Case No. 1301938/2019 (In Person)

EMPLOYMENT TRIBUNALS

BETWEEN

Mr. S Pointon	**AND**	**Alpha Omega Securities Limited**
Claimant		**Respondent**

HELD AT **Birmingham ON** **16-20 November 2020 and 26 February 2021**

EMPLOYMENT JUDGE Self
Mr P Tsouvallaris
Mrs S Campbell

Representation

For the Claimant: Ms R Levene - Counsel

For the Respondent: Mr S Jagpal - Consultant

RESERVED JUDGMENT

1. The Claim for unfair constructive dismissal is well-founded and succeeds.

2. Some allegations in respect of the following statutory provisions as set out below are well founded and succeed:
    a. Discrimination arising from disability (section 15 Equality Act (EqA)
    b. Failure to make reasonable adjustments (sections 20 and 21 EqA)
    c. Harassment (section 26 EqA).

3. All allegations of victimisation (section 27 EqA) are dismissed.

WRITTEN REASONS

1. On 10 April 2019, the Claimant brought a Claim to the Employment Tribunal in which he asserted that he had been discriminated against for a reason related to or arising from his disability and that he had been unfairly constructively

dismissed. In their Response the Respondent denied those claims and they have maintained that position throughout the proceedings.

2. This hearing was, notwithstanding the current pandemic situation, was held in person at the Employment Tribunal in Birmingham. Upon attending on the first morning the parties had failed to agree a list of issues but that was remedied by lunchtime on the first day. The Tribunal were provided with a bundle that had just under 500 pages and several witness statements.

3. The Tribunal took some time to read the witness statements that helpfully cross referred to the bundle and that task took up the first morning. We next heard evidence in chief and in cross examination from the Claimant and his witnesses and then from the Respondent's witnesses. We then considered the written and oral closing submissions of the parties which ended at around 3.30 on the fourth day. The Tribunal spent the fifth day considering their decision and then met again via CVP to conclude that process. This is a unanimous decision.

4. For the Claimant we heard evidence from:
   a) The Claimant;
   b) Mr David Pointon – the Claimant's Father;
   c) Mrs Clare Pointon – the Claimant's wife.

5. For the Respondent we heard evidence from:
   a) Mr Ken Lawton – Managing Director of Respondent;
   b) Mr Andrew Taylor – Operations director of the Respondent;
   c) Mr Matthew Wellington – Former employee of the Respondent;
   d) Ms Lauren McGreevy – Human Resources and Administration Manager.

6. The Claimant has at all material times been a disabled person as defined in section 6 of the Equality Act 2010 (EqA) and there has been an acceptance that the Respondent had actual or constructive knowledge of that disability at all material times from August 2016 (72). The impairment was cancer of the kidney and the effects were marked both physically (particularly during an uncompromising treatment regime) and mentally on account of the stress and anxiety the Claimant held about the uncertain future that lay before him.

7. Although this hearing was listed to deal with both liability and remedy it was clear from the outset that time would not allow remedy to be dealt with as Judgment would inevitably be reserved. In those circumstances we have only heard evidence in respect of liability. There was an application to amend the Claim so that the Claimant could seek an award for personal injury sustained. That application was refused by the Tribunal in that it was an application made very late and would inevitably increase costs and we considered that there would be prejudice to the Respondent.

8. We will set out the facts that we have found on the evidence and then set out the law which appears pertinent to this Claim. We will then go through the issues one by one and make our specific finding on each.

9. The claims that we have to decide in this case are set out in our conclusions so that they are not duplicated. We have retained the issues at the forefront of our attention during the hearing and during our deliberations.

10. It should be noted that in the event that if the dismissal is deemed to be a constructive dismissal the respondent no longer seeks to rely upon a potentially fair reason for the dismissal and so the dismissal will be deemed to be unfair. On the basis of the Respondent's case that they wished and indeed sought that the Claimant retracted his resignation that is a sensible concession on their part.

The Facts

11. The Respondent is a Limited Company based in Crewe which provides a wide range of security services for clients. This includes event security, door supervisors, retail security and mobile security.

12. The Respondent employed around 200 staff at the material time of which 90% were security operatives. The Head Office and supervisory function appears to have been a relatively lean affair.

13. The Claimant had worked with the Respondent for some time with breaks. So far as the most recent period is concerned the Claimant had continuous employment from 16 March 2015. The Claimant was employed as a General Manager (Operations) and his contract of employment is at 83-87.

14. So far as is relevant that contract of employment details the following:
    a) That his working hours were fifty per week from 8-6 Monday to Friday;
    b) That there was an expectation that overtime would be required consistent with the needs of the business. Overtime was not payable but time off in lieu could be authorised subject to ***"the discretion of the Managing Director."*** (83);
    c) The salary was £33,000 per annum and it had risen to £35,000 per annum at the time of the matters which are in issue in this case;
    d) There was no contractual sick pay and if absent by way of illness the Claimant would receive statutory sick pay only;
    e) The notice period to be given by an employee of the Claimant's service was one month.

15. The Tribunal would remark that the hourly rate is just under £13.50 per hour (assuming 50 hours per week) which seems very low for the level of responsibility vested in the Claimant by the Respondent.

16. The issue of sick pay is a live issue in this case and the parties agree that the issue of contractual sick pay was raised before agreement was reached and Mr

Lawton made it clear to the Claimant that due to low margins and other financial issues contractual sick pay was not an option even for the Claimant who was to be employed as his "Number 2" or "right hand man". We are satisfied that the Claimant took the role knowing fully what the sick pay situation was. The Claimant suggests that he was told that there may be some flexibility on the sick pay, but we do not accept that was the case.

17. Very often in employment tribunal claims there is shown to be a time when there was a good working relationship between the parties and some level of warmth or relationship other than work. That has not been particularly evident in this case. Mr Lawton and the Claimant have known each other for some time and there was some mutual attraction that drew them back together in 2015, but even in the early part of the period since 2015 we have only been shown matters where the two men have been at odds with each other. The relationship we have been shown is characterised by mutual distrust all be it mainly at a low level.

18. Within the contract there is mention of a discretionary system whereby overtime could be claimed back as time in lieu but only at the discretion of Mr Lawton. The Claimant considered himself to be senior in the Company and did not believe that there was any need to log those hours as they could be taken on trust and in fact on his case which we accept, he never claimed all of them back anyway.

19. It is clear that Mr Lawton expected a far more formalised approach and we have seen an email from the Claimant in April 2016 in which he effectively logs his understanding of what the position is, and it is clear that this issue had been a matter of discussion between them. There is no response to that letter, but we do not consider that any agreement to the Claimant's views can be inferred from that by Mr Lawton.

20. We are quite satisfied that Mr Lawton's view was that ultimately it was his discretion that would decide matters whatever had been said and that the position in respect of time off in lieu was what was set out in the written contract. The Tribunal's view is that no matter what the standing of an individual in the Company, transparency is best served by a clear recording of banked hours to avoid disputes and to that extent Mr Lawton's view represented a safer course.

21. The Claimant was off sick in June 2016. On 7 July Mr Lawton felt the need to write to the Claimant telling him that he had ***"chosen to allow"*** the Claimant to be paid notwithstanding the fact that it was not company policy to do so and that it was done on account ***"of the extra hours you have worked over the last few months"*** however it could not continue into the future. Any future absence would not be paid and in future extra hours worked must be written on an ***"hours reclaimed sheet"*** and authorised to be taken back at a time agreed between the parties. (109)

22. This incident is indicative of the manner in which Mr Lawton viewed the running of the Company. He was the owner and Managing Director. Staff were working for **his** Company. It was within his gift and his gift alone to offer indulgences. His way was the only way, and the Tribunal did not consider that Mr Lawton would

suffer dissent easily or at all. Mr Lawton wished not only to be in command but to be seen to be in command.

23. In the same way that the absence of an answer to the Claimant's email, at paragraph 19 above, does not signify agreement neither does the Claimant's lack of an answer to this letter. These pieces of correspondence (and the contract) are, however, important insights into the characters of the two main protagonists in this case at that time and why it is that there was an uneasy relationship between them.

24. The Claimant on the other hand is also confident of asserting his own position and is very keen to emphasise that he does not need to comply with processes which are applied to other staff as he felt he was too senior for that and that Mr Lawton would just have to take him at his word. It is likely that Mr Lawton's desire to control and the Claimant's desire to have latitude was a consistent irritant for both during the employment relationship.

25. On 23 August 2016, the Claimant was diagnosed as having Kidney Cancer and was initially signed off for two weeks. The Claimant was only 36 years old with a young son and another child imminent. There is some dispute as to how Mr Lawton was told but it seems to be accepted that Mr Lawton expressed the view that the Claimant should concentrate on his health and not worry about the finances and that things would be sorted. We do not consider that this was a specific commitment from Mr Lawton to pay or do anything in particular but was a general well-meaning comment without any real consideration of what that would look like or how it might be perceived. We can equally understand how it may have been that the Claimant, worried for his health, family and finances would have taken it as a firmer / more positive commitment. We find it likely that both parties left the meeting with very different views of what the future might hold.

26. At a meeting on 28 August 2016 the Claimant explained that he was understandably very worried about everything and was initially reassured by Mr Lawton and again Mr Lawton intimated that he had some ideas which could assist, and that the Claimant would be looked after. Again, these are very broad statements, and we have little doubt that what was envisaged by both men as what this would actually entail, differed widely.

27. On 31 August 2016, the Claimant wrote that 4 days a week had been agreed and that stress levels would need to be minimised. There is no mention of what the financial situation would be in relation to this arrangement, and we find that that was because no specifics had been discussed (112).

28. There was a Welfare Meeting on 8 September 2016. The Claimant's condition was discussed (113-114). Mr Lawton explained that:
    a) The Claimant had 31 hours stored in lieu and had taken off 40 hours sickness absence but that he would be paid for 9 hours difference;
    b) The days when the Claimant had worked 9-5 would be counted as working 8-6 and again the Claimant would get full pay notwithstanding the hours not worked;

c) For the days not worked in the week the Claimant could use holiday for those and so still retain full pay;
d) The Claimant should not rush back and should look after his health and that the Claimant could use holidays from the following year if he wanted to maintain full pay as sick pay was only £20 a day.

29. We have no doubt that Mr Lawton considered that that this offer amounted to fulfilling the promise that he had spoken about at the end of August and these were the ideas either that he had in mind at that time or subsequently developed. Mr Lawton considered that he was being generous to the Claimant.

30. The Claimant did not comment at the meeting about those proposals but emailed later that same day to express his dissatisfaction. His take from the meeting was (115):
a) He was going onto SSP following his operation;
b) That he had expected Mr Lawton to exercise discretion, by which he clearly meant paying full pay;
c) That he was being caused stress by Mr Lawton speaking about how hard he had to work because of the Claimant's absence, thus making him feel guilty.
d) He did not wish to speak about it further because of the stress caused.

31. Mr Lawton responded (117-118):
a) He expressed disappointment over a number of aspects that he takes from the Claimant's letter and in particular is of the view that the Claimant is acting ungratefully in light of the efforts he is making;
b) Responsibility for personal finance is the Claimant's responsibility not Mr Lawton's;
c) That the job is a stressful one and he is doing his best to alleviate that stress for the Claimant;
d) He is disappointed that the Claimant felt the need to set matters down in writing;
e) That notwithstanding his disappointment in the Claimant he will pay 3 weeks full pay after the operation (effectively providing the Claimant with half pay) and that if the Claimant works 8 hours, he will make it up to 10 hours for two weeks following the recovery from the operation;
f) That Mr Lawton had been working hard and was being caused stress by covering the Claimant's work.

32. This exchange shows the very differing expectations of the Claimant and Mr Lawton and those differences or variations on them are played out on many occasions over the course of this case. We have absolutely no doubt that Mr Lawton firmly believed and still believes that he has treated the Claimant well and appropriately during the course of his illnesses and that the Claimant is ungrateful of those efforts without any cause. Similarly, the Claimant considers that Mr Lawton has fallen far short of what a reasonable compassionate employer would do in the circumstances. They both view the same facts from wholly different perspectives and that is governed by their very different needs. The Claimant did

however accept the three week's full pay offered.

33. There was no contractual right to the Claimant being paid any sick pay at all. The Respondent has asserted that he was unable to pay the Claimant sick pay because of his financial situation but at no point has he provided any evidence to support that. We are certainly sure that Mr Lawton did not wish to set any form of precedent within the Company by paying sick pay to the Claimant and he told us as much in evidence. Following representations by the Claimant Mr Lawton did relent and we consider that the offer to pay half pay was a reasonable thing to do. Others may have been more generous in the circumstances and others may have stuck to the contractual position.

34. The Claimant underwent surgery and was signed off work for six weeks from 19 September 2016. A Welfare meeting was called for 25 October 2016. The Claimant was looking to return from 1 November 2016 and a slightly reduced work pattern was agreed for two weeks with the Claimant working a full week on week three.

35. Further meetings were held moving forwards and it appears as if the work was very busy and the Claimant was struggling to cope with it although he did the work he was required to do. It was particularly hectic over Christmas. In a meeting on 16 January 2017 Mr Lawton expressed his disappointment at the Claimant not attending a function and commented about how hard he (Mr Lawton) was working. This was a reasonably common feature in the Claimant's "welfare" meetings that Mr Lawton would state how hard he was working and how tough things were for him. and is demonstrative of a lack of emotional intelligence and insight on the part of Mr Lawton.

