arising.***
>
> ***I do not expect to be in the office tomorrow as I propose to take a day off in lieu for the time I have found it necessary to spend outside of the normal working week considering the situation and developing an initial description for you to appreciate the reasons for my dissatisfaction.***
>
> ***If you wish to call me, I will be available at most times during the day. It will be useful to discuss the appropriate due process going forward and the timescale over which it will be reasonable to proceed.***
>
> ***Regards***
>
> ***David***

60. At 07:22 on 13 November 2017, Mr Brettell sent the following email to the Claimant, copying Mr Barrie [368][sic]:

> ***Good morning David,***
>
> ***I have briefly read your mail to Andrew and me and will read it in greater detail shortly. I think that you need some time out and I am concerned for your wellbeing so taking today off is a good decision. I think that you need more time out and strongly recommend that you see your GP and take a longer period out the office. The issues you raised will need time to be reviewed by Andrew and he is away until the end of the week. I will do what I can to help.***
>
> ***I will phone you a little later today as your wellbeing is my most important concern at this time. See your doctor and take more time out whilst your concerns are addressed.***
>
> ***Regards***
>
> ***Sid Brettell***

61. At 09:15 on 13 November 2017, the Claimant replied to Mr Brettell (copying Mr Barrie) [387] as follows [sic]:

> ***Thank you for your prompt response. I realise when we speak you will need to ask relevant questions and take notes so it will help if I convey substantive information by email.***
>
> ***It is the case that I have recently seen my GP and been under medication over the last two months for two non-specific skin conditions triggered by a prior virus infection. A course of anti-histamine treatment was successful for one condition but 10 days ago I was prescribed***

Prednisolone oral steroid tablets to address the second.

In addition to relief of the skin condition, I have been aware the pills have had an effect on my general disposition including increased energy levels and higher emotional response. By Thursday last week the effect was sufficiently advanced that I advised my immediate colleagues I have been affected by taking steroids and may exhibit unusual aviour.

I have this morning read the medication information leaflet and found the list of side effects include the following.

"Steroids including prednisolone can cause serious mental health problems. These are common in both adults and children. They can affect about 5 in every 100 people taking medicines like prednisolone.

- ***Feeling depressed, including thinking about suicide.***
- ***Feeling high (mania) or moods that go up or down.***
- ***Feeling anxious, having problems sleeping, difficulty in thinking or being confused and losing your memory.***
- ***Feeling, seeing or hearing things which do not exist. Having strange and frightening thoughts, changing how you act or having feelings of being alone."***

I do not feel affected by points 1 or 3 but it may be that I am affected by point 2 and partially by point 4 regarding how I act.

I will make an appointment with my GP to take place as soon as an appointment is available, as recommended by you and by the medical information leaflet.

I am in the "tail-off' phase of the medication where a reducing pill dosage will be completed on Wednesday. However, due to the delayed build-up of effects from the full dosage phase , it would appear likely that I will be subject to the mental health side effects until at least the end of this week.

I will act on the GP's advice, hopefully later today, and keep you advised as to his recommendations and course of action….

62. Mr Brettell made a referral for the Claimant to see OH on 13 November 2017 [390]. The Claimant visited OH on 16 November 2017.

63. On 15 November 2017, the Claimant wrote to Mr Brettell and Mr Barrie [412] which included the following extract [sic]:

Further to my telephone discussion yesterday with Sid, I agree it is appropriate to take time off work to rest and to allow the level of oral steroids in my system to reduce.

I had a GP consultation this morning and, whilst he did not identify the need for any further medical action at this time, he said it may take at least a week for the effects of the steroids to subside, That is consistent

with the timescaie for ramp-up effects I experienced.

I completed the last taper dose today but continue to feel strong effects of the medication, both physically and mentally….

64. On 17 November 2017 at 10:49, the Claimant wrote to Mr Brettell and Mr Barrie by email [413] and said as follows [sic]:

Andrew, Sid

Dr Tomlinson did not appear to identify anything particularly significant from the medical perspective. He will forward his report to me for review and agreement prior to sending it to you, later today if his administrators process it promptly.

He also gave me a standard Workplace Stress Risk Assessment form to complete on the basis that helps both Employer and Employee identify the causes of stress and mitigate them. I will complete the form on Monday in order first to have the benefit of some rest as agreed.

Regards

David

65. Also on 17 November 2017, the Claimant wrote to Mr Meffan [414] as follows [sic]:

Mark

As promised I can update you on status with regard to my absence from work.

The Company Doctor has advised that I do not have any significant medical problem beyond the effect of the oral steroids I have been taking and therefore I will be fit to return to work when the effects of medication have worn off, as has now started.

I anticipate having a discussion with Sid on Monday about the timing and method of return to work and should be OK for the interviews you are arranging later in the week.

Thanks David

66. On 20 November 2017, the Respondent received the written report from OH [395]. The report concluded:

…..In my clinical opinion, David is fit to continue working in his full time role at KBR. Further advice is offered in the context of questions proposed in your referral.

I have explained to David that whilst he does not currently have an underlying mental health condition, failing to address stress symptoms does place him at higher risk of developing anxiety or depression in the future. It is therefore important that a proactive approach is adopted

now.

Work seems to be David's principle concern and these issues are best addressed by KBR management directly rather than through further Occupational Health Support. No further follow up has been organised at this stage. Should any questions arise from my report please do not hesitate to contact me……

67. The Claimant was cross examined during this hearing on whether he completed the workplace assessment referred to above. The Respondent has suggested that the Claimant did not complete it, whereas the Claimant says he did. On balance, the Tribunal prefers the Claimant's evidence that he did complete the workplace assessment.

68. The Claimant did not rest as he should have done. When the Claimant looked at his email records for 17 November 2017, he saw that he had replied to 15 emails and meeting requests on many diverse subjects during almost the entire day from 09:12 to 16:38.

69. On 30 November 2017 the Claimant attended his AIM review with Mr Barrie. When the Claimant arrived, he was invited to sit at Mr Barrie's personal meeting table. Mr Barrie had no papers visible and did not refer to any documentation at all during the discussion that followed. Mr Barrie then posed the question "*What do I think about the main issues we face at each level of the organisation?– That is, (i) Executive/ Stuart Bradie level, (ii) Regional/ Jay Ibrahim level and (iii) Local/GS EMEA business unit level?"* There then followed a discussion about the above, with the Claimant giving his views and thoughts. As it took some time to complete that discussion the Claimant was concerned that 30 minutes had already gone by, and was worried there would not be sufficient time left to discuss his performance and achievement of AIM objectives at all. He asked Mr Barrie whether they were going to talk about the objectives. When they did reach that part of the meeting, it was rushed and Mr Barrie was interrupted. When Mr Barrie was told that his 2pm meeting was due to start soon, he ended the meeting. The Claimant went away feeling that there had been inadequate discussion about his objectives.

70. On 1 December 2017 at 08:40, the Claimant sent an email to Mr Barrie expressing his disappointment that insufficient time had been set aside, or used at the meeting on 30 November, to discuss his objectives. Mr Barrie responded at 12:06, dismissing the Claimant's concerns and saying that he did not intend to enter into a lengthy email dialogue with him and suggesting that he set up a follow up meeting. However two minutes later at 12:08 Mr Barrie sent an email to Mr Rosbrook, forwarding the Claimant's email, and saying as follows:

After what was actually quite a reasonable AIM conversation yesterday with David I received the following this morning. I think we need to proceed as we discussed. Let's discuss when convenient.

71. On Tuesday 5 December 2017, the Claimant received an Outlook calendar invitation from Mr Rosbrook for a meeting in his office at 16:00 on 6 December the following day [449A]. When the Claimant arrived at the meeting, Mr Rosbrook invited him to sit down in a meeting room next to his office. He said: "*These discussions are always difficult but I'm afraid KBR can no longer employ you*". Mr Rosbrook ended the meeting after about 30 minutes saying: "*I will escort you to your office to maintain your dignity and you can have 20 minutes to clear up and collect your personal things*". That was the Claimant's last day in the office.

