EMPLOYMENT TRIBUNALS

Claimant: Mr. M.J Taplin

Respondent: Freeths LLP

Heard at: Nottingham

On: 16 November to 8 December 2020

Before: Employment Judge Broughton sitting with non-legal Members: Mrs Hatcliff and Mr Alibhai

Representatives

Claimant: Counsel – Mr Gilroy QC
Respondent: Counsel – Mr Epstein QC

RESERVED JUDGMENT

The Judgement of the Tribunal is as follows;

1. The claim of indirect discrimination pursuant to section 19 of the Equality Act 2010 is dismissed on withdrawal.

2. The claims of disability discrimination pursuant to sections 13, 15, 20/21 and 45 of the Equality Act 2010 are in part well founded and succeed.

3. The claim for accrued annual leave pursuant to regulation 13 and 30 of the Working Time Regulations 1996 is well founded in respect of the portion of leave entitlement which relates to the period prior to the Claimant becoming a Member of the LLP in 2004 only, the rest of the claim is dismissed.

4. The claim for accrued additional annual leave under regulation 13A and 30 of The Working Time Regulations 1996 is not well founded and is dismissed.

5. The case will be listed for a hearing to determine remedy.

WRITTEN REASONS

Background

6. The Claimant joined the Respondent, a Limited Liability Partnership in 1999 as a Salaried Partner. Following a period as an Equity Partner from 2004, he became Managing Partner of the Derby office in 2008. The Claimant served notice of his retirement from the Respondent in accordance with the Membership Agreement on 7 September 2018. He was required to give 12 months' notice. He did not work during the 12-month notice period. The Claimant presented his claim to the Tribunal on 1 October 2018 after a period of Acas early conciliation from 10 September 2018 to 1 October 2018.

Agreed Issues

7. The issues which we discussed at length and agreed during the hearing are as follows;

Disability

It is agreed that from 11/16 the Claimant had a disability by reason of adjustment disorder with mixed anxiety and depressed mood and that from 11/16 the Respondent ("R") was aware of that disability.

Requirement to work as a solicitor [PCP1]

C complains that, in breach of duty contrary to s.20 EqA, from 11/16 to 7/9/18 R applied to him a provision, criterion or practice ("PCP") that he works as a solicitor, that by reason of his disability this put him at the substantial disadvantage of being less able to manage his own workload and he was more affected by the workload and stresses and strains of his duties, and it failed to make reasonable adjustments.

In the pleadings this PCP has been called PCP1.

The PCP is pleaded in §22(a)(a) ET1 [60], FBP [74].

C's suggested adjustments are contained in §24 ET1 [62].

The suggested adjustments, as clarified by the FBP at [75-76], using the lettering in §24 ET1, are that R (a) ought to have put in place a written work plan, and/or (b) ought to have put in place a written wellness and recovery action plan ("WRAP"), and/or (c) appointed a mentor, and/or (d) intervened to provide more intensive support when C was having difficulties, and/or (j) adjusted the standard of performance expected, and/or (k) removed access to emails outside office hours and/or replaced Jamie Cooper and Laura Sephton who worked 100% for C.

R admits this PCP and that it put C at this disadvantage but denies it failed to make reasonable adjustments.

The FBP identifies the date when C was put to this substantial disadvantage and the dates when the adjustment ought to have been made from; late 2015/early 2016 to the date he resigned

The issue is, did R fail to make reasonable adjustments?

R's case at §70 ET3 [94] is that it took extensive steps to assist C, such as persuading him to reduce his workload, relinquish management of the Derby office, take time off, delegate work, focus on business development, it guaranteed his profit share, it put in place phased returns to work and offered psychological support through Dr Laher and provided pastoral and work support from a number of other individuals.

R response to C's suggested adjustments is in §71 ET3 [95-97].

For the avoidance of doubt in relation to all of the reasonable adjustment claims made in these proceedings, whereas the suggested adjustments have been summarised, C relies on the detail set out in his pleaded case.

Requirement to work as head of /managing Partner of the Derby office [PCP 2]

C complains that, in breach of duty contrary to s.20 EqA, from 11/16 R applied to him a PCP that he works as managing Partner of the Derby office, that by reason of his disability this put him at the substantial disadvantage of being less able to manage his own workload and he was more affected by the workload and stresses and strains of his duties, and it failed to make reasonable adjustments.

In the pleadings this PCP has been called PCP2.

The PCP is pleaded in §22(a)(b) ET1 [60], FBP [74].

C's suggested adjustments are pleaded in §24 ET1 [62] and are repeated in the FBP.

As with PCP1 above, the FBP limit the suggested adjustments to the same as those for PCP1.

R admits this PCP and that it put C at this disadvantage but denies it failed to make reasonable adjustments.

The issue is, did R fail to make reasonable adjustments?

So far as C relies on the sub-paragraphs of §24 ET1 identified above, R's case is the same as above.

C's position is that PCP2 applied until 29/9/17.

Requirement to bill as many hours as possible [PCP 3]

C complains that, in breach of duty contrary to s.20 EqA, from 11/16 to 7/9/18 R applied to him a PCP that he bill as many hours as possible, that by reason of his disability this put him at the substantial disadvantage of being less able to manage his own workload and he was more affected by the workload and stresses and strains of his duties, and it failed to make reasonable adjustments.

In the pleadings this PCP has been called PCP3.

The PCP is pleaded in §22(a)(c) ET1 [60], FBP [74].

C's suggested adjustments are pleaded in §24 ET1 [62].

The FBP [76] limit these suggested adjustments to the same as those for PCP1.

R denies this was a PCP and says in any event that reasonable adjustments were made as per paragraphs 9 and 10 above and that as per §76 ET3 [97] C was persistently encouraged to reduce his workload and hence his billable hours.

The FBP identifies the date when C was put to this substantial disadvantage and the dates when the adjustment ought to have been made from; late 2015/early 2016 until he resigned.

The issues are, (i) was there this PCP, and (ii) if there was, did R fail to make reasonable adjustments?

Suspension [PCP 5]
The complaint is that C was suspended. Suspension took place on 18/6/18 orally by Darren Williamson, followed in writing from Colin Flanagan the following day.

The claim is expressed in three different ways: direct discrimination contrary to s.13, discrimination arising from disability contrary to s.15, and failure to make reasonable adjustments contrary to s.20.

Direct discrimination

C's case is that R suspended him because;

(i) he was disabled,
(ii) he had had significant time off work,
(iii) he had a negative attitude, and
(iv) he had a negative management style - §§28, 29, 31 ET1 [63, 64].

R denies direct disability discrimination - §93 ET3 [101]. R says that (ii) to (iv) do not set out direct disability discrimination claims, they are "arising from" claims.

The issues are, as a matter of fact, did R suspend C because of his disability; did it suspend him for reasons (ii) to (iv) above and if so does that mean R suspended him because of disability; or, as R claims, did it suspend him because of C's joke (and the investigation to be undertaken)?

Comparators.

C relies on:

(a) a hypothetical comparator, namely a senior solicitor working for the Respondent who did not suffer from a clinically recognised adjustment disorder within the meaning of DSM-5 or ICD-10, and who made comments of a nature which were regarded by the Respondent as discriminatory within the meaning of EqA at a conference, and/or

(b) IT as an actual comparator.

The hypothetical comparator, who did not suffer from a mental illness which gave the business a management challenge, would not have been treated in the way C was treated.

C's case is that he was treated in the manner complained of because his conduct at the REC presented R with the opportunity to terminate C's membership of the LLP, either by formal expulsion or by acting in such a way that he would serve notice by reason of the conduct of R and certain of its officers towards him.

The reason for the difference in treatment is the disability.

Discrimination arising from disability

C's case is that R suspended him (i) because he had had significant time off work, and/or (ii) because he had a negative attitude, and/or (iii) because he had a negative management style, and/or (iv) because of his conduct at the 14 June real estate conference, and/or (v) because of C's depressed, anxious or irritable demeanour in the office. R denies this claim and, without prejudice to that denial, its case is that the suspension decision was justified in order to achieve the legitimate aims of maintaining standards of discipline and eliminating discrimination and harassment - §§94 to 98 ET3 [101, 102].

C's case is that R's actions were not a proportionate means of achieving a legitimate aim - see §30 ET1 [64].

R's case is that none of (i), (ii), (iii) or (v) was the reason. R accepts that it was because of the joke, which is (iv). See §§93 to 97 ET3 [101, 102].

The issues are:

(i) did R suspend C for any one or more of the five reasons above,
(ii) was any such reason something arising in consequence of C's disability, (iii) was suspension unfavourable treatment of C, and
(iii) was that treatment a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments

As clarified at the ET on 18/11/20, the PCP relied on is suspending a person alleged to have committed the relevant misconduct.

In the pleadings this PCP has been called PCP5.

C claims he was placed at a substantial disadvantage.

The disadvantage is identified in the FBP as; The suspension and lack of information greatly exacerbated C's mental impairments and hindered his recovery.

C's suggested reasonable adjustments are at §24 ET1 [62] as modified by the FBPs [77, 78].

They are, using the lettering in §24 ET1, that R (e) ought not to have had a disciplinary process but an informal meeting, and/or (f) should have had a process that was clear, structured, sensitive, visibly impartial, allowed C more time to prepare, and allowed representation by a person outside the LLP, and/or (g) ought to have clarified the complaint in writing, and/or (h) ought not to have suspended C, and/or (i) explained the basis for the suspension and disciplinary.

R admits this PCP, that it placed C at a substantial disadvantage and that R knew that.

The issue is, did R fail to make reasonable adjustments?

Formal Disciplinary proceedings [PCP 4]

As with the suspension claim, this claim is expressed in three different ways: direct discrimination contrary to s.13, discrimination arising from disability contrary to s.15, and failure to make reasonable adjustments contrary to s.20.

Direct discrimination

The pleaded claim is in §§28, 29 and 31 ET1 [64].

The factual complaint is that R put C through a disciplinary process, which was initiated on his suspension on 18/6/18 and that continued up to and including 20/8/18, when C was informed of the outcome, and the complaint includes the disciplinary outcome.

C's case, in §§ 28, 29 ET1, is that R put C through a formal disciplinary process for misconduct because (i) of C's disability, (ii) he had had significant time off work, (iii) he had a negative attitude, and (iv) he had a negative management style.

Comparators.

C relies on:

(a) a hypothetical comparator, namely a senior solicitor working for the Respondent who did not suffer from a clinically recognised adjustment disorder within the meaning of DSM-5 or ICD-10, and who made comments of a nature which were regarded by the Respondent as discriminatory within the meaning of EqA at a conference, and/or

The hypothetical comparator, who did not suffer from a mental illness which gave the business a management challenge, would not have been treated in the way C was treated.

C's case is that he was treated in the manner complained of because his conduct at the REC presented R with the opportunity to terminate C's membership of the LLP, either by formal expulsion or by acting in such a way that he would serve notice by reason of the conduct of R and certain of its officers towards him.

The reason for the difference in treatment is the disability.

(b) IT as an actual comparator.

R's pleaded case denies direct disability discrimination - §§93, 94 ET3 [101]. R says that (ii) to (iv) do not set out direct disability discrimination claims, they are "arising from" claims.

<u>The issues are, as a matter of fact, did R suspend C, put him through a disciplinary process and apply a disciplinary outcome because of his disability; or did it do so for reasons (ii) to (iv) above and if so does that mean R did so because of disability; or, as R claims, did it do so because of C's joke?</u>

Discrimination arising from disability

C's case is that R suspended C, put him through a disciplinary process and applied the disciplinary outcome (i) because he had had significant time off work, and/or (ii) because he had a negative attitude, and/or (iii) because he had a negative management style, and/or (iv) because of his conduct at the 14 June real estate conference, and/or (v) because of C's depressed, anxious or irritable demeanour in the office.

R's case is that none of (i), (ii), (iii) or (v) was the reason. R accepts that it was because of the joke, which is (iv). See §§93 to 97 ET3 [101, 102].

R denies this claim and, without prejudice to that denial, its case is that the suspension, disciplinary process and disciplinary outcome were justified in order to achieve the legitimate aims of maintaining standards of discipline and eliminating discrimination and harassment - §§94 to 98 ET3 [101, 102].

The issues are: (i) did R suspend C, put C through a disciplinary process and apply a disciplinary outcome C for any one or more of the five reasons above, (ii) was any such reason something arising in consequence of C's disability, (iii) was suspension unfavourable treatment of C, and (iii) was that treatment a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments

C's pleaded PCP in §22(b) ET1 [61] and FBP [78] is that R subjected him to formal disciplinary proceedings in circumstances where there were allegations of misconduct.

In the pleadings this PCP has been called PCP4.

C claims that that PCP put him at a substantial disadvantage and that R knew that.

The disadvantage is identified in the FBP as; the Cs mental impairments were greatly exacerbated by R decision to follow and implement a formal disciplinary process and his recovery was hindered.

The date identified as the date adjustments out to have even made is identified as between 18 June 2018 to the date of his disciplinary hearing on 15 August 2018.

R admits this PCP, that it subjected C to substantial disadvantage and that R knew that it did.

C's suggested reasonable adjustments as identified by the FBPs at [77] are that, using the lettering of §24 ET1,
(e) R ought not to have applied a formal process, and/or

(f) the process ought to have been;

- *clear, and/or*
- *structured, and/or*
- *sensitive, and/or*
- *visibly impartial, and/or*
- *allowed C more time to prepare, and/or allowed representation by a person outside the LLP, and/or*

(g) the Respondent should have clarified the complaints against Mr Taplin by setting them out in writing.

R's case in §§79 to 82 ET3 [98, 99] is that such a failure is denied and that it took C's illhealth into account during the process, no specific adjustments were identified by Dr Laher in his report dated 14/8/18, R asked C at his disciplinary if he wanted any adjustments to be made, which he did not, and C was not prevented from having representation outside the LLP.

The issue is, did R fail to make reasonable adjustments?

Indirect discrimination

No claim for indirect discrimination is being pursued.

Expulsion

The ET has heard argument as to the proper construction of ss.45 and 46 EqA, and whether this is a liability matter requiring determination at this hearing.

Time limits

It will be for C to demonstrate that his claims are in time. The relevant dates are suspension 18/6/18, resignation on notice 7/9/18, last day as member 6/9/19, ACAS registration 10/9/18, certificate 1/10/18, claim presented 1/10/18. Insofar as claims in respect of any matters are said to have been made out with the primary time limit, C will argue (a) that the relevant matters form part of a "continuing act", and/or (b) that it would be just and equitable for the Tribunal to adjudicate upon them.

Holiday pay

C's pleaded claim is in §33 ET1 [65], where he states that he did not feel able to take leave.

"[33] Because of the obligations that Mr Taplin felt towards the Respondent and his colleagues, Mr Taplin did not feel that he was able to take the holiday that he was entitled to and the Respondent did not allow Mr Taplin to carry over the holiday that he had accrued but not taken into the next leave year. Accordingly, Mr Taplin was deprived of his holiday and/or holiday pay contrary to the Working Time Regulations 1998 (as interpreted in accordance with Working Time Directive (2003/88/EC) following the decision of the CJEU in King v Sash Window Workshop Ltd (C-214/16) EU) or under s. 13 of the Employment Rights Act 1996. Mr Taplin is in the process of compiling a record of the annual leave that he has taken since 1999 and will provide further particulars of this claim as soon as possible."

The quantum of C's holiday pay claim is in his schedule of loss [1335]. The total including (i) EU and UK holiday up to giving notice and (ii) 5 days' holiday during notice comes to over £112K. C only pursues claim (i).

R accepts that for the purposes of his holiday pay claims C is a worker who is in principle entitled to claim.

Its defence is in §§103 to 105 ET3 [103, 104]. R points out that there is no carry over of leave.

The first claim is for EU holiday entitlement of 20 days per year from 2002/03, amounting to 44 days.

The second claim is for UK holiday entitlement for the past two years, amounting to 16 days.

The document from which the shortfall in days is taken is at [1003, 1004]. There is an issue about whether C recorded all holiday taken. If not, that document is an under-record. C's solicitors wrote to R's solicitors on 11/11/20 seeking confirmation that C's calculation was correct. R's solicitors indicated that they would revert but did not do so.

These are claims for compensation for untaken holiday.

As R understands these first two claims, they are that (i) R prevented C from taking his EU and UK leave, alternatively, it failed contrary to ***C-684/16 Max-Planck-Gesellschaft*** *[81] to "exercise[d] all due diligence in enabling the worker to take the paid annual leave to which he is entitled under EU law", (ii) and C claims for EU leave going back to 2002/03 and UK leave for the two years prior to presenting the ET1.*

The issues on these first two parts of the claim are: (i) did R prevent C from taking holiday, (ii) was it obliged to exercise due diligence to enable C to take this holiday, and if yes, did it fail to do so, and (iii) for how many days can C claim?

Claimant 's position

Claim 1

The Claim is advanced on a number of alternative bases:

Claim 1 (2002-2003) to date: EU holiday entitlement of 20 days per year from 2002/03. In support of this claim, C relies upon the following:

(i) The fact that C was denied, precluded or prevented from exercising his Directive Leave on account of R;

(ii) This had the effect of permitting C to carry forward such Directive Leave indefinitely;

(iii) The obligation to make payment in lieu only crystallises upon the cessation of the worker relationship. There is, therefore, no issue of licence, or permission. Further, the two year limitation period does not arise; See: ***King v The Sash Window Company [2018] IRLR 142****, and the CJEU decision in* ***Max-Planck-Gesellschaft****.*

There is an issue about whether C recorded all holiday taken. C relies on R's own records. C's case is that he invited R to agree his calculation and R intimated that it would revert in relation to that issue but did not do so.

As a result of the application of EU law, the principle originally set out in reg 13(9) (a) of the Working Time Regulations 1998 (SI 1998/1833), that statutory annual leave may only be taken 'in the leave year in which it is due' is no longer valid.

Max-Planck-Gesellschaft *is authority for the proposition (see para. 81 of the decision) that an employer must show it has "exercised all due diligence in enabling the worker to take the paid annual leave to which he is entitled under EU law". Under the principle in Max-PlanckGesellschaft (and another case:* ***Kreuziger v Land Berlin C-619/16****), the circumstances in which leave can be carried over are extended beyond employer obstruction, to those cases in which the employer has failed or neglected to facilitate the exercise of the right to annual leave.*

R has observed that the Tribunal will need to consider whether C was able to take holiday, and will need to consider in particular how, if at all, ***Max-Planck-Gesellschaft*** *applies to the facts of this case, where, as R puts it: "the worker is a senior equity Partner member of an LLP who has autonomy in how he runs his practice".*

NB This claim extends to the accrued but unexercised Directive Leave in the period 2003-to the date of termination of the relationship.

Claim 2:

The second claim is for UK holiday entitlement for the past two years, amounting to 16 days. It is advanced upon the basis of the domestic statutory right of C.

Applications

8. It is necessary to address a number of applications and matters which had to be determined by the Tribunal during the course of the hearing;

Disclosure of documents

9. The Notice of hearing dated 26 November 2018 included a number of standard case management orders which included a standard order for disclosure of documents. By the 4 March 2019 the parties were required to; "*send each other a list of documents that they wish to refer to at the hearing or* ***which are relevant*** *to the case". [Tribunal's stress]*

10. At the Preliminary Hearing on 17 January 2020, which post-dated the date for compliance with the original case management order for disclosure, a number of further orders were made. The record of the hearing referred the parties to the Presidential Guidance on General Case Management. Both parties were represented by experienced solicitors and counsel. The Presidential Guidance includes the following guidance on disclosure;

"6. Disclosure is the process of showing the other party (or parties) all the documents *you have which are* ***relevant*** *to the issues the Tribunal has to decide. Although it is a formal process, it is not a hostile process. It requires co-operation in order to ensure that the case is ready for hearing.*

8. ***Any relevant document in your possession (or which you have the power to obtain) which is or may be relevant to the issues must be disclosed. This includes documents which may harm your case as well as those which may help it. To conceal or withhold a relevant document is a serious matter.***

10. The process should start and be completed as soon as possible*. A formal order for disclosure of documents usually states the latest date by which the process must be completed."*
[Tribunal's stress]

11. The parties were also reminded of their obligation under Rule 2 of the Tribunal Rules to assist the Tribunal to further the overriding objective and in particular to co- operate generally with other parties and the Tribunal.

12. A further Order for was made that; "*The Claimant and Respondent must on or before 1 May 2020 send each other a list of all documents that they wish to refer to at the final hearing. They shall send each other a copy of any of these documents if requested within 7 days."*

13. The previous order of the 26 November 2018 for standard disclosure, was not revoked.

14. There was a further Preliminary Hearing on the **13 October 2020** before Employment Judge Heap. Attending on behalf of the Respondent was Ms Beaumont, solicitor and Mr David Potter, Partner in the Employment Department of the Respondent. The hearing was listed to deal with two applications by the Claimant for specific disclosure

which related to a number of documents which had not been disclosed and others which had been redacted by the Respondent. Orders were made for further disclosure of documents and for the Respondent to confirm the existence of further specific relevant documents following a search for the same. Previous orders for disclosure were not revoked only added to or varied in respect of dates for compliance.

15. The reason for setting out the case management history behind disclosure is because the Claimant argues that the Respondent failed to disclose relevant documents in compliance with the Tribunal Orders and that inferences should be drawn from that failure. Counsel for the Respondent at the hearing, sought to argue that the Claimant should be prevented from cross-examining the Respondent's witnesses around a failure to comply with the Tribunal Orders because the order of the 17 January 2020 did not expressly require disclosure of documents '*relevant'* to the case, but referred to the documents which the parties intended to rely upon at the hearing.

16. This was dealt with during the final hearing itself and counsel for both parties made submissions on this point.

Decision – preliminary issue - disclosure

17. The Respondent is a large firm of solicitors with a specialist employment law department. Mr Potter was responsible for dealing with the disclosure exercise and he is a Partner in the Employment Department. This is not a situation where parties are unfamiliar with the Tribunal process. At the Preliminary Hearing both parties were represented by experienced counsel.

18. There is no general duty on a party to Tribunal proceedings to allow disclosure or inspection of any of the documents in his or her possession. The Tribunal however made an order for *relevant* documents to be disclosed, in its Orders issued on 26 November 2018. However, even aside from the existence of an Order, if a party discloses some documents voluntarily, there is a duty not to leave out others if to do so would mislead the other side as to the effect of those documents that have been disclosed: EAT In ***Birds Eye Walls Ltd v Harrison 1985 ICR 278, EAT*** held as follows;

"(1) that, in the absence of a formal order for discovery, there was no general duty on a party to proceedings before an industrial Tribunal to disclose any of the documents in his possession but *that no document should be withheld if the effect of non-disclosure would be to mislead another party as to the true meaning of any document which had been voluntarily disclosed and that no party should suffer any avoidable disadvantage as a result of not being aware of a document in the other side's possession (post, p. 288B–D).*

(2) That the employers were in breach of their duty of disclosure in failing to give discovery of the working party minutes since the minutes of the disciplinary hearing which had been disclosed gave *an incomplete picture of the investigation so as to be potentially misleading (post, pp. 288G — 289B)".*

19. It was not argued by counsel for the Respondent, that the Respondent was not aware of its obligations of disclosure. It was also not argued by counsel for the Respondent that the Respondent had disclosed all relevant documents in compliance with the Order of the 26 November 2018. It was not argued by counsel for the Respondent that the Claimant had not suffered any avoidable disadvantage as a result of not being aware of documents in the Respondent's possession prior to the 13 October Order for specific disclosure by **20 October.**

20. The objection to counsel for the Claimant cross examining the Respondent's witness about relevant documents and exploring with them the reason for non-disclosure, was not upheld. The Tribunal determined that this line of enquiry was relevant to the issues in the case and that there had been an order for standard disclosure in place since 26 November 2018.

21. The evidence of the Respondent's witnesses was that David Potter, was responsible for the disclosure exercise. Mr Potter was not called by the Respondent to give evidence before this Tribunal.

Expulsion

22. On the first day of the final hearing, counsel for the Respondent argued that there was no need for the Tribunal to decide the issue of whether the Claimant had been expelled as defined by section 46 EqA, that the way the claim was pleaded in the ET1, whether his dismissal was caused by the alleged discrimination was part of the claim for compensation and not a liability point. Counsel for the Respondent referred to this giving rise to 'legal complexities' which he felt it was not necessary for the Tribunal to 'delve' into. He referred to section 46 EqA referring to an 'apparent constructive termination' and he referred to the similar wording under section 95 Employment Rights Act 1996, which provides for an unfair constructive dismissal situation. Counsel for the Respondent referred the Tribunal to the authorities of **Flanagan v Lion Trust Investment Partners LLP and other [2015] EWHC 2171 (Ch)** and **Roberts v Wilsons Solicitors LLP and others [2018] EWCA Cave 52** in support of his submission that there is no concept of a repudiatory breach of an LLP, at least where there are more than two members. He invited the Tribunal not to include this issue within the issues to be determined but rather deal with whether the Claimant 's resignation was a new intervening act which broke the chain of causation when determining remedy only. This hearing it had been agreed, would deal with issues of liability only.

23. Counsel for the Claimant, argued that there was merit in the expulsion argument under section 45 and 46 EqA. If it was correct that there was no right to pursue a section 45/46 EqA claim, then he questioned the purpose of including those provisions within the EqA. Counsel argued that Roberts and Flanagan were concerned with common law concepts of breach, whereas with the EqA, the Tribunal is concerned with statutory rights and concepts.

24. Neither counsel were able to produce any case authorities which address how section 46 EqA should be interpreted in light of the authorities of Flanagan and Roberts to assist the Tribunal.

25. The Tribunal invited counsel for the Respondent to address it on the function of section 46 EqA in light of his arguments that there can be no concept of constructive expulsion, to which he referred to the possible exception of an LLP with only two Members.

Decision - expulsion

26. After deliberating, on the morning of the second day of the hearing, the Tribunal considered the pleaded case and that para 29 of the ET1 while not expressly using the word 'expulsion', included all the core components of the complaint. Further, at the Preliminary Hearing on the 17 January 2020, there was discussion about the claim under section 45 (2) EqA and the parties it is recorded, agreed that this needed to be inserted into the list of issues for the liability hearing. The Tribunal determined d that the claim was part of the pleaded case, it had been agreed that this issue should be

included in the list of issues for the liability hearing and rather than delay the hearing further by hearing submissions on what Counsel for the Respondent accepted was a 'complex' legal argument, determined that this should be addressed in submissions at the end of the hearing. Both counsel were in agreement that it would not impact on the evidence the Tribunal would have to hear or the length of the hearing.

Medical Evidence

27. At a Preliminary Hearing on 17 January 2020 the Respondent conceded that the Claimant was disabled within the definition of section 6 of the Equality Act 2010 however it did not admit to the extent and effect of the Claimant's condition at the relevant time. The Respondent was only prepared to concede that the Claimant met the definition under section 6 from the end of 2016 onwards. The Claimant confirmed that it did not seek to rely on any alleged acts of discrimination before late 2016.It was agreed between the parties that the issue of the extent of the disability was relevant only in terms of whether the Claimant suffered a disadvantage and in respect of remedy.

28. The parties agreed at the preliminary hearing that reports from the Occupational Psychologist, Dr Laher should be included within the agreed bundle and that as the Claimant had indicated that he wanted to obtain a further report from Dr Laher, the Respondent should be able to obtain their own report. The parties agreed that a medical report to deal with causation in terms of the personal injury claim would be a matter for a remedy hearing. The parties were asked to consider by the Tribunal whether a further report was required for the liability hearing in circumstances where the Claimant would be giving evidence about the impact of his condition. The parties were referred to the Presidential Guidance on general case management and the guidance of the EAT in **De Keys Ltd v Wilson 20001 IRLR 324**; that where independent medical reports are to be instructed it is preferable for there to be a joint instruction. The hearing was adjourned to allow counsel for both parties to take instructions and try and reach agreement. On reconvening both counsel agreed that the existing reports were sufficient and further medical reports would not be required for the liability hearing.

Further Preliminary Matters

Indirect discrimination claim

29. On the morning of the second day of the hearing counsel for the Claimant informed the Tribunal that the Claimant was not pursuing the claim of indirect disability discrimination pursuant to section 19 EqA and that claim is dismissed on withdrawal.

Conduct during the notice period

30. The Respondent's witness statements included evidence relating to events of alleged misconduct during the notice period. By agreement between the parties, the Respondent withdrew that evidence and relevant paragraphs of the witness statement were removed by agreement between the parties.

Past Conduct

31. Counsel for the Claimant initially objected to the Respondent's witnesses giving evidence about the Claimant 's conduct prior to the date it is agreed he became

disabled and the period his claims cover. However, the claim includes a claim of discrimination arising from his disability (section 15). The Claimant does not assert that he was disabled for the purposes of section 6 before November 2016 but it is for this Tribunal to determine whether any issues with his behaviour arose out of his disability or whether this was his 'normal' behaviour and thus not a symptom or effect of his disability. The objection therefore was not upheld and the Tribunal determined that the evidence was relevant to the issues in the case and in particular the section 15 claims.

Holiday Pay

32. The Claimant withdrew on the second day of the hearing, the claim for 5 days unpaid holiday pay accrued during the notice period.

PCP 2: Requirement to work as managing Partner (MP) of the Derby office

33. There was discussion on the first day about PCP 2. The Respondent at the Preliminary Hearing on 17 January 2020 asserted that it had made attempts to remove the MP role from the Claimant in March 2017 but allowed him to retain the title. Counsel for the Claimant explained that the Claimant did not accept the offer was made in March 2017 and even if made, would not remove the disadvantage. Counsel indicated that he would take instructions on whether the Claimant was seeking to amend this part of the claim. On the second day after taking instructions, it was confirmed that the claim would proceed as pleaded with no application to amend.

Comparator- direct discrimination claim -section 13

34. On the first day of the hearing there was discussion about the appropriate hypothetical comparator. The Claimant sought to argue that the appropriate hypothetical comparator was someone with a mental impairment, given how broad that term is counsel was invited by the Tribunal to consider whether the comparator should have the same/similar condition as the Claimant's. The Claimant proposed a refined definition of a hypothetical comparator as set out in the list of issues.

Reasonable adjustments: PCP – comparative disadvantage

35. On the first day of the hearing in discussing the list of issues, Counsel for the Respondent confirmed that the Respondent does not take issue with the comparative disadvantage of the PCPs, this is not a matter therefore in dispute which needs to be determined by the Tribunal.

Issues

36. Following the discussion on the first day about the issues to be determined by the Tribunal, by the second day of the hearing the issues which were still to be finalised included the description of the hypothetical comparator for the purposes of the direct discrimination claim and the legal basis for the holiday pay claims. Counsel for the Claimant requested further time in which to take instructions on the holiday pay claim and counsel for the Respondent had no objection. It was agreed that the finalisation of those remaining issues should not prevent the Tribunal starting to hear the evidence.

37. On Wednesday 2 December 2020 the Tribunal was provided by the parties with a final agreed list of issues prior to submissions on Monday, 7 December 2020 which included the position on holiday and a revised definition of a hypothetical comparator.

Clarification of PCP 4 and 5: substantial disadvantage

38. Following submission on the last day of the hearing, Counsel for the Claimant referred to the substantial disadvantage in connection with PCP 4 being a 'reputational issue' and PCP 5 a 'stigma' issue. During deliberations, the Tribunal reminded itself of the issues which needed to be cross referenced to replies to the further and better particulars of the claim, and in light of Counsel's oral submission, considered it necessary to seek clarity from the Claimant about the substantial disadvantage he seeks to rely upon.

39. The disadvantage set out in the further and better particulars **[p.75]** in respect of PCP 4 (disciplinary process) is that; "the *Claimant's mental impairments were greatly exacerbated by Respondent's decision to follow and implement a formal disciplinary process and his recovery was hindered"*

40. The disadvantage set out in the further and better particulars **[p.75]** in respect of PCP 5 (suspension) is that; ""*the suspension and lack of information greatly exacerbated the Claimant 's mental impairments and hindered his recovery."*

41. The Respondent had admitted that PCP 4 and 5 placed the Claimant at the pleaded substantial disadvantage.

42. Solicitors for the Claimant confirmed in writing following the hearing, that the substantial disadvantage for PCP 4 and 5 remained as pleaded and that comments by Counsel were intended to amplify those pleadings (i.e. matters which caused or contributed to the negative effect on the Claimant 's health) not to amend the pleaded case.

43. The Respondent replied that the first question is whether it is open to the Claimant to withdraw or alter submissions and if not, the disadvantage for which the Claimant argues (i.e. reputational point and stigma point) are not ones which had been admitted by the Respondent and that the Tribunal would therefore need to determine whether therefore any reputational or stigma points placed the Claimant at a substantial disadvantage in comparison with a person who was not disabled and, whether the Respondent knew or ought to have known of those disadvantages. The Respondent argued that there was no such disadvantage, the Claimant did not mention any such points in his evidence, Dr Laher makes no reference to it, there is no evidence that even if such points were present that they would affect the Claimant any more than a non-disabled person and there is no evidence the Respondent knew or ought to have known of such disadvantages.

44. Further, the Respondent submitted that if the Claimant is permitted to withdraw or alter his oral submissions, the Tribunal still needs to determine in the light of the way the case is put, the nature and extent of the disadvantage and whether the suggested adjustments were reasonable.

45. The Respondent further argues that at the time of suspension the Claimant had been certificated as fit to be at work and no previous medical advice suggested that the Claimant should be spared from procedural norms and the suspension and subsequent disciplinary procedure was anticipated to be for a short period of time

pending investigation but extended by the Claimant's request for the parties to engage in without prejudice discussion and was treated confidentially.

46. The Tribunal accept the Claimant 's clarification that counsel was seeking to amplify not amend the pleaded case. The Respondent Counsel raised no objection at the time when Counsel for the Claimant was making his oral submissions and did not enquire or protest that the Claimant was attempting to amend the pleaded case and made his submissions on the case as set out in the list of issues. The Respondent is not therefore prejudiced by the clarification of the pleaded case. The Tribunal have therefore proceeded to determine the issues in accordance with the list of issues agreed between the parties.

Evidence

47. The Tribunal heard evidence from the Claimant who was cross examined. The Claimant did not call any supporting witnesses.

48. The Tribunal also heard evidence from the following witnesses on behalf of the Respondent; Colin Flanagan, Chairman, Charles Powell, Partner and Head of Risk and Compliance, Paul Thorogood, Partner and the Respondent's Compliance and Officer for Legal Practice, Karl Jansen, Partner and at the relevant time Head of Corporate, Carole Wigley, HR Director, Julian Middleton, Partner, Deputy Chairman and National Head of Employment, Darren Williamson, Partner and National Head of Real Estate , Janet Rhodes, Partner and Managing Partner of the Derby office since 1 April 2019, Jonathan Jefferies Commercial Litigation Partner, Jonathan Hambleton, Partner and Joint Head of the National Corporate Department and Managing Partner of the Milton Keynes office, Lean Arnold, Partner and Head of Corporate in the Oxford Office. The Respondent had exchanged a witness statement for Ms Sarah Foster, Partner and Head of the Private Client Litigation team in Oxford and Managing Partner of the Oxford office however the Respondent chose not to call her to give evidence and did not apply to include her statement into evidence. No objection was raised by Claimant.

49. The Tribunal also heard oral submissions from counsel. Additionally, both counsel submitted detailed and lengthy written submissions.

50. There was a Tribunal bundle consisting of 3 lever arch files and 1374 pages. On the morning of the first day of the hearing the Tribunal was presented with some additional documents which formed a supplemental bundle 4 consisting of pages 1137a to 1137u.The Tribunal have also considered its own written records of the proceedings.

Findings of Fact

<u>Background</u>

51. The Claimant joined the Respondent as a Salaried Partner in the Real Estate Department in 1999, becoming an Ordinary Member of the LLP in 2004. It is not in dispute that the Claimant became Managing Partner of the Derby office in 2008 (according to the agreed chronology).

52. The Claimant 's evidence which is not disputed, is that when he joined the Respondent the turnover for the Derby office was approximately £200,000 to £300,000 per annum. In the financial year ending March 2018, the turnover for the Derby Real Estate Team was £2,690,489 against a budget of £2,133,666.

53. The Claimant was recognised by the Respondent as a high performing Equity Partner. He had personally billed £1.14 million for the financial year ending 31 March 2018. The Chairman Mr Flanagan touched on the preferred model of an Equity Partner namely someone who creates a high performing/billing team rather than the measure of a Partner's financial success being the level of his own personal billings however, that aside, it is not in dispute that the Claimant was successful in terms of his financial contribution to the Respondent and the client base he had built up and the reputation he had established, both his personal reputation and that of the Derby Real Estate team. Ms Rhodes in cross examination accepted that the Claimant was a "*phenomenal driver of business*" and "*an exceptional talent at bringing clients in and bringing in fees".*

54. The undisputed evidence of the Claimant was that he had been the Respondent's highest billing Equity Partner for five consecutive years from 2013/2014 to 2017/2018, from one of the smallest offices in the business. He routinely had chargeable hours in the region of 2500 to 2600 per financial year against a target of 1400, with an additional 200 to 300 hours a year spent on business development**.**

55. The Claimant 's own evidence is that he demanded a lot of himself, that he had high professional standards and expected those working with him to have the same high standards he set himself.

56. The Claimant would however, experience what the Occupational Health (OH) Dr Laher, Clinical Psychologist described as "*burn out*". The impact on the Claimant's mental health was significant and that is not in dispute. The Respondent accepts that the Claimant was disabled as defined by section 6 of the Equality Act 2010 from November 2016 by reason of an Adjustment Disorder with Mixed Anxiety and depressed mood and that the Respondent had knowledge of that disability from that date.

57. The Claimant's case relates in essence not only to the arrangements the Respondent put in place on his return to work following periods of time off work, and an alleged failure to make reasonable adjustments but also the treatment he received following his behaviour at a Real Estate conference (Conference) on 18 June 2018 which lead to his suspension and disciplinary action.

58. The Claimant complains that the Respondent made his position untenable. As he explained at the Tribunal hearing during cross examination, his case is that he been undermined and that the Respondent wanted to '*get him out'* and the incident at the Conference was an opportunity for them to do so. He believed that the Respondent was attempting to engineer his removal from the business from March 2017 onwards.

59. In terms of which individuals specifically within the Respondent were 'engineering' him out of the business, he identified those under cross examination as; Mr Colin Flanagan, the Chairman, the Members of the FSC, Mr Hambleton, and Ms Carole Wigley, the Human Resources Director. The Claimant did not however positively assert that there had been a conspiracy between Mrs Wigley and Mr Flanagan to engineer his removal in circumstances where he had not been a party he explained, to their discussions.

60. The Claimant under cross examination explained that he believed that it was evident from an email sent by Ms Wigley on 13 September 2017, that she wanted him 'out' at the latest, from this date and Mr Flanagan from March 2017 when the Claimant did not step down as Mr Flanagan had wanted him to, as the Managing Partner.

Organisational structure of the Respondent

61. The Respondent is not a traditional Partnership. All the members are co- owners of the business, the members are not employees of the Partnership. The rights and obligations of the Members are set out in the Member's Agreement dated 23 May 2013 **[p.127-196]**

62. It was the Claimant's evidence that Mr Flanagan who is the Chairman, is viewed by the Respondent as the 'boss'. He joined as the Chief Executive Officer but was later replaced and appointed Chairman. The Claimant accepted that it was probably the case that legally under the Respondent's constitution, Mr Flanagan could not tell other Members what to do however in practice that was how the Respondent operated.

63. The Claimant accepted that no one within the Respondent was compelling him to work any particular hours, he was not required to work a certain number of hours and could he accepted have worked from 10am to 3pm if he wanted to however, he "*enjoyed working*." It is not in dispute that he had control over the hours he worked and that he was ambitious and had a very strong work ethic.

Members Agreement: 23 May 2013

64. The Respondent has a Members Agreement dated 23 May 2013 **[127 – 165].** This Agreement defines Misconduct as follows; **[134];**

> **"***means any act of omission involving a deliberate attempt to harm or utter indifference to or knowing disregards of the consequences of any act or omission, or the wilful default in relation to any duty or obligation, including any duty or obligation under this Agreement or any criminal act (other than a criminal offence for which the maximum penalty is a fine or penalty payment).*

65. The Members obligations and duties are set out at paragraph 10 and provide that each Member shall at all times comply with obligations including;

> *"10.1.4 conduct himself in a proper and responsible manner and use his best skill and endeavour to promote the Business"*

66. The Retirement provisions are set out at paragraph 19 and the relevant provisions are at paragraph 19.1 and 19.2;

> *"19.1A Designated Member may resign his designation upon giving notice to the LLP and to the other Members such notice to take effect forthwith save that in the event that such resignation would reduce the number of Designated Members at the LLP to one then the notice shall not take effect until the Voting Participators shall have appointed a new Designated Member to fill the vacancy to be created by the said notice.*
>
> *19.2 Subject to clause 19.4, if any Member shall give to the LLP and to the other Members notice of his intention to retire from the LLP then on the expiry of the notice the Member shall retire from the LLP provided that: -*
>
> *19.2.1 in the case of an Ordinary Member such notice shall be of a duration of not less than twelve Months…"*

67. The provisions which deal with Expulsion are set out in paragraph 20 and the relevant provisions are;

"20.1 If any Member shall:

20.1.1 commits any grave breach or persistent breaches of this Agreement; or

20.1.4 be guilty of any conduct

20.1.5 be guilty of any conduct likely to have a serious adverse effect upon the Business;

then the LLP may be notice in writing given to the Member concerned be entitled to expel that Member from memberships of the LLP either immediately or, at the option of the LLP, upon the expiry of a period specified in the LLP's notice.

20.2 If any Member shall (in any circumstances other than those falling or deemed to fall within 20.1 above):
20.2.1 commit any material breach of this Agreement; or
20.2.2 be guilty of any conduct which to a material extent may be inconsistent with his position as a Member of the LLP; or
20.2.3 be guilty of any conduct likely to have a material adverse effect upon the Business

Then the LLP may be notice in writing to the Member concerned placed on record for such period as is specified in the notice (but not exceeding 24 months) a reprimand and warning as to future conduct."

Management Document 12 October 2016.

68. The Appendix F **[189]** to the Management Document sets out the Members Capability, Disciplinary, Retirement and Expulsion Procedure. It is not in dispute that Appendix F is not contractual and includes the following provisions;

Initial Procedure and Investigation

4.1 Any matter of concern which may fall to be considered under this procedure should be raised with a Designated Member or the Chairman

4.2 If the ***Designated Member or the Chairman*** *considers that a matter requires further investigation or consideration under this procedure, that person will convene a* ***"First Sub****Committee****"*** *consisting of three Designated Members* ***or*** *the* ***Chairman and two Designated Members.*** *The First Sub- Committee will conduct such investigation as it considers appropriate,* ***and shall delegate any relevant part of that investigation to one of its members it is felt that examination by the whole of the First Sub-Committee is inappropriate…***

4.3 The purpose of an investigation is to establish a fair and balanced view of the facts before deciding whether to proceed with a capability or disciplinary hearing…

4.5 Members are expected to co-operate fully in any investigation. The amount of investigation required will depend on the nature of the allegations and will vary from case to case.

4.6 At the conclusion of the investigation, the First Sub- Committee will meet and decided either to close the matter or proceed to a ***capability or disciplinary hearing****.* [Tribunal stress]

69. Designated Members are defined as; "*means each of the Nominated Members and two other Members appointed from time to time by the Management Board (one of*

whom shall *be the LLP's Compliance Officer for Legal Practice for the time being if not one of the Nominated Members)."*

70. There are five Designated Member in the respondent, three are elected annually and two other Partners appointed by the Management Board from time to time to serve as Designated Members.

Suspension

71. Suspension is dealt with at paragraph 5;

> *5.1 In cases of alleged* ***gross misconduct or in any other case where it is in the interests of the Member or the LLP*** *it may be necessary to suspend a Member while an investigation or other procedure is ongoing. A decision concerning suspension will be taken by the First Sub- Committee, at any time after that Sub-Committee is convened. The suspension will be for no longer than necessary and will be confirmed in writing …*
>
> *[Tribunal's own stress]*

72. The disciplinary hearing process is dealt with at paragraph 6.1;

> *6.1 Following an investigation where it is decided to proceed to a capability or disciplinary hearing, a "Second- Sub- Committee" will be convened to consider this matter. The Second Sub-Committee shall be three Members* and shall not include any of the members of the First Sub-Committee"
>
> *[Tribunal's own stress]*

73. There is what is referred to as Emergency Action at clause 12;

"… *the Chairman will be entitled to make reasonable adjustments to the procedures where it is deemed, at the Chairman's discretion, to be in the interests of the LLP to make such adjustments…"*

Holiday

74. The Members Agreement provides that the Accounting Year **[p.129]** means a year ending on a Year End Date which is further defined as **[p.136]** as 31 March or such other date as may be determined in accordance with the provisions of the Members Agreement. It is not in dispute that the Accounting Year is 1 April to 31 March of each year.

75. Paragraph 11 of the members Agreement provides at para 11.1.2 [145] that An Ordinary Member shall be entitled to 33 days leave in each Accounting Year in addition to statutory or public holidays. It also includes the following provisions;

"11.3 Member shall not be entitled to carry forward untaken holiday leave from one Accounting Year to the next except as otherwise agreed with the Chairman…"

The Solicitors Code of Conduct

76. The Solicitors Code of Conduct sets out a number of Principles which include;

> *"You must:*
> *2. act with integrity;*

6. behave in a way that maintains the trust the public places in you and in the provision of legal services;

9. run your business or carry out your role in the business in a way that encourages equality of opportunity and respect for diversity

77. The Guidance further provides:

"Principle 9: You must run your business or carry out your role in the business in a way that encourages equality of opportunity and respect for diversity.
2.14

Whether you are a manager or an employee, you have a role to play in achieving the outcomes in Chapter 2 (Equality and diversity) of the Code. Note that a finding of unlawful discrimination outside practice could also amount to a breach of Principles 1 and 6"

78. Compliance officers for legal practice (COLPs) have duties and responsibilities which include the requirement to take all reasonable steps to:

"*ensure that a **prompt** report is made to us of any **serious** breach of the terms and conditions of your firm's authorisation, or the regulatory arrangements which apply to your firm, managers or employees": Guidance – SRA*
[Tribunal's own stress]

Structure

79. The Members of the Respondent it is not in dispute, are co-owners of the business. The Claimant was an Ordinary Member, and not an employee. The Claimant accepted that under the Membership and Members Agreement one Member cannot instruct another Member what to do however, in practice the Claimant's gave evidence that this happened and he referred by way of example to Mr Williamson telling him he was suspended and that Mr Flanagan was in practice perceived to be the 'boss'. He accepted that the Respondent operates through various boards and committees including the Management Board.

The Claimant 's behaviour: before 2016

80. The Derby office at the relevant time, included approximately 30 staff working on one floor in an open plan layout.

81. By late 2015 the Respondent was aware that the Claimant was having problems with his mental health. Ms Wigley's evidence was that she was told by Katherine Pountney, a member of the HR team based at the Derby office, that the Claimant had confided in her that he might be on the 'verge *of a breakdown'.* Ms Wigley reported this to Mr Flanagan.

82. It is common between the parties that Ms Wigley arranged professional coaching for the Claimant, during the period December 2015 to December 2016 by Mr Dorling **[p.1199-1204**].

83. It is not in dispute that the business coach attempted to contact the Claimant after December 2016 but that the Claimant did not respond. The Respondent's evidence is that this was in January 2017. Although the Claimant could not recall the date, he

accepted Mr Dorling tried to contact him but that he was struggling with his mental health by this stage and business coaching was not what he needed.

84. Ms Wigley's evidence is that the Claimant was showing signs of being 'agitated' and struggling to cope in around the Autumn 2016.

85. The evidence of Ms Janet Rhodes, who worked with the Claimant in the Derby office, was that she had become aware of issues with the Claimant's manner and his behaviours a long time prior to 2016. She referred to there being a more historic issue with his management style, a style she did not approve of. Under cross examination Ms Rhodes confirmed however that her evidence was not that before 2016 there was a '*clear* pattern *of bad behaviour'* by the Claimant in the office and she confirmed that she was not aware of any formal complaints made about his behaviour. She also accepted that before 2016 the Claimant was warmly regarded in the office and was looked *up* to however, her evidence was that in 2015 he had become a 'different person', not as measured in his behaviour with people, not as jovial around the office and not as tolerant. She believed this change came about in mid to late 2015 although she had not mentioned this in her witness statement.

86. In re-examination Ms Rhode's evidence was that incidents with regards to the Claimant 's behaviour had taken place "*certainly over the course of the previous 7 to 8 years, from 2010 or 2011 onwards*" and described those behaviours as the Claimant micromanaging people, that he would delegate work to the team members but would not always leave them to get on with it. In elaborating on this she stated the Claimant wanted things done in a certain style or elements of it, conceding that there was nothing wrong with that as long as it was not extreme. She accepted in cross examination that she could understand why people would want to know what was going on with their matters but there was an element of the Claimant wanting to take control of and not trusting his team. She accepted that it was acceptable to expect quality and accuracy but not to require that everyone should adopt a particular style but conceded that there was more than one school of thought and accepted that she could understand why a client with a multi-million-pound transaction, would want the Claimant doing it. She alleged not only a degree of over management by the Claimant but irritability with people and a lack of tolerance.

87. Ms Rhodes went on to allege that she had been approached by various people over the years wanting to talk to her or to cry, concerned that they were not pleasing the Claimant, felt they had displeased him, they were not allowed to develop, suffered raised voices and occasional swearing. She further alleged that on more than one occasion she had spoken to HR and Mr Flanagan but was not aware of what action if any was taken. She described the Claimant as a very successful lawyer, very senior and very *influential* in the Derby Market who brought in a lot of work to the Derby office. She did not however identify what concerns specifically had been raised with her, by whom or indeed what concerns she had referred to Mr Flanagan or when.

88. In support of her contention that the problems with the Claimant 's management style were *more* longstanding, Ms Rhodes referred to comments in exit interviews by former colleagues included within the bundle. She referred to the exit interview of Tertia Werry [p.1205] who had left the Respondent in May 2016. Within her interview it records that when asked to describe the morale at the Derby office she stated;

"*Derby – horrendous. Awful at Christmas. Left a scar – damage has been done".*

89. Ms *Rhodes* referred to the Christmas in question being December 2015.

90. Mrs Rhodes also referred to Charlotte Bowman's exit interview **[p.1211].** Ms Bowman left the Respondent on 25 November 2016 and within her interview notes she makes various *comments* referring to the Claimant. She refers to hearing the Claimant "*having a go at people*" and this being the thing she enjoyed the least about the role. When asked what she thought the Respondent does poorly, her response was; "*manage Mike*". The notes record when asked how to improve morale, her response was; *"Don't know! (Mike)"*

91. Ms Rhodes also referred to a document (p.324) created in August 2017 by Katherine Pountney which is alleged to record concerns raised with Ms Pountney over 'recent months/years' by a number of individuals (to which the Tribunal will address further below). Ms *Pountney* who compiled this document did not give evidence before the Tribunal and *there* are no contemporaneous documents recording the concerns at the date they are alleged to have been raised.

92. During cross examination of Ms Rhodes she conceded that; Matthew Shakespeare had emigrated to Canada. Teria Werry wanted to work in Nottingham after travelling to Derby for some time. Sam Shephard moved office to be closer to her family and Ross Condie had always wanted to work in London and moved to do so. These individuals the Tribunal find did raise negative comments about the Claimant however the Tribunal also find that the Claimant was not the sole reason for their decision to leave the Respondent, albeit it may have been a factor. We also find however, that other than informal discussions, there was never any formal action taken regarding any concerns with the Claimant's behaviour in the office.

93. Ms Rhodes also referred in her evidence to the Claimant's use of a pointing stick (cane) when amending documents with his Secretary, Ms Bull. Ms Bull had worked as the Claimant's secretary for 12 years. This was the Tribunal find, clearly mentioned by Ms Rhodes as an example of controlling behaviour. The Claimant did not dispute that he used such a stick but his evidence was that it helped him when working with Ms Bull on documents and prevented the need to lean across her. It was not alleged by the Respondent that Ms Bull had ever complained about this. While this may have looked unusual to others in the team, the Tribunal do not find that this of itself, is evidence of a controlling or inappropriate management style. The Claimant under cross examination gave evidence that he had a negative attitude and management styles as a consequence of his illness and that otherwise, he was generally a very positive person. The Tribunal find on a balance of probabilities that the Claimant was driven and that his style may well have been at times challenging if not overbearing for some who worked with him but that the Respondent condoned it, or at least was prepared not to take any formal action to address or moderate it, and that the most likely explanation is because the Claimant was so successful.

94. While the Claimant does not accept the criticisms of his behaviour the descriptions of the Claimant having exacting high standards, of a lack of trust in others and a need for control is consistent with the comments which would be reported by Dr Laher as the Claimant's own description of his behaviours in the report of 11 September 2017;

"He acknowledges that he has been very driven and has set himself and others who work with him, high standards. He acknowledges that he has tended to over-manage *others, partly driven by a sense of not wanting to fail and not wanting to let down clients." [p.356]*

95. The Tribunal accept his evidence which is consistent with the feedback in some of the exit interviews and Ms Rhodes evidence, that over Christmas 2015 he was "spinning plates", he had a multi-party transaction worth tens of millions of pounds

and he was overwhelmed and was "*drowning with work".* However, the Tribunal find that his behaviour became more difficult and his mood depressed from the end of 2016 when he started to suffer more obviously with his mental health.

96. The Tribunal therefore find that the Claimant was on a balance of probabilities, someone who expected high standards of performance and commitment and displayed a lack of tolerance or annoyance towards those who he felt were not sufficiently dedicated or performing to the standards he expected and that more likely than not, certain colleagues and in particular junior colleagues, would have found that at times unpleasant to work with. The Tribunal find that those behaviours became more pronounced however from the end of 2016 onwards when the Claimant began to have difficulties coping with his mental health. Dr Laher in the 11 September 2017 records the Claimant 's observations as follows;

"In the context of his recent stress and anxieties he acknowledges that he may have over management people in a way that may have been perceived as negative or not trusting" [p.358]

And

"The client acknowledges that, ***historically he has been*** *over dedicated to his work to* the *detriment of developing a home/social life and relaxing away from work" [p.356]*

Claimant's normal working arrangements

97. The Claimant described to the Tribunal a normal working day prior to his ill health, would be arriving at the office by no later than 7:00 am, he would take a five minute walk at lunchtime and eat his lunch at his desk while working. He would leave the office at 6 pm and continue working at home between 8 pm and 10 pm and work again on Sunday evening.

98. It is common between the parties that the work that the Claimant carried out was complex and high value property development and investment transactions and there is no dispute that he was successful at what he did.

99. In terms of the role of Managing Partner; the undisputed evidence of the Claimant was that Janet Rhodes was responsible for the staffing issues in the Derby office, and that he did not consider that the role of the Managing Partner was an onerous one.

100. It is not disputed that the Claimant had a heavy workload and generated, a very high level of personal fee income. The Tribunal were not presented with any evidence that measures were taken to monitor his working hours prior to around this period. He was the Tribunal find, left to manage his own time and if he chose to work long hours and not take annual leave, there was no mechanism for monitoring that.

101. Mr Flanagan on 24 February 2016, sent an email to the Claimant and Janet Rhodes, in response to concerns about the morale within the Derby office. It set out some agreed steps to address the morale problems including weekly meetings between the Claimant and Ms Rhodes and reinstatement of monthly meetings for the Real Estate lawyers. Mr Flanagan within that same email made the following comments concerning the Claimant and the work he was undertaking [**p.206];**

*"**Everyone in the office accepts that Mike is working under considerable pressure** and the general desire is to support him. With a relatively small-time*

commitment involved in the above, should be able to get everyone pulling in the same direction and (hopefully) happier and more productive"

"…We have to accommodate the fact that people have a need to feel loved (not just paid to do a job), and we are both committed to helping you have an effective team, for you benefit as much as anything else. ***Janet and I are both on your side, we note any shortcomings in achieving the above up to now is down to the incredible workload you are carrying, which really is exceptional requiring immense personal sacrifice from you (and Sally!)"***

[Tribunal Stress]

102. The reference to Sally is to the Claimant 's wife.

103. The Tribunal find therefore that it was clear to the Respondent that the Claimant was working under *"considerable pressure" and carrying an "exceptional workload*" and that this appeared to them to be the reason for the " shortcomings" in the morale in the Derby office.

Claimant s behaviour: from end of 2016 on onwards

104. The Claimant's evidence in chief is that in retrospect he can see that as his mental health deteriorated from 2016 onwards, his personality changed and he became a person who was easily irritated. Through the counselling and cognitive behavioural therapy he has received, he recognises that this change in his personality was a result of anxiety, depression and mental health issues.