36. Mr Lawton in the Claimant's welfare meetings often expressed views as to how the Claimant's failure to undertake his full duties impacted adversely upon himself. Whilst we do not consider that Mr Lawton said these things deliberately to attack the Claimant or to deliberately upset or irritate him, we do consider that this feature did have the effect of making the Claimant feel guilty about his inability to work at full capacity and exacerbated his stress. We also have no doubt that that the statement was true, but the effect of such comments was to place pressure on the Claimant to go beyond that which his health allowed. The Tribunal do not consider that this was a deliberate tactic on the part of Mr Lawson, but it is indicative of a blind spot that he held whereby his primary focus was ultimately always on the needs of the business and himself and that he lacked the insight to understand the effect and pressure his words would inevitably have on the Claimant.

37. On 9 February (p.136) the Claimant told Mr Lawton that his stomach was clear of the cancer and that he had a clean bill of health. He would have a further scan in 6 months and if that were all clear there would be a need for no more than yearly checks. Mr Lawton makes a long speech wherein he references again just how hard he is working and appears to want the Claimant to commit that he will be able to commit 100% to the job too. It is difficult not to conclude that Mr Lawton viewed the Claimant's absences that arose from his medical condition as highly

inconvenient.

38. The Claimant found it difficult but did go back to working full time. He was given an all clear in respect of his illness in September 2017.

39. Up until this point the Claimant had apparently been the number Two within the Company. In October 2017 Mr Taylor was announced as a person to be brought in as Operations Director. The view that the Claimant took was that was the job he was undertaking, and he was concerned that he may come to be pushed out. There had been no previous discussion with the Claimant about the appointment. Mr Taylor started on 2 January 2018. It appears that he was brought in as an extra resource at a time when the Claimant was clear of cancer, but the Claimant certainly perceived it as a threat to his employment and it undoubtedly coloured his perceptions moving forward.

40. The Tribunal consider that there was definitely a need for someone else to come in at the top end of the Company because of the sheer volume of work which needed to be done. There were still some residual issues around the Claimant being able to operate at full capacity and Mr Lawton needed an extra body to reduce pressures upon himself and also for planning for the future of the business. Having said all of that the Tribunal can understand why the Claimant saw it as a threat especially when it had not been discussed with him at all. The Tribunal's view is that whilst it was Mr Lawton's Company, and he could do what he wanted ultimately to get the best out of working relationships transparency is often an advisable policy and that was missing when he appointed Mr Taylor and caused mistrust.

41. On 15 January 2018, the Claimant received the results back from a routine scan done in December. The Claimant was told that cancer had spread, and it was in his stomach and that the prognosis was poor. He was to be referred to a specialist cancer specialist care centre in Manchester where treatment options (if any) would be considered.

42. The Claimant unsurprisingly was very upset at this news and he and his wife travelled to tell his parents. The Claimant called Mr Lawton to tell him and also that he would not be in work the next day. There is some dispute as to how Mr Taylor got to know but we are satisfied that he was told by Mr Lawton on that day. Mr Lawton asked to be kept updated as to when the Claimant would be returning to work.

43. On 16 January we accept that Mr Taylor contacted the Claimant to ask if he would be in at work the next day as that would be very helpful. We do not find that that request was made out of malice but was a product of the perception of Mr Taylor and Mr Lawton that the job came first. The Tribunal accept the evidence of the Claimant that he was pressurised to coming into work before he wanted to.

44. On 28 January, the Claimant told Mr Taylor that he did not feel up to attending a meal that was convened for the Respondent's managers (p.156). He pointed out that he had worked away from home three days the previous week and also had to work over the weekend to prepare for a meeting which he believed to be

inconsiderate on account of his medical situation and, due to the way he was feeling, the Tuesday meal in the evening was too much. He stated in an email of that day that:
"As you are aware my current health situation is critical and has made family time even more precious, especially until I have the appointment with my consultant in two weeks".

45. On 29 January, the Claimant was called to an unscheduled meeting. Within that meeting:
    a) The 28 January email detailed above is described as disappointing and harsh and the meeting had been called because ***"I don't want those sorts of emails from staff that we're trying to support.";***
    b) Mr Lawton stated that he did not mind when the preparation for the meeting was done – Friday evening, Saturday, or Sunday but the Claimant had to do it because it was his job. If the Claimant could not do it in his working day, then he would have to do it in his leisure time;
    c) Mr Lawton makes it clear how hard he had to work.

46. The purpose of the meeting was to tell the Claimant off for daring to challenge what Mr Lawton perceived as his generosity and to reinforce the message that the Claimant was obliged to work hard and, if necessary, out of hours, notwithstanding his personal circumstances. The business must come first according to Mr Lawton.

47. On 13 February, the Claimant passes on the information he has gleaned from his new Consultant at the Christie Hospital. The Claimant informs Mr Taylor that he has been accepted on a long-term trial as there is no NHS funded cure for the Claimant's condition. He discloses that there will be a number of cycles of treatment of about 10-week duration in which there will be 3-4 weeks of intensive treatment and recovery followed *by* ***"6 weeks of back to as normal as I can manage."*** Progress will be gauged after each cycle and if improvement is shown it will keep running.

48. The Claimant states that he has been told that the treatment is traumatic and stressful, and the doctor offered to sign the Claimant off until it started to allow the Claimant time and peace to prepare. The Claimant indicated that he did not want to do that. He stated that he was a disabled person and the Respondent needed to consider stress both inside and outside of work if he was to continue working. The Claimant indicated that 10-hour days would be hard for him and additional meetings outside of work were not going to be helpful although he would try and accommodate them. Outside of working hours there needed to be complete rest. He asks that the Respondent accommodates his needs.

49. The information provided is clear and if there was any doubt about what was required the Respondent could have contacted the Consultant, gone to an OH provider or sought a second opinion or asked to access records. None of that was done.

50. On 15 February, a Welfare meeting was called (166). Mr Lawton started the meeting by thanking the Claimant for the information which he considered to be clear. He then stated that the Claimant should not consider that he would be letting anybody down by taking time off.

51. Mr Lawton then asked what the Claimant means in his letter when the Claimant states that he would be classed as disabled. The Claimant reiterated that at the current time he did not feel ill, or to put it another way he was not experiencing any specific pain or other symptoms on account of the cancer.

52. Mr Lawton then raised the fact that the Claimant had mentioned that ten-hour days would be difficult for the Claimant and also that the Claimant explained that he would need a minimum of stress both inside and outside work. In broad terms Mr Lawton indicated that the Claimant's role was naturally stressful in a number of ways and asked how the Claimant was going to be able to cope. The Claimant suggests that he should not be on call out of hours when matters need escalation.

53. The discussion moved onto pay and Mr Lawton states, ***"I don't know how you're going to fund it financially yourself, it's not my problem"*** and suggests that the Claimant might wish to use holiday for his recovery as there is no contractual sick pay and otherwise, he would have to rely on SSP. Mr Lawton indicates that times when the Claimant leaves early for appointments was an issue he could be flexible on.

54. On 21 February, Mr Lawton writes a letter to the Claimant. In that letter he:
    a) States that the Claimant can reduce his hours by 1 or 2 a day but there would have to be a pro rata reduction in pay;
    b) The Claimant could take steps by preparing better to reduce his stress;
    c) If the Claimant is coming into work, then whilst help would be available to assist him but ***"he needed to take on the responsibilities of his role as much as could."***;
    d) There would be no full pay available when the Claimant was absent sick this time;
    e) Attempts would be made to minimise stress but if the Claimant chose to work then he needed to take accountability and to keep up the responsibilities of the General Manager.

55. The Claimant responded by a letter dated 25 February 2018 (178-179). The Claimant expressed his disappointment in relation to the sick pay position and also that any drop in his hours would lead to a pro rata reduction in salary. He accepted that to that point ***"the company had been excellent in allowing him time off for appointments with pay"*** but notwithstanding that he felt ***"short changed"*** by the proposals taking into account his previous loyalty and service. He indicated that he did not wish to have another meeting about it but simply wanted to place his views on the record.

56. On 3 March, the Claimant was having a day off. The Tribunal accepts that it had been agreed that the Claimant would only be contacted in exceptional emergency circumstances, but he did in fact receive multiple calls on that day. They also told

him that he would be required to attend an important meeting in London the following week in the evening and that he would not be back until very late

57. On 7 March Mr Lawton wrote back to the Claimant's previous in some detail. He indicated that he was offended by what he perceived as the Claimant's lack of gratitude for what he had offered and reiterated that any financial issues that accrued because of the illness were down to the Claimant to resolve and it was inappropriate for the Claimant to moan about the lack of sick pay because he had always known that was the case and had decided to take the job on that basis.

58. Around this time the Claimant asserts that Mr Taylor when told that the Claimant was going to the gym stated, "***It's alright for some…some of us haven't got time to saunter off to the gym".*** The Tribunal are satisfied that this was said. We consider that it was not intended maliciously and was probably viewed as banter, but it needs to be seen in the context of the Claimant already feeling of little worth and under attack for not being able to give his all 24/7. We are satisfied that that was how the Claimant was feeling after the recent interchange of correspondence detailed above and also find that feeling was justified.

59. On 5 March, the Claimant spoke with his Consultant who provided more details of the onerous treatment to come. There was a conversation about the adverse impact stress would have on the Claimant. The Claimant explained that just before the treatment was due to start on 21 March the Claimant was organising a substantial event namely the Stafford Half Marathon. The Consultant advised the Claimant that doing something so stressful so close to the treatment would not be beneficial nor set the Claimant up appropriately for treatment and so advised that the Claimant should cease work on Friday 16 March.

60. On 6 March, the Claimant told Mr Lawton that he would not be able to work the Stafford half marathon. The Tribunal accepts that Mr Lawton did not take the news well and told the Claimant that he was disappointed in the Claimant and that he had let both himself and the Company down. We find that Mr Lawton did act aggressively and did deliberately damage a phone during the discussion. Whilst the Tribunal considers that the effect upon the Claimant was not as severe as he recalls the conduct was clearly unwanted and did constitute a hostile working environment.

61. Arguably the Claimant could have foreseen that he would not be able to do the event at an earlier stage and could have alerted Mr Lawton or Mr Taylor so that they could have become fully involved earlier although we accept that it was not until the day before that it became absolutely clear to the Claimant on advice that he should not do the Stafford half marathon.

62. On 7 March there is a following meeting with Mr Lawton for which there is a transcript. We have also listened to that meeting. We do not accept that the tapping of the finger on the table which could be heard was in any way aggressive. It would appear that this is an affectation that Mr Lawton has whilst stressed. It was quite clear that Mr Lawton was still irritated with the Claimant and he was firm and assertive in that meeting. There are times when both seek to

interrupt the other. The Claimant raises the point that despite him raising the issue of limited working hours there had been numerous times recently when he has had to come in early or stay late but Mr Lawton just tells him that it is his job to do that, and he needs to not ignore his responsibilities.

63. Whilst the Tribunal can to some extent understand Mr Lawton having an issue with not specifically being told about the Claimant potentially not being able to do the Stafford half marathon, we consider that his response in general was disproportionate and the manner he went about his response was unreasonable and did not in any way ensure that the Claimant's levels of stress were minimised.

64. It seems to the Tribunal that Mr Lawton's focus was firmly on the business and its needs. Whilst he stated that he understood about the Claimant's condition and the effect upon him and that he understood the need for adjustments to be made, we find that in actual fact he did not. He said in oral evidence that he treated everybody equally and by so doing betrayed the fact that when dealing with a disabled person equal treatment is often not enough and at times you have to go further in order to level the playing field by treating a disabled person more favourably.

65. A further example of Mr Lawton failing to understand is when the Claimant made the point that he had undertaken a particularly busy week around this time, which included a trip to London from which they got back very late. Rather than see that such a trip may be stressful and /or a difficulty for the Claimant because of his disability and the stress arising from it, Mr Lawton considered that the fact he bought first class tickets somehow made all the other issues melt away and it was absurd for the Claimant to suggest he was tired. We accept that there were very limited concessions given to the Claimant about the expectations of him to work long hours, out of hours and/or reducing stress in the period leading up to his treatment.

66. The Claimant asserts that on 14th and 16th March the last two days before his treatment that he was forced to work in Mr Lawton's office and was micromanaged. The Tribunal does not accept the Claimant's account of these days. It was clearly important to ensure that any loose ends were tied up before the Claimant took extended time off and it was reasonable for Mr Lawton to have the Claimant around so that any answers could be given. It may well be that the atmosphere was a little tense, but we find that was a product of Mr Lawton's' desire to ensure all was sorted before the treatment and the Claimant's worry about what was a daunting prospect ahead of him. Clearly all of this was in the context of the general unhappy atmosphere between the two men.

