EMPLOYMENT TRIBUNALS

Claimant:	**Mr CHRISTOPHER DOHERTY**
Respondent:	**COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS (known as HMRC)**
Heard at:	**By video-link (CVP)**
On:	**15, 16, 17, 26 March 2021 and in chambers on 30 March 2021**
Before:	Employment Judge Dyal sitting with Mrs Carole Brown and Mr Christopher Goldson
Representation:	
Claimant:	Mr James Doherty, lay-representative (Claimant's brother)
Respondent:	Mr Alfred Weiss, counsel

RESERVED JUDGMENT

1. The Claimant suffered discrimination arising from disability contrary to s.15 Equality Act 2010 on 23 July 2019 by the way that Ms Leathers spoke to him.

2. The complaints otherwise fail and are dismissed.

REASONS

Introduction

1. The matter came before the tribunal for the final hearing of the Claimant's complaints of disability discrimination.

The issues

2. The claim form was presented on 11 November 2019. It was drafted in a non-technical way. The Claimant later filed a document titled 'Particulars of Claims' dated 28 December 2019. This attempted a more technical explanation of the claims but, despite the attempt, it remained unclear quite how the various allegations were put.

3. At a preliminary hearing on 31 January 2020, Employment Judge Batten gave the Claimant detailed guidance on the type of claims that can be made under the Equality

Act 2010 and ordered him to provide further particulars in light of that. A further document titled 'Particulars of Claim' dated 10 April 2020 followed.

4. At a second preliminary hearing on 15 May 2020, Employment Judge Heap noted the additional work that had been undertaken but observed that it remained difficult in parts to see how the complaints made fitted with the legal tests that applied. She provided the Claimant with further guidance on how to specify his claims. She also provided the Claimant with a table to complete in respect of each cause of action he raised. The tables had a column for each element of the relevant cause of action for the Claimant to complete in respect of each complaint. The Claimant duly completed those tables and they occupy p.102 – 154 of the bundle. Subject to one important addition discussed below, these tables are the definitive statement of the Claimant's claims and identify the complaints the tribunal must adjudicate upon. In order to avoid any doubt, this was agreed with the parties in the course of the hearing. As such the tables at p.102 – 154 will be referred to as the 'Final Tables'.

5. There is a Final Table for each of the following five causes of action:

   5.1. direct disability discrimination contrary to section 13 Equality Act 2010 ('EqA')
   5.2. discrimination arising from disability concrete in section 15 Equality Act 2010
   5.3. failure to make adjustments contrary to section 19 EqA
   5.4. harassment contrary to section 26 EqA
   5.5. victimisation contrary to section 27 EqA

6. The factual allegations the Claimant makes are divided into complaints under 18 headings which are labelled claim 1, claim 2 etc. In many cases, multiple factual allegations are made under a given heading.

Constructive discriminatory dismissal

7. In his claim form the Claimant appears to complain of constructive dismissal. At the case management stage of this litigation it was pointed out to the Claimant that he did not have the two years qualifying service needed to complain of constructive *unfair* dismissal. He therefore withdrew that complaint and he also withdrew a specific allegation of breach of contract. Those complaints were dismissed on withdrawal by a judgment dated 31 January 2020.

8. The judgment is clear that the constructive dismissal complaint that was withdrawn and dismissed was a complaint of constructive *unfair* dismissal, i.e., a complaint arising under s.94 and 98 of the Employment Rights Act 1996 (which of course does require two years qualifying service to bring).

9. However, there is an entirely distinct right to complain of constructive discriminatory dismissal pursuant to s.39(7) Equality Act 2010 and that right is not contingent upon qualifying service (if any authority is needed for that proposition see *Mcleary v One Housing Group Limited*, unreported UKEAT/0124/18/LA and the authorities cited therein). In *McLeary*, HHJ Auerbach said this:

   > *89…. In short, where it is clear from a claim form and/or particulars of claim, that a lay claimant is saying, factually, I was subjected to discrimination in my employment and this drove me to resign, it is both proper, and incumbent on the Tribunal, to seek clarification of whether such a claim is intended.*

10. At the outset of the hearing we therefore sought that clarification. The Claimant confirmed that he was indeed complaining that he was constructively dismissed. It

seemed to us that such a complaint remained open to the Claimant to pursue since that what had been withdrawn and dismissed upon withdrawal was an Employment Rights Act 1996 complaint of constructive *unfair* dismissal and not an Equality Act 2010 complaint of constructive discriminatory dismissal. Mr Weiss took instructions. The Respondent realistically accepted that the Claimant made a claim of discriminatory constructive dismissal and that it was open to him to pursue it.

11. We had a further discussion to ensure that there was clarity as to the detail of the constructive dismissal complaint. It was agreed that it raised the following additional issues:

    11.1. Was the respondent in repudiatory breach of the Claimant's contract of employment? The Claimant relies upon the implied term of trust and confidence.

    11.2. The particulars of the breach the Claimant relies upon are: that he was discriminated against in the manner set out in the Final Tables.

    11.3. Did the Claimant resign at least in part in response to the breach?

    11.4. If so, did he do so without delay, affirmation or waiver?

    11.5. If the Claimant delayed, affirmed or waived the breach is he nonetheless able to claim constructive dismissal by reason of a final straw?

The hearing

12. The hearing was conducted remotely by CVP. Generally the technology worked well. From time to time there were connectivity problems. When there were, we were able to overcome these and communicate effectively with each other.

13. At the outset of the hearing the tribunal broached the issue of reasonable adjustments to the hearing to ascertain the Claimant's needs and agree the best way of meeting them. It was agreed that:

    13.1. scheduled breaks would be taken during the course of each session (and they were);
    13.2. unscheduled breaks or micro-brakes would be taken on an ad hoc basis as the Claimant required. The Claimant was encouraged at the outset and throughout the hearing to say when he needed a break or micro-break to stretch and reset his posture etc. In the event we took regular micro-breaks (usually lasting a minute or two). Often these were at the tribunal's suggestion;
    13.3. the Claimant would give his evidence from whatever position he felt most comfortable in which in the event was a prone position.

14. In the course of the hearing, one of the Respondent's witnesses explained to the tribunal that they required some adjustments in light of a mental health diagnosis. The tribunal duly made them. They included:

    14.1. being given additional time to read documents when taken to them in the course of questioning;
    14.2. having questions repeated or rephrased if required;
    14.3. restarting answers in the event of losing the thread when giving oral answers.

15. The tribunal was presented with an agreed bundle – though as discussed below certain documents were removed by consent. There was an annex to the bundle which contained documents that the Claimant considered should be before the tribunal. The Respondent did see the relevance of those documents but did not object to them being put before the tribunal.

16. Witness statements were provided for the Claimant, Ms Lee Leathers, Ms Jennifer Thomas (previously known as Ms Jennifer Gutherie), Mr Anthony Tuxworth-Dagless and Mr Christopher Doddy.

17. Between them, the parties invited the tribunal to read the witness statements, the pleadings, case management orders and pages 384 – 562, 636 – 650 of the bundle prior to commencing the evidence. We did this on the first day of the hearing.

Preliminary applications

18. At the outset of the hearing the tribunal dealt with the following preliminary issues:

    18.1. The Claimant's application to postpone the hearing in order to pursue a potential appeal to the employment appeal tribunal in respect of Employment Judge Brewers' decision of 5th March 2021 and his affirmation of that decision upon reconsideration. That application was refused for the reasons we gave at the time.
    18.2. The Claimant's application for a privacy order in relation to certain medical records that were included in the tribunal bundle. In the event it was unnecessary to make any privacy order because, by consent, the medical records which the Claimant wished to keep out of the public hearing bundle were removed, it being agreed that it was unnecessary to refer to those documents during the course of the liability phase of this litigation.

