EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103070/2019 (V)

Final Hearing held at Aberdeen on 6, 7, 8, and 13 January 2021, deliberation day on 26 January 2021

Employment Judge A Kemp
Tribunal Member A Atkinson
Tribunal Member C Jackson

Mr L Morgan	**Claimant** **In person**
Clearwater Fire Limited	**First Respondent** **Represented by** **Mr A Turl** **Director**
Steve Richard Nickerson	**Second Respondent** **In person**
Barry Lee Stanley	**Third Respondent** **In person**
Andrew John Turl	**Fourth Respondent** **In person**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Employment Tribunal is that:

1. **The first respondent breached its duties to the claimant under sections 15, 20 and 21 of the Equality Act 2010.**

2. **The first respondent did not harass the claimant under section 26 of the Equality Act 2010 and that claim is dismissed.**

3. **The claimant was dismissed by the first respondent under the terms of section 95 of the Employment Rights Act 1996 and section 39 of the Equality Act 2010.**

4. **The dismissal was unfair under section 98 of the Employment Rights Act 1996 and unlawful discrimination under section 15 of the Equality Act 2010.**

5. **The Claim as directed against the second, third and fourth respondents is dismissed.**

6. **The claimant is awarded the sum of TWENTY THOUSAND SEVEN HUNDRED AND TWENTY SEVEN POUNDS FORTY SIX PENCE (£20,727.46) in compensation, payable by the first respondent.**

REASONS

Introduction

1. This Final Hearing took place partly in person, and partly remotely with the claimant and second respondent appearing by cloud video platform, on a screen in the Tribunal room, by agreement of the parties and Tribunal.

2. There had been five earlier Preliminary Hearings during which some claims initially made had been withdrawn or dismissed, and the claims that remained before the Tribunal were for constructive unfair dismissal under sections 95 and 98 of the Employment Rights Act 1996, and breaches of sections 15; 20 and 21; and 26; of the Equality Act 2010. The claimant asserted that he was a disabled person, which the respondents did not accept, nor did they accept that they had knowledge either actual or constructive of the same. They also argued that certain of the claims under the 2010 Act were outwith the jurisdiction of the Tribunal on the basis of timebar.

3. Although the respondents had earlier been represented by Ms McKenzie, an HR consultant, she intimated on the day prior to the start of the Final Hearing that she no longer did so. All parties therefore represented themselves.

Mr Turl confirmed at the commencement of the hearing that he would act as the representative for the first respondent.

4. Also at the commencement of the hearing the Judge explained to the parties how the hearing would be conducted, that evidence required to be given to explain matters to the Tribunal, and that the Tribunal should be referred to documents in the Bundles considered to be relevant to explain what they were and in what respect they were relevant, and that if not so referred to the documents would not be looked at by the Tribunal. Explanations were given of issues to address in cross examination, being evidence given that was challenged, or in relation to evidence the party would give that the witness had not commented on but had knowledge of, what could be raised in re-examination, and about making submissions. The Judge also explained that whether the claimant could refer to the discussions during ACAS early conciliation, which had been addressed in the earlier Preliminary Hearing and referred to in his pleadings, may depend on whether the respondents consented to him doing so. Mr Turl for all the respondents confirmed that they did not. The Tribunal considered, for reasons set out more fully below, that it should hear the evidence on that issue reserving whether or not it was evidence that could be admitted. It is dealt with below.

5. The evidence was given in the first three days of the hearing, and the fourth day was taken up with submissions. The Tribunal conducted an initial deliberation thereafter and met on a later date to continue its deliberations. The Judgment is a unanimous one.

Issues

6. The list of issues that was set out in the Note following the last Preliminary Hearing, and which was accepted by the parties, was discussed before the evidence was heard. After hearing the evidence the Tribunal decided that the list of issues required to be expanded upon in one respect, related to point (xii) as referred to below. The list discussed at the commencement of the hearing was as follows:

(i) Was the claimant a disabled person under section 6 of the Equality Act 2010?

(ii) If so, did the first respondent know, or ought it reasonably to have known, that the claimant was a disabled person, and when was that?

(iii) Is any claim made under the Equality Act 2010 outwith the jurisdiction of the Employment Tribunal having regard to the terms of section 123 of the Equality Act 2010?

(iv) Was the claimant dismissed by the first respondent under section 95(1)(c) of the Employment Rights Act 1996 and section 39(2)(c) of the Equality Act 2010?

(v) If so, was that dismissal unfair under section 98(4) of that Act?

(vi) Did the first respondent treat the claimant less favourably because of something arising out of the claimant's disability under section 15 of the Equality Act 2010?

(vii) If so, has the first respondent shown that that was a proportionate means of achieving a legitimate aim?

(viii) What if any provision, criterion or practice did the first respondent apply to the claimant?

(ix) Did doing so place disabled persons at a substantial disadvantage compared with those who were not disabled?

(x) Did the first respondent apply a provision, criterion or practice of either or both of (i) the removal of his laptop and access to emails, and (ii) the requirement to work full time at the respondent's premises, to the claimant?

(xi) If so, did that place the claimant at a substantial disadvantage in comparison with persons who are not disabled?

(xii) Was it a reasonable step for the first respondent to have instructed a stress risk assessment in relation to the claimant to ascertain what if any reasonable steps were required to be taken to avoid that disadvantage?

(xiii) Did the first respondent, and any of the second, third or fourth respondents as individuals, harass the claimant under section 26 of the Equality Act 2010?

(xiv) In the event that any claim succeeds, what remedy should be afforded to the claimant, and in that regard (a) what losses has he suffered or will suffer, (b) should any award be reduced on account of his contribution, (c) would a fair dismissal have resulted from a different procedure, and (d) has the claimant mitigated his loss?

Evidence

7. Unfortunately the parties had not complied with the case management orders regarding the Bundle of Documents. The respondents had prepared their own Bundle of Documents, but had not arranged it in chronological order nor had it been paginated. There were a number of sections, not separated adequately, and in each the documents were numbered. This meant that there were several documents each of which bore the same number, within different sections, and finding them within two volumes of the Bundle proved difficult. The claimant had also prepared his own Bundle which had dividers but no page numbers. Certain documents, primarily payslips, were added of consent during the course of the hearing.

8. During the hearing it also emerged that a Statement of Agreed Facts document included within the Bundle, with a second document with annotations, were in essentials drafts of the same, and no such agreed document had been completed. The Tribunal therefore entirely disregarded those documents.

9. Not all of the documents in the Bundles were referred to in evidence. Some of the documents that might have been helpful to the Tribunal were not in the Bundles. Some documents were extracts from email trails but not with the full trail provided. Some documents, such as text messages, did not have dates on them.

10. As the parties were not represented, and as the claimant claimed that he was a disabled person, the Tribunal considered it appropriate to assist the parties

to the extent to which they considered that they could, when evidence was given orally. The claimant was asked on a number of occasions to set out his evidence, and explain the basis on which he made his arguments. The claimant on occasion sought to refer to correspondence he sent to the Tribunal, or to the respondents. He was reminded that that was normally either argument or a form of pleading of his case, and that the Tribunal wished to be referred to the documents, or evidence of what occurred, at the time of the events leading up to the claimant's resignation. Whilst he did so to an extent, it was not clear at several points what his position was, or what evidence he wished to refer to to support that position. He did not refer to any great extent to his own Bundle of Documents.

11. During the course of the evidence the respondents made allegations against the claimant that might infer that he was guilty of one or more criminal offences. He was informed of his right not to answer questions that may incriminate him, and chose to answer to deny the allegations. The respondents also sought to refer to correspondence between parties' solicitors that had been written on a without prejudice basis. The Judge explained that doing so may waive legal professional privilege in such communications. The respondents confirmed that they were content to do so. The Judge also noted that the correspondence reserved the right of the respondents to refer to it at their instance. In so far as there was also a reference to correspondence similarly sent by solicitors for the claimant, the claimant confirmed that he too was content to waive privilege.

12. During the evidence the Judge sought clarity on points on several occasions with both of the witnesses, and sought to ensure that all of the relevant evidence was given by all parties. It was apparent that neither the claimant nor respondents had a full knowledge of the conduct of Tribunal proceedings, the law that pertained to the claims made, or issues such as what evidence was relevant and what was not. The Tribunal sought to give the parties considerable latitude to present their evidence as they wished, and intervened to the extent that it considered permissible. The evidence included matters that were related to the claimant's position as a shareholder of the

first respondent, and a director, and a potential agreement between the parties that included both the sale of his shares and an agreement as to the termination of his employment. The Tribunal does not have direct jurisdiction over what may be termed a shareholder dispute, which is a matter resolved if necessary in court, but in so far as the two matters were combined by the parties in their discussions at the time, and as there were arguments of detriment and then unlawful dismissal in relation to such issues, the Tribunal considered that it should hear that evidence and then assess the extent to which it was relevant to the issues before it, if at all.

13. Evidence was given orally by the claimant first. At the end of the evidence of the claimant Mr Turl indicated that the respondents were content to leave matters on that basis. He was informed that questions asked in cross examination did not provide positive evidence, particularly where the claimant had denied the proposition put to him in such questions. He was reminded that the provisions as to shifting of the burden of proof may operate, and after a break to confer with his other respondents he stated that they would give evidence. Mr Turl had indicated at that stage that the intent was to call each of the second, third and fourth respondents to give evidence, but after the second respondent had given his evidence then stated that the respondents did not wish to lead any further evidence. The Judge pointed out that there were matters where each of the third and fourth respondents had been involved and could give evidence that may be relevant, such that there may be a failure to give the best evidence if only the second respondent gave evidence. Mr Turl confirmed however that despite that neither he nor the third respondent wished to give evidence, and the third respondent confirmed that that was the position.

14. The end result was that the Tribunal was not presented with all of the evidence that it might have had. The evidence that was presented to it was at stages very difficult to follow, difficult to find as the Bundles had not been properly completed, and not as fully explained as could have been the case. There was much of the documentation produced in the Bundles not referred to in oral evidence by either party. The Tribunal found the conduct of the

hearing and assessment of the evidence it heard particularly difficult partly for those reasons, for which both claimant and respondents have a responsibility. Whilst the claimant has been acting for himself throughout this Claim the respondents had advice from an HR representative. Both parties had earlier been in receipt of legal advice. The Tribunal required to make allowances for the fact that all parties who appeared before it were party litigants or in the case of the first respondent represented by the fourth respondent, and to assess the evidence it had as best it could despite the difficulties that there were.

The facts

15. The Tribunal held that the following facts had been proved.

16. The claimant is Mr Lee Morgan. He was an employee of the first respondent. He was also a director, and was and remains a shareholder. His date of birth is 3 April 1974.

17. The first respondent is Clearwater Fire Limited. It is a company incorporated under the Companies Acts.

18. The second respondent is Mr Steve Nickerson. He is a director, shareholder and employee of the first respondent.

19. The third respondent is Mr Barry Stanley. He is a director, shareholder and employee of the first respondent. He is also a director and 50% shareholder of another company called Clearwater Electrical Limited.

20. The fourth respondent is Mr Andrew Turl. He is a director, shareholder and employee of the first respondent. He is also a director and 50% shareholder of Clearwater Electrical Limited.

21. The first respondent was formed in 2013 by the claimant, second and third respondents. The fourth respondent joined that company on 1 August 2015. Each of the claimant, second, third and fourth respondents were and remain shareholders of the first respondent to the extent of 25%.

22. The claimant was employed in the role of Operations Director of the first respondent from 27 August 2013. There was no written contract of employment for him, nor did the first respondent provide a statement of particulars of employment under section 1 of the Employment Rights Act 1996 either for him or the second respondent.

23. The first respondent had a staff handbook, which included a provision on grievance as follows "If you have a complaint in relation to your employment, then you should let us know. Write it down and we will give you a reply as soon as possible. If that does not satisfy you, you can ask for this to be escalated within the company. Where possible, we will do all we can to resolve the issue that you have."

24. The first respondent is a small organisation, with three employees which were the claimant, the second respondent and an office manager. It also used about six sub-contractors when required. It had an annual turnover of about £400,000 - £500,000 and profits annually of around £30,000 - £40,000 on average. It on occasion required support financially from Clearwater Electrical Limited.

25. The claimant was remunerated by payment of salary from the first respondent of £670 per month. He also received dividend payments as a shareholder of the first respondent on a monthly basis of £2,830 per month. From December 2017 he received pension payments of £600 per month. He also received private healthcare provision from the first respondent. He had payment made for use of a mobile telephone. He was provided with a laptop for work use.

26. The first respondent provided fire protection services primarily to the offshore oil and gas industry. The claimant had the primary technical knowledge of the services being provided. The second respondent was the Business Development Director of the first respondent. The claimant and second respondent carried out the day to day work of the first respondent. The fourth respondent provided support on financial and other matters. The third respondent had less of an operational role in the first respondent.

27. The claimant had for a material period misused alcohol and prescription medication. He consumed each of them to excess, both separately and together. He was prescribed medication to relieve symptoms of stress and anxiety, which ought not to have been taken with alcohol.

28. During the course of 2014 – 2015 the claimant sent a number of messages by email or text to colleagues in the first respondent, or to former colleagues in a competitor company named Paradigm, in particular relating to Mr Rob Bain of that company. He had formerly been an employee at Paradigm. The messages were on occasion inappropriate, offensive, lewd, or threatening. The messages included the following:

(i) In March 2014 to Mr Rob Bain, which the claimant said had been because of drinking alcohol after taking medication, which he apologised for in an email of 7 April 2014, which included “Rob is getting a slap one dark morning”. At the same time the claimant stated “drinking on these tablets makes me loopy”.

(ii) In April 2014 when he used expletives, and said that he had a long memory and that no one “crosses me and gets off with it.”

(iii) Emails to the office manager of the first respondent on 27 November 2015 which indicated that he had received painkillers or other medication prescribed for her.

(iv) An email to a former colleague of the claimant in December 2015 which referred to the claimant shooting Mr Bain with a crossbow.

29. He attended work, or work events, for the first respondent under the influence of alcohol on occasions in the period 2014 - 2015.

30. In November and December 2015 he sent inappropriate and lewd messages to a female employee of the first respondent, their office manager. There was a meeting held with the claimant informally after that email was sent, and he said that he would seek medical assistance.

31. Neither then nor at any other stage did the first respondent undertake any formal investigation or disciplinary process. They had informal discussions

with him and on occasion required him to send an apology to those who had received his improper communications. The claimant issued such an apology somewhat grudgingly. They did not undertake formal disciplinary processes as the claimant was the person with the technical knowledge for much of the business of the first respondent.

32. The claimant consulted his GP after the discussion in November 2015 and was referred to a consultant psychiatrist who he met in January 2016. He was prescribed with Valium. He informed the second, third and fourth respondents that he had seen a doctor and was taking Valium after that. He said that he was suffering from stress. He did so orally, and mentioned it in various emails. They included:

(i) On 26 September 2016 an email to the second respondent stating, "just learned Valium and beers don't mix yet again…"

(ii) Emails to the second respondent including on 5 October 2016, 1 March 2017 rand 18 January 2018 regarding his (the claimant's) taking of Valium.

(iii) An email to the second, third and fourth respondents on 26 April 2017 which included "Following a call with Andy [the fourth respondent] earlier I'm hearing people are concerned over my mental state and have been for the past few weeks…..Yes I should take some time off but we have far too much going on….I am totally fine….." That message followed one from the fourth respondent to the other respondents, copied in error to the claimant, which commented "Following his episode yesterday I feel we need to be covered for all eventualities." Reference was made to provisions of the Companies Act 2006 including to the removal of a director.

(iv) In September 2017 to the second respondent stating that he, the claimant, was "dead anyway…can't beat a bullet". He made reference to being stressed out, and the second respondent stated, "seriously you need to sort yourself out".

(v) Discussions about visiting the claimant at his home around December 2017 when he ceased to take all medication, and the possibility of sending him for rehabilitation.

(vi) An email to the second, third and fourth respondents on 18 January 2018 stating "……in my waking hours all I do is think about work".

(vii) Emails to the second respondent around 8 February 2018 in which the claimant referred to stress and high blood pressure. On that date the claimant used a racially offensive term in an email to the second, third and fourth respondents.

33. On 18 January 2018 the claimant informed the second, third and fourth respondents by email of his increasing level of stress, describing himself as a "stressbag", and expressing a hope that what he described as bickering between them could be avoided in future. He used inappropriate words in his email. On 31 January 2018 the fourth respondent replied asking if there was to be a meeting, to which the claimant responded that he did not see the point, and the fourth respondent in turn responded to suggest that there were issues to be resolved.