67. The Claimant then went and had his treatment. On 26 April 2018, the Claimant met with Mr Lawton and Mr Taylor for a Welfare meeting (206). The material parts of the meeting are as follows:
    a) The Claimant indicated that his health was up and down, and he did not know whether the treatment regime had had any material effect as he was waiting for scans;
    b) He was suffering from muscle and joint pain and extremes of temperature;

c) The Claimant indicated that he would not be able to come back at "full pelt" working 5 day a week at 100 mph as that would mean he would have to go off sick again;
d) The Claimant proposed three days a week for week one and then four days a week thereafter preferably with the Wednesday off;
e) Mr Lawton expresses caution about the Claimant coming back too much.

68. The Claimant was signed as maybe being fit for work by his doctor from 1 May and that he would benefit from a phased return to work, altered hours, amended duties and workplace adaptations all of which were to be discussed with management (364A).

69. The Claimant returned to work on Tuesday 1 May and went home early at 3.30 pm because he was exhausted.

70. On 2 May there was a Welfare meeting convened which the Claimant and Mr Lawton and Mr Taylor attended (212). The material parts of the meeting are as follows:

a) The Claimant explained that he had been at ***"rock bottom"*** for the preceding few months;
b) Mr Lawton explained that the first week would be very much a ***"let's see how things go week"*** but that they would need an early indication of whether the Claimant was going to be available as they could then plan better;
c) The Claimant accepted that he had been accommodated by working four days a week until he felt fit to do five days and that he ***"wouldn't be taking calls outside of hours unless its Andy or Matt or something like that for urgent things";***
d) It is explained and accepted that the Claimant would do the rotas as his main task.

71. We can understand how the Claimant felt affronted by this meeting. He had come back at a time when he could have stayed off. He was doing his best and wanted to do better but his health did not allow. It is clear that medical advice should have been sought by the Respondent to clearly ascertain the parameters of what the Claimant could or could not do. On his first day back, it appeared that he was being criticised for going home early. In fact, the real complaint by Mr Lawton was that he needed to plan properly. We feel that the Company approached this in the wrong way. It should have planned for the Claimant not being able to work and that anything he did was a bonus. Instead, it planned for him to be present full time and that caused disappointment when he could not fulfil all the duties. This view of the situation led to the Respondent not properly dealing with the Claimant's illness.

72. Amended duties were agreed with reduced hours on a phased basis and no working outside of the core hours.

73. The Claimant continued to work as per the agreed schedule and worked 1st 2nd 4th 8th 10th and 11th May. During this time there were preparations going on for a big contract at Uttoxeter scheduled for 19 May. There was a lot of rota work to do as a substantial number of employees were needed for the job and it was part of the Claimant's role to help find them. It is accepted by all that this set of circumstances brings about the most stressful part of the rostering job.

74. On 10 May, Mr Lawton Mr Taylor and Mr Wellington went to Scotland for a meeting. The Claimant was left in the office with members of the Accounts team, HR Team, Administrators, and the Compliance Officer. There are differing views as to how many bodies and who was left in the office that day. The Scotland bound team were all available on their phones if required.

75. They left at 5 am in the morning and the suggestion was that it was about a 4.5-hour journey. That would seem to accord with suggested times via the internet taking into account breaks. The Claimant suggested that the party returned back early on that day because they had to turn round because of bad weather. The Scotland team denied that, and Mr Wellington suggested that the Claimant was getting mixed up with a trip made to Scotland in February. It seemed to the Tribunal that weather so bad that a trip had to be curtailed was unlikely in May and a check on the internet showed the Met Office weather forecast for that day which did not show any weather that would be likely to cause such an event. On balance we accept that the Scotland trip got back to the office at around 5 pm having travelled or been in meetings all day.

76. Upon the return of the Scotland crew the Claimant asserts that he was shouted at by Mr Taylor over an issue about the absence of another member of staff, Although the Claimant has got his timings wrong we prefer his evidence about that day and consider that on the balance of probabilities Mr Taylor did shout at the Claimant and was hostile towards him as alleged and did tell the Claimant that he did not care what the Claimant's condition / illness /situation was and that he should not change one of his decisions again.

77. There was no forethought whatsoever by Mr Lawton as to what it would mean to leave the Claimant as the senior man in the office and no planning or consideration as to the possibility of stress being occasioned to the Claimant by that situation. Again, Mr Lawton's focus was simply on what the business needed. Having said that we accept that the managers on their way to Scotland were contactable but first port of call for any issues in the office would be to the Claimant. Mr Lawton should have been well aware that there was a need to minimise stress and it had been agreed that the Claimant would have a more limited role. We consider that the Claimant has exaggerated the effect upon him of the incidents of the day and it was not as bad as he suggests but it is still unfavourable treatment.

78. On 11 May there was a meeting between Mr Lawton, Mr Taylor, Mr Wilkinson and the Claimant about the weekly rota and the contract on 19 May was discussed at length as there were nowhere near enough staff available at that time to cover it. The Claimant worked on it for the rest of that day and Mr Taylor accepted in his statement (para. 26) that the Claimant had been asked to support Mr Wilkinson

over the weekend "because it was a large event". The Claimant stated that he tried to call John (once) who was working elsewhere about it at the weekend but did not get through.

79. We find that the Uttoxeter event was a big event for a new client, and it was causing stress to all including Mr Taylor and Mr Lawton as there was a particular need to get it right. They asked / told the Claimant to work over the weekend and we find that this was an example where the Claimant's medical needs were placed second to the needs of the business.

80. Mr Taylor knew that the Claimant and Mr Wilkinson had not spoken because they had seen and spoken to Mr Wilkinson on the Sunday afternoon and he told them so. They were aware that the Claimant had not done what he had been asked / told and they resolved to speak to the Claimant on Monday morning. We form the view that Messrs Lawton and Taylor were irritated by the Claimant's perceived lack of effort over the weekend when the job was so important and they themselves had been working over the weekend. The Claimant on the other hand was sticking with what had been agreed with them on 2 May that he would only work 4 days a week and that he would not be expected to deal with anything out of hours save for emergencies.

81. There are conflicting accounts of what took place on the Monday morning (14 May), but it is accepted that the discussion took place immediately upon arrival at work and that it took place in the Claimant's office and that it was precipitated by Mr Taylor. Mr Taylor asked what had been done on the rota and the Claimant replied nothing as there was an agreement that he worked 4 days a week and nothing out of hours. Mr Taylor knew that and the only logical conclusion for him starting the conversation in this way was to try and catch the Claimant out.

82. On Mr Taylor's account the discussion was not heated but he accepted that he told the Claimant that he needed to ***"provide more help and support on jobs of this kind as he was after all General Manager"***.

83. The Claimant has produced a note of the meeting which he asserted were taken from handwritten notes which were subsequently typed up. Those notes are at 227A and 227B and he records that after arriving at work at 0750 in the morning and before he could put his computer on Mr Taylor followed him into the office and closed the door. Parts of the note is as follows:

Taylor (AT) - Can you tell me how much work you did on the rota this weekend?
Claimant (C) - Yes, none. We have an agreement that I work 4 days a week and nothing out of hours.
AT - We have a huge event next weekend, and you need to support the events manager John Wilkinson. He says he hasn't spoken to you all weekend.
C - Correct, I support him when I am in work and I am to rest from my treatment out of hours. I did actually try and call John on Saturday whilst he was at the Gin festival out of courtesy to see how he was doing but he didn't call me back.

AT - That's not good enough I am trying to run a multimillion-pound business and your lack of cooperation is not helping.

C - I am doing all I can and what was agreed with Ken and yourself on my return. I cannot give you any more than I already am.

AT- I need more from you.

C - I think this is out of order, this is clearly a premeditated attack and I was not made aware of this meeting beforehand. I cannot give you any more than I am.

AT- You think this is out of order, when me and Ken discussed it over the weekend, he wanted to take this meeting in his office, and you know how much worse that would have been.

C - I don't care where the meeting takes place and with who, it is out of order and I feel like you are trying to force me out.

AT - Force you out? Grow up, you are a senior manager, and you can't expect to have every weekend off.

C - All three of us agreed that I would work 4 days a week and we agreed which days they would be in advance. The weekend was not included as my working days last week. I spoke to John at 5.30 before I came in to see how his weekend had gone so I knew where I was starting this morning.

AT - That's not good enough. I tried to call you this weekend on Saturday, and Derek in the control room answered your phone. Why are you diverting your phone to a controller?

C - I didn't. I diverted my phone to Matt as we agreed I would.

AT - Why is Derek answering then? I wanted to speak to you.

C - Without being here to know the exact answer, I can only assume Matt diverted his phone to the control room which double diverted mine. If you wanted to speak to me, we had previously agreed you, Ken or Matt could contact me on my personal phone. I have no missed calls on my phone. You called me on Sunday, and I answered.

AT - I need more from you.

C - I can't give you anymore. My doctor has advised my limitations on my fit note and my duties were agreed with Ken and yourself on record. If this is now not good enough for you then I will have no option other than to go home and sign back off sick.

AT - Don't be a baby, if that is how you feel it would be your choice. I am running a very busy business and need more from you.

C - I feel this is pre-meditated and completely unacceptable. I came back in between my treatments, I didn't have to, I wanted to occupy myself and lift a bit of the load from the team who I am sure have had a heavy load whilst I have been off. However, I can't give you any more than I am.

AT - Then we have an issue, I need more from you.

C - OK, then I have to put my health first and go home and go back off sick.

AT - Don't do anything hasty of silly.

C - There is nothing silly about putting my health first in any situation let alone my current circumstances. I am going home and will be going back off work sick (claimant picked up his keys and started to walk towards the door. AT tried to stand between the C and the door)

AT - Are you walking out?

C - No, I am leaving the building and going home sick, as you have now changed the agreement we had, and I am not capable of that.
(C left the office and the building with AT shouting "don't be silly, come back and we can talk about this". C did not return.)

84. At 0903 the Claimant texted Mr Taylor as follows:
"Andy, to clarify, following the Voicemail you left me this morning. I did NOT walk off or out this morning. As I advised you, I was going off sick due to the nature of the conversation you initiated. You are aware that I am under restrictions directed by my return-to-work fit note due to my ongoing health issue. I have a Doctor's appointment later this morning and I will advise further from there."

85. On the same day, the Claimant wrote a letter to Mr Lawton enclosing a sick note (229-231) stating that he was to be signed off sick until 31 July 2018 a period that covered his next course of treatment and the recovery period in addition to the next few weeks up to the treatment.

86. It is clear from that letter that the catalyst for the Claimant leaving work that day was the meeting with Mr Taylor which he described as unacceptable and the Respondent's apparent failure to comply with the agreed return to work plan. In those circumstances the Claimant considered that he had no choice but to look after his health.

87. We have considered the conflicting accounts and prefer that of the Claimant and accept that the note is broadly accurate and a reasonable summary of the meeting. We accept that it was drafted soon after the incident when the Claimant got home and so was fresh in his memory. Mr Taylor's evidence about this meeting was evasive and vague. The note is consistent with the annoyance and irritation that Mr Taylor felt about the Claimant not furthering what was a vital contract over the weekend. It was a failure on both his and Mr Lawton's part to abide by the agreement that facilitated the Claimant's return. We are of the view that the Claimant did want to return and to contribute but he was right to form the view that the Respondent's attitude towards him and his capacity to work as exemplified by Mr Taylor meant that it was not in his health interests to try and continue.

88. It is readily apparent from what we have seen in this case that there was a frosty atmosphere between the Claimant and Mr Taylor. That was true on both sides. There does not appear to be any trust between the two men and perhaps this is not surprising with Mr Taylor coming into the Company in the way that he did and no doubt both viewed the other as a threat.

89. On 14 May the Claimant was invited to a welfare meeting to discuss his current state of health. The source of the concern was the incident on 14 May. The Claimant responded by saying the cause of him leaving work was the realisation based upon the discussion that the Respondent's expectations of what he would be required to do had changed since the discussion on 2 May. We are of the view that that was a view that the Claimant was entitled to take on the basis of the

discussion as we have found it. The Claimant explained that he was not well enough for a meeting but that they should speak in the week following 28 May.

90. On 28 May, the Claimant informed Mr Lawton that his next cycle of treatment had been brought forward by a week and that the week would be taken up with scans and physical and mental preparation for the treatment and that he required zero stress.

91. On 30 May Mr Lawton agreed to postpone the welfare meeting until after the treatment and sought confirmation of the dates when the treatment would start. The following day the Claimant confirmed that his admission dates were 6 and 20 June and that he would be getting scan results early the next week. The Claimant indicated that there had been no change in his health and that he did not foresee a return before 31 July.

92. On 5 June Mr Lawton drafted a letter stating that he wished to hold a welfare meeting on 15 June 2018 ***"between your treatments"***. He stated that a meeting was needed to ***"discuss the situation"*** and ***"to let us know your scan results"***. That letter was hand delivered by Mr Wellington to the Claimant's address at 2125.

93. Mr Lawton explained that he sent the letter because he had been told that the Claimant's treatment had been delayed. The treatment had, in fact, been delayed and the Claimant had been told that earlier that day at a hospital appointment. There is a dispute as to whether the Claimant's father had told Mr Lawton that or if Mr Lawton wrote the letter in ignorance of that fact and believed that the Claimant was to go into hospital the following day.

94. We believe that the letter was written in ignorance and this was supported by the Claimant's father who told us in evidence that he had not spoken to Mr Lawton over this issue. It was also clear that to suggest it as being between the treatments as he does in the letter means that he was still of the view that the treatment was going ahead on the original dates which was false.