72. On 6 December 2017, Mr Barrie sent the following email to a number of people in the business, including the Claimant's team:

> ***Team,***
>
> ***I am disappointed to say that I have this afternoon let David Barrow go. Whilst David has many good qualities his lack of performance over the last eighteen months or so, combined with behaviour not commensurate with his leadership role, have made his continuance not tenable.***
>
> ***I have briefed both John Savidge and Ken Robertson. Given Ken's role on Sellafield, I have asked John to lead the PMC team in an acting capacity. In due course we will advertise the PMC Leadership role and assess applicants based on merit. Please support John and Ken during this period and be sensitive to concerns others may have. I will not be putting out a communication but I will brief the PMC core staff that are based in Leatherhead on Friday (I have a full day in London tomorrow). Please call me or come by and discuss should you become alert to any broader implications.***
>
> ***Andrew***

73. There followed a period during which there was an attempt to reach a financial settlement with the Claimant but that was not successful.

74. In the meantime on 23 January 2018, solicitors acting for the Claimant wrote to the Respondent informing them that the Claimant had been diagnosed with Mycosis Fungoides, a form of lymphoma (cancer).

75. On 8 March 2018, the Respondent sent the Claimant a letter with the following heading "*Invitation to attend a meeting to discuss matters relating to your employment*". The letter went on to say:

> ***We would ask you to attend a meeting with Martin Simmonite, Senior Vice President at 09.00am on Thursday 15th March 2018 at Hill Park Court, Springfield Drive, Leatherhead, Surrey KT22 7NL to discuss the following matters:***
>
> - ***The issue as to whether or not you consider that you are able to work with; constructively collaborate with and report to Andrew Barrie,***

> ***Senior Vice President Government Services EMEA, in relation to the performance of your duties and in connection with your role.***
>
> - ***You have asserted a view that you are unable to work with Mr. Barrie, accept his seniority or his authority in managing the Government Services business unit because of your disagreements as to the best approach to take in working with not only Mr. Barrie but also KBR 's clients and with members of the Government Services Senior Leadership Team.***
>
> - ***If you are adamant that this is the position then KBR has a significant concern that you are unable to perform the duties under which you are employed by KBR.***
>
> - ***From your recent behaviour and manifestations of your attitude in the workplace, it appears that you cannot accept Mr. Barrie's authority to manage Government Services consistently with the mandate given to him by the KBR executive management in Houston. Further your personal approach has caused concerns not only with Mr. Barrie but also with the Senior Leadership Team.***
>
> ***Whilst this meeting is not convened as a disciplinary hearing in that it is not convened to deal with specific allegations which might be described as relating to incidents of your conduct, it is the intention of KBR to explore with you the circumstances listed above. If these concerns are considered to be well-founded, it may cause KBR to move you to another role. Alternately KBR may terminate your employment on notice if it is concluded that you are unable to comply with directions from senior management and work cooperatively in support of the business's strategic and commercial aims. This would be on grounds that there has been a breakdown in trust and confidence which KBR considers renders the employment relationship unworkable…..***

76. On 13 March 2018, solicitors for the Claimant wrote to the Respondent stating that the Claimant was due to start treatment for cancer and therefore could not attend the meeting on 15 March 2018. That letter was followed up with a further letter on 23 March 2018 which said:

> ***He is receiving a type of chemotherapy based on a weekly cycle of increasing dosage to test what side effects he experiences and how well he can tolerate them. He has now completed the first weekly cycle and will proceed to have incrementally higher doses over the next 4-6 weeks, or longer, depending on how well he responds.***
>
> ***At present, he is taking the chemotherapy medication on Thursdays and attending at Guy's Hospital in London on Tuesdays for weekly follow-up assessment tests. Short-term side effects determining his ability to attend a meeting (including headache, nausea, fatigue and diarrhoea) are most likely to occur on the day of medication (Thursdays) or immediately after.***
>
> ***The adjustments required at this stage are to conduct the meeting when Mr Barrow is both available and fit for work. That is, outside his assessment visits to Guy's Hospital (variable times on Tuesdays) and when he is not medically affected by the side effects of his treatment (variable on Thursdays/Fridays). Unfortunately, it is not possible to***

> ***anticipate in advance the extent to which he will be affected by the treatment because of its incremental and exploratory nature.***
>
> ***It would therefore be best to hold the meeting on a Monday or Wednesday with most reliability or, if necessary, a Friday is possible on the understanding that side effects could cause Mr Barrow to request postponement at short notice.***
>
> ***He may also need to take regular breaks, depending on his condition at the time and the duration of the meeting…***

77. On 20 April 2018, the Claimant submitted a formal grievance setting out in detail his concerns regarding recent events, and particularly since October 2017. The grievance was against Mr Barrie, Mr Rosbrook, Mr Brettell and Mr Nelhams.

78. On 20 April 2018, solicitors for the Claimant wrote to the Respondent stating that the Claimant could not attend the rescheduled meeting with Mr Simonite "*due to the Company's failure to provide sufficient details of the very serious allegations set out in your email*".

79. On 24 April 2018, the Respondent wrote to solicitors for the Claimant responding to their letter dated 20 April 2018. In it, Ms Chambers, on behalf of the Respondent, expressed her disappointment that the Claimant's solicitor had felt it appropriate to "*obfuscate the basis for your attendance on grounds that you were not aware of the matters which would be the subject of discussion between yourself and Mr. Simmonite*". The letter went further to state "*You have chosen not to attend prior meetings and we do not consider this is acceptable. This is especially the case with the last meeting on 23 April 2018 when there appears no reason why you could not attend*". Following this letter, a further invite was sent to the Claimant inviting him to a meeting with Mr Simmonite on 30 April 2018 [514].

80. The Claimant wrote to the Respondent confirming that he would attend a meeting with Mr Simmonite on 30 April 2018.

81. On 26 April 2018 at 15:09 and 15:22 (two working days before the proposed date of the meeting with Mr Simmonite), the Claimant received two emails from Karen Barker of the Respondent [514] each attaching a file described as "*enclosures*". No listing or explanation of the relevance of the documents was provided. The files comprised 15 documents: 14 emails and a listing of the Claimant's AIM objectives. The emails were all between the Claimant and Mr Barrie, and covered a mixture of topics including performance, organisation, sales meetings, annual objectives and medical (relating to the Claimant's visit to the OH on 16 November 2017). Without an explanation, the Claimant considered it difficult to assess how or why these particular documents had any relevance to the allegations of trust and confidence being made against him. The Claimant found the lack of explanation and the difficulty in identifying the relevance of correspondence upsetting

because, in his words, "*I was forced to guess how they would be used in the investigation*".

82. On 27 April 2018 at 16:03, the Claimant sent an email to Ms Chambers [546] requesting a short deferment of the meeting in order to (i) allow time to assess the significance of documents he had been sent (ii) make a written response to the documents in advance of the meeting (iii) allow time for the Respondent to consider his grievance more fully before the meeting and (iv) allow time to confirm attendance and prepare properly with his chosen companion.

83. On 27 April 2018 at 16:17, the Claimant received a reply from Andrew Wood on behalf of Ms Chambers [544] acknowledging his request to defer the meeting but advising that it was unlikely a decision and reply would be forthcoming before Monday, the day of the meeting itself.

84. On 30 April 2018 at 10:45, the Claimant received a reply from Ms Chambers [556] saying that they would proceed with the meeting at 2pm regardless. The Claimant felt very distressed by this response but sent a reply saying he would attend the meeting if he could get there in time.