34. On 8 February 2018 the claimant used a racially offensive term in an email to the second, third and fourth respondents. He also said, "Moving forward I'm out in 2019 this time chaps no matter what happens…….everyone would get same if we sell? No hard feelings I just want best for all…."

35. The second respondent replied the same day suggesting that the claimant had been taking alcohol and Valium before sending that message. He said that once the claimant had had a week off they would need to sort out an attendance rota for the two of them being in the office.

36. On or around 18 February 2018 the claimant was admitted to hospital for symptoms that he thought were consistent with a heart attack. He had not suffered a heart attack, but a diagnosis was made of stress, anxiety and depression. He was discharged from hospital after one day. The first respondent was aware of his having been admitted to hospital at about that time. The claimant was signed off work by his GP on 26 February 2018, and

the fit note for that passed to the first respondent. He continued to be signed off work from then onwards during his employment with the first respondent. (The fit notes from his GP were not all before the Tribunal but indicated the cause as stress at work).

37. On 26 February 2018 the claimant withdrew from a loan account at the first respondent, being for sums of expenses he had paid on the busines of the company, a sum of about £500 to which he was entitled.

38. On 28 February 2018 the first respondent consulted a solicitor with regard to the position of the claimant.

39. On 28 February 2018 the first respondent reduced the claimant's pay from the amount that had existed at that time, referred to below, to the level of Statutory Sick Pay ("SSP"). The first respondent decided to do so as there was no contractual entitlement to full pay when off sick, having received legal advice.

40. On 2 March 2018 the second respondent emailed the claimant to inform him that from 26 February 2018 he would be receiving SSP only.

41. The claimant had been in receipt of dividend payments prior to then, which dividend payments for him ceased at the same time. The first respondent did so on legal advice received.

42. On 5 March 2018 the second respondent emailed the claimant to discourage him from work activities whilst off sick. He had been attending to work emails at that time.

43. On 12 March 2018 the claimant sent an email to the second, third and fourth respondents stating that he had been signed off for a further two weeks, that he was a director and entitled to full pay, and the following "Also been doing some thinking over the situation in general and would like to pull out of the business as soon as practicable". He referred to putting his heath first. He stated, "I've already mentioned previously I have always put clients first above everything else so will assist you in any way required going forward as its in all our interests that the company does well." He asked for a meeting later

that week, and added “I’ve made my decision and it’s just how we go about it with minimum impact to the company”. He also alleged an entitlement to full pay.

44. The second respondent replied to him on the same date to state that “there is no contractual or statutory provision requiring full pay”, that he had instructed the accountants to value the shares the claimant held, and would respond regarding a meeting. The first respondent continued to make payment to him of SSP.

45. On 12 March 2018 the first respondent removed the claimant’s access to its email system and company server. They did so on advice from their solicitor. They did so as they were concerned that the messages sent by the claimant previously referred to above led them to the belief that he may send messages to others which would cause damage to the reputation or business of the first respondent.

46. The claimant instructed solicitors to act for him and on 14 March 2018 his solicitor Mr Smith emailed the first respondent’s solicitor Ms Beedie. Mr Smith argued that the claimant’s full pay should be re-instated. The solicitors commenced correspondence, firstly to progress discussions about his leaving the business of the first respondent, which would involve a payment to the claimant to purchase his shareholding, and for loss of office, which would have been set out in a Settlement Agreement between them confirming that his employment with the first respondent was to end.

47. On or about 15 March 2018 the first respondent through its solicitor sought the return of the claimant’s laptop, mobile telephone and keys for the office. They did so because they wished to recover documents they understood from discussions with the claimant were on his laptop and had not been added to the company server. They included contractual documents with customers, pricing details, and quality assurance details required for accreditation purposes. They also wished to prevent the claimant from contacting other parties using company equipment for the reasons referred to above. They did

not wish the claimant to attend their office. The request was made in name of Clearwater Electrical Limited as owner of the laptop and principal tenant.

48. The claimant's solicitor emailed on a date not given in evidence but likely to have been on or about 15 March 2018 stating that the claimant "was going to be putting everything in order with regards to the company property."

49. The office used by the first respondent was leased by Clearwater Electrical Limited, and the first respondent was its sub-tenant. The laptop had been provided to the claimant to conduct the work of the first respondent. It had been purchased by Clearwater Electrical Limited.

50. The Statutory Sick Pay payments made to the claimant continued for the statutory period of 28 weeks and then ceased.

51. In April 2018 the first respondent removed the claimant's entitlement to pension. That entitlement had been in existence since December 2017, and amounted to £600 per month. They did so on receipt of legal advice. No prior notice was given to the claimant nor was a discussion held with him.

52. In April 2018 the first respondent also stopped paying for the claimant's mobile telephone and removed the claimant's entitlement to private healthcare. They did so on receipt of legal advice. No prior notice was given to the claimant nor was a discussion held with him.

53. In or around April 2018 the fourth respondent emailed the claimant on three occasions to seek the return of the laptop.

54. In or about May 2018 the claimant returned the laptop he had been using to the first respondent. He had removed from it all documentation that had previously been stored on its hard drive, a process known as "wiping" it. None of the documents of the first respondent that had been on it, including those set out at paragraph 47 above, were provided by him to the first respondent, which had to seek to obtain them from other sources.

55. Prior to 3 May 2018, on a date not provided in evidence, the solicitor for the first respondent made an oral offer to the claimant's solicitor of £15,605 to settle his shareholding and for loss of office. It was rejected also orally.

56. On 22 May 2018 the first respondent's new solicitor wrote to the claimant's solicitor to seek to arrange an occupational health physician's appointment for him. There was a delay in that being carried out partly as in that month the claimant attempted suicide.

57. In June 2018 the claimant was removed as a director of the first respondent following the calling of a general meeting to do so by the second, third and fourth respondents.

58. In July 2018 the claimant's solicitor informed the first respondent's solicitor that the claimant at that stage had no intention of leaving the first respondent.

59. On 3 August 2018 the first respondent's new solicitor wrote to the claimant's solicitor to offer £20,000 in aggregate for the claimant's shareholding and as compensation for loss of office and employment.

60. On 8 August 2018 the claimant's solicitor responded with a counter offer of £38,000 on the same basis. That proposal was rejected by the first respondent's solicitor, and their offer of 3 August 2018 was withdrawn. The parties' negotiations to settle matters did not progress thereafter.

61. On 9 August 2018 the fourth respondent wrote to the claimant enquiring as to his state of health, and commenting, "Given that you have now been absent from work since 26 February 2018 I would like to arrange a meeting with you to discuss your current health and your capability to continue in your role." It referred to seeking occupational health advice.

62. The claimant replied the following day. He referred to a liver condition which could not be addressed immediately as his private healthcare had been cancelled. He said that there was no problem in his attending occupational health. The fourth respondent replied to say that a taxi could be arranged for that, but in fact the claimant did not require it.

63. The claimant has suffered from mental health issues for many years. They were related initially to abuse of alcohol. They were also related initially to abuse of prescription medication. From January 2016 the claimant co-operated more fully with his medical advisers, and reduced but did not stop his consumption of alcohol. He continued to take substantial quantities of prescription medication. His condition deteriorated markedly from late February 2018 after the steps taken by the first respondent to remove access to company systems, equipment and its office, and to reduce the income he received, From May 2018 onwards the claimant's psychiatrist considered that the claimant has suffered from a significant depressive illness. He has been treated with anti-depressant medication, including Propanolol, and Valium as referred to. But for that medication the claimant's depressive illness would be materially worse. He has a difficulty in concentrating and retaining information. He has a difficulty sleeping, such that he sent messages by email and text in the early hours of the morning to the respondents. For periods he avoids socialising with others. Such symptoms of depressive illness have been present to varying degrees since February 2016, and continue.

64. The appointment with an occupational health physician instructed by the first respondent, Dr Kong, took place, on 24 August 2018, and thereafter on 30 August 2018 a report was issued in relation to the claimant. That report referred to his decision to leave the business and sell his shares, and included the following, "Mr Morgan informed me that he has found the proceedings extremely stressful. He has been experiencing significant symptoms affecting his mood, concentration and sleep. He tells me that he has also been extremely anxious and has been isolating himself. He explained that he has had difficulties with excess use of alcohol and misuse of prescribed opiates in the past. However this is not an ongoing issue…..Over approximately the last six months Mr Morgan has consulted the specialist on a number of occasions due to significant deterioration in his metal state on a background of generalised anxiety disorder; where he has described a significant period of depression related to perceived work-related stress, in particular financial stress related to his position in the company."

65. The report indicated the opinion that the claimant was not fit for work, in answer to a query as to adjustments did not recommend any, and in relation to a question of whether the Equality Act 2010 was likely to apply, which is taken to mean whether or not the claimant was a disabled person under that Act, stated, "In my opinion, it is likely to apply, although the final decision is not a medical one." In relation to a question of when the claimant may return to work was stated, "…..It is unlikely that Mr Morgan will be able to return to work, until a mutually agreeable resolution is reached." Dr Kong said that she would "be happy to see him again following the resolution of the work-related factors or if his symptoms have improved significantly."

66. The first respondent had access to legal advice at that time.

67. On 7 September 2018 the first respondent wrote to the claimant regarding the report from occupational health dated 30 August 2018, seeking clarity regarding his intention to return to work or leave the business, and further details of comments made by him referred to in that report.

68. The claimant replied on 12 September 2018 setting out a detailed description of his mental health issues, his belief that he was a disabled person, and asking the first respondent to remedy matters. He added within the body of his letter a number of emails and other documents.

69. The claimant raised a grievance with the first respondent on 27 September 2018. He referred to the implied term as to trust and confidence, duties under the Equality Act 2010 and the Code of Practice: Employment issued by the Equality and Human Rights Commission. He asked for an assessment to be carried out in relation to his disability, and for adjustments to be made "so that I can return to work". He also stated that if there was no resolution within seven working days he would instruct his solicitor "to commence pre-claim conciliation with ACAS".

70. On 4 October 2018 the second respondent wrote to the claimant to acknowledge receipt, and ask if he was "well enough to proceed with the grievance procedure". The claimant replied the same day to confirm that he

consented to the first respondent contacting his GP. He also said that he would continue with without prejudice discussions.

71. On 19 October 2018 the claimant's consultant psychiatrist wrote a report on him which stated this his "mental health has shown significant deterioration since May 2018 when he was urgently assessed following a suicide attempt. At that time of assessment it was felt that a significant contributor to this suicide attempt that sadly occurred and indeed a further episode of self-harm was the workload stress Mr Morgan was describing. He has suffered from a significant depressive illness since that time." It continued that he was not fit to attend a face to face meeting regarding his employment status. That report was sent to the first respondent.

72. On 24 October 2018 the second respondent wrote to the claimant to address his grievance. He did so without holding a meeting in light of the term of the report received. He intended that the email would be the start of a process of exchange of emails, after which a decision would be made. He set out his views on the grievance which were to reject the same and stated, "Should you wish to respond to the above we would be glad to take upon your comments prior to completing our investigation into your grievance. At this stage we will contact you again to explain our findings. You have the right to appeal against the decision….Should you wish to return to work the company will do it's utmost to facilitate a successful return to work and would welcome your suggestions as to any necessary reasonable adjustments that you see fit based on your condition. It is important for the Company to understand what practical resolution you are seeking or which you think is realistic, so we would welcome your thoughts on this."

73. The claimant challenged that response by email dated 25 October 2018. He complained about what he thought was a five day period to appeal, and about the decision he thought had been made.

74. The second respondent replied on a date not given in evidence to state that his initial message was not the grievance outcome, and commenting as to any later appeal that may be taken.

75. The matter was then referred by the second respondent to Ms F McKenzie, an independent HR Consultant engaged by the first respondent as the second respondent felt out of his depth. The date on which the first respondent did so was not given in evidence.

76. In about November 2018 the second respondent met the claimant informally. They discussed the possible sale of the claimant's shares to the second respondent but did not agree on a price for that.

77. On 5 November 2018 the claimant wrote to the second respondent to set out a grievance appeal. He asked a series of questions in that letter, made detailed reference to dealing with stress in the workplace, set out his understanding of the law with reference to statute and case law, and proposed 14 adjustments which he believed would facilitate his return to work, stating, "I believe a medical specialist would have been best placed to assist my employer and its Directorship in identifying the reasonable adjustments, after receiving the OH report, which I needed to return to work." The first respondent did not respond to that letter.

78. Ms McKenzie contacted the claimant and sought additional information from him, which he provided in a letter to her dated 4 December 2018. That included issues as to the reasonable adjustments he sought.

79. Ms McKenzie made a decision on the issues raised in the grievance by letter dated 18 December 2018. In her decision she upheld two parts of the grievance, related to the removal of healthcare cover and pension and said that she would recommend that the first respondent reinstate both. She rejected the other aspects of the grievance. Ms McKenzie did not respond in detail in relation to the arguments of the claimant that there had been discrimination on grounds of his disability, or that reasonable adjustments should be made to facilitate his return to work. She made no mention of his letter of 5 November 2018 or the adjustments he had there made reference to. She said that the company had made best efforts to address the cause of stress and identify any reasonable adjustments. She said that there had not been unfavourable treatment on grounds of disability.

80. In relation to the revoking of access to the first respondent's emails and server she held that the company had acted legitimately to protect its business. Her letter had a large number of attachments, which included examples of messages he had earlier sent which were "quite inappropriate". She did not consider that emails sent by Mr Turl about the return of the company laptop and office keys were inappropriate. She advised him of his right to appeal her decision.

81. The first respondent received that letter with the recommendations within it at about that time, but did not act on the recommendations. It did not take any action in relation to the arguments made by the claimant as to discrimination or the need for adjustments.

82. The claimant appealed that decision by letter dated 20 January 2019 setting out his arguments in detail.

83. The first respondent did not respond to that appeal in writing. Ms McKenzie telephoned the claimant at some point after the appeal was sent, on a date not given in evidence, to state something to the effect that Mr Stanley who was to hear it, the third respondent, was on bereavement leave and that there would be a delay.

84. The claimant commenced early conciliation through ACAS on 22 January 2019.

85. On 20 February 2019 the claimant resigned from his employment with the first respondent and intimated that they were in repudiatory breach of contract by letter of that date, in which he stated:.

> "I am repudiating the contract of employment (without notice) due to a fundamental breakdown in the implied term of mutual trust and confidence, which crosses the Malik threshold. ….In March 2018 the company cut off my email and server access without informing me…In March 2018 the company stop[ped] paying my mobile phone bill without informing me…In March 2018 the company made the decision to put me (a fellow director at the time) on Statutory Sick Pay…In April

> 2018 the company…revoked my private healthcare benefit for no reason and without informing me….In April 2018 the company ….revoked my company pension again without informing me……In September 2018…I sent in grievance letters dealing with my concerns over how I had been treated….It is now February 20th 2019. The timeframe in dealing with my grievance is a serious breach of the implied term of mutual trust and confidence…..I sent my grievance appeal letter in on 20th January 2019…I have yet to receive any answers to the aforesaid questions…" He said that the final straw was an offer made through ACAS [an issue addressed as to admissibility below]."

86. An ACAS early conciliation certificate was issued to the claimant on 22 February 2019.

87. On 12 March 2019 the third respondent wrote to the claimant to reject his appeal against the grievance decision.

88. On 20 March 2019 the claimant presented a Claim Form to the Employment Tribunal commencing the present proceedings.

89. On 24 April 2019 the claimant commenced new employment with a Dutch Company named Siren BV. He has been paid by that company since that date.

90. On 24 April 2019 the claimant incorporated two companies Intakam Ltd and Venganza Ltd. The company names are Turkish and Spanish respectively for "revenge".

91. Between 6 and 9 May 2019 the claimant attended a conference in Houston, Texas, USA for Siren. He had a business card for the company and attended their stand at the event, known as OTC.

92. On 30 May 2018 the claimant wrote to the Tribunal for the purposes of the present claim, and alleged that he was unable to focus on more than one thing at a time, go to a supermarket where there were groups of people, take phone calls or assist his partner with her hose if there were too many people.

He also stated that he found it difficult to go to the local shop as he was worried about seeing people. He made no mention of his new employment or attending the event in Houston earlier that month.