95. We have heard the evidence and observed the parties. We do not accept that Mr Wellington was deliberately told to drop the letter round at a late hour so as to upset or maximise the upset to the Claimant and to cause him stress. We do not accept that Mr Lawton felt vindictive towards the Claimant so as to allow this to happen nor would Mr Wellington have agreed to be party to such a scheme. We have also seen text messages from Mr Lawton around June time when the Claimant was in hospital to the Claimant's father, and we can see nothing other than Mr Lawton wishing the Claimant a good recovery. We reject the suggestion that any conduct of Mr Lawton was deliberately designed to upset or hurt the Claimant.

96. Mr Lawton does however, once again, display lack of empathy and judgment. Whilst he wants the Claimant to get better, he principally wants to know when his Company can be running at full capacity again to relieve the pressures he was under. We take the view that Mr Lawton lacked sensitivity and lacked a full

consideration for the circumstances.

97. We are satisfied that there was no need for such a meeting at that point and that Mr Lawton has given no satisfactory explanation for why he had changed his mind and wanted such a meeting hence our conclusion in the preceding paragraph. The Claimant was no doubt in a state of high stress taking into account the "brutal" treatment that had been delayed that day and whilst probably at other times the letter may not have had an adverse effect, we accept that it did on this occasion.

98. Mr Lawton's letter in response was a defensive one (240). He did not explain that the letter was delivered late by circumstance as opposed to design and apologise if there was any inconvenience as he could properly have done but sought to defend it by saying that 925 at night is not an unreasonable time. He stated that all correspondence would be by way of email and that an acknowledgement in 24 hours was required. He sought to reassure the Claimant that the meeting would not be stressful. The Claimant responded within 7 minutes saying that he would reply fully in due course thereby complying with the new response obligation placed upon him. We find that the defensive nature of Mr Lawton's response was ill-judged and did nothing to de-escalate the issues.

99. By an email of 13 June (244) the Claimant explains why he considers that the delivery of the letter was inappropriate taking into account his condition and we find that the points he makes are reasonable ones in the context of it all. We do consider this is an occasion where the Claimant does overstate the effect this incident had upon him, but his basic objection is sound. He was very sensitive to anything coming from the Respondent at this time.

100. On 15 June, a welfare meeting took place. The Claimant had clearly chosen to do the meeting under protest and to prevent any further intrusions. That meeting is a civil one which focusses upon the Claimant's health and barely touches upon the work situation at all. That meeting displays no evidence of any specific agenda on the part of Mr Lawton to harm or punish the Claimant for not being fit for work and we take his expressions of goodwill at face value. We also note that he attended the function that night in support of the Claimant.

101. On 21 June, however Mr Lawton writes to the Claimant saying that he knows that he has two more bouts of treatment which will take everybody up to Christmas but asks for an approximate date when the Claimant will be able to return to work (261). This is more typical of Mr Lawton seeking answers upon when the Claimant will be coming back to work when the treatment has barely begun. There does not seem to be any good reason for this email when there had been a discussion only a few days before and Mr Lawton was clearly asking a question for which at that point there were so many uncertainties that any answer would be meaningless. Further we find that there had been an agreement that communications would take place via the Claimant's father.

102. Again, can see how Mr Lawton would see no harm in this email at all but also, we can see why Claimant considered it an unnecessary and unwanted intrusion at a

very difficult time. We consider that the Claimant again exaggerates the effect of this letter but still consider his objection to it well-founded.

103. There had been no resolution at all in respect of the issues that had arisen with Mr Taylor and they continued to fester. As they had not been dealt with, they remained in place as a substantial problem.

104. The Claimant then goes into treatment and the tribunal can fully understand why it would be that the Claimant's focus is completely taken up with that. On 12 July, the Claimant asks for notes of the 15 June meeting and updated Mr Lawton via Ms McGreevy that he had been struggling with the effects of the treatment.

105. On 13 August Mr Lawton wrote to the Claimant to say that the SIA Licence was due for renewal on 13 October 2018 and that as a gesture of ***"goodwill"*** the Respondent would pay for the same. The Claimant was asked for a time and date that he would be able to come to the office to complete the renewal (264 and 265). The Claimant indicated on 27 August that he had decided to pay for his own renewal and that he would advise HR when he had it.

106. The Claimant phrased his rejection of Mr Lawton's offer as ***"due to current circumstances"***. The Tribunal find that those circumstances were a combination of the uncertainty caused by the treatment and also the way that the Claimant still felt about the way he had been treated. This was not a matter that was pursued at all within the Tribunal hearing.

107. On 17 September, the Claimant provided an update to Mr Lawton having seen his doctor that morning. He told him that the next cycle of treatment had been postponed indefinitely and it was believed that the cancer had gone but would be reviewed in a scan at the end of November. He indicated that he was still suffering from side effects and that he was still unfit from work. A new sick note was sent through which took the Claimant up to 30 November 2018. (p.266-267).

108. On 19 September Mr Lawton asked the Claimant to attend a welfare meeting on 24 September. The Claimant indicated that he felt uncomfortable attending at the office and asked if it could take place at his home or a neutral venue and requested information as to who else would be present. Mr Lawton wanted information as to why the Claimant felt this way.

109. The meeting took place at a neutral venue. Minutes of the meeting run from page 272. Mr Lawton starts by asking about the Claimant's illness and prognosis but relatively quickly asks the Claimant whether he might be able to start before the end of his sickness certificate and whether he might have to return part-time. The Claimant responds by saying that it is impossible to know because the side effects of the treatment and the length of time they remain is so different from person to person.

110. Mr Lawton then asks whether there is anything bothering the Claimant on the work side of things due to the points the Claimant raised in anticipation of this meeting. The Claimant indicates that the issue is with the way Mr Taylor had

treated him on the last day in the office on 14 May. Mr Lawton, although raising the concern makes it clear that he does not wish to deal with it now whilst the Claimant is still off sick. Having said that he is at pains to state that Mr Taylor did not see a problem with what took place and that it may well have been a misunderstanding.

111. The Claimant suggests that view is ***"laughable"*** and an ***"insult to his intelligence"***. The strong implication from Mr Lawton is that even though he states that the issue needs to be sorted his view seems to be aligned with Mr Taylor and that the Claimant should get over it and come back to work when he is fit. There does not seem to be any real indication that Mr Lawton is truly interested in what took place and what the impact was on the Claimant. Mr Lawton mentions that sick pay will be running out soon and the Claimant states that his health will take priority.

112. On 26 September 2018, the Respondent fills out the SSP1 which indicates that sick pay is coming to an end and is the means by which the Claimant could seek ongoing benefit payments. That form notified the Claimant that his entitlement to SSP expired on 16 October 2018 but was not delivered until 26 October. The responsibility for sending the form was that of Mrs Blatherwick. The Respondent knew from previous discussions and also from a common-sense perspective that the receipt of SSP was relevant and important yet failed to do what they were obliged to do in notifying the Claimant timeously. It appears to the Tribunal to be an example by the Respondent of a lack of care / understanding of the Claimant's precarious predicament. As in the previous meeting there is the thought that if it is not something that will be getting the Claimant back into work then the Respondent does not have any particular interest in it.

113. The Tribunal consider that this omission is consistent with much of the Claimant's treatment. The Claimant's evidence was that he only found out when he noticed that his salary was lower than for other SSP months which was on account of it having stopped mid-month.

114. The Claimant went on holiday and then returned on 6 November when he resigned. That letter is at page 294. The Claimant states that his decision comes about because ***"at the culmination of the treatment (he) received from you, your fellow director and the Company since my diagnosis of secondary cancer in January of (2018)"***. He cites the final straw as being the failure to give the SSP1 form in good time which could lead to the Claimant losing benefits. The Claimant resigned on notice.

115. The Claimant sent in a further sick note on 13 November which would take him to the end of January. The Respondent wrote to the Claimant and asked him to reconsider his position. On 19 November, the Claimant responds in a lengthy letter restating his intention to resign.

116. There is further correspondence between the two parties wherein each state and restate their respective positions and eventually the termination date is agreed as being 11 January 2019

The Law

Unfair Constructive Dismissal

117. The statutory basis for constructive dismissal is set out at section 95 (1) (c) of the ERA 1996 and that section states that an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

118. It follows that the test for constructive dismissal is whether the employer's actions or conduct amounts to a repudiatory breach of the contract of employment ***(Western Excavating (ECC) Limited v Sharp (1978) 1 QB 761)***.

119. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee ***(Malik v BCCI SA (1998) AC 20)***.

120. Any breach of the implied term of trust of and confidence would amount to a repudiation of the contract of employment and the test of whether or not there has been a breach of the implied term is objective ***(Malik at 35C)***. There is no need to demonstrate intention to breach the contract. Intent is irrelevant.

121. A relatively minor act may be sufficient to entitle the employee to resign and leave the employment if it is the last straw in a series of incidents. The particular incident which finally causes the resignation may in itself be insufficient to justify that action, but that act needs to be viewed against a background of such incidents that it may be considered sufficient to warrant treating the resignation as a constructive dismissal. It is the last straw that causes the employee to terminate a deteriorating or deteriorated relationship.

122. It is clear that the repudiatory conduct may consist of a series of acts or incidents, some of which may be more trivial, which cumulatively amounts to a repudiatory breach of the implied term of trust and confidence. The question to be asked is whether the cumulative series of acts alleged, taken together, amount to a repudiatory breach of the implied term. Although the final straw may be relatively insignificant, it must not be entirely trivial. It must contribute something to the preceding acts.

123. The paragraphs prior to his one within this section are a summary of Lord Dyson's Judgment in ***London Borough of Waltham Forest v Omilaju (2005) ICR 481***.

124. In ***Kaur v Leeds Teaching Hospitals NHS Trust (2018) EWCA Civ 978*** it was identified that normally it will be sufficient to answer the following questions to ask the following questions to establish whether an employee has been constructively dismissed:

a) What was the most recent act or omission on the part of the employer which the employee says caused or triggered his or her resignation?

b) Has he or she affirmed the contract since that date?
c) If not was that act or omission in itself a repudiatory breach of contract?
d) If Not was it nevertheless a part of a course of conduct which viewed cumulatively amounted to a repudiatory breach of the implied term of trust and confidence?
e) Did the employee respond to that breach?

Section 15 Equality Act – Disability Arising from Disability

125. Section 15 (1) of the Equality Act 2010 reads as follows:

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.

125. Section 15(2) deals with knowledge but as previously stated it is accepted that the Respondent had the requisite knowledge at all material times.

126. In ***Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14***, Langstaff J, held that there were two steps to the test to be applied by tribunals in determining whether discrimination arising from disability had occurred:

a) Did the claimant's disability cause, have the consequence of, or result in, ***"something"***?;
b) Did the employer treat the claimant unfavourably because of that ***"something"***?.

127. In ***Pnaiser v NHS England and another [2016] IRLR 170*** the EAT summarised the proper approach to claims for discrimination arising from disability as follows:

a) The tribunal must identify whether the claimant was treated unfavourably and by whom;
b) It then has to determine what caused that treatment, focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person, but keeping in mind that the motive of the alleged discriminator in acting as he or she did is irrelevant;
c) The tribunal must then determine whether the reason was ***"something arising in consequence of [the claimant's] disability"***, which could describe a range of causal links. That stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator;

d) The knowledge required is of the disability; not knowledge that the ***"something"*** leading to the unfavourable treatment was a consequence of the disability.

128. There is no statutory definition of ***"unfavourable treatment"***. However, the Supreme Court has given some guidance (***Williams v Trustees of Swansea University Pension and Assurance Scheme and another [2018] UKSC 65***):

a) It requires tribunals to answer two simple questions of fact:
   i. What was the relevant treatment?
   ii. Was it unfavourable to the claimant?
b) The concept is broadly analogous to the concepts of disadvantage and detriment. The court commented that there was little to be gained in trying to differentiate between these terms, or by distinguishing between an objective assessment of the treatment, on the one hand, and a blended subjective and objective approach on the other;
c) The court considered the EHRC Code to be helpful, although noting that it could not supplant the statutory provisions. The court referred in particular to the following aspects of the EHRC Code:
   i. being treated unfavourably for the purposes of section 15 of the EqA 2010 means that the person "must have been put at a disadvantage" (paragraph 5.7); and
   ii. ***"the courts have found that 'detriment', a similar concept, is something that a reasonable person would complain about, so an unjustified sense of grievance would not qualify…. It is enough that the worker can reasonably say that they would have preferred to be treated differently"*** (paragraph 4.9, in the part of the EHRC Code dealing with indirect discrimination);
d) There is a relatively low threshold for demonstrating that treatment was unfavourable, as demonstrated by the above provisions of the EHRC Code.

129. The EHRC Code explains that ***"the consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability"*** (paragraph 5.9). No comparator is required.

130. As to the defence of objective justification at sub-section (b) to be proportionate, the unfavourable treatment has to be both an appropriate means of achieving the legitimate aim and a reasonably necessary means of doing so (***Homer v Chief Constable of West Yorkshire [2012] UKSC 15***).