Evidence and submissions

19. The Claimant gave evidence on the second day of the hearing. The Respondent's witnesses gave evidence on the third day of the hearing. Submissions were heard on the fourth day of the hearing. Both parties relied upon very detailed written submissions as well as oral submissions. We are grateful to the representatives for the care and skill with which they presented their respective cases. We pay particular tribute to Mr James Doherty who, though he has some experience of working for ACAS, is a lay-person. He did an outstanding job of representing the Claimant.

20. From the representatives to the witnesses the hearing was conducted with civility and courtesy which the tribunal was also grateful for.

Partial withdrawal of claims

21. The Claimant withdrew claims 16 and 18 in his closing submissions.

Disability concessions

22. The Respondent admitted that the Claimant was a disabled person within the meaning of s.6 and sch.1 Equality Act 2010 in correspondence in advance of the hearing. In closing submissions the Respondent admitted it had knowledge of the Claimant's disability at the material times.

Findings of fact

Claimant's disability

23. The Claimant has a long standing back condition caused by herniated discs. It initially became problematic in 2013. Over time the back condition worsened to the point that it became debilitating and seriously disrupted day to day function. The Claimant had to use a wheelchair for a period of time. His back came to surgery in the form of a micro-discectomy in 2017. Thereafter his symptoms were very much improved though he continued to suffer from flair-ups of pain, including sciatic pain, from time to time.

24. Unfortunately, in July 2019 the Claimant's condition deteriorated again. Investigations in 2020 showed that he had suffered a recurrence of disc herniation. We say more about this below.

Pre-employment health checks

25. The Claimant applied for the role of Assistant Officer, Customer Service Agent in the self-assessment division of the Respondent's debt management function. He was interviewed in February 2019 and received a conditional offer of employment in April 2019 subject to pre-employment health checks.

26. The pre-employment health checks were thorough. The Claimant gave candid and honest responses to the questions he was asked. For example, in a document titled *Recruitment Health Declaration* the Claimant was asked: *"Have you currently any other health difficulties?"* He replied: *"Yes. I suffered a back injury whilst living in Australia in 2013 which was corrected by microdiscectomy surgery in August 2017. The injury caused chronic pain and severely reduced mobility, where I required the use of a walking cane and a wheelchair. The surgery was successful and improved my mobility and alleviated pain symptoms. Day to day I am generally pain free and have full mobility [sic], however I do occasionally experience discomfort if I am sat or immobile for prolonged periods of time. As a result I may require short breaks to stand and maintain mobility and/or a chair with adequate lumbar support and/or a standing desk.* The same document asked: *"Have you ever had back, muscle or joint problems?"* The Claimant responded: "*Yes, 2013-2018. Bulged discs L3, L4, L5, S1*".

27. The Claimant also completed an employee health questionnaire. Among other things it asked: "*do you think you will need any adjustments or assistance to help you undertake the new role?* The Claimant responded: *"Yes, a chair with adequate lumbar support will be required for sitting for prolonged periods of time.*

28. On 14 May 2019 the Claimant had a telephone Occupational Health Assessment with Duradiamond, to whom the Respondent outsourced OH advice. The advisor, Ms Rosemary Fletton, recorded a number of issues with functional capacity relating to the Claimant's back.

29. On 15 May 2019, Ms Fletton completed form *QF45 Fitness Certificate for a New Role.* She recorded that the Claimant was fit for his new role but recommended a "*standard WSA [work station assessment]*". She further advised that the Equality Act was like to apply to the Claimant and said as follows: "*On commencement of employment please complete a workstation referral form and submit this via the portal to Duradiamond. This will enable an onsite workstation assessment to take place with Christopher"…"In addition to the DSE breaks Christopher may benefit from having posture breaks in place."*

30. On 16 May 2019, the Claimant was asked by an HR Officer, Ms Sheila Louth, at the Cabinet Office for his permission to send his "*Health referral*" from Duradiamond to the Vacancy Holder. HMRC is the Vacancy Holder. The Claimant gave his permission. Ms. Louth then completed a form QF 30 HMRC Pre-placement Questionnaire and addenda, and identified the following: "*activities or risks associated with the candidates role: computer or DSE work, prolonged sitting, prolonged telephone work, repetitive tasks, working shifts."*

31. We find, on the evidence before us, that these pre-employment health checks did not come to the attention of HMRC or at least not to those who had responsibility for the Claimant. It is unclear why not.

HMRC

32. The Respondent is a large employer that operates over many different sites. The most relevant people in this case are as follows:

    32.1. Ms Jennifer Thomas (previously Gutherie). She was an Executive Officer. Executive Officer is very low level managerial role. It is one grade up from Assistant Officer, the entry level grade the Claimant joined at. She did not line manage the Claimant but had some dealings with him.
    32.2. Mr Adam Burke, Executive Officer. Mr Burke was the Claimant 'caretaker manager' in the first couple of weeks of his employment.
    32.3. Mr Taxworth-Dagless, newly promoted to Executive Officer in July 2019. Mr Taxworth-Dagless was the Claimant's line manager.
    32.4. Ms Lee Leathers, Executive Officer. Ms Leathers never had line management responsibility for the Claimant.
    32.5. Mr Doddy, Higher Officer (at the relevant times). Higher Officer was one level above Executive Officer.
    32.6. Ms Cheryl Mason, Business Leader. Ms Mason was one of the most senior people on site. She was a grade 7.

33. The Respondent maintains a range of employee relations policies including a Grievance Policy, Attendance Management Policy and specific policies relating to probationers.

Commencement of employment

34. The Claimant commenced employment with HMRC on 1 July 2019. He was part of a large influx of new employees (around 100). His employment was subject to a 12 month probation period.

35. Unfortunately, the Claimant had significant back problems on 1 July 2019 that were significantly worse than usual. He awoke with back pain radiating down his leg and struggled to wash, bend or dress. As a result he was a bit late to work. When he arrived he was greeted by Ms Thomas at reception at 9.30am. The Claimant told Ms Thomas that he was experiencing back problems.

36. The Claimant's first few weeks of employment were given over to induction and training. The training took the forms of both attending lecture type sessions and observing more experienced colleagues working. This inevitably meant that the Claimant did not have a single work-station but rather moved around between various rooms according to where the particular training or observation event was for his group.

37. Generally, he made a very good start to his employment and physically managed very well. A lot of flexibility was shown such that if at any time the Claimant needed a posture

break/micro-break he could take one. He could and did stand up and stretch. In training sessions if he found himself uncomfortable he was allowed to stand or squat at the back of the room or change the way he was sitting.

38. In the main office area in which the Claimant worked there was a hotdesking arrangement. There was a range of different types of office chairs that employees including the Claimant were free to choose from.

39. On 05/07/2019, the Mr. Adam Burke, sent all the new starters a DSE self-assessment to complete. The Claimant completed this form on 8 July 2019. On the form the Claimant summarised his history of back problems. In response to a question about discomfort using a PC the Claimant indicated that he suffered discomfort after sitting for over 30 minutes; that it occurred daily and lasted until he stretched off. The Claimant went on to indicate that he found the chair he was using comfortable, stable, of adequate size and in good condition. He also indicated that there were various features of the chair that he did not know how to adjust. Mr Burke sent the DSE form to Occupational Health on 8 July 2019. This resulted in an Occupational Health appointment being made for 16 July 2017.