93. By report dated 22 October 2019 the claimant's consultant psychiatrist stated that the claimant had attended him on a regular basis and has a diagnosis of a recurrent depressive disorder, with marked anxiety symptoms. "He has required treatment for this and is compliant with treatment. I can further confirm that since February 2018 there has been a further deterioration in his mental state and this was severe in nature, to the extent where he attempted suicide on two occasions and required urgent psychiatric assessment…..[The claimant] has had significant difficulties with mental disorder dating back, to my knowledge, to January 2016". He expressed the opinion that the claimant was a disabled person under the Equality Act 2010.

94. When employed by the first respondent prior to his absence commencing in February 2018 the claimant was paid a gross salary of £670.00 per month, and had net pay of the same amount.

95. When in receipt of SSP his pay was £368.20 per month, both gross and net.

96. The value of the mobile telephone provided to the claimant by the first respondent was £20 per month.

97. The value of the private healthcare cover provided to the claimant by the first respondent was £100 per month.

98. At no stage did the claimant claim State benefits.

99. The removal of access to the email facility and server of the first respondent, and the request for his laptop and keys caused him stress and anxiety. The lack of action by the first respondent to change that situation in the period to his resignation on 20 February 2019 caused him continuing stress and anxiety.

100. The removal of the claimant's pension, mobile telephone and healthcare payments also caused him stress and anxiety, and continued until his resignation on 20 February 2019.

Claimant's submissions

101. The claimant provided a written submission, which he supplemented orally. He had also had the opportunity of reading the respondents' submission during an adjournment on the fourth day of the hearing to enable each party's submission to be read. A very brief summary of his submission is that (i) he was a disabled person, (ii) the respondents knew that from at least 2017, or ought to have done so, (iii) the claims were not out of time, or if they were it was just and equitable to allow them to proceed, (iv) the first respondent had acted unfavourably towards him from February 2018 onwards in several respects, including cutting him off from access to work, and then not properly handling his grievance, (v) the first respondent was in breach of its duty to take reasonable steps to avoid the disadvantage caused by his disability in several respects, as a result of which he had not been able to return to work and latterly had required to resign, (vi) the respondents had harassed him, and (viii) his resignation was a dismissal, which was unfair. He referred to his Schedule of Loss as to remedy. His submission had reference to various statutory and other provisions and to some case law, not all of which was relevant.

Respondents' submissions

102. Mr Turl for all of the respondents also provided a written submission. He was given the opportunity to supplement it orally but did not wish to do so. A very brief summary of his submission that (i) the claims were out of time, and it was not just and equitable to allow them to proceed, (ii) the claimant had lied at the hearing, (iii) the first respondent had not acted unfavourably towards the claimant from February 2018 onwards in several respects, including cutting him off from access to work, but if they had it was objectively justified including as they had acted with legal advice, (iv) the first respondent complied with its obligations as to sick pay, and benefits removed as the

claimant had stated his intention to leave and that he wished a quick resolution, (v) the first respondent was not in breach of its duty to take reasonable steps as there was no indication that the claimant was disabled, and there was no requirement for a stress risk assessment as the respondent has less than five employees, that reasonable adjustments would have been considered had he been ready to return to work but the occupational health and GPs reports indicated that he was not, (vi) the respondents had not harassed him, and (viii) his resignation was not a dismissal. He was asked if he had any comment to make on the Schedule of Loss and said that he did not. The submission did not include detailed reference to any statutory provision, the Code of Practice, or to any caselaw.

The law

(i) Disabled person

103. Section 6 of the Equality Act 2010 ("the Act") provides as follows:

> "(1) A person (P) has a disability if-
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
>
> (2) A reference to a disabled person is a reference to a person who has a disability."

104. "Substantial" means more than minor or trivial under Section 212(1) of the Act.

105. What is "long-term" is defined at Schedule 1 paragraph 2 of the Act as follows:

> "**2 Long-term effects**
>
> (1) The effect of an impairment is long-term if-
>
> (a) it has lasted for at least 12 months,
>
> (b) it is likely to last for at least 12 months, or
>
> (c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."

106. The Equality Act 2010 (Disability) Regulations 2010 exclude by Regulation 3 addiction to alcohol or any other substance, but not "which was originally the result of administration of medically prescribed drugs or other medical treatment". There were equivalent provisions in the predecessor guidance.

107. In ***Power v Panasonic UK Ltd [2003] IRLR 151***, the claimant claimed that she was disabled by reason of being clinically depressed. She also drank alcohol to excess. The key issue was held by the EAT to be whether the disability from which the claimant was suffering was based on an impairment that was excluded from being treated as a disability. Similarly, in ***Hutchison 3G UK Ltd v Mason EAT/0369/03*** an individual who had a cocaine addiction was also subject to depression, and, on the facts of the case, there was sufficient evidence in the form of a medical report to support the conclusion of the tribunal that it was the depression which was sufficiently causative of an absence from work—so that the dismissal because of such absence related to such disability.

108. ***Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability (2011***) ("the Guidance") has been issued and should be taken into account in the determination of whether or not someone is a disabled person for the purposes of the Act. That includes that impairment includes:

- …..mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, or unshared perceptions; eating disorders; bipolar affective disorders; obsessive compulsive disorders; personality disorders; post traumatic stress disorder, and some self-harming behaviour;
- mental illnesses, such as depression and schizophrenia;

109. It also provides as follows:

> "It is not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded. For example, liver disease as a result of alcohol dependency would count as an impairment, although an addiction to alcohol itself is expressly excluded from the scope of the definition of disability in the Act. What is important to consider is the effect of an impairment, not its cause – provided that it is not an excluded condition."

110. As for what is relevant to the determination of this question, a broad view is to be taken of the symptoms and consequences of the disability as they appeared during the material period, see ***Cruickshank v VAW Motorcast Ltd [2002] 729, EAT***.

111. The claimant being a disabled person is not sufficient in itself. The employer must know, or ought reasonably to know, of that, and other necessary aspects. It is referred to in section 15 of the Act and in the terms of Schedule 8 paragraph 20, in relation to issues of reasonable adjustments, which are as follows:

> "**20. Lack of knowledge of disability etc**
> (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know –
> ……(b)….that an interested person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."

112. The EAT held in ***Eastern and Coastal Kent PCT v Grey [2009] IRLR 429***, that the predecessor provision to the Act meant that an employer is not under the duty to make adjustments if *each* of four matters (cumulatively, not alternatively) can be satisfied, being that the employer: (*a*) does not know that the employee has a disability; (*b*) does not know that the employee is likely to be at a substantial disadvantage compared with persons who are not disabled; (*c*) could not reasonably be expected to know that the employee had a disability; and (*d*) could not reasonably be expected to know

that the employee is likely to be placed at a substantial disadvantage in comparison with persons who are not disabled.

113. In ***Secretary of State for the Department of Work and Pensions v Alam*** **[2010] IRLR 283**, the EAT held that the correct statutory construction involved asking two questions;

(1) Did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out in what was then section 4A(1) of the Disability Discrimination Act 1995? If the answer to that question is: 'no' then there is a second question, namely,

(2) Ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)?

If the answer to that question was also negative, then there was no duty to make reasonable adjustments.

114. The Court of Appeal in ***Donelien v Liberata Ltd*** *[2018] IRLR 535* upheld the EAT decision which warned that when considering whether a respondent to a claim 'could reasonably be expected to know' of a disability, it is best practice to use the statutory words rather than a shorthand such as 'constructive knowledge'. The burden – given the way the statute is expressed – is on the employer to show it was unreasonable to have the required knowledge.

(ii) Discrimination

(a) Statutory provisions

115. Section 4 of the Equality Act 2010 (“the Act”) provides that disability is a protected characteristic.

116. Section 15 of the Act provides as follows:

“**15 Discrimination arising from disability**

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

117. Section 20 of the Act provides as follows:

"20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage……"

118. Section 21 of the Act provides as follows:

"21 Failure to comply with duty

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

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

119. Section 26(1) of the Act provides as follows:

"**26 Harassment**

(1) A person (A) harasses another (B) if—

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

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

(i) violating B's dignity, or

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

120. Section 26(4) of the Act provides that:

"(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect."

121. Section 39 of the Act provides:

"**39 Employees and applicants**

…….

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

……

(7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—

…….

(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

122. Section 123 of the Act provides:

"**123 Time limits**

(1) Subject to section 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable…….

…….

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it."

123. Section 124 of the Act provides:

"**124 Remedies: general**

(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).

(2) The tribunal may—

(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;

(b) order the respondent to pay compensation to the complainant;

(c) make an appropriate recommendation.

(3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect [on the complainant] of any matter to which the proceedings relate ….

(4) Subsection (5) applies if the tribunal—

(a) finds that a contravention is established by virtue of section 19, but

(b) is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the complainant.

(5) It must not make an order under subsection (2)(b) unless it first considers whether to act under subsection (2)(a) or (c).

(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119."

124. Section 136 of the Act provides:

"**136 Burden of proof**

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

125. Section 212(1) of the Act defines "substantial" as "more than minor or trivial".

126. The provisions are construed against the terms of the Equal Treatment Framework Directive 2000/78/EC, and may require a purposive construction. If there was a dismissal in this case it was on 20 February 2019, during the United Kingdom's membership of the European Union. The European Union (Withdrawal) Act 2018 has provisions to retain EU law in effect after the end of the transition period on 31 December 2020 such that EU law continues to apply to the circumstances of this case notwithstanding that this Judgment is given after the UK has left the EU.

127. Guidance is given in the Equality and Human Rights Commission Code of Practice: Employment which requires to be taken into account.

Admissibility

128. The terms of section 18(7) of the Employment Tribunals Act 1996 state:

"Anything communicated to a conciliation officer in connection with the performance of his functions under any of sections 18A to C shall not be admissible in evidence in any proceedings before an employment

tribunal except with the consent of the person who communicated it to that officer."

129. The Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 provide rules in Schedule 1. The overriding objective is set out in Rule 2, and states:

> "**2 Overriding objective**
>
> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

130. The terms of Rule 41 state:

> "**General**
>
> The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective……The Tribunal shall seek to avoid undue formality and may question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence. The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts."

(b) Case law

I – Discrimination

(i) Discrimination arising out of disability

131. The process applicable under a section 15 claim was explained by the EAT in ***Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305***:

> "The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words 'because of something', and therefore has to identify 'something' – and second upon the fact that that 'something' must be 'something arising in consequence of B's disability', which constitutes a second causative (consequential) link. These are two separate stages."

132. In ***City of York Council v Grosset [2018] EWCA Civ 1105, [2018] IRLR 746***, Lord Justice Sales held that

> "it is not possible to spell out of section 15(1)(a) a … requirement, that A must be shown to have been aware when choosing to subject B to the unfavourable treatment in question that the relevant 'something' arose in consequence of B's disability".

133. The EAT held in ***Sheikholeslami v University of Edinburgh [2018] IRLR 1090*** that:

> "the approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something?, and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any

unfavourable treatment found. If the 'something' was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence."

134. The Court of Appeal in ***Robinson v DWP [2020] EWCA Civ 859*** held that it was not sufficient if the discrimination would not have occurred but for the disability, but that it required to be "because of" that disability. It was necessary to consider the thought process of the decision maker.

135. Guidance had earlier been given by the EAT in ***Pnaiser v NHS England and another [2016] IRLR 170***, and as the comments are helpful for a case such as the present is quoted at length, as follows:

"(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see ***Nagarajan v London Regional Transport [1999] IRLR 572.*** A discriminatory motive is emphatically not (and never has been) a core consideration before any

prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her skeleton).

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in ***Hall)***, the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in ***Land Registry v Houghton UKEAT/0149/14, [2015] All ER (D) 284 (Feb)*** a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that ‘a subjective approach infects the whole of section 15’ by virtue of the requirement of knowledge in s.15(2) so that there must be, as she put it, ‘discriminatory motivation’ and the alleged discriminator must know that the ‘something’ that causes the treatment arises in consequence of disability. She relied on paragraphs 26–34 of ***Weerasinghe*** as supporting this approach, but

in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

(i) As Langstaff P held in ***Weerasinghe***, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's disability'. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

Unfavourable treatment

136. In ***Williams v Trustees of Swansea University Pension and Assurance Scheme [2017] IRLR 882*** the Court of Appeal did not disturb the EAT's analysis, in that case, that the word "unfavourable" was to be contrasted with less favourable, the former implying no comparison, the latter requiring it. The Equality and Human Rights Commission Code of Practice on Employment states at paragraph 5.7 that the phrase means that the disabled person "must have been put at a disadvantage."

137. That analysis was supported by the Supreme Court decision, reported at ***[2019] IRLR 306***, in which the decision of the court was given by Lord Carnwarth, whose speech included the following:

> "Since I am substantially in agreement with the reasoning of the Court of Appeal, I can express my conclusions shortly, without I hope disrespect to Ms Crasnow's carefully developed submissions. I agree with her that in most cases (including the present) little is likely to be gained by seeking to draw narrow distinctions between the word 'unfavourably' in s 15 and analogous concepts such as 'disadvantage' or 'detriment' found in other provisions, nor between an objective and a 'subjective/objective' approach. While the passages in the Code of Practice to which she draws attention cannot replace the statutory words, they do in my view provide helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section……."

Justification

138. There is a potential defence of objective justification under section 15(1)(b) of the Act. In ***Hardys & Hansons plc v Lax [2005] IRLR 726***, heard in the Court of Appeal, it was held that the test of justification requires the employer to show that a provision, criterion or practice is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business, but it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. That "necessary" is qualified by "reasonably" reflects the applicability of the principle of proportionality and does not permit a margin of discretion or range of reasonable responses.

139. In ***Chief Constable v Homer 2012 ICR 704*** Baroness Hale stated that to be proportionate a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so. She approved earlier authorities which emphasised the objective must correspond to a real

need and the means used must be appropriate with a view to achieving the objective and be necessary to that end.

140. The EAT held in ***Land Registry v Houghton and others UKEAT/0149/14*** that the Tribunal requires to balance the reasonable needs of the respondent against the discriminatory effect on the claimant.

(ii) Reasonable adjustments

Provision, criterion or practice

141. The provision, criterion or practice applied by the employer requires to be specified. It is not defined in the Act. In case law in relation to the predecessor provisions of the 2010 Act the courts made clear that it should be widely construed. In ***Hampson v Department of Education and Science [1989] ICR 179*** it was held that any test or yardstick applied by the employer was included in the definition, for example. Non-payment of allowances such as sick pay may amount to a 'PCP' (***London Clubs Management Ltd v Hood [2001] IRLR 719***

142. Guidance on what was a PCP was given in ***Essop v Home Office [2017] IRLR 558.*** In ***Ishola v Transport for London [2020] IRLR 368*** Lady Justice Simler considered the context of the words PCP and concluded as follows:

> "In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that 'practice' here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that

> although a one-off decision or act can be a practice, it is not necessarily one."

143. The Equality and Human Rights Commission Code on Employment at paragraph 4. 5 states as follows:

> "The phrase 'provision, criterion or practice' is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future – such as a policy or criterion that has not yet been applied – as well as a 'one-off' or discretionary decision."

Reasonable adjustments

144. Guidance on the claim as to reasonable adjustments under the predecessor provisions was provided by the EAT in ***Environment Agency v Rowan [2008] IRLR 20, Royal Bank of Scotland v Ashton [2011] ICR 632,*** and by the Court of Appeal in ***Newham Sixth Form College v Saunders [2014] EWCA Civ 734,*** and ***Smith v Churchill's Stair Lifts plc [2005] EWCA Civ 1220.*** The application of those authorities to the 2010 Act was confirmed by the EAT in ***Muzi-Mabaso v HMRC UKEAT/0353/14.***

145. Mr Justice Laws in ***Saunders*** added:

> "the nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP."