131. It is for the Tribunal to balance the reasonable needs of the business against the discriminatory effect of the employer's actions on the employee and the tribunal must undertake a fair and detailed assessment of the employer's business needs and working practices.

Failure to make Reasonable Adjustments.

132. Section 20 EqA provides as follows:
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.

133. In light of the above definition, an employment tribunal must identify the PCP applied by or on behalf of the employer, the identity of non-disabled comparators (where appropriate), and the nature and extent of the substantial disadvantage suffered by the claimant (***Environment Agency v Rowan [2008] IRLR 20***).

134. The Tribunal should not consider whether a PCP has been applied to the claimant. That is not a requirement of the EqA. The PCP need only put the claimant to a disadvantage, irrespective of whether it was actually applied to them:
Roberts v North West Ambulance Service ([2012] UKEAT/0085/11).

135. The Tribunal must also make findings identifying any step which it would have been reasonable for the employer to take:
Secretary of State for Work and Pensions v Higgins [2014] ICR 341.

136. As to knowledge, under paragraph 20 of Schedule 8 to the EqA, an employer is not under a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know, that the individual concerned has a disability and is likely to be at a substantial disadvantage compared with persons who are not disabled. The use of the word 'likely' in this context is important. Likely means something that "could well happen" not something that is probable or more likely than not. For the duty to make adjustments to arise, it is therefore sufficient for an employer to have constructive knowledge that an individual could well be placed at a substantial disadvantage. It is not necessary to show actual or constructive knowledge that the individual would be placed at that disadvantage.

137. In ***Secretary of State for the Department for Work and Pensions v Alam UKEAT/0242/09***, the EAT posed the required questions in the following terms:
    a) Did the employer know both that the employee was disabled and that his disability was liable to disadvantage him substantially?;
    b) Ought the employer to have known both that the employee was disabled and that his disability was liable to disadvantage him substantially?.

138. Employers will not avoid the duty to make reasonable adjustments where they did not know, but should reasonably have known, about an individual's disability and substantial disadvantage. Therefore, they should take reasonable steps, and have systems in place, to find out the relevant information.

139. The PCP, properly construed, has been described as the **"base position":**
[The PCP] **"*represents the base position before adjustments are made to accommodate disabilities. It includes all practices and procedures which apply to everyone but excludes the adjustments. The adjustments are the steps which a service provider or public authority takes in discharge of its statutory duty to change the [PCP]. By definition, therefore, the [PCP] does not***

include the adjustments"
*(**Finnigan v Chief Constable of Northumbria Police [2014] 1 WLR 445**).*

140. As to substantial disadvantage, ***"substantial"*** is defined by section 212(1) of the EqA 2010 as ***"more than minor or trivial"***. This is a low threshold. A substantial disadvantage is one which must exist in comparison with persons who were not disabled.

141. There must also be a causal connection between the PCP and the substantial disadvantage so identified:
It is not sufficient merely to identify that an employee has been disadvantaged, in the sense of badly treated, and to conclude that if he had not been disabled, he would not have suffered; that would be to leave out of account the requirement to identify a PCP. Section 4A(1) of the Disability Discrimination Act 1995 provides that there must be a causative link between the PCP and the disadvantage. The substantial disadvantage must arise out of the PCP (Nottingham City Transport Ltd v Harvey UKEAT/0032/12).

142 The making of reasonable adjustments may necessarily involve treating a disabled employee more favourably than the employer's non-disabled workforce.

143. ***'Steps'*** for the purposes of section 20 encompasses any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP:
Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216.

144. It will be a reasonable adjustment if there is **'a prospect'** – which need not even be a **'good'** or **'real'** prospect – that doing so would prevent the claimant from being at the relevant substantial disadvantage:
Leeds Teaching Hospitals NHS Trust v Foster [2010] UKEAT/0552/10.

145. The efficacy of an adjustment is a factor for the tribunal to take into account when considering its reasonableness. However, to uphold a claim, it is not necessary for the tribunal to be satisfied that a proposed adjustment would have been completely effective. As expressed in ***Griffiths***;
"So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed: the uncertainty is one of the factors to weigh up when assessing the question of reasonableness".

146. The tribunal need not be satisfied that the adjustment, if made, would have removed the disadvantage in its entirety. As per ***Noor v Foreign & Commonwealth Office [2011] UKEAT/0470/10: "…although the purpose of a reasonable adjustment is to prevent a disabled person from being at a substantial disadvantage, it is certainly not the law that an adjustment will only be reasonable if it is completely effective"***.

147. The duty to make adjustments arises by operation of law. It is not essential for the claimant to identify what should have been done, although commonly this will be

the basis on which a claim arises: ***Cosgrove v Caesar and Howie [2001] IRLR 653.*** Going further, the EAT held in ***Southampton City College v Randall [2006] IRLR 18*** that a tribunal may find a particular step to be a reasonable adjustment even in the absence of evidence that the claimant had asked for this at the time.

148. The statutory duty is to take steps which are reasonable and would avoid a substantial disadvantage to which an employee is subject. The duty is not to investigate or consider what steps should be taken: ***Tarbuck v Sainsburys Supermarkets [2006] IRLR 664***. Nonetheless, the EAT in that case issued a warning to employers of the dangers of failing adequately to consider possible adjustments: ***"..it will always be good practice for the employer to consult and it will potentially jeopardise the employer's legal position if he does not do so because the employer cannot use the lack of knowledge that would have resulted from consultation as a shield to defend a complaint that he has not made reasonable adjustments."***

149. This is advice echoed in the EHRC Code of Practice on Employment (2011) (CoP) at para 6.32, where it states:
"It is a good starting point for an employer to conduct a proper assessment, in consultation with the disabled person concerned, of what reasonable adjustments may be required".

150. The two-stage burden of proof contained in s.136 EqA applies equally to reasonable adjustments claims. If the burden shifts at the first stage, a failure by the employer to discharge the burden at the second stage must result in the claim being upheld. Its particular application to reasonable adjustments was discussed by the EAT in ***Project Management Institute v Latif [2007] IRLR 579*** where it held:
"…the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made".

151. In relation to the payment of sick pay as a reasonable adjustment, in ***Nottinghamshire County Council v Meikle [2004] IRLR 703*** the disabled employee was absent from work because of the employer's failure to make reasonable adjustments. The Court of Appeal held that the employer's failure to extend the provision of sick pay to them (once contractual entitlement had been exhausted) amounted to unlawful discrimination under the DDA 1995.

152. In ***O'Hanlon v Commissioners for HM Revenue & Customs [2007] IRLR 404***, a disabled employee who had exhausted her sick pay entitlement claimed that she was substantially disadvantaged by her employer's sick pay rules. The Court of Appeal agreed with the EAT's statement that it would only rarely be a reasonable adjustment to give higher sick pay to a disabled employee than a non-disabled employee. The duty to make reasonable adjustments is designed to enable disabled people to play a full part in the world of work, not to treat them as "objects of charity" (which may act as a disincentive to return to work). The Court of Appeal

upheld the tribunal's finding that the claimant had been disadvantaged as a disabled person (because she had exhausted her sick pay) but that her employer had made all the reasonable adjustments to alleviate her disadvantage and assist her back to work.

153. Meikle was distinguished by the fact that, in that case, the absence from work (and hence the loss of pay) had itself been caused by the employer's failure to make reasonable adjustments at work.

Harassment

154. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic which has the purpose or effect of either: violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

155. In deciding whether conduct shall be regarded as having the effect referred to above, the following must be taken into account:
- The perception of B.
- The other circumstances of the case.
- Whether it is reasonable for the conduct to have that effect.

156. There is no need for a comparator; the claimant does not have to show that they were, or would have been, treated less favourably than another person.

157. To amount to harassment, A's conduct must have the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. Where B claims that the conduct had this effect (although this was not A's purpose), the tribunal must consider whether it was reasonable for the conduct to have that effect.

158. The EHRC Employment Code advises that the word ***"unwanted"*** means the same essentially as "unwelcome" or "uninvited" and it does not mean that express objection is made to the conduct before it is deemed to be unwanted (paragraph 7.8).

159. The test of conduct "related to" a protected characteristic is wider than the test for direct discrimination, which requires treatment "because of" a protected characteristic. However, the tribunal will take into account the context in which the conduct takes place. In determining whether particular conduct is "related to" a protected characteristic, an employment tribunal must make a clear finding of fact, based on the evidence before it.

160. If A's unwanted conduct is shown to have had the purpose of violating B's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environ-

ment for B, the definition of harassment is made out and there is no need to consider if it has that effect and the reasonableness of B's perception is not relevant.

161. Where A's conduct is not shown to have that purpose, the effect of their conduct on B must be determined. When considering whether conduct has the proscribed effect, a tribunal must take into account: B's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect (section 26(4)).

162. Whether it was reasonable for A's conduct to have the effect it did on B is an objective test. A's conduct will only be considered as having the necessary effect on B where it is reasonable for the conduct to have that effect. Therefore, provided any offence caused is unintentional there will be no harassment if B is being "***hypersensitive."*** In ***Richmond Pharmacology v Dhaliwal [2009] IRLR 336*** the EAT made clear that an individual's dignity would not necessarily be violated "by things said or done which are trivial or transitory, particularly where it should have been clear that any offence was unintended".

163. In ***Pemberton v Inwood [2018] EWCA Civ 564***, Underhill LJ, sitting in the Court of Appeal, revisited guidance he had previously given in the EAT in Dhaliwal, and held that:

a) In order to decide whether conduct has either of the proscribed effects, a tribunal must consider both:
   i. whether the claimant perceives themselves to have suffered the effect in question (the subjective question) and
   ii. whether it was reasonable for the conduct to be regarded as having that effect (the objective question).
b) It must also take into account all the other circumstances
c) The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect.
d) The relevance of the objective question is that, if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for them, then it should not be found to have done so.

Victimisation

164. Victimisation occurs where a person (A) subjects another person (B) to a detriment because either B has done a protected act or A believes that B has done, or may do, a protected act (Section 27(1), EqA 2010.)
165. The following protected acts are listed in section 27(2) of the EqA 2010:
   - Bringing proceedings under the EqA 2010 (section 27(2)(a));
   - Giving evidence or information in connection with proceedings under the EqA 2010, regardless of who brought those proceedings (section 27(2)(b));
   - Doing any other thing for the purposes of or in connection with the EqA 2010 (section 27(2)(c));

- Alleging (whether expressly or otherwise) that the respondent or another person has contravened the EqA 2010 (section 27(2)(d)).

166. For the victimisation to be unlawful the detriment must be linked to a protected act. The EqA 2010 does not require a comparator for a victimisation complaint. A claimant only needs to show that they have been subjected to a detriment because of a protected act. It is not necessary for them to show that they have been treated less favourably than someone who did not do the protected act. However, the claimant must be able to show a link between the detriment and the protected act.

167. In ***St Helens Borough Council v Derbyshire and others [2007] IRLR 540***, a victimisation case under the old regime, the House of Lords stated that the reason for the treatment should be assessed by asking "why" the respondent acted as it did, and whether the treatment was "because" of a protected act.

168. As with direct discrimination, victimisation need not be consciously motivated. If A's reason for subjecting B to a detriment was unconscious, it can still constitute victimisation (***Nagarajan v London Regional Transport and others [1999] IRLR 572***). Further, the protected act need not be the main or only reason for the treatment; victimisation will occur where it is one of the reasons (paragraph 9.10, EHRC Services Code).

Conclusions

169. The issues that we have had to determine upon the parties' agreement at the start of the case are set out below. We have reached our conclusions by applying the facts we have found to the applicable law and having considered all of the evidence. We have followed the approach advised in the **Pnaiser** case set out at para 127 above for the section 15 claims and then if necessary, we have considered the legitimate aims and whether the treatment amounted to a proportionate means of achieving the relevant aims.

170. We make two comments of general application / comment. So far as the matter set out at para 127(d) i.e., knowledge, we are satisfied that the Respondent and in particular Messrs Lawton and Taylor had the requisite actual knowledge of the Claimant's disability at all material times for section 15 claims. The second point is that although the issues show five potential legitimate aims, we have not been specifically pointed to any specific linkage of any particular legitimate aim to any particular act. We accept that all five aims cited could be deemed as legitimate.

<u>Section 15 Equality Act – Discrimination arising from Disability</u>

1. ***Did the Respondent treat the Claimant unfavourably by requiring the Claimant to work out of hours on the following dates: end of January 2018 (p156); February 16th, 21st, 27th, 4th March (p178); 3rd March 2018 (paragraph 66 C WS); week commencing 12th March 2018, both early and late meetings; weekend of 12/13 May 2018? Was this unfavourable treatment because of***

the Claimant's need to reduce his workload, and did this arise in consequence of his disability?

The Tribunal finds:

a) That the factual basis for this allegation is made out by the evidence;

b) Mr Lawton's conduct did amount to unfavourable treatment as per **Williams** (para.128 above);

c) The conduct arose from the Claimant's disability because it related to failures to regulate the Claimant's work hours as was required to reduce stress / other symptoms of the Claimant's disability;

d) The requirement for the Claimant to work out of hours could be said to be in furtherance of maintaining operational and business efficiency and /or the proper planning of business activities, manpower and resources;

e) The Tribunal finds that the consistent failures of the Respondent to put in place a scheme whereby the Claimant was not required to work out of hours and their continued requirement for him to do so was not a proportionate means of achieving either of the legitimate aims. The Respondent could and should have been able to plan better so as not to require the Claimant to work out of hours;

f) This Claim succeeds.