85. The Claimant did attend the meeting – he says under protest – at 2pm on 30 April 2018. The meeting started at 2.15 and ended at 4pm.

86. Subsequent interviews with other employees at the Respondent were held with Mr Simmonite as follows:

Interviewee	Date	Time
Ken Robertson	30 April 2018	17:00
Andrew Barrie	1 May 2018	16.15
John Savidge	1 May 2018	07:30

87. In addition, Emma Barbeira wrote to various other employees seeking, what appeared to the Tribunal to be, evidence purely in support of the Respondent's case against the Claimant, rather than evidence that may have proved guilt or innocence.

88. It was agreed by Mr Simmonite that the Claimant would be able to send in written submissions to support what he said at the meeting on 30 April 2018 and was given until 4 May 2018 to do this. By this date he sent to Mr Simmonite written submissions [647] describing his concerns about the situation he was in and the investigatory process which was taking place. Then on 8 May 2018, he sent another document to Mr Simmonite headed Addendum to the Written Submission [675] because there had not been time to complete the work within the deadline of 4 May 2018 that he had set.

89. On 11 May 2018, Ms Barbeira forwarded Mr Simmonite an email in response to what the Tribunal concluded was a trawl for information supporting its case against the Claimant, in this case from Mr Savidge. Mr Simmonite responded by saying "*still limited in anything that supports the release*", which the Tribunal interpreted as the dismissal.

90. On 29 May 2018, Mr Simmonite wrote the following email to Mr Rosbrook:

> ***Tim***
>
> ***This is the final letter, its shabby and I am certainly not going to be the one that dismisses him. That is Andrew's responsibility not mine, especially as I do not agree we have a leg to stand on. See final paragraph?***
>
> ***I will try to redraft the letter this week (today) as it is not representative, but if we go with this we have problems.***
>
> ***I remain very uncomfortable with the way this has been handled and even less comfortable it has landed on my plate to pull the final trigger?***
>
> ***Views?***
>
> ***Martin***

91. On or about 15 May 2018, there was a meeting attended by Mr Simmonite, Mr Barrie, Mr Rosbrook and Mr Nelhams. The Tribunal finds as fact that this was a meeting at which the outcome of Mr Simmonite's investigation was discussed, including the action that should be taken against the Claimant as a result of it. The fact of this meeting only came to light during Mr Simmonite's cross examination. It is a meeting that the Tribunal considered was inconsistent with the Respondent's case that the decision to dismiss was Mr Simmonite's.

92. On 30 May 2018 at 10:00am, the Claimant attended his grievance hearing with David Gibson as Chairperson, Karen Barker as HR assistant, and John Buckley as the Claimant's companion.

93. On 30 May 2018 at 10:42, Ms Barbeira wrote to Mr Barrie and Mr Rosbrook saying "*Please find attached, for your information, a copy of the letter Martin is proposing to send to David Barrow this morning. Please could you review and let us have any comments*". Once again, the Tribunal concluded that the Respondent's case that this was Mr Simmonite's decision, was not correct, in circumstances where Mr Barrie was being asked to review the dismissal letter.

94. At 12:02 on 30 May 2018 Mr Simmonite wrote to the Claimant attaching a letter to him and saying "*I have attached a letter with my summary observations and position going forward*". It is a letter dismissing the

Claimant with immediate effect but with a payment in lieu of notice. In the letter, Mr Simmonite explained his decision as follows [sic]:

> ***My findings***
>
> ***Since the meeting I have again reviewed the documentation sent to you, your written submissions and spoken to those individuals referred to above and I have drawn the following conclusions:***
>
> - ***With reference to your approach to working with KBR's clients, I have noted that there was concern as to your interaction with and engaging with a certain KBR client on the ESN project, which may well have had an effect on KBR as a supplier. However, I am of the view that whilst this is unfortunate it is not something that I consider to be harmful to KBR's business interests and should not be further considered as a part of this breakdown in relations between you and Andrew Barrie and other members of the GS leadership team.***
>
> - ***I do note however that you have made a number of comments expressing clear dissatisfaction with the way in which AB is managing the Government Services business unit.***
>
> - ***I refer in this regard to your emails of 27th October and 12th November 2017. Your choice of words and phrases used led me to question whether you could accept Andrew Barrie's seniority and authority going forward.***
>
> - ***A number of your own management team commented how you would be publicly critical of Andrew Barrie and his strategy going forward. These comments were said to have been made publicly and in private meetings and included your reports and peers.***
>
> - ***I received comments when I spoke with the Government Services Senior Leadership Team which included a statement that when Stuart Bradie was visiting Leatherhead; you remarked that there were things that you wished to discuss with Stuart but they were primarily associated with Andrew Barrie's suitability to lead the business.***
>
> - ***I am mindful of the fact that you informed me that you were on medication during this period as referred to in emails to/from Sid Brettell.***
>
> - ***I specifically asked you the question of whether you were able to work for Andrew Barrie; moreover were you able to accept Andrew's authority as your line manager together with his overall authority to manage the business unit in a way which he perceived was in the best interests of KBR. You stated that in your view there has not been a breakdown in 'trust and confidence'. Yo u also remarked that you accept Andrew's authority and instruction. This is made clear too in your written submissions.***
>
> ***My interview with Andrew Barrie and other members of the Government Services Senior Leadership Team has caused me to conclude that as a result of your actions and comments, there has been a marked loss of***

trust and confidence in your ability to work with Andrew Barrie, his leadership team, your reports and peers. Andrew personally confirmed to me that he is quite unable to continue to work with you as you have undermined his position on numerous occasions, both in written communications with him and verbally with other members of the Senior Leadership Team, of which you are an integral part. Andrew remains of the opinion that there is now a breakdown in the working relationship with you and moreover, due to the historic and recent chain of events, it is impossible for you to continue to work within the Government Services' Senior Leadership Team. This is largely to do with trust, alignment to the 'One KBR' ethos and the assurance Andrew needs that his leadership team are supporting his endeavours as one team. Sadly this position was also stated by your peers, and reports, whom claimed that the misalignment with the business strategy and leadership led them to be directionally confused, with decisions 'hanging out' due to difference between you and Andrew a loss of confidence in you as a leader and that trust is now affected beyond a repairable level.

- ***The original correspondence confirmed to you that the meeting was not convened specifically as a disciplinary hearing. I t was not convened to deal with specific allegations which might be described as relating to incidents of your conduct; however those incidents are relevant in informing me as to the potential status of the working relationship going forward.***

Outcome

My conclusion is, given the evidence before me, that you will be unable to comply with management directions from Andrew Barrie or to work co-operatively with him and his leadership team in support of KBR's strategic and commercial aims. You have lost the trust of the team beneath you and around you and that the business has a due care to facilitate the necessary change to defend the business operational effectiveness.

Therefore there has been a 'breakdown in trust and confidence' which KBR considers renders the employment relationship unworkable. I believe that there is no evidence to support your contention that Andrew or KBR has unlawfully discriminated against you and indeed you clarified that Andrew had not 'bullied' you in the working relationship but had made decisions that you did not agree with and subsequently isolated yourself from.

My recommendation is that in accordance with your terms and conditions of employment that you are hereby given three (3) months' notice of the termination of your employment with KBR. Due to the protracted nature of the events leading to this decision, the effective date of the termination of your employment will be effective 31st May 2018 with your notice period being paid in full to facilitate an immediate separation.

You are entitled to appeal against the Company's decision to dismiss you and my further decision to support this action based upon the detail noted above. You should send your grounds of appeal to Susana Chambers within 5 of the date of your receipt of this letter.

95. On 6 June 2018, the Claimant appealed against his dismissal. The appeal was chaired by Stephen Peet at a meeting that was held on 12 July 2018.