146. The distinction between claims under sections 15 and 20 was explained by the EAT in ***Carranza v General Dynamics Information Technology Ltd [2015] IRLR 43*** as follows:

> "The Equality Act 2010 now defines two forms of prohibited conduct which are unique to the protected characteristic of disability. The first is discrimination arising out of disability: section 15 of the Act. The second is the duty to make adjustments: sections 20–21 of the Act. The focus of these provisions is different. Section 15 is focused on making allowances for disability: unfavourable treatment because of something arising in consequence of disability is prohibited conduct unless the treatment is a proportionate means of achieving a legitimate aim. Sections 20–21 are focused on affirmative action: if it is reasonable for the employer to have to do so, it will be required to take a step or steps to avoid substantial disadvantage.
>
> Until the coming into force of the Equality Act 2010 the duty to make reasonable adjustments tended to bear disproportionate weight in discrimination law. There were, I think, two reasons for this. First, although there was provision for disability-related discrimination, the bar for justification was set quite low: see section 5(3) of the Disability Discrimination Act 1995 and Post Office v Jones [2001] ICR 805. Secondly, the decision of the House of Lords in Lewisham London Borough Council v Malcolm (Equality and Human Rights Commission intervening) [2008] 1 AC 1399 greatly reduced the scope of disability-related discrimination. With the coming into force of the Equality Act 2010 these difficulties were swept away. Discrimination arising from disability is broadly defined and requires objective justification."

(iii) Harassment

147. The terms of the statute are reasonably clear, but guidance was given by the Court of Appeal in ***Pemberton v Inwood [2018] IRLR 542*** in which the following was stated by Lord Justice Underhill:

> "In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason

of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b)).”

148. The Equality and Human Rights Commission’s Code of Practice states (at paragraph 7.18) that in deciding whether or not conduct has the relevant effects account must be taken of the claimant’s perception and personal circumstances (which includes their mental health and the environment) and whether it is reasonable for conduct to have that effect. In assessing reasonableness an objective test must be applied.

149. The question of whether the conduct in question “relates to” the protected characteristic requires a consideration of the mental processes of the putative harasser (***GMB v Henderson 2017 IRLR 340***) bearing in mind that there should be an intense focus on the context in which the words or behaviour took place (***Bakkali v Greater Manchester 2018 IRLR 906).***

150. Further as Underhill LJ stated above when deciding whether the conduct has the relevant effects (of violating the claimant’s dignity or creating the relevant environment) the claimant’s perception and all the circumstances must be taken into account and whether it is reasonable for the conduct to have the effect (***Lindsay v LSE 2014 IRLR 218***). Lord Justice Elias in ***Land Registry v Grant 2011 IRLR 748*** focused on the words “intimidating, hostile, degrading, humiliating and offensive” and said “Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upset being caught”.

(iv) Substantial, not only or main, reason

151. In ***Owen and Briggs v Jones [1981] ICR 618*** it was held that the protected characteristic would suffice for the claim if it was a “substantial reason” for the decision complained of. In ***O’Neill v Governors of Thomas More School [1997] ICR 33*** it was held that the protected characteristic needed to be a cause of the decision, but did not need to be the only or a main cause.

(v) Burden of proof

152. There is a two-stage process in applying the burden of proof provisions in discrimination cases, which may be relevant to the issue of whether the respondents applied a PCP to the claimant, and whether or not there was harassment, as explained in the authorities of ***Igen v Wong [2005] IRLR 258***, and ***Madarassy v Nomura International Plc [2007] IRLR 246,*** both from the Court of Appeal. In **Hewage v Grampian Health Board** 2012 IRLR 870 the Supreme Court approved that guidance. The claimant must first establish a first base or prima facie case by reference to the facts made out. If he does so, the burden of proof shifts to the respondents at the second stage. If the second stage is reached and the respondents' explanation is inadequate, it is necessary for the tribunal to conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached.

153. More recently, in ***Ayodele v Citylink Ltd [2018] ICR 748***, the Court of Appeal rejected an argument that the ***Igen*** and ***Madarassy*** authorities could no longer apply as a matter of European law, and held that the onus did remain with the claimant at the first stage. As the Court of Appeal then confirmed in ***Efobi v Royal Mail Group [2019] EWCA Civ 19*** unless the Supreme Court reverses that decision the law remains as stated in ***Ayodele***.

154. With regard to the burden of proof in reasonable adjustment cases, the Employment Appeal Tribunal in ***Project Management Institute v Latif 2007 IRLR 579*** at paragraph 54 said:

> "…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."

(vi) Detriment

155. There is no statutory definition of the term "any other detriment" in section 39 of the Act. It is a wide phrase, as explained in ***Jeremiah v Ministry of Defence [1979] IRLR 436,*** and connotes a disadvantage of some kind suffered by an employee beyond that which is purely minor or trivial. The explanation given in the EHRC Code of Practice at paragraph 10.17 is "A detriment is anything which might cause an employee to change their position for the worse or put them at a disadvantage…" It refers to paragraph 9.8 which states:"….This could include being rejected for promotion, denied an opportunity to represent the organisation at an external event, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance-related awards.".

156. An employee can be subjected to a detriment by not being offered an advantage or facility even though he has no statutory or contractual right to it, if others would be or were offered it: ***Iske v P & O European Ferries (Dover) Ltd [1997] IRLR 401*****,** and it is not restricted to cases where there is some definable physical or economic impact: ***Jiad v Byford [2003] IRLR 23, Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337***. In ***Day v T Pickles Farms Ltd [1999] IRLR 217*** it was held that there could be a detriment by a failure to carry out a risk assessment required in relation to a pregnant employee by statute.

(vii) Dismissal

157. The definition of dismissal in section 39 of the 2010 Act includes a resignation by an individual in circumstances in which she is entitled to do so without notice because of the respondent's conduct, in terms the same as that in the 1996 Act referred to below. The case law on the 1996 Act is relevant to the determination of the issue under the 2010 Act and is set out below. It is not inevitable that a finding of discrimination will lead to a finding also of a constructive dismissal – ***Amnesty International v Ahmed [2009] ICR 1450,*** in which the then President of the EAT stated:

> "The fact that, as we have held, a decision based on them [the reasons for the decision not to promote] constituted unlawful discrimination does not inevitably mean that the decision violated the claimant's dignity, and in the peculiar circumstances of the present case we do not believe that it did so: Amnesty's reasons displayed no kind of racial (or ethnic, or national) prejudice on its part and could not reasonably be regarded as offensive to the claimant as an individual."

(viii) Remedy for discrimination

158. Compensation is considered under section 124 of the Act, which refers in turn to section 119, of the 2010 Act. The first issue is injury to feelings. Three bands were set out for injury to feelings in ***Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102*** in which the Court of Appeal gave guidance on the level of award that may be made. The three bands were referred to in that authority as being lower, middle and upper, with the following explanation:

> "i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.
>
> ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.
>
> iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

159. In ***Da'Bell v NSPCC [2010] IRLR 19,*** the EAT held that the levels of award needed to be increased to reflect inflation. The top of the lower band would go up to £6,000; of the middle to £18,000; and of the upper band to £30,000.

160. In ***De Souza v Vinci Construction (UK) Ltd [2017] IRLR 844***, the Court of Appeal suggested that it might be helpful for guidance to be provided by the President of Employment Tribunals (England and Wales) and/or the President of the Employment Appeal Tribunal as to how any inflationary uplift should be calculated in future cases. The Presidents of the Employment Tribunals in England and Wales and in Scotland thereafter issued joint Presidential Guidance updating the Vento bands for awards for injury to feelings, which is regularly updated. In respect of claims presented on or after 6 April 2019, the Vento bands include a lower band of £900 to £8,800, a middle band of £8,800 to £26,300 and a higher band of £26,300 to £44,000.

161. The Court of Appeal have held that it is not a necessary adjustment to continue to maintain full pay to an employee absent for a disability-related reason***: O'Hanlon v Revenue and Customs Commissioners*****, *[2007] IRLR 404***. In the earlier case of ***Nottinghamshire County Council v Meikle [2004] IRLR 703*****,** that court had envisaged the possibility of such an adjustment, but only where the employee's absence had itself been caused by a prior failure to make reasonable adjustments.

162. The question of whether or not there may be a contribution to a discriminatory dismissal is one where there is a measure of difference at EAT level. In ***Way v Crouch [2005] IRLR 1362*** it was held that it could be in some cases. The EAT stated there the following:

> "The second ground of appeal relates to contributory conduct. Mr Wallington submits that sex discrimination is a statutory tort and as a matter of principle any award of compensation is subject to reduction for contributory conduct: **Fife Council v McPhee *(EAT/750/00*** unreported) per Lord Johnston at paragraph 17–18. Mr Wallington submits there was a failure in reasoning by the employment tribunal in explaining why it was not prepared to make a reduction for contributory conduct given that that submission was made by the appellants' solicitor in his written submissions: EAT bundle p.58 paragraph 6.
>
> We accept as a matter of law that an award of compensation for sex discrimination is compensation 'of an amount corresponding to any

damages he could have been ordered by a County Court or by a Sheriff Court to pay to the Complainant if the complaint had fallen to be dealt with under s.66': Sex Discrimination Act 1975 s.65(1)(b). The reference to s.66 is a reference to claims brought under Part 3 of the 1975 Act which can only be brought in the County Court. It follows that the award of compensation in a sex discrimination case (and by analogy in other discrimination claims) is subject to the Law Reform (Contributory Negligence) Act 1945 which allows for reduction in compensation in tortious claims where the claimant's conduct itself amounts to negligence or breach of a legal duty and contributed to the damage."

163. In ***First Great Western v Waiyego UKEAT/0056/18*** the EAT suggested that that earlier authority had stated the position too widely, that at the time of the 1945 Act (quoted below) the concept of discrimination law did not exist, and that making a deduction for contribution would rarely, if ever, be appropriate in a discrimination claim. It suggested that the issue of contribution should be addressed through the issue of mitigation.

164. The concept of contributory negligence was introduced by the Law Reform (Contributory Negligence) Act 1945, which states:

"**Apportionment of liability in case of contributory negligence.**

(1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:

Provided that—

(a) this subsection shall not operate to defeat any defence arising under a contract;

(b) where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages

recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable.

(2) Where damages are recoverable by any person by virtue of the foregoing subsection subject to such reduction as is therein mentioned, the court shall find and record the total damages which would have been recoverable if the claimant had not been at fault.

(3). . . . . .

(4). . . . . .

(5) Where, in any case to which subsection (1) of this section applies, one of the persons at fault avoids liability to any other such person or his personal representative by pleading the Limitation Act 1939, or any other enactment limiting the time within which proceedings may be taken, he shall not be entitled to recover any damages or contributions from that other person or representative by virtue of the said subsection.

(6) Where any case to which subsection (1) of this section applies is tried with a jury, the jury shall determine the total damages which would have been recoverable if the claimant had not been at fault and the extent to which those damages are to be reduced."

165. It was an issue examined by the Supreme Court in ***Jackson v Murray [2015] UKSC 5,*** in which it was stressed that a broad approach was required to the assessment. In **Waiyego** the EAT noted that discrimination claims are not always easy to square with the concept of fault, as there may be unconscious discrimination for example, and suggested that ***Way*** had gone too far in its suggestion that contributory negligence was generally available.

(ix) Jurisdiction

166. Guidance was given on the issue of an act extending over a period by the House of Lords in ***Barclays Bank plc v Kapur and ors [1991] ICR 208***. A distinction was drawn between a continuing act and an act with continuing consequences. It was held that where an employer operated a discriminatory regime, rule, practice or principle that amounts to an act extending over a period.

167. The case of ***Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548,*** heard in the Court of Appeal, approved the wording used in ***Hendricks v Commissioner for Police for the Metropolis [2003] IRLR 96*** that:

> "She [the claimant] is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept 'an acting extending over a period'."

168. Where repeated applications or requests for the same right or benefit are refused in circumstances which do not amount to a discriminatory practice or policy constituting a continuing act, the question arises whether time begins to run only from the date of the first refusal, or whether each refusal can amount to a separate discriminatory act setting time to run afresh. The answer, held the Court of Appeal in ***Cast v Croydon College [1998] IRLR 318***, is that, provided the subsequent refusal(s) resulted from a further consideration of the matter, and did not merely consist of a reference back to an earlier decision, then each such refusal could amount to an act of discrimination for the purpose of the time limit, regardless of whether it was based on the same facts as before.

169. Where a claim is submitted out of time, the burden of proof in showing that it is just and equitable to allow it to be received is on the claimant (***Robertson v Bexley Community Centre [2003] IRLR 434***). Even if the tribunal disbelieves the reason put forward by the claimant it should still go on to consider any other potentially relevant factors such as the balance of convenience and the chance of success: ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278***, ***Pathan v South London Islamic Centre UKEAT/0312/13*** and ***Szmidt v AC Produce Imports Ltd UKEAT/0291/14.*** Although the EAT decided that issue differently in ***Habinteg Housing Association Ltd v Holleran UKEAT/0274/14*** that is contrary to the line of authority culminating in ***Ratharkrishnan***.

170. In that case there was a review of authority on the issue of the just and equitable extension, as it is often called, including the Court of Appeal case of ***London Borough of Southwark v Afolabi [2003] IRLR 220***, in which it was held that a tribunal is not required to go through the matters listed in s.33(3) of the Limitation Act, an English statute in the context of a personal injury claim, provided that no significant factor is omitted. There was also reference to ***Dale v British Coal Corporation [1992] 1 WLR 964***, a personal injury claim, where it was held to be to consider the plaintiff's (claimant's) prospect of success in the action and evidence necessary to establish or defend the claim in considering the balance of hardship. The EAT concluded

> "What has emerged from the cases thus far reviewed, it seems to me, is that the exercise of this wide discretion (see ***Hutchison v Westward Television Ltd [1977] IRLR 69)*** involves a multi-factoral approach. No single factor is determinative."

171. The factors that might be relevant include the extent of the delay, the reasons for that, the balance of hardship including any prejudice to the respondent caused by the delay, and the prospects of success of the claim, although all the facts are considered. In ***Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13*** the EAT said that a litigant can hardly hope to satisfy that burden unless he provides an answer to two questions:

> "The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is [the] reason why after the expiry of the primary time limit the claim was not brought sooner than it was."

(xi) Admissibility

172. The terms of section 18(7) of the Employment Tribunals Act 1996 are on their face clear, in that if the other party in an ACAS conciliation does not consent to use of what is stated in that process it is not admissible. The present case includes however one of discrimination, and the Tribunal considered that if it was alleged that something that was discriminatory occurred during the early

conciliation process it may be arguable that the statute required to be read in a purposive manner to disapply its prohibition on being referred to, if such discriminatory circumstances took place. The Tribunal considered that it was in accordance with the Rules set out above to hear the evidence, and then assess whether or not such an argument arose.

173. The Tribunal has not found authority on this point directly. The terms of the Industrial Relations Act 1971 section 146(6), which are materially the same, were considered in ***M and W Grazebrook Ltd v Wallens*** **[1973] IRLR 139.** In that case it was held that that provision 'is not intended to render evidence inadmissible which could have been given if there had been no communication to the conciliation officer … were it otherwise, either party could conceal any inconvenient evidence by simply communicating it to a conciliation officer. The test is whether evidence exists in an admissible form apart from evidence based upon such communication to the conciliation officer. Thus, in the absence of consent, no evidence can be given of the content of oral statements made to a conciliation officer in connection with the performance of his functions … or, indeed, that such statements were made'.

174. That authority however does not address matters in this case, where the parties had been in negotiation, and did so with without prejudice communications that each has now waived privilege in. The issue specifically raised by this case, being where it is alleged that there was some form of discriminatory act within the ACAS early conciliation process, is different.

175. There is some authority in the related, but different, context of without prejudice communications and their admissibility, such as ***Framlington v Barnetson [2007] IRLR 689*** and ***BNP Paribas v Mexoterro [2004] IRLR 508.*** These are based on the law of England and Wales, and the law in Scotland is not identical to that in England and Wales. In Scotland a clear and unequivocal admission of fact made in without prejudice communications is capable of being founded on in court– ***Daks Simpson Group plc v Kuiper 1994 SLT 689***. The Tribunal did not consider however that that was an exhaustive statement of the law in Scotland, including in relation to the

position before an Employment Tribunal. The ***Mezoterro*** case was a discrimination claim, and it was held that discussions prior to any dispute arising were not protected, and that there was also the exception of unambiguous impropriety engaged. The following comments were also made:

> "It is very much in the public interest that allegations of unlawful discrimination in the workplace are heard and properly determined by the employment tribunal to whom complaint is made. Cases involving allegations of sex and race discrimination are peculiarly fact-sensitive and can only properly be considered after full consideration of all the facts. Proving direct discrimination is not an easy task for any complainant. Even under the Sex Discrimination Act as amended following the EC Burden of Proof Directive, the primary facts from which inferences of unlawful discrimination can be drawn remain a vital part of any complaint of direct discrimination before an employment tribunal".