2. ***Did the Respondent treat the Claimant unfavourably by failing to pay the Claimant discretionary sick pay during sickness for his absences starting mid-March 2018, prior to his first treatment, and all other absences including until his contract ended? (The Claimant's sickness absences were 16th March until 30th April with the Claimant's return to work on 1st May (pp362-364A) and from 14th May 2018 until his termination date, 11th January 2019 (pp365-8)). Was this unfavourable treatment because of the Claimant's absence, and did this arise in consequence of his disability?***

The Tribunal finds:

a) That the factual basis for this allegation is made out by the evidence. The Tribunal accepts that in the 2018 period of illness from March 2018 until the effective date of termination in January 2019 the Claimant was only paid SSP for periods of absence from work.

b) Mr Lawton failing to exercise his discretion did amount to unfavourable treatment as per ***Williams*** (para.128 above). The Tribunal have come to this conclusion on the basis that the threshold as explained in ***Williams*** is a low one and we have been mindful of the EHCR guidance cited therein and in particular that the Claimant here would have been preferred to have been treated differently;

c) The conduct arose from the Claimant's disability because it related to the consequence of him being off work for his disability.

d) The failure to exercise discretion re sick pay can properly be said to be to be furthering the legitimate aim of the effective control and management of company finance.

e) The Tribunal finds that the non-payment of discretionary sick pay was a proportionate means of achieving that legitimate aim. We find that there were discussions before the Claimant took the job that there would be no sick pay and that was understood by the Claimant and he still took the job. He also understood and we accept that such was necessary taking into account the small margins made by the business. Some discretion had been given after great debate during the first period of sickness, but it was proportionate for Mr Lawton not to exercise that discretion during the second sickness.

f) **This Claim fails**.

3. ***Did the Respondent treat the Claimant unfavourably by KL being aggressive towards him on 6.3.18 when he requested time off before his treatment? Was this unfavourable treatment because of the Claimant's need to rest before his treatment, and did this arise in consequence of his disability?***

The Tribunal finds:

a) That the factual basis for this allegation is made out by the evidence. The Tribunal finds that Mr Lawton was hostile, aggressive, and critical in this meeting;

b) Mr Lawton's conduct did amount to unfavourable treatment as per ***Williams*** (para.128 above);

c) The conduct arose from the Claimant's disability because it related to criticism of the Claimant because he had stated that he was not going to work the Half- Marathon previous weekend which was because he had been advised to reduce stress on account of his disability;

d) This meeting and, in particular the manner in which it was conducted cannot properly be said to be to have had any of the legitimate aims cited.

e) Even if it could be said to be furthering one of the legitimate aims it the conduct was not proportionate in that there was no need for the Claimant to be treated in the disrespectful and aggressive way at this meeting or indeed at all.

f) This Claim succeeds.

4. ***Did the Respondent treat the Claimant unfavourably at the meeting on 7.3.18 by KL criticising the Claimant for not working the Stafford Half Marathon, which fell immediately prior to his treatment? Was this unfavourable treatment because of the Claimant's need to rest before his treatment, and did***

this arise in consequence of his disability?

The Tribunal finds:

a) That the factual basis for this allegation is made out by the evidence. The Tribunal finds that Mr Lawton did criticise the Claimant for not working the Stafford half marathon although his main criticism was the fact that the Claimant had not been as open as he could have been early enough about his intentions;

b) Mr Lawton's conduct did amount to unfavourable treatment as per ***Williams*** (para.128 above);

c) The conduct arose from the Claimant's disability because it related to criticism of the Claimant arising from his decision not to work the Half-Marathon for health reasons relating to his disability.

d) This meeting was in furtherance of the legitimate aims cited.

e) The Tribunal considers that holding a meeting of this type was a proportionate means of seeking to achieve standards of communication and expectation within the business that would allow the business to maintain operational and business efficiency and/or properly plan resources.

f) **This Claim fails**.

5. ***Did the Respondent treat the Claimant unfavourably when, on his final days at work prior to his treatment, 14.3.18 and 16.3.18, he was required to work in KL's office where he was aggressively micro-managed, belittled in front of colleagues, and not allowed to go to the toilet without asking or take a lunch break? Was this unfavourable treatment because of the Claimant's need to rest and avoid stress before his treatment, and did this arise in consequence of his disability?***

The Tribunal finds that:

a) That the factual basis for this allegation is not made out on the evidence.

b) There was no unfavourable treatment as per ***Williams*** (para.128 above);

c) This claim fails.

6. ***Did the Respondent treat the Claimant unfavourably when on 10.5.18 he was left in charge for the day, which meant the Claimant had to do far more than what should have been required of him, in view of his adjustments, and by AT shouting at and questioning a decision the Claimant had made in AT's absence? Was this unfavourable treatment because of the Claimant's need to reduce his workload, and did this arise in consequence of his disability?***

The Tribunal finds that there are two separate and discrete allegations in this single head of claim, one from Mr Lawton and one from Mr Taylor:

a) That the factual basis for these allegations is made out by the evidence;
b) Mr Lawton's conduct on leaving him in charge within the office (or as senior individual) and Mr Taylor's aggression and abuse did amount to unfavourable treatment as per ***Williams*** (para.128 above);
c) The conduct arose from the Claimant's disability. It should have been clear to Mr Lawton that as far as was possible the Claimant was subjected to as little stress as possible in the workplace at this time. Mr Lawton ignored that and allowed a situation to persist which would be bound to cause stress in that anything that took place in the office would initially fall at the door of the Claimant. So far as Mr Taylor is concerned when shouting at the Claimant, he specifically raised the issue of the Claimant's illness as not being an excuse for what he asserted that the Claimant had done wrong.
d) Neither alleged act of discrimination could have helped to further any of the legitimate aims cited.
e) Even if the conduct could have furthered any of the legitimate aims the conduct was not proportionate in that there were safeguards Mr Lawton could have put in place to make sure the Claimant was not in charge on that day by leaving another person to be in charge or to make sure any issues were not referred to the Claimant. There was no need for the Claimant to be treated in the disrespectful, aggressive, and demeaning way that he was at this time or indeed at all and so his conduct was not proportionate.
f) **This Claim succeeds**.

7. ***Did the Respondent treat the Claimant unfavourably when on 14.5.18 AT criticised the Claimant for not working hard enough, suggesting a lack of cooperation, and told him not to 'be a baby'? Was this unfavourable treatment because of the Claimant's need of reasonable adjustments/a reduced workload, and did this arise in consequence of his disability?***

The Tribunal finds:

a) That the factual basis for this allegation is made out by the evidence. The Tribunal finds that Mr Taylor was hostile, aggressive, and critical in this meeting;
b) Mr Taylor's conduct did amount to unfavourable treatment as per ***Williams*** (para.128 above);
c) The conduct arose from the Claimant's disability because it related to criticism of the Claimant because he did not work out of hours the previous weekend which was caused by the need to reduce stress on account of his disability;
d) This meeting and the manner in which it was conducted cannot properly be said to be to have had any of the legitimate aims cited.

e) Even if it could be said to be furthering one of the legitimate aims it the conduct was not proportionate in that there was no need for the Claimant to be treated in the disrespectful, aggressive, and demeaning way at this time or indeed at

f) **This Claim succeeds**.

8. ***Did the Respondent treat the Claimant unfavourably when MW delivered a letter to the Claimant's home at 21.25 on 5.6.18, the night before the Claimant's scheduled treatment? Was this unfavourable treatment because of the Claimant's need to rest and avoid stress before his treatment, and did this arise in consequence of his disability?***

The Tribunal finds:

a) That the factual basis for this allegation is made out by the evidence;

b) Mr Lawton's conduct, for it was he who had instructed Mr Wellington to carry out the task, did amount to unfavourable treatment as per ***Williams*** (para.128 above);

c) The conduct arose from the Claimant's disability because it related to when the Claimant would return from sickness absence;

d) The Contact could have helped to further any of the legitimate aims cited.

e) The conduct was not proportionate in that there was no need for the Claimant to be contacted directly at all, the day before his treatment nor was it appropriate at that time of the evening / night. In fact, there was no need at that time when the Claimant was undergoing major treatment and would obviously not be returning for some time to contact him at all and there was also no need for the welfare meeting to be brought forward.

f) **This Claim succeeds**.

9. ***Did the Respondent treat the Claimant unfavourably when it contacted the Claimant directly on 21.6.18, when the Claimant was mid-treatment in hospital, rather than contacting the Claimant's father as had been agreed? Was this unfavourable treatment because of the impact of the Claimant's treatment and the need for the Claimant to focus on his recovery and did this arise in consequence of his disability.***

The Tribunal finds:

a) That the factual basis for this allegation is made out by the evidence;

b) Mr Lawton's conduct did amount to unfavourable treatment as per ***Williams*** (para.128 above);

c) The conduct arose from the Claimant's disability because it related to the pay due because the Claimant was on sickness absence because of his disability;

d) The Contact could not have helped to further the legitimate aims cited.

e) The conduct was not proportionate in that there was no need for the Claimant to be contacted directly and it should have been via his father as agreed and indeed there was no need at that time when the Claimant was undergoing major treatment and would obviously not be returning for some time to contact him at all.

f) **This Claim succeeds**.

10. ***Did the Respondent treat the Claimant unfavourably through cessation of his sick pay? Was this unfavourable treatment because of the Claimant's absence, and did this arise in consequence of the Claimant's disabilities?***

The Tribunal finds:

a) That the factual basis for this allegation is made out by the evidence;

b) The cessation of sick pay without notification was unwanted by the Claimant and did amount to unfavourable treatment as per ***Williams*** (para.128 above);

c) The conduct arose from the Claimant's disability because it related to the handling and admini9startion of the Claimant's SSP;

d) The Conduct could not have helped to further the legitimate aim of the effective control and management of company finance.

e) The Tribunal finds that the cessation of sick pay was a proportionate means of achieving that legitimate aim. We find that there were discussions before the Claimant took the job that there would be no sick pay and that was understood by the Claimant and he still took the job. He also understood and we accept that such was necessary taking into account the small margins made by the business. Some discretion had been given after great debate during the first period of sickness, but it was proportionate for Mr Lawton not to exercise that discretion to extend during the second sickness.

f) **The Claim fails.**

11. ***Did the Respondent treat the Claimant unfavourably through cessation of his sick pay without providing notice of when it would stop nor the SSP1 form in advance? Was this unfavourable treatment because of the Claimant's absence, and did this arise in consequence of the Claimant's disabilities?***

a) That the factual basis for this allegation is made out by the evidence;

b) The failure to give notice of sick pay terminating was unwanted by the Claimant and did amount to unfavourable treatment as per ***Williams*** (para.128 above);
c) The conduct arose from the Claimant's disability because it related to when the Claimant would return from sickness absence and his statutory payment for that absence;
d) The Conduct could not have helped to further any of the legitimate aims including the effective control and management of company finance.
e) Even if there was deemed to be a legitimate aim to be met it was not proportionate means of achieving it as it was an administrative error that did not benefit the Claimant at all.
f) **This Claim succeeds**.

12. ***Can the Respondent show that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The Respondent relies upon the following legitimate aims and these have been factored in above:***
    a) *Maintaining operational and business efficiency;*
    b) *The proper planning of business activities, manpower and resources;*
    c) *Management of staff absences, capability, and performance;*
    d) *Effective control and management of company finance and resources;*
    e) *The communication and conveying of information.*

Failure to make Reasonable Adjustments.

1. Did the Respondent fail in its duty to make reasonable adjustments towards the Claimant (contrary to s.39(5) EqA), having regard to the following?

2. Did the Respondent apply a provision, criterion, or practice (PCP) of?
    a) Paying the Claimant SSP only;
    b) Requiring the Claimant to work long hours (8am – 6pm);
    c) Requiring the Claimant to work outside of those hours, including dealing with calls and meetings;
    d) Contacting staff directly rather than a nominated third party when on sick leave.

The Tribunal finds the following in respect of each PCP:

i. This PCP was applied during the periods of sickness that took place in 2018.
ii. The PCP that was applied was that there was an expectation that the Claimant would work long hours.
iii. This PCP was applied throughout the period although it is probably better phrased as being an expectation that the Claimant would work outside of his contracted hours.

iv. This PCP was applied during the Claimant's sick leave.

3. Did the aforesaid PCPs put the Claimant at a substantial disadvantage (more than minor or trivial) in comparison to persons who are not disabled?

a) The Tribunal do not accept that the Claimant was placed at a substantial difference in comparison to non-disabled persons. The Respondent did not pay sick pay to anybody who was absent on sick leave and the only person we find had benefitted had been the Claimant when he was previously disabled in his first bout of illness.

b) The Tribunal accepts that the Claimant was at a substantial disadvantage when working long hours because of the tiring nature of his condition and the fact that the longer hours and the expectation of working those hours increased the stress for him and his need for rest which flowed from his disability.

c) The Tribunal accepts that the Claimant was at a substantial disadvantage when working out of hours or being expected to work out of hours because of the tiring nature of his condition and the fact that the longer hours increased the stress for him and his need for rest which flowed from his disability.

d) The Tribunal accepts that the Claimant was at a substantial disadvantage when being contacted direct rather than via the nominated third party because of the stress which such contact caused him and his need for rest which flowed from his disability.