96. By letter dated 5 July 2018 from David Gibson, the Claimant was informed that his grievance was not upheld. On 3 August 2018, the Claimant wrote to the Respondent appealing against that outcome. That appeal was chaired by Elliott Seymour at a hearing on 27 September 2018. The Claimant did not attend and the appeal was not upheld.

97. The Claimant's appeal against his dismissal was heard on 4 July 2018 and chaired by Stephen Peet. The Claimant attended and was accompanied by Mr Clark. By letter dated 21 November 2018, the Claimant was informed that his appeal was not upheld.

Legal principles

(a) Unfair dismissal

98. The law relating to the right not to be unfairly dismissed is set out in s.98 ERA which says as follows:

> ***(1) In determining….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 or qualifications of the employee for performing work of the kind which he was employed by the employer to do,***
>
> ***(b) relates to the conduct of the employee,***
>
> ***(c) is that the employee was redundant, or***
>
> ***(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.***
>
> ***(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.

99. What is clear from the above is that there are two parts to establishing whether someone has been unfairly dismissed. Firstly, the Tribunal must consider whether the employer has proved the reason for dismissal. Secondly, the Tribunal must consider whether the Respondent acted fairly in treating that reason as the reason for dismissal. For this second part, neither party bears the burden alone of proving or disproving fairness. It is a neutral burden shared by both parties.

100. With regard to employee performance, it may be legitimate to characterise lack of confidence in an employee's ability to do the job as SOSR rather than capability. Where an employer dismisses for a breakdown in trust and confidence, that is in essence a reliance on a breach of the implied duty not to "*without reasonable and proper cause"* conduct oneself in a manner likely to destroy or seriously damage the relationship of trust and confidence between employer and employee; ***Malik v Bank of Credit and Commerce International SA [1997] I.C.R. 606***.

101. However it is also clear that trust and confidence should not be used as a means to circumvent the requirements of a fair dismissal on the grounds of performance or capability. Its use by employers to avoid the need for proof of actual incidents of misconduct by the employee was strongly disapproved by the previous EAT President, Underhill P in ***A v B [2010] ICR 849, EAT*** in which he referred to the reversal of the implied term on to the employee as a form of "*mission creep which should be avoided*". This decision was upheld by the Court of Appeal in ***Leach v OFCOM [2012] IRLR 839, CA.***

102. It is necessary for the employer to identify conduct that is repudiatory. It will not be sufficient to rely on matters that may have given rise to disagreement between the employer and employee but were nevertheless legitimate matters of debate. In ***Handshake Ltd v Summers EAT 0216/12***, the EAT held that an Employment Tribunal was entitled to find on the facts that a disagreement about salary and bonus did not result in a breakdown of trust and confidence so as to amount to SOSR. The EAT upheld the tribunal's decision, observing that it could not be right that an employee, even a senior one, who opens up a debate leading to a dispute over a term of his or her employment was by that alone acting in breach of the duty to maintain trust and confidence. However, here the tribunal did not find anything repudiatory in the way in which the debate was conducted to indicate that trust and confidence had evaporated. Although the relationship was said to be souring, on the evidence, life was in fact going on much as before: the parties were able to continue their work and were simply disputing how much money the claimant was entitled to.

103. In ***Iceland Frozen Foods Ltd v Jones***, it was said that the function of the

Employment Tribunal in an unfair dismissal case is to decide whether in the particular circumstances the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band, it is unfair.

104. Importantly, in ***London Ambulance NHS Trust v Small*** the court warned that when determining the issue of liability, a Tribunal should confine its consideration of the facts to those found by the employer at the time of dismissal. It should be careful not to substitute its own view for that of the employer regarding the reasonableness of the dismissal for misconduct. It is therefore irrelevant whether or not the Tribunal would have dismissed the employee, or investigated things differently, if it had been in the employer's shoes: the Tribunal must not "*substitute its view*" for that of the employer.

105. If an unfair dismissal complaint is well founded, remedy is determined by sections 112 onwards of the ERA. Where re-employment is not sought, compensation is awarded by means of a basic and compensatory award.

106. Section 123(1) provides that the compensatory award can be reduced if the Tribunal considers that a fair procedure might have led to the same result, even if that would have taken longer (***Polkey v A E Dayton Services Limited [1988] ICR 142***.

107. The basic award is a mathematical formula determined by s.119 ERA. Under section 122(2) it can be reduced because of the employee's conduct:

> ***Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.***

108. A reduction to the compensatory award is primarily governed by section 123(6) as follows:

> ***Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding……***

109. The leading authority on deductions for contributory fault under section 123(6) remains the decision of the Court of Appeal in ***Nelson v British Broadcasting Corporation (No. 2) [1980] ICR 111***. It said that the Tribunal must be satisfied that the relevant action by the Claimant was culpable or blameworthy, that it caused or contributed to the dismissal, and that it would be just and equitable to reduce the award.

(b) Direct discrimination

110. The EQA sets out provisions prohibiting direct discrimination. Section 13 EQA states:

> ***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.***

111. The focus in direct discrimination cases must always be on the primary question "*Why did the Respondent treat the Claimant in this way?"* Put another way, *"What was the Respondent's conscious or subconscious reason for treating the Claimant less favourably?"* It is well established law that a Respondent's motive is irrelevant and that the protected characteristic need not be the sole or even principal reason for the treatment as long as it is a significant influence or an effective cause of the treatment. In ***R v Nagarajan v London Regional Transport [1999] IRLR 572*** it was said that "*an employer may genuinely believe that the reason why he rejected the applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim, members of an Employment Tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, that race was the reason why he acted as he did*".

112. The provisions relating to the burden of proof are set out at Section 136(2) and (3) of EQA which state:

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

113. It is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of any evidence from the Respondent, that the Respondent committed an act of discrimination. Only if that burden is discharged would it then be for the Respondent to prove that the reason it dismissed the Claimant was not because of a protected characteristic. Therefore, it is clear that the burden of proof shifts onto the Respondent only if the Claimant satisfies the Tribunal that there is a 'prima facie' case of discrimination. This will usually be based upon inferences of discrimination drawn from the primary facts and circumstances found by the Tribunal to have been proved on the balance of probabilities. Such inferences are crucial in discrimination cases given the unlikelihood of there being direct, overt and decisive evidence that a Claimant has been treated less favourably because of a protected characteristic.

114. When looking at whether the burden shifts, something more than less favourable treatment than a comparator is required. The test is whether the

Tribunal "*could conclude*", not whether it is "*possible to conclude*". In ***Madarassy v Nomura International plc 2007 ICR 867, CA*** it was said that the bare facts of a difference in treatment only indicates a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "*could conclude*" that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination. However, 'the "more" that is needed to create a claim requiring an answer need not be a great deal. In some instances, it can be furnished by non-responses, an evasive or untruthful answer to questions, failing to follow procedures etc. Importantly, it is also clear from case law that the fact that an employee may have been subjected to unreasonable treatment is not necessarily, of itself, sufficient as a basis for an inference of discrimination so as to cause the burden of proof to shift.

115. Notwithstanding what is said above, in ***Laing v Manchester City Council and anor 2006 ICR 1519, EAT***, the point was made that '*it might be sensible for a tribunal to go straight to the second stage… where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question where there is such a comparator — whether there is a prima facie case — is in practice often inextricably linked to the issue of what is the explanation for the treatment*'.

(c) Failing to make reasonable adjustments

116. A claim for failure to make reasonable adjustments is to be considered in two parts. First the Tribunal must be satisfied that there is a duty to make reasonable adjustments; then the Tribunal must consider whether that duty has been breached.

117. Section 20 of EQA deals with when a duty arises, and states as follows:

> ***(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.***
>
> ***……***
>
> ***(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.***

118. Section 21 of the EQA states as follows:

> ***(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.***

> ***(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.***

119. The duty to make adjustments therefore arises where a provision, criterion, or practice, any physical feature of work premises or the absence of an auxiliary aid puts a disabled person at a substantial disadvantage compared with people who are not disabled.