176. The EAT has more recently addressed the potential exclusion to the rule as to the admissibility of without prejudice communications in ***Cole v Elders Voice UKEAT/251/19,*** in which it was reiterated that there may be circumstances where it is appropriate to admit such evidence***.***

II - Unfair dismissal

(i) Dismissal

177. The definition of a dismissal is found within section 95 of the Employment Rights Act 1996 ("the ERA"), and includes what is colloquially referred to as a constructive dismissal in subsection (1)(c) as follows:

> "**95 Circumstances in which an employee is dismissed**
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—
>
> ……..

(c) 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."

178. A dismissal where someone resigns on the basis of the employer's conduct is normally referred to as a constructive dismissal. The onus of proving such a dismissal falls on the Claimant. From the case of ***Western Excavating Ltd v Sharp [1978] IRLR 27,*** followed in subsequent authorities, to be able to claim constructive dismissal, four conditions must be met:

(1) There must be a breach of contract by the employer, actual or anticipatory.

(2) That breach must be significant, going to the root of the contract, such that it is repudiatory

(3) The employee must leave in response to the breach and not for some other, unconnected reason.

(4) She must not delay too long in terminating the contract in response to the employer's breach, otherwise she may have acquiesced in the breach.

179. In every contract of employment there is an implied term derived from ***Malik v BCCI SA (in liquidation) [1998] AC 20,*** which was slightly amended subsequently. The term was held in Malik to be as follows:

> "The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

180. In ***Baldwin v Brighton and Hove City Council [2007] IRLR 232*** the EAT held that the use of the word "and" following "calculated" in the passage quoted above was an error of transcription of the previous authorities, and that the relevant test is satisfied if either of the requirements is met such that the test should be "calculated or likely". That was reaffirmed by the EAT in ***Leeds Dental Team Ltd v Rose [2014] IRLR 8***,:

> "The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…"

181. In ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978*** the Court of Appeal gave guidance in what are "last straw" cases which included as one of the tests to apply whether there was a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence. The Court stated this:

> "16. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim "de minimis non curat lex") is of general application.…
>
> 19. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.
>
> 20. I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final

straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

21. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle."

182. In ***Williams v Alderman Davies Church in Wales Primary School UKEAT/0108/19*** the EAT considered the position in relation to the final straw, and commented as follows:

"28…..The starting point is that there will be a constructive dismissal, that is to say a dismissal within the meaning of Section 95(1)(c) of the Employment Rights Act 1996 where (a) there has been a fundamental breach of contract by the employer, (b) which the employee is entitled to treat as terminating the contract of employment, and (c) which has materially contributed to the employee's decision to resign. 29. As to the first element, the fundamental breach may be a breach of the Malik term. That may come about either by a single instance of conduct, or by conduct which, viewed as a whole, cumulatively crosses the Malik threshold. As to the third element, the conduct amounting to a

repudiatory breach does not have to be the only reason for resignation, or even the main reason, so long as it materially contributed to, or influenced, the decision to resign. Some authorities use different language to express the same idea, such as whether the employee resigned at least partly in response to the breach, but the underlying point is the same. These two points are long established in the authorities and generally, I think, well understood. 30. As to the second element, in recent years, the following question has been explored in the authorities. If there has been conduct which crosses the ***Malik*** threshold, followed by affirmation, but there is then further conduct which does not, by itself, cross that threshold, but would be capable of contributing to a breach of the Malik term, can the employee then treat that conduct, taken with the earlier conduct, as terminating the contract of employment? 31. That question appeared to have received different answers from the EAT, but was tackled head on by the Court of Appeal in ***Kaur v Leeds Teaching Hospital NHS Trust***. Their decision confirms that the answer is "yes". In Kaur, Underhill LJ, which whose speech Singh LJ concurred, gave the following guidance: "I am concerned that the foregoing paragraphs may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions: (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation? (2) Has he or she affirmed the contract since that act? (3) If not, was that act (or omission) by itself a repudiatory breach of contract? (4) If not, was it nevertheless a part (applying the approach explained in ***Omilaju***) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the ***Malik*** term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.) (5) Did the employee resign in response (or partly in response) to that breach?

> None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy". 32. This helpful guidance assists Tribunals to navigate through one particular possible permutation of the branchings of the decision tree. Some other possible permutations are relatively straightforward. If the answer to Underhill's LJ question two is "yes", then the claim of constructive dismissal must fail. If the answer to question three is "yes" then the Tribunal should proceed to question five. 33. As I understand it the parenthetical "if it was" following question four, conveys that it is an affirmative answer to that question that will also take the Tribunal to question five. However, what if the answer to question four is "no"? That is the scenario with which this ground of appeal in the present case is concerned. The answer is, that if the most recent conduct was not capable of contributing something to a breach of the ***Malik*** term, then the Tribunal may need to go on to consider whether the earlier conduct itself entailed a breach of the ***Malik*** term, has not since been affirmed, and contributed to the decision to resign."

183. The position was further considered in ***Phoenix Academy Trust v Kilroy UKEAT/0264/19.*** In the more recent case of ***Gordon v J & D Pierce (Contracts) Limited UEATS/0010/20*** the EAT in very different circumstances to the present outlined some of the limits to the concept of acquiescence or affirmation.

184. In ***Firth Accountants Ltd v Law [2014] IRLR 510*** the EAT noted that in a case concerning a breach of the implied term of trust and confidence there must have been no reasonable or proper cause for the employer's conduct for there to be a breach of the implied term. If there was reasonable and proper cause for the employer's conduct which has the effect of destroying or seriously damaging mutual trust and confidence then there is no breach of the implied term and therefore no dismissal.

185. There must be a connection between the breach of contract, and the resignation, such that the resignation is caused by the breach, and not by some other factor.

186. If there is such delay before the resignation indicating that the individual has acquiesced (affirmed is the term used in English law) in any breach, there will not be a dismissal.

187. The leading case on that principle is ***W E Cox Toner (International) Ltd v Crook [1981] IRLR 443.*** In ***Bunning v GT Bunning and Sons Ltd [2005] EWCA Civ 104*** there was a finding of detriment because of pregnancy, but not that there had been a constructive dismissal, as there had been acts which amounted to affirmation.

188. One issue of relevance in the assessment of delay is where the employee has been off sick during the period. The issue has been addressed in a number of authorities, but not in a manner that is always easy to reconcile.

189. In ***Bashir v Brillo Manufacturing Co [1979] IRLR 295.*** a two-month delay while off sick and claiming sick pay was held not to amount to affirmation.

190. In ***el-Hoshi v Pizza Express Restaurants Ltd UKEAT/0857/03*** the employee was off sick with depression for three months after the alleged repudiation, submitting sick notes and receiving sick pay; his claim for constructive dismissal was allowed to proceed as there was no affirmation, the EAT saying that receipt of sick pay is at best a neutral factor which should not prejudice the employee's rights.

191. In ***Fereday v South Staffordshire NHS Primary Care Trust UKEAT/0513/10*** it was held that the employee had affirmed after a delay of six weeks while receiving sick pay, it being said that such receipt is not necessarily a neutral factor, depending on the facts***.***

192. In ***Hadji v St Luke's Plymouth UKEAT/0095/12*** a period of four months between repudiation and resignation, spent on sick leave (but with the complication that the employee did not receive sick pay), was held to constitute affirmation, in the light of consideration being given by him to possible alternative roles within the organisation, up to the eventual decision to leave.

193. In ***Chindove v William Morrison Supermarkets Ltd UKEAT/0201/13*** a period of sickness absence of six weeks before resigning was held not to amount to affirmation. The then President of the EAT indicated that, as a general principle, a tribunal might be more indulgent towards the period of delay because the need to make a decision one way or the other is arguably less pressing than if the employee is continuing actually to work for the employer. Delay is therefore not sufficient in itself, but can be an important factor.

194. In ***Mari (Colmar) v Reuters Ltd UKEAT/0539/13*** the Claimant was in a senior position, was off sick with stress and when she returned claimed that she was given no work commensurate with her position and was badly treated by the employer and fellow employees. She went off sick again, this time for 19 months, at the end of which she resigned and claimed constructive dismissal. She had claimed sick pay for 39 weeks during this period. The employer argued that she had affirmed her contract and the tribunal agreed. The employer relied on her receipt of sick pay as only one of four factors showing affirmation, the others being (i) her insistence on having access to work email reinstated, (i) her request to be considered for permanent health insurance payments and (iii) continuing discussions with the employer about other matters consistent with wishing to return to work.

(ii) Fairness

195. If there is a dismissal, it is for the first respondent to prove the reason for a dismissal under section 98(1) and (2) of the ERA. If the reason proved by the employer is not one that is potentially fair under section 98(2), the dismissal is unfair in law. Conduct is a potentially fair reason for dismissal. The fact that the employer did not realise that as a matter of law he had dismissed the employee was irrelevant: the facts which caused him to act as he did are treated as the reason for dismissal (see ***Ely v YKK Fasteners (UK) Ltd [1993] IRLR 500***).

196. If the reason for dismissal is one that is potentially fair, the issue of whether it is fair or not is determined under section 98(4) of the Act which states that it

> "depends on whether in the circumstances…..the employer acted reasonably or unreasonably in treating [that reason] as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case."

197. It is possible for a dismissal to be fair, even if it is a constructive dismissal. That is rare, as a repudiatory breach of contract is normally something that leads to a finding of a fair dismissal, but it does not automatically follow. In the circumstances of a potential constructive dismissal the question becomes whether the first respondent acted reasonably in acting in the manner it did that led to it acting in a manner that constituted repudiation of the contract.

(iii) Remedy

198. In the event of a finding of unfair dismissal, the tribunal requires to consider whether to make an order for re-instatement under section 113 of the Employment Rights Act 1996. The matter is further considered under section 116.

199. The tribunal requires also to consider a basic and compensatory award which may be made under sections 119 and 122 of the Employment Rights Act 1996, the latter reflecting the losses sustained by the claimant as a result of the dismissal. In respect of the latter it may be appropriate to make a deduction under the principle derived from the case of ***Polkey,*** if it is held that the dismissal was procedurally unfair but a fair dismissal would have taken place had the procedure followed been fair. That was considered in ***Silifant v Powell 1983 IRLR 91***, and in ***Software 2000 Ltd v Andrews 2007 IRLR 568,*** although the latter case was decided on the statutory dismissal procedures that were later repealed.

200. The amount of the compensatory award is determined under section 123 and is "such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

201. The Tribunal may separately reduce the basic and compensatory awards under sections 122(2) and 123(6) of the Act respectively in the event of contributory conduct by the claimant. Guidance on the amount of compensation was given in ***Norton Tool Co Ltd v Tewson [1972] IRLR 86.*** In ***Nelson v BBC (No. 2) [1979] IRLR 346*** it was held that in order for there to be contribution the conduct required to be culpable or blameworthy and included "perverse, foolish or if I may use a colloquialism, bloody minded as well as some, but not all, sorts of unreasonable conduct." Guidance on the assessment of contribution was also given by the Court of Appeal in ***Hollier v Plysu Ltd [1983] IRLR 260***, which referred to taking a broad, common sense view of the situation, in deciding what part the claimant's conduct played in the dismissal. At the EAT level the Tribunal proposed contribution levels of 100%, 75%, 50% and 25%. That was not however specifically endorsed by the Court of Appeal. Guidance on the process to follow was given in ***Steen v ASP Packaging Ltd UKEAT/023/13.)*** A Tribunal should consider whether there is an overlap between the ***Polkey*** principle and the issue of contribution (***Lenlyn UK Ltd v Kular UKEAT/0108/16)***.

Observations on the evidence

(i) The claimant

202. The claimant's evidence notably included very many occasions when he stated that he could not remember sending emails, texts or other messages where the content was wholly inappropriate. Whilst the Tribunal recognised that he has been diagnosed by a psychiatrist of suffering from mental illness, as discussed below, it did not consider that such widespread inability to recall all such matters was likely to be genuine. On his own evidence the claimant could not recall substantial details, and had abused alcohol and medications to a substantial extent, but it was clear that he had sent the messages referred to.

203. The claimant had also submitted a letter to the Tribunal in relation to the effect of disability on day to day activities which indicated that he had great difficulty in going out, and being with large numbers of people, yet he went to a major

international conference for his new employer a few days afterwards. That was inconsistent, and led to material doubts over credibility.

204. There was a sharp difference in evidence in relation to whether the laptop that the clamant had used, which he later returned at the first respondent's request, had been wiped such that all company information had been removed, or whether he returned it with company information re-installed as he claimed. The Tribunal preferred the evidence of the second respondent on that point. The claimant's suggestion that he had wiped the laptop then replaced the company documents was not accepted by the Tribunal. It was clear that there was a material delay between the request for the laptop and its return, which did not assist the claimant's evidence. Mr Nickerson explained the steps taken to obtain information from other sources as nothing was on the laptop when returned, and that evidence appeared to the Tribunal to be more likely to be correct. The steps taken by the claimant to wipe the laptop was not the act of a reasonable person, and was again an act that did him no credit.

205. Having so stated those concerns, the Tribunal did regard it as clear that he had a mental illness, and had received treatment for that for many years. On his admission he was highly stressed, such that matters that may not unduly affect others affected him, or did so to a far greater extent.

206. His behaviour in sending messages to others in such inappropriate terms is considered below, and did him no credit at all. There was a failure to appreciate, from his own emails, that he had acted wrongly, and caused offence. He had a somewhat combative style, and used language that on occasion was racist, homophobic and lewd. It went far beyond the normal language used, even in an industrial context where swearing and robust language may be commonly found.

(ii) The second respondent

207. Generally the Tribunal considered that the second respondent was seeking to be honest, and was largely reliable. There were however areas where his evidence caused concern. Firstly, he claimed that the claimant had withdrawn

his directors loan account on or about 26 February 2018 and gave the impression when he did so that that was inappropriate. The claimant however withdrew about £500 in unrecovered expenses he had himself paid on company business. That was in no way inappropriate. To imply that it was, as Mr Nickerson did, was not helpful to him.

208. It was put to the claimant in cross examination that the pension and healthcare provisions were ended, in summary, because he had indicated a desire to leave the business. Mr Nickerson said however that advice had been that those could be removed from him because they were not thought to be contractual. That was an inconsistency, and the reason given to remove what had been benefits for him was at best insufficient. Someone who has expressed a desire to leave in such circumstances, where there required to be discussions as to terms and details, has committed no act of misconduct or similar, and an expression of that desire to leave does not of itself warrant or explain the removal of benefits.

209. Mr Nickerson said when asked to explain matters that the reason for the actions taken against the claimant which effectively cut him off from the business in March and April 2018 were that they had all been taken on legal advice, and were because of a fear of the claimant acting to the prejudice of the first respondent. The basis of that fear was messages sent much earlier, some as far back as 2014, and when no action was taken by the respondents. The fear was not reasonably based given the terms of the claimant's message of 12 March 2018, and the circumstances overall. None of the messages were recent in time. Whilst more recent ones included wholly inappropriate terms that did not indicate an intention to prejudice the first respondent. Mr Nickerson also referred to the claimant having taken lists of email contacts and other documents when he left his former employers Paradigm, but that was not referred to in the Response Form, not formally addressed by the first respondent in or around March 2018 when it was corresponding with the claimant, or through solicitors, not addressed by the first respondent at the time (who if it is true may have benefitted from that) and if there was a concern of intellectual property being removed there were

other protections available to the first respondent including interdict. Separately, no account whatsoever appears to have been taken of the fact that the claimant was, and remained, an employee. He was treated as if he had ceased to be an employee, but statutory sick pay was paid to him, and at no stage was it suggested that his email of 12 March 2018 was taken as a resignation. Further, no account whatsoever appears to have been taken of the claimant's mental health issues, and that he was as has now been found, or at least may have been considered to be at the time, a disabled person. At that stage, in or around March 2018, no occupational health advice was sought. The position of the respondents as explained by its sole witness Mr Nickerson was at best unreasonable and at worst wilfully blind to facts that ought to have been obvious.

210. The respondents position in cross examination of the claimant had been that they had hoped to meet the claimant and agree an amicable departure with him directly, and that they had only required to seek advice from a solicitor after he had intimated that he had instructed a solicitor. It later emerged in the evidence of Mr Nickerson who gave his evidence after the claimant that the respondents had first sought advice on 28 February 2018. That was materially inconsistent with their earlier position. It indicated that they sought advice, and acted to move to SSP and cease payment of dividend, prior to the email of 12 March 2018 or the message from the solicitor two days later. Mr Nickerson could not point to anything that indicated that the claimant had informed them that he was taking legal advice before his email of 12 March 2018.