40. On 10 July 2019, Mr Burke asked the Claimant and others to complete a further DSE self-assessment using an updated form. The Claimant completed this form on 15 July 2019. The Claimant's answers were in similar terms to the first DSE checklist. He again noted his back problems. In response to question G1 '*Is your chair comfortable, stable, of adequate size and in good condition?'* he answered '*Yes*'. He was asked by questions G3 – G8 whether he knew how to adjust various aspects of the chair. He answered variously, yes to some questions, no to others, and did not answer at all in relation to others. In response to question G9 '*After you have made the adjustments specified in G3 to G8, is the chair comfortable for you?'* he answered '*No*'. There was a space for adding additional comments where was left blank.

41. As a result of the DSE self-assessment the Claimant was referred to OH. He had a telephone consultation with an OH adviser, Mr Mark Shannon, on 16 July 2019. Mr Shannon took a history of the Claimant's back condition. His notes of the session record among other things: "*DSE assessment self-check… Workstation OK but may benefit from Ergo[nomic] chair, hotdesking in place*". Under recommendations he noted "*Manager advice consider workstation assessment ergonomic chair, ergonomic breaks, adjustable desk if required, advice to be sought from assessor regarding hot desk*".

42. Mr Shannon also produced a formal report in which he set out the Claimant's history of back problems. He recorded that the Claimant *"reports experiencing episodes of pain ranging from 2 to 3 on a pain scale of 1 to 10. This can be exacerbated by prolonged standing or sitting."* Mr Shannon gave some general advice about good DSE habits and the importance of breaks. He said "*Due to his medical history he may benefit from a workstation assessment. This can be requested by completing form QF21…".* Under the heading of general recommendations Mr Shannon recommended a risk assessment be carried out and that the Claimant be monitored and encouraged to raise any concerns. He also noted: *"there are likely to be occasions when the severity of the symptoms increase despite Christopher complying with appropriate treatment. In this regard, there is a potential for ongoing symptoms as a result of his underlying medical condition."* He opined that the Claimant was likely to be a disabled person within the meaning of the Equality Act 2010.

43. On around 16 July 2019, Mr Burke completed a Workstation Referral Form, requesting a Workstation Assessment for the Claimant.

44. On 17 July 2019, the Work Station Assessment referral was triaged and assigned a case number. On 22 July 2019, a recommendation was made for a Work Station Assessment to be arranged.

45. On 24 July 2019, occupational health contacted the Claimant to try and make an appointment for a WSA. However he was by then on sick leave so this was deferred.

46. In the Respondent's workplace there is a significant difference between a DSE assessment and a WSA. A DSE assessment is conducted by someone with a day's training. It is therefore extremely basic and not at all expert. A WSA by contrast is conducted by an outside specialist and is a much more sophisticated and expert assessment. When it comes to matters such as the provision of auxiliary aids, such as ergonomic chairs / sit-stand desks, the need for the same and the particular choice of model falls to be assessed and decided in a WSA not a DSE.

47. The index incident in this case occurred on 23 July 2019. Up until it happened, the Claimant's employment had been going well. His line management had recently passed from Mr Burke to Mr Taxworth-Dagless. The Claimant had discussed his back problem with Mr Taxworth-Dagless. He told Mr Taxworth-Dagless that he was a bit embarrassed about his back problem and did not want to draw attention to it. Mr Taxworth-Dagless was very sympathetic and the Claimant was happy with how the conversation had gone.

Events of 23 July 2019

48. The tribunal was faced with competing accounts of the index events. We listened to the witnesses we heard from carefully and considered such contemporaneous documents as there were that shed light on what happened that day. Those documents included: the account of the incident the Claimant gave by email on 25 July 2019; the account the Claimant gave in conversation with Ms Thomas on 30 July 2019 (there is a transcript of the conversation); the account the Claimant gave on forms HRACC1 and VIO1, the account the Claimant gave in correspondence to the PCS and the accounts given to Mr Taxworth-Dagless, in the course of an internal investigation, by Ms Leathers, Ms Sophie Baker, Ms Liv Skeet and Mr Kyle Weston.

49. We found Ms Leathers' recollection of the incident, which styles it as wholly benign, to be a bit self-serving though we would stop short of saying it was dishonest. There are indications that Ms Leathers account understates the incident. For instance, on Ms Baker's account, Ms Leathers said the noise was "*annoying her*" and that it was "*driving her crazy*". On Mr Weston's account, he did his best to "*de-escalate the situation*". We do not think this comment by Mr Weston is quite as significant as the Claimant does because we think primarily Mr Weston was referring to calming the Claimant down rather than acting as a peacemaker between the Claimant and Ms Leathers or anything of that nature. Nonetheless, Mr Weston's account generally gives some support to the assessment that this was not a wholly benign incident.

50. Further, in Ms Leather's account of the incident at p514 she states that the Claimant packed away his work items and left at 5pm. It is now agreed all round that Ms Leathers left at around 5pm and that the Claimant left at around 6pm; so she could not have seen him pack up and leave at 5pm or at all. Whilst those are not of themselves important details their inaccuracy does contribute to our view that Ms Leathers' evidence cannot be relied upon in full. Also, in her account at p514, Ms Leathers quotes the Claimant as saying "I will just stay here and be in pain or <u>go sick</u> [underlining added]". Nobody else attributes those underlined words to the Claimant and we do not think he said those words. Although we note that, while that is not what he said, it is in fact what he did.

51. We found the Claimant to be a broadly satisfactory witness who was doing his best to give a truthful account. In gauging his evidence, however, we think it is important to bear in mind that he was in a lot of pain at the time of the incident. While we accept most of his account of 23 July 2019, we think that his perception of the level of hostility does not reflect the reality. We infer this from the Claimant's colleagues accounts. Further, on the Claimant's own evidence he was in severe pain and was panicking. We think that this is likely to have affected his assessment and recollection of the volume and tone with which Ms Leathers spoke.

52. Doing our best, and taking into account all of the competing evidence, we make the following findings.

53. The Claimant was working in an open plan room. It was a large room and there were several banks of desks. Ms Leathers was also in the room and was getting on with her own work. She was in a different bank of desks to the Claimant and had her back to him.

54. The Claimant was sitting at his computer and began to experience pain in his lower back and left buttock. At around 4.45pm a colleague sitting opposite offered him the use of a pain pen (a type of mini-TENS machine). The pen made a clicking noise that was distracting. Ms Leathers, who was sitting some way behind the Claimant and facing in the opposite direction, was distracted by the noise. She turned around, saw the Claimant with the pain pen and said to the Claimant words to the effect of, "*that won't do any good through your jeans, go to the toilets and take your jeans off and do it*." The Claimant responded "*I'm not doing that*." The Claimant continued using the pen and Ms Leathers asked him to do it somewhere else. That was because the noise was distracting. In this exchange Ms Leathers was talking to the Claimant rather than shouting or raising her voice.

55. The Claimant continued to experience pain in his back. A few minutes later he started making some repetitive clicking noises as he tried to adjust his chair. Internally he was panicking because his back pain had reached a severe level.

56. The noise he was making with his chair was irritating and distracting to people trying to work. Ms Leathers' desk was in a different row of desks to the Claimant. Ms Leathers did not know who was making the noise and said over her shoulder: "*will you stop clicking that bloody chair! For god's sake! You're getting on my nerves!"* Her tone was one of irritation. Her voice was raised because she was speaking to a person unknown behind her in an open plan room; but it was not raised to the point of shouting. The Claimant responded with a note of sarcasm saying *"I'll just sit here in pain then Lee*."