120. The EQA says that a substantial disadvantage is one which is more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact, applying the evidence adduced during a case, and is assessed on an objective basis.

121. In determining a claim of failing to make reasonable adjustments, the Tribunal therefore has to ask itself three questions:

    a. What was the PCP?

    b. Did that PCP put the Claimant at a substantial disadvantage compared to someone who is not disabled?

    c. Did the Respondent take such steps that it was reasonable to take to avoid that disadvantage?

122. The key points here are that the disadvantage must be substantial, the effect of the adjustment must be to avoid that disadvantage and any adjustment must be reasonable for the Respondent to make.

123. The burden is on the Claimant to prove facts from which this Tribunal could, in the absence of hearing from the Respondent, conclude that the Respondent has failed in that duty. So here, the Claimant has to prove that a PCP was applied to him and it placed him at a substantial disadvantage compared to someone who is not disabled. The Claimant must also provide evidence, at least in very broad terms, of an apparently reasonable adjustment that could have been made.

124. It is a defence available to an employer to say "*I did not know and I could not reasonably have been expected to know*" of the substantial disadvantage complained of by the Claimant.

125. To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply (***Ishola v Transport for London [2020] EWCA Civ 112***).

(d) Discrimination arising from disability

126. Section 15 EQA provides as follows:

> ***(1) A person (A) discriminates against a disabled person (B) if (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.***
>
> ***Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.***

127. Section 15 EQA therefore requires an investigation into two distinct causative issues: (i) did the Respondent treat the Claimant unfavourably because of an (identified) 'something'?; and (ii) did that something arise in consequence of the Claimant's disability? The first issue involves an examination of the state of mind of the relevant person within the Respondent ("A"), to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant 'something'. The second issue is an objective matter, whether there is a causative link between the Claimant's disability and the relevant 'something'. The causal connection required for the purposes of s.15 EQA between the 'something' and the underlying disability, allows for a broader approach than might normally be the case. The connection may involve several links; just because the disability is not the immediate cause of the 'something' does not mean to say that the requirement is not met. It is also clear from case law that it is only necessary for the Respondent to have knowledge (actual or constructive) of the underlying disability; there is no added requirement that the Respondent have knowledge of the causal link between the 'something' and the disability.

128. The distinction between conscious/unconscious thought processes which are relevant to a Tribunal's enquiry on a S.15 claim, and the employer's motives for subjecting the claimant to unfavourable treatment, which are not, was described by Simler J in ***Secretary of State for Justice and anor v Dunn EAT 0234/16*** in the following terms: "*Counsel for the claimant asserts that motive is irrelevant. Moreover, he submits that the claimant did not have to prove the reason for the unfavourable treatment but simply that disability was a significant influence in the minds of the decision-makers. We agree with him that motive is irrelevant. Nonetheless, the statutory test requires a tribunal to address the question whether the unfavourable treatment is because of something arising in consequence of disability… [I]t need not be the sole reason, but it must be a significant or at least more than trivial reason. Just as with direct discrimination, save in the most obvious case, an examination of the conscious and/or unconscious thought processes of the putative discriminator is likely to be necessary*" [emphasis added].

129. Turning to the issue of knowledge, HHJ Eady QC in ***A Ltd v Z [2020] ICR 199, EAT***, summarised the authorities as follows (at [23]):

"(1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment, see City of York Council v Grosset [2018] EWCA Civ 1105, [2018] IRLR 746, [2018] ICR 1492 CA at para 39.

(2) The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of s 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long-term effect, see Donelien v Liberata UK Ltd (2014) UKEAT/0297/14, [2014] All ER (D) 253 (Dec) at para 5, per Langstaff P, and also see Pnaiser v NHS England (2016) UKEAT/0137/15/LA, [2016] IRLR 170 EAT at para 69 per Simler J.

(3) The question of reasonableness is one of fact and evaluation, see [Donelien v Liberata UK Ltd] [2018] EWCA Civ 129, [2018] IRLR 535 CA at para [27]; nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.

(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for EqA purposes (see Herry v Dudley Metropolitan Council (2016) UKEAT/0100/16, [2017] ICR 610, per His Honour Judge Richardson, citing J v DLA Piper UK LLP (2010) UKEAT/0263/09, [2010] IRLR 936, [2010] ICR 1052), and (ii) because, without knowing the likely cause of a given impairment, "it becomes much more difficult to know whether it may well last for more than 12 months, if it is not [already done so]" [sic], per Langstaff P in Donelien EAT at para 31.

(5) The approach adopted to answering the question thus posed by s 15(2) is to be informed by the Code, which (relevantly) provides as follows:

"5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.

5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

(6) It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so (Ridout v T C Group (1998) EAT/137/97, [1998] IRLR 628; Alam v Secretary of State for the Department for Work and Pensions (2009) UKEAT/0242/09, [2010] IRLR 283, [2010] ICR

665).

(7) Reasonableness, for the purposes of s 15(2), must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code."

130. If section 15(1)(a) is resolved in the Claimant's favour, then the Tribunal must go on to consider whether the Respondent has proved that the unfavourable treatment is a proportionate means of achieving a legitimate aim. As stated expressly in the EAT judgment in ***City of York Council v Grosset UKEAT/0015/16*** the test of justification is an objective one to be applied by the tribunal; therefore while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning, the ET was nevertheless acting permissibly in reaching a different conclusion to the respondent, taking into account medical evidence available for the first time before the ET. The Court of Appeal in ***Grosset [2018] EWCA Civ 1105***, upheld this reasoning, underlining that the test under s 15(1)(b) EqA is an objective one according to which the ET must make its own assessment.

131. The EAT in ***Hensman v Ministry of Defence UKEAT/0067/14/DM*** applied the justification test as described in ***Hardy and Hansons Plc v Lax [2005] ICR 1565, CA*** to a claim of discrimination under s.15. Singh J held that when assessing proportionality, while an ET must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer.

132. In terms of the burden of proof, it is for the Claimant to prove that he has been treated unfavourably by the Respondent. It is also for the Claimant to show that 'something' arose as a consequence of his or her disability and that there are facts from which it could be inferred that this 'something' was the reason for the unfavourable treatment.

(e) Harassment

133. Harassment is defined under s.26 EQA as follows:

(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.

> ***(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"***

134. Unwanted conduct means "*conduct which is unwanted by person B*"; ***Thomas Sanderson Blinds Ltd v English UKEAT/0317/10/JOJ*** at [28]. Consequently, this requirement is a subjective one which depends on the state of mind of the Claimant.

135. The final element to consider is whether the purpose or effect of the conduct was to violate the Claimant's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

136. The purpose requirement is a subjective one with respect to the harasser. With respect to the effects requirement however, the Court of Appeal in ***Pemberton v Inwood [2018] I.C.R. 1291*** held at [88]

> ***In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances—subsection (4)(b).***

137. This test is therefore a mixed subjective and objective one, with it being necessary to consider both elements.

138. Whether or not the conduct is related to the characteristic in question is a matter for the tribunal, making findings of fact and drawing on all the evidence before it; ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and anor EAT 0039/19***. The fact that the complainant considers that the conduct related to a particular characteristic is not necessarily determinative, nor is a finding about the motivation of the alleged harasser. Nevertheless, in any given case there must still be some feature or features of the factual matrix identified by the tribunal which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged in the claim.