211. The stated basis for the decisions to cut off the claimant from sources of messaging or contact with the first respondent in March and April 2018 was their fear that, having indicated an intention to leave, he may send messages that were harmful to the business. But that stated intention changed when negotiations did not succeed, firstly in July 2018 when the claimant's solicitor informed the respondents that he did not wish to leave (as recorded by Ms McKenzie in her decision letter) and secondly when he intimated his grievance in September 2018. There was no consideration at that stage of

re-instating the claimant's means of contact. He remained an employee. Whilst he was off work sick, the occupational health report indicated in general that remedying his workplace concerns was required to facilitate a return. There was a complete failure to engage with the claimant properly, either to address how he might return to work or, if the respondents thought that he could not because of issues of conduct or capability the commencement of a procedure to effect his termination on those grounds. They did nothing effective at all.

212. When Ms McKenzie later advised the first respondent to allow the grievance in relation to pension and healthcare, that advice was not taken and acted upon. The explanation Mr Nickerson gave was that it "would be sorted out in these proceedings", but they did not commence until in March 2019. The claimant had referred to tribunal claims in correspondence admittedly, but that was not the same as making a formal claim, and he was at that stage seeking a resolution by agreement. The decision by Ms McKenzie was on 18 December 2018, when he remained an employee and over a month before the claim had been commenced with the first step of early conciliation. The failure to act on its recommendations in that regard at that time was not explained to any adequate extent.

213. The first respondent's position as explained by Mr Nickerson seemed to be that the claimant had not indicated an intention to return to work, but that was simply wrong. The decision letter from Ms McKenzie noted in the introduction that on or around 19 July 2018 Lesley Wisely the claimant's then solicitor had said that he "had no intention of leaving the company". He had then re-iterated that when he presented his grievance, in which he referred in terms to seeking to return to work and in his letter of 5 November 2018 he set out the adjustments he suggested to help him do so. Mr Nickerson frankly explained that he considered that he was out of his depth when he read the reply by the claimant to his initial letter of 24 October 2018, and involved Ms McKenzie, but in her decision no attention appears to have been paid to the issue of a return to work, the letter of 5 November 2018 is not mentioned at all, and that was not picked up by any of the respondents.

214. Finally, it is notable that neither the third nor fourth respondent gave evidence although they were both present for all the hearing, the initial indication was that they would, and it was something of a surprise when they did not. They could have done so, and it was their decision not to do so and be subject to questioning by the claimant and Tribunal. Others who might have given evidence, in particular Ms McKenzie, did not give evidence. It was said, for example, that she had telephoned the claimant on receipt of his appeal to say that Mr Stanley who was to hear it was on bereavement leave, but the claimant said that he had no recollection of that, and there was no evidence that that call had been made, save what Mr Nickerson indicated what was a vague understanding about it. Whilst the Tribunal considered it more likely that such a call had been made, the lack of any formal response to the appeal for a period of a month was not explained.

215. In short, the evidence from each party was imperfect at best. There were a number of disputes on matters of fact, but the central disputes were on issues such as whether or not the claimant was a disabled person, whether or not the first respondent ought to have known that, whether or not decisions were taken which arose out of disability, whether or not PCPs were applied, what if any reasonable adjustments were required, whether or not there had been harassment, and whether or not there had been a dismissal, all of which are assessments of the facts against the law that applies.

Discussion

216. The Tribunal addressed each of the issues set out above as follows:

(i) Was the claimant a disabled person under section 6 of the Equality Act 2010?

217. The Tribunal considered that it was clear that the claimant was a disabled person. That was clear from the terms of the reports from his psychiatrist (who advised in terms that the claimant was a disabled person) and GP, from his own evidence, and from the emails to and from the respondents which referred on many occasions to his levels of stress, taking Valium, and related matters. Some referred to issues that would be of obvious concern, such as

"bullet to head". Some replies expressed concern for him. Whist the claimant had abused alcohol on occasion, and took high levels of prescription medication, that did not mean that he was not a disabled person. The medical reports were clear that he had suffered from issues of stress, anxiety and depression. That had continued for a material period, of several years. Whilst the level of that may have fluctuated, it was present throughout, and likely to recur. It affected his day to day activities to a substantial extent, including for example his sleep patterns, and ability to concentrate. In February 2018 he had been admitted to hospital and detained overnight. His condition thereafter was said in the reports to have become worse in about May 2018, and in that month he attempted suicide. His medication included anti-depressants. He was being treated by a consultant psychiatrist. The Tribunal took account of its own assessment of the claimant from the manner in which he gave evidence. That the claimant was a disabled person was also importantly the indication in the occupational health report the first respondent instructed. The Tribunal did not consider that his abuse of alcohol, either of itself or in combination with medication, excluded him from that definition, and took account of the EHRC Code of Practice and the authorities set out above on that issue.

(ii) If so, did the first respondent know, or ought it reasonably to have known, that the claimant was a disabled person, and when was that?

218. The Tribunal concluded that the first respondent did not know but ought reasonably to have known of the disability. The claimant told them of his stresses, and medication, he had been prescribed Valium which they were aware of, and would reasonably have known was a medication to relieve symptoms including stress and anxiety, and his condition was the subject of suggestions of rehabilitation for example. In light of the messages that the claimant sent, and the expressions of concern about him in the latter months of 2017, a reasonable person would have been on notice that the claimant had material mental health problems and that it was possible that he was a disabled person under the Act. Matters became even clearer at the stage he was admitted to hospital in February 2018, and then when he was signed off

work at the end of that month, with stress at work given as the cause. The cause of disability is not material. It did not matter whether the cause was work or otherwise, unless it was an excepted condition. The first respondent and Ms McKenzie appeared to be of the view that the cause of stress or anxiety or otherwise was a factor in the assessment, but it is not. The Tribunal considered that the first respondent was by 26 February 2018 at the very latest on notice that the claimant may be a disabled person. It ought reasonably to have known of that at that stage from the prior history of comments as to stress and Valium, the admission to hospital and the GP fit note. From the terms of the emails in September 2017 and background circumstances however the Tribunal considers that the first respondent ought reasonably to have known of the claimant's disability at that point. If they did not have a working understanding of the statutory test they could have taken other steps. They could have sought occupational health or other advice at that stage. They could have asked for a report from his GP. They could have sought legal or other advice. There were several indicators by that stage of someone who had material mental health issues. Mr Nickerson accepted that he did not know the full terms of the 2010 Act. He was a disabled person himself, and did not think that abuse of alcohol was within the definition of the Act, but he was not aware of the full provisions relevant to that issue and did not suggest that he had made an enquiry specifically about it. He thought that there had been abuse of prescription medication, and appeared to think that that meant that the claimant was not disabled. His knowledge was incomplete. The assessment that is required is not purely a medical one, but a functional one. The cross examination of the claimant also included suggestions that the work being done in the six months to February 2018 was not very great, but its relevance is hard to see. The claimant thought that he was working hard. He was emailing customers after signed off work by his GP. There was an issue as to his attendance at the office but his role did not necessarily require such attendance, and he did appear to work late at night on occasion and take few holidays. The respondents' lack of actual knowledge is not sufficient for them to avoid being potentially liable. But the knowledge reasonably required must be more than just that the employee is

a disabled person, and must include that the disability causes substantial disadvantage for disabled persons as described in the case law referred to above. The Tribunal considered that it ought to have been reasonably known to the first respondent that the levels of stress, the unusual behaviours, the taking of medication and the other factors referred to were likely to cause a substantial disadvantage to the claimant, as they did.

(iii) Is any claim made under the Equality Act 2010 outwith the jurisdiction of the Employment Tribunal having regard to the terms of section 123 of the Equality Act 2010?

219. No. The Tribunal considered that all of the material events on which the claimant founds, as referred to more fully below, were part of acts extending over a period, and that period continued up to the date of his resignation. They started in March 2018 when, very shortly after he was in hospital, and within a day or days of the sick note, he was cut off by the first respondent from contact with work. That continued throughout. When in July 2018 his solicitor stated, and then in September 2018 when he stated specifically in his grievance, that he sought to return to work and referred to making adjustments to do so, no attempt was made to address that, or to give him the means to contact work for example by re-instating email access. In the meantime in March and April 2018 his access to emails was removed, his mobile telephone account was stopped, and benefits for pension and healthcare summarily terminated. In June 2018 he was removed as a director. When the claimant made his grievance it was not adequately addressed. It did not engage with the issue of his return to work adequately at all. That part of the grievance decision by Ms McKenzie that recommended re-instatement of benefits issued on 18 December 2018 was not acted upon by the first respondent. When the claimant appealed there was no formal response, and no proper engagement with it. There was a connection between each of these acts and they all emanate from his being in hospital and providing a fit note from his GP, then suggesting that he wished to leave, such that they were all related to his disability. In any event, if these matters were not part of acts extending over a period, it was just and equitable to

allow the claim to proceed. The claimant was materially unwell after February 2018. Not only was he signed off work, but in May 2018 he attempted suicide. His mental health deteriorated during the course of that year. His demeanour before the Tribunal supported the evidence as to his having a disability. He sought to raise a grievance about matters, and that continued throughout the rest of the year. The decision on his grievance on 18 December 2018 recommended re-instatement of benefits, but that was not done. He presented an appeal, and the appeal was not formally answered until 12 March 2019. No prejudice from any delay in making the discrimination claims was suggested by the respondents. Whilst it is true that he had legal advice from at least March 2018 that does not mean that it is not just and equitable to allow the claim to proceed. At that point the parties were seeking to resolve matters by agreement, and negotiating on a potential agreed termination of employment. When those negotiations broke down, and only then, the first respondent sought occupational health advice. The first respondent failed thereafter to engage with the issue of the claimant returning to work as set out above. The claimant's claim for discrimination is, the Tribunal has found as set out below, one that has merit. It includes a dismissal at the point of the resignation which is within the time-limit. The prejudice that there would be to the claimant is materially greater than the prejudice to the respondent. The claimant suffered from mental health issues during the material period, culminating in an attempted suicide in May 2018, his claims have merit as referred to below, and the evidence that is challenged is relevant to the claim of unfair and unlawful dismissal which is within the jurisdiction of the Tribunal. There is accordingly little prejudice to the respondent, and no material prejudice was suggested. Having regard to the case law referred to above the Tribunal determined that even if any of the discrimination claims were otherwise outwith the jurisdiction of the Tribunal it was just and equitable to allow them to be determined.

(iv) Was the claimant dismissed by the first respondent under section 95(1)(c) of the Employment Rights Act 1996? and section 39(2)(c) of the Equality Act 2010?

220. The Tribunal required first to address the issue of the ACAS communications in February 2019 which the claimant said led to his resignation. The Tribunal did not consider that there was any basis to use a purposive construction to amend the terms of the 1996 Act. The respondents had not consented to use of the communication. The claimant said in evidence that the offer he received was less than that earlier made. There was no other basis put forward. The Tribunal did not consider that that could on any view be evidence of discrimination. A party can make whatever offer it wishes. That does not treat a disabled person any differently from someone not disabled, it is simply part of a process of negotiation. If there had been a comment indicative of discrimination, or evidence material to that issue, a point might have arisen as to whether or not that statutory provision could permissibly be varied by purposive construction but the point does not arise, and that evidence is not admissible. That removed what had been said by the claimant to have been the final straw that led to his resignation.

221. The Tribunal then had regard to the case law on dismissal, in particular the case of ***Williams.*** It dealt with the arguments for the claimant as follows:

(i) the payment of SSP was not in itself discriminatory. The claimant did not have any contractual entitlement, and as a director had the power to ensure that employees did have that, or a statement of particulars. The removal of dividends was not explored substantially in evidence.

(ii) The removal of access to emails and the company server, with no prior notice or explanation at the time, was repudiatory. He remained an employee. An employee on sick leave may well have a good reason to use the email facility, including to communicate with his employer about his illness, send fit notes, suggest meetings or comment on work matters to the extent that he can.

(iii) The request to return laptop and keys was repudiatory, for similar reasons. There was no good reason to do so for someone still an employee.

(iv) The removal of his mobile telephone account was also repudiatory, and removed a financial entitlement he had as an employee.

(v) The pension payment had been instigated in December 2017. It had been paid for three months. There was nothing documented by the first respondent. Normally it is a benefit for an employee. There was no document to indicate that it was not a contractual benefit for the claimant as employee, It was the Tribunal concluded a contractual benefit. Its immediate withdrawal was repudiatory.

(vi) The healthcare provision was similarly considered by the Tribunal to be a contractual benefit, and was withdrawn in a manner that was repudiatory.

(vii) These acts collectively removed the claimant from active participation in the business of the first respondent. They breached the term as to trust and confidence to a material extent. There was insufficient reasonable and proper cause for the first respondent to do so. Simply intimating a desire to leave the business, as the claimant did, did not give proper cause to remove the claimant from means of contact in the way that they did. It was an unreasonable reaction, and the fear of some form of retribution or reaction was not justified given the circumstances as explained above.

(viii) The claimant did not resign his employment at that point. The respondents did not seek to treat his email of 12 March 2018 as a resignation. The claimant therefore remained an employee. He had been signed off work initially for a period of two weeks by his GP.

(ix) The claimant's status as a director was removed in June 2018 at a meeting of the first respondent. It is possible that that was a detriment under the 2010 Act, but as it relates to matters of company law not employment directly and featured very little in the evidence it did not appear to the Tribunal to be material to the issue of whether or not there was a dismissal.

(x) Matters are further complicated by the discussions held between solicitors to agree terms for his departure, which did not succeed. Those discussions linked two separate matters, firstly the disposal of his shares and secondly the ending of his status as an employee. That link appears to have been proposed by the solicitor for the first respondent, for reasons that are entirely understandable and not contentious at that time. Both parties were however seeking to resolve both matters together during the period of negotiations which continued intermittently from March 2018 to August 2018. They did not succeed, but the claimant's failure to commence a claim at that time is not unreasonable, and as he was seeking higher sums than being offered indicated his disagreement with what had happened at least to an extent. That there was an increased offer to him made on two occasions is also not insignificant.

(xi) There was a delay before the occupational health report was first instructed, and then in it being obtained. Shortly after it was received the first respondent wrote to the claimant to ask him about his intentions including whether he sought to return to work, and he then replied both stating in effect that he did, and addressing issues such as the adjustments he sought to do so, and making a grievance formally.

(xii) In their submission the respondents argued that the claimant had "accepted the alleged breaches" by which is taken to mean an argument as to acquiescence, as there was no evidence of direct acceptance. Given all the circumstances, including his ill health which was material, and that he was not in receipt of pay or income save SSP, and the manner in which the respondents dealt with matters overall, the Tribunal did not consider that the claimant acquiesced in the breaches. He made his position clear in early September 2018. Whilst that is a reasonably lengthy period from the end of February 2018 at a little over seven months, during that period there was a succession of events, such that the "picture" was a changing one, and there were in addition to his position as an employee issues of his

directorship and shareholding being addressed in continuing discussions throughout. These are unique facts, and although the overall period is lengthy that does not by itself lead to a conclusion of acquiescence. Separately to the facts there are three further matters. Firstly, the respondents did not plead acquiescence. Secondly, they did not raise that in cross examination of the claimant. Thirdly, Ms McKenzie in her decision not only did not seek to raise that, but positively found in favour of the claimant for two matters, on the basis that there had been no proper foundation for the decision to remove pension and healthcare. The Tribunal concluded that the respondents had not shown acquiescence, and in any event had not given notice of that fairly to the claimant.

(xiii) The grievance did take a material period to progress, but that was largely because it was complex, lengthy, and involved a number of matters raised by the claimant, not always in an entirely clear way. He made arguments that were not correct in law. Throughout that grievance procedure however the claimant was protesting what had occurred, and seeking to secure what he argued were reasonable adjustments such that he may return to work.

(xiv) The first respondent did not adequately address that issue of a return to work at all. They appear to have considered that he would not return to work, or should not do so, but they did not seek to do anything either to address his issues properly, or to resolve matters in another manner either by agreement or otherwise such as by a disciplinary or capability process, albeit that that was mentioned in correspondence with him. The adjustments he sought were never directly considered and addressed, perhaps because of the view that he was not a disabled person, and his adjustments proposed in the letter of 5 November 2018 were in effect ignored entirely both by the respondents and very largely by Ms McKenzie in her decision. In their submission the respondents argued that “reasonable adjustments would have been considered if he had been ready to return to work which we were advised by both the OH report and his GP report that he wasn’t”. That

however refers to reports issued earlier, and ignores his comments about returning if reasonable adjustments were made to facilitate that return. The duty of making adjustments falls on the first respondent as employer, and the submission by the respondents fails to address the issues raised by the claimant in this regard at all.