4. Could the Respondent have been reasonably expected to know that the Claimant had a disability and also that the Claimant was likely to be placed at the disadvantage?

There were many meetings between Mr Lawton and the Claimant, and we find that Mr Lawton was well aware of the Claimant's disability and should have been well aware of what was required in order to ensure that the Claimant was not placed at a substantial disadvantage.

5. If the duty to take reasonable adjustments arose, did the Respondent fail to take such steps as it would have been reasonable to take to avoid that disadvantage? The Claimant pleads that the following reasonable adjustments should have been made:

a) Paying the Claimant discretionary sick pay during sickness;

Although we have found that the Claimant was not placed at the required comparative disadvantage, we do not consider that the payment of discretionary sick pay would have been a reasonable adjustment. It would not have been reasonable for the reasons set out within our decision in the section 15 claim above.

This head of Claim fails.

b) Reducing the Claimant's workload;

There were some reductions in the Claimant's workload but when the need arose for the business, we find that the Claimant would be asked to take on more work than his condition allowed and so the reductions were not sufficient nor were they consistently applied.

This head of Claim succeeds.

c) Reducing the length of the Claimant's working day;

There were some reductions in the Claimant's working day from time to time but when the need arose for the business, we find that the Claimant would be asked to work for those hours (and beyond) which was other than his condition required and so the allowances were not sufficient nor were they consistently applied.

This head of Claim succeeds.

d) Reducing the requirement for the Claimant to attend work out of hours as far as possible, including for meetings and dealing with out of hours calls;

There were some minor reductions in the Claimant's need to not work out of hours but when the need arose for the business, we find that the Claimant would be asked to work / was expected to work out of hours (and beyond) which was other than his condition required and so any allowances were not sufficient nor were they consistently applied.

This head of Claim succeeds.

e) ***Ensuring that the Claimant was given 4-5 days off work prior to his treatment starting;***

The Tribunal has no recollection of any evidence in respect of this save that it was often the Claimant who sought to work up to his treatment.

We do not consider that this matter has been proven and so the Claim is rejected.

f) ***Liaising with the Claimant's father when the Claimant was in hospital and/or undergoing treatment.***

The Tribunal consider that this would have been a reasonable adjustment so as to comply with the Claimant's wishes and needs. Some communications

did go via the Claimant's father but not all and there was no reason not to do it consistently.

This Claim succeeds

Harassment

1. ***Did the Respondent or those acting on its behalf engage in conduct unwanted by the Claimant? The conduct relied upon by the Claimant is:***

   a) ***Requiring the Claimant to work out of hours from mid-February 2018 onwards despite his request for reasonable adjustments.***

   Working outside of contracted time was expected as the norm at the respondent and by Mr Lawton and latterly Mr Taylor in particular. The Claimant understood that was the norm. From March 2018 it was harassment but not before.

   This Claim Succeeds

   b) ***KL aggressively telling the Claimant that out of hours meetings were part of the job and he would have to do extra work at the meeting on 15.2.18.***

   The Tribunal do not accept that the tone of this meeting was aggressive. Mr Lawton very clearly set what he considered the situation was about but then so did the Claimant. The notes of the meeting appear to demonstrate a frank exchange of views. Some of the points that Mr Lawton made may well have been unwanted, but they were part of an attempt by him to provide clarity about what expectations were and to discuss how the Claimant would find the stresses of the job. There was an indication that matters would not always be as neatly packaged as the Claimant would have liked but that was being realistic at a very early stage of the process. The Tribunal is not convinced that this meeting had the effect of creating a hostile environment and certainly would not, even if it were such an environment, have thought it reasonable for it to be so considered.

   This Claim is rejected.

   c) ***KL being aggressive and abusive in the meeting on 6.3.18 following the Claimant communicating his doctor's advice for him to rest in advance of his treatment. The aggressive and abusive conduct included telling the Claimant that it was not acceptable and throwing a telephone against the wall.***

   The Tribunal deals with this matter at paragraph 60. We accept that Mr Lawton lost his temper and did damage a telephone in some way deliberately.

This was in relation to the Claimant's disability because it flowed from his decision not to work the Half Marathon. Mr Lawton's behaviour fell well below what would have been acceptable in any workplace and was unwanted and created a hostile environment. Taking into account all the circumstances we accept that this was an act of harassment as defined within the Act.

This Claim is successful.

d) ***KL failing to constructively engage with the Claimant's concerns expressed in his letter dated 25.2.18. Indeed on 7.3.18 stating that responding to that letter was taking time for me and I am disappointed that I have to address these items.***

The Tribunal has listened to the recording of this meeting and do not accept the Claimant's characterisation of it as not constructively engaging. Both men had matters that they wished to raise and did so.

Mr Lawton was firm and assertive in the meeting but kept his temper well in check and the impression was of a frank exchange of views between the two men. Mr Lawton did say that he was disappointed that he had to deal with this matter but his primary concern was what he perceived as the Claimant not telling him about his plans for the half- marathon and so it was primarily a communications issue that he was disappointed in.

We accept that some of the views expressed by Mr Lawton would have been unwanted as set out above but there was no intention to humiliate etc. the Claimant. We accept that following the days before inappropriate behaviour, that there may have been a carry-over sensitivity for the Claimant and so accept that it may have had the effect of providing a hostile environment but objectively, having listened to the recording we do not accept that the matters detailed above constituted harassment.

This Claim is rejected.

e) KL attacking the Claimant in the meeting on 7.3.18 by conveying disappointment in the Claimant, conveying that the Claimant had let people down, and that the Claimant had caused himself and AT to work excessively;

The Tribunal has listened to the recording of this meeting and do not accept the Claimant's characterisation of it as aggressive. From our listening we found that both parties were prone to interrupt the other and we did not find that the tapping of the desk (which we could hear) was aggressive in any way.

Mr Lawton was firm and assertive in the meeting but kept his temper well in check and the impression was of a frank exchange of views between the two men.

We accept that some of the views expressed by Mr Lawton would have been unwanted as set out above but there was no intention to humiliate etc. the Claimant. We accept that following the days before inappropriate behaviour that there may have been a carryover sensitivity for the Claimant and so accept that it may have had the effect of providing a hostile environment but objectively, having listened to the recording we do not accept that this meeting constituted harassment.

This Claim is rejected

f) KL aggressively micro-managing the Claimant in KL's office on 14.3.18 and 16.3.18 and not allowing the Claimant to take a lunch break, requiring the Claimant to seek permission to go to the toilet, and belittling him by quizzing him on a phone call from PPS Security;

The Tribunal does not accept that this description is made out as set out at Para 66 of this Judgment. We accept that the office may have been tense but there was a lot to do and so it is little wonder if Mr Lawton was directional. We do not accept that the Claimant was not permitted to take lunch, nor do we accept that he had to ask permission to go to the toilet. It may have been busy, and the work may have been focussed with little time for chit chat, but we do not accept the Claimant's description of the day. If Mr Lawson did ask any questions of the Claimant, we are satisfied that he would have done so directly and with little fuss in keeping with his general non nonsense attitude and the fact that much needed to be done in a short time.

We are satisfied that what took place on these days was not linked to the Claimant's disability.

This Claim is rejected.

g) When the Claimant was working in KL's office (16.3.18), in response to MW asking if the Claimant was OK, KL not giving the Claimant the chance to reply and KL telling MW, "Get out, Steve is fine, or he will be when he finished this work and leaves the event to you guys".

The Tribunal accepts that this incident took place. On 16 March 2018 just before the Claimant was to start his sick leave. There was a large amount to do and very little time to do it and we consider that it was "all hands to the pump situation".

Work needed to be done and Mr Lawton needed it to be done and so in the circumstances the Tribunal finds that such a comment was appropriate in order to further the reasonable needs of the business. The Tribunal has considered whether or not the phrase "leaves the event to you guys" was meant

as a "dig" at the Claimant and do not consider that it was meant, nor should it have reasonably had the effect despite the Claimant asserting that it was both unwanted and affected his dignity etc.

We have not accepted that the period from 14 to 16 March could appropriately be deemed aggressive micromanagement and having found that environment did not exist, but it was a fraught busy office we do not consider that this specific phrase was harassing.

This Claim fails.

h) On 10.5.18 AT being aggressive and shouting at the Claimant in relation to what Andy Essex was doing/where he was and stating I don't care what your illness or situation is, don't ever dare change a decision of mine again, slamming the door as he left.

As set out at paragraph 76 we accept the Claimant's version of events and accept that he used the words set out above or words to that effect. We are satisfied that he made reference to the Claimant's condition and that whilst his anger may have been primarily related to what he perceived as a slight on his authority he specifically referred to the Claimant's medical condition and so it was related to the Claimant's disability.

The abuse was unwanted conduct, and the intention was to put the Claimant in his place after he had had overruled a management direction of Mr Taylor. The purpose and the effect were to attack the Claimant's dignity and to create an intimidating, hostile, degrading, humiliating and offensive environment for the Claimant.

This allegation succeeds.

i) On 14.5.18, in a discussion that concerned hours and adjustments, AT:

- ***i. telling the Claimant that he was trying to run a multimillion-pound business and his lack of cooperation was not helping.***
- ***ii. challenging the Claimant's commitment and standard or work, stating that he needed more from him;***
- ***iii. telling the Claimant not to be a baby.***

This matter is dealt with at paras 83-84. We accept the Claimant's account of this meeting and find that Mr Taylor's attitude and demeanour left much to be desired and did not take any account of the Claimant's condition or medical situation at all.

It was unwanted conduct, and the intention was to put the Claimant in his place after he had had the temerity not to work over the weekend and stick to what had been agreed as the basis for his return to work. The purpose

and the effect were to attack the Claimant's dignity and to create an intimidating, hostile, degrading, humiliating and offensive environment for the Claimant.

We take into account Mr Taylor's attempts to belittle the Claimant which was bullying in nature and consider that his questioning of the Claimant's commitment to work wholly inappropriate. Many in the Claimant's circumstances would have not even considered coming into work notwithstanding the financial issues. The Claimant was doing the best his health allowed.

It was perceived as being harassing in nature by the Claimant and taking into account all the circumstances of the case we consider that it was reasonable to have that effect. Mr Taylor lost his temper and acted inappropriately and the Claimant's response to go home was wholly understandable as was the decision to sign the Claimant off thereafter even though this caused the Claimant loss of wages.

There was a breakdown in the relationship between Mr Taylor and the Claimant on this date which never recovered. It cast a long shadow over the Claimant's future with the Company.

It was perceived as being harassing in nature by the Claimant and taking into account all the circumstances of the case we consider that it was reasonable to have that effect.

j) KL failing to address the Claimant's concerns set out in his letter dated 14.5.18.

The tenor of the letter of 14 May (229) was that the Respondent had decided not to stick with the agreement they had come to on 2 May as set out at para.72 above and the issue with Mr Taylor. We accept that Mr Lawton failed to take hold of these matters (particularly those re Mr Taylor and as a result they festered. We do not accept however that the manner in which Mr Lawton held off was, of itself an act of harassment. In fact, it appears to the Tribunal that the Claimant was also reluctant to engage on these matters and we do not therefore consider that the conduct was unwanted as really the Claimant did wish to be left alone.

This allegation fails.

k) On 5.6.18 MW visiting the Claimant's house at 21.25 with a letter, the night before treatment was scheduled to begin.

Our findings in relation to this matter are set out above. The Claimant was seemingly in for a long haul of brutal treatments. Mr Lawton knew that. This is another example of him placing his own needs and that of the Company over that of the Claimant. He was aware that the Claimant had grave concerns about the recent treatment from work and that he felt pressured all the

time to do more or come back earlier and this letter simply perpetuates that pestering. The timing was inappropriate at the best of times let alone at 2125 on the evening before the Claimant, on what we have found Mr Lawton knew, was to undergo treatment was singularly inappropriate.

We accept this was unwanted conduct and find that whilst not the purpose of the visit and the letter, the effect of it was to create (or rather continue) an intimidating and/or hostile environment for the Claimant.

It was perceived as being harassing in nature by the Claimant and taking into account all the circumstances of the case we consider that it was reasonable to have that effect. The timing was just before the Claimant went into intrusive and painful treatment and was unnecessary and ill thought. It is indicative of Mr Lawton placing his needs over the Claimant's health. The email related to the Claimant's disability as it dealt with a welfare meeting linked to his treatment for his disability health his likely return date.

The Claim is successful.

l) KL disregarding the Claimant's concerns as set out in an email dated 5.6.18.

Our findings in relation to this are at paras 98. The concerns expressed were why there had been a change of stance in relation to welfare meetings and when they should be held and indicating that the incident had caused him stress because of the change detailed above and the timing of the delivery.

Mr Lawson simply states that the timing was in his view not unreasonable and tells the Claimant that he should not feel stressed. WE consider that Mr Lawson does completely disregard the Claimant's concerns as expected and seeks to pass the blame for stress back onto the Claimant whereas in reality it was a manifestation, at least in part, of the continued acts of the Messrs Lawson and Taylor. He places further pressure on the Claimant by insisting on a 24-hour acknowledgement (240).