105. The undisputed evidence of the Claimant was that his mental health began to deteriorate in 2016 and that he felt he was struggling from around October 2016.

106. The undisputed evidence of Mr Flanagan is that there is no one designated to deal with and take responsibility for a situation where a senior Partner develops significant mental health issues, but that it would be normal to raise issues with him first but that he accepted under cross examination each situation is dealt with on an individual basis and there are no formal procedures in place. Mr Flanagan referred to one of the features of the way the Respondent operates its business is to; "minimise *bureaucracy"* and support people in a less formal and "*very human way".* Mr Flanagan accepted that he did not initially consider the Claimant had a serious mental health condition because *"often"* people *"here*" are struggling with stress. He accepted the Claimant's word when the Claimant told him that he was looking after himself. Mr Flanagan gave evidence that there was an employee assistance programme in place which offers counselling and that there is a general awareness of it because it is on the intranet however, he did not personally direct the Claimant to this resource because the Claimant told him that he was accessing his own counselling via his GP.

November 2016

107. Dr Laher would later report that by November 2016, that the Claimant had been "*feeling burnt out".*

108. From November 2016, it is not in dispute that the Claimant was disabled due to his mental health condition **]**. From this date the Claimant complains that there was a failure to make reasonable adjustments.

109. It is not in dispute that in mid-November 2016 the Claimant took 7 to 10 days off work, his undisputed evidence is that he was struggling to sleep and would wake up feeling sick at the thought of the day ahead. The Claimant visited his GP who informed him that he seemed to be experiencing anxiety and depression and recommended counselling. Ultimately the client organised his own private counselling sessions.

November 2016 – December 2016

110. Mr Flanagan's undisputed evidence is that in the period running up to Christmas 2016 the Claimant became increasingly agitated, that there were discussions about the problems the Claimant was having and that he informed Mr Flanagan that he was reluctant to take the medication prescribed by his GP. The Claimant's undisputed evidence is that the period up to Christmas is always particularly busy period with client's wanting to complete on transactions before the Christmas break.

111. In November 2016 it is not in dispute that Katherine Poutney attempted to recruit into the Derby Real Estate team. The Claimant accepted he instructed her not to continue with the recruitment exercise **[p.207].** His evidence before the Tribunal was that at the time he was struggling, his mental health was going 'downhill' and he did not know what was happening to him and he was struggling to make decisions. There is an email from Ms Poutney to Mr Pickup, Director in the Real Estate team in Derby, confirming the Claimant's instructions, however Mr Flanagan intervened, he spoke with the Claimant and emailed later that day (including to Ms Poutney) referring to not wanting to be "*overstretched"* and that he had agreed with the Claimant to keep looking for suitable candidates but "we are going to have a *fairly high bar in terms of quality.".*

112. The Claimant does not complain that he was not in agreement with this decision. The fact that he had informed Ms Poutney, HR Manager, not to continue with recruitment and was then persuaded it should proceed, is supportive of the Claimant's account of his indecision and deteriorating mental health during this period. The intervention of Mr Flanagan also we find, is supportive of the Claimant's account of Mr Flanagan having some authority over the other Members/Partners and that he is prepared to intervene in decisions and has a role in overseeing the business.

113. The evidence of Ms Wigley was that she did not know who was responsible for the Claimant in terms of dealing with his health issues but; "*I can only say, not me"* because as she explained, within the LLP, she was the Claimant's employee and that; *"Partners in truth deal with their own HR issues"*. She described it as not an "ideal vehicle" and in cases like this it "*creates some difficulty*". Her undisputed evidence is that over the years it is Mr Flanagan who has dealt with Partner HR issues.

114. Mr Flanagan then took the step of contacting the Partner in the Nottingham office, Guy Winfield and Heather Davies on 23 November 2016 to discuss them providing some support to the Derby office. **[p.213]**

115. Guy Winfield emailed not the Claimant, but Mr Flanagan on 23 November 2016 and offered to attend the Derby office the following week on Wednesday and for Heather Davies to attend that same week on Monday /Tuesday and another colleague Liz Banks to attend Thursday/ Friday.

116. The Claimant accepted in his evidence, that at that time Mr Flanagan was trying to help him. The Tribunal find that Mr Flanagan was clearly prepared to be proactive and take measures to support the Claimant even in circumstances where the Claimant did not appreciate or was even resistant, initially to being provided with that support.

117. Mr Winfield in his email to Ms Banks and Ms Davies on 23 November 2016 comments that; "*Hopefully between us Mike has the comfort that there are Partners on the ground that* can *assist Ben Pickup etc until he is back on his feet."*

118. It is clear that by November 2016 the Respondent was aware that the Claimant required support.

119. By late December 2016 it is not in dispute that Mr Flanagan was trying to persuade the Claimant to take time off work. On the 22 December 2016 Mike Copestake sent an email to Mr Flanagan expressing his concerns about the Claimant **[p.220];**

> *"He is not easy to talk to at the best of times but this seemed to be on a totally different level"*
>
> *…" Mike is not the most communicative of people but underneath it all he is a decent fellow and* ***he does not deserve what might be some sort of breakdown****"* [Tribunal stress]

120. Mr Flanagan responds to these concerns **[p.221]** by informing Mr Copestake that he has been aware of the situation "*for some time"* and is "*managing it as best as I can."*

> And;
>
> "*I am reassured that all the external sources of assistance which can be engaged are engaged."…*
>
> *"Janet is fully aware and is assisting in monitoring on a day to day basis".*

121. Mr Flanagan under cross examination accepted that there were significant '*noises'* coming out of the Derby office by Christmas 2016. Mr Flanagan recalls the claimant mentioned he was taking medication around this time and he accepted that medication would have had an effect on his mental condition and "*common sense"* dictates that there would be side effects but nonetheless as he appeared 'lucid' he accepted the Claimant's word that he was receiving help from his own GP.

122. What the Tribunal find remarkable is that the Respondent had a very high performing Senior Partner who another Partner feared may be at risk of a breakdown, who was taking medication and generally regarded by his peers to be a 'workaholic', and yet the Respondent with all the resources at its disposal (not least an HR team and a specialist Employment Law department), did not take the obvious step of either engaging with Occupational Health or as a minimum, asking to contact the Claimant's GP to find out what they can do to support him and to understand his condition better. Throughout the hearing we heard reference especially from the HR Director Ms Wigley about how closely she and Mr Flanagan have worked together over the years, and therefore it is even more surprising that Mr Flanagan was not seeking her assistance or advice on what steps would normally be taken by HR when dealing with this sort of situation. An obvious step would have been to obtain a medical opinion on what exactly the 'employer' is dealing with.

123. Although there is reference to **all** external sources of assistance being engaged, at this stage, the Respondent is not taking responsibility for engaging any external support itself.

124. It is not in dispute however that prior to the Christmas 2016 break, Mr Flanagan encouraged the Claimant to take an extended break from work. The Claimant accepted

under cross examination, that now Mr Flanagan's overarching concern was for the Claimant, that he had his best interests at heart and that they were on friendly terms at this stage.

125. In event it is not in dispute that the Claimant only took one week off over Christmas. The Claimant did not follow Mr Flanagan's advice that to take an extended break off work over the Christmas period.

126. The Claimant described not understanding what was happening to him and likened it to having an injury and wanting to "*get back on the pitch*" while Mr Flanagan was he accepted, trying to keep him off it. He admitted being reluctant to taking time off because he "*liked playing the game."* He described in his evidence being reluctant to take time off as it was "*not the norm.*"

127. On the 30 December 2016 Mr Flanagan sent a forceful email to the Claimant **[p.223].** Within this email he referred to the Claimant not taking his 'advice' to extend his Christmas break and that he had spoken to a couple of the Board Members and there is a 'very strong view' that the Claimant's needs a complete break of **at least 3 weeks** in order to 'recharge your batteries'. He goes on to state;

> *"I think you should be telling your clients that you are going on holiday and simply refer them on to someone else to progress matters in your absence. The 'someone else' might be one of your team in Derby, but you also have Liz Banks. Guy Winfield and Heather Davies all happy to help. If all else fails, you can speak to Darren and he will sort appropriate cover. Having done this, then I would expect that you should;*
>
> *1)Put an out of office on your email, telling clients that they need to refer elsewhere*
> *2)Change your voicemail on your mobile to say the same;*
> *3)Having done (1) and (2) then don't attempt to get involved in any client matters*
> *…*
>
> ***As you know I always try to work by consensus and, for this reason, my wish would be for you to agree that what I am suggesting is the right thing to do. However, you should be in no doubt that this is an instruction from me. As Chairman of the firm, and not a request".*** [Tribunal Stress]

128. Mr Flanagan commented that his overriding concern was for the Claimant and that; " *There is nothing I would like more than to have you back on Monday 16 January firing on all cylinders and your old self again*."

129. The difficulty with the instruction from Mr Flanagan, who evidently felt that he had the authority to instruct the Claimant over how he managed his work and clients, is that putting aside his disability, the Claimant was known to be a highly committed individual who had spent his career building up a client base, to cease contact with client's and refer them elsewhere, Mr Flanagan must have known would be something he would have great difficulty with. While the Tribunal find the advice was well intentioned, the Claimant was clearly struggling with his mental health and a having a few weeks break is unlikely to be an effective remedy for a serious mental illness. The Claimant was taking prescribed medication which would of itself indicate that this was more than 'stress'.

130. Mr Jeffries is a commercial litigation Partner and Member of the Respondent, he has been working at the Respondent since October 1995 and based at the Derby office. The evidence of Mr Jeffries which is not in dispute, is that he provided emotional support to the Claimant during the initial period of his illness. The evidence of Mr Jeffries is that it was clear from about October 2016 that the Claimant was suffering in

terms of his mental well-being. The Claimant confided in him about the difficulties that he was having during a work related social event. Mr Jeffries had almost daily conversations with the Claimant from that point until the Claimant took time off work in January 2017. The evidence of Mr Jeffries was that it was difficult to persuade the Claimant "*to let go and take time off*" work.

131. The evidence of Ms Janet Rhodes who worked closely with the Claimant at the Derby office was that she could see that the Claimant was struggling at work from the end of 2016 onwards; that he was struggling to make decisions in the office, was changing his mind and his demeanour was different, he was subdued and a lot quieter that he had would normally be. She accepted that it had occurred to her that his mental wellbeing may not be quite right and she understood that from the end of 2016 onwards, but certainly from December 2016, Mr Colin Flanagan was aware of the issues with his health.

132. There were clear signs that what the Claimant was experiencing a serious problem with his mental health.

2 January 2017 – Forward Plan

133. The undisputed evidence of the Claimant is that he told Mr Flanagan how he was feeling and this led to Mr Flanagan sending a note to the Claimant on 2 January 2017. The note refers to their discussion the previous day **[p.225]** and sets out a 'forward plan' for 2017 which included the following suggestions;

1) To achieve a better work/life balance

2) With a view to (1) above, to limit working hours to maximum of 7:45 am to 7 pm with an objective most days of finishing soon after 5 pm is possible

3) To take a sensible break at lunch time each day of about an hour's duration

4) To take a holiday of at least one week's duration before the middle of February

5) To plan further holidays through the remainder of the year amounting to at least three full weeks taking blocks of a least a week each time

134. Within this memorandum Mr Flanagan refers to an agreement with the Claimant that he should tell his clients and refer them to someone else to progress matters in his absence.

135. Mr Flanagan accepted in cross examination that in terms of monitoring to ensure the plan was being followed, this consisted of telephoning the Claimant regularly and asking him how he was doing and feeling. There were no other specific steps taken.

136. Mr Flanagan sought to explain what the Tribunal consider was a 'light touch' approach to supervision or monitoring by stating that one aspect of the Respondent is that Partners are allowed a lot of autonomy, a plan is agreed and they are trusted to deliver it, and he accepted in cross examination that this was the approach even if a Partner has a mental impairment which appears to indicate as a feature taking on an excessive workload.

137. In terms of someone who has a medical impairment where an aspect of it is 'workaholism', Mr Flanagan's evidence under cross examination was that he was not

aware how the Respondent could control how someone is working at home; "*if you have a solution I would be interested to know*". He then went on to accept the suggestion when put to him under cross examination that one method may be to discuss with them on a daily or weekly basis what they have been doing in the evenings and review it with their consent, their emails from 6pm to 9pm. Mr Flanagan did not suggest this has even occurred to him, he felt the Claimant *'may'* have been resistant and with regards to moving to a more instructive approach stated that; "*this is where the structure of the Partnership becomes problematic*". Mr Flanagan conceded that no steps were taken to check the Claimant had put his out of office on his email when on holiday or on his voicemail. He also did not check what chargeable hours he was recording.

138. This explanation about how the Respondent operates as a reason for not being more 'instructive' however, is not consistent with how the Respondent and in particular Mr Flanagan is prepared to act and intervene when he has broader concerns. For example, he would the Tribunal find, be forceful about removing the role of Managing Partner later because of his concern about the morale at the Derby Office. He was also prepared to give a clear direction on the 30 December 2016, being prepared to move from a more consensual approach where he considers it is required. Mr Flanagan was aware that the Claimant was struggling with his mental health, was having difficulties making decisions (as he had exhibited over the recruitment decision) and was also reluctant to take a break from his work when he clearly needed it but continued with the 'light touch' supervision.

139. With regards to adjusting his hours, Mr Flanagan referred to his note as doing that and that was the; "*informality of the way we do things*" and that this is the underlying culture however he accepted under cross examination that; "*there may be times we need to intervene more"* and "*there would be times when we were more directive*".

140. Mr Flanagan also makes the following statement within this same note of the 2 January 2017;

> "***It does of course involve you booking fewer chargeable hours than in recent years*** *. I must emphasise that this is my wish for you and I'm sure will be supported by the whole Board. You have earned this ability to pace yourself going forward with the commitment you have shown over the years and, in the current financial year, you have already put in the hours and fees to more than justify your position"*
>
> *[Tribunal stress]*

141. Mr Flanagan invited the Claimant to discuss the plan and suggest changes if they are not agreed.

142. Mr Flanagan does not stipulate in this 2 January 2017 note what 'fewer' chargeable hours are expected, he is not saying no chargeable hours are expected. However he does not state within this note and nor is it alleged the Respondent stated at any other tim, that the Claimant was required to bill as many hours as he could in 2017. Within this note, Mr Flanagan is seeking to limit the hours he works i.e. from 7.45am to 6pm with an objective to finishing as soon as possible after 5pm. The Claimant in cross examination complained that the number of chargeable hours he was expected to bill was not clarified however he accepted the "*overall gist*" was to stop working so hard.

143. The Claimant's evidence under cross examination was that he had routinely in the past exceeded his targeted hours, that he had been previously set a target of 1400 and

routinely exceeded that, recording 2,500 -2,600 and that no one had been concerned about the hours he was billing until he began struggling with his mental health.

144. In 2016 **[p.1177]** the Claimant had a target of in excess of £315,000 for the f/y 2016/17. For the f/y 2017/18 the forward plan set a target of in excess of £250,000 **[p.1192]** however his actual billing was more than £1million.

145. It is not in dispute that the Claimant returned to work the week after Christmas; " *.. I was wanting to play the game and carry on working – it felt alien to me not to, so trying to carry on".*

146. Ms Wigley's undisputed evidence was that it was no later than the beginning of January 2017 when there was a total awareness within the Derby office that the Claimant was suffering with a serious mental health issue.

Meeting 9 January 2017

147. The undisputed evidence of the Claimant was that his wife and daughter were concerned about his health and on 9 January 2017 Mr Flanagan met with the Claimant at his home. The Claimant 's evidence is that the combination of discussions with Mr Flanagan, his own awareness of his illness and the concerns of his family, convinced him that he needed to take more time off work.

148. Mr Flanagan sent the Claimant a follow up note after this meeting **[p.229].** He apologised for having to be 'firm'; with him and set out a number of agreed steps;

1. *"That as of 10:00pm Monday 9 January you are on sick leave and unable to undertake any client work*
2. *That **you will** not appear in the office until further notice and clients will be notified that you are sick That you will remain available on the phone for the next two working days for any necessary briefings*
3. *That **you will** then take a complete break from at least two weeks*
4. *That, when you feel ready to return work, you will first speak to me to agree when and how that should be achieved*
5. *That you are free to ring me at any time for an update/catch up*

[Tribunal stress]

149. The Claimant accepted under cross examination that Mr Flanagan was trying to help him and was concerned about him. The instruction is very firm; *"You will".*

150. The Claimant was then away from the office from 10 January 2017 for a period of 7 weeks.

Absence 10th January 2017 - 6 March 2017

151. The Claimant was then absent from work from 10 January 2016 (although not formally signed off by his doctor, as confirmed in Dr Laher's report of 11 September 2017).

152. Mr Flanagan sent an email to all the Derby office on 9 January 2017 **[p230**] informing them that the Claimant had been struggling for a few weeks and as of that evening, would be away on sick leave and arranging to meet the Real Estate lawyers to discuss workload/ reallocations. The Claimant accepted in cross examination that Mr Flanagan put in arrangements for other lawyers to cover his work. [**p.236].** The same email included an additional note at the foot of it (which all the staff could also see) to Ms

Bull his PA, asking her to "***monitor***" the Claimant 's emails "*tomorrow*" and pass them to another lawyer to respond/deal. Mr Flanagan was giving instructions for the Claimant's emails to be diverted.

153. Mr Flanagan was not sure under cross examination whether the Claimant had consented to this email being sent out but his evidence was that because the Claimant was open about his condition, he sent the email. In response a secretary replies stating that it will not be the same without the Claimant which is obviously a positive message about how he is viewed **[p.240].** This document was however not disclosed prior to the 20 October Order for disclosure, Mr Flanagan could not explain why.

154. The Respondent did not stop the Claimant 's access to his work emails however Mr Flanagan did instruct the Claimant to change the voicemail message on his phone and instructed Ms Bull to ensure that the Claimant's out of office was activated with a message explaining that he was on sick leave and redirecting them to colleagues **[p.236].**

155. There is then a further note from Mr Flanagan to the Claimant on 10 January 2017 **[p.238].** This note set out a few practical issues which include the Claimant avoiding contact with clients and asking the Claimant not to answer calls received on his mobile unless he knows that they are not from clients or from the Respondent's personnel. He also suggests that the Claimant may want to take the opportunity to trial the medication prescribed by his doctor;

> ***"I realise that his can have a side effect of making you feel "not quite right",*** *but should help in the medium/longer term. It may be worth your going back to the doctor to update in the latest situation."*
>
> [Tribunal Stress]

156. The Claimant accepted he found it difficult to keep away from work; "yes*, as described, people described me as a workaholic – same with any 'ism' – I enjoy work – difficult to let go"*

157. The Claimant under cross examination accepted that at that time in January 2017, Mr Flanagan was doing all he could to assist him and he was not putting any pressure on him to return to work.

Medication

158. The Claimant's undisputed evidence is that during this period of absence he began taking Sertraline, an antidepressant medication prescribed by his doctor. He described the numbing effects of the medication and the difficulty that he had with it and because of the side effects he would take the medication for a period of time and then stop taking it for a number of days.

159. Mr Jeffries maintained contact with the Claimant during this first period of absence, during which he also visited the Claimant at his home from time to time. Mr Jeffries was so concerned after speaking to the Claimant on the telephone one day during this period of absence, that he drove to his home and accompanied him and the Claimant 's wife, to see the Claimant 's doctor. Mr Jeffries does not profess to have any particular understanding or experience of mental health issues, but he did provide some personal support to the Claimant during this period. The Respondent does not contend that this

was something it organised but rather it was support Mr Jeffries provided on a personal basis. The Claimant described their relationship as a professional friendship, that he was very supportive; "*John was fantastic*"

160. It is not in dispute that during this period the Claimant felt suicidal and on one occasion tried to cut his wrists and on another occasion turned the gas oven on and sat in the kitchen contemplating death. The Claimant described and it is not disputed, the enormous strain his mental health had on his family and his relationships including with his wife and son. The Claimant did not inform the Respondent of his suicide attempts and during this period there was no communication between the Claimant's doctor and the Respondent, any communication was dependant at this stage on what the Claimant was able or willing to share.

161. During this period there was still no referral by the Respondent to Occupational Health and neither had the Respondent taken ANY steps to obtain a report from the Claimant's treating doctor.

Functional effects of the condition

162. The Tribunal find that from November 2016 the Claimant's mental health was such that he was not well enough to cope with the stress and pressure of dealing with his work. In terms of further functional effects, the undisputed evidence of the Claimant is that he was struggling to sleep and waking up feeling sick at the thought of the day ahead. It is not in dispute that by January 2017 the Claimant was struggling to cope with everyday tasks, and gives the example of struggling to give a meter reading. He also struggled with socialising with people. From November 2016 he had low moods, anxiety, found it difficult to maintain sharp focus and decision making, he became withdrawn, flat and anxious and found t difficult to 'switch off'. He had difficulty coping with stressful situations and relationships.

11 January 2017: Management Board Meeting

163. A Management Board meeting took place on 11 January 2017 **[p.242].** Those attended included Mr Flanagan, and Mr Williamson.

164. The minutes of that Management Board meeting were discussed at the Preliminary Hearing on the 13 October 2020, the document had been disclosed but a paragraph had been redacted. Employment Judge Heap made an Order for specific disclosure of that page of the minutes to be provided without redaction. The relevant entries within the minutes are as follows;

> "*CSF [Mr Flanagan] referred to his note circulated and confirmed that this was a stress related issue affecting MJT [Claimant]. CFS confirmed that MJT had had discussions with his GP plus counselling and mentoring. He confirmed that he had agreed a plan with MJT* ***but this had proved inadequate*** *and MJT had subsequently deteriorated and was struggling with life in the office therefore a 2-week break had been* ***imposed*** *and a return to the office would be subject to a further meeting. From the work perspective a meeting had taken place with the Derby staff, Guy Winfield was working closely with Janet Rhodes and all MJT jobs had other lawyers working on them. Max Marrison from Sheffield was also attending Debry on a regular basis in respect of current work.*
>
> The paragraph which had originally been redacted was as follows;
>
> *"There followed a wide discussion regarding working patterns needing to be looked at and the possible position of rules forcing individuals to take holidays, having a "buddy" process to allow a colleague to pick up work load in absence etc. It was agreed that this was*

*perhaps a '**wake up' call** and that the issues needed to be looked at in more detail" [Tribunal Stress]*

165. Mr Flanagan could not explain why the minutes had originally been redacted. The 'wake up' paragraph he did not dispute, was relevant to the issues in this case. This pattern of the Respondent's witnesses having no knowledge of the reasons for the failure to disclose relevant documents or the reason for redactions, was consistent with all the witnesses who were asked about documents. The only person it appeared who may have been in a position to explain, Mr Potter was not called by the Respondent to provide an explanation.

166. The minutes refer to one measure to address the problem in the workplace being to force individuals to take their holiday.

167. The evidence of Darren Williamson, was that the Respondent had put policies in place to make sure people take their holidays and he referred to a 'general understanding' that work will be handed over to colleagues when people take holiday but that he was not aware of anything else that had been specifically put in place follow the 'wake up' call Management Board Meeting. He understood that uring 2017 and 2018 a number of well-being initiatives were introduced however he was not in a position to comment on whether any of those initiatives had been offered to or brought to the attention of the Claimant.

February 2017 - absence

168. Mr Flanagan met with the Claimant on 10 February 2017. The Claimant does not dispute that the conversation was as recorded in a note prepared by Mr Flanagan of the discussion which he reported to Mr Winfield and Ms Rhodes following his meeting **[p.259**]. The Claimant did not feel ready to return to work. Mr Flanagan had encouraged him to stay away until he felt ready and he would need to phase his return to work. The note also recorded;

"I also emphasised that he would need to take this opportunity to revise his working practices*, both driving himself less hard and also translating that to people around him".*

169. There was a clear view that the Claimant created an environment where those around him in the office felt under pressure.

170. Ms Rhode's gave evidence that during the Claimant's absence in January to March 2017, the staff in the Derby office were slightly more relaxed and the office was a lot more 'open'. The Tribunal find on a balance of probabilities, that the environment in the office was more relaxed when the Claimant was absent during this period.

171. We were taken to emails from some of the administrative staff commenting on the Claimant's behaviour in the office such as the email exchange between his secretary Ms Bill and Ms Rhodes in December 2016; "*he seems back to his normal self – curt and to the point*" however Ms Bull did also say that she had missed him.

172. The Claimant under cross examination accepted that no pressure was being applied to return until he felt fit to do so however that he found it difficult to *'let go'*.

Return to the office – 2 March 2017

173. The Claimant called briefly into the office during the latter part of February 2017 and had a meeting with Mr Flanagan on 2 March 2017 to discuss his return to work.

174. The Claimant had been supported 100% with his work by two colleagues; Mr Cooper and Ms Sephton however by early 2017, Laura Sephton had left the Derby office. It is not in dispute that the Respondent struggled to recruit to cover the position.

Return to Work Plan – 3 March 2017

175. Mr Flanagan set out the most salient parts of their discussion in a memorandum dated 3 March 2017, the content of which is not disputed by the Claimant **[p.268].** The Claimant accepted under cross examination that Mr Flanagan was trying to identify ways in which the Claimant could safety return to work. The memorandum sets out in writing what is in effect a return to work plan, which although it is not headed as such the Tribunal find that it is clearly dealing with the arrangements for his return to work.

176. Ms Wigley was not aware of this conversation which she described under cross examination as a "*relatively loose conversation".*

Phased Return

177. Mr Flanagan proposed a phased return to work, he did not dictate what this will be but made a suggestion; *"To some extent only you know how you feel, but I would suggest that you limit yourself to 3 or 4 hours per day in week one, and 5 to 6 hours in week two."*

178. Mr Flanagan also suggested that he delay or phase the announcement of his return to clients so they do not all require his attention immediately.

179. The Claimant complains that Mr Flanagan did not address who was going to support him with his workload during this phased return to work or who he could turn to if he needed help. Despite the reference in the minutes of the 'wake up' Board Meeting to having a 'buddy' system in place, no 'buddy' was identified in this document and it is the case, that it failed to set out clearly what support would be available for him, how work would be distributed and to whom and what involvement he would have in that process or oversight. The Claimant it is not in dispute found it difficult to give up control of his workload and the Tribunal find that an obvious measure to help his anxiety over his workload was to have a clear plan in place for work allocation which he felt involved in and was reassured by.

Working Pattern

180. Mr Flanagan proposed a 'permanent' change to his working pattern; "*This involves restricting the need to work very long hours, taking proper breaks at lunchtime and having 3 or 4 holidays every year when you take a complete break. You need to* ***discipline yourself to*** *do all this"*

181. The Claimant had problems regulating his own hours. He was the Tribunal find, a poor judge of what levels of work he should be carrying out and when and how to 'switch off' **[p.357];** "*He had found it difficult to switch off. He has tended to become withdrawn and he has found it difficult to share his feelings.* ***He reports that the latter has been part of his make-up historically****. He has previously tended to just get on with things."*.

182. Although he refers to the Claimant working less hours, Mr Flanagan does not inform the Claimant of any reduced expectation in his financial targets or indeed what his targets are.

Performance Review – year to 31 March 2017

183. The performance review document for the year to 31 March 2017 **[p.1187]** Included the following;

a. To achieve a better work/life balance
b. To keep my working hours under constant review
c. To take regular breaks
And generally

a. To seek to improve the morale of the Derry office
b. To maintain the profitability of the Derby office and to maintain the profitability of the Derby Real Estates team
c. To achieve a personal fee income of more than £250,000
d. …

184. The Claimant 's billing target was decreased for the financial year 2016 to March 2017 to in excess of £250,000 from the previous year as set out in the performance review documents for the year to 31 March 2016, which set his personal fee income target at in excess of £315,000 **[p.1186].** There was no performance review for 2017/2018 and nothing mentioned about the billing target for 2017/2018 in the back to work plan in March 2017.

Management of the Derby Office

185. Mr Flanagan also within the 3 March 2017 memorandum instructs that the Claimant leave the management of the Derby Office to Ms Rhodes, it is clear the Tribunal find, that this is not a change which is focused on the needs of the Claimant, but the improvement in the morale in the office. Mr Flanagan refers to Ms Rhodes who had; "… *done a very good job of running the office";*

"She has made some positive changes with regular meetings for the real estate team and being more inclusive across the office so that there is again a feel of 'one team'. I do not want this to be lost with your return and, ***putting it bluntly you need to leave the management of the office to Janet.*** *It is time to play to your strengths – winning work for the team and working with your clients – and not get involved in the day to day running of the office. Of course, Janet will consult with you on key issues".*

186. Mr Flanagan refers in his note to it being time for the Claimant to **[p.269];** *"recognise that you are entering 'the final phase of your career"* and;

"You have lost a yard of pace and can no longer expect to bang in 30 goals per season. You must drop back into midfield and don't try to cover every blade of grass of play every game. You can stay on as "club captain" but leave the captaincy on the field to someone else (i.e. Janet)".

187. Mr Flanagan also refers in this memorandum to the change in the atmosphere during the Claimant 's absence;

> *"There is also a different atmosphere in the office and again, this is a positive change. It is important that you work with Janet to preserve this. It involves you avoiding the frenetic and pressurised way of working which you are used to".*

188. Mr Flanagan was clearly not merely giving guidance or making suggestions, with respect to the wider changes in the office, he was clearly giving a firm instruction to the Claimant about the changes he wanted for the Derby office. We therefore do not accept the contention that the Claimant was completely his own boss, it is clear that despite the autonomy the Claimant had as a Member/Partner, Mr Flanagan exercised control and considered he had the authority to impose significant changes.

189. The Claimant we find, was hurt by the comments in this memorandum and understandably so not least given the state of his mental health at the time. Ms Rhodes confirmed that she agreed with Mr Flanagan's comments about how things were in the office and could understand however why the Claimant may have seen what was contained in that Memorandum as a criticism of him personally. Regardless of what appears to be an attempt to soften the blow with sporting analogies, it must we find have been a difficult document for the Claimant to read particularity given his state of mind at the time.

190. The Claimant saw this as a; *"damning critique*" on his management of the office. He interpreted the message as; "..*the office was better off without me and I was not to disrupt that when I returned*" . The Claimant considered that Mr Flanagan was more concerned with the Respondent's ranking in surveys such as the Best Companies survey than with the Claimant's mental health. Mr Flanagan near the end of the memorandum, after describing the change in the office does state;

> *"All the above Mike, is designed not only to make the office a better place to work (and no longer performing below the standards of the rest of the firm as highlighted in the latest best Companies Survey) but also given you a better work/life balance and ultimately a more rewarding time at work".*

191. We find that the message in the memorandum although these were genuine concerns and it was legitimate to address them, was communicated to the Claimant, given his mental health issues insensitively. Mr Flanagan had by this stage only his own observations and the Claimant's description of his illness by which to assess the Claimant's condition. The Respondent had surprisingly (given their HR support internally and specialism in employment law) still taken no steps to obtain any advice or guidance form the Claimant's own doctor or Occupational Health on his illness and indeed how perhaps to address these concerns in a way which was not likely to cause the Claimant more anxiety and distress.

Role of Managing Partner – PCP

192. The Claimant's evidence under cross examination is that role of Managing Partner (MP) of the Derby office was more of a leadership role and that the MP of a regional office within the Respondent's structure does not have authority to make decisions at a high level, by way of example he explained and it was not disputed, that he did not have the power to make decisions about a relocation of the Derby office. The office was 70 % real estate and his evidence was that he did not consider that it required a great deal of work to run the Derby office and he clearly did not consider the role of MP of the Derby office to be an onerous responsibility. The responsibility for staffing issues had always been dealt with by Ms Rhodes which left the role as he described it as more a figurehead requiring essentially nothing much more than his attendance at regular meetings.

193. The Claimant under cross examination gave evidence that; "*MP did not take a great deal of management – in hindsight what I was objecting to at the time – what I know now I was saying – was I need adjustments to do the role – don't take the title away - as demotion – let me carry on in the role".* He referred to not seeing the need to remove the role but that he needed support doing it however, he did not identify in his evidence to the Tribunal what support he would have required in addition to that which was provided by Ms Rhodes. The Claimant did not identify anything specifically prior to his absence in January 2017, which he was required to do as MP which put him at a disadvantage.

194. We find that from 2 March 2017 meeting, the Respondent was not applying a requirement on the Claimant to carry out the role of Managing Partner, but actively trying to prevent the Claimant from performing those duties however, he was he accepts, resistant to giving up this role. In any event, the Claimant 's own evidence is that he could perform the role and that it was not onerous, and that he considered at the time that there was; "*no need for change*". The Claimant did not identify that there were duties that he Claimant had difficulty performing as MP. The Claimant accepted under cross examination that not being the MP would not affect his ability to fee earn or impact on the client transactions he was responsible for, but that it was a status issue.

195. What Mr Flanagan wanted as communicated in his memorandum of the 3 March 2017, was for Ms Rhodes to take on the role of MP i.e. the 'Captaincy'. We therefore find that from the date this instruction was communicated to the Claimant on 3 March 2017, the Respondent did not require the Claimant to carry out the duties of the Managing Partner.

196. Ms Rhodes evidence was that she understood she would be taking on the role of Acting MP and her evidence was that although she understood why the Claimant would find that '*difficult*' she believes the Claimant thought there was more involved in her taking over as Acting MP than was intended. The Tribunal find that it was probably from this point that Ms Rhodes began to feel her position was becoming untenable.

Return to work 6 March 2017

197. The Claimant then returned to work on 6 March 2017.

198. The evidence of Mr Jeffries was that by Spring 2017 the Claimant was in a fragile state of mind and he did not consider the Claimant to be substantially recovered by that stage.

199. Mr Jeffries refers to the support he believed had been put in place for the Claimant 's return to work however his evidence was that he felt the 'biggest hurdle' to the Claimant being relieved of any workload was the Claimant himself. He describes the Claimant as a workaholic who is not comfortable doing nothing or letting others deal with his workload including managing the Derby office.

200. The evidence of Ms Rhodes was that the Claimant did not seem very much improved on his return in March 2017.

201. The Claimant 's evidence is that on his return Ms Rhodes was; "*carrying on doing what she had always done*". He was we find resistant to the changes Mr Flanagan had wanted for the Derby office in terms of who would be responsible for the overall

management. The Claimant was not the Tribunal find, prepared to relinquish the role of MP, although there was no longer a requirement for him to carry out this role.

202. The Claimant was still however presenting as unwell to colleagues in the office and on the 30 March 2017 Diana Copestake, Partner in the Family Law Department at the Derby office wrote to Mr Flanagan by email raising concerns about his health and its impact on the office; **[p. 276];** "it *has all gone back to how it was before with micromanagement".* She also referred to the impact on in Ms Rhodes who she refers to as "*becoming really stressed with it all*" and offers her opinion;

> *"I know no one can force him to seek counselling and medical assistance but that is what, in my opinion, he clearly needs. He will implode if he does nothing and I am very concerned that he might do something silly if he does not seek help.* ***He is a nice chap but he is destroying himself and he risks destroying the Derby office".***

203. The Tribunal find on a balance of probabilities, although he has returned to work, that there was no material improvement in the functional effects of his condition.

204. It is clear that there are genuine concerns with the morale of the Derby office at this time.

205. The Tribunal find that while the Claimant had always been driven and expected high standards of his colleagues and may well have exhibited management behaviours which were unproductive and difficult for others, his mental health issues exacerbated those behaviours and we accept on a balance of probabilities, caused problems with morale within the Derby office and his working relationships. It was understandable and reasonable for the Respondent to seek to address those, for the benefit not only of the Claimant but the health and welfare of his colleagues. The Claimant complains however that he was left on his return to very much to manage his own mental health independently.

30 March meeting with Mr Flanagan

206. Mr Flanagan went to meet with the Claimant at his home in the presence of the Claimant 's wife on 30 March 2017. The Claimant found the meeting upsetting.

207. The Claimant's undisputed evidence is that he was taking medication at this time. He was taking Citroline which he was adjusting to and his evidence is that he was not able to communicate very much, that he was withdrawn due the numbing effects of it.

208. Mr Flanagan evidence under cross examination was that he was sensitive to the side effects of the medication in the way the Claimant was presenting, he referred to him as "*subdued*" but he considered the Claimant was 'lucid'. Despite knowing the Claimant was taking medication and was not behaving normally, surprisingly Mr Flanagan did not ask about the medication, what he was taking, how he was adjusting or what the side effects were. Such enquiries would have been this Tribunal find, routine for an HR professional and as Mr Flanagan effectively assumed this role for Members/ Partners these are enquiries this Tribunal would have reasonably expected someone to have made in order to understand the impact of the condition. It shows a distinct failure to really engage with the Claimant's health issues and the Respondent's obligations.

209. Mr Flanagan's evidence was that no one made enquiries about the impact of the Claimant's medication because; "it *is not for the firm to delve into medication – it is a personal matter …"*

210. Mr Flanagan under cross examination accepted that the Claimant was open about his condition and accepted that the impact of the medication on the Claimant's behaviour was important but that as the Claimant was seeing his GP they were reliant on the GP providing a report, if there was anything they needed to take into account. However, the Respondent did not request a report from the Claimant's GP.

211. The Tribunal find that as the Respondent was aware the Claimant was taking medication, Mr Flanagan observed himself that the Claimant was ' subdued' and that the Claimant was open about his condition, there was an obligation on the Respondent to make enquiries about the medication he was taking and its impact from the date that Mr Flanagan was aware the Claimant was taking medication was which was in or around late December 2016 and certainly at the latest by the date of this meeting when the Claimant was presenting as 'subdued'. It is not alleged that the Claimant was asked and refused to discuss it. Mr Flanagan was only aware that the Claimant was taking medication because he had been open enough to tell him. Mr Flanagan's explanation is not convincing and the Tribunal find that it is more likely that given how open the Claimant had been with Mr Flanagan, Mr Flanagan was not sufficiently interested or curious to make reasonable enquiries.

212. The Claimant's evidence is that Mr Flanagan told him that he was not the MP of the Debry office any more, that the office was an awful place, and that the Claimant should be '*more jovial around the office'*. Mr Flanagan accepts that he told the Claimant he should '*be more positive'* in the office even if he was not feeling positive. To give an instruction to someone with a depressive mental health condition who is taking medication (you have failed to enquire into the effects of), to in effect 'cheer up' or at least to appear to be more positive, is grossly insensitive and really the Tribunal find, quite irresponsible and reckless as to the impact on the Claimant. Mr Flanagan gave this instruction without even taking any steps at this stage to obtain advice from Occupational Health on the extent and impact of the Claimant's condition.

213. The Claimant's evidence is that his wife asked Mr Flanagan why he was being so *'brutal'*. Mr Flanagan accepts that Mrs Taplin referred to him being brutal but he recalls this being a reference to his note of the 10 January 2017 although under cross examination he conceded that his recollection may be flawed. Mrs Taplin did not give evidence however, the Claimant and his wife, the Tribunal accept were left very upset after this meeting. The Claimant's father in law who had not been present at the meeting but who had been told about what had happened, telephoned Mr Flanagan on the 31 March 2017 and made a note of his call [**p.281a- 281b**]. It is not in dispute that this note was created by the Claimant's father in law and in it he refers to the Claimant's wife being distressed after the meeting and feeling it necessary to contact Mr Flanagan. He refers to asking Mr Flanagan whether he was aware how ill the Claimant was and the impact this was having on the family. He notes that he believed Mr Flanagan to be unsympathetic and generally defensive. Mr Flanagan does not dispute this conservation took place, his evidence was that the Claimant's father in law sounded *"distressed".* Mr Flanagan was concerned about discussing anything confidential and was *"guarded"* and a "*bit uncomfortable*" discussing the Claimant with his father-in-law but denies being unsympathetic.

214. The Tribunal accept that the reluctance by Mr Flanagan to engage in a discussion with the Claimant's father in law may reasonably have been perceived as defensive and unsympathetic although we do not find this intentional. We do find, on a balance of

probabilities that Mrs Taplin did accuse Mr Flanagan of being brutal at this meeting and her view of his conduct would be consistent with the contact the unusual step the Claimant's father in law took, of contacting Mr Flanagan. The Tribunal consider that the way Mr Flanagan dealt with the Claimant was insensitive and it clearly caused the Claimant and his wife, some distress.

215. The Claimant's evidence is that his wife also asked why there had been no replacement for Darren Williamson and why the Claimant was left with no adequate support at work. Mr Williamson has been recruited by the Claimant and worked with him on transactions until March 2011 when he had moved to the Nottingham office to become Head of its Real Estate team. Lack of support for the Claimant with his work we find, was raised with Mr Flanagan.

Managing Partner

216. Following further discussions between Mr Flanagan and the Claimant it was agreed that Ms Rhodes would take over as Acting MP of the Derby office. The Claimant accepted under cross examination that he had agreed this with Mr Flanagan. Mr Flanagan sent suggested wording for an email announcement to the office, to the Claimant on 6 April 2017 **[p.289],** the Claimant responded on 13 April 217 agreeing with the principle of what Mr Flanagan was saying but he wanted to put it into his own words **[p.289].** His wording referred to Ms Rhodes taking over as Acting Managing Partner until the Claimant was "*fully recovered*".

217. Ms Rhodes was invited to the MP meetings by Sarah Foster on 25 April 2017. The Claimant found out that Ms Rhodes had been invited and he admitted under cross examination that he was unhappy about and that; "I *felt it was undermining me* ". **[[p.296].** The evidence of Ms Rhodes was that she and the Claimant had a discussion towards the end of April 2017 during which the Claimant made it clear that he was not happy about Ms Rhodes taking on the management duties and that he felt that she wanted to take his role, she did not want to 'lock horns' with him and did not therefore protest. Mr Flanagan was informed that they would be reverting to the Claimant being at the 'helm'. Mrs Rhodes evidence is that she did not have a choice about it.

218. We find that the Claimant did impose this decision on Ms Rhodes and that he did not seek her agreement. The Claimant under cross examination gave evidence that he objected to being what he saw as '*demoted'*. The memorandum to the office was not sent.

219. During cross examination the Claimant's evidence was that he was not resistant to someone helping him doing the "*day to day tasks*" in the office.He also gave evidence that the MP of the Derby office was more of a title, he was resistant to someone doing the role instead of him but not to people helping him do the tasks. However, the Claimant failed to identify before this Tribunal what support he required. He referred to someone else doing the duties and the Claimant retaining the title however, he did not allege that the duties he wanted someone else to assist with included attending the MP meetings (and indeed he had objected to that). As Ms Rhodes carried out the staffing day to day management, and he wanted to attend meetings as the MP figurehead- what was left that he needed support with? He did not identify it and it is not obvious to this Tribunal**.**

220. Mr Flanagan did not believe that the decision for the Claimant to remain as MP was made in agreement with Ms Rhodes and the Claimant under cross examination explained that he believed this was the turning point in his relationship with Mr

Flanagan, that his decision to take back the MP role was the reason why his relationship with Mr Flanagan "*went wrong".* The Claimant felt this removal as MP was being imposed on him when he was in a vulnerable mental state. The Claimant accepted that he had never explained to Mr Flanagan that he wanted to stay as the MP figurehead and for someone else to do the work of the MP however, as stated above, the Tribunal do not understand how in any event that was meant to work in practice and what duties he needed assistance with. The Claimant alleges that;

"*Mr Flanagan did not appreciate me not complying with what he wanted me to do – he was not looking for an opportunity [* to engineer him out*] but when the opportunity arose he took advantage of it – he wanted me suspected – Mr Flanagan sanctioned it"*

May to June 2017

221. The Claimant's health problems continued and on 11 May 2017 Mr Middleton expressed concern to Mr Williamson in an email **[p.298]** that the Claimant still did not seem well and was; "*Really struggling to make any kind of sense."*

222. On the 16 May 2017, Ms Wigley now became directly involved, despite Ms Wigley normally dealing with employee HR matters only and Mr Flanagan Member/Partner issues. Ms Wigley emailed the Claimant following a 'chat' they had had in early May 2017 at an event at a Hotel. Within this email **[p.300]** she touched on her own experience of mental health issues and invited him to let her know if she could help. On the 30 May she was in contact again and emailed to ask if he would **like an introduction** to an organisation who are workplace psychologists **[p.301].**

223. On 14 June 2017 the Claimant attended a Board Meeting and afterwards spoke with Julian Middleton, National Head of Employment, and John May (Managing Partner for Manchester, Leeds and Sheffield) about his mental health. It is not in dispute that Mr Middleton encouraged the Claimant to take some more time off work. Mr Middleton's undisputed evidence is that the Claimant looked unwell during the Board Meeting and when they spoke afterwards, he claimed that he was struggling generally with life and work, that in addition to work he was concerned about his marriage and an extensive house renovation. Mr Middleton's evidence is that the Claimant was reluctant however to take more time off.

224. The evidence of Julia Middleton under cross examination was that by June 2017 the Claimant was the; "*lowest I had seen him".*

225. On 15 June 2017, Ms Wigley emailed Mr Flanagan **[p.303]** raising concerns about the Claimant; "…*nothing I hear from various sources leads me to believe that Mike is on track to getting better or that his behaviour or ability to work properly is improving."* Ms Wigley referred to Jamie Cooper leaving in a short time, that they had no applications for his role and the recruiters are not positive about their chances. There was no discussion with the Claimant about what had been reported back to Ms Wigley to understand the reasons for these behaviours.

226. On 15 June Ms Wigley also emailed the Claimant asking whether he had given any thought to a workplace psychologist **[p.302].**

227. There was no meeting with the Claimant, to understand how he was coping on his return, how a report from a workplace psychologist may assist and what adjustments he felt he needed in the interim. Despite being aware that he needed to work less and

that he struggled to do so, there was no monitoring of the hours he was doing, the work he was taking on, the support he had, there was no mentoring or buddy in place or indeed any sit-down meeting and discussion with him.

228. The Claimant did not identify any adjustments he needed although lack of support had been raised the Tribunal find in the meeting with Mr Flanagan on 30 March 2017**.**

229. The Tribunal find on the evidence that the functional effects of the disability had not improved and certainly not in any material way. The Claimant was the Tribunal find still struggling to cope with the work, stressful situations and relationships and lacking in confidence and in low mood, supported by comments and observations of colleagues (see below).

230. The Claimant then took a further period of absence after only being back at work for 4 months. The evidence in relation to the period from his return in March to June in terms of what support he was given, is 'thin'. The Claimant was we find, largely left to manage his own return with no discussion about what adjustments he may require putting in place or beyond the recommendations from the return to work meeting with Mr Flanagan. Mr Flanagan did not arrange regular follow up meetings to check how the Claimant was doing or indeed any meeting. He appears to have taken a step back from the situation and Ms Wigley made it clear in her evidence, that she did not feel able to instruct the Claimant what to do as he was her employer.

Absence: 25 of June 2017 to 11 August 2017

231. The Claimant then had a second long period of absence (7 weeks) from 25 June to 11 August 2017.

232. The Respondent took some steps to arrange support for the Claimant's work during his absence. Gary Reynolds a Partner in the Real Estate Department in Nottingham confirms in an email of the 19 June 2017 **[p.307]** that he had spoken to Catherine Sharp to provide cover when Jamie Cooper leaves the Derby office;

> "I *have spoken to Catherine and she will help out in Derby on a short-term basis but has some concerns quite apart from Mike's reputation (which precedes him!)" on 19 June 2017".*

233. Mike Copestake on 27 June 2017 writes to Mr Flanagan and a number of the Partners (p.309):

> *"Since Mike came back the office has not been a happy place. It is not so much that Mike has been rude or aggressive. It is more the fact that his presence has a* ***depressing effect*** *upon the whole office as a whole.* ***He has no confidence in his own work; he is still depressed….*** *All of this is in stark contrast to the last time Mike was absent from the office and Janet was managing the office… I do think that we need to make some decisions immediately as to who is going to run the office" [*Tribunal stress]

234. On 28 June 2017, Mr Flanagan sent a memorandum to Mike Copestake copying in a number of Partners including Ms Rhodes and Julian Middleton amongst marked confidential for Derby Members and Directors only reassuring them that the Board is aware of the situation with the Claimant and;

*"Rest assured that this is **high on our agenda** and we are conscious of the need to resolve the situation in the best interests of all concerned". [Tribunal stress]*

235. It may have come back on to his agenda after Mr Copestake's email however the Tribunal find that Mr Flanagan had not taken any positive steps to try and support the Claimant during the period he was back at work after the initial back to work meeting on 2 March 2017.

236. On the 18 July 2017 **[p.312]** Ms Wigley contacted Mr Flanagan by email complaining that the Claimant is "*apparently… ringing every 5 minutes"* and *"barking orders."* She also refers to Jamie Cooper wanting to leave immediately and use his holiday and that Matthew Shakespeare is thinking about whether he wants to go on to become a lawyer but says if the Claimant is going to come back he will leave immediately. This information had been provided by Ms Rhodes. Ms Wigley did not investigate the complaints, nor did she bring these concerns to the Claimant's attention.

237. Ms Rhodes gave evidence that she had been told by members of the team, that the Claimant was ringing and quizzing them about things and barking orders at them however, she did not say who he had spoken to or on what date or gave any specifics about what had been said. Under cross examination she conceded that he had not been shouting but raised his voice from time to time when delivering instructions and alleged she had heard this.

238. The Tribunal find that on Ms Rhodes own evidence on a balance of probabilities, she had exaggerated the behaviour of the Claimant when describing it to Ms Wigley and that Ms Wigley passed on those comments without seeking to verify them.

239. Ms Rhodes confirmed under cross examination that by this stage she was now acutely aware that the Claimant 's behaviour was linked to his mental well-being but had no further information about the nature of his condition or whether he was taking medication. However, the Tribunal find that Ms Rhodes evidence is really very critical of the Claimant and she does not express much sympathy with his condition. Ms Rhodes the Tribunal find was increasingly frustrated by the Claimant and refers in her statement to his "*unwillingness to step back from the day to day decision making*" which she refers to as; " *making things impossible*.."

240. The Claimant denies shouting and barking orders, his evidence is that the person he had most contact with during this period was with Jamie Cooper who had been left to look after most of his workload but who the Claimant complains, was relatively inexperienced and required support and guidance which he was not getting. **[p1228].** There is a WhatsApp message from Jamie Cooper to the Claimant in June 2020 where he states;

"I can't remember having a meeting when I left but the work life balance thing was true. That was because you weren't around and I wasn't getting any proper support.

You'd been off, came back and then went off again. The only person who asked how I was really was Sam and Heather – the latter was basically saying how/ what clients I was acting for",

241. The Respondent does not dispute that the Whatsapp message was from Mr Cooper but does not accept that this reflects his feelings at the time. It is not disputed however that Mr Cooper was relatively inexperienced.

242. We find on a balance of probabilities that the Claimant was contacting the office quite regularly because he was not confident that Mr Cooper was receiving the appropriate support, we do not find that he was calling as frequently as Ms Rhodes complained to Ms Wigley or that he was 'barking' at people in the office. We also find that this alleged issue with his behaviour was not raised with him and that the Respondent although some steps had been taken to cover the Claimant 's work had not put it steps in place to ensure it was being dealt with at the appropriate level, at least we consider that this was the perception of the Claimant at the time. Indeed, in a later discussion he would with Julian Middleton in early August 2017, Mr Middleton reports back to Ms Wigley and Mr Flanagan that;

> *"I also think he feels he has to come back to work sooner rather than later because he does not have the support back in the office (now Jamie has gone) to do the client work in the way he wants it doing by people he would like it to be done by. Whether or not that is correct as a matter of fact I do not know, but we clearly have some work to do to reassure him on that front" [p.314]*

August 2017

243. Mr Middleton discussed appointing a workplace psychologist with the Claimant but reported that the Claimant was not prepared to engage with some further "*unfocused counselling*". On the 9 August 2017, Mr Middleton informed Ms Wigley that the Claimant wanted the Respondent to arrange this.

244. Mr Flanagan accepts under cross examination he did not contact the Claimant during this period of absence because he had agreed with Mr Middleton that Mr Middleton would take the lead in providing support to the Claimant, however he did not explain to the Claimant that he was leaving Mr Middleton to 'step into his shoes'. There was no discussion the Tribunal find between Mr Flanagan and/or Mr Middleton and the Claimant what role Mr Middleton had, no discussion or plan about what Mr Middleton's responsibilities would be or how to structure contact.

245. Mr Middleton's evidence was that he provided some pastoral support to the Claimant, but his evidence is that Ms Wigley and Mr Flanagan did "*not bring me in*". He did not take on the role of a mentor or buddy, his support was unstructured, which is no criticism of him but show a lack of real engagement by the Respondent.

246. Heather Davies on 10 August 2017 agreed to work out of the Derby office for the rest of the summer rather than Nottingham **[p.320].** The evidence of the Claimant is that Heather Davies had always been on the Derby budget although located in Nottingham, the change that she would be based out of Derby was not therefore additional support. The Claimant did not consider that her presence in Derby was a solution to the problem of adequate support and we find that although the Claimant's work was distributed and covered, there was no clear plan and the fact the Respondent was still trying to recruit indicates that more support was required.

247. Mr Middleton contacted Ms Wigley on 17 August 2017 **[p.326]** to report that the Claimant was;

"…*banging on about resource and support for his work.* ***It is now his view that this is the fundamental obstruction to his rehabilitation and successful return****. Getting Mike to appreciate and accept some personal responsibility for the reason why he has found it so difficult to build a stable and supportive team around him is a real challenge…"* **[*p.326*]** [Tribunal stress]

August 2017 - Return to work

248. The Claimant began calling into the office from around mid-August 2017, to carry out some work, mainly during the mornings.

249. The evidence of Ms Wigley was that Ms Poutney, the HR manager based at the Derby office, was not monitoring the Claimant on his return and that she was not asked to watch what was going on with the Claimant but was doing her normal role; "*to talk to staff, deal with problems, recruitment… what she would normally do*". When asked during cross examination whether she was specifically looking at what the Claimant was doing in the office, Ms Wigley gave evidence that; "*no – not a special case…"*

250. Ms Wigley gave evidence that she was concerned about Ms Poutney at the time, because she was being overwhelmed with Derby staff. The Tribunal find therefore that Ms Poutney was not tasked with monitoring the Claimant.

Adjustments on return to work in August 2017

251. The Claimant during around mid-August 2017 is now back to work albeit only working during the mornings. The only written plan setting out what the arrangements would be on his return to work is the one prepared by Mr Flanagan on 2 January 2017 **[p.225]** and the 3 March 2017 **[p.268].** There was no back to work interview and no further discussion with the Claimant about his return or indeed the current state of his health. There was no discussion about what support he needed, what help he needed to organise his workload or generally what would help to reduce his stress and anxiety. There was no consultation with the Claimant on his return in August to discuss in detail was support he needs to carry out his work as a solicitor.

252. The Respondent was putting the Claimant under no pressure to return to work and had maintained his drawings, however the Claimant had built up a successful reputation and client base, he was anxious not to jeopardise that and his continued absence was the Tribunal find, causing him anxiety in part at least because of the absence of reassurance about the appropriate type of support in place to cover his work.

253. There is no communication with the Claimant setting out in detail the plan for who would cover his work and how that was going to be managed, monitored and measured to address those obvious concerns and by 17 August 2017 the Claimant was still "*banging on"* about this and which Mr Middleton reported as what the Claimant
saw, as the barrier to his rehabilitation.

254. Mr Middleton's evidence was that the Claimant's work was redistributed amongst his colleagues but as a Tribunal we were left unclear what work had been assigned to who, who decided which clients should be supported by whom, how different levels of complexity of work would be managed and who was responsible for supervising

and what had been agreed about what and when the Claimant would be kept up to date with his clients and work. There was we find no clear plan in place which alleviated the Claimant's anxiety.

255. The Respondent was taking steps to recruit to replace Jamie Cooper who by the Claimant 's return in August had left but it is not disputed they had difficulty doing so..

256. On his return to work in August 2017 we find that there was no plan for his return; there was no fresh back to work plan. Mr Flanagan has set out some proposals back in January and March 2017 but they were not revisited with the Claimant as part of this return to work. There was no mentor or buddy appointed to support him, albeit he was receiving pastoral support from Mr Middleton. The Claimant was allowed to return to the workplace without any clear arrangements in place and the Respondent by this stage had still not seen any medical advice or guidance about his condition.

257. Mr Middleton in cross examination accepted that where there is a mentoring relationship it is a "good idea" to set out in writing what the mentor's responsibilities are and whether they are doing what they should be doing. However, he did not consider that "*facing the Claimant with something in writing he had agreed to do"* would be constructive and denying access to emails may increase a solicitor's stress. However, there was no mentor and there was no discussion about the steps the Respondent could take to help him manage his workload and reduce his workplace anxieties. There was no discussion about what work he was capable of doing at this stage and no attempt even to explore with him how to help monitor and manage his workload and alleviate the risks to his health.