(xv) The grievance the claimant raised was not adequately answered by Ms McKenzie who was acting for the first respondent. No direct response was given to the claimant in relation to his comments about a return to work and adjustments he sought to facilitate that. At best they were glossed over. They were not engaged with in any real sense, as they ought to have been. It appeared from that failure to address the issue of adjustments that the respondents did not wish to have him return to work.

(xvi) Ms McKenzie's decision partly upheld his grievance in that she recommended the re-instatement retrospectively of his pension and healthcare benefits, but that part was effectively ignored by the first respondent, who did not act on it or explain why it was not doing so. Ms McKenzie was right to find that there had been no proper basis for withdrawing the pension and healthcare. In light of her findings the first respondent ought to have re-instated those matters retrospectively but they did not do so, and that is a material matter.

(xvii) There was no formal response given to his appeal at all until well after he resigned. It was not explained why the appeal had to be conducted by the third respondent, who had suffered a bereavement. It could have been heard by the fourth respondent, or by another external consultant (the decision having earlier been taken to involve Ms McKenzie). Neither the third nor fourth respondent gave evidence, and this and other matters could not therefore be put to them.

(xviii) The claimant in his evidence referred to the succession of events building up cumulatively, saying that it was like cutting down a tree with a number of small strokes. That was entirely consistent with there being a series of individual issues cumulating in the failure adequately

to address the appeal against the grievance decision, when even the recommendations made by Ms McKenzie had not been acted on by the first respondent, with no adequate explanation for that given.

(xix) Whilst the stated trigger for the resignation in the letter to do so cannot be founded on as it relates to the ACAS early conciliation, for the reasons set out above, that is not fatal to there being a dismissal. Each of the events above, save for (i) (and the discussion regarding there not being acquiescence) were repudiatory, and collectively they were substantially so. The basis to remove the claimant from access to the business, founded on his stated intention to leave and a fear that he may send inappropriate messages at that point, should have disappeared when the negotiations broke down and he said that he would return, but the respondent did nothing to change its earlier actions. It then mishandled his grievance, failed to act on the recommendations which were made, and then failed to act properly on the appeal. Even if it had been held that there had been acquiescence at a point prior to the grievance being intimated, the case law of ***Williams*** and ***Kaur*** explain that subsequent events can be considered in the context of earlier events, such that there can in law be what amounts to a dismissal. There were a number of repudiatory steps by the first respondent, they continued during the period up to and beyond the grievance and the failure properly to address the appeal, and these acts were repudiatory and were a substantial and founding part of the decision the claimant made to resign without notice (some indeed are addressed specifically in his letter of resignation).

(xx) In light of all the circumstances the Tribunal considered that there was in law a dismissal.

(v) If so, was that dismissal unfair under section 98(4) of that Act?

222. The respondents did not argue for any particular reason for that dismissal, their position being that there was only a resignation and no dismissal, but the Tribunal were clear firstly that there was no potentially fair reason for the dismissal, being in this context the events that led to the resignation set out

above, and it is therefore unfair, and in any event the absence of a full or proper consultation procedure in advance of it, and the failure properly to address the grievance issues raised, rendered it unfair even if there had been a valid reason put forward. Consultation is a basic part of a fair dismissal as explained in the ACAS Code of Practice on Disciplinary and Grievance Procedures.

(vi) Did the first respondent treat the claimant unfavourably because of something arising out of the claimant's disability under section 15 of the Equality Act 2010?

223. The Tribunal considered that there could be no doubt but that there had been unfavourable treatment. The issue focussed on whether that was because of the claimant's disability for the purposes of section 15. That does not require the disability to be the sole or principal reason, as has been explained in authority. The first respondent argued that the reasons for its actions were a combination of the claimant indicating his intent to leave the business, and concerns from his earlier messages that he may act in a manner detrimental to the first respondent. The Tribunal considered that the speed with which the first respondent moved after the claimant was in hospital and then on sick leave, including them seeking legal advice on 28 February 2018 despite suggesting earlier in evidence that they had only done so after being aware that the claimant had instructed a solicitor, which they did on 14 March 2018 on receiving an email, and then removing access to work facilities to such an extent, including financial benefits, raised a prima facie case of discrimination. There was a sufficient causal link between the disability and their knowledge of the same, and the decisions they took which treated him less favourably. There was no good reason to act as they did. An intent to leave is not a reason to cut someone off from the business. That happens if employment terminates. It did not. The earlier messages had not been addressed formally at the time, and were not recent. There was no proper basis for a fear of retribution or otherwise, as is commented on further below. There was an insufficient basis for the first respondent's stated explanation for its actions such that the Tribunal considered that the claimant's disability did play a

material part in the decision to do so. The first respondent's argument was that the claimant did not need access to the office or facilities as he was off work sick. That is a direct link to his disability. The respondents' evidence generally was inconsistent as referred to in the observations on the evidence above. The claimant had, the Tribunal considered, established a prima facie case that the detriments and dismissal arose out of his disability from the following – (i) the taking of action shortly after the claimant's admission to hospital. (ii) the unreasonable reaction to the claimant's reasonably framed message of 12 March 2018, (iii) the respondents taking action on messages the claimant sent years earlier when they did not take action at the time, (iv) the evidence of the second respondent that they had taken legal advice as a reaction to the claimant doing so and later admitting that they had done so considerably earlier, (v) the respondents failure to explain why they did not respond reasonably to the claimant's indication of a return to work, (vi) their failure to accept and act on the advice from Ms McKenzie in her grievance outcome, without any explanation, or to respond adequately to his comments about a failure to take reasonable steps to avoid disadvantage, and (viiii) a delay in addressing the appeal. The onus then passed to the first respondent. They did not discharge it. They did not lead the evidence that they could have done. The evidence that they did leave was insufficient to establish that their acts or omissions were not discriminatory, and it had material limitations. They had not acted previously against the claimant despite his inappropriate messages sent on several occasions. Their stated fears that he may act to the prejudice of the company were not articulated to him at all. They were not consistent with his own comments in the message of 12 March 2018, and his instruction of a solicitor was something both that he was entitled to do, and not indicative of any improper acting at that stage or in future, indeed it may be quite the reverse. The terms of his message of 12 March 2018 were reasonable, and not indicative of someone about to send inappropriate and damaging messages to third parties. If they wished to have access to documentation on his stated intent to leave they could have asked him to send them to them, or dealt with it otherwise than by seeking the return of laptop, keys and other means of participating in the business. Not only did he

remain an employee, but he remained a director and therefore someone with, at that stage, continuing duties as a director. The parties then commenced negotiations through solicitors. Both sides were entitled to seek to secure the best deal that they could. It turned out that there was no agreement, but the respondents did not actively engage with the claimant at that point, in that they neither addressed what he said about returning to work, nor took any steps actively to terminate his employment, and that was so despite his grievance making it clear that he sought to return to work. They then did not act on Ms McKenzie's recommendations which upheld the grievance in part. She did not address much of the grievance, and made no reference to the letter of 5 November 2018. The appeal was not formally responded to until after the resignation It was all left to drift, at best, by the respondents, with a grievance process so inadequately handled that that too does not support the respondent's position, as they did nothing to reverse what they had done when the basis of it, an intended departure was not agreed and the claimant said that he wanted to return to work. In the jurisprudence on direct discrimination it has been held that discrimination may be inferred if there is no explanation for unreasonable behaviour (***The Law Society v Bahl [2003] IRLR 640***, upheld by the Court of Appeal ***[2004] IRLR 799.*** There was a series of detriments and what has been found to be a dismissal which were, the Tribunal concluded, breaches of section 15 as they arose out of the claimant's disability, which are unlawful unless objectively justified.

(vii) If so, has the first respondent shown that that was a proportionate means of achieving a legitimate aim?

224. The legitimate aim relied on for the decisions taken by the first respondent was said to be protecting the business of the first respondent, which is legitimate, but the Tribunal held that the means taken were not proportionate. They were grossly disproportionate. If they were concerned at what the claimant had in his possession when he was off work sick and stating that he wished to leave the business, and they wished to obtain documents, they could and should have asked for them. There was no need for the laptop itself to be returned, and to cut off all contact by email or telephone. The laptop

may have been purchased by Clearwater Electrical Limited but it was provided to the claimant to enable him to carry out his duties. Similarly the office was used by the first respondent and the claimant had the keys for that to enable him to perform his duties. The basis on which they were required to be returned was never explained beyond a reference to Clearwater Electrical Limited, and that was not sufficient to explain why they were required from him at that point. The cutting off of contact was said to be because of a fear that he would send messages to others that would harm the first respondent. There were many earlier messages he had sent to others, but the respondents had not treated that formally at the time, and had in effect forgiven him for what he had done. There was a considerable change in attitude from 2017 and earlier, when nothing formal was done in respect of inappropriate messages he sent, to early 2018 when action was suddenly taken to remove access without any notice. There was no recent incident of him sending a message that was threatening or similar. There was no recent incident of him sending a message that was reasonably liable to be harmful to the legitimate business interests of the first respondent. It was not necessary to have removed all access on the basis of a fear that was not reasonably based, not least when the claimant was indicating at the time that he wished to resolve matters amicably and leave with least difficulty caused to the company. His instruction of a solicitor was not indicative of improper actings by him. If there were concerns over potential behaviours, or a need to recover documents they could have been address in a far less detrimental way. The claimant could, as stated above, have been asked for the documents that were said to be needed. If they were not provided, other action could have been taken, including disciplinary action or an action for delivery. If there was a fear as to how he might act, he could have been asked to provide an undertaking not to do so, for example not to contact customers or suppliers of the first respondent. The claimant had duties as both employee and director. If they were breached, the respondents had remedies available to them in court. If there was a reasonable apprehension of acts that may prejudice the business of the first respondent, there could have been consideration of action for interdict, although in the circumstances given there

was little realistic prospect of such an interdict being granted ad interim as the apprehension was not reasonable. The advice to reinstate pension and healthcare was ignored. The issue of reasonable adjustments was not properly addressed when the claimant indicated a wish to return to work. The steps that were taken were not proportionate. The respondents have not therefore discharged the onus on them. There was therefore a breach of section 15.

(viii) What if any provision, criterion or practice did the first respondent apply to the claimant?

225. The Tribunal held that the majority of the proposed provisions, criteria or practices (PCPs) argued for by the claimant did not meet the test in the statute as explained in the case law set out above. For example the claimant argued that there was a requirement to work full time at the office, but no such requirement was put in place. The claimant was able to work largely as he wished, but Mr Nickerson thought it unfair that the claimant spent relatively little time in the office whereas he, Mr Nickerson, worked a normal week there. He was in effect complaining about that and making suggestions of a rota, but that was not sufficient to be a PCP. Others of his proposed PCPs were either vague, or not relevantly expressed under the statute, or were otherwise not relevant, for example about documentation he sought for the valuation of his shareholding which was not an issue that the Tribunal considered it had jurisdiction over. The Tribunal did not consider that the first respondent's decision to place the claimant on SSP was itself a PCP. There was no contractual entitlement to sick pay, and the reason for the claimant's absence was not, at that stage, any failure to make a reasonable adjustment. There was a statutory right to SSP which was engaged. There was no lawful entitlement to pay beyond SSP in the circumstances, there being no written contract.

226. The issue of what is a PCP is not straightforward. As the case law makes clear, a one-off act may not be a PCP. What is generally required is an element of repetition, or likelihood of repetition, as explained in ***Ishola***. The Tribunal considered that there had been PCPs applied to the claimant. There

were a series of acts that were taken by the respondent, set out above, which had the cumulative effect of cutting him off from access to the business both physically and electronically. That was maintained throughout. The grievances which were upheld were not acted on at all by the respondents, and they did not engage with his arguments as to taking reasonable steps. The grievance was not adequately answered, and when an appeal was taken it was not adequately responded to. The history is of a continuing series of actions against the claimant indicative of PCPs being applied, and there was none of the kind of evidence of other compliance as presented in ***Ishola*** put forward by the respondents that would retain the events as one off matters not a PCP.

227. The Tribunal held that the following were PCPs applied to the claimant that did fall within the statutory definition –

(a) The removal of access to emails, and the company server in March 2018 after he indicated a desire to leave the business of the first respondent.

(b) The removal of pension, mobile phone payment and healthcare benefits In March and April 2018 on the same basis.

(c) The requirement to return his laptop and office keys in March 2018 on the same basis.

(d) The maintaining of those removals and requirements in effect in notwithstanding that the claimant had indicated in July and September 2018 that he no longer wished to leave the business, and commencing a grievance alleging discrimination.

(ix) Did doing so place disabled persons at a substantial disadvantage compared with those who were not disabled?

228. The Tribunal considered that this was also a difficult question, in that all employees whether disabled or not would have been placed at a substantial disadvantage by such provisions. It reminded itself that this was a matter the

claimant must prove, as the EAT in ***Project Management Institute v Latif [2007] IRLR 579*** said:

> "…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."

229. There was little direct evidence on this question, although it was raised directly with the claimant, but on balance the Tribunal concluded that the claimant had proved that he had suffered material levels of stress from what occurred, and that a disabled person, particularly one with mental health issues, would be placed at a substantial disadvantage compared with those not disabled as a result. The steps taken reduced his income or benefits, which would obviously add to stress. The removal of private healthcare had a practical effect when an issue arose in relation to his liver that was not addressed as quickly as it would have been had that healthcare still been in place. The respondent prevented access to the first respondent's systems or office premises at a time when his employment was continuing. That was also liable to increase stress for those disabled in comparison to those who were not.

(x) Did the first respondent apply a provision, criterion or practice of either or both of (i) the removal of his laptop and access to emails, and (ii) the requirement to work full time at the respondent's premises, to the claimant?

230. The first part of the question is dealt with above, the second was not explored to any extent in the evidence, and in the absence of adequate evidence the Tribunal considers that there was not PCP of being required to work full time at the respondent's premises, as explained above.

(x) If so, did that place the claimant at a substantial disadvantage in comparison with persons who are not disabled?

231. This is dealt with above, and the answer is yes. The definition of "substantial" is set out above.

(xi) Was it a reasonable step for the first respondent to have instructed a stress risk assessment in relation to the claimant to ascertain what if any reasonable steps were required to be taken to avoid that disadvantage?

232. The Tribunal considers that it was a reasonable step to have instructed a risk assessment in relation to the claimant in early March 2018. By that time he had been admitted to hospital and signed off work with stress said to be related to work. There was a background of use of medication, and messages about his perception of his stress levels. An occupational health report to advise on such matters at that point was a reasonable step to take. It was not instructed until over two months later, and then did not include a risk assessment, but during that two month period the claimant had stated that he wished to leave. The stress risk assessment should however have been instructed again at latest in September 2018 when the claimant intimated a grievance referring to a return to work following the break-down in negotiations over a departure. Whilst there is no duty to write a stress assessment down for employers with less than five employees that does not mean that it is not a reasonable first step in a case such as the present. In order to find out what reasonable adjustments are required it is important to know what the disability is, and what its effects are. That is indicated by the Code of Practice: Employment which states at paragraph 6.32

> "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. …."

233. The first respondent started that process eventually, when writing to the claimant on 7 September 2018 to ask him about what he proposed, but when he then replied more than once with comments and details they failed to

engage with that. Ms McKenzie's decision letter did not address the point properly, and failed entirely to respond to the claimant's letter of 5 November 2018. It appeared to the Tribunal that the first respondent and its advisers were of the view that if any issues were not caused by work the claimant was not disabled. That is not the position. Whether that was their view or not, it does appear that they proceeded on the basis that the claimant was not a disabled person when, as established above, he was and they ought to have been aware of that. The Code at paragraph 6.9 states as follows:

> "In order to avoid discrimination, it would be sensible for employers not to attempt to make a fine judgment as to whether a particular individual falls within the statutory definition of disability, but to focus instead on meeting the needs of each worker and job applicant."