57. The Claimant explained that he was struggling to adjust his chair. Ms Leathers said "*go and get another chair then*" (because there was a variety to choose from). In this exchange she was talking directly to the Claimant and we mean talking rather than shouting or raising her voice. She had an irritated tone.

58. The Claimant then pushed his chair, with both his hands on the chair back, to a different part of the office and selected another that he walked back with. Although he was in significant pain, his outward appearance was unremarkable in that it did not indicate anything beyond discomfort. There was nothing to indicate that this was a serious situation that required a medical intervention or anything of that nature.

59. Ms Leathers then asked the Claimant if he had had a DSE assessment. The Claimant responded that he had had an OH referral but was waiting on a workstation assessment. This element of the conversation was conducted politely.

60. The Claimant messaged Mr Weston using the Teams chat function, asking if he had heard the exchange. The Claimant was enraged by what had happened. After a few minutes he went to the kitchen area and Mr Weston followed him and tried to calm him down. The Claimant returned to his desk shortly before 5pm. Ms Leathers left at around that time. The Claimant continued until the end of his shift at 6pm.

61. Finally, we note that, at this time Ms Leathers barely knew the Claimant, she did not know he had a back disability nor that he had a history of serious back problems.

Subsequent events

62. The Claimant called in sick the following day. He contacted the absence reporting line, that happened to be staffed by Mr Doddy. The Claimant said that he was suffering from back pain and could not attend work. Mr Doddy said words to the effect of, 'so it's not a question of taking painkillers and coming in?'. This was an innocuous attempt on his part to understand the situation.

63. The Claimant's sickness absence was certified by his GP on 24 July 2019 with a fit note that recorded he was unfit for work from 24 July 2019 to 4 August 2019 with low back pain.

64. On 24 July 2019, Mr Taxworth-Dagless emailed the Claimant and asked him for a copy of his fit-note. The Claimant responded by email, attaching the fit-note and requesting a "*copy of HMRC's formal grievance policy*" [emphasis added]. Mr Taxworth-Dagless swiftly responded thanking the Claimant for the fit-note and asking for a little context to the request for the grievance policy. He also said "*we aim to resolve issues informally first before exploring formal options*" and pointed out that the policy was available on the intranet but that the Claimant would need to be on site to access it.

65. On 25 July 2019 at 11.03am, the Claimant responded with a short email that briefly gave some context. He said that a manager had shouted at and humiliated him for making adjustments to his work-station. He went on that he had been unable to make adjustments to his work-station and this had exacerbated his back pain leading to him being signed off. He then requested the "formal grievance procedure" [emphasis added]. The Claimant further stated "*Whilst I appreciate you may wish to resolve grievances informally, the impact this incident has had on me has breached my confidence and trust in management, and I would like to familiarise myself with the formal grievance procedure in order to decide for myself what course of action is appropriate for me to take".*

66. Mr Taxworth-Dagless swiftly responded with a polite email at 2.48pm in which he attached HR20504 Grievance: Procedure. Technically this was indeed the Respondent's grievance procedure. However, it was part of a suite of documents in the family HR20500 that cumulatively comprise the Respondent's grievance policy. Other documents in the suite include things like FAQs, worked examples, guidance to managers and so on. Mr Taxworth-Dagless also said that he would like to arrange a brief telephone call with the Claimant the following day. He said "*this is part of the absence process*".

67. Unfortunately, the Claimant had, what we think was, an extreme reaction to this. He was furious. He formed the view, unfairly in our judgment, that Mr Taxworth-Dagless was somehow being deeply obstructive by sending him only part of the grievance policy. The Claimant wrote back to Mr Taxworth-Dagless on Friday 26 July 2019 asking for the grievance policy again. He said that he was not, at that time, in an emotional state to participate in a telephone call. He asked for his contract of employment and other

information and said that all being well he would arrange a time for a telephone conversation on Monday.

68. Despite Mr Taxworth-Dagless's emails being, in our view, polite and innocuous, already by this stage the Claimant developed a very deep sense of mistrust to Mr Taxworth-Dagless that was out of all proportion to anything he had done.

69. On 30 July 2019, Ms Thomas telephoned the Claimant for an informal discussion about his sickness absence. Ms Thomas was a more experienced manager and since the correspondence with Mr Taxworth-Dagless had become fraught on the Claimant's side it was worth seeing whether Ms Thomas calling would soothe the situation.

70. Ms Thomas left a message for the Claimant and he telephoned her back. There is a transcript of the call in the bundle which we accept is accurate. The Claimant lost his composure on the call including to the point of using the *F-word* on several occasions. He was in something of a rage and spoke about the incident of 23 July 2019 and his correspondence with Mr Taxworth-Dagless thereafter. However, Ms Thomas approached the call in a very kind, sympathetic and forgiving manner. She took no issue with the Claimant's conduct of the call (though she could have). She also generally gave no impression at all that the Claimant's employment was at risk by reason of his absence – her approach was very much about what could be done to get the Claimant back to work. This was indeed a good attempt to soothe the Claimant, though unfortunately it did not work.

71. Shortly after the call, Ms Thomas sent the Claimant copies of his contract, the Grievance Procedure and an overview of the Grievance Policy and the Attendance Procedure and an overview of the Attendance Policy. These were not the complete suite of documents that comprised, respectively, the grievance and attendance policies. Ms Thomas did not send those documents in full because they were extremely large. She sent the key information. What she did send, however, included hyperlinks to the remainder of the policies. The wording of the hyperlinks made clear what the other bits of the policies were. In relation to those Ms Thomas said: *If you want any information from various hyperlinks that display on the documents above then please let me know, I haven't included them here as the majority are forms and templates for us to use at those parts of the process. Again, any further questions please let me know.* The Claimant thanked Ms Thomas for the documents and did not request anything further parts of the policies.

72. In the meantime, on 29 July 2019 the Claimant had contacted the PCS Trade Union who soon began to act for him. On 31 July 2019, Ms Jasmine Froggatt, by now the Claimant's representative, sent Mr Doddy a copy of form *HRACC1: Accident, near miss or work related ill health* report in which the Claimant's account of the events of 23 July 20219 were described in box 4. This was passed to Mr Taxworth-Dagless to investigate.

73. On 2 August 2019, Mr Taxworth-Dagless emailed the Claimant and invited him to a formal absence review meeting. The attached letter, which was dated 1 August 2019, said "*You have now been absent for 9 days. I would like to meet with you to discuss your progress and what we can do to help you to return to work as soon as you are able."* The meeting was scheduled for 7 August 2019. It also said "*I must remind you that your employment with the Department could be affected if your sickness absence can no longer be supported. I will let you know what further action will be taken within 5 working days of our meeting*." The letter also stated *"If you need me to make any special arrangements or if you have any special accommodation needs to enable you to attend the meeting, please let me know as soon as possible."*

74. On 5 August 2019, the Claimant was signed off by his GP with “low back pain” until 18 August 2019.

75. On 6 August 2019, Ms Froggatt sent Mr Taxworth-Dagless a copy of form *VOI1: Abuse, violence or threats to staff*. In box 4 it recited the Claimant’s account of the incident of 23 July 2019.

76. On 7 August 2019 at 13.38 (less than an hour before the scheduled meeting), Ms Froggatt notified Mr Taxworth-Dagless that the Claimant would not attend the sickness absence review meeting. A number of reasons were given including that, she was not able to attend, that the Claimant had not had time to prepare and that he was not well enough to travel to the meeting. The meeting was postponed.