Psychologists Report

258. On 21 August 2017 Ms Wigley contacted Validium to provide a psychologists report. She emphasised the urgency of the case **[p.335];**

> *"**We are having some difficulty in persuading the individual not to return to work** and he is now going in and out of the office and attempting to take back control of some of his work. The effect of his presence in the office is extremely disruptive for the other members of staff"* [Tribunal Stress]

259. Within the referral Ms Wigley referred to the Claimant; "*not regularly attending the* office *by mutual consent but he wishes to resume doing so as soon as possible."*

260. Prior to sending this referral to Validium, Katherine Poutney of HR **[p.324]** had sent to Ms Wigley a memorandum dated 10 August 2017 listing names of people who work for the Respondent who she alleges had made comments or raised concerns about the Claimant's behaviour "*over months/years*". Ms Wigley had asked Ms Poutney for this information.

261. In the covering email Ms Poutney referred to; *"The only exit interview which says anything helpful is Charlotte…so I have attached that too".* The note does not provide the dates the comments were made. The comments were highly critical of the Claimant. Ms Wigley accepted that she did not, 'drill down' into these incidents which she had been told about only anecdotally. When taken to the Whatsapp message from Mr Cooper to the Claimant she; "*accepted there is always another side to everything*".

However, Ms Wigley failed to make that observation in the report to Validium and went on to concede that a number of those mentioned, had other reasons for leaving or leaving the Derby office which were not related to the Claimant.

262. The Tribunal find that there were other reasons why a number of the individuals referred to by Ms Poutney did not remain at the Derby office and the failure to explain that in referral document or highlight that these matters had never been raised with the Claimant, presented an unfair and unbalance critique of the Claimant's relationship with colleagues.

263. The information provided to Dr Laher was very damning; *including comments such* as;

"*staff say he is* ***constantly*** *angry and unpredictable and he is unapproachable"*

"he is not open to embracing new initiatives"

"he does not develop staff in ***any way".***

[Tribunal stress]

264. Of the 12 people and their comments reported by Ms Poutney in her memorandum not one of them complains of not being developed in any way or of the Claimant being constantly angry.

265. In terms of the exit interviews, there are only two individuals who refer to lack of appraisal was **[p.1205]** and one of those is Ms Werry, an Associate who Ms Rhodes under cross examination accepted, reported into her and Ms Rhodes conceded that *"quite possibly"* it was her and not the Claimant therefore, who had responsibility for her appraisal.

266. The Claimant accepted under cross examination that it was fair of the Respondent to raise his negative attitude and management style with the workplace psychologist however, Ms Wigley did not qualify her comments in the information provided to Dr Laher, on the basis that this information was anecdotal, over what period these comments had been collected (and how) and that the Claimant had not had a chance to comment on the allegations. The Tribunal find that the Claimant was a challenging person to work for and with, perhaps at time abrasive or even overbearing presence in the office however, he was also highly regarded however, the picture this memorandum paints we do not accept is a fair or reliable account of his behaviour. It also fails to accept responsibility for the Respondent failing to act on these issues previously with the Claimant and explain why it did not do so; either they were not as serious as suggested or the Respondent failed to take reasonable steps to protect the welfare and wellbeing of those staff.

267. We do not find that Ms Wigley was unsympathetic to the Claimant's situation. However, the information she provided to Dr Laher was not balanced and given her experience it is difficult to understand why she provided this information and presented it in the way she did. The Tribunal find on a balance of probabilities, that the most likely explanation is that Ms Wigley was trying to encourage Dr Laher to recommend that the Claimant remain off work. His presence in the office was clearly viewed as a problem and impacting on morale and rather than understand it and consider what adjustments could be made, as Ms Wigley explained in the referral, they were having difficulty *"persuading him not to return".*

268. The Claimant asked for copies of other exit interviews but had been told that 9 out of 12 of the exit interviews did not exist. He memorandum from Ms Poutney was not disclosed as part of the Claimant's later subject access request and only disclosed in these proceedings after the Order for specific disclosure. There was no explanation given by the Respondent for that failure to disclose the document either during the SAR request or earlier in these proceedings despite it clearly being a relevant document.

269. The medical report would not be obtained until 11 September 2017.

270. The Claimant was in the interim back working for several weeks with no adjustments in place. The Respondent had had many months, since November 2016, to take steps to arrange a medical report.

Functional Effects of the disability

271. In terms of the functional effects of the Claimant's condition and the resulting disadvantages he suffered; the Claimant describes being less able to manage his own workload and being more affected by the workload and stresses and strains of his duties*.* A feature of his illness (w/s para 54) was that he felt negative and anxious about things and the Tribunal find that the Claimant was still experiencing those affects in August 2017 onwards until his next absence and that the Respondent had actual or constructive knowledge of those effects, through its own observations of his behaviour and the advice it would later receive from Dr Laher.

272. The report of Dr Laher **[p.356]** states that from November 2016 the Claimant started to feel *"burnt out" and that;*

> "*This was manifest in terms of feelings of anxiety and low moods. He found it difficult to maintain his sharp focus and decision-making ability which he was accustomed to… He became more withdrawn, flat and anxious".*

273. Dr Laher further describes the effects further as follows;

> **"***He feels that his own thinking is not as sharp of focussed. He worries about failing".*
>
> *And;*
>
> *"The client has started to acknowledge that he probably cannot sustain the same intensity, drive and high expectations that he has previously been accustomed to without this then fuelling the clinical stress which has emerged".*
>
> And;
>
> *"Clinically, his pattern of symptoms is consistent with the DSM -5 (APA 2013) diagnostic criteria for Adjustment Disorder with Mixed Anxiety and Depressed Mood (Code 309-.280 equivalent ICD -10 code is F43 .23) ….The subjective distress or impairment associated with Adjustment Disorders is frequently manifested as decreased performance or other important areas of functioning and temporary changes in social relationships."*
>
> *And;*

> *"It is not unusual as part of individual's Adjustment Disorders and stress reactions, for there to be an adverse impact on their communication style and interpersonal interaction both in the workplace and away from work (eg the person with an Adjustment disorder may appear to be overly insensitive or aggressive with others). I would expect to explore and address these issues with the client".*

274. Mr Flanagan in cross examination, could not recall when he first saw this report and whether he saw it at this time. Mr Flanagan was asked about the other reports from Dr Laher, and his evidence was that he will have seen some but could not recall and that; "*even if report not put under my notes- possible Mr Middleton or Ms Wigley discussed the report and adjustments to be made."* The following day under cross examination his evidence was he would have seen them but was not able to recall until taken to them when he could see the content. His evidence was not convincing, he was clearly sent the reports and aware of them, however we find on a balance of probabilities that he did not pay a great deal of attention to the reports. He was no longer actively involved. The evidence of Mr Flanagan was that this was the first time the Respondent had used an external psychologist and there was no procedure around what to do when such a report is received and although Ms Wigley was responsible for staff and not the Members, his evidence was that she was dealing with the reports and not him. Further, his evidence was that there was no written process about how to implement any proposals around adjustments and that the only cooperation required from the employee is their authority to obtain the report in the first place. Mr Flanagan was asked whether for example the Respondent had in place a practice of holding return to work interviews to discuss such reports to which he commented; "*I cannot comment on return to work meetings*" and accepted it was "*absolutely true*" that there was no mechanism to ensure that value was got from the reports and he accepted that he was not aware of any particular training on disability in the context of equal opportunities.

275. There was the Tribunal found an unstructured and poorly communicated approach by the Respondent in dealing with this situation which appears to have suffered from a perception that as a Member/Partner, a more informal and 'light touch' approach was appropriate.

276. The Respondent obtained the report from Dr Laher dated 11 September 2017. This was the first report which the Respondent had obtained on the Claimant 's condition. The Respondent would continue to fund another 12 sessions with Dr Laher **[p.356].**

277. With regards to work adjustments; Dr Laher in that report does not have any specific recommendations other than to encourage the Claimant to maintain a constructive dialogue with his Partners and work staff. He also refers to the general principle to be to "*aim* for *a gently phased pattern of working. This may require discussion about additional staff resources and space for the client to step back a little bit both during the phased return and also over the longer term".*

278. He comments on the fact that the Claimant is already going into work on reduced hours and notes that;

> *"He is aware that this is double- edged. On the one hand, if managed well with clear aims and a clear pathway then this could be a good platform for later sustainable work. On the other hand, if* ***the current arrangement is left too informal and loose, this could be a recipe for frustration and misinterpretation which could then be detrimental to his emotional health****"* [Tribunal Stress]

Disclosure of the Report

279. The Claimant spoke with Julian Middleton on 12 September 2017. During this discussion, as confirmed in an email from Mr Middleton to Ms Wigley and Mr Flanagan on 12 September 2017 **[p346],** the Claimant expressed concern about who would see the medical report. It was agreed during that access to the report would be limited to Mr Flanagan, Mr Middleton and Mrs Wigley at that stage [**p347]**

280. Mr Flanagan under cross examination gave evidence that Dr Laher's report was "disappointing" because "it *had no specific work adjustment*", that there were still problems on the ground but he considered this report was "leaving *us to deal with it"* by not making specific recommendation about what they should do.

281. Mr Flanagan accepted under cross examination that an option was to seek advice from someone else but he accepts that they did not do so because; " *it was clear that the claimant has confidence in Mr Laher*", however, no steps were taken to discuss with the Claimant his consent to seeing another Occupational Health advisor and neither he nor Ms Wigley gave evidence that it had even occurred to them to either go back for more information or advice from Dr Laher (which the Tribunal consider would have been an obvious and reasonable step to take) or instruct another workplace psychologist.

282. Mr Flanagan denied being disappointed because the report did not say that the Claimant could not return to his role, his evidence was they wanted him back working "effectively". He accepted that Dr Laher by referring to not leaving things too "*loose"* was recommending in his words; "a defined plan" and his evidence was that although there was "*no written plan*" there can be an unwritten plan however his evidence was that they knew they had to give him an arrangement "*not too informal*".

283. The evidence of Mr Middleton, was that he considered having a WRAP which deals with signs of the Claimant becoming unwell and identifies the triggers for the Claimant's illness, *"may well be necessary … sorry helpful"* to the Claimant but he did not consider it necessary in the Claimant's case and referred to the absence of a reference to this in Dr Laher's report. However, Dr Laher's report does refer to "*reasonable organisational adjustments*" (without specifying what those are) and a "constructive *dialogue with his Partners and work staff."*

284. Dr Laher's report the Tribunal find, recommended that adjustments were made, what it failed to do was give specific advice on what those adjustments were. It did not state that a WRAP or a written plan would <u>not</u> be a reasonable adjustment.

Email: Mrs Wigley 13th of September

285. Following receipt of Dr Laher's report, Mrs Wigley sent an email to Mr Flanagan and Julian Middleton **[p.348].** It is this email which the Claimant alleges makes it clear, that by this date at the latest, Mrs Wigley was seeking to engineer his removal. The Claimant did not see this email however until after he had resigned. Ms Wigley within the email makes the following statement;

> "*…we need to be in control of the report. It has been obtained for our benefit, not his and it should give us help in determining the way forward. We should reassure Mike that we limit sight of the contents to me (after all I did the referral and he hasn't queried what I put in that), you as chairman and Julian as his nominated*

"confessor"

286. Mrs Wigley also makes the following comment;

> "*From my view of the office and the people, he is continuing to drive Derby slowly but surely downwards. This report represents our final chance to take control of the situation because* ***we have no real avenues to pursue (other than to ask him to leave the firm"*** *[Tribunal stress]*

287. Mrs Wigley within that same email states that everything the Claimant has been asked to do; rest, visit the GP, try coaching and counselling he has been unable to sustain *"**with a consequent result that he is no better than he was 18 months ago** and his request to attend the board only shows how far he is away from recovery because I think he believes that he should still be controlling the office*".

288. Mrs Wigley also refers to a meeting she has had with Janet Rhodes for three hours during the previous and that she believes the strain Ms Rhodes is under is *"akin*" to the Claimant's and that Ms Rhodes;

> "*Talks not only of his illness but of a complete change of personality (something that another exiting employee referred to as* ***an absence of "nice" Mike)*** *…It is bullying pure and simple. In all conscience we as responsible employers must stop the situation and give Mike an* ***ultimatum*** *to get better in a proper and sustainable way, put proper measures in place to run the office for the medium term (I think that may be a new MP for Derby other than Janet but alongside Janet)…" [Tribunal stress]*

289. The Claimant accepted under cross examination that he was displaying a negative attitude and a negative management style and the Tribunal find that although he could be a difficult person to work with when not unwell, there was now an "*absence of nice Mike".* One effect of the disability was the Tribunal find, a negative impact on his interpersonal relationships and his mood and negative behaviour with colleagues.

290. The Claimant it is not in dispute did not see this email at the time and he complains that on the face of it, Ms Wigley was appearing to support him (as shown in the 5 October 2017 email), while having a different conversation of behind his back. The Claimant's evidence under cross examination was that he was not alleging that Ms Wigley was lying when expressing concern for him in the 5 October email but that this was "*inconsistent with what was going on in the 13 September email – so she was inconsistent in her thought process."*

291. Mr Flanagan's evidence is that Ms Wigley's language was 'harsh' but her objective was for him to get better however he did not agree that there should have been mention of the Claimant leaving the firm because there would be "other avenues".

292. We find there was on a balance of probabilities, a genuine concern on Ms Wigley's part that the Claimant's behaviour was impacting on staff. We do not accept that this email is evidence of Ms Wigley engineering the Claimant out but we find that she was raising his departure as a possible outcome. However, she does so before the Respondent has put in place any adjustments or had a conversation with the Claimant about the report, the effects of his disability and explained in any meaningful way what adjustments may assist.

293. There is nothing within Ms Rhodes evidence in chief that refers to her being 'bullied' by the Claimant rather she refers to his behaviour towards others and made no reference to raising any complaints to Ms Wigley. The Tribunal find on a balance of probabilities that while difficult and frustrating, the concern by Ms Wigley that Ms Rhodes was being bullied would appear to be an unreasonable description, which either Ms Wigley or Ms Rhodes was responsible for, we consider that it was most likely the latter given our findings about the frustration Ms Rhodes was feeling and her own admission that she was feeling that her role was becoming untenable

September 2017 - recruitment

Appointment of David Williamson as Acting Managing Partner

294. The Claimant complains that on 29 September 2017, Mr Flanagan marched into the Derby office and told him in a "*cold and matter of fact way*" that David Williamson was taking over as MP and directed him to send an email. This was the Tribunal find no doubt in response to the concerns raised by Ms Wigley, which had not been discussed with the Claimant.

295. Mr Flanagan's evidence is that he went to the Derby office to discuss the appointment of Mr Williamson and that it was difficult but that the Claimant conceded that he did not disagree with the logic of appointing Mr Williamson. Mr Flanagan had however already without prior consultation with the Claimant, sought the approval of the Board to the appointment of David Williamson. Mr Flanagan had also prepared by 9.14am that morning a draft email to be sent from the Claimant. The minutes of the subsequent Board meeting of the 11 October **[p.370]** also refer to the "decision *previously referred to have been implemented and DTW was not I post as Managing Partner*." The evidence of Mr Williamson was that he anticipated that it was referring to a conversation about the Derby office, the difficulties the Claimant was having and the need to act.

296. On a balance of probabilities, we prefer the evidence of the Claimant that this was presented to him as a fait accompli after Mr Flanagan had sought and been given approval by the Board, rather than as matter for discussion as Mr Flanagan presents it.

297. Mr Flanagan confirmed under cross examination that removing these duties had nothing to do with Dr Laher's report and his recommendations. The removal of these duties was not an adjustment made to benefit the Claimant and the way it was handled we accepted must have upset the Claimant. Despite Mr Flanagan's evidence under cross examination about the true reason behind removing these duties, the Respondent's witness in their evidence in chief attempted to present this as an adjustment made to benefit the Claimant; Ms Rhodes in her statement attempted to present this as an adjustment to "*attempt to support him* "(w/s pars 19). Ms Wigley [w/s para 25] attempted to assert that Mr Flanagan spoke to the Claimant about removing the MP duties on the back of Dr Laher's report. The Tribunal find, it was not an adjustment to support the Claimant, it was in response to the concerns raised about the impact of his behaviour on other staff.

298. An email was sent from Colin Flanagan to the Derby Partners and directors dated 29th of September 2017 **[p.361]** which referred to discussions with the Claimant to keep his workload to a manageable level and to the appointment of Darren Williamson as Acting

Managing Partner for the time being. This change was to be effective immediately. The Claimant sent an email to the Derby staff which was an amended version of the email announcement prepared by Mr Flanagan **[p.362]**

299. There is a dispute as to whether or not Mr Williamson was taking over in practice only as Acting Managing Partner. He is referred to by Mr Flanagan in his email of the 29 September as Acting however in the subsequent Board minute of 11 October 2017, reference is made to Managing Partner rather than Acting "*DTW was now in post as Managing Partner*" **[p.375].** Mr Williamson's explanation for the omission of the word "*Acting"* is that this was nothing other than a typographical error. The evidence of Mr Williamson was that he took over the role as Acting Managing Partner. Given the issues the Respondent considered there were with the Claimant's management of staff, the Tribunal find on a balance of probabilities that while Mr Williamson accepted the position on an Acting or temporary basis, the Respondent did not intend for the Claimant to return to that role.

300. None of the witnesses who gave evidence and who sat on that Board meeting could explain under cross examination why the entry in the Management Board meetings which they all accepted was relevant to the issues in this case, had not been disclosed until the order for specific disclosure was made on 13 October 2020. They did not give evidence that the Respondent had not considered itself under a duty to disclose it.

301. The Claimant's evidence which was not disputed, is that he had short conversations with Mr Middleton between 29 September to 5 October and 'zero' conversations from 9 October 2017. The pastoral support therefore was very limited from September onwards.

Adjustments from date of medical report to start of sabbatical

302. Following receipt of Dr Laher's report there was no discussion of the report with the Claimant and no adjustments were made. There was no discussion with the Claimant about the hours he would work, the expectations around billing, how he would be supported with his workload when he was not in the office, the appointment of a mentor or what the triggers were for his anxiety at work; all of which the Tribunal find would have been obvious adjustments which had a real prospect of alleviating the Claimant's difficulty coping with his work and his anxiety.

303. The Tribunal accept there was a short period from the receipt of the report and the Claimant taking a sabbatical on 9 October 2017, however the Tribunal find on the evidence that the Respondent could have taken steps to obtain consent from the Claimant to obtain advice from Dr Laher much sooner, before the Claimant's last absence and had a discussion with the Claimant as soon as he began coming back into the office. The Claimant's reluctance was because he had not understood the purpose of the referral to Dr Laher the Tribunal find, hence his comment to Mr Middleton about not wanting general counselling again. It had not been properly explained to him sooner.

304. Ms Rhodes refers in her witness statement to the Claimant coming in during this period and that the Claimant had not slowed down and was working long hours.

305. The Tribunal find that the focus of the Respondent was not on making adjustments on his return to the office to support his return work, but to persuade him to go off again. Mr Flanagan in his statement [w/s para 75] talks about encouraging him to take time off again as does Ms Wigley which is not what Dr Laher had recommended. He had recommended a phased return to work which may require;

"…a discussion about additional staff resources and space for the client to step back a little but …".

306. The Tribunal find that the Respondent did not discuss additional staff resource and did not discuss with the Claimant a plan for a phased return and what that would look like. It did not discuss what other support may assist him such as a mentor, a clear back to work plan, a WRAP to identify his stressors and signs of a stress/anxiety or a discussion about expectations around his billing target, all of which there is a real prospect may have removed his anxiety and stress including anxiety over his work and what support he had. The focus was not on implementing reasonable adjustments but to persuade him to not work.

Sabbatical: 9th of October 2017 to 14 May 2018

307. It is agreed between the parties that the Claimant had a further long period of absence from 9 October 2017 to 14 May 2018, a sabbatical of 7 months (which Ms Wigley encouraged him to take) during which the Claimant maintained his drawings and the Respondent continued to fund sessions with Dr Laher. The undisputed evidence of the Claimant was that this was an open-ended sabbatical.

308. The Claimant 's evidence is that he decided he needed more time off work following the demotion from MP and because of a continued lack of help and support. The Tribunal find that the Claimant had not been supported on his return in August 2018.

309. The Claimant does not dispute that Mr Jeffries maintained contact with him during this absence, although he disputes that they spoke every day; "*nowhere near as frequent",* his evidence is that it was limited contact and he cannot recall a great deal of contact after 9 October 2017. There is no evidence to support either account. However, Mr Jeffries does not provide any detail about what was discussed and deals with the period of contact fleetingly in his witness statement and there are no emails or reporting back about this contact to Ms Wigley or Mr Flanagan. On a balance of probabilities, given that the Claimant otherwise is accepting of Mr Jeffries support and given the lack of evidence of regular contact, the Tribunal prefers the Claimant's evidence that contact was limited during his absence from work.

310. Mr Jeffries evidence is that the Claimant had a lot on his plate with his various property interests however the Claimant denies this. His evidence under cross examination n was that he bought 3 houses in the 1990's and sold the last one in January 2017. He has a 50% shares in 3 commercial properties; he is a non-executive of 2 companies. There was some commercial dispute however the Tribunal accept the undisputed evidence of Dr Laher that the Claimant felt 'burnt out' and had been over dedicated to work to the detriment of his home and social life.

311. Mr Flanagan had limited contact with the Claimant during this period of absence. There was no attempt during his absence to discuss what adjustments may be made to facilitate his return.

Management Board Meeting: 8 November 2017

312. At a Management Board meeting on 8 November 2017 **[p379]** Mr Williamson is recorded as reporting that workloads *remained heavy*, and an active programme of recruitment was underway and that Mr Williamson was keen to reorganise the working environment partly to improve morale.

313. There are within the bundles emails been sent to the Claimant during this period. On the 28 November 2017 an email was sent by Mr Flanagan to 'client maintenance' asking them to let everyone know that the Claimant was on sabbatical and emails of that 'nature' i.e. about who the main point of contact will be for the Claimant's clients should not be sent to the Claimant [**p.380].** Clearly therefore Mr Flanagan was prepared to authorise the monitoring and diverting of the Claimant's emails and did so during this period of sabbatical.

January 2018

314. By mid-January 2018 the Claimant was calling into the office and had mentioned to Ms Rhodes a possible phased return in February.

315. In an email from Janet Rhodes to Mrs Wigley on 15 January 2018, Ms Rhodes reports that the Claimant was using his work mobile and looking at certain emails while on leave.

316. There is an email from Mr Williamson on 23 January to Ms Rhodes where he responds about a suggestion of inviting the Claimant to a Real Estate Strategy Meeting on 9 February, believing that he should not be '*drawn into things like this'*; while he is recovering and that the Claimant was due to be off work until Easter. There is no apparent strategy about what contact there should be with the Claimant during his absence and no discussion with the Claimant about what involvement he would like and can cope with.

317. There is no real engagement with the Claimant during this period and no consideration about adjustments to get him back to work.

Medical report 27th of February 2018

318. A further report was obtained from Dr Lahar on 27 February 2018 **[p.386].** The Claimant had now attended 12 sessions with Dr Laher and was last reviewed on 21 February 2018. He refers to the therapy the Claimant has received which includes strategies to help him relax, explore and address issues of *communication and interpersonal interaction.*

319. The report refers to a return date of May 2018. It refers to the prognosis with intervention as; "*good chance of sustained work at a realistic and manageable level through the consistent application of self-management strategies through* ***appropriate/reasonable organisational adjustments***".

[Tribunal Stress]

320. In terms of adjustments the recommendations set out in the report are as follows in summary;

> "… *A phased return to work over six weeks beginning Monday, 14 May 2018 or earlier if the client is ready to return. I recommend the following provisional plan which needs to be subject to further discussion about specifics between him and his firm:*
>
> *Week 1- Re-orientation. No substantive work should be taken on. 50% hours*

Week 2 -Gentle stepping up of responsibilities. 60% hours

Week 3 - 6- Gradual increase to normal hours.

Reasonable long-term adjustments for sustainable plan;

1) *recommend that his previous managerial responsibilities are reviewed to a more manageable level;*
2) *I recommend that his client work is reduced to a more manageable level".*

Relapse 2018

321. Ms Wigley made contact with the Claimant on 9 April 2018, she sent a memorandum which started; *"How are things with you? It seems an age since we last spoke".*

322. Ms Wigley referred to the report from Dr Laher and suggested a meeting to discuss his return and what could be organised to make his return to work smooth and successful.

323. It is not in dispute that the Claimant considered taking his own life in April 2018. This was not something he disclosed to the Respondent. However, the report of the 3 May 2018 **[452]** referred to a "***recent significant relapse***". The evidence of Mr Flanagan under cross examination was that he was only aware what that was, when he heard the Claimant's evidence before this Tribunal and he accepted as he received the report either he did not read it, or he did and asked no questions about the relapse however, he argued that he would not have enquired anyway because it was confidential and Dr Laher would have mentioned it if he felt it was relevant for Respondent to know about it. His evidence was that;

"it *is not from the Respondent to go back and ask for more information if he [Dr Laher] has done his job responsibly"*

324. Mr Flanagan however had already been disappointed with the last report, and despite no explanation around the relapse, does not make a reasonable enquiry about the nature of that relapse, what caused it, what was the triggers and what adjustments can the Respondent make in the workplace to help prevent a further relapse.

325. There is a distinct failure by the Respondent to accept responsibility to making reasonable enquires and informing itself about the Claimant's health.

326. Mr Middleton accepted under cross examination that if the nature of the relapse was that the Claimant had tried to take his own life and was in hospital on life support, that he said; "*would be of interest*" and that the Respondent would have sought to have a meeting with Dr Laher in the Claimant's presence and ask how they could deal with it because it was a "*more serious than any of us thinks".* However, he defended the Respondent not going back to Dr Laher for more information on the grounds that the Claimant was sensitive about who had access to the medical reports and if Dr Laher thought it was relevant for them to know, he would have told them.

327. Ms Wigley's evidence however was that the Claimant discussed with Heather Davies Dr Laher's report and his personal issues prior to starting the sabbatical and that he was having conversations with a number of people in the office. The Claimant the Respondent knew, was therefore not sensitive about talking about his illness and to give this as a reason for not asking, is unconvincing.

328. Ms Wigley's evidence was that she had no idea what the "relapse" was and that she did think to enquire but she was on holiday in Canada and did not return to the UK until 17 June however, she did not enquire when she met with him on the 3 May. Her evidence is she asked him to be honest with her and whether there was anything he wanted to tell her and she did not;

"*.. necessarily take it to mean an attempt on his own life – if I have known I would have halted the process– I would not have allowed him to return to work if I have known about that"*

329. Ms Wigley although still in contact did not recommend that anyone ask Dr Laher for further information about the Claimant's relapse or indeed the medication he was taking and its possible side effects, what the identifiable stressors were (to avoid a further relapse) or for more specific advice on other adjustments beyond reduced hours.

330. The Tribunal do not find that the lack of enquiry on behalf of the Respondent in understanding the Claimant's condition is reasonable or justified.

331. The undisputed evidence of the Claimant is that his medication of fluoxetine was doubled to 40 mg following his attempt to take his own life in April. An increase in fluoxetine was confirmed in a letter of 18 April 2018 from Derbyshire Healthcare NHS Foundation Trust to Dr Gayed **[p.404].** While the letter does not confirm that this was a doubling of the Claimant's medication, the dosage is confirmed and the Tribunal accept on a balance or probabilities, the Claimant 's evidence that his medication was doubled. The letter also refers to increasing the dosage further if the there is no change following a period of 2 weeks adjustment to the 40mg dose and to also considering prescribing Venlafaxine if there is no continued improvement.*"*

332. The Claimant's undisputed evidence is that his GP diagnosed Fluoxetine which he was more suited to but that one of the effects was it makes "*you come across as hyper*". However, his evidence is that 20mg did not have the effect of being hyper "*or nowhere near the same*", but it did when it was increased to 40mg.

333. Ms Wigley's own evidence under cross examination was that she was aware that Fluoxetine affects people differently and can cause increased anxiety, nervousness, headaches, possibly aggression and memory problems and **emotional blunting**.

334. Ms Wigley explained that she has taken serotonin inhibitors and therefore she knew how they can affect people and accepted that they can affect self-inhabitation and behaviour which may be socially unacceptable.

335. Mrs Wigley met with the Claimant for an informal meet up to discuss his return to work, at the Radisson Hotel

Meeting at Radisson Hotel: 3rd May 2018

336. The Claimant complains that Ms Wigley made no effort to establish how his recovery was progressing and he felt no one at the Respondent really cared. It is not disputed that the meeting at the Hotel lasted about an hour and Ms Wigley accepts that they did not discuss the detail of the medical report from Dr Laher. She did not refer to the report at this meeting which she only had on her mobile telephone.

337. Ms Wigley's evidence was that in terms of Dr Laher's reports, had she known the nature of the relapse he had experienced before he returned in May, she would have gone back and asked for further clarification. She did not, ask the Claimant about the relapse however because she did not discuss the report with him at all which would the Tribunal consider, be standard HR practice as part of a back to work interview even one as informal as this.

338. The meeting was held in a public place, they were seated in the main lounge of the hotel. This was a strange choice of venue for such a meeting however the Tribunal find that Ms Wigley did not arrange this as a return to work interview because it was not clear that he would be returning to work very soon.

339. The Claimant's evidence is that after having limited contact and "zero" contact from Ms Wigley during his absence, he felt that the; "*love wasn't there"* The Claimant alleges that he asked Ms Wigley how the Partnership thought he would cope on his return and that she informed him that the view was that he would either "*crash or burn*" or "*return and decide that it was not what I wanted to do*"

340. Ms Wigley denies making the "*crash and burn"* comment. The Claimant does not allege that he mentioned this comment or raised this with anyone other than his wife, who did not give evidence. Further, this comment the Tribunal find is not consistent with the friendly messages which would be later exchanged as between Ms Wigley and the Claimant. For example, on the 3 June 2018 the Claimant would contact Ms Wigley while she was on holiday with her husband; "*Hi Carole. Good to hear from you – sounds like you and Paul are having a good time* …".

341. Ms Wigley informed Mr Williamson by memorandum dated 24 May 2018 that the Claimant had told her again that day that he did not wish or intend to "*crash and burn".* This is documented prior to any allegation about Ms Wigley had said being raised by the Claimant.

342. On balance or probabilities, the Tribunal find what is more likely is that these were words used by the Claimant but may have been perhaps repeated back to him..

343. The only adjustments discussed at this meeting were about the Claimant's hours and a suggestion that the Claimant work less hard. There was no discussion about a risk assessment, a designated mentor, and no discussion about other adjustments the made need and no discussion about managing his access to emails or working generally outside of working hours. There was we find, no discussion about how longer term his client work would be reduced to a more manageable level. There was no discussion with him about what medication he was taking and what any side effects of that medication may be. The previous report had referred to the condition manifesting in the appearance of the person being overly sensitive or aggressive; there was no discussion about how to manage that in the workplace where such behaviours may be exhibited and what the strategy for dealing with it may be.

344. During this meeting it was agreed that the Claimant would return to work initially for a 'few hours' two mornings a week, building up his attendance at work over coming weeks and months as and when he felt able. It was agreed to review his working hours at the end of the first 2 weeks.

345. Ms Wigley in her evidence admitted that with regards to a mentor;

" *..the honest answer is that it did not occur to us to appoint a mentor.."*

346. The Tribunal finds it surprising that there was no thought given to a mentor in circumstances where the Claimant had sought support informally from Mr Jeffries and Mr Middleton, who Ms Wigley had referred to as his 'confessor' and the Respondent had already by this stage discussed at Board Level a 'buddy' system to support people in the workplace in the context of the 'wake up' meeting.

347. Ms Wigley went on to express doubt that the Claimant would have been prepared to listen to a mentor however, the Tribunal find that there was evidence that he was, if it was someone appropriate. He had listened to Mr Middleton when he recommended that he see a psychologist, he had thanked Ms Wigley for keeping him on the 'straight and narrow' and listened to Julian Middleton when he recommended that he let Heather Davies work on one of his matters without reporting back to him and listened to Dr Laher when he recommended a phased return. The Tribunal find therefore on the evidence that the Claimant was prepared to listen to and take on board the guidance of others.

348. This was the Tribunal find, an obvious adjustment to make. There is no reason the Tribunal find for the Respondent to reasonably doubt that he would not benefit from a mentor who could help relieve his anxieties, help him keep on track with his working hours and the type of work he was doing, check whether he was working outside of working hours and even perhaps be a conduit with the rest of the team to help him understand the impact of his behaviours and the team understand his condition better.

349. Ms Wigley also give evidence that if the Claimant had been an employee she would have raised the issue of adjusting performance targets and billing hours. There was however no discussion about expectations about billing, with the Claimant.

350. The Claimant had a fairly complex condition for which he was taking medication, the only adjustment discussed at this meeting, was the Tribunal finds, discussion about the hours he would work on his return. However, this was not a physical illness, and as Ms Wigley understood; "*I knew from previous experience how difficult it was to get Mr Taplin to let go of the reigns."* What had been clearly communicated including by Mr Middleton, was that at least part of the problem was the Claimant's anxiety about how his work would be managed and the support available. Ms Wigley does not allege that this was addressed at this meeting. The Claimant's relationship with his team was also clearly problematic, there was we find no discussion about how the Respondent would support the Claimant manage his behaviours in the workplace when experiencing stress or anxiety.

351. The Respondent is critical of the support provided by Dr Laher's in his reports and the lack of guidance however, it took no steps to either ask Dr Laher for more guidance or seek an alternative report. Ms Wigley is an experienced HR professional with a team of HR specialists working within a profitable organisation with a specialist Employment Law Department, there was really no excuse to not properly engage with the question of what adjustments in the workplace had a prospect of removing the disadvantage.

Preparations for the Claimant's return to work – 14 May 2018

352. The evidence of Ms Rhodes was that the Claimant's workload was being dealt with at Derby or other offices, she was not shown a written plan about what should happen to

the Claimant's work on his return. Her evidence is that she and the senior members of the team understood what it would be advisable for the Claimant to do and that she and the senior team were up to speed on what the Claimant should be doing probably by the middle to the end of the week before he returned on 14 May. She had not been made aware of the reports of Dr Laher or that the Claimant had been referred to OH; her evidence was that no one gave her even a summary of what Dr Laher had said in his report she was aware only that he required a gentle return.

353. On 8 May 2018 **[p.408]** Mr Williamson sent an email to Mrs Wigley and Mr Flanagan. Within this email he refers to the Claimant returning to work the following Monday, 14 May 2018. Mr Williamson raises a number of questions including on what basis the Claimant was returning, whether this was on a phased return, on what hours and what discussion there had been had with him about coming back. He also asked about the arrangements for welcoming back into the office and whether an HR person will be in Derby for the week. He comments; *"I am conscious that I am no expert in mental health issues and clearly it is a very difficult situation. If not managed correctly it leaves scope for significant issues, including Mike's well-being"* ***[p.408]***

354. Mr Williamson's undisputed evidence is that he did not see Dr Laher's report. He had not been told that the Claimant had been diagnosed with a clinically recognised disorder and it had not been explained to him about the potential impacts of that disorder as set out in Dr Laher's reports or what medication someone may be taking who has this type of disorder and what the side effects of that medication may be. He was aware there had been a report but had not been shown it.

355. Mr Williamson also accepted under cross examination that Dr Laher's advice about not leaving arrangements too informal or loose, had also not been shared with him. This is despite the fact that Mr Williamson was now managing the Derby office and along with Ms Rhodes, would be the two Partner's working closest with the Claimant.

356. Mr Flanagan's evidence under cross examination was that he accepted that the Claimant should have clarity about what his regime would be on his return, what he would and would not be doing. Mr Flanagan referred to the meeting with Ms Wigley at the Radisson Hotel as giving him that clarity. Mr Flanagan accepted that it would have been "preferable*"* to have set out in writing what the back to arrangements were but his evidence was that it was only important for the Claimant because Ms Wigley and Mr Williamson had a clear idea before the Claimant returned to work of the arrangements for the Claimant's return.

357. Mr Flanagan could not explain why the email from Mr Williamson of the 8 May 2018 had not been disclosed before the Preliminary Hearing on the 13 October despite him accepting it was relevant to the issues in the case and indeed "*may be of great relevance".*

358. Mr Williamson under cross examination referred to having had a conversation with Ms Wigley on Tuesday 8 May, after he had sent the email of the same date **[p.407].** He alleges that they had sat down together and discussed the Claimant 's return to work. His evidence is that they had discussed reduced hours but without specific reference to Dr Laher's report. The evidence of Mr Williamson was that it was his understanding that the Claimant did not want the report to be disclosed. That such a meeting took place is in dispute. Mr Williamson had failed to mention this within his witness statement. There is also no reference within Mrs Wigley's witness statement to this discussion taking place. However, they both mentioned this discussion in their oral

evidence and although there is no written record of this discussion taking place there is an email exchange between Ms Wigley and Mr Williamson setting up a discussion that afternoon **[p407].** The Tribunal find on a balance of probabilities that there had been a meeting. Mr Williamson was proactive enough to ask a number of questions and we accept that on a balance of probabilities he would have chased up Mr Flanagan or Ms Wigley if those questions had not been addressed. The explanation Mr Williamson gave for not including any reference to this conversation within his witness evidence was that he; "*didn't know it was particularly pertinent"*. The Tribunal find that this indicates a lack of understanding about just how crucial it was to ensure the arrangements and adjustments for the Claimant's return were in place and adhered to. Whatever was discussed was not even committed to writing.

Action Plan

359. Mr Williamson accepted under cross examination that it was important to have a clear action plan for the Claimant's return to work and that one had not come out of his discussion with Ms Wigley. It is clear that there was no written document setting out what had been agreed and the extent of what had been discussed was that the Claimant was returning on a phased return. The plan was for the Claimant to return initially for 2 days mornings per week, substantially less than the 50% of hours which Dr Laher had recommended for week 1 and less than the 60% recommended for week 2. Mr Williamson also gave evidence that the intention was to monitor the Claimant in the office, however the Tribunal find that this appeared to be little more than general observations rather than a clear plan about what was being observed and when intervention may be required and if so how would that be managed and by whom.

360. The evidence of Ms Rhodes was that she and Mr Williamson understood between themselves and the senior members of the team, what it would be advisable for the Claimant to do on his return and that she believes that they were up 'to speed' between the middle to the end of the week before his return. She understood he needed a 'gentle return'. Ms Rhodes however was not, the Tribunal find 'up to speed' and neither was Mr Williamson, in terms of understanding what his condition was, what the stressors were, what may cause a relapse, what medication he was taking, what the side effects may be and how his condition may impact on his behaviours.

361. Ms Rhodes was not aware there was in existence a report from a psychologist or that he was having counselling. Ms Rhodes confirmed that she and Mr Williamson would be the two people who would be working most closely with the Claimant on his return to work, (and the team generally which would be working with him on any particular transaction) and accepted in cross examination that the absence of a written plan about the arrangements for his return "*could result in difficulties but not likely to*".

362. Ms Wigley as the director of HR, agreed under cross examination that given the Claimant exhibited 'abnormal behaviour' and had gone back on agreements (i.e. stepping back as MP), committing arrangements to writing would be' necessary'; if he had been in a state of mind to enable him to embrace that however she did not *"feel"* that he would. This we find it not a satisfactory explanation for failing to implement an adjustment which the HR Director considers necessary, if anything concerns about the Claimant sticking to a plan make it logically even more important to have it documented so that he could be referred back to it and what was set out.

363. In terms of a WRAP, Ms Wigley's evidence was rather inconsistent, she went from stating that to have a document explaining what the triggers for his illness were was not realistic in the workplace, to stating that the Claimant had gone on sabbatical before the Respondent could do anything but the Respondent would not have used a

WRAP because *"we do not use them*" . She then asserted that it would not have been a reasonable step to take because the Claimant was in no state to identify what the triggers for his illness were but she conceded in cross examination that "*it may have reasonable"* to go back to Dr Laher and asked him to explain and put in writing the signs that the Claimant was becoming unwell and the triggers. The Tribunal interpreted Ms Wigley's evidence as accepting that a WRAP may have been helpful but that the Respondent had not thought about it.

364. Ms Wigley gave evidence about how differently the Claimant would have been treated if had been an employee;

" … *if the Claimant had been an employee, I would have had a* ***proper*** *conversation with him – the conversation would have taken place in a meeting"* [Tribunal stress]

365. The clear inference the Tribunal find, is that the HR director did not consider her discussion with the Claimant in the public lounge of a Hotel about his possible return to work, without any discussion about the most recent medical report, to be the sort of conversation she would have had, with an employee in those circumstances in that it would have been more formal, probably documented and thorough.

366. The Tribunal find that there was a failure by the Respondent to make reasonable enquiries to inform itself about the Claimant 's condition, the medication he was taking, its possible side effects, the triggers for his anxiety and stress, the signs he was struggling and what further support he may benefit from other than a 'gentle return' in terms of hours and work.

367. The Claimant was understandably concerned about who would have access to his medical report but there was no attempt to discuss with him what information should be shared with Mr Williamson and Ms Rhodes who would be working with him day to day, or the wider team so they could understand his condition and how for example it may affect his behaviours. He had displayed an openness about discussing his health.

Management Board Meeting – 9 May 2018

368. At the Board Meeting on the 9 May 2018 the Board were not informed about the diagnosis of the Claimant's illness, there was no discussion about the medical report. The extent of the return to work arrangements are confirmed in the minutes; **[p.415];**

"…*Mike Taplin probably due back into the office the following week and it was proposed that this would be a phased return to work".*

Claimant 's return to work: 14 May 2018

369. The Claimant returned to work on 14 May 2018, and it is not in dispute that a meeting took place between the Claimant, Ms Wigley, Mr Williamson and Ben Pickup. The Claimant 's evidence is that Ms Rhodes was there however her evidence is that she was not and this is consistent with the evidence of Ms Wigley and Mr Williamson and on a balance of probabilities the Tribunal accept she was not present.

370. The Claimant 's evidence under cross examination was that on 14 May 2018, he "*sensed something was not right*" and believes that the Respondent was trying to get him out of the business and the Conference gave them the opportunity to do so.

What were the functional effects of his disability at this stage

371. The Tribunal find that although with his medication doubled, he was considered fit enough to make a phased return to work with organisational adjustments, the Claimant still found it difficult to cope with the stress of his normal work, and that during his phased return he was not it is accepted, involved in the normal complex transactional work he would normally undertake. His mental health was still fragile and he could not cope with working full-time hours. The Claimant's undisputed evidence is that he had lost confidence during his illness. On a balance of probabilities the Tribunal accept based on the Claimant's evidence, the original explanation of his condition in the September 2017 report from Dr Laher, and the evidence of the Respondent's witnesses about the Claimant's behaviour, that certainly in the lead up to the Real Estate Conference his mental health was deteriorating again and he was for want of a better word, presenting in quite a manic or over stimulated way and the Tribunal accept that this impacted on his judgement at least in respect of the usual social norms and assessing acceptable social behaviour. The deterioration in his health was noticed by colleagues but there was the Tribunal find, no process or plan or mechanism in place to report this and respond to it.

Return to work

372. Mr Williamson's evidence is that the action plan was discussed with the Claimant at this return to work meeting and that it was expressed clearly to him and in easy language what would be expected in terms of his hours of work. He referred to a member of HR who would be in the office consistently and they would keep it tight by monitoring the Claimant.

373. The evidence of Mr Williamson was that the Claimant was used to working on complex transactional work but the focus on his return would be on business development, not in terms of going out and winning new work but with client's who are also friends, playing golf, having lunch etc.

374. On 14 May 2018 Mr Williamson sent an email to all the staff at the Derby office informing them about the Claimant's return to work that same day and that he was going to be working part-time; two mornings that week and then three mornings the following week.

375. The Claimant's evidence is that there was no discussion about the hours he would work, only about what days. It is not in dispute that Dr Laher's report was not discussed. The Claimant denied that it had been agreed that Ms Wigley would act as his 'conscience' during the phased return. We accept the Claimant's evidence that this was not discussed, Mr Williamson's evidence that he understood someone, not necessarily Ms Wigley would be monitoring him in the office.

376. The evidence of Ms Rhodes who was 'up to speed' on the arrangements for the Claimant's return, was not aware of anyone 'labelled' as the Claimant's "mentor" although her understanding was that Mr Williamson remained in the office as Acting Managing Partner to provide support.

377. We find that Mr Williamson was not providing a designated 'pastoral' role although he had some oversight. Someone from HR was supposed to be present in the office when the Claimant was working.

378. The Tribunal find on a balance of probabilities, that the email of the 14 May 2018 reflected the extent of the discussion around the hours and days of his return, there is

no other document recording any other detail of the arrangements. Ms Wigley would on the 21 May **[p.424]** propose discussing with the Claimant what his continued phased return should look like after he was noted to be coming into work early, this would not have been necessary had this already been clear, she could have simply reminded him of the earlier discussion On 24 May Ms Wigley would report back that she had discussed with the Claimant that he should take a break if he is in work for more than 4 hours, there is no mention of maximum hours or the times during which the hours should be worked.

379. There is an email exchange between Mrs Wigley and Mr Williamson on 17 May [**p.421]** where Mr Williamson is reporting to Mrs Wigley that the Claimant had arrived at the office at 7:50 am. Ms Wigley informs him that she will send the Claimant a reminder. It appears from the emails that Ms Poutney had been present but it would appear, she had not spoken to the Claimant and nor had Mr Williamson, about arriving early and therefore it is unclear what her or indeed Mr Williamson's monitoring role was.

380. The evidence of Mr Williamson under cross examination was that although there was no WRAP in place there were "*5 people wrapped"* around the Claimant to support him; a "*HR professional on the grounds at all times*" and " *I was there to have the authority to tell the Claimant to stop and constrain him within what was set out*". He referred to the Claimant straying from what had been set out and that this was going to be picked up but it was not because of intervening events i.e. the RE conference. However, it was not even clear to this Tribunal who was responsible for what. Mr Williamson did not take steps to restrict the hours the Claimant was working, he referred this on to Ms Wigley on 17 May. The HR professional on the ground Ms Pountney, was apparently in the office on the 17 May but had not spoken to Mr Williamson about the Claimant coming into work before 9am, spoken to the Claimant or reported it directly to Ms Wigley, therefore quite what her involvement was, what she was monitoring and her responsibilities as part of the back to work arrangements, is not clear.

381. On the 25 May Ben Pickup **[p.431]** would write about the Claimant asking Ms Davies to copy him to work and that "***we do all need to be clear*** *with Mike what the boundaries are."* He does not explain what the boundaries are but evidently, the Tribunal find, this had not before been made sufficiently clear otherwise again, he would be referring back to the agreed boundaries.

382. Ms Wigley would report that the Claimant did not have a "*balance button*" **[p.432]** and Mr Pickup on 25 May 2018, would suggest that HR check the Quiss log to check how much work material the Claimant is accessing when not the in the office **[p.431]** however this was not actioned.

383. The Claimant's evidence is that he was told there was no new work coming in to the Derby Real Estate team and that it would be more or less down to him to make sure that the work flowed in again. The Claimant's evidence is; "*I felt it and said by Williamson at the meeting and Ms Rhodes on 12 January 2018..*." The 12 January is a reference to an email which deals with the importance of pulling work back into the office **[p.389].** This was however back in January 2018; *"Mike has popped into the office this morning …and I have mentioned that we are trying to start pulling work/clients back into the Derby office/team and he is totally on board with this…"*. We do not find on a balance of probabilities that he was told that it was down to him to make the sure the work comes in, but it is more likely there was a conversation about the Claimant focussing on client development, and the Claimant may well have perceived this to be putting the burden on him, given that this was to be his focus rather than fee earning. This however the Tribunal consider, is one of the problems of not having a clear written plan about what the agreed expectations are, not only what the

working hours and days but what he will be expected to be doing and what the arrangements will be with regard to his client and fee earning work.

384. The Claimant complains however that he was not asked what he wanted to do on his return, that not all fee earning work is stressful and that seeing clients was the "*wrong thing to do*" after he had been off for 7 months, his medication had been increased, he had suicidal thoughts and a loss of confidence. Neither does he say that he expressed any of this at the meeting because he alleges that he felt intimidated and had only been back in work for a couple of hours. Mr Williamson and Ms Wigley do not allege that they asked the Claimant what he would feel comfortable doing.

385. The Claimant also complains that the Respondent did not follow Dr Laher's recommendation because he returned doing 1.5 days rather than the recommended 50% and that Dr Laher had said week 2 -3 his hours should be increased to 60% normal hours which would be about 22.5 hours which is equivalent to 3 days but that was not the hours the Respondent was telling him to do, they were therefore not implementing the hours recommended by Dr Laher and not suing Dr Laher's report as a back to work plan.

386. There is an email from Ms Wigley to Ms Rhodes and Mr Pickup on 21 May 2018; "*Is there anything that you have observed or are concerned about what I should raise with Jim? For example, are you noticing any of the behaviours that we had before which became so destructive?"* The problem the Tribunal find with this communication, is that in isolation it indicates that the Claimant's behaviour may be problematic i.e. destructive, but what those individuals are not being told is what the triggers are for that behaviour and how to help manage them and recognise them, what the cause of the 'destructive' behaviours may be, what medication he is taking and what impact of that may be. It reads as if the Claimant is seen as a potential 'problem'. Ms Rhodes, Mr Pickup and Mr Williamson were not we find, given the information about his condition necessary to understand what they were dealing with or the tools to understand how to manage the Claimant's condition.

23 May 2018

387. On the 23 May 2018 the Claimant saw Dr Laher and reported that thus far *"it is going well"* and the Claimant gave evidence that there was "*nothing to complain against, I was following his recommendation".*

388. On 24 May 2018 the Claimant sent an email to a number of Partners and Mrs Wigley expressing his gratitude for the support shown and for Mrs Wigley for *"agreeing to keep me on the straight and narrow*!" **[p.426**]. This the Tribunal find is a recognition that he requires assistance to stop him overworking and that he is prepared to engage with that.

389. Mr Williamson gave evidence that that from 24 May to the date of the Conference, the Claimant presented with a positive attitude, he was looking to increase his hours to 4 days per week and was in "*good health"* however in the memorandum on 24 May 2018 from Mrs Wigley to Darren Williamson (another document not disclosed until after the order for specific disclosure of the 30 October) she also makes the following observation about his behaviour;

> "*I think he seems* ***quite frenetic and a bit hyper*** *and I have urged him to be less impatient to move things forward*…" [Tribunal stress]

390. Ms Wigley agreed that she was fixing Mr Williamson with knowledge about her concerns about the Claimant's frenetic behaviour by her email of the 24 May 2018 **[429].**

Management Board Meeting – 13 June 2018

391. Mr Flanagan's evidence was that he was not aware that the Claimant was displaying frenetic behaviour. He was on annual leave but returned by 28 or 29th May. He alleges that he did not enquire about the Claimant's state of mind on his return and he professed to having no knowledge before the Conference that the Claimant was still showing signs of suffering with his mental wellbeing. The Tribunal do not find his evidence to be credible. He himself reported to the Management Board on **13 June 2018 [p.458]** following what he accepts must have been a discussion with Mr Williamson, that the Claimant's behaviour is;

…" *satisfactory when DTW [Mr Williamson] was present to moderate behaviour and* ***it was not in the firm's interests for DTW to be diverted in <u>the long term</u>. CSF suggested that when the lease came to an end in 18 months' time it might to be necessary to consider closure of that office…"*** [Tribunal stress]

392. Mr Flanagan accepted that he was linking the closure of the Derby office with the ongoing problems with the Claimant 's behaviour. The Tribunal find that to have made this statement about the potential closure of the Derby office as a "*potential alternative solution*", indicates a significant concern about the possibility that because of the nature of his illness this may continue to be a diversion over the long term for Mr Williamson. That concern was not supported however by the medical advice in Dr Laher's last report.

393. The Tribunal is concerned that Mr Flanagan obviously held such serious concerns, such that he was proposing to the Management Board the possible closure of what was a very successful office, and yet asserted when first questioned before this Tribunal, that he was not aware of any ongoing concerns with the Claimant's behaviour.

394. Mr Williamson was present at this Board Meeting and his evidence under cross examination was that he needed to prevent the Claimant taking on too much work which would otherwise *"crush*" him. It is clear that the Respondent accepted, that a functional effect of his condition was that he was less able to cope with the stress and strain of his normal job and full-time workload and that he struggled to judge the amount of work he was able to cope with.

395. Mrs Wigley had also sent an email to Mr Flanagan on 28 May 2018 **[p.434]** Within this email she makes the following observations;

*"He doesn't seem to have developed with the Psychologist any tools to help him from continuing with his "**obsessive" behaviour."***

…

"What is the most difficult for all of us, I think, is that if we want this to go in the way we want we have to be on to him when he steps out of line. If he over works too soon his physical and mental energy will only be there for so long and it will be back where he started"

…

"I think you should now sow the clear message he isn't going to be MP again and that he needs to leave that to Darren and Janet now" [Tribunal stress]

396. Ms Wigley was seeking to enlist the support of Mr Flanagan to set out more clearly the parameters of what the Claimant should and should not be doing; "*If he over- works too soon his physical and mental energy will only be there for long a due will be back to where he started. I think **you** do **need*** to reinforce *the message that Darren and I have been giving: this is slowly, slowly with no need to rush"*. [Tribunal stress]

397. Mr Flanagan did not however engage with the Claimant as advised by the HR Director. He did nothing to support what she was doing in trying to support the Claimant at a distance, limit his workload and in doing so, prevent/reduce his stress and anxiety.

398. Despite the description of his behaviour as 'obsessive', there were no steps taken to monitor the work he was doing outside of the office and Mr Flanagan did not 'step in' to give any instruction or support. Steps we find on a balance of probabilities (given his previous involvement) he would have been prepared to take in 2017/early 2017 but which he was no longer it appeared prepare to take.

399. Despite the obvious concerns with his health and his 'obsessive behaviour' there is no risk assessment or WRAP.

400. Ms Rhodes under cross examination confirmed that the information Ms Wigley passed on in her email to Mr Flanagan on 28 May, came from her, Mr Williamson and Ben Pickup. The 28 May would be around the time Ms Rhodes would report to Mr Powell that the Claimant's behaviour had 'changed'.

401. Ms Wigley was then on annual leave from 29 May to 14 June 2018. Although on holiday celebrating her 60th birthday, Ms Wigley maintained contact with the Claimant The messages are friendly and supportive. While she attempts to encourage him to not work too many hours from a distance, what the Tribunal find is more likely than not to have been more effective, is a nominated mentor physically present in the office with the clear responsibility to monitor and regularly review with the Claimant the work he was doing inside and outside the office and what support he needed and how he was copying.

402. The Tribunal do not accept that Ms Wigley was engineering the Claimant out of the business, that is not consistent with the behaviour of someone who while on her 60th birthday trip to Canada is in contact with him offering support. Ms Wigley also asked Mr Flanagan to authorise further sessions with Mr Laher.

403. Ms Wigley was we find, trying to support the Claimant however, there was no holistic approach to managing his condition in the workplace. The focus was on hours. He was left to try and discipline himself inside and outside working hours but he was clearly struggling to do that and those working closest to him had no real understanding of what his condition was, how it affected him, and there was not real engagement with alternative forms of support and adjustments, as the Tribunal find there would have been had he been an employee.

Billing Targets

404. The Claimant would normally meet with Mr Flanagan each January to set his targets for the next financial year. There had **not** been a meeting in January 2018 to set his targets for 2018/2019. Mr Flanagan's note of the 2 January 2017 and 3 March 2017 had related to financial year ending March 2018, it did not cover the financial year to 2018 to 2019.

405. The Claimant complains that he was expected to bill as many hours as he could. The Tribunal do not accept that this was a policy, condition or practice and this certainly was not communicated to the Claimant. However, the Tribunal find that there is a prospect that clarity about expectations over billing performance would have alleviated some of the Claimant's anxiety about his work and what was expected of him..

406. Ms Wigley's evidence was that had he been an employee, his billing hours and targets would have been adjusted.

407. Ms Rhodes under cross examination, gave evidence was that she could not recall seeing an adjustment to the budget. She recalled Mr Flanagan saying that there was no expectation on the Claimant in respect of billing or chargeable hours although she had not seen anything set out in writing about what the Claimant's billing hours or targets were. The Tribunal find that there was no discussion with the Claimant about what he was expected to bill, indeed Mr Flanagan did not engage with him on his return. There was therefore an unusual vagueness about what his targets were.