(f) Victimisation

139. Section 27 of EQA provides as follows:

> ***(1) A person (A) victimises another person (B) if A subjects B to a detriment because—***
>
> ***(a) B does a protected act, or***
>
> ***(b) A believes that B has done, or may do, a protected act.***
>
> ***(2) Each of the following is a protected act—***
>
> ***(a) bringing proceedings under this Act;***
>
> ***(b) giving evidence or information in connection with proceedings under this Act;***
>
> ***(c) doing any other thing for the purposes of or in connection with this Act;***
>
> ***(d) making an allegation (whether or not express) that A or another person has contravened this Act.***
>
> ***(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.***

140. The test to be applied here is threefold:

- Did the Claimant do a protected act?
- Did the Respondent subject the Claimant to a detriment?
- If so, was the Claimant subjected to that detriment because he had done a protected act, or because the employer believed that he had done, or might do, a protected act?

141. The most important decision to be made by the Tribunal is the "*reason why*" the Respondent dismissed the Claimant. Was it because of the complaint alleged to be a protected act – or was it something different? Even if the reason for the dismissal is related to the protected act, it may still be quite separable from the complaint alleged to be a protected act.

142. A person claiming victimisation need not show that less favourable treatment was meted out solely by reason of the protected act. As Lord Nicholls indicated in **Nagarajan v London Regional Transport 1999 ICR 877, HL**, if protected acts have a "*significant influence"* on the employer's decision making, discrimination will be made out.

143. Whilst the same burden of proof applies in such cases, namely that the Claimant must prove sufficient facts from which the Tribunal could conclude, in the absence of hearing from the Respondent, that the Claimant has suffered an act of discrimination, it is also perfectly acceptable to go straight to the "*reason why*" because that is the central question that the Tribunal

needs to answer.

Legal submissions

144. Counsel had helpfully provided detailed written submissions which were supplemented by oral submissions at the hearing. The Tribunal returned to these submissions during their deliberations and gave them careful consideration before reaching its decision.

Analysis, conclusions and associated additional findings of fact

Unfair dismissal

Did the Respondent prove the reason for dismissal?

145. The Respondent relies on some other substantial reason as the reason falling within s.98(1) ERA, that substantial reason being a breakdown in trust and confidence between the Claimant and the Respondent caused by the Claimant.

146. The process of reaching a conclusion on this issue by necessity involved some discussion about who the real decision maker was.

147. Essentially there were two dismissals in this case: the one in December 2017 and the one in May 2018. The Tribunal concluded that the decision to dismiss the Claimant in December was Mr Barrie's decision, albeit he was advised by Mr Rosbrook, who from his evidence appeared to suggest that exiting an employee in the way the Claimant was exited, was normal practice for senior employees. As to when that decision was made and why it was made, that issue is covered below.

148. The Tribunal concluded that the real decision maker, as far as the May 2018 decision is concerned, was also Mr Barrie. The process conducted by Mr Simmonite was, in effect, a sham; this is because Mr Simmonite was merely the messenger, put forward by the Respondent to give the *impression* that the process of dismissal was fair. In reality, however, Mr Barrie and Mr Rosbrook were controlling matters behind the scenes, and it was Mr Barrie who was, in the Tribunal's view, making the decisions.

149. The Tribunal concluded that Mr Simmonite found it difficult to give evidence in this case because his loyalty drove him to 'toe the party line' in circumstances where, quite clearly, he considered the process grossly unfair. He considered that a capability process ought to have been followed in respect of the Claimant. It was clear to the Tribunal that Mr Simmonite found himself in tricky waters when giving evidence on matters which he found deeply uncomfortable talking about. That was evident from the email referred to at paragraph 90 above, but also came through in his evidence to

the Tribunal. The Tribunal concluded that there could only be one reason for Mr Simmonite's meeting on 15 May 2018 with Mr Barrie, Mr Rosbrook and Mr Nelham, and that was in order that the decision to dismiss the Claimant could be confirmed. Mr Simmonite's only role in that part of the process, the Tribunal finds, was to deliver Mr Barrie's decision to the Claimant.

150. The Tribunal had little difficulty in concluding, on the evidence, that the Respondent had not proved that a breakdown in trust and confidence, and therefore SOSR, was the reason for the dismissal. Looking at the letter from Mr Simmonite, dismissing the Claimant, at best it suggested that there were complaints about the Claimant's conduct/performance. The letter confirmed what the Claimant had said, namely that he believed that he could work with Mr Barrie and accept his authority as the line manager. Despite Mr Barrie alleging that he had lost trust and confidence in the Claimant, the letter provided little if no evidence forming the basis of a breakdown in trust and confidence. In addition, of course, it was clear to the Tribunal that Mr Simmonite did not believe there was a breakdown in trust and confidence and believed that the matter ought to have been dealt with under a different procedure. The Tribunal concluded that Mr Barrie had decided that he wanted the Claimant to go, and the only way this could be done quickly was to dress it up as a breakdown in trust and confidence. Ms Bone described the Respondent's actions as a "*ruse*" to dismiss the Claimant for legitimate actions and the Tribunal was inclined to agree with her when looking at the evidence.

Was the dismissal fair?

151. Notwithstanding its above finding, the Tribunal still went on to consider the fairness of the dismissal. In doing so, the Tribunal makes the following findings:

a. There was no genuine attempt to investigate the complaints about the Claimant in an even handed manner, such that a fair assessment could be made as to the strength and validity of the complaints against him. Mr Simmonite accepted at face value what he was told by other managers and line reports about the Claimant, either during their face to face meetings with him or by email; there was no challenge to what they were saying, or no attempt to find evidence that might point to the Claimant's innocence. Essentially what the Respondent did was "trawl" for evidence it could use to support its decision to dismiss the Claimant. It was quite evident from emails HR sent to various individuals that this was the approach it was taking.

b. The Claimant was invited to a meeting on 30 April 2018 to answer allegations made against him, yet he was given little in terms of detail, and inadequate documentary evidence to assist him

understand fully the case against him. All the Claimant could do was speculate as to the case against him. This left the Claimant severely hampered when attempting to defend himself at the meeting with Mr Simmonite.

c. The Claimant was not told what others had said about him because he was the first person to be interviewed by Mr Simmonite and he was not re-interviewed. If the status of Mr Simmonite's meeting with the Claimant was an investigatory meeting, then there would have been a separate dismissal meeting at which the Claimant would have been sent all the emails and notes of interviews and been able to comment on them. Mr Simmonite gave an extensive list of all of the documents and emails which he said he was sent prior to the Claimant's meeting with him. Yet the Claimant was not sent these documents. The Respondent effectively merged the investigation with the dismissal meeting, making Mr Simmonite investigating officer and (notional) dismissing officer. The Claimant could not give his response to the documents or the interviews prior to the decision being made.

d. Witnesses were spoken to long after the Claimant's exclusion from the business – indeed many months after a number of them had been informed in December 2017 that he had left the business. No consideration was taken as to the weight that should be attached to such evidence, given the length of time that had elapsed and how their evidence might be affected or "tainted" or "prejudiced", knowing that the Claimant had already left the business and would not be returning.

e. The Respondent did not approach the appeal in a genuine attempt to consider matters impartially or to correct any defects arising from the dismissal. The Tribunal concluded that the appeal did not correct the defects in the process identified above.

152. The Tribunal concluded from the above that there was no genuine attempt to look at matters afresh and impartially in May 2018. It also concluded that the process adopted by the Respondent, together with the end result, fell significantly outside the band of reasonable responses open for an employer to take. The Tribunal concluded that no reasonable employer would have acted in the way the Respondent did in dismissing an employee who had spent 36 years working for the company. The dismissal of the Claimant was unfair and this claim therefore succeeds.

S.13, s.15 and s.21 EQA claims

When did the Respondent have knowledge of disability?

153. Aside from the reasonable adjustment and victimisation claims, which it considered separately, the Tribunal approached its task by looking at each allegation, rather than each separate head of claim, as many of the allegations are repeated and claimed under different heads of discrimination. First, however, it considered the important issue of when the Respondent had actual and constructive knowledge of the Claimant's disability.