77. On 9 August 2019, Mr Taxworth-Dagless completed the remainder of form HRACC1 having conducted an investigation. This followed an investigation which he had conducted and which was his first ever investigation. The investigation comprised:

    77.1. obtaining background information and documentation about the Claimant’s back condition from Mr Burke;
    77.2. considering the Claimant’s account of 23 July 2019 and his sick-notes;
    77.3. obtaining written accounts of the incident from Ms Leathers and from the three employees who had been sitting in the same bank of desks as the Claimant: Ms Baker, Ms Skeet and Mr Weston.

78. The investigation was unable to reach a clear conclusion on whether or not the Claimant’s period of sickness absence had been caused by the incident complained of though it correctly noted that the Claimant’s fit notes had not made reference to mental ill-health which, in addition to back problems, the Claimant had mentioned on the form. It recommended that should the Claimant return to work another external WSA assessment would need to be booked and that the internal DSE assessment would need to be rescheduled.

79. On 15 August 2019, Mr Taxworth-Dagless emailed the Claimant and attached a letter inviting him to a formal sickness absence meeting on 23 August 2019. The email stated that “*The purpose of this formal meeting is to discuss your plans to return to work and how we can support you in doing so”.* The attached letter was in similar terms to that of 1 August 2019.

80. On 16 August 2019, Mr Taxworth-Dagless wrote to the Claimant responding to form VI01. He had taken advice form HR as to whether the form was appropriate for the scenario in issue and had been advised that it was not. He had also run the matter past Cheryl Mason, Grade 7, who had agreed with him that the form was not applicable. In his letter to the Claimant, Mr Taxworth-Dagless said VI01 was not applicable and that the matter should be approached under the Grievance Policy. He went on to say that in the first instance informal resolution would be attempted failing which mediation could be arranged. He also said that he was satisfied that the event described did not constitute bullying, harassment or victimisation. Finally he referred the Claimant to the Respondent’s employee assistance programme.

81. In response to Mr Taxworth-Dagless’s letter of 16 August 2019, Ms Froggatt emailed Mr Doherty on 22 August 2019. She began by stating that the Claimant would not attend the formal absence meeting the following day because he had a doctor’s appointment and because she was not available to attend. She also objected to Mr Taxworth-Dagless’s involvement in the meeting on account of his handling of the VOI1 form and his conclusion that there had not been bullying or harassment. She further stated that the

Claimant had no choice but to start putting a formal grievance together and that the grievance would name Mr Taxworth-Dagless.

82. The Claimant vehemently disagrees with Ms Froggatt's comments on him putting a formal grievance together so much so that it was a factor in his decision to part company from the PCS Union. He takes the view that he had already raised a formal grievance in his email to Mr Taxworth-Dagless on 25 July 2019 giving context to the request for a grievance policy and subsequently by completing forms HRACC1 and VOI1.

83. The Claimant also emailed Mr Doddy on 22 August 2019 asking for the meeting to be postponed. He said he had a doctors appointment at 4pm "in order to secure a fitnote".

84. Mr Doddy responded to both Ms Froggatt and the Claimant in emails. He indicated that the meeting would go ahead as it had previously been postponed. He considered that Mr Taxworth-Dagless had acted appropriately in dealing with the VOI1 form. He had taken advise from HR and had sent the form to the grade 7 (a reference to Cheryl Mason) who had rejected it.

85. The Claimant negative thoughts had spiralled by this stage and he was convinced that the Respondent was 'managing him out' of the business and that this was the real purpose of the absence management meeting. We do not agree with that analysis and see no real basis for it. In fact this was simply a first formal absence management meeting. We are satisfied that the purpose of the meeting was as it had been stated: to review the Claimant's absence and see what could be done to help get him back to work. There was no pre-conceived plan to manage him out of the business using his sickness absence as a pretext for doing so:

    85.1. The Respondent's desire to hold such a meeting was is exactly in keeping with what we would expect in the circumstances.
    85.2. The Claimant had been absent from work for a long time and it was objectively a good idea for his absence to be reviewed. Not least to see what might be done to assist him to return to work.
    85.3. The Claimant had been absent on sick-leave for a long time and during that time his negative thoughts had spiralled out of proportion and control. It was clearly a good idea to have a meeting and if it had taken place it may well have helped to clear the air.
    85.4. The meeting was to be chaired by Mr Taxworth-Dagless who did not even have authority to dismiss the Claimant.

86. The Claimant resigned by a letter dated 23 August 2020. In his letter of resignation he made a detailed Data Subject Access Request. Among many other things he requested:

    86.1. *All sent/received emails from my work email address.*
    86.2. *Chat logs referred to in Kyle Weston's statement used in your "investigation".*
    86.3. Various policies.

87. Mr Taxworth-Dagless first responded to this DSAR on 23 August 2019. Among other things he stated that:

    87.1. *all emails from work email address: not provided – not available – account withdrawn;*
    87.2. *chat logs: Kyle Weston: "application [MS Teams] used does not log chats." No access.*
    87.3. *copies of policy docs / disciplinary procedure, sickness absence and grievance*: not personal data.

88. On 27 September 2019, the Claimant replied complaining that the response was incomplete and making a Freedom of Information Act request for further documents. On 2 October 2019, Mr Taxworth-Dagless further responded. He provided some further documents and said this:

    88.1. *all sent/received emails: not provided. After conducting a diligent search for records relating to your access request, I have determined that HMRC does not hold information about you which falls within the scope of your request OR HMRC has destroyed, erased or made personal data anonymous in accordance with HMRCs record retention obligations and practices.*
    88.2. *Chat logs referred to in Kyle Weston's statement used your "investigation". After conducting a diligent search for records relating to your access request, I have determined that HMRC does not hold information about your you which falls within the scope of your request OR HMRC has destroyed, erased or made personal data anonymous in accordance with HMRCs record retention obligations and practices.*
    88.3. [*Policy documents]: …not personal data.*

89. Mr Taxworth-Dagless explained that the Claimant's email account had been deactivated as an automatic consequence of his resignation being processed and for that reason was not available. He accepted that with hindsight, given the DSAR in the letter of resignation, this could have been handled better. We accept that, at the time he did not realise that processing the Claimant's resignation would have this affect.

90. In his oral evidence, Mr Taxworth-Dagless explained that he had made considerable efforts to try and get hold of the Teams chat messages that Mr Weston had referred to. He had asked Mr Weston for copies of them but Mr Weston had not been able to provide them. Mr Weston said that he was unable to export them from Teams. Mr Taxworth-Dagless then suggested to Mr Weston that he either print out copies of the message or provide him with screen shots of them. When Mr Weston tried to do this he found he was unable to because the messages were no longer there. He reported to Mr Taxworth-Dagless. Mr Taxworth-Dagless accepted what Mr Weston said. He was unable to explain why the messages had disappeared but in cross-examination, on invitation, speculated as to a possible reason. His understanding was that while information posted on Teams channels was stored centrally on Microsoft SharePoint, chats between users outside of the channels were not. Instead they were stored in the users' outlook accounts. Messages could be deleted from outlook accounts and/or they could be subject to errors.

91. The Respondent's FOI team engaged in some correspondence with the Claimant and ultimately provided the policy documentation he requested. This included the complete grievance policy and attendance management policy.

Professor Klezl

92. In December 2019, the Claimant had an MRI scan of his back. This followed a step change in his back problems from 23 July 2019 from which date he was in much more pain than previously.

93. On 8 January 2020, the Claimant had a private consultation with Professor Klezl, Consultant Orthopaedic and Spinal Surgeon. The tribunal has before it Professor Klezl's letter of 8 January 2020.