408. The Tribunal find that there was a risk that whatever steps were taken the Claimant would have been resistant to changing his approach to work however, we find that on a balance of probabilities there was a real prospect that a more holistic and a more formalised and structured approach to his working arrangements which extended beyond just hours and instructions to work less hard, would have had a real prospect of alleviating the disadvantage. Those steps were obvious and the Tribunal consider that it is more likely than not that they were not taken because of the Claimant's position as a Member/ Partner and how the Respondent approached its treatment of Partners/Members as opposed to employees, however that does not alter what adjustments had a prospect of avoiding or reducing the substantial disadvantage.

409. Jamie Cooper and Laura Sephton had worked 100% with the Claimant but had still not been replaced by May 2018. However, Heather Davies was providing support and the Claimant's work had been absorbed by others. The Claimant was not doing complex transactional work and therefore the Tribunal do not find that he was compelled to do work because of a lack of support although what we find was not clear is how his work had been distributed and who would support him when he was back to working full time.

Adjusted the standard of performance expected

410. Between the dates of his return to work and his suspension it is not in dispute that the Claimant was not required to carry out complex work. The Claimant was not performance managed, there was no complaints about the work that he did. In terms of quality of his work, it was not clear from the Claimant's evidence what adjustment was required and or even why this was required.

Claimant's behaviour immediately prior to 14th of June 2018

411. From June 2017 onwards, Mr Flanagan had no direct contact with the Claimant.

412. On the 6 June 2018 **[p.449]** Ms Wigley contacted Mr Flanagan and attached the further report from Dr Laher, undermining yet further Mr Flanagan's assertion that he was unaware of problems with the Claimant 's behaviour prior to the conference. In this email she states; *" … as the report confirms it is still all* ***very fragile***" [Tribunal Stress]

413. In cross examination Mr Flanagan accepted that the medical report referring to a recent relapse, and Ms Wigley's reference to things being fragile; were 'red flags' and Mr Flanagan conceded that; *"… it was clear the Claimant was very much in recovery phase"*

414. On the 11 June 2018 Mr Williamson emailed Ms Wigley about the Claimant's behaviour in the office. He complains of the Claimant taking over the presentation at the Conference **[p.456].** Mr Williamson could not explain why this email had not been disclosed before the Tribunal Order of the 13 October for specific disclosure despite accepting that it was relevant.

415. Janet Rhodes would give a statement later to Colin Powell during the investigation by the FSC **[P.556]** that; **"***When Mike came back to work he appeared calm. However, in the last couple of weeks something has changed. It was like he was on speed and was "totally buzzy".* [Tribunal stress]. Ms Rhodes during cross examination refused to accept however that the Claimant's condition had regressed from 1 June 2018. Her explanation under cross examination for her reference to what had "*changed* "was that the Claimant was getting better and wanted to stamp his authority on the team.

416. Janet Rhodes was also asked about her reference to the Claimant being on *"speed*" during the period up to the Conference in the investigation document. She did not deny having used that expression but under cross examination attempted to explain that she had meant that the Claimant was a lot more confident than he had been.

417. The Tribunal did not find Ms Rhodes a convincing witness and found her evidence about her view of the Claimant's behaviour before the Conference to be unreliable. When asked what she understood 'speed' to be, she referred to the Claimant having more confidence and being more talkative. Only when pressed further in cross examination was she prepared to accept that 'speed' is a term for a drug but tried to maintain, unconvincingly that she was not referring to the drug when she used this term.

418. The Tribunal find that the only credible and reasonable interpretation of what Ms Rhodes had said in her interview with Mr Powell was that during this period, the Claimant's behaviour had been a source of concern, that he was behaving unusually as if he was taking an Amphetamine like 'speed'. Ms Rhodes by this stage considered her position with the Respondent untenable because of the Claimant and Mr Williamson described her as 'hacked off' because the Claimant had taken over the Conference and that she had 'lashed out' because of that. The Tribunal find that Ms Rhodes was supposedly one of the 5 people who were 'wrapped around' the Claimant and supporting him, however we find on a balance of probabilities, that Ms Rhodes was aware his behaviour was unusual but took no steps to report it.

419. The observations of Ms Rhodes are consistent with the observation of other staff. Ms Davies when interviewed by Mr Powell would describe his behaviour leading up to the Conference thus**; [p.553]** *"…MT had been "overly jolly" as if on medication. She said that the firm owes him a duty and he should not have been speaking at the conference"*

420. Ms Shepherd described his behaviour to Mr Powell as follows; **[p.557]** *When Mike first came back to the office he was quiet and seemed to be settling back in to the office well. However, for the last week or so he has been much more "**hyper**"*

421. Despite the apparent monitoring of the Claimant in the office, he was openly displaying behaviours which even those who were not aware of his diagnosis and medication, perceived as unusual but no one sought to understand what was happening and discuss how he was feeling. No one took any action to support him or escalate their concerns.

RE Conference

422. The Respondent was planning a Conference on the 14 June 2018.

423. Ms Rhodes was copied into an email from Richard Beverley, Managing Partner at Birmingham on 1 June 2018. The Claimant was not copied in **[p. 461B].** Mr Beverley who was organising the conference, invited short presentations from each of the office Real Estate teams and issued an instruction to actively encourage participation of the younger and more energetic members of the teams and to use humour and imagination where possible.

424. The Claimant did not receive the email however he was told about it by Ms Rhodes and her evidence is that he *'hijacked'* it. A sentiment shared by other including Ms Sam Shepherd. The Claimant does not dispute that he wanted to do it and told Ms Rhodes he would do the presentation. His evidence is that he saw it as an opportunity to get his confidence back.

425. The Claimant had mentioned to Ms Rhodes that he was intending to tell a funny story involving Mr Williamson and Mr Beverly but he did not tell her what the story was going to be. Ms Rhodes asked the Claimant if it was a good idea for him to tell a joke "*partly because he had not been back very long and this was not the brief we had been given".* She denied that the Claimant was presenting as if he was unwell, her evidence was that he was presenting as if he was "perfectly well" and a lot better "there was nothing" in her mind at that time about how the Claimant 's mental health may be affecting his behaviour. For the reasons already explained above, we do not find her evidence to be credible and we find on the evidence and balance of probabilities, that he was exhibiting behaviours which should have alerted Ms Rhodes to the possibility that he was struggling with his mental health.

426. Despite Ms Rhodes having contacted Ms Wigley previously to complain about the Claimant's behaviour toward her and others, she did not alert Ms Wigley to the behaviours he was displaying in the office and that he had put himself forward to do the presentation.

427. Ms Rhodes sent an email to Mr Williamson on 11 June, 3 days before the Conference, she did not express concern about the Claimant's behaviour and his health, or whether he should be permitted to give a presentation but **[p.457]** made the following comments;

"Just a quick heads up as well Darren about Mike's "team" speech on Thursday as the RE conference – it is apparently to quote, a " funny story about you and Richard Beverley"… why do I suspect this may result in a car crash…

Unfortunately (or possibly fortunately given the above) I may struggle to attend …"

428. Ms Rhodes evidence was that there was "*no thought in my mind*" that the presentation would be a car crash because of his behaviour and that what she meant by "*car crash"* was that she had asked the Claimant if he needed a PowerPoint presentation *and* he had told her that he would not because he was planning to tell a funny story, *that* she did not believe that his presentation would be in keeping with the direction from Mr Beverley and she was concerned the Derby office would to stand out. Ms Rhodes referred to having experience of the Claimant's "*funny stories*" in the past. She elaborated on this by saying that she had experience of his jokes which were not always appropriate to the circumstances. Not only had Ms Rhodes made no mention of any previous inappropriate jokes within her witness statement, there is no reference to this in the record of her interview during the investigation process with Mr Powell, and her evidence under cross examination that she presumed the Claimant was going to say something "*edgy"* but that she had no reason to suspect it will be anything beyond that. "*I did not for one minute expect it to be as inappropriate and offensive as it was*…" (w/s para 26).

429. Mr Williamson's evidence was that the Claimant had never told a joke like the one he would tell at the presentation, in the context of a presentation before.

430. We find it troubling that Ms Rhodes, having been aware of the Claimant's serious mental health issues over the past few years, did not the Tribunal find, express any concern about what impact it may have on his recovery if it was a 'car crash', only on how it may reflect on the Derby team. There was the Tribunal accept, a certain expectation of disaster and willingness to let it unfold.

431. When it was put to her in cross examination, that at the time she had thought it was 'not bad thing' if his presentation was a car crash her answer was not convincing; "*I don't think I thought that at the time*". Ms Rhodes would report later to Mr Powell during his investigation into the Claimant's conduct at the Conference that; "*It is impossible to manage MT in the Derby office. It will be a major problem if he returns. He is prepared to do things his way or not at all".*

432. Had Ms Rhodes and Mr Williamson, understood the Claimant's condition better, the medication he was taking, the signs that his mental health may be deteriorating and there was a risk assessment in place and an action plan for how to respond to signs of a deterioration in his mental health and triggers, such a plan may well have prevented the Claimant from either giving the presentation at all, or giving the one he gave. There was however no risk assessment in place.

433. Mr Williamson did not act on the email from Ms Rhodes, in terms of the 'car crash' comment, he felt she was "lashing out" because she could not do the presentation on brief.

Incident –Real Estate Conference 14th of June 2018 – Thursday

434. It is common between the parties that on the morning of the conference, the Claimant informed Ms Shephard of the joke he intended to tell and the Claimant accepts that she suggested he 'pass it' by HR and indeed she went so far as to tell him not to say it.

435. The Conference was mainly attended by colleagues who worked across Real Estate in the Respondent however there were some external persons present including an

external speaker. It is common between the parties that 63% of the attendees were female.

436. At the conference there were a number of presentations. The only two we are concerned with are those which were given by the Claimant and another Equity Partner, Mr Tempest. It is not in dispute that both gave a presentation which contains elements which were inappropriate. There was another presentation involving an inappropriate joke about a donkey however, it is not alleged that it was comparable to the presentation by Mr Tempest or the Claimant in terms of offensiveness.

437. Dealing first with the presentation of the Claimant;

438. The 'joke' which the Claimant told was in essence that a team from the Respondent had carried out a site visit in a jungle where they met cannibals with spears and went on to allude to and make fun of the relative penis size of the Claimant, Mr Williamson and Mr Beverley. The Claimant had also referred to him having all his certificates so that he was both GDPR and LGBT compliant. The Claimant accepted under cross examination that his presentation involved sexual crudeness, stereotypical racist descriptions, mocking of sexual orientation and was in his own words; "*totally indefensible".* He accepted under cross examination (as he would at the disciplinary hearing) that it was a joke he had told over a number of years which he had made into a story for the presentation.

439. The Tribunal consider that a reasonable objective view of the presentation is that it was likely to cause offence in light of the references to the sexual matters, the racial stereotypes and the ridiculing of LGBT awareness.

440. It is not in dispute that no one from the Respondent intervened to stop this presentation.

441. Mr Tempest's presentation **[p.779- 781]** made reference to one of his team being on maternity leave and the PowerPoint included a picture of a baby and a comment which the Tribunal find alluded to the promptness with which the female colleague became pregnant after getting married. Mr Tempest then showed a slide of 'forthcoming attractions' with the face of a woman who was to join the team and at the side of her a picture of Pamela Anderson in a swimsuit. Mr Tempest then put on screen an old black and white picture of himself with the job title 'National *Head of Porn.* The Tribunal find it was a juvenile and offensive presentation and likely to offend, particularly women in the audience.

442. It is agreed between the parties that after the presentation there were drinks and a meal. It is not in dispute that none of the Partners present spoke to the Claimant raising any concerns about his presentation. His evidence is that no one commented on his presentation at all. Mr Flanagan was not present. However. Peter Smith, Chief Executive and Guy Winfield, Head of Real Estate Nottingham were present.

443. Ms Wigley's evidence is that she takes no responsibility for the Claimant's presentation, she had no knowledge of the presentation as she was on holiday at the time but that; *"I would absolutely had he asked me, said do not do it".*

444. However, Ms Wigley was in contact with Mr Williamson and on the 11 June 2018, 4 days before the presentation and was told that the Claimant had taken over the Conference [**p. 456]** but despite asserting under cross examination that she would

not have let him do it, neither she nor Mr Williamson took any steps to prevent it or to discuss with him whether he was well enough.

15 June 2018 – Friday

445. An email was sent to Ms Gallagher and Mandy Chan by Mr Beverley the following morning at 9.46am **[463]** in which he thanked them for their assistance with the conference which he felt; "*went well on the whole*".

446. By 12:30 that Friday afternoon Ms Sfar-Gandoura, Partner in the Nottingham Office approached Mr Williamson and asked to speak to him about the previous evening. Because of work commitments Mr Williamson did not speak with her to until 5.15pm.

447. Before speaking with Ms Gandora, Mr Darren Williamson sent an email to Richard Beverley and Ms Gallagher copied to Mr Flanagan on 15 June 2018 at 4.16pm which states **[p464];** "All in all I think it was a success and the presentations *gave it an informal "family" feel which I thought was spot on.* He referred to good feedback on the room and mixed feedback on the food, he made no reference to feedback on any of the individual presentations in particular he did not comment on the Claimant or Mr Tempest's.

448. Mr Darren Williamson on the 15 June 2018 sent an email at 4.27pm to the whole of the National Real Estate Team thanking everyone for the presentation stating **[465];**

> "…*they were light-hearted and fun and I thought that* ***they mirrored our approach to collegiality perfectly."*** [Tribunal stress]

449. Mr Williamsons' apparent support for the presentations, was he would admit in hindsight, mistaken. It is certainly difficult to reconcile it with his alleged shock and disapproval at the content of Mr Tempest and the Claimant's presentations.

450. It is not in dispute that the emails from Mr Beverley, Ms Roberts and Mr Williamson (other than the 4.27pm emails) were not disclosed by the Respondent until 20 October 2020, following the13 October Order. Yet again, none of the witnesses could explain why the emails had not been disclosed earlier.

451. On Friday 15 June, Ms Sfar Gandora then met with Mr Williamson, she was very distressed about the presentations. He told her it was in hand and his evidence is that he resolved to contact Mr Flanagan Monday morning because Friday simply "ran away" with him. He had been busy Friday he said with drafting and had to send a few emails – he could not it seems afford a few minutes to send a short email to Mr Flanagan about his alleged concerns with the Conference although he made the time to send emails praising the presentations.

452. It is not in dispute however, that despite the apparent endorsement of the presentations within the above emails there had been expressions of disapproval by other colleagues. Ms Gillian Roberts a Real Estate Partner sent an email to Mr Flanagan on 19 June 2018 in which she stated expressed her disapproval and referred to having raised this directly with Mr Williamson and Mr Beverley on the evening of the presentations.

17 June 2018 – Sunday

453. James Hart, Real Estate Equity Partner, sent an email to Mr Williamson on Sunday 17 June 2018 in the evening, at 9.57pm **[p.467].** He had not been present during the presentations of the Claimant or Mr Tempest but reported that quite a few colleagues were concerned about some of the content in the first half- specifically Mike Taplin and Ian Tempest's presentations and;

"My Understanding (and it is only an understanding as I wasn't there) is that Mike's included:

- *A racial stereotype pf African's as cannibals*
- *A conflation of LGBT with GDPR as in essence) annoyances we have to put up with these days*
- *A punchline based on penis size*

If I have understood this correctly, and I appreciate I may not have done, it seems to me that all three elements are unacceptable in a business context but particularly given the diverse but predominantly young, female audience. For me the comment about LGBT is the one that stands out because, if I have understood correctly, it is so dismissive of a diverse range of sexualities and because the firm was worked so hard to improve understanding of sexual diversity…"

454. Mr Williamson forwarded the email to Mr Flanagan that Sunday evening at 10:11pm **[p.468]** and now appeared to appreciate that he should not have included his comment about them mirroring the Respondent's *approach to collegiality perfectly."* A realisation he had only appeared to have reached on receiving Mr Hart's email.

455. The email from Mr Hart was also not disclosed until the 13 October order for specific disclosure, the Respondent's witnesses had no explanation. Mr Flanagan specifically was asked and could not explain.

456. Mr Williamson's evidence was that he was so shocked by the presentation given by Mr Taplin that he could not speak to the Claimant that evening and that he did not stop the presentation because he "froze" and held his head in his hands. The Tribunal found Mr Williamson's evidence on this issue unconvincing (in the sense of not credible) . Within a short time of receiving an email from Mr Hart he made the time to alert Mr Flanagan to the concerns Mr Hart had raised, but despite the alleged extent of his reaction; the alleged shock - it took him 3 days to send an email late on a Sunday evening. In the intervening 3-day period Mr Williamson found the time to send emails in which he not only praised the event, he endorsed the presentations.

457. The Tribunal do not accept that Mr Williamson was particularly personally concerned over the content of the presentations. Mr Williamson as Chair of an organisation not related to the Respondent, had not voted in favour of but did not give evidence that he took steps to prevent, the booking of a comedian who told jokes 'degrading women' at an event for 600 business people. This was in October 2017 and resulted in a number of complaints he had to deal with. That makes what the Tribunal find to be a dilatory reaction to the concerns raised and apparent endorsement of these presentations by the Claimant and Mr Tempest, even more perplexing. Those endorsements and delay in speaking to the Claimant, would understandably create confusion and suspicion about the genuineness of the Respondent's motives.

Functional Effects

458. We find that based on the medical evidence and the Claimant's own evidence and the evidence of those witness interviewed by Mr Powell during the investigation, that his

disability and or the medication he was taking, on a balance of probabilities, impaired his judgement such that his behaviour exhibited as hyper and over stimulated in the period leading up to Conference. By 18 June 2018 the Tribunal find he remained mentally fragile and in a state of recovery and was less able to cope with negative and stressful situations. He was as described by Dr Laher in his February 2018 report **[p.396],** emotionally vulnerable, and as stated in the May 2018 report experienced unhelpful thought patterns **[p.452**]. The impact of stressful situations such as disciplinary action and suspension; impacted as described by Dr Laher in a relapse and risk of further bodily harm and impacted on his ability to work.

18 June 2018

459. Mr Flanagan sent an email in response to Mr Williamson's email at 5.54am on 18 June 2018, the promptness with which he responded, the Tribunal find indicated the seriousness with which he viewed the situation. The email was sent to Mr Beverley, Mr Karl Jensen, Julian Middleton and Darren Williamson; *"I am keen to hear from Richard and Darren exactly what was said, but if the concerns are justified, we only have a short window of opportunity to formulate a response which people might expect."*

460. The undisputed evidence of Mr Flanagan is that early on the day of Monday 18 June 2018 he spoke with Mr Williamson who told him that the Claimant's joke had contacted racial stereotypes and he may have also made remarks disparaging the Respondent's diversity policies. He then spoke to Head of the Leicester team and Nottingham, Real Estate team who confirmed that the context was potentially offensive.

461. The Claimant does not assert that the Respondent should not have investigated and addressed the complaints and the Tribunal find that it was of course reasonable that they did so.

A First Sub- Committee meeting: 18 June 2018

462. A First Subcommittee (FSC) was convened on 18 June in accordance with paragraph 4 of Appendix F (see above) of the Management Document.

463. Mr Flanagan's evidence is that because of the seriousness of the situation, he gave no consideration to whether to deal with the situation in an informal way with the Claimant. When asked if he gave any consideration to the Claimant 's mental health when deciding on how to deal with it under Appendix F, his answer was simply; "No". His evidence was that he was not aware his disability was affecting his judgement and in doing that; "*I had to work on the basis of the information I had".*

464. Mr Flanagan's evidence is that; "*If Dr Laher was saying he was fit to return to work, he is fit to make judgment about complex legal matters, so I have no reason to believe he could not make these judgemental*". Although Mr Flanagan accepted that the Claimant was not in fact involved in complex legal matters on his return.

465. The three Designated Members of the FSC were; Paul Thorogood, the Respondent's Compliance Officer for Legal Practice, Charles Powell, Head of Compliance and Karl Jansen, National Head of Corporate.

466. The meeting of the FSC took place on 18 June 2018. Mr Flanagan although not on the FSC, was present. There are no notes of that meeting. The presence of Mr Flanagan

is a concern for the Claimant who complains about his influence over the FSC. His explanation under cross examination for his presence was that he helped facilitate the meetings.

467. The Management Document para 42 does provide that where the matter is raised with the Chairman, the Chairman "*will convene*" a FSC. It was therefore appropriate within the provisions of the Management Document the Tribunal find for Mr Flanagan to make the initial arrangements for the FSC.

468. However, para 4.2 of the Management Document provides that the FSC shall be three Designated Members or in the alternative, it may be composed of the Chairman and two Designated Members. It does not provide for a situation where the FSC is comprised of three Designated Members and in addition, the Chairman.

469. During the FSC meeting on 18 June, the FSC spoke to Mr Williamson and Mr Beverly by telephone. Mr Williamson did not mention the Claimant's ill health or medical reports, he was not himself aware that the Claimant was taking medication. He assumed that Mr Flanagan would have informed them, if they were not already aware.

470. The Claimant under cross examination gave evidence that Richard Beverley was <u>not</u> one of the people trying to engineer him out of the business. What Mr Beverley had said to the FSC therefore, the Claimant does not allege was motivated by a desire to remove him because of his disability.

471. The evidence of Mr Williamson is that he gave his account of what had happened and the feedback from Gillian Roberts, James Hart and Ms Sfar-Gandour. Mr Williamson gave evidence that the Claimant 's presentation was worse because it involved racial stereotyping, denigrating the Respondents policies and GDPR and LBGT issues and that it was consistent and prolonged.

472. The evidence of Mr Powell was that based on the information available the Claimant's conduct appeared more serious than Mr Tempest's conduct because it involved content that was potentially racially as well as sexually offensive compounded by remarks which appeared to trivialise the Respondent's equality and diversity policy. Mr Powell denied that this decision was made; "*because of his mental health"* or part of a plan to oust him from the firm.

Consideration of the Claimant's mental health issues

473. Mr Powell's who does not sit on the Management Board, gave evidence in his statement that *"…there was* ***no obvious link*** *between the alleged conduct and Mr Taplin's health*." [Tribunal stress]

474. Mr Powell however in cross examination gave evidence that although aware the Claimant "had been off and had come back", there was no mention at this FSC meeting of whether the 'joke' was caused by his ill health and that if he had been aware that his ill health had caused or contributed to what happened at the Conference his evidence was that; *"of course it could have"* made a difference to the decision they made.to suspend. He confirmed that he was not aware of any reports from a psychologist and Mr Flanagan made no mention of it.

475. Mr Powell's evidence was the extent of what they were told about the Claimant's condition was that it was stress related. Mr Flanagan did not explain that the Claimant had been demonstrating any strange behaviours leading up to the Conference. Mr

Powell gave evidence under cross examination that there was no consideration about whether to simply make a telephone call to Dr Laher because; " *I didn't know anything about Dr Laher"* however he conceded that that he was; " *.. was not in a position to judge his medical condition"*

476. Mr Powell stated that he understood what a serious detrimental effect suspension may have on someone with a mental health condition.

477. The sensitivity shown towards the Claimant and his mental health condition he stated, extended to having; "*sympathy"* with him.

478. In re- examination when taken to Dr Laher's report of 30 May 2018, Mr Powell's evidence was that there was nothing in that report that would make him think they should not consider suspension because of his ill health however, Mr Powell was not prior to the decision to suspend, however of the observations of Ms Wigley, Mr Williamson, Ms Rhodes and Ms Davies about the Claimant's changed behaviour leading up to the Conference.

479. The evidence in chief of Mr Thorogood is that the decision to suspend the Claimant and not Mr Tempest was because, he genuinely viewed his conduct as more serious based on what Mr Williamson and Mr Beverley had told them. It is notable that Mr Thorogood makes no mention of the Claimant's mental health problems when dealing in his witness statement with the decision to suspend.

480. Mr Jensen's evidence in chief does however unlike Mr Powell or Mr Thorogood's, touch on the Claimant 's mental health issues; *"We were conscious of the fact that Mr Taplin had had some mental health issues and recently returned from a period of sabbatical but felt that notwithstanding this fact, suspension was the appropriate response given the potential seriousness of the issues*…"

481. Mr Jensen in cross examination stated that he was mindful of the "*impact of suspending"* someone however, his evidence as that he had never heard of the specific condition the Claimant had been diagnosed with when he was told what the diagnosed condition was under cross examination.

What information about his disability did the FSC have ?

482. Mr Flanagan under cross examination confirmed that the FSC would not have seen the medical reports. He did not answer directly whether he passed on Ms Wigley's' comment about the situation being "*fragile";* stating; "I *am pretty certain everyone would have been aware"* going on to explain that they knew the Claimant had come back from a long absence.

483. Mr Flanagan explained that he had not mentioned the medical reports about the Claimant's health because it was not "*apparent*" to him that the incident was referable to his health.

484. There was no reference to Ms Wigley for advice, despite her close involvement with the Claimant.

485. Mr Flanagan's evidence was that the Claimant's mental health was not a consideration under Appendix F. He confirmed under cross examination that there was no consideration of his mental health and whether they should deal with the situation in

an informal way because of the seriousness of the situation. Mr Flanagan's evidence was that in terms of the Claimant's judgement, he did not consider it had been impaired because Dr Laher had said he was fit to return to work and the Claimant 's work required him to deal with complex measures. However, the Claimant had returned to work on a phased 'gentle' return to work and was not yet dealing again with complex matters. Mr Flanagan had considered that the Claimant should not continue as Managing Partner because of the impact of the Claimant's behaviour on morale in the office. Mr Flanagan had therefore himself differentiated between the Claimant's ability to complete transactional work/ his performance in his job and his interpersonal skills..

486. The Tribunal have regard to what Dr Laher said in his report of 11 September 2017 **[p.357]** that the condition;

> *"…frequently manifested in decreased performance **or** other important areas of functioning and temporary changes in social relationships"*
>
> *And;*
>
> *" It is not unusual, as part individuals Adjustment Disorders and stress reactions, for there to be an adverse impact on their communication style and interpersonal interaction… (eg the person with and Adjustment disorder may appear to be **overly insensitive** or aggressive with others)"..*
>
> [Tribunal's own stress]

487. The report was clear, that this type of Adjustment Disorder may affect performance **or** other areas such as relationships, not that there cannot be one affect/impact without the other or that all areas will be affected. The report therefore identifies in effect that performance may not be affected but other important areas of functioning may be.

488. The Tribunal find that Mr Flanagan's evidence on why he did not mention the medical reports to be utterly unconvincing and once again, the Tribunal do not consider Mr Flanagan to be a credible witness. Mr Flanagan did not explain to the FSC that he did not consider the Claimant's behaviour to be impaired by his condition because he was able to carry out complex work and, he did not give this explanation in his witness statement for why he did not disclose what he knew about the medical reports and what he knew about the Claimant's condition. In fact, the evidence he gave in his witness statement contradicts the Tribunal find what he gave as the explanation under cross examination. He does not state in his statement that he formed the opinion that the Claimant's health was not relevant, he in fact states that he considered the possibility of a potential impact to be a matter left open for consideration;

> "[w/s para 102)
>
> *"…what mitigation he might or might not offer and **what bearing if any, health matters had on the matter were of course things that would be for the subsequent investigations and if applicable, disciplinary hearing to consider"***

489. If Mr Flanagan had considered as he alleges he did in his witness statement, that the issue of the impact of his health, was a matter to be considered during the investigation and disciplinary hearing; there is therefore we find no reasonable explanation for failing to make the investigating officer aware of the existence of the medical reports,

reports which were from a psychologist appointed by and paid by the Respondent to give it advice.

490. Mr Flanagan may have formed his own view that his health was not a factor and despite the fact he was not a member of the FSC, did not disclose relevant information because he did not want them to come to a different decision to suspend or he may not have even applied his mind to the possibility, or he may have considered that his health may have been a factor and withheld information to prevent the Claimant's health being taken into account, because an easy solution to the problems of managing the Claimant's ill health and the diversion this caused for Mr Williamson, was to suspend him, removing him from the workplace and potentially also forcing him into an exit situation or dismissal.

491. What is clear from the evidence of the FSC Members evidence, is that before deciding whether to suspend him;

- They did not have sight of the medical report,
- They did not know about Dr Laher's diagnosis,
- They did not discuss with the Claimant the possible impact,
- They did not discuss with the Claimant's colleagues or Ms Wigley the possible impact and/or whether he had been displaying since his return unusual behaviours
- They did not know what if any medication the Claimant was taking at the time.

492. The evidence of Mr Thorogood was that the SSC was given a summation of the recent position principally from Mr Flanagan about the Claimant's health, his return to work and certified fit to work but that there was "not *a great deal of discussion in that meeting about the Claimant's history of mental* health" and they had no medical reports. Mr Thorogood under cross examination stated that there was limited discussion about the Claimant's mental health and that they could have spent more time going through the medical background to the Claimant's condition but they didn't. The did not, because Mr Flanagan was not disclosing what he knew about the Claimant's health problems and that he was taking medication. Mr Flanagan was very much we find, steering the FSC toward suspension.

Suspension

493. The FSC considered that it was appropriate to suspend the Claimant whilst the investigation was carried out but not Mr Tempest.

494. Mr Flanagan's evidence under cross examination was that that he expressed a view when sending the case to the FSC and that he *"may have*" expressed a view in the FSC meeting as well .

495. Mr Williamson called the Claimant into a room on 18 June 2018 and told the Claimant that he was being suspended because of the joke that he had told at the presentation It is not in dispute that the Claimant was informed by Mr Tempest on 18 June 2018 that he had not been suspended and the Claimant alleges that from the difference in treatment "*he sensed something was not right".*

496. The Claimant's evidence is that far from a neutral act, the suspension particularly when for a prolonged time, it makes it practically impossible for a high-profile individual to

return to their role and this he believes this is why Mr Tempest was not suspended and he was.

497. It was Mr Flanagan who wrote to the Claimant on 19 June 2018 informing him of the decision to suspend him;

> *"The decisions taken yesterday but the First Sub- Committee* ***consisting of three Designated Members*** *was to undertake an investigation under paragraph 4 of that procedure.*
>
> ***In view of the nature of the concerns,*** *the First Sub Committee also decided that suspension* ***was necessary*** *in accordance with paragraph 5 of the procedure…*
>
> *I would add that everyone involved in the decision was sensitive to your health issues."*

498. The process at appears provides under para 5.1 for suspension in 2 different scenarios;

- Gross misconduct; or
- In any other case where it is in the interests of the Member or the LLP;

It may be *necessary* to suspend a Member…

499. Mr Flanagan failed to identify whether it was a case of alleged gross misconduct or whether and if so why, it was in the interests of the Claimant or the LLP and indeed why it was deemed necessary. He does refer to the "nature of the concerns" but does not identify that allegation as one of gross misconduct. The Claimant in his witness statement **[p.123]** stated that; "*Clearly. at this point, Freeths were dealing with this as a gross misconduct issue, which could justify and result in, my expulsion from the Partnership. Given the way I felt upon my return, I was extremely concerned that Freeths intended to expel me*". The Claimant refers later in his witness statement **[p.129]** that in with respect to the email from Mr Powell on 19 June 2018; "*At this point, and having been suspended for alleged gross misconduct, I knew that I was under threat of expulsion…".*

500. The Tribunal find that despite the lack of reference to gross misconduct within the correspondence however, the Claimant believed that at the latest by the 19 June that the Respondent was treating this as a matter of gross misconduct. It was put to the Claimant that he was then 'playing games' through his solicitor asking questions and challenging lack of clarity over the reasons for the suspension. The Tribunal find that on a balance of probabilities that the Claimant was less than cooperative with the process but accept that he was feeling vulnerable not least given the difference in his treatment from Mr Tempest, treatment which the HR Director herself clearly did not consider to be well judged. We therefore find his concern and challenge over the lack of clarity over the process to be understandable on the circumstances and there was a failure to explain why regardless of it being treated as gross misconduct, why suspension was 'necessary' given the decision not to suspend Mr Taplin, the delay in taking any action and the emails praising the presentations after the Conference; it was a confusing picture.

501. The Claimant then received an email on 19 June from Mr Powell; "*As you know* ***Colin has*** **asked** ***me*** *to conduct an investigation into events at last Thursday estate* conference*" [Tribunal stress].* The Management Document provides that it is the FSC

who will conduct such investigation as *"it"* considers appropriate. Mr Flanagan was not on the FSC. It was not for Mr Flanagan to decide who would conduct the investigation.

Investigation decision

502. Mr Flanagan sent an email to the conference participants **[p.495 – 198].** It states; *"**I have asked** Charles Powell, as Head of Compliance, to undertake a full investigation and, subject to the outcome of that investigation, further action may then be necessary"* [Tribunal stress]

503. The email refers to Mr Flanagan having asked Mr Powell to investigate, he had no authority to do so within the terms of the Management Document, that authority the Tribunal find, rested with the FSC.

Mr Flanagan's involvement in the FSC and the decision to suspend

504. It is difficult for this Tribunal to understand Mr Flanagan's involvement with the FSC, his presence at the FSC meeting, his endorsement of the suspension, his email informing staff he had personally delegated the investigation to Mr Powell.

505. The Claimant alleges that all Mr Thorogood, Mr Powell and Mr Jenson went along with what Mr Flanagan wanted them to do. The relevance of that, is that the Claimant alleges that Mr Flanagan wanted to exit him because of his disability and/or something arising from it, and the Conference was an opportunity to do that and he applied influence to the FSC to achieve that outcome. He was we find on a balance of probabilities, instrumental in the decision to suspend and refer the matter to the SSC.

506. Mr Flanagan the Tribunal find was a less than candid in his witness statement in which he stated that his role was to facilitate the meeting and advise on the rules in the Member's Agreement, he did not explain that he had also expressed a view on whether the Claimant should be suspended and in a claim of discrimination it is of course central to the case to determine who made the decision. The Respondent is not only itself a law firm with its own specialist employment department it has legal representation. This issue the Tribunal find on a balance of probabilities, must have been considered when Mr Flanagan's evidence was taken and his statement prepared. The Tribunal find that he failed to reveal the extent to which he involved himself in that process not only in his witness statement but it was not disclosed to the Claimant or his solicitor when they were raising concerns about the constitution of the FSC.

507. Mr Flanagan also admitted under cross examination that had the FSC decided to suspend Mr Tempest and not the Claimant he would have asked them whether they should; "*reconsider".* That is clearly the Chairman being prepared to use his influence and position to encourage then to reach a different decision, in breach the Tribunal find, of the terms of the Management Agreement. That is not how Mr Flanagan presented his involvement at the outset of the cross examination when he attempted to maintain that he was there only to assist in the process and arrange the meetings. Mr Powell under cross examination when it was put to him that Mr Flanagan was not someone to take a 'back seat', replied; "*he is the Chairman, that's his job".* We find on a balance of probabilities that as Mr Flanagan was prepared to encourage the FSC to reconsider' its decision if it did not accord with his own. The Tribunal find it is more likely than not that he did express a robust view on whether the Claimant should be suspended at the FSC meeting. If Mr Flanagan did not consider his opinion would carry any weight, it would have made little sense to have expressed it and to have been

present at that meeting. The Tribunal find he gave his opinion to influence the FSC and on a balance or probabilities it did influences them so much so Mr Powell disregarded the advice of Ms Wigley.

508. The Tribunal find on a balance of probabilities, that Mr Flanagan was not there to sit silently and direct about process, he was the Tribunal find on a balance of probabilities, there to exert influence about the direction the process was going to follow. The Tribunal find that Mr Flanagan wanted the Claimant to be suspended and we find that he used his influence to steer the FSC to that outcome.

509. The Tribunal found that Mr Flanagan had shown support for the Claimant up to the Claimant changing his mind about handing over management responsibilities to Ms Rhodes, thereafter he had no direct contact with him and left others to support the Claimant.

510. Mr Flanagan was keen for the Claimant to remain off work until he was fully fit, no pressure was put on him to return however, the Tribunal find that given the continuing need for support, the past issues with his behaviours towards staff and then his behaviour at the Conference, on a balance of probabilities Mr Flanagan, had lost patience with the Claimant and his recovery and that he used his influence to persuade the FSC to suspend the Claimant. That influence consisted not only of we find on a balance of probabilities letting them know his opinion about suspension, but the decision to withhold relevant information about his health including the medical reports. We have drawn inferences from Mr Flanagan's unreliable accounts of why he did not disclose about what he knew about the Claimant's ongoing ill health after his return in May 2018, why he did not disclose information about the Claimant's health to the FSC and the extent of his involvement with the FSC.

511. The Tribunal do not find however that Ms Wigley was looking to engineer the Claimant out of the business. She expressed concerns about his behaviour and may well have considered action should be taken to address it, the Tribunal consider that she presented an unbalanced and unfair account of the Claimant's behaviour to Dr. Laher to persuade him to recommend that the Claimant remain off work however, we find that this was based on genuine concerns for the team at Derby office however, she was very robust in her view that the Claimant should have been treated the same as Mr Tempest, she did not condone any difference in treatment. Ms Wigley also supported the Claimant although she did not consider herself to be responsible for doing so, even contracting him while on a holiday in Canada with her husband to celebrate her 60th birthday which went above and beyond what she could be expected to do. The Tribunal find that Ms Wigley had no involvement in the decision by the FSC and was not asked to comment on the Claimant's behaviour by the SSC.

Consideration of Claimant 's mental health and alternatives to suspension

512. The Tribunal find that the FSC did not consider the impact suspension may have on his mental health or at least if they did, it did not extent to considering alternative to suspension, regardless of the seriousness of the offence.

513. There was no explanation by the FSC about why suspension was deemed necessary pending the investigation, what purpose was it seeking to achieve.

514. An obvious alternative would be to permit the Claimant to take a period of leave. The Claimant was in a very senior position, and he was known to have taken periods of leave. This would not only be for appearance purposes but the Claimant felt that he was being unsupported, dealt with unsympathetically and treated differently. This would have also given the Respondent time to carry out some investigation into the possible link between his ill health and his conduct at the Conference, and then made a decision about suspension at that stage

515. When asked by the Tribunal about paid leave as an alternative to suspension, Mr Flanagan's evidence was that it was;

"another alternative – may be a good option"

516. Mr Flanagan referred to this not being an option in Appendix F at the moment but could be when they review it. He did not explain why they could not have reviewed it at the time and the Tribunal note that there is a process for making reasonable adjustments under paragraph 12 of Appendix **[p.194]** where it is in the interests of the LLP**.** The Tribunal find that another option was to carry out some initial investigation and in circumstances where there was evidence of a possible link between his ill health and his conduct, take that into account and afford him the same treatment as Mr Tempest.

Investigation

517. Mr Powell's undisputed evidence is that the he started the investigation by contacting Ms Wigley to check her thoughts on possible sanctions and training options, although sanctions was not the FSC remit he was concerned to understand the types of diversity training.

518. Mr Powell's evidence was that during his investigation Mr Tempest mentioned that the Claimant behaviour was "*far too up*"; he couldn't recall if it was about the conference or his behaviour generally but he did not investigate this and it was not taken into account in any decision after the suspension decision was taken. He also accepted that it was entirely possible that it would have had a bearing on the decision to suspend had the FSC known that the Claimant had attempted to take his own life and; " *… if we had more information we may have reached a different decision of course"*

519. Ms Wigley's sent an email setting out training options following a request for this information from Mr Powell, but she went on to set out her unsolicited opinion to Mr Powell on the decision to suspend the Claimant and not Mr Tempest [**529];** *"I think we have made a serious error of judgement in not treating these two offences the same. What it says to me is that the members of this firm don't treat the objectification of women (and Ian made at least two references to that in his presentation) in the same way as they treat an office that also contains race and homophobia."*

520. Ms Wigley when asked about her assessment now, looking at the bundle and witness statements, about whether the Claimant and Mr Taplin should have been suspended or neither she was reluctant to give her opinion ultimately stating; *"…not fair to expect me to put my neck on the line"*.

521. Ms Wigley was clearly discomforted by this line of questioning but accepted that as Mr Tempest did not have a mental disorder, Mr Tempest was in her words; "*potentially, possibly"* more culpable than the Claimant. In answer to questions from the tribunal, Ms Wigley however stated that if it had been two employees, she considered it would be reasonable for an employer to suspend both.

522. The email from Ms Wigley itself was not disclosed until after the Tribunal order for specific disclosure on the 13 October, and again Mr Flanagan, Chairman of the Respondent was not in a position to explain. Mr Powell failed to make any mention of it in his statement.

523. Mr Powell did not report back to the FSC Ms Wigley's concerns. There was no review of the suspension decision.

524. Mr Powell interviewed 15 delegates at the conference and he set out their comments in an appendix to his report [**587 – 591]** and they included the following comments;

"Heather Davies:

- ***she said that MT had been "overly jolly" as if on medication. . She said that the firm owes him a duty and he should not have been speaking at the conference"***

Janet Rhodes;

- ***When Mike came back to work he appeared calm. However, in the last couple of weeks something has changed. It was like he was on speed and was "totally buzzy".***
- *I warned Darren that Mike was intending to do a joke about him and Richard.*
- *It is impossible to manage MT in the Derby office. It will be a major problem if he returns. He is prepared to do things his way or not at all.*

Sam Shepherd

- ***When Mike first came back to the office he was quite quiet and seemed to be settling back in to the office well. However, for the last week or so he has been much more "hyper"***

525. That document was not shown to the Claimant before the disciplinary hearing.

526. The comments about the Claimant's behaviour leading up the Conference, given this was an individual with a known mental health condition, were in the clearest terms alerting those conducting this investigation to the heightened and unusual behaviours of the Claimant leading up to the conference.

527. Mr Powell in answers to questions from the Tribunal stated that he understood the reference to "speed" to be a reference to drugs and the term "hyper" gave him cause for concern and when asked if he explored those concerns, his answer was noncommittal and unconvincing; *"I may well have done".*

528. Further, on the 18 June 2018 timed at 12:35 Mr Powell reported directly to Mr Flanagan, Mr Williamson and the FSC members that he had spoken to Ian Tempest **[p.492]** and that; "He *mentioned that in recent conversations he's had with Mike that Mike was "**far too up".** That tallies with Darren's experience today".* This was the Tribunal accept another 'red flag', alerting the FSC to the very possible link between the Claimant's behaviour at the Conference and his ill health. That email was received about an hour after the FSC meeting had made the decision to suspend was made and it was by then too late to stop proceeding to a formal disciplinary because according to Mr Flanagan in cross examination; "*the decision had already been made*".

529. Mr Flanagan when asked during cross examination whether if he had seen this email before the FSC meeting, he would have put a brake on the FSC, his evidence was; *"I don't know"* however he accepted that it was reasonable to say that there was possibility it may not have gone to the FSC if he had seen it.

Attempts to speak with the Claimant

530. Mr Powell sent an email to the Claimant on 19 June asking to meet as part of the investigation. After receiving no reply, he contacted the Claimant again by email the following morning and followed this up with a letter proposing a meeting on 22 or 25 June 2018.

531. The Claimant replied by email on 22 June. The Claimant set out in brief his ill health and asked a series of questions about the process.

532. On 22 June 2018 Mr Powell replied; *"A "First Sub- Committee" meeting was convened on Monday 18 June 2018 consisting of three Designated Members (myself, Paul Thurgood and Karl Jenson)* ***together with Colin Flanagan".*** *[Tribunal's own stress]*

533. There was further exchange of emails with the Claimant proposing a meeting. Having heard nothing further, and making no further attempt to contact Claimant, Mr Powell informed him on the 29 June that he had concluded his investigation.

534. Mr Powell's evidence under cross examination was that he felt he was being given the run around by the Claimant but that it did **not** occur to him he may be affected by his mental health condition or medication because at the time he did not know he was dealing with some with a mental impairment, he was he stated completely unaware.

Investigation Report

535. The report **[p.582 – 591]** Is addressed to the other two members of the FSC and Mr Flanagan. It was sent to them by email on 29 June 2018 **[p581]**. The pre-amble to the report states that the;

"A First Sub- Committee meeting was convened on Monday 18 June 2018 ***consisting of*** *three Designated Members (Charles Powell, Paul Thorogood and Karl Jansen)* ***and the Chairman, Colin Flanagan****"*

[Tribunal's own stress]

536. The report confirmed that the Claimant 's suspension was carried out under para 5.1 of Appendix F, however it did not confirm whether this is on the grounds of gross misconduct or in any other cases where it in the interests of the Member or LLP.

537. The conclusion was that the presentations were 'universally' considered to be inappropriate by those he interviewed but the Claimant's was more offensive than Mr Tempest's. He also reported that neither Mr Tempest nor the Claimant understood how their presentations could have caused offence albeit as acknowledged in the report, Mr Powell had not spoken to the Claimant. With regard to Mr Tempest his comments were;

"*He indicated that he had not intended to cause offence and he apologised unreservedly if anyone had been offended by his presentation" and*

*"It is striking that **neither** Ian Tempest nor Mike Taplin understood how their presentations could have caused offence"*

538. Mr Powell's evidence before this Tribunal was that when he interviewed Mr Tempest on 20 June, he had been immediately cooperative and contrite, he does not comment on it being 'striking' that he did not understand how he had caused offence.

539. Attached to his report were bullet points from the interviews he conducted.

540. Mr Powell recommended to the FSC that both Mr Tempest and the Claimant should be referred to a capability or disciplinary hearing and he recommend that both should be reported to the SRA for breach of conduct; "*I do believe that we have an obligation to report Mike Taplin, the **only possible mitigating factor being his ill health"*** [Tribunal stress]

541. Some of the comments set out in Appendix A included;

"*MT's comments were more serious but appeared to be an error of judgement rather than malicious"*

"MT's much worse than IT but IT's talk was completely disrespectful of women."

"IT was sexist and ill-judged but not as bad as MT"

Solicitors intervention

542. The Claimant's solicitors wrote on 2 July 2018 **[p.606].** This was their first contact with the Respondent. It was a lengthy letter which dealt with a number of issues, including commenting on the Claimant 's ill health and recent return to work; "*The accusations against him remain unacceptably vague, it would appear to amount to an allegation that he told a joke that some members of the audience thought was inappropriate*".

543. The letter also challenged the membership of the FSC comprising four persons instead of three (including Mr Flanagan) as outside the terms of Appendix F. It raised concerns regarding the involvement of Mr Flanagan both in terms of procedure but more substantively because the Claimant considered he was not an appropriate person to sit on the FSC having sent an email to staff on 18 June 2018 in which he referred to believing elements of the conference had been "*wholly inappropriate and inconsistent with the values of the firm"* thus prejudging the outcome and that the Claimant believed there was an agenda to force him out.

544. The letter of 2 July also raised the lack of clarify around why it was necessary to suspend, referring to Mr Powell in his email of the 22 June had only referred to the serious nature of the offence, which may explain why it was treated as gross misconduct but does not address the second part of clause 5.1 which requires it to be gross misconduct and 'necessary'. The 'necessary' part given Mr Tempest had not been suspended for a similar offence was never addressed and we find fuelled the suspension around the Respondent's motives in treating them differently and thus his anxiety about a hidden agenda to remove him.

545. The response came from Mr Powell and did not explain that Mr Flanagan had expressed an opinion on the decision whether to suspension going on to defend his

right to do so but rather gave what the Tribunal consider to be misleading explanation of the extent of Mr Flanagan's involvement. **[p.640];**

"*The First Sub- Committee, consisting of three Designated Members and assisted by the Chairman* ***to facilitate procedure****… I was delegated* ***by the*** *First Sub- Committee to conduct the investigation"*

546. Mr Flanagan by his own admission under cross examination did not just advise on procedure, he gave his opinion on the decision which he would have known as Chairman would carry a significant amount of weight.

547. The letter of the 2 July also raised the lack of clarify over whether this was an allegation of gross misconduct and if not, what '*interests'* under para 5.1 were being relied upon and why suspension was considered 'necessary'; "*What are the interests of both Mr Taplin and Freeths which made it "necessary" to suspend him during the investigation?"* **[p.610]** The letter also referred to para 3.3 of Appendix F (see above) and argued that this provision entitles the Respondent to withhold names of witness potentially, but not the content of their allegations.

Decision to refer to disciplinary or capability hearing

548. The FSC met on the 2 July 2018. There are no notes of that meeting just as there are no notes or minutes of their first meeting on the 18 June. The lack of minutes the Tribunal finds surprising, these are lawyers who understand the importance of record keeping and yet we have not one single record kept by any of the attendees of what was discussed. There was no explanation for the absence of any record of their decision-making process.

Was Mr Flanagan involved in the decision to refer the case to a disciplinary or capability hearing?

549. Mr Powell denied under cross examination that Mr Flanagan had a role in deciding whether to refer the case to a disciplinary hearing under cross examination however the report he prepared for the FSC included the names of the FSC committee members and also Mr Flanagan, which would not we find be consistent with him attending to give advice on procedure only. Indeed, at no point did Mr Flanagan explain what procedural issues he was required to advise on let alone any issues which required his physical attendance at that meeting.

550. We were not convinced by the evidence of the Respondent's witnesses regarding Mr Flanagan's involvement. Further, Mr Flanagan although there to allegedly oversee the process and despite asserting that any mitigation around his medical situation would be a matter for the investigation and disciplinary, he did not raise the information he had about the Claimant's health including his medical reports, at this meeting or with the SSC. He did not explain to Mr Powell that there was information about the Claimant's medical health which should be included in his report. We find on a balance of probabilities, that Mr Flanagan was present to exert his influence again over the process, that he would not have taken a 'back seat' but would have expressed his view which would have carried a lot of weight. Further we find he influenced the process by withholding the information he knew about the Claimant's medical condition. Even at this stage with more 'red flags' about his condition leading up to the Conference, he held back that information despite his evidence being that it was relevant at the

investigation and disciplinary stage. He was we find, on a balance of probabilities I instrumental in the decisions made by the FSC at each stage.

551. The decision was taken to refer the case to Second- Sub Committee (SSC) under para 6 of Appendix F.

552. Mr Powell wrote to the Claimant's solicitors on the 3 July, he referred to the FSC being *"acutely aware*" of the Claimant's long-term health issues. He also stated; "*you are incorrect that the investigation is solely considering Mr Taplin's conduct at the Real Estate Conference*". **[p.639]** however later in the same letter, it refers to the investigation and decision to refer to a capability or disciplinary hearing, being "*based solely on Mr Taplin's conduct at the Real Estate Conference",* which created more confusion. Mr Powell also completely failed to answer the question around why pursuant to the requirements of Appendix F the suspension was considered "*necessary", a* legitimate and reasonable enquiry given the decision not to suspend Mr Tempest. Mr Powell repeated that it is was in the Claimant and the Respondent's interests to suspend without explaining why and what interests are being allegedly served by the suspension [**p.640].** The answer we find would reasonably be considered evasive. On the same day Mr Powell received a telephone call from Mr Tempest [**p.644]** in which Mr Tempest expressed concern about the Claimant;

"…*very worried about Mike and that he had "gone to ground" and he couldn't contact him. CRP said that we were aware of Mike's fragile condition and will do everything we could in order to get through the process as fairly as possible*".

553. The outcome of the FSC meeting appears not to have included a decision over which process whether capability or conduct to recommend**.** The Claimant's solicitor wrote again on 6 July 2018 asking which process was being followed **[p.668].** It was not clarified. The solicitors complained about the failure to respond to the 2 July letter in any "*meaningful way*" and the Respondent was asked again to address the points in the letter fully. The request is repeated for the Respondent to explain the basis for the suspension under Appendix F which would include why the suspension was necessary and whose interests were being served by it. The letter refers to the disciplinary process being harmful to the Claimant's health and interests as a Member and that the *"continued obfuscation in your letter only makes this worse*". **[p670].** The solicitor also responds to Mr Powell's comment that it is incorrect that the suspension only relates to the Conference and complains that the investigation has been completed without identifying the other issue/s.

554. Mr Thorogood in his capacity as COLP decided to await the outcome of the disciplinary hearing before forming a view whether to report either of the Partners to the Solicitors Regulation Authority to allow them to state their case first, this is despite the duty to promptly report.

Review suspension decision

555. Mr Thorogood's evidence was that his understanding is that the FSC had the opportunity at the second meeting to review the suspension however, despite the further information about the Claimant's condition his evidence is that; *"it was not seriously considered"*.

556. Mr Jenson did not dispute under cross examination that there was an obligation to keep the suspension under review. There is no mention of a review in the statements of those on the FSC are in Mr Flanagan's statement or in correspondence with the Claimant or his solicitor. We find on a balance of probabilities that there was no consideration of whether to review the appropriateness of the suspension. Mr Flanagan was there to advise he states on process but he did advise the FSC to consider whether to review it in light of the investigation findings.

557. Mr Jensen gave evidence under cross examination that if Mr Flanagan had telephoned Dr Lather and been informed that the Claimant had made attempts to take his own life and his medication had been doubled: *" … we would have taken that into account – difficult to say what would have been – would have needed more information"* but although he stated that would still have been looking at suspension, he stated*;*

"we would have looked at other options".

558. In terms of what those options were, Mr Jensen's evidence was;

"…*if we took the view it was inappropriate for the Claimant to work in the office due to state of his mental health – one was suspension - other ways of doing it in consultation with people – possibly*"

559. Mr Jensen gave evidence that by agreement it may have been possible to find another option but options were not discussed.

560. With regards to why the FSC did not delve deeper into the background, his evidence was that it was 'time', it would take time to get reports and that would delay the process.

561. The Tribunal consider that a simple step would have been to seek the Claimant's consent to a delay to obtain more information. Mr Thorogood did not explain why delay of itself would create difficulties for the Respondent and the Respondent would be perfectly content later to delay the disciplinary process to allow for without prejudice discussions to take place – so why not take some time to investigate the Claimant's mental health issues and the possible impact on his conduct? There was no explanation given to the Tribunal why delaying the process would have been problematic. Further Appendix F expressly provides for time limits to be varied where it is reasonable to do so pursuant to paragraph 2.3 **[p.189]**

Disciplinary Proceedings – Second Sub- Committee

562. The Second Sub-Committee (SSC) Included; Sarah Foster, Leon Arnold and Jonathan Hambleton (Chairman).

563. The SSC wrote to Mr Powell on 5 July 2018 **[p655]** and asked for further information about the investigation following the receipt of his report, it is also referred to the Claimant 's health and in particular **[p.656]**

> *"Finally, the SCC are very conscious of MT's reported health issues and would obviously* ***not want to do anything that might exacerbate the position.*** *Common sense would suggest that MT's best interest would be served by completing the disciplinary process as quickly as reasonably possible… That said none of the members of the SSC have been closely involved with the Firm's effort to support Mike over recent months – and we suspect that Colin and HR are somewhat closer.* ***The SSC would therefore ask that Colin/HR let the SSC know***

straight away if there is any concern that proceedings as planned will be detrimental to MT's health" [Tribunal stress]

564. No other members of the FSC were copied into that email from Mr Hambleton however, Mr Flanagan was and he did not even at this stage alert them to Dr Laher who would have been able to advise them .

565. Mr Flanagan's witness statement did not comment on this enquiry about the Claimant's health or any steps he took to discuss his health with the SSC. Under cross examination Mr Flanagan stated that it had only required a response if he considered to proceed would be detrimental. Again, his failure to disclose what he knew about the Claimant's condition and the medical reports, is at odds with his assertion that this was a matter for consideration also at the disciplinary stage. We find that a significant reason why Mr Flanagan did not want to alert the SSC to the extent of the Claimant's disability, the fact that an Occupational Psychologist was involved in the treatment of the Claimant and perhaps should be consulted with or the enquiry directed to him, was because of the nature of the Claimant's illness and Mr Flanagan's concerns about the ongoing diversion this was causing for the Respondent.

566. Mr Powell replied and in response to the question about possible detrimental impact it states merely; "*noted*". Mr Hambleton's evidence under cross examination is that 'noted' was the only response received to their enquiry. Despite being alerted to concerns during the process over the Claimant's health by his solicitors and Mr Tempest, neither Mr Flanagan nor Mr Powell raised concerns.

567. Further interviews took place with additional witnesses who had attended the conference [**p.709-722/727 – 730**]. The Tribunal accept the evidence of Mr Hambleton that the witnesses asked for their identified to be kept confidential which was why the statements were anonymised when provided to the Claimant. On the 6 July 2018 **[p.683]** late that afternoon (17:23) Mr Hambleton emailed the Claimant informing him that the investigation was complete into his 'conduct' at the Conference and that disciplinary hearing was required and would take placed on 25 July 2018. There had been no discussion with the Claimant.

568. It is notable that despite Mr Flanagan's attending the FSC meetings ostensibly to provide guidance on the process, he clearly did not consider it necessary to attend the SSC. The Claimant's solicitors had of course challenged the constitution of the FSC by this stage, which we find may well explain his lack of involvement, albeit there was clearly some communication.