We accept this was unwanted conduct and find that Mr Lawson did intend to put the Claimant in his place and so the purpose of his response was to disregard the Claimants concerns and tell the Claimant they were not valid thereby creating an intimidating and hostile environment. In the alternative, the effect of it was to create (or rather continue) an intimidating and/or hostile environment for the Claimant.

It was perceived as being harassing in nature by the Claimant and taking into account all the circumstances of the case we consider that it was reasonable to have that effect. The timing was just after the Claimant's surgery had been delayed and the response was unnecessary and ill thought. It is indicative of Mr Lawton seeking to inappropriately show his authority and paid no heed for the Claimant's health. The email related to the Claimant's

disability as it dealt with matters arising from and related to the Claimant's disability.

This Claim is successful.

m) KL contacting the Claimant directly on 21.6.18 when he was mid-treatment in hospital regarding his return to work rather than going through his father as had been agreed.

Our findings in relation to this are at para 101. We find that Mr Lawton well-knew that at this time the Claimant did not want any direct contact with him and that it had been agreed that any contact would be through his father. There was no need to contact the Claimant at this time as his treatment was planned to continue for a substantial time and any prognosis depended on how the Claimant reacted to future treatment. This email was indicative of the pressure regularly brought to bear upon the Claimant to work longer hours / out of hours / return sooner during his illness. Any allowance that was professed to be made by Mr Lawton was soon forgotten about.

We accept this was unwanted conduct and find that whilst not the purpose of the email the effect of it was to create (or rather continue) an intimidating and/or hostile environment for the Claimant.

It was perceived as being harassing in nature by the Claimant and taking into account all the circumstances of the case we consider that it was reasonable to have that effect. The timing was just before the Claimant went into intrusive and painful treatment and was unnecessary and ill thought. It is indicative of Mr Lawton placing his needs over the Claimant's health. The email related to the Claimant's disability as it dealt with his likely return date.

This Claim is successful.

n) The cessation of his sick pay without proper notice and without the SSP1 form in advance.

Factually the Respondent did fail to provide the Claimant with proper notice via the required Form and did not inform him that his SSP was coming to an end until after it had ceased. There had been many conversations about the financial difficulties merely being on SSP was causing the Claimant and we find that the failures which had the effect of causing the Claimant surprise when looking at his pay slip and delayed any application for benefits did amount to unwanted conduct.

We accept that the omission was not a purposeful one, but the failure needs to be looked at in the context of the other circumstances of the case and the failure did have the effect of creating (or rather continuing) an intimidating and/or hostile environment for the Claimant.

It was perceived as being harassing in nature by the Claimant and taking into account all the circumstances of the case we consider that it was reasonable to have that effect. The provision of SSP and the failure is related to the Claimant's disability especially as there had been many discussions in respect of pay and the problems the Claimant's disability had on his earnings.

This Claim is successful.

o) Was that conduct related to the Claimant's protected characteristic of disability?

p) Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? In considering whether the conduct had that effect, the Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

These are dealt with above.

<u>Victimisation</u>

1. Has the claimant carried out a protected act?

2. The Claimant relies upon the following acts:

a) His letter dated 25.2.18, in which the Claimant communicated that cancer was a disability. The Claimant relies on s27(2)(c) – doing any other thing for the purposes of or in connection with this Act. The Claimant avers that in that letter the Claimant was asserting his status and rights as a disabled person to receive recognition for his disabled status via reasonable adjustments. The Claimant also relies on s27(2)(d) – making an allegation (whether or not express) that A or another person has contravened the Act. In the letter the Claimant explains that he has frequently worked out of hours by coming in early and travelling on a Sunday. This is contrary to reasonable adjustments that were supposed to be in place. The Claimant was thus complaining that the Respondent had contravened the Act by failing to honour the adjustments.

This letter is at page 178 and 179 of the Bundle. In it the Claimant does use the word disability at the second bullet point, but the Tribunal does not accept that the word is used in a legal context. The Tribunal finds that the way it was intended and the way it was received was as a synonym for "impairment". It is correct that the Claimant does mention that he has had to work out of hours, but he does not link that to the disability. The Tribunal does not

accept that a fair and proper reading of this letter is that the Claimant is making an allegation that the Respondent has contravened the Equality Act 2010 or is it anything in connection with the act as required by subsections (c) and (d) of s.27 (2). He is replying to points made by Mr Lawton in his previous letter.

The Tribunal does not consider that this is a protected act.

b) At the meeting on 7.3.18 telling KL that he was working out of hours by coming in early or staying late and that consideration was not being given to his hours. This falls under s27(2)(d) and is clearly demonstrated at p186 (lower half of page). The Claimant is stating that the adjustments that ought to be in place to protect the Claimant against out of hours work such as coming in early have not been heeded.

This is the discussion the day after Mr Lawton had lost his temper over the Half-Marathon. The Claimant does state that he has come in early for meetings regularly. This is in the context of a disagreement between the Claimant and Mr Lawton about giving the Claimant adequate consideration. The Tribunal has considered the letter and has listened to the meeting and again does not accept that what is said within this meeting expressly or otherwise constitutes a protected act as set out within the EqA. We do not consider it clear enough to be an allegation that the EqA was being broken nor do we consider it sufficiently connected.

The Tribunal find that taken in context of the whole meeting this is not a protected act.

c) Telling KL that the company were not sticking to the agreement regarding the Claimant's adjustments via letter dated 14.5.18. This is s27(2)(d). The Claimant is asserting that the company was not sticking to the agreement relating to the adjustments that had been agreed upon his return to work in May 2018 (p229).

The Tribunal considers that this handwritten letter was a protected act. This is the letter just after the big argument with Mr Taylor which is quoted at length in the Judgment. The Tribunal considers the connection between the disability and the failure to comply with agreements made is far clearer in this letter than the previous two matters and accept that it is a protected act both under sub paragraph (c) and (d).

This letter is a protected act.

d) By email dated 5.6.18 the Claimant complained about the letter being delivered to his home that night and that the Respondent had gone back on its agreement not to hold a welfare meeting until after his treatment (p239). This is s27(2)(c)/(d). The Claimant is complaining that he was disturbed and suffered stress when this was to be avoided. By complaining the Claimant was asserting his right to be protected from discrimination as a disabled person (even if this is not articulated). He was also so asserting his right not to be treated unfavourably or harassed, albeit not using those precise words.

The Claimant explains that a letter is delivered at 2125 and asks two questions of the Respondent. We accept that the Claimant arises a complaint but even the Claimant above accepts that the assertion of his right to be protected as a disabled person is not articulated and we agree with that assessment of the Claimant. This email is not connected in any way to the EqA nor is it an allegation of a breach of it.

This is not a protected act.

e) By email dated 13.6.18 communicating that the Claimant was finding the Respondent's treatment stressful in terms of contacting him the night before his treatment was due to begin, referring to the issue on 14.5.18 which concerned the honouring of adjustments, and changing the date of the meeting (p244). This is s27(2)(d). The Claimant complained that he found the delivery of the letter and content of the letter stressful in light of his condition. This amounts to a complaint of harassment and unfavourable treatment arising from his disability.

This email is part of an exchange wherein the Claimant is complaining over a letter that was delivered late and Mr Lawton's justification of it. Again, the Tribunal do not consider that this letter is sufficiently clear to constitute a protected act under either subsection (c) or (d)

3. If there was a protected act, has the Respondent or those acting on its behalf subjected the Claimant to detriment because he had done a protected act, or it was believed that he had done or may do a protected act?

Upon the findings above the only protected act is the letter dated 14 May 2018 and allegations 4(a) to 4(d) below are matters that take place prior to that date and so cannot have been acts of victimisation.

The Tribunal does not find that there was any connection between the email of 14 May from the Claimant to Mr Lawton and Mr Lawton's request for a welfare meeting to take place on 15 June.

That request was made because Mr Lawton was focussed on trying to understand when the Claimant would be back to work as opposed to providing the Claimant

with the space to have his treatment and recover. As we say above it is a manifestation of Mr Lawton's lack of empathy and judgment. We are satisfied that it is not on account of the suggested protected act at all.

The Tribunal wish to record that whilst it has found a number of the actions of the Respondent discriminatory and are quite clear of those findings it did not consider that this was a victimisation claim at all and the focus was very much on the other sections of the EqA than those that deal with victimisation.

The Tribunal records that even if any of the matters above were, contrary to the Tribunal's assessment, protected acts we do not find that the Respondent's actions were influenced in anyway set out in the allegations below.

Further allegation (c) has been found not to be an accurate account of the period between 14-16 March. The cause of the Claimant going off sick in May at (d) was on account of Mr Taylor's behaviour and there was no indication from the evidence that his actions were influenced by anything other than that which had taken place the weekend before which did not include any of the alleged protected acts.

We further find that whenever the Claimant complained about any matter Mr Lawton tended to take some sort of umbrage and felt the need to respond point by point to make it clear he did not agree and so his disappointment expressed at (a) below was nothing out of the ordinary. We find in respect of (b) the holding of formal grievances were not in Mr Lawton's DNA and he preferred to simply put his views on the record.

4. The Claimant relies upon the following detriments:

a) By letter dated 7.3.18, KL telling the Claimant that it was disappointed to have to address the Claimant's February letter and that the Claimant should not repeat such an email.

b) Not inviting the Claimant to a grievance meeting further to his letter dated 25.2.18 or indeed further to any of the Claimant's other emails expressing concerns over his treatment.

c) By KL's aggressively micro-managing the Claimant in KL's office on 14.3.18 and 16.3.18, when he did not allow the Claimant to take a lunch break, required the Claimant to seek permission to go to the toilet, and belittled and humiliated him through quizzing him regarding a phone call from PPS and KL answering MW's query into the Claimant's well-being.

d) The Claimant having to go off sick on 14.5.18.

e) ***By insisting that the Claimant attend a welfare meeting on 15th June 2018.***

Constructive Dismissal

171. The Tribunal finds that the Claimant has been unfairly constructively dismissed. As described within this Judgment the Claimant was subjected to a number of discriminatory actions by the Respondent over the period from March through to his resignation in November.

172. The Respondent was in breach of the implied term that it should not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Whilst not all of the conduct was calculated to have that effect it was certainly likely to when viewed on an objective basis.

173. The failure to provide the SSP form timeously was discriminatory in our view and although a relatively minor act it was still sufficient to entitle the Claimant to resign and leave the employment as it is the last straw in a series of incidents. It was the last straw that caused the Claimant to terminate a seriously deteriorating or deteriorated relationship.

174. The Tribunal is satisfied that the cumulative series of acts found, taken together, amount to a repudiatory breach of the implied term. The final straw in this case did contribute something to the preceding acts.

175. Adopting the ***Kaur*** questions, we are satisfied that the SSP issue was the act that caused or triggered the Claimant's resignation. We are satisfied that the Claimant did nothing to affirm the contract after his resignation and in particular we do not consider that there is any issue or problem with him resigning on notice and in accordance with his contractual obligation. We are satisfied that the SSP issues was a part of a course of conduct which viewed cumulatively amounted to a repudiatory breach of the implied term of trust and confidence?

176. We do not accept that the Claimant can be said to have affirmed his contract post May 2018. He could have resigned earlier if he had have wished especially after Mr Taylor's conduct in May, but he did not. He did not do so but he made it clear that he had serious concerns about the way he had been treated and was perfectly right to place his treatment and recovery first rather than considering his position. In many senses his employment was placed on hold over that summer whilst the Claimant underwent treatment and recovery. We find there was no affirmation.

177. Upon finding there was a constructive dismissal the Respondent did not put forward a potentially fair reason and so the dismissal is unfair. For the avoidance of doubt the dismissal was discriminatory as well.

Time Limits

178. Does the Claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such

accordingly in time and if not, was any complaint presented within such other period as the Tribunal considers just and equitable?

a) Having determined the matters above the Tribunal now considers time limits.

b) The Claim Form was issued on 10 April 2019. Early Conciliation was undertaken between 30 November 2018 and 13 January 2019. The Claimant's effective date of termination was 11 January 2019.

c) The unfair dismissal claim was brought within the three-month statutory time limit and no issue arises in respect of that claim.

d) The last act of discrimination that we have found is the Claimant's dismissal and that act is in time. We have found a number of other acts of disability discrimination through 2018 from towards the start of the year. We have also found that these various acts of discrimination contributed to the constructive dismissal on 11 January. The acts of discrimination were carried out by Mr Lawton and Mr Taylor and were almost exclusively a result of the way they dealt with the Claimant not feeling well enough to work as hard as he had done in the past and/or cope with long hours and being constantly on call.

e) The Tribunal has no hesitation in concluding that the discriminatory acts amount to a continuing act or state of affairs and so link in with the dismissal which was lodged in time. In these circumstances we accept that the discriminatory conduct is conduct extending over a period as detailed in the Equality Act 2010

179. For the reasons given above the Claimant has been unfairly dismissed and has also been subjected to disability discrimination and this matter will be relisted for the matter of remedy to be considered at the earliest opportunity.

Employment Judge Self

Signed on: 18/03/21