94. Professor Klezl recites the history of the Claimant's back problems. The MRI findings showed that part of the Claimant's spinal canal was congenitally narrower. It also

showed diffuse disc degeneration from L3 to S1. He goes on to say that the Claimant had surgery on the left side for disc herniation at L5-S1 in 2017 and that the disc herniation had recurred on the same side. He explains that recurrent disc herniation is a known risk of disc surgery with a recurrence rate of 15-20%.

95. Professor Klezl goes on to state that the Claimant had mentioned some sort of legal claim with not being given the right chair he wanted at work. He then offered the following opinion: "*I told him that the recurrent disc herniation was quite unlikely to be linked to a specific chair requirement…".*

96. The Claimant had only spoken to Professor Klezl briefly about the potential legal claim. In the consultation itself, Professor Klezl had indicated that he would not provide an opinion about it. The Claimant was therefore disappointed that Professor Klezl in fact did so.

Law

Direct discrimination

97. Section 13 EqA provides: *"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."*

98. Section 23 EqA provides as follows:

> *(1) On a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to each case.*
> *(2) The circumstances relating to a case include each person's abilities if –*
> *on a comparison for the purposes of section 13, the protected characteristic is disability…*

99. In ***Nagarajan v London Regional Transport*** [1999] IRLR 572, the House of Lords held that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case is, '*why the complainant received less favourable treatment…Was it on the grounds of [the protected characteristic]? Or was it for some other reason..?*'.

100. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] ICR 337 at [11-12], Lord Nicholls:

> *'[…] employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.*
>
> *The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant […]'*

101. Since ***Shamoon***, the appellate courts have broadly encouraged Tribunals to address both stages of the statutory test by considering the single 'reason why' question: was it on the proscribed ground, or was it for some other reason? Underhill J summarised this line of authority in ***Martin v Devonshire's Solicitors*** [2011] ICR 352 at [30]:

> *'Elias J (President) in Islington London Borough Council v Ladele (Liberty intervening) [2009] ICR 387 developed this point, describing the purpose of considering the hypothetical or actual treatment of comparators as essentially evidential, and indeed doubting the value of the exercise for that purpose in most cases-see at paras 35–37. Other cases in this Tribunal have repeated these messages- see, e.g., D'Silva v NATFHE [2008] IRLR 412, para 30 and City of Edinburgh v Dickson (unreported), 2 December 2009 , para 37; though there seems so far to have been little impact on the hold that "the hypothetical comparator" appears to have on the imaginations of practitioners and Tribunals.'*

Discrimination arising from disability

102. Section 15 EQA 2010 provides as follows:

(1) A person (A) discriminates against a disabled person (B) if –
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
(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."

103. In ***Pnaiser v NHS England*** [2016] IRLR 170 the EAT gave the following guidance:

(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her skeleton).
(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where

the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

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

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

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in s.15(2) so that there must be, as she put it, "discriminatory motivation" and the alleged discriminator must know that the "something" that causes the treatment arises in consequence of disability. She relied on paragraphs 26–34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the "because of" stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the "something arising in consequence" stage involving consideration of whether (as a matter of fact rather than belief) the "something" was a consequence of the disability.

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

104. As to what is unfavourable treatment, see the Equality and Human Rights Commission Code of Practice gives the following guidance: *"For discrimination arising from disability to occur, a disabled person must have been treated 'unfavourably'. This means that he or she must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably."*

105. The Code does not replace the statutory words but gives helpful guidance and an indication of the relatively low threshold sufficient to trigger the requirement for justification: ***Trustees of Swansea Assurance Scheme v Williams*** [2019] ICR 230 (per Lord Carnwath at para 27).

106. As to the requirement for knowledge of disability on the part of the employer, there need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment: ***City of York Council v Grosset*** [2018] IRLR 746, Court of Appeal.

107. In ***MacCulloch v ICI*** [2008] IRLR 846, Elias J (as he then was) set out four legal principles with regard to justification, which have since been approved by the Court of Appeal in ***Lockwood v DWP*** [2014] ICR 1257:

(1) The burden of proof is on the respondent to establish justification….
*(2) The classic test was set out in **Bilka-Kaufhaus GmbH v Weber Von Hartz** (case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (paragraph 36). This involves the application of the proportionality principle, which is the language used in reg. 3 itself. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see Rainey v Greater Glasgow Health Board (HL) [1987] IRLR 26 per Lord Keith of Kinkel at pp.30–31.*
(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardys & Hansons plc v Lax [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60].
(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no "range of reasonable response" test in this context: Hardys & Hansons plc v Lax [2005] IRLR 726, CA."

108. Concrete evidence is not always required to prove justification (***Lumsdon v Legal Services Board*** [2015] UKSC 41)

Reasonable adjustments

109. Section 20(3) EQA 2010 provides:

> *"…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, [there is a requirement] to take such steps as it is reasonable to have to take to avoid the disadvantage."*

110. Section 20(5) EQA 2010 provides:

> *"…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, [there is a requirement] to take such steps as it is reasonable to have to take to provide the auxiliary aid."*

111. "Substantial" is defined at section 212(1) EQA 2010 to mean "more than minor or trivial".

112. An employer is not under a duty to make reasonable adjustments unless it knows or ought to know the employee has a disability and is likely to be placed at the substantial disadvantage in question (per paragraph 20(1) Schedule 8, EA 2010)

113. General guidance as to the overall approach to reasonable adjustments was given in ***Environment Agency v Rowan*** [2008] ICR 218:

- The PCP must be identified;
- The identity of the non-disabled comparators must be identified (where appropriate);
- The nature and extent of the substantial disadvantage suffered by C must be identified;
- The reasonableness of the adjustment claimed must be analysed.

114. The duty does not arise however unless the employer knows or ought reasonably to know that the employee is disabled *and* that the PCP put him at a substantial disadvantage. The EHRC *Code of Practice on Employment* gives useful guidance on knowledge particularly at paragraph 5.15.

115. In ***Linsley v HMRC****,* unreported EAT, 2018, the EAT observed that the terms of an employers internal policy can be a relevant factor in the assessment of the reasonableness of adjustments.

116. In ***Tarbuck v Sainsbury's Supermarkets*** [2006] IRLR 664**,** the EAT held that the duty to make adjustments does not extend to matters such as consultations or assessments and declined to follow ***Mid-Staffordshire General Hospital NHS Trust v Cambridge*** [2003] IRLR 566. The only question is whether the employer has *substantively* complied with its obligations or not. ***Tarbuck*** has been repeatedly followed since and correctly states the law.

117. It is for the tribunal to assess for itself the reasonableness of adjustments. The Equality and Human Rights Commission Code of Practice gives useful guidance at paragraphs 6.28 and 6.29 upon potentially relevant factors.

Harassment related to disability

118. 22. Section 26 EQA 2010 provides:

> (1) A *person (A) harasses another (B) if –*
> *(a) A engages in unwanted conduct related to a relevant characteristic, and*
> *(b) the conduct has the purpose or effect of –*
> *(i) violating B's dignity, or –*
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B [for short we will refer to this as a "proscribed environment"].*
> *…*
> *(4) In deciding whether conduct has the purpose or effect referred to in subsection (1)(b), each of the following must be taken into account –*
> *(a) the perception of B;*
> *(b) the other circumstances of the case;*
> *(c) whether* it is reasonable for the conduct to have that effect."