569. On 9 July 2018 the Claimant wrote to Mr Hambleton **[p.693]** raising a number of issues and asking for clarify on whether this was a capability or disciplinary hearing and the basis for the continued suspension. He again asked about the basis for the suspension and that he cannot understand the refusal to set this out. The response from Mr Hambleton is deliberately short and fails to engage with the questions over the suspension and the reason for doing so is clearly tactical. Mr Hambleton provides his suggested response to the other members of the SSC explaining that; "*I have deliberately kept the email short and clinical at this stage. This keeps our powder dry if Mike refuses to attend*…" **[p.699].** There is no regard shown for the impact this type of continued evasion may have on the Claimant's health or indeed his confidence that the underlying reason for the suspension is not related to his ongoing mental ill health. Mr Hambleton expresses no concern for or even comments on the Claimant's health. He informs the Claimant only that; "*The decision to suspend you was a decision of the First Sub-Committee and is not a matter the Second Sub Committee can comment on or assist with."* **[p.705].**

570. The Claimant is informed that the SSC will not be responding to his solicitor's letter. There is therefore continued avoidance of reasonable questions raised by the Claimant and failure to either seek an explanation from the FSC for the suspension, refer the enquiry on to them to deal or indeed for the SSC to consider the original reason for the suspension and whether suspension is still "necessary." We find that the FSC and SSC members did not really engage with the requirements of Appendix F and considered beyond the seriousness of the offence, why it was "*necessary"* to suspend or what interests were being served by it.

Mr Tempest's disciplinary hearing

571. The disciplinary hearing with Mr Tempest took place on 25 July 2018 **[p.797/799].**

572. The evidence of Mr Hambleton was that Mr Tempest at the hearing; "*readily acknowledged his mistake and made errors of judgement. He also said he wished to apologise*". He was viewed by the SSC as constructive and cooperative. The sanctions applied to Mr Tempest were **[p. 798];** an apology, diversity training, great care to be taken in the future to avoid any conduct that could be interpreted as objectionable, consider with input from Mr Flanagan whether it would be helpful/appropriate to join the firms Diversity Committee and a substantial contribution to the firms nominated charity.

Dr Laher report – 25 July 2018 [782]

573. The Disciplinary hearing with the Claimant did not take place on 25 July 2018, there had been a without prejudice meeting in the interim and it was agreed to adjourn the disciplinary hearing. Dr Laher produced a further report on 25 July 2018 which referred to the Claimant showing signs of relapse due to the suspension and that the way his Partners/Firm was handing the ongoing process was;

"undoubtedly *now causing some psychological detriment to the Claimant" and;*

"The client continues to feel that he had not been given clear information about the reasons for the suspension and his perception is that there is an underlying agenda against him"; and

I cannot rule out further deterioration in his emotional health ***and a potential return to self- harm vulnerability. It is therefore paramount that his Partners and the firm itself maximise the support of the client and minimise any stress in the current situation****"*

574. At a second without prejudice meeting on 6 August 2018 matters were not settled and the Claimant was promptly afterwards sent a date for the disciplinary hearing of the 16 August 2018.On the 7 August 2018 solicitors for the Claimant wrote reserving the Claimant's position about the validity of the disciplinary procedure **[p.819].** The letter referred to the Respondent repeatedly refusing to explain the basis of the suspension; "*in particular Mr Taplin is entitled to know if he is accused of gross misconduct*." It also referred to Mr Powell making vague reference to the suspension being in the interest of the Claimant and/or Respondent but failed to explain either interest.

Mr Hambleton's approach

575. There is a memorandum from Mr Hambleton to Mr Flanagan and Mr Powell in which he blithely the Tribunal find, proposes to "*ignore for now*" the letter from the Claimant's solicitor **[p.823]**. This again shows a disregard for the Claimant's health during this process. He goes on to propose some responses, none of which answer the question about the Appendix F grounds; all the proposed responses amount the Tribunal find to a '*batting awa*y' of the questions and with no apparent sensitivity being shown.

576. Mr Hambleton states in this email of the 7 August 2018 **[p.823]** that he has a corporate lawyer approach and so tends to '*ignore the niceties of litigation'.* The Claimant was of course however, still a Member and they still had a duty of care toward him under the Equality Act. They were not in a litigation process at this stage, they were dealing with an individual with a mental health condition who had worked for the Respondent for many years and shown immense dedication to his work, to the detriment of his personal health. None of this it appears to have particularly registered with Mr Hambleton when devising his 'strategy' for how to respond. Neither Mr Powell nor Mr Flanagan reminded Mr Hambleton of the sensitivity to be shown towards the Claimant and that he was dealing with someone who was mentally fragile. It is clear that Mr Flanagan was therefore in dialogue with Mr Hambleton who was seeking his advice on handling this process, he ends his letter asking to "*discuss and agree the best approach…"*

577. Mr Hambleton's approach to protecting the Respondent's position rather than supporting the Claimant through this process is also reflect in his comment at the foot of the email;

"Happily the Anderson email does not ask if the solicitor can accompany MT at the hearing"

Documents for the disciplinary hearing

578. On the 8 August 2018 Mr Hambleton provided the Claimant with documents for the disciplinary hearing. He had not replied to the Claimant's solicitor and the questions specifically he raised about the investigation process. The Claimant is informed that at the disciplinary hearing he will be asked to summarise the presentation including the 'joke' that was told, respond to the comments made by staff about their view of the presentation/joke, whether he considers the presentation complied with the Firm's Equality, Diversity and Inclusion; policy and whether he considers that his conduct at the Conference but him in breach of clauses 20.1.1 (10.1.4 and 10.1.7), 20.1.1. and/ or 20.2.2. of the Members Agreement. We find that it was clear from this email, what the complaints into his conduct at the Conference were, prior to him attending the disciplinary hearing. He now had the detailed complaints from staff about the offence alleged to have been caused.

579. Mr Hambleton disclosed a summary of the comments made to Mr Powell during the FSC committee meeting. He explained to the Claimant that those interviewed wanted them identifies to be kept confidential therefore he had done this by referring to them as 'interviewee 1' etc and that he had also removed details where this referred to other members of staff or presentations. The aim he said was to give the Claimant; " .. *a fair and balanced report".*

580. The Tribunal are profoundly concerned that Mr Hambleton did not only anonymise the interviewees or delete references to other members of staff or presentations but he actually removed the following comments;

"Heather Davies:

- *she said that MT had been "overly jolly" as if on medication. She said that the firm owes him a duty and he should not have been speaking at the conference"*

Janet Rhodes;

- *When Mike came back to work he appeared calm. However, in the last couple of weeks something has changed. It was like he was on speed and was "totally buzzy".*
- *I warned Darren that Mike was intending to do a joke about him and Richard.*
- *It is impossible to manage MT in the Derby office. It will be a major problem if he returns. He is prepared to do things his way or not at all.*

Sam Shepherd

- *When Mike first came back to the office he was quite quiet and seemed to be settling back in to the office well. However, for the last week or so he has been much more "hyper"*
- *It was very difficult when he returned as he seemed to think he was back in a management role when we all thought that he was not, it would appear that no one told him he was no longer in a management position*

581. Ms Rhodes referred to a change in the "last couple" of weeks, which would be from circa end of May / beginning of June 2018. Ms Shepherd referred to the 'hyper' behaviour being displayed in the last week or so i.e. from circa 7 June 2018, which would post date Dr Laher's last report **[p.452]**.

582. On the 9 August 2018 the Claimant sent Mr Hambleton a copy of Dr Laher's report of the 25 July 2018 **[p.849]** expressing surprise that it had not been passed on to him by Mr Powell.

583. On the 10 August 2018 **[p.850**] the Claimant asked for a reply to his solicitor's letter of the 7 August 2018 which he felt was "*important to my understanding of the situation I face"*.

584. The response on 10 August, failed to address the questions about the grounds/reasons for suspension, asserting that situation was not a matter for the SSC. The response was yet again evasive and dispassionate in its tone.

585. The Tribunal find that the act of suspension and the manner in which the disciplinary process was managed was likely to have exacerbated the Claimant's mental health and it would have been obvious that with his condition, this was a likely outcome.

586. In response to a further letter from the Claimant's solicitor **[p.856]** which included concern about the editing of Mr Powell's Appendix (Appendix), Mr Hambleton replied stating that **[p863**] that the only editing was as set out in his 8 August email. He also

stated in his witness statement **[para 27 e]** that any editing was in relation to the identity of staff.

587. On giving evidence Mr Hambleton stated during supplemental questions, that his witness statement was incorrect and that the editing of the Appendix was wider than just editing the identify of staff. He gave evidence that the extent of it was however as explained in the covering email of the 8 August to the Claimant **[p.833]** and that the editing, according to the evidence he gave under oath had 4 elements to it;

i. To separate out comments made about the Claimant and Mr Tempest

ii. Anonymise by deleting comments names and comments that identified other people or those comments which could have only come from 1 or 2 people

iii. Deletion of extraneous information

iv. Deletion of comments which were not related to the conference and were negative so as not to damage working relationships.

588. Mr Hambleton denied making this change to his statement because he had been *'rumbled',* i.e. that what he had actually done was select and remove comments helpful to the Claimant.

589. The Tribunal find that the redactions however go beyond the type of edits Mr Hambleton told the Claimant he had made and indeed his evidence before this Tribunal. His evidence under cross examination was that he removed the comments by Ms Davies because she was inappropriately speculating that the Claimant was on medication and her comment that the Claimant should not have been speaking at the Conference, was not relevant to his behaviour <u>at the Conference</u> because they referred to previous weeks and thus were not relevant and deleted. Given Mr Hambleton's evidence that he removed what were helpful comments to the Claimant, not because they potentially assisted the Claimant but because they predated the actual presentation itself, he was asked by the Tribunal why applying that principle, he had left in the comment by Sam Shephard which referred to the Claimant 'hijacking' the Conference and being insistent that he had wanted to do it. Mr Hambleton's explanation was not convincing;

"the intention was to take out comments prior to – quite clearly I failed to keep to that policy or intention ..."

590. The Tribunal find that the comments Mr Hambleton removed were those which were potentially critical of the Respondent's management of the Claimant. The Tribunal find on a balance of probabilities that Mr Hambleton '*cherry picked'* the comments which incriminated the Claimant and removed comments which may not only have linked his illness to his behaviour at the conference, but identified potential liability on the Respondent for a failure to take steps to protect him. The Tribunal arrive at this finding not only because of the unconvincing answer to the above question, but the comment he made under cross examination that he had also removed the comment by Ms Davies because; "I *didn't like introducing concept of duty, not for Heather Davies to comment*". Mr Hambleton was in contact with Mr Flanagan during this process, he sought his approval for how he would respond to the Claimant's solicitors for example however, there is no evidence to support a finding that Mr Hambleton edited the

investigation on the instruction of Mr Flanagan however, we were not satisfied with either Mr Flanagan or Mr Hambleton as witnesses in terms of their credibility.

591. Mr Hambleton was the Tribunal find, in a 'litigation mind frame', his focus being on protecting the Respondent and not on fairness or balance to the Claimant. Those comments exposed that the Respondent had potentially failed to protect the Claimant and we find in a bid to protect the Respondent, he edited that document.

592. There is an exchange of emails with Mr Hambleton from 8 to the 9 August 2018 regarding the arrangements for the disciplinary hearing. Mr Hambleton wrote on 6 August (promptly after the second without prejudice meeting) informing the Claimant that the hearing would take place on 16 August 2018. The Claimant replied on the 8 August stating that he was not available on the 16 or 17 August and providing dates when he would be available on 14 August through to the 21 August 2018 (including 15 August) stating "*please also note that I will not be blocking out these dates and times for too long*." He referred to Dr Laher's report of the 25 July 2018 provided to Mr Powell which he assumed Mr Hambleton had seen.

593. Mr Hambleton then sent a memo to the rest of the SSC members objecting to the tone of the Claimant 's response and commenting that the Claimant should generally be available as he was on suspension.

594. Mr Hambleton then responded to the Claimant **[p.832]** expressing 'disappointment' at the Claimant 's response and asking him to reconsider his availability and refers to him having spent considerable time and effort co-ordinating the members; there is no enquiry about the Claimant's wellbeing

595. In response **[847]** the Claimant expresses his disappointment in turn at Mr Hambleton's expressed disappointment, explains that he had planned a couple of days break staying with a friend and refers to the report of Dr Laher of the **25 July 2018** and asks for the hearing to be, not cancelled but "*re-arranged*".

596. On 9 August Mr Hambleton responds and informs the Claimant that he has not seen Dr Laher's report which is then sent by the Claimant to him on 9 August **[P.849].** Mr Hambleton responds with brief comments inserted against the Claimant's email. The Claimant refers to the report explaining the effect the Respondent's action are having. Mr Hambleton responds to this with the words; *"I have not seen the report referred to".* Mr Hambleton does not ask to see the report, he does not enquire about it or about how the Claimant is coping with the process and more generally there is no expression of concern or interest in his health.

597. Mr Hambleton confirmed under cross examination that he had not seen any of the medical reports prior to the 9 August.

598. The exchange between the Claimant and Mr Hambleton is fractious, Mr Hambleton is clearly irritated by what he sees as the Claimant being deliberately obstructive and difficult and the Claimant is we find, clearly upset and irritated in his communications. However, the Tribunal find that Mr Hambleton had taken a deliberately litigious and obstructive mindset to the Claimant and his solicitor in respect of their enquiries. We find the tone of his communications with the Claimant to be dispassionate and lacking in care and sensitivity.

599. The Tribunal find that the Claimant was anxious and unwell during this period, upset that he had been suspended when Mr Tempest was not. Ms Wigley had commented on his fragile state of mind prior to the Conference and Dr Laher would address in his

report the impact the suspension had on his mental health. The Tribunal find that the Claimant was less able to cope with the stress of this situation and more anxious and irritable than he would otherwise have been because he was unwell and felt vulnerable. That he was fragile and there were 'red flags' that his behaviour had deteriorated before the Conference and his behaviour was hyper was known to the Respondent, it was specifically known to Mr Flanagan, and as Mr Hambleton had seen Mr Powell's investigation Appendix, he had also seen those comments and was on notice that the Claimant's health appeared unusual or unstable prior to the Conference.

600. In his memo to the other members of the SSC **[p.847]** on 10 August 2018, expressing clear annoyance at the Claimant 's response, there is absolutely no mention of the 25 July 2018 medical report, of the Claimant's ill health and whether this may be affecting his behaviour, his ability to cope with the process and what if any allowances/ adjustments need to be made for that; it makes no reference to his health at all.

601. Mr Hambleton's evidence under cross examination was that he had received the 25 July Dr Laher report on 9 August but did not send it to the other members of the SSC because he would have asked for the Claimant's consent first. This is also not a convincing explanation for taking no steps to share the content of that medical report. He could have asked the Claimant for his consent. Further, he makes no mention of the 10 August to receiving a medical report when referring to the Claimant "*messing about".* Mr Hambleton was also the Tribunal find unconvincing when under cross examination he informed the Tribunal that "*may have*" mentioned the medical report in telephone calls, but could not say during which calls, when and nor did he explain what he said. The Tribunal did not find Mr Hambleton to be a reliable witness.

602. On receipt of the medical report of the 25 July 2018 on the 9 August, Mr Hambleton responds the next day to the Claimant **[p.850].** He still makes no reference to the report or expresses any interest in the Claimant's health or how he is copying, or what adjustments he may require. The Claimant presses him to answer his solicitor's letter which Mr Hambleton had decided to delay answering, without any we find consideration of whether this may cause the Claimant more anxiety. He replies in the evening on the 10 August **2018 [p.853]** at 8.04pm, despite the Claimant asking for the response to be sent to his solicitor by 4.30pm that afternoon. The 10 August is the Friday before the hearing the following Wednesday. If the Claimant wanted his solicitor to receive it before the weekend or even discuss it with the Claimant, Mr Hambleton did not assist by sending it so late in the evening. Again, there is no expression of interest regarding the medical report and the Claimant's health or enquiry about any adjustments he may require. It is a perfunctory response which did not answer all the questions including failing to answer or redirect questions about the suspension process. The Claimant's solicitor would complain again about a failure to answer the fully the questions asked again in his letter of the 12 August 2018 **[p.856].** The Claimant complains about not knowing why he has been suspended by email of the 13 August **[p.862].** Despite all these repeated requests for clarity, Mr Hambleton sends another evasive reply on 14 August 2018 by email essentially citing from the Management Agreement that suspension is a matter for the FSC.

Dr Laher's report – 25 July 2018.

603. The 25 July Dr Laher report **[p.782**] refers to the Claimant having been continuing to improve but the suspension has caused him additional stress when still fragile. The report also refers to the claimant being prescribed Fluoxetine. The report makes the following observations about the impact of the formal process;

"The Client was continuing to improve and was pacing himself well but, unfortunately the way his Partners/the firm have been handling the recent suspension process has understandably caused additional stress at a time when the Claimant was still fragile, Unfortunately, the work issues have predictably provoked a slight relapse"; and

"The client continued feel that he had not been given clear information about the reasons for the suspension and his perceptions are that there is an underlying agenda against him"

"… I cannot rule out further deterioration in his emotional health and potential return to self – harm vulnerabilities are therefore paramount that his Partners and the firm itself maximise the support of the client and minimise any stress in the current situation"

Medication – side effects

604. Mr Hambleton gave evidence under cross examination that he knew something about Fluoxetine and a "little" about its side effects which he understood to be;

"*various in individuals – in some can make them rather low and depressed, not depressed, low and negative thoughts – other can make them agitated, even aggressive – running too quickly – the dials are set too high"*

605. Mr Hambleton despite having this knowledge of possible side effects and having knowledge of the type of medication the Claimant was taking, under cross examination had no recollection of discussing with the other SSC members the possible effects of the medication the Claimant had been taking.

606. The Claimant alleged under cross examination that on 9 August he was asking for the hearing to be rearranged "*full stop*", rather than rearranged. The Tribunal do not find that this is what he was asking in this 9 August email, he was proposing alternative dates, nowhere does he object to the hearing going ahead at all.

The Claimant's Disciplinary - 15 August 2018.

607. The disciplinary hearing was postponed for 2 weeks to allow without prejudice discussions to take place. He did not request a further adjournment to prepare for the hearing.

608. Tena Magdani, Head of Employment Leicester office replaced Ms Foster and the hearing took place on 25 August 2018 **[p.833-846].**

Medical Report – 15 August 2018

609. On the morning of the hearing which took place on 15 August 2018, the Claimant produced a further report from Dr Laher [**p.871/873].** The report included the following observations/opinion(paraphrased);

- The Claimant had been under his care since August 2017
- He was being treated for a "*serious stress related condition which can (and has, in Mr Taplin) provoked suicidal feelings and which, in my opinion, has arisen primarily in the context of Mr Taplin's work at Freeths*"

- The Claimant has required and remains on adjunctive psychotropic mediation

- Dr Laher understands that the Claimant gave a light-hearted presentation and was told it had been very well received.

- The ongoing disciplinary process was "*having an adverse impact"* on his psychological health and has "*undeniably caused a relapse in his health*".

- "*The ongoing uncertainly surrounding the disciplinary process and the way in which his firm have been handling the disciplinary process has had a marked adverse impact on Mr Taplin's psychological health. This has caused a psychological relapse which I am very concerned about."*

- *…" he has been; baffled as to what the substance of the allegations are against him and what specifically he is being disciplined for. In such a confusing milieu, Mr Taplin has understandably, wondered and worried about possible other reason why his firm have chosen to instigate a disciplinary process"*

- "*It also goes without saying that any effort that the firm makes towards clarifying what the specific issues of concern are and what process needs to be followed is likely to reduce Mr Taplin's level of distress"*

610. Dr Laher referred in his report to strongly recommending reasonable adjustments to allow the Claimant to engage in the disciplinary process but does not state what adjustments are required. The Claimant under cross examined referred to reasonable adjustments being to have his wife present in a more informal setting or not to have the disciplinary process given that Mr Tempest was given a reprimand outside of a formal process.

611. The Claimant under cross examination denied that he had failed to disclose to Dr Laher the nature of the joke by the date of this report but accepted that it could be inferred that he had not do so because in this letter he refers to it being a light-hearted presentation which had been well received but Dr Laher he would later in April 2019 (when sending a letter for the purposes of the SRA self-referral), refer to it being in his objective view reasonable for people to have been offended. The Tribunal find on a balance of probabilities that the Claimant had not disclosed the full extent of the 'joke' initially to Dr Laher however in his later report in April 2019 Dr Laher opinion is nonetheless that the Claimant's judgment was impaired by his illness and he does not resile from his opinion on this.

612. The Claimant was accompanied by Mr Morrison, a Real Estate Partner. The Claimant it is not disputed did not ask to attend the hearing with someone outside the LLP. He had a companion and neither he nor his solicitors nor indeed Dr Laher recommended that he should be permitted to take someone else with him. The Claimant asserts that it did not occur to him because of his mental state. It is not clear to this Tribunal how this adjustment would have been effective in removing the disadvantage. The Claimant did not give evidence about what he would have said or not said or indeed how he would have managed or coped with the process better with a different companion.

613. The Claimant read out a pre-prepared statement **[p.921]** which includes a sentence about reserving all his rights arising out of the process. He also draw an analogy about how he had been working in which **[p.921]** he likened himself to driving a car at 70mph while everyone sat in the back seat and knew he should be driving at 50mph but as he

seemed fine and wanted to drive the car at 70mph; " *no one said to me, even though they knew how hard I was working, that I should slow down…"*

614. The evidence of Mr Hambleton is that the Claimant was "*generally awkward and uncooperative*". His evidence is further that the Claimant showed no remorse and that he felt that his behaviour was so frustrating he wondered whether he was trying to goad the SSC to expel him. Mr Hambleton's evidence is that he urged the Claimant to change his approach and at the end he made a credible apology and that having reflected he could see how some attendees may have been offended and that he misjudged things somewhat.

615. The notes of Mr Arnold refer to the Claimant making a number of comments in the hearing where he does not accept the seriousness of the situation; including that he would retell the story /joke and it was part of how to develop relationships with clients and that it was a bit of banter however, at the end of the hearing he is noted as stating that;

"I *have been very open about my mental health issues. It was the first opportunity after a short space of time at work to give a presentation and with hindsight I think I overtried and tried to be funny and I recognised I misjudged it. My mental state of mind may have contributed to that"*

616. The evidence of Mr Hambleton was that the SSC considered the evidence including from the Claimant at the hearing about his health and decide not to expel him;

"*considering he accepted that others may have been offended, his willingness to apologise and* ***the fact that his health may have impaired his judgement*****".** [Tribunal stress]

617. The notes of the hearing **[p.878/879]** record the decision that;

"***it seemed likely (****although difficult for the SSC to judge the extent)* ***that MT'S judgment at the Conference and at the Hearing had been impacted by his health issues.*** *It was also noted that this had been the first formal complaint about MT'S conduct in his 19 years with the Firm*"

618. The decision was sent to the Claimant on Monday 20th August 2018**,** the evidence of Mr Hambleton was he was keen to get it to the Claimant and sent it Friday but due to a "computer glitch" the email was not sent, and he resent it on the Monday.

619. Mr Flanagan wrote to the Claimant on the 20 August also **[p.957]** suggesting for the first time , a mentor for him ;

"I think it is important that you have access to a senior person in the firm, other than those involved in the management structure of your office or business group, with whom you can discuss any matters related to your return and ***who can support you*** *in that process. I would suggest either Julian Melton or John May …"* [Tribunal stress]

620. Mr Hambleton confirmed that Mr Tempest was not told during his disciplinary hearing that he was under threat of expulsion. His evidence was that it was the Claimant who first mentioned expulsion in his disciplinary hearing. The Claimant may have first raised the issue of suspension however it is clear from Mr Hambleton's note of the meeting

[p.945] that there was discussion and consideration of expulsion as an outcome for the Claimant.

Sanction

621. Mr Flanagan described the sanctions applied as something akin to a warning. The sanctions applied to the Claimant in summary were;

i. Agreement to attend diversity and equality training ii. To apologise to the conference attendees
iii. To consider a contribution to charity
iv. "*must take great care as to his future conduct and to avoid any behaviour that could be regarded as objectionable by any member of staff*"

622. The Claimant complains that the last, iv was broad in terms of its wording and was not in Mr Tempest's outcome however the Tribunal find that this was in the outcome to Mr Tempest **[p.797]** following his disciplinary hearing.

Apology

623. Mr Flanagan proposed the wording for an apology to be issued from the Claimant and Mr Tempest on 20 August 2018 [**p.950/960]**. Mr Flanagan also wrote to the Claimant on 24 August 218 to let him know he was going on annual leave **[p.964]**and told him that it would be preferable to delay his return until 3 September when Mr Flanagan would be back in the office **[p.964].** The Claimant replied explaining that he was saying his doctor on 5 September 2018 **[p.973]** and then wrote on 5 September stating that he had been medically advised not to return to the office at the time but had a further medical appointment on 19 September 2018 **[p.979].** Dr Laher provided a report following a session with the Claimant on 5 September 2018 **[p.974]** which included the following observation;

"*The Client was continuing to improve and was pacing himself well, but unfortunately, the way his Partners/the firm have been handling the recent suspension process has understandably caused additional stress at a time when the Claimant was still fragile. Unfortunately, the work issues have predictably provoked a slight relapse"*

624. It was clear that Mr Flanagan did not want him to return until he was back in the office.

Resignation

625. On the 7 September 2018 the Claimant served notice that he was retiring/resigning form the Respondent **[p.980].**

626. Dr Laher in his report of the 19 September 2018 wrote as follows **[p974]**

"*Despite the client's good motivations and preparedness to return to work, unfortunately there seems to have been a breakdown in the relationship between the client and his firm arising from the issues already alluded to in this report. The client continues to feel that the recent* ***suspension process has been very unfairly and poorly*** *handled. His perception is that there is an underlying agenda against him..."*

627. The Claimant under cross examination gave evidence that the outcome of the disciplinary was not what made his position untenable but it was the formality of the

process; "*compared to Mr Tempest"* and the *method that led to it – the suspension* amongst *other things".* The Claimant's evidence was that his; "*position had been made untenable by the suspension and I expected that the undermining of me would continue* "[w/s 49].

628. The Claimant was required to give 12 months' notice pursuant to the Members Agreement and did so.

629. The Claimant contacted Acas on 10 September 2018 and issued Tribunal proceedings on 1 October 2018.

630. The Claimant remained off work on health grounds throughout the notice period and his notice expired on 6 September 2019.

631. Under cross examination the Claimant 's evidence was that the Respondents made his position "*untenable"* and that he was "*undermined"*. In re-examination the Claimant's evidence was that the suspension was not the only reason for his resignation, it was a "*whole host of matters*", unfair treatment, failure to take into account medical reports" and the disciplinary action and treatment compared to Mr Tempest; "*my position became untenable as senior equity Partners – all the staff at Derby would know I had been suspended".*

632. The Tribunal find based on Dr Laher's report and the Claimant's own evidence, that as a *consequence* of the suspension and disciplinary process but in particular the suspension, the Claimant suffered a further relapse such that he was unable to return to work after the disciplinary hearing. He had indicated in May 2018 that he felt the return to work was going well, the Tribunal find that it was the suspension and the way the disciplinary process was handled that caused the Claimant to believe that his position was untenable but the suspension was the main trigger.

Nature and extent of the substantial disadvantage relied on by the Claimant - functional effects of his ability.

633. The Tribunal find on the evidence, including the various comments from colleagues as set out in Mr Powell's Appendix, that the Claimant's behaviour leading up to the Conference was unusual, he was exhibiting 'hyper' and over stimulated way, and was less able to make sound judgements about socially sensitive and appropriate behaviour. It was during this period that his medication had been doubled which the was more likely than not to have been a cause or contributing factor with respect to his conduct at the Conference.

634. Further, the Tribunal find that the Claimant remained mentally fragile on his return and was still in 'recovery phase', returning to work only a matter of few weeks after a relapse which led to him considering taking his own life and that he was less able to cope therefore with negative and uncertain and/or stressful situations including disciplinary action and suspension. The impact of that stress was as described by Dr Laher being a relapse and risk of further bodily harm.

635. The Tribunal also accept that the Claimant was less able to cope with uncertainty and the failure by the Respondent to answer his questions and those of his solicitor, which the Tribunal find were reasonable questions about the process including particularly given the difference in treatment Mr Tempest experienced, and that this caused the Claimant further stress and reinforced his belief that there was an agenda to remove him and/or that his position was nonetheless untenable and this impacted on his health**.**

SRA

636. Despite the FSC including Mr Thorogood's, view that the conduct of the Claimant was so serious it warranted suspension, Mr Thorogood's evidence is that after speaking to Mr Hambleton (although he does not say what was relevant about what Mr Hambleton had to say to him) and the absence of a clear SRA definition of '*serious' failure to comply with a Principle that triggers an obligation to report,* he decided to give each of the Partners "the benefit of the doubt" and did not report it their conduct to the SRA.

637. The Claimant however self-reported and this was sent to Mr Thorogood on the 5 February 2019 **[p.1116]** by the SRA with a request for information. Mr Thorogood replied on the 19 February 2019 **[p.1130].**

638. In a letter to the SRA on **19 February 2019 [p.1137c]** Mr Thorogood informed them that;*"As noted in the decision of the disciplinary committee quoted at paragraph 76 of Mr Taplin's self-report, although the committee considered it likely that Mr Taplin's judgment had been impaired by his health issues, they found it difficult to judge the extent to which Mr Taplin's illness may have contributed to his behaviour"*

639. Mr Thorogood accepted in cross examination that he did not send to the SRA, the interviews carried out by the SCC, the email exchange from Ms Rhodes with the 'car crash' comment or the email from Mr Williamson on the 15 June congratulating the presenters on the presentations because he was not aware of the two emails. He accepted that these documents may have influenced the view of the SRA in concluding that the Claimant's comment were more serious than Mr Tempests **[p.1137].** The email from Mr Flanagan of the 18 June was however provided to the SRA when there was further disclosure following their request on the 26 March 2019 **[p.1136]**

640. That decision by Mr Thorogood is difficult for the Tribunal to reconcile with the apparent seriousness with which the Respondent treated the Claimant's offence, so serious that they considered it as '*necessitating suspension'* , sufficiently serious as to amount to gross misconduct and possibly justify expulsion.

641. There was an exchange of correspondence with Respondent with the SRA who wrote on **10 April 2019** [1**137**]. The SRA had decided that Mr Tempests' conduct did not warrant any further SRA action and; "we agree with the firm's assessment that the comments made by Mr Taplin appear to be more serious. What distinguishes Mr Tempests' presentation with Mr Taplin's is that Mr Taplin made comments about race and sexual orientation which do not respect diversity and as such may amount to a breach of Principle 9"

Dr Laher report – 29 April 2019

642. Dr Laher provided a further report on 29 April 2019 to assist with the SRA investigation.

"***Because of his compromised psychological health***

a. He understandably misjudged his readiness to undertake the said presentation in the first place;

b. He misjudged the appropriateness of the contact of his presentation"

643. Taking into consideration this report, the evidence of the Claimant, the initial diagnosis of the Claimant's condition by Dr Laher and its affects, and the evidence of those who commented during Mr Powell's investigation on the Claimant's behaviour leading up

to the Conference and the comments by Mr Tempest; we find on a balance of probabilities that an affect or outcome of the Claimant's disability and/or medication was his compromised psychological health and the 'joke' at the Conference was something arising from his disability.

644. On the 24 May 2019 while the SRA considered that the Claimant had breached Principle 9 they decided it was not in the public interest to take action, taking into account a range of factors including Dr Laher's report **[p.1139]**

645. Counsel for the Respondent argues that Dr Laher's opinions provided after the Conference are not reliable because he was not in receipt of important information about the Claimant having told the joke before, was not told that the Claimant had put himself forward for the presentation and the content of the presentation itself. However, even if the Claimant had not been candid previously about the circumstances leading up to the presentation, whether he informed Dr Laher that he had told the joke previously to clients (albeit not in a presentation setting) or told him the content of his presentation, by the 29 April 2019 report from Dr Laher, he was aware of the content of the presentation. He refers **[p1137**] to; "*I confirm that I am aware, both directly through Mr Taplin in the course of his clinical treatment with me and also through the document that was appended to Mr Allen's letter of 11 April 2019, of the very specific content of Mr Taplin's presentation and the context of this*" .

646. Dr Laher makes no reference to the Claimant telling this joke in a different context before however he refers to the remorse he has shown and the Tribunal accept that Dr Laher is giving a clinical assessment of the impact of his condition. Tribunal find that the Claimant had not told this joke in this type of presentation setting and for the reasons set out above, do not accept that this was 'normal' for him. It is to be noted that in the report of the 29 April 2019 however, Dr Laher refers to understanding the Claimant's; "*readiness to undertake the presentation"*.

647. The Tribunal do not consider it appropriate to draw any adverse inference from the failure to call Dr Laher as a witness. The reason why he was not called was a matter discussed with both counsel representing both parties at the case management hearing where medical evidence was discussed and counsel (not those counsel before this tribunal), reached agreement that neither would seek to rely upon further medical evidence.

648. Dr Laher refers to the impact of his suspension and the Tribunal consider that there is no evidence to suggest, nor does the Respondent suggest, that from the date of the presentation to the disciplinary hearing, there was any material improvement in his condition, indeed Dr Lather's report states that the suspension had provoked a relapse **[p. 988].** If the Claimant's judgement was impaired on 14 June 2018, the medical evidence does not suggest that after a further relapse, his judgement would be any less impaired.

Measures to address workplace stress

649. Although he did not address this in his witness statement, Mr Flanagan mentioned that the Respondent has introduced measures to help address mental health issues in the workplace including; a wellbeing programme, a mental health first aider, mindfulness sessions, an app called Headspace and act active wellbeing group – however he was not able to say when each of these initiatives were implemented. He was not aware that the Claimant was offered the services of a mental health first aider.

650. The evidence of Ms Wigley to which Mr Flanagan deferred for the dates of the initiatives introduced, gave evidence that the mental health first aiders were not introduced until "*fairly recently*" in 2019. The mindfulness sessions were started in 2016 and advertised internally on a monthly bulletin, The Headspace app was introduced in the Spring of 2018. The app she explained has audio sessions on mediation and relaxation. A wellbeing Chair was introduced in 2019. One of the HR Team is delegated as Wellbeing Champion and this initiative began with the recruitment of a new member of the HR team in July 2018.

651. The Employees Assistance Programme was introduced before 2012, this is a telephone helpful and website offering advice.

652. While all of these measures are positive steps towards addressing what the Respondent accepted was a 'wake' up' call about workplace stress, the really more substantive changes such as an HR First Aider, Well-Being Champion and Wellbeing Chair, were not changes made during the time during which the Claimant needed support.

Subject Access Request

653. Following his resignation the Claimant made a subject access request.

654. Including within the disclosure were two email exchanges which the Claimant complains were mocking of his mental health issues.

655. The first was **[p.218/219]** an email with a comment made by Ms Bull his former PA in December 2016 to Ms Rhodes. The Claimant was not aware of who had sent the email and once aware he gave evidence under cross examination that he did not believe that Ms Bull was mocking his mental health. The Tribunal find that the natural reading of the email exchange is that Ms Bull was referring to it being 'mental' ie ridiculous that she was missing the Claimant in the context of her commenting that he seemed "back to his normal self- curt and to the point".

656. The second email exchange was between two Partners **[p. 341]** who were commenting on what the Claimant had billed in the 5 months to August 2017. After being told his billings were £741,000 and he was off work, Mr Golding responded; "*in which case, even more mental".* The Claimant under cross examination accepted that the comments could be viewed in a number of ways but that Mr Golding would have been aware that the Claimant was absent from work with stress. The Tribunal find that while the use of the term is unfortunate, the use of the term "mental" in the context the Tribunal find on a balance of probabilities was meant to express how unbelievable he considered those figures to be.

Holiday Record

657. The evidence of Mr Flanagan under cross examination did not accept that the information provided about the holidays taken by the Claimant and produced by the Respondent's Finance Director from 2002/2003, were correct however, he was not able to confirm what the correct details were stating; "*we can't deal with it I'm afraid."* **[p.1003].**

658. Mr Flanagan was unable to identify who from the Respondent would be able to deal with the issue of what annual leave the Claimant had taken. He confirmed that the

information provided by the Respondent was taken from the Respondent's own time recording system. His evidence was that some Partners did not record their holidays taken and that there was; "*no control*" over the recording of leave during the periods in which the Claimant is seeking an amount in lieu of untaken annual leave. He conceded that; *"I don't have anything to contradict it if he says it is his holiday*". We find on a balance of probabilities, that as the Respondent cannot produce its own record of the holiday's taken by the Claimant or gave no evidence to rebut his record, that the Claimant's record of what holidays he had taken set out in his schedule of loss, is correct **[p.1335].**

659. The Claimant when asked specifically by the Tribunal about the arrangements for taking holiday gave evidence that he was never prevented from taking holiday and "*I liked to work*". He also gave evidence that he could have over work when taking annual leave. The Claimant did not allege that he was given any inducement not to take leave, that he was discouraged or found it a problem to do so, his evidence was that he enjoyed being at work.

660. Mr Flanagan accepted that no one within the Respondent would make sure Partners generally or the Claimant took his full allocation of annual leave; "*this is a Partnership we give each-other a lot of freedom*".

661. None of the Respondent's witnesses have evidence about the arrangements which were in place prior to the date the Claimant became a Member of the LLP, to encourage Salaried Partners to take annual leave or the steps taken to make them aware that they would lose holiday not taken.

The Legal Principles

662. Before reaching our conclusions in relation to the issues before us, we have had regard to the law which we are required to apply when considering the matters for consideration.

The Discrimination Complaints under the Equality Act 2010 (EqA)

Reasonable adjustments – section 20 and 21 EqA

663. Section 45 Equality Act 2010 ("EqA") applies the disability discrimination provisions to

LLP members.

664. Section 20(3) is the subsection relevant to the reasonable adjustments claims in this case and sets out what the legislation calls "the first requirement", which imposes on a person, whom the legislation calls "A", *"a requirement, where a PCP 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 as it is reasonable to have to take to avoid a disadvantage.*

665. S.21(1) provides that a failure to comply with this requirement *"is a failure to comply with a duty to make reasonable adjustments."*

Knowledge

666. Para 20 of Sch.8 to the EqA provides that *"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 disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."*

667. A Respondent must know, or ought reasonably be expected to know, not only that the (a) Claimant is disabled but also that (b) the PCP puts him at the substantial disadvantage.

Failure to make reasonable adjustments

668. Duty to make reasonable 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.*
>
> *(4) The second requirement is a requirement, where a physical feature 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.*
>
> *(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.*
>
> *(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.*
>
> *(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to*

whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

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.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

669. It is a question for the Tribunal to determine, objectively, whether there has been a failure to make such adjustments as are reasonable.

670. The EqA, unlike its predecessor the Disability Discrimination Act 1995 (“DDA 1995”), contains no checklist of factors that the Tribunal may wish to have regard to.

671. The Equality and Human Rights Commission's Code of Practice on Employment (2011), refers to certain matters to which Tribunals may have regard. It is the EqA which takes precedence. *"Discrimination in work relationships other than employment"* is dealt with in Chapter 11 of the Code. Discrimination against Partners in a firm and members of LLP's is referred to at paragraphs 145 and 146, and the application of the duty to make reasonable adjustments to Partners and members of an LLP is referred to at paragraph 146.

672. As Harvey L [401] states: *"It was necessary to examine under DDA 1995 s.18B(1)(a), the extent to which making the adjustment would prevent the disadvantage created. As the EAT made clear in* ***Royal Bank of Scotland v Ashton [2011] ICR 632****, this involves an objective test. Whilst not expressly re-enacted under the EqA 2010, this issue is clearly of central importance in determining whether any adjustment is "reasonable" or not."*

673. Further, in that same para, *"As the DDA Code of Practice said (at para 5.28) it would be "unlikely to be reasonable for an employer to have to make an adjustment involving little benefit to the disabled person"."*

674. Although the duty to make an adjustment arises by operation of law, and hence it is not essential for a Claimant himself to identify what should have been done, this commonly will be the basis on which a claim arises (Harvey L[403]). The Tribunal have reminded itself of the qualification to that proposition as set out by the EAT in **PMI v Latif [2007] IRLR 579**.

675. Thus, if a code provides an example of an adjustment which on the face of it appears appropriate and which was not made, that is something the Tribunal should take into account –para 57.

676. If the Tribunal is to conclude that there was a failure to make a reasonable adjustment, there needs to be evidence of some apparently reasonable adjustment that could be made – para 54.

677. Further cases authorities which we have considered include:

- **Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 644, EAT.**
- **Environment Agency v Rowan [2008] IRLR 20 EAT, approved by the Court of Appeal in Newham Sixth Form College v Saunders [2014] EWCA Civ 734).**
- **Ishola v Transport for London [2020] IRLR 368 Lamb v The Business Academy Bexley UKEAT/0226/15 JOJ • Archibald v Fife Council [2004] IRLR 651**
- ***Redcar and Cleveland Primary Care Trust v Lonsdale UK EAT/0090/12, (EAT)*** **and** ***Wolfe v North Middlesex University Hospital NHS Trust [2015] ICR 960, EAT*****).**
- **(*Environment Agency v Humphreys EAT/24/1999*).**
- ***Noor v Foreign and Commonwealth Office [2011] ICR 695*****,**
- ***'Romec v Rudham [2007] All ER (D) 206 (Jul), EAT***
- ***Cumbria Probation Board v Collingwood [2008] All ER (D) 04 (Sep), EAT:***
- ***Southampton City College v Randall [2006] IRLR 18:***
- ***Mid-Staffordshire v Cheshire,***
- ***Tarbuck v Sainsbury***
- ***Smiths Detection v Berriman [2005] All ER (D) 56 (Sep), EAT***
- ***Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10, [2011] EqLR 1075,***

- ***Burke v College of Law [2012] EWCA Civ 37, [2012] All ER (D) 29, [2012] EqLR 279***
- ***The Home Office (UK Visas and Migration) v Kuranchie UK EAT/0202/16*.**
- ***Project Management Institute v Latif [2007] IRLR 579*.**

Direct discrimination, s.13

678. Section13(1) EqA provides that;

"A person (A) discriminates against another (B) if, because of a protected characteristic, a treats be less favourably than a treats or would treat a person (A) discriminates against another (B) if, because of a protected characteristic, a treats B less favourably than A treats or would treat others."

679. What is required is an examination of the mental process of the putative discriminator to determine whether the reason, or a reason, for the treatment complained of was C's disability.

680. The focus can only be on what the putative discriminator knew: **CLFIS (UK) Ltd v Reynolds [2015] ICR 1010**.

681. Where a claim concerns allegedly subjectively discriminatory treatment, at both the first and second stage of the analysis required by ***Igen v Wong*** is that it is the mental processes of the alleged discriminator which are in play, not the mental processes of others who may have provided information but did not make the relevant decision. In **Reynolds and ors v CLFIS** R contended that her consultancy arrangement had been terminated because of her age. The decision to terminate was taken by a senior manager, G. However, the employment tribunal found that he had been influenced by a presentation made by M and N, at which various deficiencies had been identified in the service provided by R. The tribunal examined G's mental processes, finding that the principal reason for the termination was the employer's unhappiness with the service that R provided, rather than her age. The Court of Appeal — overturning the EAT — held that there was no error by the tribunal in only considering G's motivation. If this were a case where the decision to terminate R's contract had been made jointly by G and others, the tribunal would have had to consider the motivation of all those responsible, since a discriminatory motivation on the part of any of them would be sufficient to taint the decision.

682. Direct discrimination involves a comparison as between the treatment of different individuals who do not share the relevant protected characteristic. Otherwise, *"there must be no material difference between the circumstances relating to each case".*(EqA s.23(1)).

Burden of Proof

683. It is important to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of discrimination. In deciding whether the Claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

684. In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.

685. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw. Where the Claimant has proved facts from which conclusions could be drawn that the Respondent has treated the Claimant less favourably on a proscribed ground, then the burden of proof moves to the Respondent.

686. It is then for the Respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

687. To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the relevant proscribed grounds, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.(See also ***Madarassy v Nomura International plc [2007] ICR 867(CA)***, and ***Hewage v Grampian Health Board [2012] IRLR 870*** (Supreme Court)).

Drawing inferences

688. An employment Tribunal was not limited in its ability to draw inferences to merely an evasive or equivocal reply to a questionnaire: ***Dresdner Kleinwort Wasserstein Ltd v Adebayo (EAT) [2005] IRLR 514***, (cited with approval in ***A v Commissioners for HMRC [2015] IRLR 962***). *"The fact of inconsistent accounts as to why something has happened have for many years, if not centuries, been regarded as a basis from which inferences can be drawn by tribunals of first instance".*(per HHJ Hand QC in ***Veolia Environmental Services UK v Gumbs UKEAT/0487/12/BA***).

Determining the reason

689. ***Nagarajan v London Regional Transport 1999 ICR 877, HL***, a case concerned with the definition of direct discrimination under the RRA.: "*Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out".*

690. Other case which we have considered include

D'Silva v NATFHE [2008] IRLR 412 [30],
***Mezey v South West London and St George's Mental Health NHS Trust [2007] IRLR 244*:**
Agoreyo v London Borough of Lambeth [2017] ICR 1572 CA
Hewage v Grampian Heath Board (SC) [2012] IRLR 870
Kalu v Brighton and Sussex University Hospitals NHS Trust UKEAT/0609/12,
The Law Society v Bahl [2003] IRLR 640
***Wisniewski v Central Manchester Health Authority [1998] PIQR P324 (CA)*,**
Efobi v Royal Mail Group Ltd [2017] IRLR 956
Wisniewski v Central Manchester HA, CA, 1/4/98,

Limited *liability Partnerships: section 45*

691. Section 45 deals with the liability of LLPs under the EqA;

(2) An LLP (A) must not discriminate against a member (B) -

(c) by expelling B
(d) by subjecting B to any other detriment.

(7) A duty to make reasonable adjustments applies to -

(a) an LLP;

Interpretation: section 46

692. Section 46 of the EqA is an interpretations section which provides that;

(1) This section applies for the purposes of sections 44 and 45.

(2) "Partnership" and "firm" have the same meaning as in the Partnership Act 1890.

(6) A reference to expelling a Partner of a firm or a member of an LLP includes a reference to the termination of the person's position as such -
(a) by the expiry of a period (including a period expiring by reference to an event or circumstance);

(b) by an act of the person (including giving notice) in circumstances such that the person is entitled, because of the conduct of other Partners or members, to terminate the position without notice;

Discrimination arising from disability, s.15

693. S.15(1) provides that:

(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.

694. For a claim under section 15 (1) to succeed, the unfavourable treatment must be shown by the Claimant to be 'because of something arising *in consequence* of [his or her] disability'. In other words, the discriminatory treatment must be as a result of something arising in consequence of the Claimant 's disability, not the Claimant 's disability itself.

695. The EHRC Employment Code states that the consequences of a disability 'include anything which is the result, effect or outcome of a disabled person's disability' — para 5.9. An example from the Code: '*A woman is disciplined for losing her temper with a*

colleague. However, this behaviour was out of character and is a result of severe pain caused by her cancer, of which her employer is aware. This disciplinary action is unfavourable treatment. The treatment is because of something which arises in consequence of the worker's disability' — para 5.9]

696. Other case authorities we have considered include;

- **T-Systems Ltd v Lewis EAT 0042/15**
- **Basildon and Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305, EAT**
- **Pnaiser v NHS England and anor 2016 IRLR 170, EAT**
- **Hall v Chief Constable of West Yorkshire Police 2015 IRLR 893, EAT**
- **In Risby v London Borough of Waltham Forest EAT 0318/15.**
- **Charlesworth v Dransfields Engineering Services Ltd EAT 0197/16.**
- **City of York Council v Grosset 2018 ICR 1492, CA**

Burden of Proof

697. Section 136 EqA essentially provides that once a Claimant has proved facts from which an employment Tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof 'shifts' to the Respondent to prove a nondiscriminatory explanation. In the context of a S.15 claim, in order to prove a prima facie case of discrimination and shift the burden to the employer to disprove his or her case, the Claimant will need to show: that he or she has been subjected to unfavourable treatment, that he or she is disabled and that the employer had actual or constructive knowledge of this, a link between the disability and the 'something' that is said to be the ground for the unfavourable treatment, some evidence from which it could be inferred that the 'something' was the reason for the treatment. If the prima facie case is established and the burden then shifts, the employer can defeat the claim by proving either : that the reason or reasons for the unfavourable treatment was/were not in fact the 'something' that is relied upon as arising in consequence of the Claimant 's disability, or that the treatment, although meted out because of something arising in consequence of the disability, was justified as a proportionate means of achieving a legitimate aim

698. Other case authorities considered include:

- **Carranza v General Dynamics Information Technology Ltd [2015] IRLR 43, EAT,**
- **Post Office v Jones [2001] ICR 805.**
- **Lewisham London Borough Council v Malcolm (Equality and Human Rights Commission) [2008] 1 AC 1399**
- **Williams v Trustees of Swansea University Pension and Assurance Scheme [2018] IRLR 306.**
- **City of York Council v Grosset [2018] IRLR 746, CA).**
- **Chief Constable of Gwent Police v Parsons and Roberts UKEAT/0143/18 – • Ojutiku v Manpower Services Commission [1982] ICR 661 • Land Registry v Houghton & Others UKEAT/0149/14 • Hensman v Ministry of Defence UKEAT/0067/14**
- **Naeem v Secretary of State for Justice [2014] ICR 472)".**
- **Ali v Torrosian t/a Bedford Hill Family Practice [2018] UK EAT/0029/18).**

Expulsion

699. s.46(6) provides that *"A reference to expelling a Partner of a firm or a member of an LLP includes a reference to the termination of the person's position as such – (b) by an act of the person (including giving notice) in circumstances such that the person is entitled, because of the conduct of other Partners or members, to terminate the position without notice"*.

700. The Explanatory Notes on s.46 of the EqA, taken from the legislation.gov.uk website, put the matter beyond doubt:

> *"Section 46: Interpretation*
>
> *Effect*
>
> *161.This section explains what is meant by terms used in sections 44 and 45. As well as defining the types of Partnership to which these provisions apply, it establishes what is meant by expulsion from a Partnership.*
>
> *Examples*
>
> • *A gay Partner in a firm who, because of constant homophobic banter feels compelled to leave his position as a Partner, can claim to have been expelled from the Partnership because of his sexual orientation. Should an employment Tribunal agree with him, the firm could be found to be in breach of these provisions in a similar way to how the employment Tribunal would find for an employee who wins a claim for constructive dismissal"*

701. **Flanagan v Liontrust [2015] Bus LR 1172 [234]**: authority for the proposition that where there is a LLP agreement with more than two members, the doctrine of repudiatory breach if excluded. **Roberts v Wilson Solicitors LLP [2018] ICR 1092 [51]:**

Causation

702. **Essa v Laing Ltd [2004] ICR 746, CA, [37]** decides that the correct approach to assessment of damages by a Tribunal is to determine what damage or loss was caused by or arose "naturally and directly" from the unlawful act

703. **Rahman v Arearose [2001] QB 351**, **[32 to 33]** - "the real question is, what is the damage for which the defendant under consideration should be held *responsible*."

704. **Ahsan v The Labour Party EAT/0211/10,** The EAT held at para 76 that Ahsan is *"authority for the proposition that in appropriate circumstances resignation, as opposed to dismissal, from a post can break the chain of causation for future losses."*

705. ***Western Excavating (ECC) Ltd v Sharp [1978] ICR 221***, which articulates the principle that an employee alleging constructive dismissal must establish that the employer committed a serious breach of the contract of employment, that he resigned in response to that breach, and that he did not delay or acquiesce in relation to the breach, or affirm the contract notwithstanding the breach.

706. ***Lewis v Motorworld Garages Ltd [1986] ICR 157*** : A series of minor breaches may entitle the employee to rely on a "final straw" which constitutes a breach but may not

be fundamental if viewed in isolation. The employee will be entitled to identify earlier breaches in the series which he waived where he relies on a final breach of the term relating to trust and confidence.

707. Other cases we have considered;

- **Courtaulds Northern Textiles Ltd v Andrew [1979] IRLR 84 • Woods v WM Car Services (Peterborough) [1981] ICR 666 (EAT),**
- **Lewis v Motorworld.**
- **Mahmud v The Bank of Credit and Commerce International SA (In Compulsory Liquidation) [1997] ICR 606.**
- **In Baldwin v Brighton & Hove CC [2007] IRLR 232, • Osei-Adjei v RM Education EAT/0461/12**

Time Limits

Section ***123 Time Limits***

(1) 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.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something -

(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it

Jurisdiction (Time Limits)

708. The Claimant was suspended on 18 June 2018. He resigned on 7 September 2018. His notice expired on 6 September 2019. He registered with ACAS on 10 September 2018 and obtained an early conciliation certificate on 1 October 2018. The claim was presented on that date. The Respondent takes the traditional time limit points. (***Hendricks v Metropolitan Police Commissioner [2003] IRLR 96***)(See, in particular, the observations of Mummery LJ at para. 52:*"The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period'".*

709. Whilst it is for the Claimant to establish that the discretion should be exercised in his favour, the discretion is wide.

710. ***Robertson v Bexley Community Centre [2003] IRLR 434***) and (***Chief Constable of Lincolnshire v Caston [2010] IRLR 327***).

<u>Holiday Pay</u>

711. The claim is brought under regulation 30 of the WTR, a claim available to employees and workers.

712. The WTR implement the EU Directive 2003/88/EC of the European Parliament (WTD). Article 7 of the WTD provides that Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

713. The entitlement to annual leave is set out in regulation 13 WTR.

714. Reg.13(1) provides that *"… a worker is entitled to four weeks' annual leave in each leave year.*

715. Regulation 16 (1) entitles the worker to be paid in respect of any period of annual leave to which he is entitled under regulation 13 (4 weeks) and additional annual leave under regulation 13 A WTR (1.6 weeks), at the rate of a week's pay in respect of each week of leave. The rate of a week is to be calculated by reference to section 221 to 224 of the ERA 1996, subject to modifications set out in regulation 16 (3).

716. Regulation 14 provides for the payment of compensation where the worker's employment terminates during the leave year and there is accrued leave which has not been taken.

717. Regulation 16 provides for the payment of leave where leave has been taken but the worker has not received payment as defined.

718. WTR regulation 13 (9) provides that the basic entitlement to leave may be taken in instalments but it may only be taken in the leave year in respect of which it is due and may not be replaced by a payment in lieu except where the workers employment is terminated.

719. WTR regulation 13A (6) (a) also provides that leave may be taken in instalments and may not be replaced by a payment in lieu except where the worker's employment is terminated however additionally regulation 13A (7) provides that a relevant agreement may provide for any leave to which a worker is entitled under this regulation to be carried forward into the leave year immediately following the leave year in respect of which it is due.

720. The leave year for the purposes of the WTR is, pursuant to regulation 13 (3) and in the absence of a relevant agreement, the date on which that employment begins (if the workers employment begins after 1 October 1998) and each subsequent anniversary of that date; regulation 13 (3) (b) (ii) WTR

721. The WTR regulations on the face of it therefore do not provide for any carry over of leave other than as prescribed by regulation 13A (7). However, there have been a number of cases which have considered whether there are other circumstances in which leave under the WTR may be carried over.

722. Where the reason that leave has not been taken during a leave year is that it was not possible for the worker to do so because of absence on sick leave, the prohibition on carrying forward the untaken leave contained in regulation 13 (9), has been held to be

incompatible with the requirements of the Working Time Directive (WTD): **NHS Leeds v Larner [2012] EWCA Civ 1034**. The WTD provides basic entitlement to leave to ensure that workers benefit from sufficient rest and if a worker is sick, they are not able to take advantage of the welfare benefits of annual leave which is at the heart of the WTD.

723. The European Court of Justice in **King v The Sash Window Workshop C-214/16** considered the carry-over of leave where the employer refused to pay holiday pay in circumstances where it believed that the worker was self-employed and not entitled to it. The ECJ held that the Directive precluded a requirement that the worker first takes the leave as a condition of entitlement to be paid for it, where there was a dispute between the parties about whether the worker was entitled to paid leave. The ECJ went on to decide that the WTD precludes national provisions which prevent a worker from carrying over and accumulating leave without limit of time, until the termination of the employment, where it has not been taken because the employer refused to pay it.