234. The issue as phrased did not directly address the PCPs that the Tribunal had identified and what if any adjustments were reasonably required to remove the disadvantage under section 20. The Tribunal considered that it was appropriate for it to do so. Conducting a stress risk assessment formally or informally would not itself have avoided the disadvantage, rather it would have identified the steps required to do so. That still left open the issue of what those steps were. The Tribunal considered whether the claimant had established that in evidence. It was satisfied that the basis for the decisions to remove the claimant's access to the facilities of the first respondent was misconceived and unreasonable, and that it was a reasonable adjustment to have restored the claimant's access including his laptop and keys, access to the server and emails, and the benefits removed from him, both in March and April 2018 and later in the year after it was intimated that he no longer was to leave. These were steps that the claimant argued for, particularly in his email of [7 November 2019?] Doing so would have facilitated a return to work. Whilst that would have been difficult given the circumstances the first respondent was the primary author of those difficulties in light of the way that it had acted. The Tribunal considers that, on balance, had that been done then by October 2018 the claimant would have been able, and fit enough, to return to work.

(xii) Did the first respondent, and any of the second, third or fourth respondents as individuals, harass the claimant under section 26 of the Equality Act 2010?

235. The Tribunal considered this also to be a difficult issue. There are statutory limits to what is envisaged by section 26, as explained by Lord Justice Elias in the authority set out above. Removing access to premises and systems, without notice or proper explanation, removing benefits such as pension, mobile telephone and healthcare, requiring the return of a laptop and keys, and handling matters as the respondents did, was inappropriate. The question of whether what occurred amounts to harassment under the Act however is more nuanced. There was nothing improper in moving the claimant to SSP in all the circumstances. That was a matter that appeared to cause the claimant particular concern and stress. The claimant did have a tendency to over-react to matters. His own perception is a factor to consider, but is moderated both by the statutory words and the requirement for his perception to be reasonable. It must also be considered in context. He had himself stated that he had decided to leave the business. That was the "trigger" for much of what happened, but set against the background of messaging sent by the claimant that has already been set out, and the fear on the part of the respondents that the claimant may do something prejudicial. Whilst the acts of the respondents were not appropriate, were ill considered, and failed to take account of the distinction between a formal resignation (not given) and an informal indication of a desire to leave, the Tribunal considered on balance that the claim of harassment had not been made out. The Tribunal noted that the claimant's solicitor did not protest directly in relation to the return of the laptop for example, in fact to the contrary he indicated that steps were being taken to do so, nor was there at that stage any allegation or formal grievance that there had been harassment. Whilst that is far from determinative, it tends to support the view that the claimant had not been harassed as that term is defined in section 26. It is true that the basis for the respondents' actings, being that the claimant had expressed a wish to leave, changed with the breakdown of negotiations, if not earlier as in July 2018 the claimant's solicitor said that he did not intend to leave, as recorded by

Ms McKenzie in her decision. The claimant made that entirely clear from September 2018 onwards. The Tribunal did not however consider that the failure to address the issue of a return to work properly, or address the stated concerns the respondents had over conduct or capability, amounted to harassment under the terms of the section, and that whilst the claimant perceived himself to be harassed, that was not within the statutory language, and not reasonable.

236. That claim was therefore dismissed. It is the claim for harassment which the claimant directed to the second, third and fourth respondents as individuals. As that was the basis of his Claim against them the Tribunal did not consider that it had a basis, on which fair notice had been given to those respondents, of any potential liability under sections 111 and 112 of the Act, which were not referred to in the Claim Form, nor in the evidence given by the claimant did he address any issue of liability of individuals beyond the issue of harassment. The Tribunal considered that the claims against those individual respondents required to be dismissed in light of that.

(xiii) In the event that any claim succeeds, what remedy should be afforded to the claimant, and in that regard (a) what losses has he suffered or will suffer, (b) should any award be reduced on account of his contribution, (c) would a fair dismissal have resulted from a different procedure, and (d) has the claimant mitigated his loss?

237. The Tribunal assesses matters as follows:

(i) Equality Act 2010

(a) Injury to feelings

238. The starting point is section 124 of the 2010 Act and what is just and equitable. The claimant had an underlying stress condition, including anxiety and depression, as set out in the medical reports. That pre-dated the matters complained of in these proceedings, and included an admission to hospital on 18 February 2018. These facts indicate a reasonably severe underlying condition. What happened thereafter, where held to be unlawful as set out

above, exacerbated that condition. The extent to which it did so was not clearly set out in the evidence. There was no medical report directly addressing these issues. The claimant's medical records were not produced. The reports that were submitted were brief. The claimant gave a little evidence on this issue himself, but did not do so beyond asserting that he was severely affected by what had happened. Whilst the extent of that was not entirely clear, it was clear that there was an exacerbation of his symptoms, that that was beyond minor, and that the position continued for almost a year. The claimant had in his submission referred to the case of ***Dickens v O2 PLC [2008] EWCA Civ 1144***. That is however a case about personal injury from the Court of Appeal in England, and the law in Scotland is not the same. The Tribunal considered that it required to assess compensation on the basis of the extent to which the claimant's existing condition was exacerbated by the first respondent's unlawful acts. It did not consider that the claimant's own assessment of a sum at the top of the highest band was correct. Against that background, the Tribunal considered that the appropriate level of award for injury to feelings was the sum of £10,000, as at the lower level of the middle band from ***Vento*** as adjusted.

239. Interest is due at the rate of 8% per annum for the period from 28 February 2018 to the date of the Judgment, which is a period of 23 months. That is the sum of £1,533.33. The total is therefore £11,533.33.

(b) Other losses

240. There are other losses which are also established by the claimant and fall under the terms of section 124 of the 2010 Act. Not all of the matters in the Schedule of Loss were appropriate. The claimant sought his legal expenses, but they are firstly related largely to the shareholding dispute and secondly not recoverable generally save where a claim for expenses is made under the Rules. The elements of the Schedule of Loss which the Tribunal regarded as having been established and are appropriate are as follows:

(a) Pension contributions of £600 per month for the period from April 2018 March 2019, 12 months and a total of £7,200.

(b) Healthcare benefits for the same period, at £100 per month, a total of £1,200.

(c) Mobile telephone account of £20 per month for the same period, a total of £240.

(d) The total of these sums is £8,640. Interest is due on them at the rate of 8% per annum from the mid-point of the period as above, and is a sum of £663. The total of these losses is the sum of £14,277.20.

(e) The Tribunal considered whether, if there had been a stress risk assessment and reasonable steps taken to seek to facilitate the claimant's return to work, he would in fact have done so, and started earning wages from the first respondent. It concluded that the likelihood was that the claimant would have returned to work had the first respondent acted within its duties. It knew in July 2018 that the claimant did not wish to leave the business, terms for settlement having not been agreed. The Tribunal considered that the first respondent ought at that stage to have addressed the consequences of that directly, either by seeking advice or by engaging directly with the claimant. Matters were very clear by September 2018 when the grievance was intimated. Had they done so, the likelihood is that by a date towards the end of October 2018 the claimant would have been in a position to return to work. The report from Dr Kong made it clear that to return to work the issues that had arisen at work required to be addressed. The Tribunal did not regard those issues as insoluble. The claimant's technical expertise was never in doubt. Had the claimant not performed properly, or otherwise acted inappropriately, that could have been addressed separately. The claimant has therefore lost the benefit of the pay he would have received for the period of six months for the time to his new employment started. It is possible that he has also lost the dividends that he may otherwise have had, but there was no real evidence of that, no argument about that in the Schedule of Loss, and no fair notice to the respondents of that being put in issue by the claimant accordingly. The Schedule of Loss did not in fact directly address the issue of return to work, and had

sums for lost earnings that were at the level of his SSP. The Tribunal considers however that it is in accordance with the overriding objective to allow the head of loss for lost income in this regard, being related to the pay that he would have then received, and that there had been some notice of the point to include the loss of pay, but not for any loss of dividend. Dividend is a right of a shareholder. It may depend on whether there were profits, and if so to what extent. If a dividend is later declared the claimant may be entitled to that as he remains a shareholder. In all the circumstances the loss that the Tribunal regarded as appropriate in this claim is the loss of six months of his pay, of £670 per month, a total of £4,020. To that is added one further month pension loss (the other losses having been addressed above) of £600. The total of such losses is £4,620. Interest is due on that sum for the period from October 2018 to date of Judgment at 8% per annum, a sum of £406. The total is therefore £4,466.

(f) The total of the sums for financial losses is £18,743.20 accordingly.

(g) The total of both heads of loss is £30,276.53.

(d) Contribution

241. The claimant had clearly acted wholly inappropriately in sending a number of messages, as set out above. These messages were part of the background that led the respondents to act as they did. The claimant sought to underplay the significance of them by saying that at the time he had been drinking to excess and using prescribed medication to excess, and in combination of the two which he ought not to have done. That is not an explanation that exculpates him from what he did. He sent some messages that indicated that he failed to appreciate the harm he was liable to have caused. The nature of the messages he sent changed after January 2016, when his medication was changed and treatment with a consultant psychiatrist started. The Tribunal was struck by the fact that the messages most obviously wholly improper, containing what amounted to threats or lewd remarks, were those before 2016. They claimant continued to send messages that were unprofessional,

objectionable and wrong. He used offensive terms. But it also noted that some of the respondents emailed him using swear words.

242. Some of the language used by the claimant in his emails is shockingly bad, and that happened on a number of occasions. The respondents in effect forgave him for that at the time, as they said that they needed his technical expertise for the busines. Their attitude towards him changed after he was admitted to hospital, signed off by his GP, and then once he mentioned leaving the business, but it was clear from the emails sent to him at the time that he had behaved wholly wrongly in their view. The Tribunal took into account however that the messages which were relied on as leading to a belief that the claimant would act to damage the first respondent were several years old, and their acts were an unreasonable over-reaction at best. Nevertheless it did play a part in their thinking, and was part of the background circumstances.

243. The claimant acted entirely improperly in wiping the laptop of all content before returning it. That can also only have affected the mindset of the respondents. It is likely to have been a factor in how they reacted to him in general, including their own expectation about whether or not he would return and how to respond to the points that he made. This was done at a time when the negotiations for an agreed departure had not yet ended. Their original request for its return was not appropriate, given that he remained an employee, but his response was wholly wrong.

244. This is therefore a complex mixture of issues. Misuse of alcohol is excluded from the definition of someone who is disabled, or putting it another way if the only issue is misuse of alcohol that does not lead to a finding that the person is a disabled person. Here that was part of the background but did not mean that the claimant was not a disabled person. More generally, however, someone who misuses alcohol cannot excuse their behaviour whilst under the influence of it, either alone or in conjunction with medication which should not be taken with alcohol, for that reason. Stress, anxiety and depression are different, and those suffering such symptoms or conditions can be affected in

how they act. Each of those factors was at play, and requires to be considered carefully in light of that.

245. The respondents handled the whole process essentially incompetently from late February 2018 onwards. They acted as no reasonable employer could have done. They breached material terms of the contract of employment, both specific and implied. Their failure to respond properly to the complaints of the claimant and his formal grievance was obvious and wrong. That will have borne on how the claimant acted. He felt that he was not being properly treated, and was justified in that feeling. The claimant's combative style did not assist however, and it is not easy to know what would have happened had the respondents formally addressed the issues related to his attempted return to work. It appeared that the parties each took intransigent positions. The Tribunal concluded that in fact the claimant would have returned to work even had there been a stress risk assessment, and steps taken to seek to facilitate a return to work, as set out above.

246. Considering all the evidence and the circumstances overall, the Tribunal did consider that the claimant had contributed to the dismissal to a material extent, and that that should apply both to the unfair dismissal element of the award, and (unusually) to the award in respect of discrimination. That is so firstly as the messages and behaviours he exhibited were wrong, and predated the discrimination of which he claims. Secondly, he was fortunate that the respondents treated him at that time in the manner that they did. Other employers would not have been so lenient, and may have considered dismissal. Thirdly wiping the laptop was wrong, a breach of his duties at least as employee if not also as director, and whilst the respondents handled matters in a manner that the Tribunal has commented on above, these behaviours were a material part of the reason why they did so act.

247. It is highly unusual for there to be a deduction for contribution in a discrimination claim. There is in simple terms a conflict between the authorities of ***Way and Waiyego*** referred to above.

248. As a matter of law neither of the two EAT judgments takes precedence over the other (indeed ***Way*** quotes from an earlier case supporting the basic principle). The terms of the 2010 Act are not materially different to those in the earlier discrimination statutes. They refer to what is "just and equitable". Those are very broad words, indicating a wide discretion. Whilst the 1945 Act would not have contemplated discrimination delicts that does not prevent Parliament from using such concepts in later statutes (for example the House of Lords held that holiday pay was included in the definition of unlawful deduction from wages although the former was not a right when the latter was introduced). Contributory negligence is a basic principle of the law applied in sheriff courts in the analogous, albeit different, context of delictual claims (such as for personal injury). Whilst there may be some cases where mitigation may be a convenient place to put arguments over what the claimant did, this case is not, the Tribunal concluded, one of them. Mitigation arises after the breach founded on, and here the acts of the claimant arose before, or in the case of the laptop partly during, the period that led to what was a repudiatory breach. The contribution therefore at least partly pre-dates the acts of the respondent founded on, and all do so in the period prior to the claimant accepting the repudiatory conduct. Here, the conduct of the claimant was both blameworthy, took place prior to the events which were individually and collectively repudiatory, and made a material contribution to what the respondents did, and it is what the respondents did that eventually led to the resignation which has been held to be a dismissal. Against that background both of fact and law the Tribunal considered that the only manner in which to take account of the claimant's actions in a manner that was just and equitable was by a deduction from what would otherwise have been the award by the concept of his contribution.

249. The Tribunal considered that it was just and equitable, and in accordance with the statutory provisions in the Act as referred to above, to reduce the awards by 35%.

250. The total of the awards for injury to feelings and for financial losses is £30,276.53. Reduced by the contribution of 35% that leads to an award of

£19,679.74. The claimant's evidence that he had not received State benefits was accepted by the Tribunal and the recoupment provisions are not engaged accordingly.

251. The terms of section 124 empower the Tribunal to make a recommendation. The Tribunal did not consider that necessary in this case. It did appear to the Tribunal that the first respondent had an incomplete understanding of the law pertaining to disability discrimination, and its own responsibilities, such that the Judgment made may not have been anticipated by the first respondent. The Tribunal suggests that the first respondent reflect on the comments made in the Judgment.

(i) Unfair dismissal

(a) Basic award

252. The claimant had gross monthly pay prior to his absence of £670.00. He also had pension contributions which require to be taken into account, prior to their unlawful removal, of £600 per month. The total is £1,270.00 per month, or £293.07 per week. The claimant sought to include in this calculation his pay the dividend payments he received, but they are dividends as a shareholder not pay for statutory purposes and cannot be taken into account. The claimant's weekly pay for statutory purposes is therefore £293.07 and the basic award is £1,611.88.

253. The award is, the Tribunal considered, to be reduced by the same percentage set out above in light of the claimant's contribution to his dismissal at 35%. That leads to a net award of £1,047.72.

(b) Compensatory award

254. The losses are addressed above under the 2010 Act, with the same losses having been suffered, such that no additional award falls to be made.

(c) Mitigation

255. The respondents did not put forward evidence as to any lack of mitigation. The claimant secured new employment reasonably quickly, and has no claim for the period after he did so. The Tribunal held that he had mitigated his loss.

(d) Polkey

256. This question is whether there is likely to have been a fair dismissal in the event that a different, and fair, procedure had been followed. This requires evidence to be presented by the respondents on which such a finding can be made. There was at best insufficient evidence to do so. Whilst the claimant's behaviours had been inappropriate, as commented on above and below, the respondents had not chosen to do anything formal about them. The claimant did not act improperly during 2018 or 2019. He was seeking to return to work when not able to agree termination terms, as he was entitled to. In all the circumstances the Tribunal did not consider that there was evidence available to make any finding in this regard, and no deduction for this principle is made. It is in any event not a matter that arises under the 2010 Act where losses are set out above, and has become essentially academic.

Conclusions

257. The claimant's claims under sections 15, 20 and 21 of the Equality Act 2010 succeed, as does his claim of constructive unfair dismissal under the Employment Rights Act 1996 sections 95 and 98.

258. The claimant's claim of harassment under section 26 of the Act fails and is dismissed, and his claim against the second, third and fourth respondent is dismissed accordingly.

259. The claimant is awarded the total sum of £20,727.46 in compensation.

Employment Judge A Kemp

Date of Judgment: 10 February 2021

Date sent to parties: 10 February 2021