119. ***In Weeks v Newham College of Further Education*** UKEAT/0630/11/ZT, Langstaff J said this at [21]:

> *"An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staff-room concerned. We cannot say that the frequency of use of such words is irrelevant."*

120. In ***Richmond Pharmacology v Dhaliwal*** [2009] IRLR 336 (at ¶15), Underhill J (as he was) said:

15…*A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That…creates an objective standard….Whether it was reasonable for a claimant to have felt her dignity to be violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt."*

22…We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…"

121. A finding that it is not objectively reasonable to regard the conduct as harassing is fatal to a complaint of harassment. That point may not be crystal clear on the face of s.26 Equality Act 2010 but see the *obita dicta* of Underhill LJ in ***Pemberton v Inwood*** [2018] IRLR 557 at [88] and the ratio of ***Ahmed v The Cardinal Hume Academies***, unreported EAT Appeal No. UKEAT/0196/18/RN in which Choudhury J held that ***Pemberton*** indeed correctly stated the law [39].

122. In considering whether a remark that is said to amount to harassment is conduct related to the protected characteristic of disability, the Tribunal has to ask itself whether, objectively, the remark relates to the Claimant's disability. The knowledge or perception by the person said to have made the remark of the alleged victim's disability is relevant to the question of whether the conduct relates to the protected characteristic but is not in any way conclusive. The Tribunal should look at the evidence in the round (per HHJ Richardson in ***Hartley v Foreign and Commonwealth Office Services*** UKEAT/0033/15/LA at [24-2].)

123. In considering whether the conduct is related to the protected characteristic, the Tribunal must focus on the conduct of the individuals concerned and ask whether their conduct is related to the protected characteristic (***Unite the Union v Nailard*** [2018] IRLR 730 at [80]).

124. In ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam*** [2020] IRLR 495 HHJ Auerbach gave further guidance:

[21] Thirdly, although in many cases, the characteristic relied upon will be possessed by the complainant, this is not a necessary ingredient. The conduct must merely be found (properly) to relate to the characteristic itself. The most obvious example would be a case in which explicit language is used, which is intrinsically and overtly related to the characteristic relied upon. Fourthly, whether or not the conduct is related to the characteristic in question, is a matter for the appreciation of the Tribunal, making a finding of fact drawing on all the evidence before it and its other findings of fact. The fact, if fact it be, in the given case that the complainant considers that the conduct related to that characteristic is not determinative.

[24] However, as the passages in Nailard that we have cited make clear, the broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. Ms Millns confirmed in the course of oral argument that that proposition of law was not in dispute.

[25] Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be.

Victimisation

125. Section 27 EQA 2010 provides as follows:

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

126. In ***Chief Constable of the West Yorkshire Police v Khan*** [2001] IRLR 830 Lord Nicholls said *"The primary object of the victimisation provisions is to ensure that persons are not penalised or prejudiced because they have taken steps to exercise their statutory rights or are intending to do so."*

127. In ***Aziz v Trinity Street Taxis Ltd*** [1988] IRLR 204, at 29, dealing with the Race Relations Act equivalent to section 27(2)(c) EQA 2010:

"An act can, in our judgment, properly be said to be done 'by reference to the Act' [the Race Relations Act] if it is done by reference to the race relations legislation in the broad sense, even though the doer does not focus his mind specifically on any provision of the Act."

128. The putative discriminator has to have knowledge of the protected act. See, for example, ***South London Healthcare NHS Trust v Al-Rubeyi*** at UKEAT/0269/09/SM.

129. An unjustified sense of grievance cannot amount to a detriment: ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] IRLR 285).

Constructive dismissal

130. An employer must not discriminate against an employee by dismissing the employee, and dismissal for these purposes includes a termination of employment by an act of giving notice in circumstances such that the employee is entitled, because of the employer's conduct, to terminate the employment without notice (section 39(1) and (7) EQA 2010).

131. The essential elements of constructive dismissal were identified in ***Western Excavating v Sharp*** [1978] IRLR 27 as follows:

> *"There must be a breach of contract by the employer. The breach must be sufficiently important to justify the employee resigning. The employee must resign in response to the breach. The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach in terms to vary the contract".*

132. It is an implied term of the contract of employment that: *"The employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee"* (***Malik v BCCI*** [1997] IRLR 462).

133. It is for the tribunal to decide whether or not a breach of contract is sufficiently serious to amount to a repudiatory breach. However, a breach of the implied term of trust and confidence is inevitably a repudiatory breach of contract. Whether conduct is sufficiently serious to amount to a breach of the implied term is a matter for the employment tribunal to determine having heard all the evidence and considered all the circumstances: ***Morrow v Safeway Stores*** [2002] IRLR 9.

134. In ***Gogay v Hertfordshire County Council*** [2000] IRLR 703 upon the analysis of Hale LJ (as she was)**:**

    134.1. The test for a breach of the implied term is a severe one [55].
    134.2. Even if the employer acts in a way that is calculated or likely to undermine trust and confidence there is no breach of the implied term if the employer has reasonable and proper cause for what is done [53].

135. The implied term can be breached by a single act by the employer or by the combination of two or more acts: ***Lewis v Motorworld Garages Ltd*** [1985] IRLR 465.

136. Breach of the implied term must be judged objectively not subjectively. The question is not whether, from either party's subjective point of view, trust and confidence has been destroyed or seriously undermined, but whether objectively it has been. See e.g. ***Leeds Dental Team v Rose*** [2014] IRLR [25] and the authorities cited therein.

137. In ***Amnesty International v Ahmed*** [2009] IRLR 884, Underhill J gave importance guidance on the relationship between discrimination and constructive dismissal:

> *…The provisions of the various anti-discrimination statutes and regulations constitute self-contained regimes, and in our view it is wrong in principle to treat the question whether an employer has acted in breach of those provisions as determinative of the different question of whether he has committed a repudiatory breach of contract. Of course in many if not most cases conduct which is proscribed under the anti-discrimination legislation will be of such a character that it will also give rise to a breach of the trust and confidence term; but it will not automatically be so. The question which the tribunal must assess in each case is whether the actual conduct*

in question, irrespective of whether it constitutes unlawful discrimination, is a breach of the term defined in Malik*. Our view on this point is consistent with that expressed in two recent decisions of this tribunal which consider whether an employee is entitled to claim constructive dismissal in response to breaches by the employer of his duty under the Disability Discrimination Act 1995: see* Chief Constable of Avon & Somerset Constabulary v Dolan *(UKEAT/0522/07) [2008] All ER (D) 309 (Apr), per Judge Clark at paragraph 41, and* Shaw v CCL Ltd *[2008] IRLR 284, per Judge McMullen QC at paragraph 18.*

138. The employee must resign in response to the breach. Where there are multiple reasons for the resignation the breach must play a part in the resignation. It is not necessary for it to be 'the effective cause'. See e.g. ***Wright v North Ayrshire Council*** [2014] ICR 77 [18].

Burden of proof and inferences

139. ***Igen v Wong*** [2005] IRLR 258 and ***Madarassy v Nomura International PLC*** [2007] ICR 867 are the leading cases on the burden of proof. These cases, the tribunal accepts and directs itself, authoritatively explain how the burden of proof operates. The tribunal considered in particular the annexe to the judgment in ***Igen*** which spells the matter out and was endorsed by the Court of Appeal again in ***Madarassy***. In ***Madarassy*** the Court of Appeal emphasised that a difference of treatment and a difference of protected characteristic status is not enough to shift burden of proof of itself. It gives rise to a mere possibility of discrimination.