724. The ECJ considered that Article 7 WTD and the right to an effective remedy set out in Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that, in the case of a dispute between a worker and his employer as to whether the worker is entitled to be paid annual leave under Article 7, they preclude the worker having to take his leave first before establishing whether he has the right to be paid in respect of that leave ;*"39 Similarly, such circumstances are liable to dissuade the worker from taking his annual leave. In that regard, it must be noted that any practice or omission of an employer that may potentially deter a worker from taking his annual leave is equally incomputable with the purpose of the right to paid annual leave "*

725. The further questions referred by the Court of Appeal to the ECJ in King were; (2) if the worker does not take all or some of the annual leave to which he is entitled in the leave year when any right should be exercised, in circumstances where he would have done so but for the fact that the employee refuses to pay him any period of leave he takes, can the worker claim that he is prevented from exercising his right to paid leave such that the right carries over until he has the opportunity to exercise it? (3) if the right carries over, does it do so indefinitely or is there a limited period for exercising the carried overwrite by analogy with the limitation imposed where the worker is unable to exercise the right to leave in the relevant leave year because of sickness? (4) if there is no statutory or contractual provision specifying a carry-over period, is the court obliged to impose limits to the carryover period to ensure that the application of the national legislation on working time does not distort the purpose behind article 7? (Five) if the answer to the preceding question is yes, is a period of 18 months following the end of the holiday year in which the leave accrued compatible with the right set out in article 7[of Directive 2003/88]?

726. The ECJ held that article 7 of the Directive 2003/88 must be interpreted as precluding national provisions or practices that prevent a worker from carrying over and, where appropriate, accumulating, up to termination of his employment relationship, paid annual leave rights not exercised in respect of several consecutive reference periods because the employer refused to remunerate that leave;

" 52 … It is clear from the court's case law that a worker who has not been able, for reasons beyond his control, to exercise his right to paid annual leave before termination of the employment relationship is entitled to an allowance in lieu under Article 7 (2) of Directive 2003/88 . The amount of that payment must be calculated so that the workers put in a position comparable to that he would have been in if he had

exercised that right during his employment relationship (judgement of 20 January 2009 Schultz – Hoff and Others , C-350/06 and C-520/06 EU-C-2009:18 paragraph 61)"

"60 in must be noted that the assessment of the right of the worker, such as Mr King, to paid annual leave is not connected to a situation in which his employer was faced with periods of his absence which, as a long term sickness absence, would have led to difficulties in the organisation of work. On the contrary, the employee was able to benefit, until Mr King retired, from the fact that he did not interrupt his professional activity in its service in order to take paid annual leave.

61 …even if it were proved, the fact that Sash WWW considered, wrongly, that Mr King was not entitled to paid annual leave is irrelevant. Indeed, it is the employer to seek all information regarding his obligations in that regard.

62 Against that background, as is clear from paragraph 34 the present judgement, the very existence of the right to paid annual leave cannot be subject to any preconditions whatsoever, that right being conferred directly on the worker by Directive 2003/88. Thus, as regards the case of the main proceedings, it is irrelevant whether or not, over the years, Mr King made requests for paid annual leave (see to that effect, judgement of 12th of June 2014, Bollacke , C -118/13 EU;C-2014:1755 paragraphs 27 and 28"

63 it follows from the above that, unlike in a situation of accumulation of entitlement to paid annual leave by worker who was unfit for work due to sickness, an employer that does not allow a worker to exercise right to paid annual leave must bear the consequences.

65 it follows from all the foregoing considerations that the answer to the 2nd to 5th questions is the Article 7 of directive 2003/88 must be interpreted as precluding national provisions or practices that prevent a worker from ***carrying over and, where appropriate, accumulating, until termination of his employment relationship, paid annual leave rights not exercised in respect of several consecutive reference*** *periods because his employer refused to remunerate that leave"*

727. In two subsequent decisions of the ECJ ; ***Kreuziger v Land Berlin Case C-619/16, ECJ*****, and** ***Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Shimizu Case C-684/16, ECJ*****,** the European Court clarified the application of the 'use it or lose it' principle to a worker who seeks a payment in lieu of unused leave on termination of employment.

728. In *Kreuziger*, K was a legal trainee employed by the Land of Berlin. During the last months of his traineeship, he did not take any paid annual leave. After his traineeship ended, he requested an allowance in lieu of the days of untaken leave, which the Land refused in reliance on national law. K challenged that refusal before the German administrative courts.

729. In **Max – Planck- Gesellschaft zur *Förderung der Wissenschaften e v Shimizu C684/16 [2019] CMLR 1233***, the ECJ held that Article 31(2) of the Charter of Fundamental; Rights and Article 7 WTD preclude national legislation which provides that a worker automatically loses untaken leave without prior verification as to whether the employer enabled him to exercise the right. The worker is the weaker party and although the employer does not have to force him to take leave the employer is required to ensure the worker is in a position to take it by encouraging him to do so. The burden of proof rests on the employer to establish this. Employment Tribunals will

have to interpret WTR regulation 13(9) to give effect to this decision if possible to do so. Articles 31(2) of the Charter has the same effect as the WTD Article 7. The ECJ held that the domestic courts must disapply any domestic legislation which prevents leave being carried over where the employer has taken insufficient steps to ensure leave is not lost even where the employer is not an emanation of the state. The ECJ commented in its judgement as follows [Tribunal's stress];

''Failure to take annual leave

H7. Article 7 of the Directive should not be interpreted as meaning that, irrespective of the circumstances underlying the worker's failure to take paid annual leave, that worker should still be entitled to the right to annual leave referred to in art.7(1) , ****1236*** *and, in the event of the termination of the employment relationship, to an allowance by way of substitution therefor, pursuant to art.7(2) . [30]"*

Automatic loss of entitlement to paid annual leave

H11. Where national provisions had the effect that a worker who had not requested any paid annual leave during the relevant reference period in principle lost his entitlement to leave at the end of that period as a consequence, and, accordingly, his entitlement to an allowance in lieu of the leave which was not taken upon termination of the employment relationship, such an automatic loss of the entitlement to paid annual leave, ***which was not subject to prior verification that the worker was in fact given the opportunity to exercise that right****, failed to have regard to the limits which were binding on Member States when specifying the conditions for the exercise of that right. [39]–[40]*

Weaker position of worker in employment relationship

H12. ***The worker had to be regarded as the weaker party in the employment relationship****, and it was therefore necessary to prevent the employer from being in a position to impose upon him a restriction of his rights. On account of that position of weakness, such a worker might be dissuaded from explicitly claiming his rights vis-à-vis his employer where, in particular, doing so might expose him to measures taken by the employer likely to affect the employment relationship in a manner detrimental to that worker. [41]*

...

Incentives not to take annual leave

H13. Incentives not to take annual leave or encouraging employees not to do so were incompatible with the objectives of the right to paid annual leave, relating in particular to the need to ensure that workers enjoyed a period of actual rest, with a view to ensuring effective protection of their health and safety.

…
Employer to encourage worker to take annual leave

H14. While it should be made clear that compliance with the requirement, for employers, under art.7 of the Directive should not extend to requiring employers to force their workers to actually exercise their right to paid annual leave, the fact remained that employers had to ensure that workers were given the opportunity to exercise such a right. To that end, the employer was in particular required, in view of the mandatory nature of the entitlement to paid annual leave and in order to guarantee the effectiveness of art.7 ***, to ensure, specifically and transparently, that the worker was actually given the opportunity to take the paid annual leave to which he was entitled, by***

encouraging him, formally if need be, to do so, while informing him, accurately and in good time so as to ensure that that leave was still capable of procuring for the person concerned the rest and relaxation to which it was supposed to contribute, that, if he did not take it, it would be lost at the end of the reference period or authorised carry-over period, or upon termination of the employment relationship where the termination occurred during such a period*. The burden of proof in that respect was on the employer. [44]–[46]*

Burden of proof

H15. Should the employer not be able to show that it had exercised all ***due diligence in order to*** *enable the worker actually to take the paid annual leave to which he was entitled, …However, if the employer was able to discharge the burden of proof in that regard, as a result of which it appeared that it was deliberately and in full knowledge of the ensuing consequences that the worker refrained from taking the paid annual leave to which he was entitled after having been given the opportunity actually to exercise his right thereto, art.7(1) and (2) did not preclude the loss of that right or, in the event of the termination of the employment relationship, the corresponding absence of an allowance in lieu of the paid annual leave not taken. [46]–[47" And;*

Worker not exercising right to paid annual leave

H20. Both art.7 of the Directive and, as regards situations falling within the scope of the Charter, art.31(2) thereof, had to be interpreted as meaning that they precluded national legislation pursuant to which the fact that a worker had not requested to exercise his right to paid annual leave acquired under those provisions during the reference period automatically entailed, without prior verification that the worker had actually been given the opportunity to exercise that right, the consequence that the worker lost the benefit of that right and, accordingly, his entitlement to an allowance in lieu of paid annual leave not taken in the event of the termination of the employment relationship. ***On the other hand, where the worker had refrained from taking his paid annual leave deliberately and in full knowledge of the ensuing consequences, after having been given the opportunity actually to exercise his right thereto, art.7(1) and (2) of the Directive and art.31(2) of the Charter did not preclude the loss of that right or, in the event of the termination of the employment relationship, the corresponding absence of an allowance in lieu of paid annual leave not taken, without the employer being required to force that worker to actually exercise that right. [55]–[56] *1240***

730. Further, the CJEU stressed in para 30 that the particular circumstances of each case determine whether there is a right to carry over and to payment in the event of termination: *"In that regard, first, it cannot be inferred from the Court's case-law mentioned in paragraphs 22 to 25 of the present judgement that article 7 of Directive 2003/88 should be interpreted as meaning that, irrespective of the circumstances underlying the worker's failure to take paid annual leave, that worker should still be entitled to the right to annual leave referred to in article 7(1), and, in the event of the termination of the employment relationship, to an allowance by way of substitution therefor, pursuant to article 7(2)."*

731. With regards to additional leave under the WTR regulation 13 A, namely the additional 1.6 weeks which is additional to the basic requirement set out in Article 7, there is no facility under regulation 13 A (7) to carry the untaken leave forward into a later year unless there is a relevant agreement which allows for the leave to be carried forward "*into the leave year immediately following the leave year in respect of which it is due*": The **EAT in Sood Enterprises Ltd v Healy [2013] IRLR 865** held that the fact that

additional leave is not taken for reasons outside the workers control does not alter the position and that there is no EU right undermining the right to *additional* leave and the regulations (WTR) must be applied.

732. Based on the current authorities, the position is that the right to annual leave under the WTD i.e. the basic 4 weeks, will accumulate in certain circumstances where for example the employee is prevented from taking leave by his employer

Submissions

733. The Respondent produced lengthy and detailed written submissions augmented by oral submissions. The submissions are set out in summary only below.

Respondent's Submissions

734. Counsel set out his written submissions with reference to the complaint, the issues, the law, the facts and analysis. The Tribunal are grateful for the manner in which those written submissions were set out.

Requirement to work as a solicitor – reasonable adjustment

735. The Respondent it is submitted took extensive steps to assist the Claimant. With regards to the specific adjustments the Respondent denies that it failed to put in a structured and clear work plan and that to put it in writing would not have been a reasonable adjustment or would not have been effective in preventing the disadvantage. That the Respondent conducted itself in essence in accordance with the suggested wellness and recovery plan and to have committed it to writing would not have been a reasonable adjustment or effective to prevent the disadvantage. It is denied that there was a failure to appoint a mentor in that support was provided through individuals as well as psychologist support and it is denied further support would be a reasonable adjustment or effective to remove the disadvantage.

736. It is denied that it would have been reasonable or practical to remove the Claimant's access to emails it would have required his consent and they contend he would have refused.

737. Counsel relied in submission and the Tribunal have considered, the authorities of: **PMI v Latif [2007] IRLR 579, Tarbuck v Sainsbury's Supermarket Ltd [2006] IRLR 644 EAT** and referred to The Equality and Human Rights Commission's code of Practice on employment (2011).

738. Counsel submits that the Respondent took steps to assist the Claimant; provided counselling from Mr Dorling, and refers to the supported provided by Mr Flanagan and Ms Wigley. He was provided with support through Dr Laher and the Respondent ensured he maintained his profit share and drawings during his absences.

739. During November 2016 to 7 September 2018 it is submitted, the Claimant was not required to work as a solicitor; in that the Respondent attempted to persuaded him to reduce his workload, take time off, delegate, have a pushed return, provided financial, pastoral and counselling support.

740. Counsel submits that the adjustments proposed were not suggested the time by the Claimant or Dr Laher which implies they are not reasonable unless they are obvious or in the EHRC Code.

741. Written work place: work plans were in place when Mr Flanagan was encouraging the Claimant to reduce his workload. On 14 May 2018 Dr Laher set out a plan in his reports; 27/2/18 and 30/5/18. In May 2018 there was therefore a written plan in place and further it is submitted that such document would not have been effective as the Claimant it is submitted ignored instructions in writing eg on 30/12/16 from Mr Flanagan.

742. Dr Laher's report of 11/9.17 refers to arrangements not being left "too informal and loose" and the Claimant alleges therefore that there should have been something further in writing for his return in May 2018.Counsel submits that Dr Laher could be failed to specify the need for it to be in writing. That the first report was superseded by further reports from Dr Lager setting out a written back to work plan. That the Claimant was not disadvantaged because in May 2018 he stated about his return to work that "thus far, it is going well." Dr Laher made similarly favourable comments.

743. Further, the Claimant never asked for anything in writing and in cross examination said he was not complaining that it was a problem but noted as a fact there was no written confirmation.

WRAP

744. Counsel relies on the same points with respect to the above however notes that Dr Laher never suggested a WRAP, Dr Laher was providing advice about triggers for his illness etc.

Mentor

745. The Respondent relies on the same points as above but additionally the Claimant was given support and neither he nor Dr Laher suggested a mentor. Ms Rhodes saw Mr Williamson's role as a mentor.

More Intensive Support

746. All proper support was provided and additional sessions with Dr Laher were paid for.

Adjust standard of performance Required

747. If it is suggested that the Responded should from November 2016 to 7 September 2018 have allowed the Claimant to carry out work which would not ordinarily have been expected of a Senior Equity Partner, that is not a reasonable adjustment. If the adjustment is hours, it is addressed above. It is unclear what is being suggested.

Remove access to emails and case management system outside of office hours

748. It would not be reasonable or practicable; Inevitably certain matters may happen outside of office hours, the Claimant's clients were his friends, Mr Flanagan had suggested this in 2017 without success, the LLP agreement or management document did not permit this and the Claimant would not have consented. Further, as Mr Middleton stated, it may create more stress.

Replace team members who worked for the Claimant 100%

749. These are not reasonable adjustments, because the focus must be on the Claimant's own work where the PCP is about the requirement for the Claimant to work as a solicitor, therefore the adjustments must relate to that requirement and his work however, it is submitted that steps were taken to replace staff. The Respondent struggled to recruit, as explained by Ms Rhodes in cross examination because it was known that the Claimant was a "hard taskmaster". Support from other lawyers was provided and hs workload was absorbed but others.

Requirement to work as managing Partner – reasonable adjustment

750. It seemed the Respondent was being charged with failing to save the Claimant from being manipulative in relation to the MP role but that is not the claim and could not amount to a PCP: **Isholav TfL [2020] IRLR 368 .**

751. The Respondent attempted to relive the burden on Claimant of running the Derby office at the latest but 3 March 2017 though in reality it was February 2016, by March 2017 the adjustment had been made.

752. The Claimant gave evidence that the MP role was "more of a title" and the demands were not great therefore the Tribunal could find it caused no substantial disadvantage. Counsel also refers to the evidence regarding the Claimant's resistance to being relieved of the requirement.

753. All if not most of the suggested adjustments are inapt to apply to the requirement to be MP. Respondent relies on its submissions in connection with the requirement to work as a solicitor.

Requirement to bill as many hours as possible

754. The Respondent denies this was a PCP but relies on the submissions regarding the PCP to work as a solicitor and as MP. The Claimant continually exceeded his targets. The Respondent tried to persuade the Claimant to reduce his workload. The performance review in March 2017 set a lower target than the previous year.

755. Respondent relies on the same arguments on reasonable adjustments in both other sections as above.

Suspension

756. Direct Discrimination

757. Respondent asserts that the reasons put forward by the Claimant (ii) to (iv) are if anything' "arising from" claims.

758. The Respondent relies on the authorities of: **CLFIS (UK) Ltd v Reynolds [2015] ICR 1010, D'Silva v NATFHE [2008] IRLR 412, The Law Society v Bahl [2003] IRLR 640.**

759. The Respondent denies that Mr Flanagan was decision maker, the decision to suspend was made by the FSC only but counsel submits who made the decision is an 'arid' debate since the only possible conclusion as to the facts can be that the Claimant was suspended for making the 'joke'. There is no evidence it is submitted that the

Respondent was trying to engineer the Claimant our or had a hidden agenda thus it is submitted an analysis of a hypothetical comparator is unnecessary. Whether Mr Tempest was in material the same circumstances but was nevertheless treated differently (an analysis which the Respondent disagrees as it is submitted seemingly did the SRA) is nothing to the points because the reason for the treatment is known.

760. Counsel submits that the claim is concerned only with the reasons for treatment and thus is it unnecessary to consider what was discussed about the Claimant mental health – it does not turn on process.

Discrimination arising from disability – section 15

761. The Respondent's position is this the reason for suspense was the joke.

762. Counsel refers to the approach identified in: **Pnaiser v NHS England [2016] IRLR 170.**

763. The Respondent submits that the Tribunal may draw an inference from a failure to call a witness**; Wisnieswski v Central Manchester HA CA 1/4/98.**

764. The Respondent submits that the joke was not something arising from his disability in that; I. The Claimant during the disciplinary hearing did not consider the joke offensive and otherwise defended it during the hearing, the had told the same joke from time to time prior to his disability, ii. Ms Rhodes gave evidence that Claimant had told inappropriate stories at client events before, iii. witnesses referred to the Claimant being buzzy etc in the week before but counsel submits that there is no evidence that buzzy people tell racist, homophobic, sexually crude jokes and it could be viewed as offensive to those with stress impairments and iv. the report of Dr Laher 29/4/2019 is the only evidence to contradict a lack of causation and there are two difficulties with it; 1) the Claimant had not told Dr Laher he had told this joke before and did not disclose other information to him 2) by the date of the Conference the Claimant had been signed fit to return to work and there is no hint in Dr Laher's report of impaired judgement and that the Claimant should avoid interaction with clients or colleagues. Dr Laher was not called and the Tribunal is entitled to draw an inference from that.

765. Without prejudice to the Respondent' primary position that the joke was not something arising from the disability, it argues there was justification. The joke was gross misconduct and the legitimate aim was i. maintain good standards of disciplinary ii. maintain a workplace free from discrimination or harassment and iii. Enforcing its policies as to diversity and inclusion.

766. Suspension was proportionate; the joke was potentially very serious and could affect the reputation of the firm.

767. Additionally counsel argues that if the Tribunal find that the joke was because of the Claimant's mental ill health, in that he so lacked judgement in that he was liable to make racist, homophobic and sexually crude comments at work, that in itself meant that suspension was proportionate for any or all of those four aims.

Failure to make reasonable adjustment

768. It is not part of the Claimant's case that the Respondent should have stopped him making the presentation.

Ought not to have had a disciplinary process but an informal meeting

769. Whether the Claimant's judgement was impaired was not for the FSC to judge. The joke was so offensive and went against the firm's values, an informal meeting would have in effect have been to judge that the matter was too insignificant to warrant an investigation.

770. It was put to the Responded witnesses that they should have made further enquires of the Claimant and/or Dr Laher which would have uncovered suicide attempts and increased medication. Counsel submits that further enquiries were not required bruise; the Claimant had seen the reports and approved them, Dr Laher chose not to refer to the contemplated suicide attempt, he referred to the recent relapse only in the context of further funding, the report said the Claimant was for to return to work and there was nothing to suggest the Claimant was not well enough to the presentation. The report did not refer to any increase in medication. The Claimant had not disclosed the suicide attempt in the meeting with Ms Wigley prior to his return to work.

771. Hatton v Sutherland [2002] ICR 613, 631; Hale LJ;" *The employer is generally entitled to take what he is told by his employee at face value, unless he had good reason to think to the contrary. He does not generally have to make searching enquiries of the employee or seek permission to make further enquiries of his medical advisors"*. A case not concerned with the EqA but the employer's duty of care in tort for an employee's mental health.

772. The information the Claimant suggests the Respondent should have asked about is, counsel submits confidential and the Claimant was concerned to maintain confidentiality about his medical details. He had not disclosed the suicide attempt to Mr Jefferies.

Ought not to have suspended the Claimant

773. Ms Wigley had not suggested that the Claimant was not suspended but that both he and Mr Tempest should have been.

774. The FSC took the view that the Claimant's presentation was worse that Mr Tempest's which was a reasonable conclusion. The same conclusion the SRA reached.

775. CD suspended of making two homophobic comments had been suspended [p.1303]

Out to have clarified in writing

776. The Claimant accepted in cross examination that he knew the complaint was that he told the joke at the Conference – he and Mr Williamson discussed it on 18 June 2018.

777. He had told the joke before and knew what he had said. Putting the complaint in writing would serve no purpose. The suspension letter referred to the concerns Mr Williamson had raised with him. This is not a reasonable adjustment.

Ought to have explained basis for the suspension and disciplinary

778. Similar points are relied upon as the previous adjustment; it is submitted that the Claimant knew that the basis of the suspense was the joke.

Ought to have had a process that was clear, structure, sensitive, visibly impartial, allowed more time to prepare and allowed representation by a person outside of the LLP

779. The suspension it is submitted was a decision and not a process, thus the proposed adjustment is not apt for the suspension decision. Further, it is submitted that the process was clear, structured, sensitive and impartial and representation is not apt for the decision to suspend neither is preparation rime

Disciplinary proceedings.

Direct discrimination

780. The Respondent submits that the reasons (ii). to (iv) are "arising from" claims.

781. The FSC made the decision at its second meeting after considering the CP investigation that the Claimant should be subject to disciplinary proceedings. The reason was the 'joke'. There was it is submitted no one else involved in that decisions. Mr Flanagan, it is submitted was not involved. The SSC made the outcome decision.

782. The reason cannot have been disability, it was the joke. The SSC took into account the Claimant's health by way of mitigation. An analysis of hypothetical comparator is unnecessary. The Claimant under cross emanation stated that " the ultimate position of a reprimand is no problem". It is submitted that the Claimant was not complain about the outcome; "*The means by which taken on a particular route to get to that point, totally unfair, totally unreasonable and discrimination and took advantage."*

Discrimination arising from disability

783. The Respondent's case is that the joke was the reasons not the other cited reasons.

784. The Respondent relies on the same point in connection with the previous section 15 claim and argues that the 'joke' was not someone arising from the disability but in any event, relies on the same justification arguments. The disciplinary process and outcome it is argued were justified and the outcome was measured.

Failure to make reasonable adjustment

785. The Claimant was communicated with Dr Laher up to an included 13 August 2019 about the report, the report stated the process was affecting the Claimant but made not recommendations about adjustments. It did not suggest a formal process ought not to have been applied, that the Claimant should have had more time to prepare or that the Claimant should be allowed representation outside the LLP.

786. The Claimant did not ask for adjustments although he had solicitor instructed.

Ought not to have applied a formal process

787. Counsel refers to the points made in relation to suspension, the seriousness of the offence, that the matter needed to be dealt with formally and that his health was taken into account in mitigation

The process ought to have been clear, structured, sensitive, visibility impartial allowed the Claimant more time to prepare and allowed representation outside of the LLP.

788. The Respondent denies the allegation that the process was not clear etc and refers to the Claimant having a supportive companion.

Should have clarified the complaints by setting them out in writing

789. Counsel submits that the complaints were in fact set out in writing **[p. 833]**

Expulsion

790. **The Claimant expresses his claim in the RT1 as ; "***lost trust in the respondent LLP and he no longer felt able to continue his membership of it… Since an LLP cannot be terminated by the acceptance of a repudiatory breach, Mr Taplin has been forced to give the Respondent 12 months' notice."*

791. The Claimant relies on the extended definition of expulsion under section 46 EqA.
792. Where there is an LLP agreement with more than two members, the doctrine of repudiatory breach is excluded: **Flanagan v Lointrust [2015] Bus LR 1172.** Hence as the Claimant acknowledge d in his ET1, he could not terminate his membership there than by giving notice.

793. Section 46 (6) apply only in circumstances where an LLP member is "entitled" to terminate his position without notice. Counsel submits that that is a reference to a contractual entitlement.

794. The Court of Appeal accepted the approach of the Claimant LLP member in **Roberts v Wilson Solicitors LLP [2018] ICR 1092** that there is no such concept as "*constructive termination*" and that to rely on it is misconceived.

Causation

795. **Essa v Laing ltd [2004] ICR 746 CA:** correct approach to assessment of damages s to determine what loss was caused by or arose "naturally *and directly "from the unlawful act".*

796. **Rahman v Arearose [2001] QB 351; "the** *real question is, what is the damage for which the defendant under consideration should be held responsible"* The questions it is submitted is not simply what is the factual chain of causation but what is the loss for which the law will find R liable.

797. **Ahsan v the labour Party EAT/0211/10:** The EAT decided that causation cannot be decided on a simple "*but for"* approach. It referred to Rahman,

798. **Osei- Adjei v RM Education EAT /0461/12:** The Tribunal found a failure to make reasonable adjustments for disability but no repudiatory breach and C resigned**. EAT held that Ahsan is: "authority** *for the proposition that in appropriate circumstances resignation as opposed to dismissal, from a position can break the chain of causation for future losses"*

799. Counsel submits that there is no need to fashion a remedy out of section 46(6) where none exists, since remedies already exist for underlying conventions of the EqA.

800. To the extent of any contravention is found in respect of acts or omissions in 2016 or 2017 i.e. the first three PCPs, such contravention would be very stale by the date of resignation on 7/9/18 and the losses resulting from resignation in response cannot be ones for which the Respondent should be held responsible.

801. Even if contraventions are found in 2018 for the first three PCPs they are still it is submitted, too remote in time from the resignation to be losses for which the Responded should be held responsible.

802. It is submitted with respect to suspension and disciplinary even if contraventions are found, the issues is whether it breaks the chain of caution and it is submitted that; the Claimant delayed before resigning, he did not resign when he remained suspended, during investigation and did not resign when put through a disciplinary process. He resigned only after suspension had ended and the inference to be drawn from this delay, is that as a matter of fact, the suspension was not the reason or a reason for his resignation.

803. The Respondent does not argue that he delayed too long after the disciplinary outcome but that the outcome of the disciplinary hearing was minor and that outcome was not his principal concern and that outcome could in no way be said to make the Responded responsible for millions of pounds of losses precepted by the Claimant's resignation.

804. The Respondent submits that the most plausible explanation for this resignation was because he believed that the Respondent was trying to engineer him out of the business and counsel submits that there are "wild and unsubstantiated allegations".

805. The Respondent submits that the Claimant resigned because of his theory he was being engineered out of the business, there was no basis for that theory and he therefore made a choice which broke the chain of causation.

Time Limits

806. The Respondent submits that it is for the Claimant to demonstrate that the claims are brought in time.

Holiday Pay

EU Leave

807. The respondent invites the Tribunal to assume the holiday that the Claimant has not taken is as shown in his schedule of loss.

808. Counsel's submits that none of the cases the Claimant relies upon; C**-214/16 King v the Sash Window Company [2018] IRLR , C – 684/16 Max – Planck – Gesellschaft and C- 619/16 Kreuzigar v land Berlin** does not assist the Claimant. That Respondent did not refuse to pay the Claimant hence King is not applicable.

809. In terms of **Max- Planck – Gesellschaft** it is submitted that the decision did not address the position of an autonomous senior equity Partner who is a co- owner of the "employer" and at liberty to take holiday when he chooses.

UK Leave

810. It is submitted that there is no facility under reg 13A WTR to carry over leave unto a later year save by agreement. The members agreement provides there shall be no carry over of leave save with the agreement of the chairman. There was no such agreement and the claim must fail. There is no claim in respect of leave for the Accounting Year 2018/2019.

Claimant's submissions

811. Counsel for the Claimant helpfully set out various AppendiCES in his written submissions which included Agreed List of Issues Details of the Hearing, Chronology: disclosure of documents and a table of Dr Laher's reports and correspondence, extracts of oral evidence and correspondence around the disclosure process.

812. We have considered the submissions in full.

813. Counsel set out in his reflections on the evidence comments about untruthful or misleading evidence it is submitted was given by the Respondent witnesses and in particular Mr Flanagan's evidence concerning the medical reports in that during his evidence initially he could not recall seeing the report of the 11 September 2017 but that the following day in his evidence he stated he had seen the report, that he stood by his comment that everyone involved in the suspension decision was sensitive to the Claimant's health issues and yet he did not provide any of the reports to the FSC, and that there is it is submitted, no doubt he participated in the FSC and SSC proceedings throughout with Mr Powell and Mr Hambleton deferring to him.

814. It is also submitted that Mr Williamson sought to mislead the Tribunal; namely that on the first day of giving evidence he said he had not seen Dr Laher's first report and that he had not seen anyone of the reports, and yet in his statement (para 16) he had stated that when the Claimant returned on 14 May 2018 the firm "sought to implement a phased return in accordance with the recommendations that have been given by the psychologist". Further, it is submitted that Mr Williamson would have the Tribunal believe that he was shocked by the presentations however it is submitted the contemporaneous evidence reveals what happened, in that it is submitted he only realised he was shocked after receiving the email from Mr Hart on the Sunday evening, three days later.

815. It is also submitted that Ms Wigley refused to answer a question about her opinion whether Mr Tempest should have also been suspended and it is alleged was evasive in other issues.

816. It is also submitted that Mr Hambleton mislead the Claimant and his solicitor during the disciplinary process in relation to the deletion of extracts from the investigation carried out by Mr Powell.

817. It is also submitted that Ms Rhodes when asked about comment to Mr Powell that "it will be a major problem if he returns" was referring to her personal position when Mr Powell's evidence was that this was not what was said to him.

818. Counsel submits that a number of the Respondent's witnesses were reluctant to admit that Mr Tempests presentation was offensive.

819. Counsel refers to the Respondent admitting to not consulting with the workplace psychologist prior to suspending and not seeking clarification of any issue arising out of the reports. No one sought to clarify how the recommendations n the first report

should be implemented, what the relapse was, what adjustments it would be reasonable to make, to understand the impact on suspension and the FSC did not even know the identity of Dr Laher. Ms Wigley, the HR director never discussed the report with the Claimant prior to his return to work in May 2018.

820. Counsel also refers to the non-disclosure of documents and the absence of any explanation and has provided a detailed list of documents and dates when documents were disclosed and refers to **Wisneiski** and the propositions about inference endorsed by the EAT n **Efobi v Royal Mail Group ltd [2017] IRLR 956**. It is submitted that the matter of disclosure is a procedural issue and not a substantive one but that the Respondent failed to take steps during the hearing to call a witness to displace the presumptions created by the various non-disclosure issues and invites adverse inferences to be drawn, albeit counsel does not identify what inferences in relation to which witnesses or which aspects of the claims.

Direct discrimination

821. Counsel argues that suspension is not a neutral act and refers to **Mezey v South West London and St Georges Mental Health NHS Trust [2007] IRNR 244** and **Agoreyo v London Borough of Lambeth [2017] ICR 1572 CA.**

822. Counsel submits that the Claimant was selected for suspension not because of a genuine view that his conduct was worse than Mr Tempests but there was a despite to exit him, certainly on the part of Mr Flanagan and the Conference presented an opportunity to do so, that the Claimant's disability presented the business with challenges.

823. Mr Tempest is relied on as a comparator and counsel refers to the authorities **Hewage v Grampain Health Board (sc) [2012] IRLR 807** and **Kalu v Brighton and Sussex University Hospitals NHS Trust UKEAT/0609/12.**

Discrimination arising from disability

824. In terms of claims in respect of suspension and disciplinary process, counsel refers to the reasons cited but states that they will not be "*dissected and analysed*" by counsel in submissions but submits that there is copious and unchallenged evidence that establish that each of the 5 matters arose in consequence of the disability.

825. In respect of the evidence of Ms Rhodes that the Claimant had exhibited such behaviour prior to the Conference, counsel makes a number of observations including that this as not featured in the Respondent's case prior to the hearing, Mr Williamson had not been aware of such previous behaviour, there had been non- complaint about the Claimant in 19 years.

826. Counsel submits that each of the 5 reasons cited played a part in the reason for suspension and putting the Claimant through the disciplinary and the Tribunal "can *take its pick".* It is submitted it was any or all of them.

827. Counsel refers to maintaining standards of discipline and eliminating discrimination and harassment can be said to be a legitimate aim, it is not conceded it was pursuing that aim and that in any event, the Respondent's treatment fails the ' balancing exercise': **Chief Constable of Gwent Police v Parsons: Naeem, and Ali v Torrosian.** Counsel refers to Mr Flanagan's evidence that paid leave was not an option

at the material time but that it may be an option once the Respondent has revised its procedures.

828. His absence could have been presented to the firm as a step other than suspension.

Reasonable Adjustments

829. Counsel reminds the Tribunal that all that needs to be established in relation to any particular adjustment is that there was a real prospect of a particular adjustment, that it may have worked, not that it necessarily would have done.

830. The Claimant was demoted from MP rather than making adjustments to allow him to continue.

PCP 1

831. From November 2016 to 7 September 2018 the Respondent applied PCP 1.

Work Plan

832. Counsel contends that any junior HR practitioner or entry level manager would know the importance when discussing with someone who is returning to work following illness, to committing what has been agreed to writing and that to contend that "structured and forma" (opposite to informal or loose) would mean "unrecorded" is a nonsense and that the Respondent admitted there was no Return to Work Plane or WRAP. Reference was made to Mr Williamsons evidence where he referred to talk of a written plan but that this is not the way the Respondent does things, it has supportive network around.

Mentor

833. Ms Wigley said that it was agreed she would act as the Claimant's "conscience" on his return to work, but that the Claimant was not aware she was to act as his mentor, Ms Wigley went it is submitted to extraordinary lengths to persuade the Tribunal she had no control over the Claimant and he was not her responsibility. Ms Rhodes evidence was that no one was labelled a mentor for the Claimant by Mr Williamson may have been.

More Intensive support

834. Counsel in his submission does not set out what this further support should have been.

Adjusting standards pf performance

835. It is submitted that nothing formal was done to give the Claimant comfort around time and billing expectations.

Removing Access to emails outside of office hours

836. Counsel submits that this had a real prospect of supporting the Claimant, to manage his health and return to work and thus was a reasonable adjustment to make.

Replacing Jamie Cooper and Laura Sephton

837. Counsel in his submissions does not dispute that the Respondent had difficult recruiting but that this was not the Claimant's fault.

PCP 2

838. Counsel relies on the same points as are made in connection with PCP 1.

PCP3

839. Counsel refers to the points in submission on PCP 1 and argues that the Respondent has failed to provide evidence that it made this adjustment.

PCP 4

840. It is submitted that other than telling the Claimant he could take breaks there was no consideration of adjustments and an obvious adjustment would be to have allowed his wife to attend with him.

Time limits

841. It is submitted to the extent the matters complained of fall outside the primary time limit, the various aspects formed part of a continuing act.: **Hendricks v Metropolitan Police Commissioner [2003] IRLR**

842. Counsel was asked whether he wanted to address the Tribunal specifically on the time limit issues, however he invited the Tribunal simply to exercise its discretion on just and equitable grounds. He made no further submission on the grounds or any particular evidence the Tribunal should consider.

Holiday Claim

Claim 1: EU leave

843. With regards to EU leave; It is submitted that; the Claimant was denied, precluded or prevented from exercising his Directive leave on account of the Respondent, this had the effect of permitting the Claimant to carry forward such Directive Leave indefinitely, the obligation to make payment in lieu only crystallises upon the cessation of the worker relationship. There is no issue of licence or permission: **King v The Sash Window Company [2018] IRLR 142 and C-684/16 Max – Planck – Gesellschaft.**

844. It is submitted that there is no evidence put before the Tribunal that before 30 December 2016 taking any steps in relation to the Claimant taking holidays and no evidence of the Respondent enforcing the position with regard to holidays; it is submitted that the Respondent has not satisfied the burden of proof.

845. The Claimant confirmed that the second claim is for UK entitlement for the last two years and based on the Claimant's domestic statutory entitlement. It is not submitted that the Claimant had a contractual right to carry over leave or that he had been given any authority to carry over leave by the Chairman. It is not disputed in submissions that the Member's Agreement was relevant agreement for the purposes of the WTR and required the agreement of the Chairman for leave to be carried over.

Expulsion

846. It is submitted that Counsel for the Claimant argues that a member of an LLP is entitled to expect that the LLP and its officers will act towards him in a way which respects the maintenance of the relationship of trust and confidence and that the obligation is mutual as are the 'Members obligations and Duties" under clause 10 of the Members Agreement (pages15 and 16). This includes at clause 10.1.4 that each Member shall; "*conduct himself in a proper and responsive manner and use his best skill and endeavour to promote the busies".*

847. Further, it is submitted that this is precisely the type of situation contemplated in the Explanatory Notes at paragraph 126 and that the words "*entitled*" in section 46 (6)(b) EqA, is a reference to entitlement under the EqA itself arising from acts deemed unlawful by the EqA itself i.e. not a contractual entitlement.

848. Counsel did not assert in his submissions that Flanagan was decidedly wrongly but that this is a claim brought under the EqA specifically, and that if section 45 and 46 EqA did not provide protection in this type of situation it would be a 'dead letter'.

849. Neither counsel was able to produce any case authorities where a 'constructive' expulsion claim has been brought by a member of an LLP invoking section 45 and 46 EqA.

Waiver/Delay

850. Counsel submits that the Claimant had been employed for 19 years, he was suffering from a clinically recognised medical condition at the time and a gap of 18 days between notification of the disciplinary process and resignation was not enough to constitute a waiver of the right to resigned claim expulsion.

Conclusions

Suspension

Direct Discrimination: section 13

851. The complaint is that the Claimant was suspended because of one or more of the following; i) he was disabled ii) he had had a significant amount of time off work iii) He had a negative attitude iv) he had a negative management style.

852. The Respondent denies the claim. It argues that the grounds ii to iv. are not claims of direct discrimination but claims which should be properly brought as section 15 claims and in any event, the Claimant was suspended because of the 'joke' he told, and not any of the other factors.

Detriment

853. Counsel for the Respondent in his oral submissions confirmed that the Respondent is not suggesting suspension is not a detriment and therefore the Tribunal do not need to concern itself with this issue. However, it is worth noting that the Respondent's own witnesses Mr Jenson and Mr Powell gave evidence that they acknowledged the impact of suspension particularly on someone with a mental health condition. Further, suspension the Tribunal accept, is not a neutral act, it casts a "shadow" over the employee's competence: **Mezey v South West London and St Georges Mental Health Trust [2007] IRLR 244.**

854. The Tribunal consider that the more senior an individual, potentially the damaging is the act of suspension to the ongoing working relationship. Suspension carries with it a stigma.

Putative Discriminators

855. The decision makers and thus the putative discriminators first need to be identified because in a direct discrimination claim we are concerned with their knowledge and why they acted as they did.

856. The Respondent makes submissions that Mr Flanagan was not a decision maker, it was the FSC members only and we should therefore be concerned only with the mental processes of Mr Powell, Mr Thorogood and Mr Jensen, what information was known to them and why they decided to suspend. The Tribunal have to consider the motivation of all those responsible, since a discriminatory motivation on the part of any of them would be sufficient to taint the decision: **CLFIS (UK) Ltd V Reynolds.**

857. The Tribunal do not accept the Respondent's submissions that Mr Flanagan was not a decision maker for the reasons set out in its findings.

858. The decision to suspend, the Tribunal find was taken not only by Mr Thorogood, Mr Powell and Mr Jenson but by Mr Flanagan. Mr Flanagan was involved in the decision whether to suspend and whether to refer the case to the SSC. The Tribunal are therefore concerned also with what information was known to Mr Flanagan and why he exerted his influence on the FSC to suspend the Claimant and refer the case to the SSC.

859. The Tribunal have found that Mr Flanagan exerted his influence over the process to ensure that suspension was the outcome. He was not only involved as set out in our findings, in the decision the FSC made, he withheld relevant information from them about the Claimant's medical condition which may have influenced or changed their decision in the Claimant's favour. Mr Flanagan was therefore we find instrumental in the suspension of the Claimant despite his protestations to the contrary, which we do not find to be credible. For the reasons set out in our findings, we did not find Mr Flanagan to be a satisfactory witness in that we did not find his evidence to be credible specifically in respect of his involvement with the decision to suspend and his reasons for not disclosing information to the FSC (and later to the SSC) about the Claimant's disability including what he had been told about his behaviour leading up to the Conference.

860. The Respondent submits that whether Mr Flanagan was involved or not is however an '*arid*' debate because the reason for the suspension was not any of the reasons put forward by the Claimant but was the 'joke' ie not his disability. The Respondent also made submissions that the claim does not turn on what process was followed but only the reason for treatment. However, the Tribunal consider the process that was followed is relevant in terms of what if any inferences may be drawn from how the process was managed and in particular the information which was withheld from the FSC.

Information known to the decision makers

861. The FSC committee prior to the decision to suspend, had a copy of the email from James Hart and the FSC had also heard from Mr Williamson and Mr Beverley. As set out in our findings, the Tribunal do not accept as credible Mr Williamson's alleged 'shock' at the presentation by the Claimant, however that said, the Tribunal accept that

by the time he had received Mr Hart's email he was regretting the emails he had sent praising the presentations and the Tribunal find by the time of the FSC, he was presenting his view of the presentation differently and he would now have been aligned to the disapproval captured in Mr Hart's email.

862. Mr Beverly also spoke with the FSC and he had according to the undisputed evidence of Mr Williamson, considered the presentation to be inappropriate at the event itself.

863. The Claimant in his evidence confirmed that he does not allege that Mr Beverly was trying to engineer him out of the business and he does not allege that he would have misrepresented his view of the presentations to the FSC.

Comparator

864. The Claimant relies in the first instance on Mr Tempest as an actual comparator.

865. The Tribunal has considered whether there was a material difference in the degree of inappropriateness and offence caused by the presentations. The unanimous opinion of this Tribunal is that the presentations were equally as offensive. A view we found to be shared by Ms Wigley, the HR Director. On a balance of probabilities however we accept that the FSC committee was in receipt of information, having listened to the initial feedback, that the Claimant's presentation had caused greatest offence. That is consistent with Mr Hart's email and the feedback he said he had received from colleagues. The Claimant does not complain that Mr Hart was discriminating against him. We also accept that the SRA (albeit without all the relevant evidence) formed the view that the Claimant's presentation was more offensive, which supports the argument that the belief of the FSC was not an irrational or even unreasonable one. We conclude that there was a material difference therefore in the content of the presentations, at least in terms of the initial feedback regarding the relative offence caused by them to colleagues. However, that does not necessarily explain why the decision was taken to suspend the Claimant. There was no explanation, although the question was asked repeatedly by the Claimant and his solicitor during the disciplinary process, why suspension was 'necessary'. Mr Tempest's presentation was still offensive but it was not deemed 'necessary' to suspend him.

866. The Tribunal must consider whether there are primary findings of fact which would evidence a difference in treatment based on the protected characteristic of disability or inferences from which discrimination can be inferred.

867. We have considered the reasonableness of the conduct of those involved in the decision to suspend and in particular the conduct of Mr Flanagan. What concerns the Tribunal is the influence Mr Flanagan had over the FSC, the reason why he involved himself so directly in the FSC process which was in breach of Appendix F (the very process he alleges he was involved in order to advise on) , and why he withheld information about the Claimant's medical condition to both the FSC, including the medical reports of Dr Laher, when as he stated in his evidence in chief, he accepted such information was relevant to the investigation and disciplinary process.

868. Mr Flanagan never even disclosed the medical evidence to the SSC or answered their email of the 5 July 2018 when they asked about possible detrimental impact on the Claimant's health. Why when Ms Wigley had been supporting the Claimant was she not asked about his current condition? Why was there no review of the decision

to suspend after the evidence obtained by Mr Powell during the investigation and the email from Mr Tempest regarding the Claimant's behaviour being "far too up"?

869. There is the Tribunal find no satisfactory explanation for the paucity of evidence to explain the lack of consideration of the Claimant's medical condition prior to suspension and the withholding of that information from the FSC. Mr Flanagan was aware from Ms Wigley that the Claimant was 'fragile' during this period, and accepted that there were 'red flags' regarding his mental health and that the Claimant was very much in 'recovery phase'; none of this he shared with the FSC and while the Respondent argues none of this is relevant, the Tribunal conclude it is relevant to consider what inferences it may be appropriate to draw from this conduct.

870. There was no meeting with the Claimant before he was suspended to understand his health and to assess whether there was a potential link between his illness and his presentation. However, Mr Flanagan's evidence was that (although he could not recall them) he had received the reports from Dr Laher prior to the suspension. Mr Flanagan was aware of the medication the Claimant was taking, he was aware of the diagnosis of the Claimant's condition and it is not argued by the Respondent that he did not personally have knowledge of the Claimant's disability when the decision to suspend was taken.

871. The other members of the FSC were also aware that the Claimant had suffered with long term mental health issues, further Mr Jensen and Mr Thorogood were on the Management Board and were aware that the Claimant had been absent long term due to his mental health. We conclude that they had knowledge that the Claimant had a long term mental health problem although not that the diagnosis of an Adjustment disorder. Further Mr Powell, was aware that the Claimant had been unwell long term and certainly by the time he had carried out his investigation, he knew that there were serious concerns about the Claimant's mental health leading up to the Conference. The members of the FSC had sufficient information to put them on notice that the Claimant's mental health was serious, long term and there was we find, sufficient information to put the FSC and Mr Flanagan on notice not only of his disability but the possible link between the Claimant's disability and his conduct at the presentation.

872. The Tribunal have found that the Claimant's ill health and/or medication, was a cause or significant contributory factor in his behaviour in the office generally from the end of November 2016 onwards when his health began to deteriorate. Further, we find on a balance of probabilities that there was a 'casual' between his disability (and/or medication) and the 'joke' he told at the Conference. The reasons for this are set out in the findings (para 673).

873. By the date Mr Powell had interviewed the witnesses (as per his Appendix) the Respondent and the FSC had knowledge we conclude, that the Claimant's behaviour was unusual, that he was acting in a manner which indicated he was on medication and that his behaviour was not 'normal' for him. Despite this they did not review their decision to suspend or seek further medical advice at that stage although they could have done so. Appendix F specifically provides for suspension to only be "no longer than necessary" and Mr Thorogood gave evidence that suspension could be reviewed at the second meeting however, his evidence was that it was *"not seriously considered.* The Respondent and in particular Mr Flanagan and the FSC had sufficient information about the Claimant's ill health to put them on notice that his health may have been an caused or contributed to his conduct, in that it impaired his judgment.

Why in factual terms, did the Respondent suspend the Claimant?

874. The EHRC Employment Code notes that 'the [protected] characteristic needs to be **a cause** of the less favourable treatment, but does not need to be the only or even the main cause' — para 3.11. So were any of the pleaded factors a cause of the treatment and if they were does this amount to direct discrimination?

875. In determining whether the protected characteristic was an underlying reason for — as opposed to the immediate cause of — the less favourable treatment, the Tribunal may need to look beyond the superficial answer to the question of why the employer treated the employee less favourably hence why we consider it necessary to look at the surrounding circumstances.

Inference

876. We have reminded ourselves that discrimination cannot be inferred from unreasonable conduct alone: **Commissioner of Police of the Metropolis and anor v Osinaike EAT 0373/09.** Simply showing the employer's conduct was unreasonable or unfair is not by itself enough to raise an inference of discrimination and trigger a shifting of the burden of proof.

877. Mr Flanagan does not however allege that he would ordinarily involve himself in decisions by the FSC and he did not admit to doing so in his evidence in chief. He does not allege he would routinely withhold medical advice and reports at the suspension decision stage and at the investigation and disciplinary stages. There is no evidence he behaved this way with anyone other Member/Partner during an Appendix F process. Mr Flanagan does not allege that he breached the terms of the Membership Agreement in disciplinary proceedings before. He does not admit to breaching the terms of Appendix F and this was denied to the Claimant and his solicitor throughout the process but we find that he did, repeatedly.

878. There is a distinction between unreasonable treatment and an absence of any explanation for that unreasonable treatment: **Bahl v Law Society and ors 2004 IRLR 799 IRLR CA.**

879. Mr Flanagan's evidence was not credible. We found his evidence about the reasons for and his level of involvement in the FSC to be unreliable and we likewise did not consider the evidence of the other members of the FSC to be reliable when questioned over Mr Flanagan's involvement.

880. The Tribunal have made a direct finding of fact that Mr Flanagan applied his influence and pressure to the FSC to steer them toward suspension. He also failed to disclose relevant information to them which may have influenced their decision to suspend which is relevant when considering his motive and his reasons for influencing them to suspend. We do not find his explanations for why he withheld information to be credible. His conduct was not only unreasonable we find, it was unexplained because he does not seek to explain his breach of the Management Agreement because he does not admit to it. He also does not admit to having acted unreasonably in not disclosing relevant information to the FSC, important information including about the Claimant taking medication and his own knowledge of the possible side effects. His explanation was that he did not consider there to be a link between his conduct at the Conference and his disability but we do not accept

that this is credible in light of what he knew from Dr Laher but also what he had been told by Ms Wigley about the Claimant's behaviour in the run up to the Conference. In any event, his evidence was that information about his medical condition would be relevant to the investigation and disciplinary stage, and yet he still withheld it even when directly asked by the SSC about whether there may be any detrimental impact on the Claimant. He knew the Claimant was taking medication, he had seen him behaved at him in a 'subdued' manner and understood such medication may cause side effects. Mr Flanagan's explanations for his behaviour quite simply make no sense, they are not convincing, they are not consistent and not credible. There was no credible non-discriminatory explanation.

881. Mr Flanagan the Tribunal find (along with Ms Wigley) had previously been keen to keep the Claimant out of the business until he was fully well again, and had encouraged him to stay off work rather than come back before he was fully fit. The Claimant was now back to work, in 'recovery phase' and requiring support which had clearly caused Mr Flanagan such serious concern that only 1 day before the Conference, he had raised the support the Claimant needed in the office at the Management Board level, identifying it as a diversion for Mr Williamson. He had expressed the view that it was not in the Respondent's interest for this to be long term – even suggesting as a solution closure of the office.

882. Mr Flanagan was concerned we find, that the disability was going to continue 'longer term' although he had not sought to establish with Dr Laher what the likely timescales around his recovery were likely to be as at June 2018. This view was the Tribunal conclude, based on the fact that the Claimant's condition was a mental impairment for which recovery is less easy to forecast and he had a stereotype influenced view of mental illness ie that it was going to drag on longer term and continue to be a 'challenge' or diversion, when there was no medical evidence to support that view. He would not we find have had those same concerns if it was a physical illness the Claimant was recovering from. Those are the factual criteria that we conclude were an operating cause, a reason behind the treatment i.e. behind the decision by Mr Flanagan to exercise his significant influence to steer the FSC toward suspension.

883. Mr Flanagan had become the Tribunal find, frustrated with the Claimant such he became much less involved in supporting the Claimant, even failing to intervene when asked to do so directly by Ms Wigley on 28 May 2018. He began to see the Claimant's disability we conclude, on his return in May 2018 as a continuing problem and a distraction for the Derby office and in particular for Mr Williamson and he was clearly concerned that it would be a longer-term problem. The Tribunal do not find however, that this was in any way related to the amount of time off the Claimant had taken.

884. The Tribunal find no evidence within the Management Board meetings or elsewhere, and nor does the Claimant allege, that there was any complaint about the Claimant continuing to receive his drawings during his absences. We conclude that his absences were not a problem and played no part in the decision by Mr Flanagan to apply his influence to the FSC to suspend. It was the Claimant's presence in the workplace while still disabled not his absences, which Mr Flanagan saw as a problem for the Respondent. It was this view we find, which played a significant part in his decision to influence the FSC to suspend, by telling them as Chairman of the business that he thought the Claimant should be suspended and he withheld what he knew about his medical condition, even that the Respondent was providing ongoing counselling from a psychologist, to prevent further questions being asked about the possible connection with his illness and his conduct at the Conference.

885. Mr Flanagan's withholding of medical information we find, deprived the FSC of relevant information which had they had it, may have led them to consider other options rather than suspend and ask more questions of the Claimant or Dr Lather about the possible connection between his psychological health and his conduct at the Conference such that there may have been no referral to the SSC at all and no formal action.

886. Mr Flanagan was dealing with someone, who he saw as*; "entering 'the final phase"* of his career and who needed ongoing supervision which was a diversion.

887. The Claimant invites the Tribunal to draw inferences from the editing of the interviews Mr Powell conducted and the failure to comply with the Tribunal's 13 October order for disclosure. However, the disclosure exercise was the responsibility of Mr Potter and there is the Tribunal find no evidence to link the decisions Mr Potter took about disclosure to the conduct of those on the FSC committee. There were failures to disclose and a breach of the 26 November 2018 order however these related to documents which related to the matters extending beyond the FSC and we do not consider it appropriate to draw an adverse inference from those failings in relation to the reasons why Mr Flanagan behaved as he did.

888. We have reminded ourselves that the Protected characteristic need not be only reason for treatment. It did we find have a 'significant influence on the outcome, and thus discrimination is made out. **Nagarajan v London Regional Transport 1999 ICR 877, HL**

889. The Respondent alleges that the reason was the offensive 'joke' told at the Conference. The Tribunal find based on the primary findings of fact and the inferences drawn, that although the 'joke' was a factor in the decision-making process, another reason which we find had a significant influence on the decision to suspend, was the Claimant's his disability.

890. The Tribunal find that there was no evidence to support Mr Flanagan's concern that the Claimant would continue to be a diversion for the management at the Derby office long term, this was not something arising from his condition, this was we find on a balance of probabilities, an assumption he made because of the nature of the Claimant's condition, namely a mental health condition. The report from Dr Laher in February 2017 **[p.396]** was positive, his opinion was there was a good chance of a sustainable recovery and his recommended phased return was only for a 6-week period. The May 2018 report **[p.452]** referred to the phased return to work going well. The Tribunal conclude that in this case, it is appropriate to draw an inference of a discriminatory reason for the decision by Mr Flanagan to recommend and steer the FSC toward suspension

891. That this was a concern and a factor in Mr Flanagan's decision-making process is we find further supported by the letter he sent immediately after the decision of the FSC on 20 August as set out in the findings, informing the Claimant that he was making one adjustment, namely putting in place someone to support the Claimant who was not "*in the management structure*". No other adjustment or support is proposed, that is his immediate concern and the first measure he wants to put in place before the Claimant returns. This is consistent with the concerns he raised the day before the

Conference with the Management Board that the Claimant's disability may be a diversion long term for the management of the Derby office i.e. for Mr Williamson. No such adjustment had been proposed before by Mr Flanagan and we conclude that this was measure was suggested not out of concern for the Claimant but (as with replacing him as MP) out of concern for the Derby office and in particular to address Mr Flanagan's concern about the longer-term distraction his disability may create for Mr Williamson, now that he had not been expelled, had not yet resigned and no exit had been agreed.

892. The other factors pleaded by the Claimant are matters which arise from the disability rather than disability itself and therefore if the decision was taken because of those factors, that cannot amount to direct discrimination in any event.

893. We therefore conclude that Mr Flanagan was part of the decision-making process, he had discriminatory reason for steering the FSC toward suspension which tainted the decision to suspend the Claimant on the 18 June 2018. The discriminatory reason was a significant factor in the decision to suspend and the claim of direct discrimination is therefore made out.

894. **Tis complaint amounts to discrimination as far as the Claimant's disability was a reason for suspension but not the rest of the pleaded section 13 matters.**

Suspension: Section 15 – something arising from

895. The Claimant complains that the Respondent suspended him because;

(i) He had significant time off work
(ii) Because he had a negative attitude and/or
(iii) Because he had a negative management style and/or
(iv) Because of his conduct at the 14 June Real Estate conference and/or
(v) Because of his depressed, anxious or irritable demeanour in the offices.

896. The Respondent denies this claim but in the alternative, argues that the suspension was justified to achieve the legitimate aim of maintaining standards of discipline and eliminating discrimination and harassment. The Claimant argues that the actions were not a proportionate means of achieving a legitimate aim.

897. The Claimant argues that it had been clearly established that each of the five matters arose in consequence of the Claimant's disability.

898. The Respondent accepts that the Claimant was suspended because of point iv i.e. his conduct at the Real Estate conference

Unfavourable treatment

899. The Respondent accepts, suspension was a disadvantage, no question of comparison is involved.

What was the cause of the treatment - who carried out the unfavourable treatment.