154. The Tribunal finds as fact that the Respondent had actual knowledge of the Claimant's disability upon receipt of the letter from the Claimant's solicitor dated 23 January 2018. The Tribunal therefore went on to consider whether the Respondent had constructive knowledge at an earlier point and considered the following factors in reaching its decision on this issue:

    a. Whilst the 12 November 2017 email was a lengthy email sent very late at night/early in the morning, there was no other indicator that the Claimant might have been suffering from a disability. On the face of it, the email was a well constructed email and the Tribunal does not consider that it alone provided information from which the Respondent ought to have known that the Claimant was, or even may be, disabled.

    b. Further information was given to Mr Brettell and Mr Barrie by the Claimant on 13 November 2017 when the Claimant sent them an email telling them that for the last two months he had been taking prednisolone (a strong steroid) for two non-specific skin conditions triggered by a prior virus infection. The Claimant set out the generally known side effects of taking prednisolone and stated how he himself had been affected by the medication (see paragraph 61 above).

    c. Mr Brettell immediately referred the Claimant to OH. The OH report, concluded that he did not have an underlying mental health condition. No further follow up was recommended (see paragraph 66 above).

    d. The Claimant wrote to Mr Barrie and Mr Brettell saying that OH "*did not appear to identify anything particularly significant from the medical perspective*" (see paragraph 64 above).

    e. The Claimant wrote to Mr Meffan (copied to Mr Brettell and Mr Barrie) saying "*The Company Doctor has advised that I do not have any significant medical problem beyond the effect of the oral steroids I have been taking and therefore I will be fit to return to work when the effects of medication have worn off, as has now started*" (paragraph 65 above).

155. At best the Respondent will have known that the Claimant was suffering

from a skin condition for which he was taking steroids. There was every indication that the necessity to take the steroids was temporary, and therefore also its side effects. The OH report did not report anything that would have placed the Respondent on notice of a long term physical or mental impairment. The Claimant himself did not provide any indication that it could be something more serious, and of course at that stage he did not know he had cancer. In those circumstances it is difficult to know what more the Respondent could have done; certainly there was nothing from which, in the Tribunal's conclusion, the Respondent ought to have concluded the Claimant was disabled. Accordingly the Tribunal concludes that the Respondent could not be said to have had constructive knowledge of the Claimant's disability before 23 January 2018.

Did the Respondent discriminate?

156. The Tribunal went on to consider whether the behaviour at paragraphs 2(C)(i)(a)-(p), 2(D)(i)(a)-(p) and 2(E)(i)(a)-(p) breached s.13, s.15 or s.26 of the EQA.

(a) The treatment of the Claimant during the meeting of 6 December 2017 including stating to the Claimant that he was going to be dismissed and without any reason

(b) The Claimant's exclusion from the workplace

(c) The humiliating treatment of the Claimant in escorting him from the office in full view of colleagues and subordinates

157. The Tribunal considered these three allegations together as they are closely related in time.

158. The Tribunal concluded that the above behaviour by the Respondent did not constitute direct disability discrimination. Given that each of these occurred before the Respondent knew that the Claimant was disabled, the Tribunal did not think the Respondent was consciously or unconsciously motivated or influenced by the Claimant's disability. The claims brought pursuant to s.13 in respect of these allegations therefore fail.

159. As knowledge of the Claimant's disability is required before the Respondent can be liable under s.15 EQA, and the Tribunal has concluded that the Respondent did not know about the Claimant's disability at the time of each incidents, these claims brought under s.15 EQA also fail.

160. As liability under s.26 EQA requires that the unwanted conduct is *related* to disability, and it is clear that the Respondent did not know that the Claimant was disabled at that time of each incident, the Tribunal considered this to be a relevant factor in determining whether the unwanted conducted was

related to disability. The Tribunal concluded that the conduct was not related to the Claimant's disability and that no act of harassment had been commited within the meaning of s.26 EQA and therefore these claims fail.

(d) Refusal and/or failure to use the contractual disciplinary and/or capability procedures

161. The Tribunal concluded that the Respondent's failure to use their disciplinary and capability policies was due to expediency and not because of the Claimant's disability. They had decided that they wanted the Claimant to leave and chose the quickest way to achieve that objective. That decision was made before the Respondent became aware of the Respondent's cancer but continued to be the operative reason even after January 2018. The Tribunal does not accept that this was influenced by the Claimant's disability. This claim of direct disability discrimination therefore fails.

162. Having decided upon the reason for not using the disciplinary and capability policies, the Tribunal also concluded that there was no causal link between the "something" and the Claimant's disability. This claim therefore also fails.

163. The Tribunal concluded that the claim of harassment must fail because it was not satisfied, for the above reasons, that the unwanted conduct was related to disability.

(e) Grading the Claimant as "usually meets expectations" in his performance review

164. As this grading occurred in November 2017, the claims under s.13, s.15 and s.26 fail for the same reasons provided at paragraphs 157-160 above.

(f) Failure to pay the Claimant bonus under the LTI and under the STI in March 2018

165. The Tribunal concluded that it did not hear sufficient evidence about the terms of the bonus scheme to assess or determine whether the Claimant was entitled to a payment under the scheme and therefore they could not properly assess the validity of the Respondent's reasons for not paying it. The Tribunal was not satisfied that sufficient facts had been proved by the Claimant. The claims brought pursuant to s.13, s.15 and s.26 therefore fail.

(g) Criticism of the Claimant for not being able to attend the meetings convened for 15 March and 23 April 2018

166. The Tribunal refers back to its findings at paragraphs 75-79 above. The Tribunal found the letter sent by the Respondent on 24 April was a rather terse and unfortunately drafted letter. Importantly, because the Respondent wrote "*You have chosen not to attend* ***prior meetings*** *and we do not*

*consider this is acceptable. This is **especially the case** with the last meeting on 23 April 2018*".. (the Tribunal's emphasis) it meant that the criticism was not confined to dealing with non-attendance on 23 March 2018 but also previous meetings, one of those being a day that the Claimant was due to start treatment. The Tribunal concluded that this was unwanted conduct related to the Claimant's disability which certainly had the effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant and the Tribunal concludes that it was reasonable for the conduct to have had that effect. This s.26 EQA claim succeeds.

167. For the above reasons, the Tribunal also concluded that this was unfavourable treatment (the comment in the letter) relating to his inability to attend (the something) and that the reason for the something was due to the Claimant receiving treatment for cancer. The Tribunal does not accept that such behaviour by the Respondent was justified because it simply was not proportionate to write to the Claimant in those terms. This s.15 claim therefore succeeds.

168. The Tribunal did not believe that the reason for the comment in the letter was "because" of the Claimant's disability. This is because the Tribunal concluded that a hypothetical comparator, namely someone else in the same circumstances but not diagnosed with cancer, would have been met with the same letter. For this reason the claim of direct disability discrimination claim fails.

(h) The arrangements for the meeting with Mr Simmonite, including inviting the Claimant to meetings during his period of chemotherapy

169. The Tribunal found a lack of clarity with regards what this particular claim was about. It was not at all clear what was meant here by the reference to "*arrangements*". When the Claimant was first invited to a meeting, the Respondent would not have known that he was due to start chemotherapy. In the subsequent letter by the Claimant's solicitor dated 23 March 2018, it is not suggested that the Claimant could not attend during the period when he was receiving chemotherapy. There was a request to make reasonable adjustments when scheduling the meeting, which the Respondent agreed to and took into account. The Tribunal was not satisfied, neither was it in a position to make findings, that there was less favourable treatment, unfavourable treatment or unwanted conduct. The claims under s.13, s.15 and s.26 therefore fail.