900. The putative discriminators for reasons already set out above, we conclude were the FSC and Mr Flanagan, all of whom made the decision to suspend.

Knowledge of disability

901. The knowledge required is of the disability section 15 (2), not of the casual link.

902. An employer has a defence to a claim under section 15 if it did not know and could not reasonably have been expected to know of the employee's disability. However, the employer cannot simply turn a blind eye to evidence of disability. The EHRC Employment Code states that an employer must do all it can reasonably be expected to do to find out whether a person has a disability (see para 5.15). It suggests that 'Employers should consider whether a worker has a disability even where one has not been formally disclosed— para 5.14. The following example is provided in the Code: '*A disabled man who has depression has been at a particular workplace for two years. He has a good attendance and performance record. In recent weeks, however, he has become emotional and upset at work for no apparent reason. He has also been repeatedly late for work and has made some mistakes in his work. The worker is disciplined without being given any opportunity to explain that his difficulties at work arise from a disability and that recently the effects of his depression have worsened. The sudden deterioration in the worker's time-keeping and performance and the change in his behaviour at work should have alerted the employer to the possibility that these were connected to a disability. It is likely to be reasonable to expect the employer to explore with the worker the reason for these changes and whether the difficulties are because of something arising in consequence of a disability'* — para 5.15.

903. The Code also makes the important point that knowledge of a disability held by an employer's agent or employee; such as an occupational health adviser, in this case Dr Laher will usually be imputed to the employer (para 5.17).

904. The Respondent had reports from Dr Laher, and Mr Flanagan himself had received those reports. The FSC had also been put on notice following the comments made to Mr Powell in the investigation, that there had been concerns raised before the Conference about a deterioration in his apparent psychological health/stability. It was therefore incumbent on the FSC to enquire into his mental wellbeing. Had it made reasonable enquiries, the FSC members might reasonably have been expected to know about the diagnosis of the Claimant's condition, that he had a disability, the effects of it and given the report Dr Laher provided in April 2019, the link between his behaviour at the Conference and his disability.

905. The Respondent and in particular Mr Flanagan and the FSC had knowledge of the disability

What was the reason for the unfavourable treatment

906. The 'something' that caused the suspension, 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 and must be "something arising in consequence of the Claimant's disability. The causal link

between the something that causes unfavourable treatment and the disability may include more than one link. This is an objective test.

907. The Respondent's case is that it suspended the Claimant because of the 'joke' the Claimant told at the Conference. The Respondent's case is that this was the sole reason. As we have already set out above, we do not find that this was the sole reason for suspension, we have found that a significant reason was the disability itself however the 'joke' was also another reason or an effective cause. It was the reason why we find the FSC made the decision (the decision being tainted by the discriminatory reason of Mr Flanagan).

908. The Claimant accepts that the joke was an effective reason or a cause of the treatment, however he alleges that there were other reasons which had a significant influence on the decision to suspend, all of which were an effect or outcome of his disability.

Causation

909. Did any of the other alleged factors amount to an influence or cause that operated on the mind of the FSC including Mr Flanagan?

Significant time off work

910. The Tribunal do not find that a significant influence on the decision to suspend was the Claimant's absences, negative behaviour or negative management style. His level of absence we find were never an issue raised with him or at Management Board Meetings indeed, he was actively encouraged to stay away from work. It was his presence and the assumption because of the nature of his condition, that this would
be a long-term diversion for the Respondent and in particular Mr Williamson as Acting MP, that was a significant factor but not his absence

911. The Respondent had been supportive of the Claimant's time away from the office and were actively encouraging him in fact to stay away from the office, to return slowly on a phased return and putting no pressure on him to come back. If anything, it was more his presence than his absence which was an issue. We do not conclude that this was a reason.

Negative attitude

912. The Tribunal find that the Respondent and Mr Flanagan in particular was concerned about the Claimant's impact on morale in the office and we do find that this was likely to have been considered by Mr Flanagan when steering the FSC to suspend and not to disclose medical evidence however, this had been an ongoing matter and there had been no recent serious reports of problems with his behaviour. The morale issue had been largely addressed by the step Mr Flanagan took to remove the Claimant as MP. Although a consideration, we do not conclude that this was significant factor in the decision, we conclude that the operative reasons were the stereotypical view about mental ill health and the 'joke'.

Negative management style

913. The Claimant was no longer the MP at Derby and while his management style had been an issue, we find that Mr Flanagan had taken decisive steps to address that and

done so and do not conclude that this was a factor in the suspension decision, certainly not a significant one.

The Claimant's depressed, anxious or irritable demeanour in the office

914. The Claimant's demeanour in the office since his return had been reported to be 'hyper' and 'obsessive', rather than depressed, anxious or irritable however we do not find that it was his demeanour which was a reason for his suspension. For the reasons set out above, we conclude it was the view that his mental health would continue to be a challenge/ a distraction because of the concern that it required Mr Williamson to moderate it and the joke. If this was a consideration it was not we conclude an operative cause or a significant reason.

The Claimant's conduct at the Conference

Causal link to the disability

915. The Respondent accepts that the Claimant was suspended because of the joke and submits that the 'joke' was not a something arising from his disability.

916. The Respondent submits that the Claimant during the disciplinary interview commented that he did not consider it offensive and there were other occasions when the Claimant had told this 'joke' albeit not in this type of forum.

917. While the Tribunal have found that the Claimant had told other inappropriate jokes in the past, there is a stark difference (although the Tribunal do not condone it) from telling inappropriate jokes amongst colleagues or a client and telling such an inappropriate joke to a large gathering of a mixed audience. Mr Williamson's evidence was that the Claimant had never said anything like that in the context of a presentation before and there is no evidence that he had done so.

918. Ms Rhodes gave the most damning evidence about the Claimant's propensity to tell in appropriate 'jokes' however, we were not impressed with Ms Rhodes in terms of her credibility as a witness and this evidence had clearly not been considered particularly important or relevant because there is no mention whatsoever of this in her witness statement. This evidence only came out under cross-examination and in response to questions from the Tribunal and her evidence did not sit easily with her evidence that she did not consider that the presentation he would give would be a 'car crash'. Further, she sought to avoid any responsibility for failing to act to prevent the presentation because she did not anticipate that he would tell such a 'joke'. Ms Rhodes has worked with the Claimant for a long time. He and the Claimant had joined Derby City Council 37 years before and worked together in various businesses. If she did not "*for one minute"* expect something offensive like this' joke' to be told by the Claimant, the Tribunal conclude that it must be inferred form this that this is because it is not his 'normal behaviour.

919. There was no evidence from the Respondent's witnesses that over the Claimant's long service, he had behaved in this way in a presentation before. Ms Wigley's evidence was that while she had reports that he was not always as 'politically correct' as he should be, her evidence was that she was not aware that the Claimant had told jokes of that nature before.

920. There is evidence that a number of individual noticed that his behaviour leading up to the conference was unusual.

921. Counsel for the Respondent argues that there is no credible evidence that "*buzzy"* people tend to tell racist, homophobic jokes and that it could be viewed as offensive to those with stress impairments to say so. This the Tribunal finds is a rather simplistic and unhelpful argument because what the witnesses said including Ms Davies, Ms Shephard and Ms Rhodes during the investigation was not simply that he was "*buzzy"* but that he acted as if he was on medication or as Ms Rhodes stated, on *"speed*" and further such an argument fails to address the specific nature of the Claimant's condition, it was not simply 'stress' it was an Adjustment Disorder.

922. The Claimant was also taking anti-depressant medication, fluoxetine which according to the evidence of the Respondent's own witness, Mr Hambleton, can have side effects he understood, including that the person would behave as if their 'dial was set too high'. Only a matter of a few weeks before the Conference (as a result of attempting to take his own life) the Claimant's medication had been doubled.

923. Dr Laher in his report of 19 September 2018 referred to a moderate clinical relapse especially due to the suspension and in his letter of the 29 January 2019 referred to the situation at work being "*very stressful*" and "*set him back psychologically*" **[p.1008].**

924. Dr Laher in his report of the 29 April 2019 provided a report to assist with the SRA investigation gave his opinion that was;

> "Because of his "*compromised psychological health*
> *a. He understandably misjudged his readiness to undertake the said presentation in the first place;*
> *be misjudged the appropriateness of the contact of his presentation"*

925. Counsel for the Respondent argues that Dr Laher's report/ his opinion is not reliable because he was not in receipt of important information about the Claimant having told the 'joke' before or that he put himself forward for the presentation and the content of the presentation itself. However, even if the Claimant had not been candid previously about the circumstances leading up to the presentation (which it appears he may not have been), or whether he informed Dr Laher that he had told the joke previously to clients (albeit not in a presentation setting) or told him the content of his presentation, by the 29 April 2019 report from Dr Laher he was aware of the content of the presentation. He refers **[1137**] to; "*I confirm that I am aware, both directly through Mr Taplin in the course of his clinical treatment with me and also through the document that was appended to Mr Allen's letter of 11 April 2019, of the very specific content of Mr Taplin's presentation and the context of this" .*

926. Dr Laher makes no reference to the Claimant telling this 'joke' in a different context before however we conclude that he had not done so in the context of a presentation of this sort and Dr Laher he refers to the remorse he has shown and the Tribunal accept that Dr Laher is giving a clinical assessment of the impact of his condition and/ or adjunctive psychotropic medication prescribed by his GP. It is to be noted that in the report of the 29 April 2019 however, Dr Laher comments on the Claimant's "*readiness to undertake the presentation"* and thus he was clearly aware of this at the time of this report.

927. The evidence of Dr Laher not only highlights that insensitivity is not an unusual symptom of this condition, the comments from Mr Powell's investigation attest to the Claimant's very unusual behaviour leading up to the presentation where he was behaving as if on drugs.

928. The Tribunal do not consider it appropriate to draw any adverse inference from the failure to call Dr Laher as a witness. Dr Laher had produced a fairly substantial number of reports and the need for further medical evidence was discussed at a case management hearing with counsel representing both parties at the case management agreeing that neither would obtain further medical evidence. Indeed, the Respondent indicated that it would not obtain further medical evidence on condition that the Claimant did not obtain a further report from Dr Laher.

929. The Claimant was the Tribunal find initially defending his behaviours at the disciplinary hearing however there is no evidence to suggest, nor does the Respondent suggest it, that from the date of the presentation to the disciplinary hearing, there was any material improvement in his mental health. Indeed, Dr Lather's report states that the suspension had provoked a relapse **[p.988].** If his judgement was impaired on 14 June 2018, the medical evidence does not suggest that after a further relapse his judgement would be any less impaired at the disciplinary hearing.

930. There is no indication in Dr Laher's return to work reports of impaired judgement and that the Claimant should avoid any type of interaction with clients or colleagues. We have also considered the Respondents submission that given the Claimant was deemed fit to return to work to carry out work which requires appropriate and careful judgement that this is inconsistent with a suggestion that the Claimant's judgment was impaired. However, as set out in our findings, Dr Laher had indicated in his report that the Claimant's performance may be affected or other functioning and highlighted the not unusual symptom of a lack of sensitivity. Further, the Claimant's medication had been doubled and after that report we have the evidence from the Respondent's witnesses about the Claimant's behaviour leading up to the Conference which in effect, and in varying terms, express concern and alarm about what appears to be manic behaviour – certainly not behaviour they consider normal for the Claimant and which appears to be during the week or two week leading up to the Conference and as such appears to post-date Dr Laher's report last assessment of the Claimant .

931. The Tribunal have little difficulty concluding that the decision the Claimant made about the content of his presentation, on a balance of probabilities, was impaired by his disability and/or medication and therefore the 'joke' he told was something arising from his disability. We find that this was not his normal behaviour, it was not behaviour expected from him and that during the disciplinary hearing while still defending it initially, he not only remained unwell, his health had deteriorated under the stress of the suspension.

932. We conclude that his behaviour at the Conference was linked to his medical condition and that although the Respondent was not required to have knowledge of the casual connection we conclude that the Respondent did knew of the link or could reasonably be expected to know of the link had it made reasonable enquiries.

Justification – proportionate means of achieving a legitimate aim

933. The Respondent submits that it is proportionate to suspend to achieve the legitimate aim of maintaining good standards of behaviour in the workplace, to maintain a workplace free from discrimination or harassment and enforce policies as to diversity and inclusion. Further, the Respondent submits that if this Tribunal were to find that that because of the Claimant's ill health the Claimant lacked judgement so that he was

liable to make racist, homophobic and sexually crude comments at work, that meant suspension was even more proportionate.

934. The Tribunal accept that the pleaded aim is a legitimate aim and counsel for the Claimant in his submissions did not seriously challenge that.

935. Employers are expected to show tolerance and take the illness into account when judging an employee's performance and conduct, including considering whether to treat the problem as a ill health or misconduct issue. They did not explore this as an option, they focused on conduct because we find they were directed to do so by Mr Flanagan and Mr Flanagan chose to withhold information about the Claimant's medical evidence, ostensibly (though we do not accept this as credible) because, despite the involvement of an Occupational Psychologist, Mr Flanagan felt that he was able to assess without reference to the treating Psychologist, whether the Claimant's behaviour was impacted by his Adjustment Disorder. An alleged opinion, he did not share with the FSC whose responsibility it was to make the decision. Hence, those who should have been solely responsible for making the decision, did not consider whether this was a conduct or ill health issue, whether his medical condition was a mitigating and if so, what other options were there to suspension.

936. Mr Flanagan when informing the Claimant of his suspension on 19 June 2018 did not refer to gross misconduct and did not identify otherwise whose interests the suspension was seeking to protect. The Respondents counsel argues that the joke was obviously rightly considered to be potentially gross misconduct and the Management Agreement provides for suspension however, Mr Powell in his email of the 26 June 2018i informed the Claimant that the Respondent was at the "initial procedure and investigation" stage and further that no decision had been taken as to whether a capability or disciplinary hearing would be invoked. Further, Mr Powell does not refer to gross misconduct in his response to the Claimant and seeks to rely on the second limb of namely that it is in the interests of not only the Respondent but the Claimant, without identifying what those interests are.

937. On the 25 June 2018 Mr Powell raises a query with Mr Flanagan over whether the wording of the Membership Agreement clause 20 is even invoked at that stage. On the 3 July 2018 Mr Powell wrote again to the Claimant 's solicitors stating that "*the investigative interviews are solely for the purpose of fact finding and no decision on disciplinary action will be taken after a capability or disciplinary hearing had been held"*

938. Despite reference to the Respondent considering whether this should be dealt with under the conduct or capability procedure, the Tribunal heard no further evidence that there was any discussion about whether the capability procedure and specifically ill health capability, was more appropriate.

939. The presentation took place on the 14 June, the Claimant was not suspended that same day, indeed not until the 18 June**.** There was time to contact Dr Laher and time to consult with the Claimant about his condition and potential impact on his behaviour at the Conference and discuss potentially alternatives to suspension at least while his health was being investigated.

940. The Claimant complains of the impact on his mental health of the suspension. He felt unsupported and in his fragile state of mind, he believed that the Respondent was engineering him out and for the reasons we set out above, we conclude that his concerns were justified in respect of Mr Flanagan at least.

941. The Respondent had been told that he had suffered a relapse before returning to work in May 2018 and there was we conclude, a failure to make reasonable enquiries to find out about it was and indeed what may trigger another relapse. The FSC were not therefore aware that the Claimant had tried to take his own life and his medication had been doubled. Had they understood this the evidence of Mr Jensen is that they would have "*looked at other options"* by agreement with the Claimant. He did not clarify what those options were but clearly considered there were other options.

942. Mr Flanagan in response to a question by the Tribunal conceded that paid leave could have been not only an option, but in his view may be a "good option" but was not explored. It was the Tribunal conclude, an obvious alternative not least given the amount of absence the Claimant had had and that it was common knowledge that he remained unwell and was in a 'recovery phase' working a phased return.

943. The Claimant's evidence is that he felt under threat of expulsion and that his career and reputation were both in serious jeopardy. While suspension is supposed to be a neutral act, he felt quite understandably and reasonably we find that, "for a senior, high profile individual in a business to be suspended makes it practically impossible for that individual to return to their role".

944. It may be argued that it would make no difference to the perception of his colleagues if he was absent on paid leave following the presentation because they had not been informed about his suspension in any event and would not know the reason for his absence. However, firstly, it is the act of suspension on the individual, and how they consider they are viewed by their employer and whether they feel, particularly when they are suffering with a mental health problem, supported. Whether the employer is keen to understand their illness and whether it caused the behaviour or whether they are 'blaming' the individual will impact on how supported the individual feels. The impact on the Claimant's mental health because he felt that the Respondent was not supporting him and trying to force him out, not least given the difference in treatment with him and Mr Tempest, was we find on the evidence including the Claimant's and Dr Laher's, significant. Further, his absence from the office could have been explained as paid leave and in circumstances where Mr Tempest was not suspended, there would appear to no reason why staff would not accept that explanation. With the Claimant's consent colleagues could have been informed that the Claimant was unwell, being supported and taking some further time away from work.

945. The Claimant's evidence is that his position had been made untenable by the suspension and that he expected that the undermining of him would continue.

946. Another option was simply not to suspend considering the mitigating factors.

947. Mr Tempest's presentation was offensive, and he was not suspended. His apology was clearly considered sufficient to enforce the policies on diversity and inclusion and maintaining good standards of behaviour. The Claimant was not refusing to be reprimanded and apologise, it was the act of suspension he complains about.

948. There is provision in Appendix F to make adjustments to the process.

949. The Claimant felt unsupported in the way in which the suspension was managed and we conclude he was. Telling him he was being dealt with sensitively, was to pay lip service to the Respondent's obligations.

950. Suspension is not a neutral act, it carries with it a stigma and for someone in a fragile mental state who is emotionally vulnerable, and for whom their status and reputation is so important, it is foreseeable that to suspend would not only cause potentially significant and perhaps irretrievable damage to the working relationship but further psychological harm to that person. Whether or not other staff were told he was being suspended, his fellow Partners knew, the Chairman knew and the Claimant felt unsupported.

951. The Respondent argues that to allow him to return if his judgment was so impaired may have led him to say other inappropriate things, which means suspension was proportionate. That of course presupposes that his behaviour was not affected by stress in the run up to the Conference or could not have been addressed by an adjustment to his medication or further counselling. The Respondent failed to carry out any kind of assessment or evaluation of the risk of the Claimant repeating this behaviour and there are no complaints that he had said anything prior to the Conference which was inappropriate.

952. The ECHR provides [para 5.21]; "*if an employer had failed to make a reasonable adjustment which would have presented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was justified"*

953. The EHRC Employment Code sets out guidance on objective justification. As to proportionality, the Code notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see para 4.31).

954. The Tribunal find that the FSC did not apply its mind to whether there were other means of achieving the stated aims which were less discriminatory and the Tribunal finds that there were other options those included either not suspending perhaps accompanied by putting in place closer supervision at least until advice had been obtained about the risk of the Claimant making further inappropriate comments or putting the Claimant on paid leave of absence, at least until the Respondent had carried out some investigation into the link between his illness and his conduct at the Conference . Suspension in the circumstances was not a proportionate response. There were other less discriminatory measures which could have been taken to achieve the legitimate aims.

955. **This complaint amounts to discrimination.**

Failure to make reasonable adjustments – section 20/21 EqA: suspension (PCP 5)

956. The PCP relied on is suspending a person alleged to have committed the relevant misconduct, however the further and better particulars referred to the PCP as the requirement to stay away from work on suspension without clear information about the allegations he was facing and for longer than was necessary to complete a full investigation (the list of issues confirm that in relation to the section 20/21 claims the Claimant relies on the pleaded case and not the summary in the agreed list of issues).

957. Counsel for the Claimant directs the Tribunal to the EHRC code para 6.33 which includes as an example of what may be reasonable adjustments; "*Modifying disciplinary or grievance procedures* "… Counsel for the Respondent submits this

Code has no application to a Partnership situations however, as the Counsel for the Claimant points out, Chapter 11 of the Code deals with discrimination in work relationships other than employment and discrimination against Partners in a firm and members of LLP's is referred to at paragraphs 145 and 146, and the application of the duty to make reasonable adjustments to Partners and members referred to at paragraph 146. We therefore agree with Counsel for the Claimant that the Code can be appropriately relied upon to provide assistance in this case.

958. Appendix F also provides for adjustments to the process under clause 12

Substantial Disadvantage and knowledge if disadvantage.

959. The Respondent admits that this PCP placed the Claimant at a substantial disadvantage and that the Respondent had knowledge not only that he was disabled but likely to be placed at the pleaded substantial disadvantage by the PCP and concedes the comparative disadvantage. The pleaded disadvantage is that; "*the suspension and lack of information greatly exacerbated the Claimant's mental impairments and hindered his recovery".*

960. It is agreed that the only issue for the Tribunal is whether there was a failure to make reasonable adjustments.

961. What adjustment would it be reasonable to make to avoid the disadvantage?

962. The functional effects of the functional effects of the disability are set out in our findings and we have considered these effects in order to ascertain what adjustments are reasonable and how any adjustment would have alleviated the disadvantage. We have taken the list of adjustments out of the order as they appear in the list;

1.Adjustment: ought not to have suspended the Claimant

963. The presentations by both the Claimant and Mr Tempest were offensive and caused serious offence to a number of Partners and employees. The matter warranted investigation.

964. The Claimant was less able to cope however with the stress of a suspension, he was emotionally vulnerable and mentally fragile. To have not suspended pending investigation into the link between this disability and his conduct, we consider would have been a reasonable step to take and once established to look at other options. There were other options as we have addressed above.

965. Mr Tempest was also guilty of an offensive presentation but it was not deemed, 'necessary', to suspend him. There could have been a proper risk assessment carried out with Dr Laher regarding the risk the Claimant posed in terms of repeating the behaviour, if he remained in work pending that investigation or put on paid leave or some other options as alluded to by Mr Jenson, in discussion with the Claimant

966. The adjustment of not suspending would have been effective to alleviate the disadvantage, in that there is a real prospect that the Claimant would have felt more supported, would have felt less under threat, it would have reduced the stress and anxiety, the 'shadow' of suspension and prevented the deterioration in his health which was a barrier to his return to work. We have considered counsel's submission around the risk of repeat behaviour raised in the context of the s.15 claim, however for the reasons set out above on steps and alternatives to address that concern, we do not

consider that those practical issues, mean that this adjustment was not a reasonable one to take in the circumstances.

967. It is not a matter of 'sweeping things under the carpet' as submitted by counsel for the Respondent, if that argument were to have merit then by the same token the Respondent must be admitting to 'sweeping' Mr Tempest's offensive presentation 'under the carpet' by the decision not to suspend him. The FSC considered the degree of offensiveness when deciding we are told, not to suspend Mr Tempest, it is equally relevant to consider whether the seriousness is mitigated by the individual's ill health which may have been the cause or a contributory factor.

968. There was no reasonable (if any) assessment of whether to treat the issue as a capability rather than conduct matter. Mr Flanagan failed to disclose the information he knew about the Claimant's condition, and therefore what process should be followed and whether he should be suspended, did not receive the required consideration.

969. The Respondent did not manage this situation well and we find that to have not suspended was a reasonable adjustment, there was a real prospect that it would have alleviated the disadvantage. The decision was taken on the 18 June 2018 and there was a failure/omission to review that decision following the investigation and further information received, at the second hearing of the FSC on 2 July 2018. The PCP remained in place from 18 June to the 15 August 2018.

970. **<u>This complaint amounts to discrimination</u>.**

2.Adjustment: not to have a formal disciplinary process but an informal meeting

971. The presentations by both the Claimant and Mr Tempest were offensive and caused serious offence to many Partners and employees. The matter warranted investigation. To have dealt with the situation informally outside of any process, whether conduct or capability would have had a prospect of alleviating the disadvantage of the PCP.

972. The Claimant was less able to cope with the stress of a formal disciplinary process, he was emotionally vulnerable and mentally fragile. To have dealt with the situation normally outside of a formal process would have had a real prospect of alleviating the disadvantage, the stress and anxiety and risk of relapse.

973. However, whether dealt with as conduct or capability, we conclude on balance that it was reasonable to carry out a formal disciplinary process. Mr Tempest was also subject to a formal investigation and a disciplinary hearing. Although we conclude that the Respondent was under an obligation to consider how to conduct the process in a manner and make adjustments, which would alleviate or avoid the substantial disadvantage, we do not consider that a reasonable adjustment would involve not invoking a formal process at all. It is possible that the FSC may have decided against referring to the matter to the SSC had the FSC members been made more fully aware of his medical condition and not influenced by Mr Flanagan, or just as reasonably it may have referred it with a view to the Claimant's health being further investigated and taken into account in mitigation.

974. The Claimant's evidence was that he did not object to being 'told off', it was the process that was followed. That process should and could have been more supportive and sensitive to his mental fragility and there is a way to manage a formal process with adjustments to achieve that which was not done in this case. But whether capability or conduct, a formal process was of itself reasonable subject to adjustments. Following a formal process can ensure there are safeguards in terms of representation, a proper investigation etc. What is important is that adjustments are in place to reduce or avoid the disadvantages that arise from such a process and to ensure that the individual as the opportunity it explain before any disciplinary action is taken, the extent to which their disability may have impacted on their conduct. The initial FSC was to consider whether there was a case to answer, that was part of the formal process, had it been a fair and non- discriminatory process, it may not have led to a disciplinary process however, it may still have done so for the SSC to determine the extent to which the disability was responsible for the Claimant's conduct at the Conference. The Tribunal conclude that that it is not reasonable to find that an 'employer' is breaching the EqA by following its formal process in cases of serious misconduct where the conduct may be linked to a disability. It is the way that the process is managed and the outcome which may need to be adjusted.

975. **This complaint is not well founded and is dismissed.**

3.Adjustment: ought to have clarified the complaint in writing

976. The Claimant was informed by Mr Williamson on 18 June 2018 that the reason for the suspension, the 'complaint' was the presentation. It is clear from the letter from the Claimant's solicitor on the 2 July 2018 as set out in our findings, that the Claimant understood what the complaint was, it was about the presentation.

977. Counsel for the Respondent submits that the Claimant knew what the joke was, the presentation had been only 4 days earlier and he was able at the disciplinary hearing to give a detailed account of what he had said. Putting the complaint in writing he submits would not have served to reduce or avoid any disadvantage the Claimant was under and the submission letter of the 19 June 2018 referred to the concerns Mr Williamson had raised with him. Th Respondent admits the PCP, that it placed the Claimant at a substantial disadvantage and that the Respondent knew that. The Respondent does not seek to argue that any disadvantage the Claimant was under because of the process /way in which the suspension was carried out cannot give rise to a duty to make reasonable adjustment to reduce or avoid any disadvantage caused by the suspension decision itself but rather argues that putting the complaint into writing would not have served to reduce or avoid any disadvantage, because the Claimant understood the reasons for the suspension.

978. The Claimant did not allege during the hearing that he needed to be reminded of the joke or was unclear what part of his presentation was unacceptable therefore this did not put him at a substantial disadvantage which required this adjustment to be made. We conclude that with respect to this specific allegation and clarifying the complaint in writing, the Claimant knew that the concern was about the Conference, he knew what he had said and it was explained to him by Mr Williamson at the outset that what he had said had caused offence. We conclude that not setting out specifically in writing what had caused offence and to whom during the investigation, would not have been effective in reducing or removing the substantial disadvantage, because it was obvious to the Claimant what was unacceptable about his presentation.

979. **This complaint is not well founded and is dismissed.**

4.Adjustment: ought to have explained the basis for the suspension and disciplinary

980. There is an overlap with this proposed adjustment and the previous one. There was a lack of explanation around whether suspension was on the grounds of gross misconduct or in the interests of the Member of LLP and this resulted in communications from the Claimant and letters from the Claimant's solicitors which we have found were never satisfactorily answered, however the Claimant knew and as set out in our findings of fact, had understood that the offence was being treated as gross misconduct for the reasons set out in our findings.

981. Although counsel for the Respondent argues that the adjustments below numbered 5, are matters of process and do not relate to the decision, he did not raise the same objection to this adjustment. Counsel for the Respondent submits that the Respondent explained the basis for the suspension and investigation and that the Claimant knew from the 22 June 2018 letter **[p.568]** that the Claimant was suspended because of the serious nature of the concerns about racism, sexism and being dismissal of diversity.

982. What was not explained we find however, when the Claimant was suspended was the second part of para 5.1 of Appendix F i.e. why it was '*necessary'* given Mr Tempest who on the face of it, was culpable of a very similar offence, was not suspended. That failure to properly explain why it was '*necessary'*, caused the Claimant more stress and anxiety that he was less able to cope with due to his emotional vulnerability and mental fragility and it fuelled his concern about an agenda to force him out and that contributed to a situation where his health deteriorated, he had a relapse and he was unfit for work.

983. We conclude that it would have been reasonable to respond to the questions asked by the Claimant and that there would be a real prospect of that reducing the substantial disadvantage caused by the PCP by putting his mind at rest that there was a reasonable explanation for why it was considered 'necessary' to suspend beyond the seriousness of the offence.

984. The Claimant understood that the basis for the suspension and disciplinary was the presentation and that it was being treated as gross misconduct. We therefore conclude that there was no prospect of clarifying that the offence was being treated as gross misconduct, removing or reducing the substantial disadvantage arising from this PCP.

985. The failure to explain the basis for the suspension, in terms of the requirements of Appendix F was unreasonable, the Respondent was deliberately evasive and this put caused the Claimant additional anxiety. A reasonable adjustment would have been to have been more open in the communication around suspension, explain why it was deemed 'necessary' and why it was considered in the interests of the Claimant and/or the Respondent, if indeed the latter was being relied upon by the Respondent..

986. **This complaint amounted to discrimination.**

5.Adjustment: The Respondent should have had a process that was clear, structured, sensitive, visibly impartial, allowed the Claimant more time to prepare and allowed representation by a person outside of the LLP

987. It is not clear to this Tribunal what the specific adjustments are which it is alleged should have been made, outside of the other adjustments relating to the suspension (as set out above). These adjustments are a repeat of the pleaded adjustment for the disciplinary and do not appear to be adjustments applicable to the suspension. As counsel for the Respondent submits, these adjustments relate to the process and not the decision that was taken.

988. There was not a meeting with the Claimant prior to suspension therefore the issue of representation is not applicable. In terms of time to prepare, this would also appear to be relevant not to the suspension but the disciplinary process, there was no meeting with the Claimant prior to the decision to suspend. There is an issue over whether Mr Powell should have given the Claimant more time to attend a meeting before completing his investigation however, this does not relate to the suspension decision, it may relate to the failure to review that suspension but not the decision to suspend.

989. We have addressed the issue of communication of the basis for the suspension and the formality of the process for suspension above. It is not clear what the adjustment is regarding the clarity of structure, this is not addressed in submissions and is not clear from the evidence.

990. With regard to handling the suspension sensitively, the real issue was the act of suspension, and we have addressed that above in terms of the adjustment which should have been made to address the substantial disadvantage caused to the Claimant, what is central to that adjustment is that an alternative to suspension would have been a more sensitive way to manage the situation, and therefore this adjustment is covered by that adjustment. It is not clear what specific adjustments dealt with above, the Claimant is asserting should have been made to ensure a sensitive process around suspension.

991. As for a visually impartial process, the involvement of Mr Flanagan in the process when this was contrary to the Appendix F policy, was we accept a cause for concern for the Claimant expressed through his solicitors and increased his anxiety and stress and his fears of an agenda to force him out. For the reasons we have set out in relation to the direct discrimination claim, Mr Flanagan did not conduct himself in an impartial manner and had an ulterior motive.

992. The Claimant was concerned about Mr Flanagan's involvement, (which for the reasons we have set out, we accept had credence) and he would have coped better with the process, found it let stressful, have been less concerned about an underlying agenda had Mr Flanagan not been involved. Those concerns about the impartiality of Mr Flanagan were not raised however until his solicitor's letter of the 2 July 2018, which was after the suspension decision was made. The adjustment is not put on the basis that an unfair process was reasonable to reduce the disadvantage caused by the suspension, but that a 'visibly' impartial process was. While Mr Flanagan's involvement for reasons we have set out, tainted the process, it was not reasonable to adjust the process by removing him from the process where it was not yet known that the Claimant 'perceived' his involvement to be impartial and that this was putting him at a disadvantage.

993. In any event it is difficult to see how these alleged adjustments would remove the disadvantage caused by the pleaded PCP.

994. **This complaint is not well founded and is dismissed.**

Disciplinary Proceedings

995. **Direct Discrimination: section 13**

996. The complaint in relation to the disciplinary process relates to the period from the suspension on the 18 June 2018 up to and including the date the outcome which was communicated to the Claimant on 20 August 2018 and includes the disciplinary outcome itself. The Claimant relies on the same comparators as he does for the suspension direct discrimination claim. The Claimant's case is that he was put through the formal disciplinary process for misconduct because i) of his disability ii) he had a significant amount of time off work iii) he had a negative attitude and iv) he had a negative management style.

Putative Discriminators

997. Since this claim is concerned with putting the Claimant through a disciplinary process and the outcome, it is necessary to consider who made the decision that he should be put through a disciplinary process and why, and who made the decision about the disciplinary outcome and why. Counsel for the Respondent submits that the FSC made the decision to put the Claimant through a disciplinary process (not Mr Flanagan) and the disciplinary outcome was the SSC.

998. It is alleged that the Claimant was put through a formal disciplinary process for misconduct because of his disability, because he had a significant amount of time off work, he had a negative attitude and/or because he had a negative management style.

999. As set out in our findings, the decision to refer the matter to the SSC was taken by the FSC along with Mr Flanagan who we find persuaded them to suspend him and withheld information from the FSC and later from the SSC.

FSC and Mr Flanagan – referral to SSC

1000. In addition to the information known to the FSC members and Mr Flanagan at the first FSC meeting, by the time of the second meeting on the 18 June, the FSC members (and we refer to the FSC as not included Mr Flanagan throughout for ease – not as an indication that Mr Flanagan did not in practice form part of that committee) although still not in receipt of the medical reports, were aware of the observations raised by colleagues during the investigation process and indeed by Mr Tempest.

1001. The FSC were therefore on notice despite the absence of medical reports, that the Claimant's behaviour leading up to the conference had been a serious cause for concern amongst his colleagues. Even at that stage, with those 'red flags', Mr Flanagan held back what he knew about the Claimant's condition, the medical reports and that he had been prescribed medication. That information therefore never found its way into the investigation report and was not considered by the FSC when deciding whether to suspend and whether to refer to the SSC, whether to investigate further the link between his condition and his conduct and possibly then whether to take any action or deal with it as a ill health capability issue. Even when asked if there was any reason to believe that the disciplinary process may have a detrimental effect on the Claimant, Mr Flanagan made no comment.

Why in factual terms did the Respondent put the Claimant through a disciplinary process and issue the outcome it did

1002. We shall not rehearse the conclusions reached on the section 13 claim in respect of the suspension issue, however we also conclude for those same reasons that a significant reason why the case was referred to the SSC was because of the Claimant's disability and the assumption, because of the nature of the illness, Mr Flanagan formed about the continued diversion that this would create for the Derby office. The other factors it is alleged were a reason for the matter being referred to SSC, are matters arising from and not the Claimant's disability itself.

1003. A t reason why the Claimant's case was referred on to the SSC was therefore we find because of his disability. We do not need consider a comparator helpful, taking into consideration the primary findings of fact we have made and the inferences we have considered it appropriate to draw from those facts. Mr Flanagan chose not to disclose information about the possible mitigation i.e. the extent of the Claimant's illness and medication and used his influence to achieve suspension as an outcome and a referral to the SSC. There was no proper Investigation of the possible impact of his medical condition, no referral back to Dr Laher, no raising of this with the Claimant, no review of his medical reports and the Respondent has not given a convincing explanation for that conduct. Had there been a fair and balanced investigation, without the influence of Mr Flanagan there may have been no referral to the SSC or at least a recommendation that it was not treated as a misconduct issue. His disability was a significant and operative cause in the decision to suspend and then refer it to the SSC for formal conduct or capability proceedings and the Claimant was then subject to the ongoing SSC process where the offence was treated as potential gross misconduct.

Knowledge of the SSC.

1004. What is also concerning for the Tribunal is the decision by Mr Hambleton to edit Mr Powell's Appendix and remove comments which clearly indicated a possible link between the Claimant's ill health and his conduct. The explanation from Mr Hambleton was not satisfactory and not convincing (in the sense of not being credible). He withheld that information not only from the Claimant but the SSC. Again, Respondent counsel submits that the process is not relevant, it is only the reason for the decision to initiate disciplinary action that is relevant.

1005. The SSC were asking Mr Flanagan and Mr Powell if there was any concern that proceeding as planned would be detrimental to his health, Mr Flanagan withheld information but so did Mr Hambleton; the editing of the investigation report to remove comments about his mental health leading up to the Conference and the failure to forward on the 25 July Dr Laher report to the FSC. Why? His explanation for editing the Appendix was not convincing and neither was his reason for not supplying the medical report.

1006. Mr Hambleton was aware the Claimant had suffered with his mental health for a long time, he may not have known the details but he knew about his absences, he had seen the comments from staff about what may be described as his unstable behaviour leading up to the Conference and he had seen the correspondence from the Claimant's solicitors, he then saw Dr Laher's report and had sufficient knowledge to put him on notice that the Claimant had a disability. However, the factual complaint is that the Claimant was put through a disciplinary process and that was initiated by the FSC and Mr Flanagan, not Mr Hambleton.

SSC Decision

1007. The SSC made the decision to apply what was in effect the same sanction as they applied to Mr Tempest and the Claimant had no real objection we find, to the outcome, although he felt the outcome letter to him was more critical. We find that it was how the process was managed from suspension that was his real complaint. The SSC did not apply the sanctions we find *because* of his disability, the matter had already been referred to the SSC and they took into account his disability as mitigation at the disciplinary hearing. Claimant had initially defended the content of the presentation at the disciplinary hearing and was less contrite than Mr Tempest however, the SSC accepted that his condition may have been a factor in his behaviour at the Conference. It is that investigation and consideration about the extent to which his disability may have been a cause or contributory factor to his conduct, which should have been made at a much earlier stage, at the FSC stage.

1008. We do not find that the decision of the SSC was an act of direct discrimination, the decision was because of the 'joke', not the disability itself but his the disability was taken into account as mitigation.

1009. The suspension continued up to the 20 August 2018. The decision had been taken on the 18 June. There had been an ongoing failure to review the act of suspension at the second meeting on the 2 July 2018 after Mr Powell's investigation and before referral to the SSC. After referral there was a failure by Mr Flanagan in particular to disclose the information he had about the Claimant's condition to the SSC when they contacted him and Mr Powell on the 5 July 2018 (see para 591 to 594 of our findings). A significant reason by Mr Flanagan for failing to disclose information to the SSC at this stage when they were enquiring about whether proceeding with the formal process as planned may be detrimental, was the Claimant's disability; an act of direct discrimination.

1010. **This complaint amounts to discrimination in respect of the decision to suspend and the referral to SSC for formal proceedings for capability or misconduct proceedings but not we conclude with respect to the outcome of the disciplinary hearing.**

Discrimination arising from disability: section 15

1011. It is alleged that the Claimant was *suspended,* put *through a disciplinary process* and the *disciplinary outcome* was applied because of the same factors cited in connection with the suspension section 15 claim i.e. i) because he had had a significant time off work and/or ii) because he had a negative attitude and/or iii) because he had a negative management style and/or iv) because of his conduct at the 14 June real estate conference and/or v) because of the Claimant's depressed, anxious or irritable demeanour in the office. The Respondent accepts that the Claimant was suspended, put through a disciplinary process and applied the outcome, because of the 'joke' and no other reason.

1012. The Respondent accepts that putting the Claimant through a disciplinary process and the disciplinary outcome are unfavourable treatment. It is not argued otherwise by the Respondent. No question of comparison arises.

1013. We are not going to rehearse our conclusions in relation to the suspension section 15 claim, which overlap with this claim.

1014. The Respondent does not take issue with knowledge, the knowledge that is required under section 15 (2) is only of the disability which is conceded but in any event we have set out in respect of the suspension section 15 claim the knowledge which the Respondent had of the disability. Knowledge is not required of the casual link. In any event the Members of the SSC were aware that the Claimant had a long standing mental health condition for which he had taken a significant amount of time off work, if they did not have actual knowledge that he had a disability, they certainly had constructive knowledge. Had the SSC Members made reasonable enquires, including speaking to the Claimant and Dr Laher, they would have acquired the actual knowledge. In any event by 9 August 2019 the Chairman of the SSC had a copy of Dr Lather's report of the 25 July 2018. All the Members of the SSC had sight of Dr Lather's report of the 15 August 2018 by the disciplinary hearing, this fixed them with knowledge about the severity of his condition, that he had been under Dr Lather's care for a year and the condition was so serious that he had experienced suicidal feelings. Actual knowledge of the disability.

1015. A significant reason and indeed the main reason that the Respondent relies upon for taking him through the formal disciplinary process and the sanctions that were applied, is the 'joke' the Claimant told at the RE Conference.

1016. It is a question of fact for the Tribunal determine objectively whether the cause is something "arising in consequence" of the disability.

1017. As set out in our findings, the FSC suspended the Claimant, however we have found that Mr Flanagan significantly influenced that process and we have found that a significant reason for him doing so was because of the "diversion" created by the Claimant's disability, it was a distraction for Mr Williamson as Managing Partner. It was not we have found because of the time he needed off work, nor have we found that it was due to a negative attitude or management style, we have also not found that it was due to his depressed, anxious or irritable "demeanour", it was we find because he required support and supervision which was more about his problems moderating his own workload and attendance at the office and trying to take back work from colleagues, not his "demeanour". Because of the nature of this type of mental health condition, we have found that Mr Flanagan was concerned that the Claimant would require ongoing support and be a diversion. That said another operative reason for the suspension was the 'joke' he told at the Conference. That was why the FSC, influenced by Mr Flanagan believed they were suspending and recommending disciplinary action.

1018. The FSC referred the matter on to the SSC and a significant reason for recommending formal disciplinary proceedings was the 'joke'.

1019. The SSC made the decision to issue the outcome they did because of the 'joke' taking into account the Claimant's ill health as mitigation.

1020. The 'joke' was an affect/ outcome of the disability and therefore something arising from the Claimant's disability however, we then need to consider justification.

Justification

1021. The remaining issue for the Tribunal is whether the disciplinary process and disciplinary outcome were justified to achieve the legitimate aims i.e. aims of

maintaining good standards of behaviour in the workplace, to maintain a workplace free from discrimination or harassment and enforce policies as to diversity and inclusion (the same aims are relied upon for the suspension section 15 claim).

1022. The Tribunal have considered whether it can be a proportionate means of achieving those aims to carry out a formal disciplinary process, when there was such a failure during the investigation process prior to that stage, to consider the impact of the Claimant's Ill health, the connection between that and the alleged misconduct. If the investigation had been carried out fairly and without discrimination, either there may have been no referral to SSC or there could have been a recommendation that it was not dealt with as gross misconduct.

1023. However, on balance we conclude that it is proportionate to carry out a formal process where there are allegations of serious misconduct, it is how that process is managed with someone who is so emotionally vulnerable and mentally fragile which is important. There were alternatives to suspension which could have been implemented and we have found that the act of suspension was particularly damaging and put the Claimant at a substantial disadvantage. He was not dealt with sensitively through the process. However, it was a serious issue and therefore while we conclude that alternatives to suspension were available, the alternative proposed by the Claimant to a formal disciplinary process was an informal process, and we find that a formal process given the seriousness was justified, managed sensitively, with reasonable adjustments and an outcome which took into account the impact of the Claimant's disability.

1024. The SSC did consider and take into account that his illness may have been a contributory factor in his conduct and reflected that in the sanction applied, despite his apparent initial defence of his presentation.

1025. The Claimant himself had no issue with being "told off", it was the process he objected to and principally we find, the act of suspension (particularly as Mr Tempest was not suspended) and how the disciplinary process was conducted, the failure to respond to the questions was asking during the disciplinary process not the fact there was a formal process and that sanctions were applied.

1026. **The complaint is not well founded as far as it relates to the process which was followed other than the act of suspension.**

Failure to make reasonable adjustments – section 20/21 EqA: disciplinary proceedings (PCP 4)

Substantial Disadvantage and knowledge of disadvantage.

1027. The PCP is that the Respondent subjected the Claimant to a formal disciplinary proceeding in circumstances were there were allegations of misconduct. The pleaded disadvantage is that the Claimant's mental impairments were greatly exacerbated by the decision to follow and implement a formal disciplinary process and his recovery was hindered.

1028. The Respondent admits that this PCP placed the Claimant at the pleaded substantial disadvantage and that the Respondent had knowledge not only that he was disabled but likely to be placed at the pleaded substantial disadvantage by the PCP and concedes the comparative disadvantage.

1029. The issue it is agreed, for the Tribunal is what adjustment if any, would it be reasonable to make to avoid the disadvantage.

1030. The functional effects of the disability are set out in our findings (para 477) and we have considered these effects in order to ascertain what adjustments are reasonable and how any adjustment would have alleviated the disadvantage. We have taken the list of adjustments out of the order as they appear in the list;

1.Adjustment: not to have a formal disciplinary process but an informal meeting

1031. We have already set out our conclusions on this adjustment which is a repeat of what was set out in the section 20/21 EqA claim in respect of PCP 5. Those conclusions apply equally to that adjustment as pleaded here.

1032. **This complaint is not well founded and is dismissed.**

2.Adjustment: ought to have explained the basis for the suspension and disciplinary

1033. We have already set out our conclusions on this adjustment which is a repeat of what was set out in the section 20/21 EqA claim in respect of PCP 5 and those conclusions apply equally to this complaint.

1034. **This complaint is not well founded and is dismissed.**

3.Adjustment: The Respondent should have had a process that was clear, structured, sensitive, visibly impartial, allowed the Claimant more time to prepare and allowed representation by a person outside of the LLP

1035. We have set out our conclusions in the section 20/21 claim in respect of PCP 5 section on most of the same points and are not going to repeat those. However, we have additionally considered the adjustments of having more time to prepare and to be allowed representation by a person out of the LLP which are applicable to the disciplinary and not suspension process;

3.1 More time to prepare

1036. Allowing more time for the Claimant to prepare for the hearing is potentially a reasonable adjustment however, he did not request more time, he asked for the meeting to be rearranged as he was due to take a break with a friend and then there was a delay due to without prejudice discussions. The Claimant does not identify in his evidence how having more time to prepare would have avoided or reduced the pleaded disadvantage. He does not explain in his evidence and nor did counsel address in his submissions, what particular difficulties he suffered because of the time he had to prepare for the hearing which relate to the stated pleaded substantial disadvantage and in respect of which this adjustment would have been effective in reducing or avoiding.

1037. The Claimant did not give evidence about how much more time he required and what he required that time for and in what way more time would have assisted in helping

him cope better with the process. We did not hear evidence from the Claimant or counsel in submissions about the impact the time he had to prepare had and how more time would have been effective in removing or reducing the disadvantage. As set out in our findings the disciplinary hearing was postponed for 2 weeks to allow without prejudice discussions to take place and the Claimant did not request a further adjournment to prepare for the hearing. The Claimant did not ask for the hearing to be cancelled, he asked for it to be re-arranged to allow him time to take a break with a friend but suggested the 15 August as a possible date, which was the date the hearing took place. We heard no evidence about how an adjustment of giving the Claimant more time to prepare would be effective in alleviating the pleaded substantial disadvantage and therefore in the circumstances do not conclude that this was a reasonable adjustment in the circumstances.

1038. **This complaint is not well founded and is dismissed.**

3.2 Representation at the hearing

1039. As set of out in our findings, the Claimant did not ask to be accompanied by someone outside the LLP or his wife. He had the support of Dr Laher who had provided a report and recommended generally that adjustments be made without identifying the need for a companion outside the LLP. The duty to make an adjustment is not contingent on the Claimant requesting it however we did not hear evidence from the Claimant or counsel in submissions about how having a companion outside the LLP would have been effective in removing or reducing the pleaded disadvantage.

1040. The Respondent was aware of the Claimant's mental fragility and had anticipated that he may ask for his solicitor to attend with him, but did not offer the adjustment of a different companion. This was not only an obvious adjustment it was one they anticipated he may have asked for however, we heard no evidence from the Claimant about how having a different companion would have been effective in removing or helping to reduce the pleaded disadvantage.

1041. The Claimant does not complain that he was disadvantaged at the hearing itself because this adjustment was not made, either in terms of how he presented his case or his ability to cope with the stress and anxiety of the process. In the circumstances we do not find that this was a reasonable adjustment in the circumstances because we do not find that there is evidence that this would have been effective in removing or reducing the pleaded disadvantage. He did have a companion with him, someone he had chosen and the Claimant makes no criticism of the support he provided during the hearing.

951 **This complaint is not well founded and is dismissed.**

3.3 More Sensitive Process

952 The PCP relates not just to the decision but the proceedings as a whole. We find that it would have been a reasonable adjustment, to alleviate the substantial disadvantage the formal disciplinary process gave rise to, to take steps to ensure that the formal process was conducting sensitively. This covers the way in which

the FSC dealt with the suspension i.e. not considering alternatives through to how Mr Hambleton then communicated with the Claimant up to the Disciplinary hearing.

953 As set out in our findings, Mr Hambleton in his dealings with the Claimant and his solicitors in the period up to the hearing did not take a sensitive and supportive approach to the Claimant and it is not surprising that the Claimant felt unsupported and that this added to his fears about an agenda to remove him.

954 The Claimant was not aware at the time that Mr Hambleton had edited the Investigation Appendix to remove comments which he considered were helpful to the Claimant and potentially exposed a breach of a duty of care by the Respondent, however as set out in our findings, that 'litigation mindset' influenced we find and is evidence in his approach and tone of communications with the Claimant.

955 Mr Hambleton did not treat the Claimant as a man who had worked tirelessly for the Responded and was unwell, he was defensive and expressed no interest in his health even when directly provided with a copy of a medical report about the impact of the process. The medical report of the 25 July 2018 highlighted his fragility and the need for clear information about his suspension and his perception of any underlying agenda, it highlighted also the risk of a return to self-harm. The medical report of the 15 August 2018 confirmed the impact on his psychological wellbeing and ability to copy with the process and the way the process was being handled and that clarity around the concerns would reduce his distress. It also highlighted again his concern about other possible reasons for the disciplinary process. We find that given the nature and extent of the disadvantage, there was a duty to make reasonable adjustments to the process and an obvious adjustment would have been with how the Respondent communicated with the Claimant, to ensure communication was sensitive and supportive. The medical evidence advised that open and supportive communication would be effective in avoiding or reducing the disadvantage i.e. the impact on the Claimant's mental health.

956 The formal disciplinary proceedings put the Claimant at the pleaded disadvantage, to have adjusted the method and manner of communication in terms of communicating more clearly and sensitively with the Claimant, would have had a real prospect of alleviating (along with other measures such as not being placed on suspension) the substantial disadvantage. The Respondent does not allege that this was not a reasonable adjustment but argues in submissions, that the process was clear, structured, sensitive and impartial. We do not accept that the way the process was handled was clear or sensitive.

957 We have set out our conclusions in respect of the suspension itself, in terms of the handling of the process once referred to the SSC, we find that Mr Hambleton adopted a dispassionate tone. He approached communications with the Claimant and solicitor not with the intention of being sensitive and open but how tactically it was best to protect the Respondent's position. The reasonable adjustment to the way the process was handled would have involved Mr Hambleton responding promptly and fully to the Claimant and his solicitor's enquiries, explaining why it was "*necessary*" to suspend in his case and what *"interests*" were being served by the suspension; that explanation and openness had a prospect of reducing or avoiding the disadvantage in terms of the stress and anxiety caused by the process and the concerns the Claimant had about an ulterior motive namely his mental health issues.

958 We refer to our findings as set out above in connection with the Mr Hambleton's conduct during the disciplinary process. Adjusting the manner in which the Claimant

was being treated and the way the process was managed, would also have involved Mr Hambleton expressing interest and concern for the Claimant's health.

959 Mr Powell also failed to provide Mr Hambleton with the medical report he received in 25 July 2018, which also illustrated a distinct lack of interest or concern in the Claimant's current medical condition and the impact of the process on his health. Dr Laher within that report expressed concerns about the Claimant's wellbeing during the disciplinary process and yet this was not provided to the SSC and it should have been. There was we conclude a failure to express concern and interest in the Claimant's condition and a lack of sensitivity and candour when responding to requests for clarity from the Claimant and his solicitor.

960 We conclude that certainly once the matter was passed to the SSC, Mr Hambleton was more concerned with protecting the Respondent's position than avoiding or reducing the disadvantage to the Claimant of the Respondent putting him through a formal disciplinary process the and that attitude would have and did, reveal itself in how he managed his communications with the Claimant. This was a reasonable step which had a real prospect of reducing the disadvantage or avoiding it along with other adjustments such as an alternative to suspension.

961 The adjustment had a real prospect of reducing the Claimant's anxiety including his anxiety over the reason for suspension and his concern that there was an underlying, ulterior motive which the manner of communication including the evasion and lack of enquiry into the Claimant's health, exacerbated. This adjustment should have been in place from the start of the involvement of the FSC, and throughout the disciplinary process.

962 **<u>This complaint amounts to discrimination.</u>**

Other - Reasonable Adjustments

PCP1: Requirement to work as a solicitor

963 The Claimant's case is that from November 2016 to 7 September 2018 the Respondent applied the PCP1 namely the requirement to work as a solicitor, that because of his disability this put him at a substantial disadvantage of being less able to manage his own workload and he was more affected by the workload and stresses and strains of his duties and the Respondent failed to make reasonable adjustments.

964 The Respondent admits that it applied this PCP. The Respondent admits that it put the Claimant at this pleaded substantial disadvantage. What the Respondent denies is that it failed to make reasonable adjustments.

965 The Respondents case is that it took extensive steps to assist the Claimant. Those steps are set out in the findings of fact. Steps were indeed taken to support the Claimant, including the support initially provided by Mr Flanagan who encouraged the Claimant to take time off work, the support provided through Dr Laher, maintaining the Claimant's drawings during his absences and the attempts to persuade him to delegate his work. There is no doubt that adjustments were made and support was provided however, despite this the Claimant continued to experience the disadvantage.

966 It is not asserted by the Claimant that the adjustments he claims should have been made were raised by him at the relevant time nor that these were necessarily matters raised by Dr Laher however, the employer should independent of the employee turn its mind to the question of reasonable adjustments.

1. Written plan

967 The Respondent was aware that the Claimant was unwell from November 2016, he took some leave over December 2016. Mr Flanagan sent the note to the Claimant on 2 January 2017 **[p.225]** which set out a 'forward plan' for 2017 and included suggestions and instructions to achieve a better work life balance, along with practical suggestions about limiting his working hours. That we find was a written plan confirming what had been discussed and a plan to support the Claimant.

968 The Claimant in cross examination gave evidence that at this time in January 2017 Mr Flanagan had done everything to assist him.

969 The Claimant was then absent on sick leave from 9 January 2017 and returned to work in March 2017. The Tribunal find that what Mr Flanagan set out in writing in the memorandum of the 3 March 2017 **[p.268]**, was in effect a further back work plan. The plan included a phased return to work and changes to the Claimant's working pattern. It also included a suggestion about the removal of his management duties.

970 To have in place a back to work plan after a period of absence is an obvious step to take, and indeed that is what we find was implemented by Mr Flanagan in January and March 2017. Mr Flanagan clearly understood the importance of recording in writing what had been agreed and what the Claimant should adhere to going forwards. This plan included a change to the Claimant's working hours.

971 The Claimant was then absent from 25 June 2017 to 11 August 2017, a period 7 weeks absence. As set out in our findings, we find that the Claimant was during this period anxious about his work and clients and thus continued to contact the office to give instructions, in particular to Mr Cooper, something which Ms Rhodes complained about. It was clear to the Respondent that the Claimant wanted to return and we find a significant reason for that was that he did not feel he had the right support for his work and clients. The Claimant started coming in to work from around mid-August.

972 When the Claimant returned in August 2017, it would have been an obvious step to discuss with the Claimant what work he would be doing, what hours and how his work would be organised and who would support him.

973 By the start of August 2017, Dr Laher had not yet provided a report however, to have a back to work plan set out in writing was an obvious adjustment to make. Mr Flanagan had done just that with the back to work plan in March 2017 because on clearly it was something he understood to be potentially helpful. The benefits are obvious when dealing with someone who struggles to manage his own workload. Part of that plan should have included a plan for support for his work when he was not in the office to provide him with the reassurance that he clearly needed. There is no evidence that there was a discussion and agreement with him about who would be dealing with which clients and what the process for reporting back to him would be hence his attempts to get Ms Davies to report back to him on work she was doing for one of his clients (which she refused to do).