(i) Reliance on the Claimant's behaviour under the effect of medication in considering the decision to dismiss

(j) Not giving due account for the Claimant's disability and treatment in making the decision to dismiss

(l) The unfair treatment of the Claimant as set out above at paragraphs 94-100 of the Amended Particulars of Claim

(m) The decision to dismiss the Claimant

170. The Tribunal considered the above four claims together because they all related to the dismissal.

171. The Tribunal did not conclude that the Respondent dismissed the Claimant because of his disability; neither was the decision to dismiss materially influenced by the Claimant's disability. That is because at the time the Respondent had decided to dismiss the Claimant, they did not know, neither ought they to have known, that the Claimant was disabled. Whilst the decision in May 2018 was made after the Respondent became aware of the Claimant's disability, the Tribunal finds that the Respondent was effectively carrying through a decision that was made in December 2017 and the Tribunal does not believe that decision was made because of the Claimant's disability.

172. The position is different when it comes to the s.15 and s.26 claims. The Tribunal concludes that the emails sent to Mr Barrie on 12 November 2017 and 1 December 2017 [paragraphs 56, 57 and 70 above] were written when the Claimant was still affected by the prednisolone he was prescribed. The Tribunal accepts that the effects of the medication are as described in the Claimant's email to Mr Barrie and Mr Brettell on 13 November 2017 and that he would not have written either email in such terms had he not been taking prednisolone. It was clear to the Tribunal that both these emails were influential in Mr Barrie's decision making. As is clear from paragraph 70 above, it was after receiving the email on 1 December 2017 that Mr Barrie suggested to Mr Rosbrook that they "*should proceed as discussed*". The Tribunal concludes that Mr Barrie and Mr Rosbrook discussed the proposal to dismiss the Claimant following his email to Mr Barrie on 12 November 2017, and when the 1 December 2017 email came in, that was the final straw.

173. Whilst neither Mr Barrie or Mr Rosbrook knew about the Claimant's disability at that point and therefore could not be liable then under s.15 EQA, the process conducted by Mr Simmonite was an opportunity to take a different approach knowing that the Claimant was disabled and that his manner in writing the above emails was affected by the medication he was taking. The Tribunal noted that in Mr Simmonite's dismissal letter, the 12 November 2017 email was expressly mentioned, and the Tribunal concludes that it was a material factor in the Respondent's decision. The Tribunal rejects Mr Simmonite's attempt to play down the effect of this email in his evidence. In any event, the Tribunal concludes that the decision was made by Mr Barrie and both the Claimant's emails played an important part in his decision to

dismiss in December 2017 and continued to play their part when deciding to push ahead with the decision to dismiss in May 2018.

174. The Tribunal rejects any assertion that the unfavourable treatment was justified. There was no legitimate aim, as far as the Tribunal is concerned, and dismissal was not a proportionate means of achieving that legitimate aim, for all the reasons already given above in connection with the dismissal. The claims under s.15 EQA in respect of these allegations are therefore well founded and succeed.

175. With regards the s.26 claim, the Tribunal concluded that the above acts represented unwanted conduct and that it was related to disability for the reasons given above. The Tribunal further concludes that its purpose was to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant; if it was not intended, then it certainly had that effect and it was reasonable for the Claimant to feel this way in the circumstances. For this reason, the Tribunal concludes that the claims of disability related harassment under s.26 in respect of these allegations are well founded and succeed.

(k) Refusal and/or failure to engage with the Claimant's allegations of unfair treatment and discrimination

176. This is pleaded as a s.13 and a s.26 claim only.

177. The Tribunal concluded that the Respondent did engage with the Respondent, in that they heard his grievance. The Tribunal found it difficult to understand precisely the allegation being made and therefore it was unable to conclude that this allegation was made out. For these reasons the Tribunal concluded that this allegation must fail.

(n) Failure to consider the Claimant's appeal in a reasonable period

178. This is pleaded as a s.13 and a s.26 claim only.

179. The Tribunal could not reach any conclusions on this issue as it does consider it heard sufficient evidence on the point. This claim therefore fails.

(o) Failure to take into account the impact of its unfair and/or discriminatory treatment on the Claimant in making the decision to dismiss him and/or to dismiss his grievance and/or to dismiss his grievance appeal

180. The Tribunal did not fully understand what was being claimed by the Claimant over and above what has been dealt with in other allegations. The Tribunal did not consider that it took matters any further and that its conclusions on other allegations dealt with the broad point. This claim fails in so far as it is a free standing allegation.

(p) The email of Andrew Barrie of 6 December 2017 to the team in which Mr Barrie breached the Claimant's confidence and made offensive and humiliating remarks

181. The Tribunal concluded that claims in respect of this reason brought pursuant to s.13, s.15 and s.26 fail and are dismissed for the same reasons as set out at paragraphs 157-160 above.

Failing to make reasonable adjustments

182. The Tribunal agreed with Ms Tharoo's submission that the only PCP alleged by the Claimant that was capable of being a PCP was that referred to at paragraph 2F(i)(a) above. The Tribunal concluded that those PCPs at paragraphs 2F(i)(b)-(f) above were drafted in such a way that they are asserted to apply specifically to the Claimant. The Court of Appeal in ***Ishola v Transport for London [2020] EWCA Civ 112*** made clear that whilst the words 'provision, criterion or practice' should not be narrowly confined, it was significant that Parliament had chosen to define claims by reference to these specific words, and had not used the words "act" or "decision" either instead of, or in addition to what was included. The court concluded that "*all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again*." Thus, a one-off decision might be a practice, if it was carried out with the intention that it would be followed in future, similar cases. However, a one-off decision in an individual case where there is nothing to indicate that the decision would apply in future would not be sufficient to amount to a practice. The Tribunal concluded that the PCPs at paragraphs 2F(i)(b)-(f) above were precisely those that the court in ***Ishola*** had identified could not properly be described as PCPs within the meaning of s.20 EQA. Claims at paragraphs 2F(i)(b)-(f) above therefore fail.

183. Having found that allegation at paragraph 2F(i)(a) above was properly described as a PCP, the Tribunal concluded that the PCP was not applied to the Claimant in any event as the Claimant did not attend work from December 2017. This claim therefore fails.

Victimisation

184. Having considered carefully the evidence in this case, the Tribunal finds that the Respondent's decision to maintain their position that the Claimant should be dismissed, notwithstanding the grievance and various appeals, including the conversation with ACAS, was because they had decided that the Claimant should leave in December 2017, and then again in May 2018. The Tribunal agrees with the Claimant that notwithstanding the grievance and various appeals, the Respondent was adamant that they would not re-

employ the Claimant. However, the Tribunal finds that this was not because of the protected acts alleged by the Claimant. The Tribunal was in no doubt that the Respondent had made its decision regardless, and not because of the protected acts. For this reason, the claims of victimisation fail.

Remedy

185. At the hearing, the Tribunal heard submissions on *Polkey* and contribution. The Tribunal concluded that the failings were so fundamental, it was impossible to speculate as to what might have been, had the Respondent acted fairly. It could not conclude, either when or if, the Claimant's employment would have come to an end had the Respondent began to properly performance manage the Claimant in respect of any complaints about his performance.

186. The Claimant considered carefully the issue of contribution. The difficulty the Tribunal found, however, was that it could not identify culpable behaviour on the part of the Claimant that contributed to his dismissal. For example, whilst it was alleged that the Claimant publicly criticized Mr Barrie and the SLT, the Tribunal does not accept that he did anything beyond that considered acceptable for a senior manager within the company. The Tribunal concluded that no reduction for contribution is applicable in this case.

187. A remedy hearing will be listed as soon as possible. The parties representatives should send their dates to avoid, for the next three months, to the Tribunal within 14 days of this decision being sent to the parties, so that a remedy hearing can be fixed. The parties should indicate how long they anticipate will be needed for the remedy hearing.

……

Employment Judge Hyams-Parish
14 December 2020