974 The Respondent argues that a plan whether written or not would not have been followed by the Claimant and thus would have been of no effect. However, we find that one of the main causes of the Claimant's anxiety was around his work and the support which was in place. A full and properly considered plan, worked out with the Claimant about how his work would be managed, by whom, the way he would be kept updated/ informed and the hours he would do, would have had a real *prospect* of removing the substantial disadvantage he suffered, namely his inability to cope with his workload and manage the demands of his work.

975 Although the Respondent was not encouraging his return, they did not prevent it. There was no instruction from the Management Board for the Claimant to remain on sick leave pending a psychologist's report. Ms Wigley referred in the referral form to the Claimant not attending *regularly* by 'mutual consent'.

976 The Respondent allowed the Claimant to return without first sitting down with him and understanding what he required and discussing in detail how this could be addressed. This was an individual with a serious mental health problem, who was permitted to come back into work with no clear plan for how that was going to be managed and how he would be supported day to day.

977 Ms Wigley referred to the urgency of the situation when contacting Validium for a report on 21 August 2017, however the Claimant had been off work for 7 weeks, and within that time the Respondent could but did not take steps to get advice from occupational health or other medical expert, to obtain advice on how to manage the Claimant 's condition. The Respondent did not ask to contact the Claimant's own GP.

978 While Ms Wigley had suggested to the Claimant arranging a psychological referral, it had not been explained to the Claimant what the purpose of this was i.e. that it would be to assist the Respondent in understanding how they could support him. Ms Wigley referred to the Respondent affecting an introduction. The Claimant was already receiving support from his GP and a private counsellor. Mr Flanagan did not press the requirement for this referral despite him clearly believing he had the authority to demand the Claimant comply with other instructions regarding his health and presence in the workplace and later removal of the Managing Partner title. The attempt by the Respondent to present the structure of the Respondent such that Mr Flanagan did not have the authority to give instructions Members is not the reality of how the Respondent functioned. Mr Flanagan did exert his authority when he chose to do so.

979 Mr Middleton persuaded the Claimant for the need for a report. It appeared the Claimant's reservation had been about the benefit of general counselling; the Respondent having previously arranged professional counselling with Mr Dorling which was not what he felt he needed.

980 The Respondent knew that the Claimant had serious mental health issues for almost a year before taking steps to obtain advice from a psychologist, they were relying upon the Claimant seeking his own advice and counselling and took no steps to inform themselves about the extent of his condition or indeed what exactly his condition was.

981 We find that it would have been reasonable for the Respondent to have put in place a plan for his return to work following his absence in June 2017, which set out the arrangements for his return. This was not done. A written plan would have been a

reasonable adjustment that would have had a prospect of reducing or removing the disadvantage.

982 The only written plans in place were the one prepared on 3 January 2017 and 3 March 2017 by Mr Flanagan. There was no further discussion between Mr Flanagan and the Claimant about the arrangements which would now be suitable or the current state of his health. The Claimant was permitted to return to work without any clear plan in place for his return and in particular no clear plan for how his work would be supported and managed.

983 We have considered when the Respondent should have implemented this adjustment, and put in place an appropriate back to work plan. Given the uncertainly around when he was planning to return, we find that it would have been reasonable to have had that discussion with him and put in a place a suitable return to work plan, within a week of his return in August 2017. We understand that he returned in around 14 to 18th August and therefore the plan should have been in place by the last week of August 2017.

984 Taking the approach of allowing the Claimant to work as and when he wanted, for a person who struggled to regulate his own workload was a risky strategy.

985 That plan was not in place by the latter part of August 2017. There was thus a failure to make a reasonable adjustment.

986 As set out in our findings, the report did not address the arrangements for the Claimant's return to work. The Respondent argues that the 'peg' on which the Claimant's puts his argument, that there should be something in writing, relates to the comment in the 11 September report that if the "*current arrangement is left too informal and loose*" this could be a recipe for frustration and misinterpretation which could be detrimental to the Claimant's emotional health. The Respondent argues that Dr Laher does not state that there should be a written plan and that if he felt this was required he could have said so. The Claimant had 19 sessions of therapy with Dr Laher by 30 May 2018 and there is no reference to a written report. Further the Claimant did not call Dr Laher to give evidence on this point. The words "informal and loose" appear only in Dr Laher's first report.

987 Dealing with the period from August 2017 when he returned to when he went off again in October 2017; the Claimant had returned to work on reduced hours and Dr Laher is clear in that he states that "*if managed well with clear aims and a clear pathway*" it could be a good platform. However, his return was not clear and there were no clear aims. His return was as Ms Wigley reported to Validium on 21 August *"extremely disruptive*". There was a note in Ms Wigley's request for support for the Claimant not returning where she refers to him "*going in and out"*

988 During this period, there was no clear plan in place and it would have been again, an obvious step to sit down with the Claimant and agree the arrangements around his return, the hours, the work he would be doing and the support he would be provided. There is a prospect that this adjustment, particularly assurance and clarity around the support for his work and communication with him over this issue, would have alleviated the disadvantage.

989 After Dr Laher's report was obtained the Claimant was removed as Managing Partner however this was principally motivated by concerns over the impact of the

Claimant's behaviour on the Derby office. An email was sent from Mr Flanagan referring to discussions with the Claimant about keeping his workload to a manageable level but there was no clear plan with the Claimant about what that meant in practice, how it would be monitored, enforced and supported.

990 Dr Laher had stated in his report that the Claimant should be able to reach a sustainable level of work with appropriate help and "*organisational adjustments*". The report did not set out what those adjustments were, he referred expressly to having no specific work adjustments to recommend but encouraged a constructive dialogue. The Tribunal find that there was no such constructive dialogue and hence the Claimant was then absent again for 7 months from October to May 2018. The Tribunal find that the Respondent was, on a balance or probabilities, given Ms Wigley's comments about the difficulty they were having persuading him not to return and the concerns over morale in the office, relieved that the Claimant was taking further time off work.

991 There was no constructive dialogue about adjustments with the Claimant and the Tribunal find that a written plan setting out what had been agreed would have been an obvious adjustment and had the prospect if done well, of enabling the Claimant to have coped with his workload and the strain of his work and remained in work, building up his hours. The Respondent cannot simply excuse its failure to really engage with what would help the Claimant stay in work by pointing to a report which failed to identify specific adjustments but encouraged a dialogue with the Respondent to identify a back to work plan and which identified the need specifically for discussion about "*additional staff resource."*

992 The Tribunal find that by this stage, the Respondent did not engage constructively with the Claimant because they considered the better and easier option for the Respondent, was his absence from the business.

993 The Respondent failed to make that reasonable adjustment.

994 The Claimant then returned to work on 14 May 2018. He was then at work only a short time until his suspension, a period of just over 4 weeks.

995 Prior to the Claimant's return to work a further report was obtained from Dr Laher on 27 February 2018 **[p.386].** It recommended a phased return to work on 14 May 2018 and recommended a plan for reduced hours over a 3 -6-week period. It referred to reducing his work to a manageable level and "*appropriate/reasonable organisation adjustments".* It did not prescribe what those organisational adjustments would be.

996 On 30 May 2018 Dr Laher provided a further report which refers to the "*complex nature of his difficulties"* and a recent relapse. It repeated the need for appropriate and reasonable organisational adjustments. Dr Laher had seen the Claimant 7 days after his start of a phased return to work on 21 May **[p.452]** and the Respondent submits that the reference to the Claimant believing his return was going well is fatal to any claim that the Claimant was disadvantaged by not having a written return to work plan. However, we find that the Claimant continued after his return to be placed at a substantial disadvantage by this PCP, so although he may have expressed the view that it was going well, that had not we find removed the substantial disadvantage, more could have been done. The issue however is whether a *written* work plan would had a prospect of alleviating the ongoing disadvantage.

997 The Tribunal reminded itself that it is appropriate to consider a holistic approach. Along with other adjustments which we shall go on to address, having a mentor who could amongst other things, have helped support the Claimant to adhere to an agreed and preferably, written plan for this return which had been discussed, agreed and was capable of being monitored, would we conclude have had a prospect of removing the conceded disadvantage the PCP caused him.

998 The Claimant was an extremely hard-working individual who by his own admission loved to work, he found it difficult to step back. The Respondent had benefited over the years from his drive and passion for his work however, that at least in part, had we find on a balance of probabilities caused or contributed to his ill health. He was disabled the Respondent accept because of his mental health issues but remained keen to return to work, he had difficulty regulating his own work load and if the Respondent were to allow him to return to the workplace, they had an obligation to apply their minds to how they could prevent the risk to his health that his work may cause.

999 The Tribunal find that the Respondent were concerned about his impact on staff morale and initially Mr Flanagan had been keen to encourage the Claimant to take leave and reduce his work, but he had from June 2017 stepped back and had no real direct involvement with the Claimant. Ms Wigley met with the Claimant on 3 May 2018 but failed to discuss the report with him and the only discussion was about hours of work and the Claimant working less hard. Advising someone with an addiction, to stop doing whatever they are addicted to is of limited assistance without support. What we conclude the Claimant needed was clear guidance, monitoring and mentoring – a holistic approach. The Claimant had experienced a relapse (which Ms Wigley had not enquired about) and remained vulnerable

1000 The lack of a clear plan for the Claimant's return is highlighted we find by the failure to share (with the Claimant's consent); the medical reports, his diagnosis or at least information about his diagnosis and medication to those who would be working closest with him; Mr Williamson and Ms Rhodes. Mr Williamson said there was a clear plan which came out of the meeting on the 8 May however this appears to have been limited to hours and work, and the Tribunal find there was clearly room for confusion because the Claimant understood that he was tasked with bringing work back into the Derby office – that may have been a misunderstanding but that is of course is the very problem about relying on verbal communications even more so with someone with a serious mental health problem.

1001 Had there been a clear plan not only about hours, but work outside of office hours, the business development work he would be responsible for, the support he would have, and a holistic approach which included other adjustments (as set out below) there was a real prospect of those adjustments removing the disadvantage. There was a failure to put in place those adjustments up to the date of his decision to resign, even if that did not apply during his suspension, he was expected to return to work on 3 September and the obligation continued up to the date his employment ended. However, in terms of when the Respondent acting reasonable, would have made the adjustments we consider that those adjustments could have been made at the latest within two weeks of the Claimant's return to work in May 2018 ie by the end of May 2018.

1002 **<u>This complaint amounts to discrimination.</u>**

2. Wellness and recovery action plan (WRAP)

1003 As counsel for the Respondent identifies in his submissions, the argument for a WRAP are like those about a written return to work place.

1004 The Respondent argues that the Claimant and his solicitors never suggested there should be a WRAP and Dr Laher was instructed to support the Claimant s recovery and identify warning signs. The reports refer, including the May 2018 report **[p.452]** to the therapy he was receiving "*incorporating cognitive behaviour therapy*" including strategies to help him relax more. Counsel for the Respondent argues that for the Respondent to have a WRAP would be to reproduce what the professional was being paid to provide.

1005 Dr Laher was supporting the Claimant with an action plan for his recovery. A WRAP is a term familiar to HR professionals as a way of monitoring wellness and identify when someone is less well and when they experience distress/symptoms and how they would like to be supported at those times.

1006 Whether it is a WRAP or more generally the type of support which would be included in a WRAP, the Claimant had what Dr Laher described as a complex condition, the Respondent was alerted to the fact he was vulnerable, that he had suffered a relapse and that his condition meant that his behaviour could impact his social skills in that he may be perceived as lacking sensitivity or be perceived as aggressive. It strikes this Tribunal as obvious that when someone has a complex mental health issue, an employer particularly one such as this, with experienced HR support internally, should have considered whether it would be reasonable to put in place a plan to monitor and assist the Claimant should he display behaviours which identify a problem or a deterioration in his mental health.

1007 Ms Wigley did not share with Mr Williamson or Ms Rhodes, despite the Claimant's willingness to be open about his condition, what his symptoms were, what may trigger a relapse, what the stressors may be in the workplace and how these may be mitigated and what to do when those behaviours are exhibited.

1008 The Claimant was exhibiting behaviours leading up to the Conference, which gave his colleagues, Ms Davies, Ms Shephard and Ms Rhodes cause for concern. He was perceived to be behaving as if on "speed" or medication. Had such a plan been in place, those behaviours would have been potentially recognised as an alert and action take, including no doubt action to prevent the Claimant from giving a presentation at the Conference. That a WRAP was required and was a reasonable adjustment, is clearly illustrated we conclude, by the failings leading up to the Conference.

1009 There was a failure to consider beyond working hours what adjustments the Claimant needed to support him in the workplace. It may well be that because he was a Member and not an employee, there was a different approach, a less 'hands on' approach but that does not justify the failure to consider what he needed with his complex mental health issues and take a holistic approach to what would remove the disadvantage he suffered from being at work.

1010 The EHRC includes as examples of adjustments; providing support or arranging help from a colleague

1011 It would have been reasonable and obvious given the nature of his condition, to identify with the Claimant what the stressors were for him in the workplace and how to identify the signs of a deterioration in his health; whether this is carried out as

part of a WRAP or workplace stress risk assessment, it amounts to essentially the same sort of measure.

1012 We find that this could and should have been carried out within the first few days of his return to work in August 2017 and to revise that plan on his return by the latest within the first two weeks of his return in May 2018 i.e. by the latest by the end of May 2018.

1013 **This complaint amounts to discrimination.**

3.Mentor

1014 The EHRC code identifies a mentor as an example of an adjustment which may be reasonable. This is we consider, an obvious adjustment: para 6.33.

1015 There was an informal acknowledgment that the Claimant required a mentor for support. Ms Wigley referred to Mr Middleton as the Claimant's 'confessor'. The Claimant himself sought out people to talk to in the workplace about his mental health such as Mr Middleton. The Respondent argues that it made adjustments for the Claimant including providing pastoral support however, this was ad hoc. It was Mr Flanagan until he stopped having direct contact. Mr Middleton provided support for a period on an informal level but did not see himself as the Claimant's mentor as he confirmed in cross examination.

1016 Ms Wigley in her evidence stated that when the Claimant returned to work on 18 May 2018 it was "agreed" that she would act as his "conscience" as she put it. The Claimant understood that Ms Wigley was providing him with support but it was not explained to him that she was his mentor and he was her employer. Ms Rhodes did not understand that Ms Wigley was acting as his mentor, she did not understand that anybody had that label but thought Mr Williamson 'may' have done. Mr Williamson was managing the office but was not his personal mentor. There was to be HR monitoring of the Claimant but this was not solely down to Ms Wigley, he was whoever was in the office including Ms Pountney. There was the Tribunal find no consistency to the support the Claimant received and he was not asked at any point whether he felt a mentor would assist and who he would feel comfortable with as his mentor.

1017 A mentor would have been someone who would have had the responsibility to check in with the Claimant perhaps daily and ensure that he was not struggling and assist him to regulate his working pattern because the Respondent knew he struggled to do that on his own.

1018 The Claimant sought out people to speak to. He spoke with Mr Middleton and was it was because of their discussion that he agreed to see Dr Laher. There is there no reason to believe he would not have benefited from that sort of arrangement in circumstances where he actively sought out people to talk to.

1019 Had the Claimant had a designated mentor, the complexity of his condition, the effect on his personal relationships, the medication he was taking could have been discussed and understood. That mentor may have even with his consent, been able to explain his behaviours to colleagues who were upset by them and considered them disruptive. The mentor may well have identified the signs of unusual, frantic

behaviour and took steps to escalate those concerns including preventing the Claimant from giving the presentation.

1020 Mr Williamson and Ms Rhodes worked the closest with the Claimant did not even know he was taking medication and had never been shown Dr Laher's reports.

1021 It is difficult to understand why such an obvious adjustment was not discussed with him and put in place. That along with the other adjustments, taken as a holistic approach had a real prospect of alleviating the disadvantage.

1022 Ms Wigley may have provided support, but she had not even discussed with the Claimant the report from Dr Laher, what relapse he had suffered, what the effects of his medication were, the stressors or the signs of a relapse.

1023 The Respondent's own view that a mentor was important is confirmed by Mr Flanagan after the disciplinary hearing when he writes to the Claimant on 20 August 2018, and refers to it being "important" for the Claimant to have access to a senior person in the firm "*with whom you can discuss any matters related to your return and who can support you in that process*". The Claimant is asked to let him know how he wants to undertake ether role.

1024 This is an adjustment which the Respondent could and should have implemented at the latest after his return by the end of August 2017 and within the first two weeks of his return in May 2018 i.e. by the end of May 2018. His designated mentor should have been in place promptly for his return and involved in the discussions about his back to work plan including what would be involved in the mentoring role.

1025 **This complaint amounts to discrimination.**

4. More intensive support

1026 It was not identified during the course of the evidence or in submissions, what this adjustment refers to and what precisely this adjustment includes over and above the WRAP, a mentor and a written back to work plan. Counsel for the Claimant in his written submissions **[p.35]** comments beneath this proposed adjustment; "*in reality, the only response was exasperation, and encouraging the Claimant to be absent*".

1027 The Respondent asserts that all proper support was provided and when Dr Laher recommended further support sessions, they were provided and this was indeed the case. The Claimant did not identify further adjustments he needed either during the relevant period, at the Tribunal hearing and nor as counsel identified what they are within his submissions. The Tribunal do not consider that there are any other obvious adjustments over and above those we have addressed above which the employer should have considered and made.

1028 **This complaint is not well founded and is dismissed.**

5. Adjustment to the standard of performance expected

1029 In submissions counsel for the Claimant refers to the Respondent not giving the Claimant comfort about **[p.35]** about what was expected regarding his billings or performance.

1030 The Respondent submits that it would not be reasonable to permit the Claimant to carry out work of a standard not ordinarily expected of a senior equity Partner. However, counsel for the Claimant in his submissions clarified that this adjustment is not about *quality* of work but performance in the context of time and billing expectations. Counsel or the Respondent submits that bill expectations were dealt with in the back-work plan.

1031 The March 2016 forward plan had set the Claimant 's target at in excess of £250,000 That was not revisited and amended formally however in January 2017 [**p.225**] Mr Flanagan had discussed reducing the Claimant 's chargeable hours. Mr Flanagan had proposed that the Claimant limit his working hours and acknowledged that this would mean booking fewer chargeable hours and refers to in 2017 the Claimant having "*already put in the hours and fees to more than justify your position".*

1032 In the note of 3 March 2017, Mr Flanagan does not state that the Claimant is not required to bill, he refers to him playing to his strengths which includes winning work and "*working with your clients".*

1033 There is therefore a communicated expectation that the Claimant will be generating fees to some extent, and the Tribunal consider that it should be part of a back to work plan to discuss expectations around performance namely what the person is expected to contribute by way of bills and chargeable hours.

What happened in August 2017?

1034 When the Claimant returned to work in May 2018, he was asked to focus on business development rather than fee earning and re-e stablish his contact with clients but what was not clear was what his targets were for the year (if any). What was expected of him had been set out in the forward plan in 2016 but there was no forward plan discussed with the Claimant on his return in May 2018.

1035 There is a prospect that taking a holistic approach along with other adjustments; a thorough and well thought through back to work plan which includes setting out what support will be provided and what the expectations are around his contribution to the Respondent in the short to medium term in terms of fee generation, would have helped to alleviate the disadvantage, namely the difficulties he had managing his work load, and regulate his own workload and working patterns to allow him to be able to cope with his job as a solicitor.

1036 The expectations around bill performance should have formed part of the back to work plan in the latter part of August 2017 and again on his return by the end of May 2018; what the expectations were in terms not only of the hours he was working but what his targeted chargeable hours /his billing targets were. The Claimant had made a significant financial contribution to the Respondent in terms of his fees. A key performance indicator/measure for a solicitor is what he/she bills. That would not only mean his personal billing but those of his team. The Respondent was not telling the Claimant that he did not have to bill anything and only focus on business development, so what his targets were and over what period would have helped him to understand the expectations the Respondent had and manage his workload accordingly.

1037 **This complaint amounts to discrimination.**

5. Remove access to emails

1038 Counsel for the Respondent in submission argues that it would not have been reasonable or practical for the Respondent to remove the Claimant's access to email out of hours, he argues that the LLP agreement or management document does not permit this and that the Claimant's consent would have been required and the Claimant would have reacted adversely to it. However, as counsel for the Respondent conceded, Mr Flanagan had taken the step of diverting the Claimant's emails without his consent while he was off work. There is no evidence that the Claimant reacted 'adversely' to this.

1039 The Respondent was alerted to concerns about the work the Claimant was doing out of hours but it failed to monitor the work he was doing, it failed to monitor how many emails he was sending, it failed to in discussion with the Claimant agree a time when his access to his emails would be restricted or diverted. These concerns were raised but not acted upon.

1040 Part of the Claimant's problem was taking on too much work, that is accepted from the Respondent's witnesses, not being able to regulate the time he spent on work and not switching off. It is a 'red flag' that someone who should be building up their workload is sending/receiving work emails after working hours. The Respondent was concerned and seeking to restrict his hours in the office but took no steps to regulate or even monitor his work out of hours.

1041 The Tribunal consider, that again as part of a holistic approach along with the clear back to work plan and a mentor, there is a prospect such a step would have helped alleviate the disadvantage. The Tribunal find that this should have formed part of the back to work plan in the latter part of August 2017 and again on his return in May 2018 as part of the back to work plan.

1042 **This complaint amounts to discrimination.**

6. Replace team members who worked 100% for the Claimant when they left such as Jamie Cooper and Laura Sephton

1043 Counsel for the Respondent submits that this adjustment cannot relate to the PCP which involves the work of the Claimant. However, we do not accept that argument because this adjustment relates to the assistance provided to the Claimant to enable him to carry out his work; whether it is a piece of equipment to assist him or human resource, it is an adjustment which relates to the requirement to carry out his work.

1044. Mr Cooper left the Respondent on the 15 August 2017, he had supported the Claimant 100%'. It was clear that the Respondent was aware that the Claimant was concerned that there was a lack of support for his work **[p.326].**

1045 The Respondents evidence was that there were *recruitment difficulties.* Ms Rhodes gave evidence that the Respondent struggled to find a replacement for Jamie Cooper and unable to find a legal assistant or trainee to replace Laura Shepton.

1046 Support was provided by other colleagues including with Heather Davies, and for a period Guy Winfield and Liz Banks. Mr Williamson was moved over to Derby on 29 September 2017 as Acting Managing Partner **[p.361]**and he was able to call on resource from the wider Real Estate lawyers. The undisputed evidence of Mr Middleton was that all the Claimant 's workload had been "*absorbed by others".*

1047 It is clear that efforts were made to replace Jamie Cooper and Laura Sephton but it is not clear from the evidence the extent of those efforts. The evidence was rather limited in that regard however, the Claimant did not identify any work which was not done. However, as raised by Mr Middleton, the Claimant was very concerned about *the* arrangements to cover his work, and while we do not uphold the allegation that there was a failure to take steps to replace Mr Cooper and Ms Sephton, we conclude that there was no clear plan about who would do what work and for how long and how work for the Claimant's clients would be communicated back to him (if at all).

1048 The Claimant was concerned about his client base and his reputation and the loss of control and anxiety about losing those clients or their confidence must have been considerable, it had taken him a career to build. While his work was distributed there was no clear plan agreed with him about which clients would be dealing with which solicitor and what will be reported back to him. The Tribunal accept that the Claimant was told that his work was being done however that we find was not sufficient for him because he remained anxious **[w/s JM para 13].** How his work was being organised and what control he had over that, should have been part of the back to work plan, it was clearly a trigger for his stress and anxiety. However, the Tribunal do conclude that the Respondent was not under a specific obligation to replace anyway, only to ensure adequate support was provided but in any event, that support was available but it was the organisation and communication of the support which was lacking and should have formed part of the written return to work plan.

1049 **<u>This complaint is not well founded and is dismissed.</u>**

PCP 2: Requirement to work as a Managing Partner of the Derby office

1050 The Respondent accepts that it applied this PCP and that it put the Claimant at a substantial disadvantage but denies that it failed to make reasonable adjustments.

1051 Th Claimant's own evidence under cross examination is that he did not consider the role he performed as MP to be onerous, the day to day responsibilities for managing staff were and had always been, carried out by Ms Rhodes. He was really then only required to attend meetings and he wanted to continue to do that. His evidence we conclude did not support his complaint that carrying out this role placed him at a substantial disadvantage, however the Respondent had conceded the substantial disadvantage point at the outset and did not in light of the Claimant's evidence apply to amend their defence. We have therefore gone on to consider the issue of reasonable adjustments in the context of the agreed issues.

1052 The Claimant in his evidence stated that he did not want the title of Managing Partner to be removed from him, what he wanted was to retain the title but not carry out the duties. He did not seek to amend his claim to include a complaint of discrimination arising from disability or direct discrimination under section 13 or 15.

That he wanted to retain the title but not the responsibilities of the position was not something which the Claimant had requested or raised with Mr Flanagan.

1053 The EHRC lists examples of adjustments which includes reallocating *some* of the disabled person minor or subsidiary duties, not all their duties. We do not consider that to remove all the duties and be left with the title of MP would be a reasonable adjustment to make.

1054 The pleaded adjustments relied on are the same as the requirement to work as a solicitor however, the Claimant failed to give any evidence regarding those adjustments in the context of the role of MP. The reference to billing targets had nothing to do with the MP role. In terms of a back to work plan, he gave no evidence that he was unclear about his duties as MP and that this caused him any concern or anxiety in the context of what he was required to do. He did not assert that he required a mentor to carry out the MP role and we do not consider this was obvious given his evidence that the role was not onerous and it was more of a figurehead role. He did not give evidence that he received emails out of office hours concerning the MP role. He did not give evidence about the standard of performance which was expected and should be adjusted. The pleaded adjustments generally are not applicable to the MP role but to the requirement to work as a solicitor and the evidence we heard is not supportive of the effectiveness of and generally the reasonableness of any of the pleaded adjustments.

1055 What the Tribunal conclude the Claimant was really upset about was no longer having the title of MP. It is not a reasonable adjustment to remove all the responsibilities and retain the role. The duty to make reasonable adjustments is concerned with removing barriers to allow individuals to carry out their roles or in certain circumstances relocate them to another role, it is not about removing all their duties but being allowed to retain a title.

1056 The Respondent attempted to remove the PCP altogether in March 2017 however the Claimant refused to give up the role. The role and thus the PCP was however removed from 29 September 2017 and therefore there can be no claim under section 20/21 from this date.

1057 Further, while disadvantage was conceded, the adjustment of allowing the Claimant to retain the title of MP would not have been a reasonable adjustment to make in that it would not have been effective we conclude in reducing or avoiding the pleaded disadvantage.

1058 **This complaint is not well founded and is dismissed.**

PCP 3: Requirement to bill as many hours as possible

1059 The Claimant complains that from November 2016 to 7 September 2018 the Respondent applied a PCP that the Claimant bills as many hours as possible and that by reason of his disability this put him at the substantial disadvantage of being less able to manage his own workload and he was more affected by the workload and stressed and strains of his duties, and it failed to make reasonable adjustments. The Claimant relies on the same adjustments as pleaded for PCP1.

1060 The Respondent denies that it applied this PCP.

1061 As set out in the findings of fact, Mr Flanagan since 2016 set out in the appraisal documents a reduced billing target for the Claimant.

1062 From January 2017 Mr Flanagan referred to the Claimant reducing his working hours and accepted that this would mean reduced billing.

1063 It was not the Claimant's evidence before this Tribunal that he had been told whether verbally or in writing that he was required to bill as many hours as possible at any time from November 2016 to 7 September 2018. We have addressed the concern over the lack of clarity regarding the arrangements for his return to work following his periods of illness and expectations around his billing performance with respect to PCP 1. However, while we conclude that what was expected of the Claimant should have been made clear and set out in a formal written to work plan, it was not the Claimant's evidence that there was a requirement to bill as many hours 'as possible'.

1064 As set out in our findings, the Claimant had been set an annual target every year and he had exceeded it. He had enjoyed working and taken pride in exceeding his targets. From early 2017 however he was being told to reduce his working hours. In the forward plan in January 2017 he was expressly told by Mr Flanagan that the plan would mean that he would record inevitably record "*fewer chargeable hours*" than in recent years. In the performance review for the year to 31 March 2017 the focus was on a better work/life balance. As set out in our findings, following his return in May 2018 there was no discussion about targets and no targets set.

1065 There is no evidence that the Claimant was required during the relevant period to 'bill as many hours as possible'. The Claimant placed enormous expectations on himself and we accept that the Respondent it appears, only started to 'wake up' and appreciate the impact on his health from November 2016. However, there is no evidence that the Respondent required him to work at the level he did. The analogy the Claimant used at the disciplinary hearing was that he was driving the car at 70mph and that everyone was sat in the back knowing he should be driving slower but as he seemed fine no one told him to slow down. What he does not allege is that he was being told he had to drive at 70mph. What the Claimant's case is we conclude, is that he was allowed to over work and that no one stepped in to slow him down to protect him. That is however different from there being a requirement to work at that pace. **[p.921]**.

1066 The Tribunal find that the Respondent did not apply this PCP to the Claimant during the relevant period.

1067 **The complaint is not well founded and is dismissed.**

Summary

1068 In summary the Tribunal conclude that while in isolation the adjustments of having a written back to work plan, a mentor, a WRAP/risk assessment and clear communication about performance expectations may not have removed the substantial disadvantage, there is a real prospect that had the Respondent applied its mind properly to how it could support the Claimant back in the workplace, those adjustments taking a holistic approach, would have had a real prospect of removing/avoiding the disadvantage.

1069 The approach was different the Tribunal conclude to how an employee would have been treated. Ms Wigley repeatedly made the point that as HR Director, she "muscled in" at times on matter concerning the Partners, but it was Mr Flanagan's remit and not hers. Mr Flanagan by June 2017 however had no direct contact with the Claimant, this followed the Claimant's refusal to give up the role of Managing Partner and on a balance of probabilities the Tribunal find that this likely to be because he had become somewhat exasperated with the Claimant. However, this was an individual who was unwell. He was a challenging and perhaps at times difficult person to work for and the 'softer' interpersonal skills were not his strength, but his behaviour was exacerbated by his condition. There was genuine concern from the Respondent over the impact of his behaviour on his colleagues however, there was no meaningful communication and explanation about the Claimant's condition and in particular how it may affect his behaviours. A mentor would not only have assisted we find the Claimant but perhaps been a useful interface between him and colleagues who found his behaviours difficult to understand.

1070 What strikes the Tribunal as indicative of the lack of real engagement with the issues, are the comments from Ms Shepherd, Ms Davies and even Ms Rhodes leading up to the Conference on the 14 June; the 'red flags' that were not heeded because of a lack of understanding about this health issues as a result of a lack of enquiry and a lack of communication.

1071 If the Claimant was being monitored by HR, or David Williamson, those concerns which others found so obvious and alarming, should have been promptly acted on. Had the Claimant been an employee exhibiting those same behaviours which gave the appearance of him being on medication or "speed", we consider that the Respondent would have responded very differently. There was a failure to really understand his condition, what the triggers/stressors were and put in place a clear, structured, closely monitored and holistic plan of how to support him.

Expulsion

1072 The Claimant argues that the Respondent's conduct towards him was such that he could not be expected to put up with it. He seeks to rely upon s 45 and s46(6)(b) EqA and argues that his retirement on notice was a 'constructive expulsion' i.e. that he was expelled in circumstances where he was entitled to do so without giving notice (although he did in effect give notice).

1073 The Tribunal have made findings that some of the Claimant's substantive claims of discrimination are well founded and succeed. In such circumstances Counsel for the Claimant argues that the Claimant in reacting to that conduct, was 'expelled' for the purposes of section 45 and 46.

1074 The first step for the Tribunal is to consider whether the expulsion provisions under section 45 apply.

1075 The interpretation section at para 46 provides that and "LLP" means a Limited Liability Partnership (within the meaning of the Limited Liability Partnerships Act 2000). There is no dispute that the Respondent is an LLP for the purposes of the 2000 Act.

1076 Counsel for the Claimant submits that this is precisely the type of situation contemplated in the Explanatory Notes at paragraph 126.

1077 The complaint is as set out at paragraph 32 of the particulars of claim, is as follows;

> *"As a result of the Respondent's treatment of Mr Taplin set out in this claim Mr Taplin lost trust in the Respondent LLP and no longer felt able to continue his membership of it. He has therefore resigned his membership by giving notice of retirement.* ***Since an LLP cannot be terminated by the acceptance of a repudiatory breach****, Mr Taplin has been forced to give the Respondent 12 months' notice". [Tribunal stress]*

1078 Counsel for the Respondent submits that as a Member of an LLP the Claimant could not terminate his Membership other than by giving notice; section 46(6) only arises in circumstances where an LLP member is "*entitled*" to terminate his position without notice and he relies on **Flanagan** for the proposition that there is no principle of repudiatory breach applicable to LLPs with more than 2 members.

1079 **Flanagan** was appealed but not on the repudiation point and leaves a number of complicated questions such as what is the position as regards two-member LLPs? For two member firms what terms apply if repudiatory breach does work? However, those are not our concern, what we have to wrestle with is whether the **Flanagan** decision means that the Claimant cannot claim to have been expelled under section 46 (6) EqA. If he was expelled, he would be entitled to the losses that flow from that act of expulsion and the last act of discrimination would be the date his notice period ended on 6 September 2019.

1080 Counsel for the Respondent argues that there is no need to "*fashion a remedy"* out of section 46 (6) where none exists because losses can be recoverable from earlier acts of unlawful discrimination as clarified by the Court of Appeal in **Roberts**. That would then of course require consideration of time limits, whether resignation breaks the chain of causation and what losses flow from the unlawful acts.

1081 Counsel for the Claimant argues that a member of an LLP is entitled to expect that the LLP and its officers will act towards him in a way which respects the maintenance of the relationship of trust and confidence and relies on clause 10 of the Members Agreement (pages15 and 16) however, that does not get round the Flanagan decision.

1082 Members are protected under the EqA from discrimination and can bring a claim for discriminatory expulsion or detriment, but what if they are subjected to egregious acts of discrimination but not expelled? Are they unable to walk away and claim the same right to expulsion as the Member who had been directly expelled? They will be in breach of contract if they do in the absence of any express contractual right to leave without giving notice and if they refuse to continue to work, they would themselves be in breach (as in **Roberts**).

1083 Counsel for the Claimant submits that the words "*entitled*" in section 46 (6)(b), is a reference to entitlement under the EqA itself arising from acts deemed unlawful by the EqA itself. Counsel for the Respondent submits that *"entitled*" must be a reference to the contractual entitlement under the LLP Agreement itself. The wording being similar to the wording of section 95(1)(c) ERA which allows for a constructive unfair dismissal situation where "*entitled*" has been held arise in cases of repudiatory breach: **Western Excavating.** The Tribunal have considered the words of Lord Denning in Western Excavating when considering the words "entitled";

*"**The word "entitled" in paragraph 5 (2) (c) has a legal connotation, and Parliament must have been aware of how it was interpreted by the courts, whereas, had a moral connotation been intended, the word "justified" could have been used**. The test must be whether as a matter of common law the employee was in the* circumstances *entitled to terminate his contract without notice, which is repudiation; there is difficulty with any other interpretation".*

and

"The word "entitled" in this context connoted the existence of a right. The only right which the employee can have to terminate his contract of employment is that which the law gives him. His right is of a specified kind. It is a right to terminate "without notice by reason of the employer's conduct." In my judgment, this is the language of contract; language which has a significant meaning in law in that it confers a right on an employee to be released from his contract and extinguishes the right of the employer to hold the employee to it. Any other construction would produce an odd result. As Mr. Smith pointed out in argument, if sub-sub-paragraph (c) did not bring the contract to an end altogether the nonsensical position would arise that the employee could terminate it but the employer could sue him for damages for doing so without notice. In my judgment, contracts can only be brought to an end in ways known to the law".

1084 In what circumstances could a constructive expulsion occur such that a Member of an LLP is "entitled" to leave without notice under section 46? If there is no possible scenario it makes the statutory provision as far as LLPs are concerned a dead letter. Counsel for the Respondent argues that is not correct because it could apply to LLPs' with only two Members.

1085 However, the wording of section 46 EqA would, appear to relate to a case of repudiation and acceptance, and while it is difficult to conceive of situations where an LLP agreement would entitle a Partner to terminate his Partnership without any form of notice whatsoever, this does appear to be the natural reading of the word, with detriment then available to cover any discriminatory acts and the compensation provisions able to compensate for attributable loss.

1086 This would entitle those Partners/Members with LLP agreements which include the right to leave without notice in circumstances of repudiatory breach of the agreement, where they have been acts of discrimination against them, a broader protection than others with no such contractual safeguard while other Partners/Members may be required to give notice or risk being in breach of contract, in circumstances where for example they are being subject to harassment.

1087 The EqA makes it unlawful to discriminate against employees by dismissing them which includes a constructive unfair dismissal under section 39 (2)(c) however, it is possible for there to be discrimination but for a Tribunal to find that there has not been unfair constructive dismissal because the act of discrimination did not amount to a fundamental breach of contract. The employee would then have to rely on the detriment provisions.

1088 The EqA also protects Barristers (who do not have employee status) from being subjected to "*pressure to leave chamber*" : section 47 (2) (e) EqA. A protection they have in addition to claiming detriment. The wording does not refer to them being "entitled" to leave but to being subjected to pressure to do so.

1089 If the provisions relevant to expulsion under the EqA do not require a repudiatory breach why do they use the words "entitled" rather than *"justified*" or "put *under pressure*" to leave?

1090 It is unsatisfactory because we are left with a potential outcome, whereby an individual may be compelled to remain working within an LLP despite being subject to most egregious acts of discrimination and remain bound by contractual terms which require that individual to remain during the period of notice because of the absence in common law of a principle of repudiatory breach and not right under the EqA to treat the contract as at an end. That said, they are not without remedy in that they could refuse to attend the workplace and if expelled, have a potential remedy as a detriment claim for the prior acts of discrimination and the losses flowing from that.

1091 However, contractually applying Flanagan as we consider we are bound to do, there can be no repudiatory breach. We are persuaded by the reasoning of Lord Denning that Parliament must have meant "entitled" to refer to whether as a matter of common law the individual was in the circumstances, entitled to terminate his contractual relationship otherwise the individual would have the right to leave under the EqA while remaining liable to be sued for breach of contract.

1092 We have considered whether section 144 or 142 EqA applies however the LLP Agreement is not seeking to disapply a provision of the EqA. It is the provisions of section 46 (6)(b) which limits the application of the EqA to certain types of Partnership and LLP agreements.

1093 It is we feel an unsatisfactory situation because of the lack of clarity in the EqA and the Explanatory Notes however, we find on a balance that there was no expulsion within the meaning of section 46 (6)(b) EqA.

Time Limit

1094 The Tribunal has a wide discretion to extend time under section 123 EqA where claims have been brought outside the primary time limits. It is for the tribunal to take into account all the circumstances it considers relevant when exercising its discretion and weigh up the relative prejudice to either party of refusing or extending time.

1095 Submissions on the issue of time limits were brief.

1096 With regards to the adjustments which we find should have been in place as set out in our findings, in August 2017 after his return back to work, the Claimant was then off work from October to May 2018. When he returned he required adjustments but of course his needs had to be assessed at that time, there had been a considerable gap and it is not argued that adjustments should have been made during his absence from work.

<u>Reasonable adjustments before October 2017</u>

1097 The adjustments which relate to the period before his sabbatical from 9 October 2017 to 14 May 2018, amount we find to a continuing act: **Hendricks**. The same individuals were involved in supporting the Claimant and responsible for making reasonable adjustments.

1098 The failure to make the adjustments which we have found the employer acting reasonably would have implemented in August 2017, if not part of a continuing act, occurred almost 12 months out of time.

1099 The Respondent has not argued it has been prejudiced by these claims (although inevitably facing claims it otherwise would not have to face gives rise inevitably to a prejudice as it does in all out of time claims). The Respondent has also not claimed that the cogency of its evidence is affected. The Respondent's witnesses have responded to the allegations in full, they have produced considerable documentation in support.

1100 We have also taken into account that the Claimant is a lawyer and had the resources to research the time limits for claims of discrimination and fund legal advice There is an important public interest in enforcing time limits and in finality of litigation.

1101 We have taken all the circumstances into account including the reason for the delay; the Claimant was focussed on getting well and getting back to work and he was disabled with a serious mental health condition from August/September 2017 to his return in May 2018 but even on his return he was in 'recovery phase' and emotionally vulnerable and mentally fragile and trying to re-establish himself at work.

1102 Some of the complaints are well founded and they are important to the Claimant's case as he relies on a longstanding failure to support him.

1103 We find that the prejudice favours the Claimant and considering the balance of hardship, time should be extended to allow the claims which relate to a failure to make adjustments which predate his sabbatical in October 2017.

Reasonable adjustment claims from May 2018

1104 In terms of the claims of a failure to make reasonable adjustments claim which relate to his return to work in May 2018, we find that acting reasonably those adjustments could have been implemented by the end of May 2018. No alternative dates were proposed by the Respondent counsel in his submissions.

1105 The ACAS process started on the 10 September 2018, taking the end of May 2018 date as the date by which the adjustments relating specifically to his return (not the suspension and disciplinary) could have been implemented, those complaints would have been brought 10 days or so outside the primary time limit.

1106 We have considered that the Claimant is himself a lawyer with access to information and resources to take advice. He was from July 2018 represented by a law firm. However, he had long service with the Respondent, had been off work for a considerable period, he was in 'recovery phase', still mentally fragile and emotionally vulnerable and wanting to make his return a success. He had only a few weeks before had a relapse and attempted to take his own life and was on medication throughout.

1107 Some of the claims are well founded. The Respondent has not alleged any prejudice in dealing with these claims or raised any issue about the impact on the cogency of their evidence as a result of any delay. The Claimant was from the end

of June 2018 suspended and as we have found subject to acts of discrimination and further failures to make reasonable adjustments which caused or contributed to a deterioration in his health. It is just and equitable to extend time.

1108 We have considered that time should be extended to allow these claims on the basis that it is just and equitable to do so. The balance of prejudice favours the Claimant.

Suspension and disciplinary process

1109 The claims in respect of the suspension and disciplinary process were presented in within the primary 3-month time limit.

Causation

1110 The Tribunal have made findings of substantive contraventions of the EqA. The next issue then to determine is what damage or loss was caused by or arose naturally and directly from the unlawful acts.

1111 The Claimant felt we accept, that he had lost the support of Mr Flanagan and on his return in May 2018 he was not given adequate support in that reasonable adjustments were still not made. He remained emotionally fragile and in recovery, and the failure to make the adjustments we have identified meant that the disadvantage he suffered by being at work was not alleviated.

1112 Leading up to the Conference his behaviour then began to become 'hyper' and a source of concern. It was we find, the suspension which was the main reason for and the trigger for the breakdown in the relationship. The Claimant also believed that he had lost the support of the Respondent and in particular Mr Flanagan and that there was an agenda to remove him, and we have found that he had good reason to believe that this was the case.

1113 The Claimant's health deteriorated from the date of suspension and Dr Laher attests to the impact the suspension had on his mental health. Mr Tempest raised himself concerns that the Claimant had 'gone to ground' following his suspension.

1114 The Claimant attended the disciplinary hearing and defended his position including making the SSC aware of the possibility of his health having impacted his judgement.

1115 Although we find breaches of the duty to make reasonable adjustments prior to the sabbatical he took in August 2017 and on his return in May 2018, and although we find he was not given the support he should have been given, he had indicated to Dr Laher that he thought the phased return was going well in May 2017 and therefore he was we find, still hopeful of a successful return to work and continued working relationship. What we find was the turning point that resulted in him deciding that his continued employment was no longer tenable was the act of suspension.

1116 The Claimant was further upset by the conduct of Mr Hambleton during the process leading to the disciplinary hearing. The unlawful acts of discrimination arising from the suspension we find, were so serious that it would in an ordinary employment relationship have amounted to a repudiatory breach. The suspension lead to a

deterioration in his mental health and he reasonably concluded that his position was untenable and he was unable to return to work and he continued to be treated insensitively during the disciplinary process.

1117 We do not accept counsel for the Respondent's submissions that the Claimant waited too long before resigning. Firstly, we have found that after suspension there were other breaches of the EqA, but in any event, the act alone of suspension was we find so serious that it led to the deterioration in his health, he 'went to ground' as Mr Tempest put it and he believed that it made his position untenable. Given his mental health, we do not accept that he delayed too long or that the resignation was an intervening act. He had been a Partner for many years, he had been dedicated to the Respondent, he was mentally fragile and emotionally vulnerable, and his health deteriorated from the date of suspension, that he took some time to decide what to do, we do not accept in the circumstances amounts to a waiver of the breach.

1118 He was throughout the disciplinary period since suspension, complaining vociferously including through his solicitors, about how he was being treated, about the suspension and the lack of communication and explanation around why suspension was 'necessary' and at the disciplinary hearing, he expressly reserved his rights as set out in our findings (as he had done in previous correspondence from his solicitors). The Respondent appreciated the seriousness of the situation and the potential for litigation, hence Mr Hambleton's approach to managing the arrangements for the disciplinary process including his conduct in 'editing' the evidence.

1119 Counsel for the Respondent submits that the real reason is that the Claimant felt there was an agenda to get him out and despite counsel for the Respondent submitting that this was a 'wild and unsubstantiated' allegation, we have found that it was not. The Claimant had good reason to feel he had lost the support of the Respondent and in particular Mr Flanagan, because we find that he had.

1120 The other breaches since August 2017 we find were part of the background of the Claimant not feeling adequately supported, however but for the suspension which was an unlawful act of discrimination, we consider that he would not have felt that his position was untenable but there were further unlawful acts during the ongoing disciplinary process.

1121 The Tribunal do not accept that the Claimant's decision to resign broke the chain of causation for future losses, the Claimant resigned we conclude because of reasons which amount to unlawful acts of discrimination.

Holiday Claim

1122 There are two claims for holiday pay as set out in the Claimant's schedule of loss **[p.1335].** The first claim is for EU holiday entitlement of 20 days per year from 2002/20013 which amounts to 44 days. The claims are advanced as claims under the Working Time Regulations 1998 (WTR) not as claims for unlawful deduction of wages under section 13 ERA.

1123 The second claim is for UK holidays entitlement for the past two years amounting to 16 days.

1124 Any claim for holiday during the notice period is not pursued.

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1125 The Respondent does not seek to contest the amount of holiday claimed. 1126 Regulation 13 (1) provides for an entitlement to four weeks annual leave in each year. Reg 13 (9) provides that leave may only be taken in the leave year in respect of which it is due and may not be replaced by a payment in lieu except where the worker's employment is terminated.

1127 The holiday year is the Accounting Year 1 April to 31 March (Members Agreement p.145). The Claimant is not seeking any shortfall for the holiday year 2018/2019. His claim relates the holidays years 2002/2003 through to 2017/2018.

1128 The claim was presented in October 2018 and the last date for his EU holiday claim is 14 days in the holiday year ending 31 March 2018.

1129 The Claimant relies on three Court of Justice cases; **C-214/16 King v The Sash Window Company [2018] IRLR, C-684/16 Max – Planck- Gesellshcaft** and **C-619/16 Kreuzigar v Land Berlin.**

1130 The Claimant's pleaded case as set out in the claim form [**p.65]** is that he did not feel able to take leave; "*because of the obligations that Mr Taplin felt towards the Respondent and his colleagues. Mr Taplin did not feel that he was able to take the holiday that he was entitled to and the respondent did not allow Mr Taplin to carry over the holiday that he had accrued but not taken into the next leave year. Accordingly, Mr Taplin was deprived of his holiday and/or holiday pay contrary to the Working Time Regulations 1998 (as interpreted in accordance with Working Time Directive (C-214/16) EU) or under s.13 of the Employment Rights Act 1996*".

1131 The Respondent accepts that for the purposes of his holiday claim that the Claimant is a worker who is in principle entitled to claim.

1132 The Claimant does not allege that he was unable to take his leave due to periods of sickness. His case is advanced on the basis that the Claimant was denied, precluded or prevented from exercising his Directive Leave because of the Respondent, which had the effect of permitting the Claimant to carry forward such Directive Leave indefinitely and the obligation to make payment in lieu crystallises upon the cessation of the work relationship.

1133 In terms of the Claimant's record of what leave he had taken, we have found on a balance of probabilities, that his record is correct as set out in our findings.

Claim 2: The EU Claim: 44 days

1134 The Claimant was not prevented from taking his annual leave and nor do we find that he was 'dissuaded' from doing so. He was not we have found actively encouraged to take his leave prior to December 2016, but the Claimant did not allege that he was dissuaded from taking it.

1135 The Claimant does not allege that he took leave for which he was not remunerated. We accept counsel for the Respondent's submission that **King** therefore is not applicable to the circumstances of this case.

1136 The Claimant puts his claim on the basis that the Respondent failed or neglected to facilitate the exercise of the right to annual leave from 2002 until holiday year ending March 2018. The ECJ held in **Max- Planck- Gesellschaft** that the worker is the 'weaker' party and although the employer does not have to force him to take leave the employer is required to ensure the worker is able to take it by encouraging him to do so.

1137 It is clear from the findings of fact that the Respondent did not monitor what holiday its Partners took and indeed Mr Flanagan was not even able to comment on whether the holiday the Claimant he alleges he took is correct.

1138 The evidence of Mr Flanagan was that the Claimant was encouraged from December 2016 to take his holiday, he does not allege that he was encouraged prior to that. Mr Flanagan also gave evidence as set out in our findings, that some Partners record the holidays they take while some do not and while the policy appears to have changed, now requiring that Partners record holiday, he conceded there was 'no control' over it previously.

1139 Partners we have found, were left to manage their own holiday and there was no monitoring of the holidays the Claimant was taking even when he was working long hours and exceeding by a considerable amount, his financial target.

1140 The Respondent relies on the position of the Claimant as an "*an autonomous senior equity Partner*", who is co-owner of the "*employer*" and at liberty to take holiday when he chooses. That he had the autonomy to take holiday when he wanted as a Member is not in dispute. That the Claimant was not monitored and not encouraged to take holiday prior to December 2016, is not in dispute by the Respondent.

1141 The Tribunal must determine however whether the Respondent "*exercised all due diligence in enabling the worker to take the leave*…" and whether the Respondent took sufficient steps to ensure leave was not lost.

1142 On the 11 January 2017 at the 'wake up' management Board meeting there was a recognition that working patterns needed to be looked and "*the possible position of rules forcing individuals to take holidays…".* The evidence of Mr Williamson was that he was aware that the Respondent has since the 11 January 2017 meeting introduced a requirement for Partners to log their holidays however he was unsure whether that had been introduced before the Claimant had officially left the Respondent.

1143 The Claimant did not allege he was given incentives not to take leave. He worked tirelessly but his evidence was clear that he enjoyed work, he was in his own words a 'workaholic' and he profited from that work ethic albeit at the expense ultimately to his mental health. When asked by the Tribunal whether his work could be delegated while he was on annual leave, the Claimant's evidence was that it could be and the further he could resolve any problems with his work easily by a quick discussion over the telephone. His evidence was that he could hand over work to allow him to take annual leave.

1144 The undisputed evidence of the Claimant however is that at no point did anybody at the Respondent ever raise with him the fact that he was taking fewer than 20 annual leave days per year.

1145 The ECJ stressed that compliance with the requirement, for employers, under article 7 of the Directive should not extend to requiring employers to force their workers to exercise their right to paid annual leave however employers had "*to ensure that workers were given the opportunity to exercise such a right*."

1146 The ECJ also addressed the burden of proof; "*Should the employer not be able to show that it had exercised **all due diligence** in order to **enable** the worker actually to take the paid annual leave to which he was entitled, it had to be held that the loss of the right to such leave, and, in the event of the termination of the employment relationship, the corresponding absence of a payment of an allowance in lieu of annual leave not taken, constituted a failure to have regard, respectively, to art.7(1) and (2) of the Directive" [Tribunal stress]*

Period during which the Claimant was a Member and co-owner of the Respondent

1147 The Claimant does not allege that he was prevented from taking his EU leave, indeed his evidence is that he enjoyed working and could hand over his work if he took leave.

1148 The Claimant was not in this case the 'weaker' party as a worker or employee normally would be; he was a co-owner of the business with significant autonomy including as he accepted, with regard to his working hours. We do not find that this was the type of relationship envisaged by the ECJ as requiring the sort of protection and measures set out in their judgement in Max- Planck. The Claimant does not allege that he did not appreciate the limitations on his leave and that he would lose it if he did not take it. He was a party to the Member's Agreement which expressly provides at para 11.3 that Members are not entitled to carry forward any untaken holiday leave from one Accounting Year to the next without unless agreed with the Chairman and the Claimant does not allege that he did not understand the consequences of not taking leave.

1149 We conclude that there was no obligation on the Respondent as far as the WTR is concerned, to take steps to actively encourage one of the co-owners of the business to take his full annual leave in circumstances where we find the Claimant had refrained from taking his paid annual leave deliberately and in full knowledge of the ensuing consequences, after having been given the opportunity actually to exercise his right but electing not to do so freely.

1150 Further, from December 2016 we find that the Respondent exercised all due diligence to encourage the Claimant to take his leave.

Period during which the Claimant was a Salaried Partner

1151 The claim also covers the annual leave which was not taken during the period prior to the Claimant becoming a Member and co-owner of the business. In respect of that earlier period, the Respondent has failed to prove that it took any measures to encourage the Claimant to take his leave entitlement. We heard no evidence about the arrangements for salaried Partners at that time, in terms of what steps were taken to encourage them to take their leave.

1152 The Respondent does not allege and counsel for the Respondent in his submissions did not submit, that there was a limitation on the Claimant carrying over to the date of termination, the untaken holiday from this period.

1153 Whether or how to treat this earlier period was not addressed by either party in submissions and there was no evidence specifically dealing with this earlier period. A Salaried Partner is in a 'weaker' position than the 'employer'. The Salaried Partner may be an employee or worker depending on the circumstances but would not have the autonomy and power which an Equity Partner and Member would enjoy. The Respondent gave no evidence about what arrangements were in place to encourage the taking of holidays during that period and the burden of showing that it exercised all due diligence rests with the 'employer'.

1154 In the absence of any evidence about the arrangements in place to encourage annual leave to be taken or evidence about what Salaried Partners were told about the consequences of not doing so, the Respondent we conclude has failed to comply with its obligations to exercise due diligence to enable its Salaried Partners and in particular the Claimant, to have sufficient rest by taking their basic 4 week annual leave.

1155 The Claimant is entitled to the leave which he did not take during the period he was a Salaried Partner before he became a Member of the LLP. The untaken leave is carried forward and accumulates until termination.

1156 **The claim is well founded in respect of the portion of leave entitlement which relates to the period prior to the Claimant becoming a Member of the LLP in 2004. The precise date will need to be confirmed at the remedy hearing.**

Claim 2: UK leave

1157 The second claim is for UK holiday entitlement for the two years being 16 days. This is for the period 2016/2017 and 2017/2018. This is brought only as a claim under the WTR.

1158 The Claimant was entitled pursuant to para 11.1.2 of the Members Agreement as an Ordinary Member to 33 days leave per year.

1159 Regulation 13A WTR, provides no right to carry over of leave untaken in the relevant holiday year. Regulation 13A (7) provides that *a relevant agreement may provide for any leave to which a worker is entitled under this regulation to be carried forward into the leave year immediately following the leave year in respect of which it is due.*

1160 A relevant agreement includes an agreement in writing which is legally enforceable as between the worker and employer: regulation 2 WTR.

1161 The Members Agreement which would constitute a relevant agreement for the purposes of regulation 2, provides expressly at paragraph 11.3 that Members shall not be entitled to carry forward untaken holiday leave from one accounting year to the next except as agreed with the Chairman. It is not the Claimant's case that such authority was ever given, he does not allege that there was any agreement with the Chairman or anyone else to carry over leave.

1162 The Claimant does not claim for holiday beyond the holiday year ending March 2018. He continued to work for the Respondent into the following holiday year 2018/2019 for which he makes no claim. He did not leave part way through the 2017/2018 holiday year and does not allege that he was allowed to carry over the

2017/2018 leave, therefore in accordance with the terms of the Members Agreement the Claimant cannot succeed in this claim.

1163 **The claim for UK leave under regulation 13A WTR is not well founded and is dismissed.**

Remedy

1164 The case will be listed for a hearing to determine remedy.

Employment Judge Broughton

Date 7th April 2021

JUDGMENT SENT TO THE PARTIES ON
10 April 2021
.....
S.Cresswell
.....

FOR THE TRIBUNAL OFFICE