140. In ***Deman v Commission for Equality and Human Rights Commission & others*** [2010] EWCA Civ 1279, Sedley LJ (giving the judgment of the court) said this:

> *We agree with both counsel that the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.*

141. Thus where there is a difference of treatment and a difference of status it does not take much more to shift the burden of proof.

142. In a complaint of failure to make reasonable adjustments the Claimant has the burden of proving that the PCP, physical feature or failure to provide auxiliary aid, would put him at a substantial disadvantage compared to others who are not disabled. The burden does not shift unless there is evidence of some apparently reasonable adjustment which could have been made. This does not necessarily mean providing the detailed adjustment but at the least requires the broad nature of the adjustment to be clear enough for the Respondent to understand and engage with it. See ***Project Management Institute v Latif*** [2007] IRLR 579.

143. However, discrimination cases do not always turn on the burden of proof provisions. In ***Hewage v Grampian*** [2012] IRLR 870, Lord Hope said this:

> "*It is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other*".

144. The tribunal reminds itself that direct evidence of discrimination is rare and that discrimination is often sub-conscious. For this and other reasons establishing discrimination is usually difficult and tribunals should be prepared, where appropriate, to draw inferences of discrimination from the surrounding circumstances or any other appropriate matter. These points are made, in among other places, ***Amnesty International v Ahmed*** [2009] ICR 1450.

145. In ***Anya v University of Oxford*** [2001] ICR 847 the Court of Appeal emphasised that, in a discrimination case, the employee is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of the causative link between the protected characteristics on which he relies and the discriminatory acts of which he complains. The Tribunal must avoid adopting a 'fragmentary approach' and must consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts. The Tribunal should consider indicators from a time before or after the particular decision which may demonstrate that an ostensibly fair-minded decision was, or equally was not, affected by unlawful factors.

Discussion and conclusions

Reasonable adjustments

Claim 1: failure to make adjustments - auxiliary aids: chair and desk (p121)

146. The auxiliary aids the Claimant says should have been provided are a chair with adequate adjustable lumbar support and a sit/stand desk.

147. In order to properly analyse this claim it is vital to identify the "substantial disadvantage" that the Claimant relies upon. He relies upon a relapse of disc herniation. This is an injury he had historically suffered from but that was repaired with spinal surgery in 2017. His case is that the failure to provide auxiliary aids put him at a substantial disadvantage by causing a recurrence of disc herniation on 23 July 2019. The Claimant does *not* rely upon transitory pain whilst sitting at an uncomfortable work station.

148. The Respondent placed significant weight on this identification of the substantial disadvantage in its skeleton argument and oral closing submissions for reasons that will be clear.

149. As the identification of the substantial disadvantage is a vital matter, the Employment Judge checked with the Claimant's representative during the Claimant's closing submissions whether the above characterisation of the substantial disadvantage relied upon was indeed correct. He also explained why it mattered: because, on the face of it at least Professor Klezel's opinion was that the recurrence of the Claimant's disc herniation was quite unlikely to be related to any specific chair requirement. The Claimant's representative confirmed that the substantial disadvantage relied upon was indeed the relapse of disc herniation.

150. In the circumstances of this case, we think we must take the substantial disadvantage as it is thus put (and avoid the temptation to define it in a different way that might make it easier for the Claimant to prove a substantial disadvantage). That is because there has been extensive case management prior to the hearing as to the definition of the claims culminating in the Final Tables, the Respondent has accordingly relied upon the issues as defined in the Final Tables in defending the claims and care has been taken at the hearing itself to discuss how the substantial disadvantage is put.

151. On the balance of the evidence the tribunal concludes that the Claimant was not/would not have been, placed at the substantial disadvantage complained of by the non-provision of the auxiliary aids in issue.

152. In his evidence and submissions the Claimant placed all of the emphasis on the lack of an appropriate chair and this is where the focus of the case therefore naturally was. He made no more than passing reference to the possible need for a sit/stand desk.

153. As regards the chair, we acknowledge and take into account the history of back problems the Claimant had and the OH evidence about that, including a recommendation for a WSA which might identify a need for an ergonomic chair.

154. However, we consider that Professor Klezl's opinion is the best evidence before us. He explains that the Claimant has a congenitally narrower spinal canal from L3 down to the sacrum and diffuse disc degeneration from L3 to S1. He further explains that recurrence of disc herniation is a frequent complication of disc surgery with a risk of 15 - 20%. He goes on to say "*the recurrent disc herniation was quite unlikely to be linked to a specific chair requirement…".*

155. The Claimant is aggrieved that Professor Klezl included that opinion in his letter. That is because he went to see Professor Klezl for treating purposes not medico-legal purposes. He only told Professor Klezl about the legal proceedings as a courtesy. Accordingly, only a small part of the consultation related to the claim and the workplace events that underly it. Further, in the consultation itself Professor Klezl suggested that he would not give an opinion on the claim. In the circumstances, we can understand why the Claimant feels aggrieved that Professor Klezl then offered an opinion; but the fact is that he did, the opinion is before us, is in evidence and we cannot ignore it.

156. Professor Klezl is a Consultant Orthopaedic and Spinal Surgeon. We find that very significant: he has the relevant expertise to opine on the relationship between spinal injury and chair requirements. It is clear that he was aware that the Claimant's essential complaint was that he had been at work and had not been given a suitable chair by his employer and that he (the Claimant) believed that this had caused a recurrence of his disc herniation. We think Professor Klezl knew enough about the matter, then, to offer an opinion and his opinion is clear. His letter also gives another explanation for the recurrence of the Claimant's disc herniation, namely the congenital features of the Claimant's spinal canal, disc degeneration and the known substantial risk of recurrence following disc surgery (15 – 20%).

157. On balance, we do not think that the Claimant was or would have been put at the substantial disadvantage complained of by the failure to provide a chair with adequate adjustable lumbar support.

158. We also do not accept, on the evidence in front of us, that the Claimant was or would have been put at the substantial disadvantage relied upon, by the absence of a sit-stand desk. It is right to acknowledge that both the Claimant and Occupational Health identified that he might benefit from a sit/stand desk. It is something the Occupational Health advice indicated a WSA would consider.

159. However, firstly, the Claimant was allowed to and did take frequent posture and micro-breaks to stand and stretch whenever he needed to. He was thus able to stand from time to time as required. Secondly, the Claimant did not complain about the desks in either of the DSE assessment forms he completed. This included a question "*Does your desk cause you any other problems"* to which he answered "*no*". It seems likely

that if the desk situation had been problematic he would have said so. Thirdly, in cross examination when it was put to the Claimant that the desks were not problematic he said "*when sat down, height was fine; but when working standing up they were a bit low. But generally by and large when sat down they were of a suitable height."* The impression from his evidence was that the desk situation was not perfect from his perspective but was not a significant issue. Fourthly, there is, simply, no cogent evidence that in circumstances in which the Claimant was able to take breaks from his work to stand and stretch, that the lack of a sit-stand desk would or did cause or contribute to a recurrence of his disc herniation.

160. More generally we find that while the occupational health evidence indicates that the Claimant might need an ergonomic chair and might need a sit/stand desk it does not say or suggest that the failure to provide the same would or could lead to a recurrence of the Claimant's disc herniation.

161. Overall then we do not accept that the non-provision of the auxiliary aids would (or did) put the Claimant at the substantial disadvantage relied upon.

162. We in any event consider that the Respondent did not know and could not reasonably be expected to have known that the failure to provide the auxiliary aids would put the Claimant at the substantial disadvantage in issue, namely, a recurrence of disc herniation.

163. We say that it did not know because having read the Occupational Health advice carefully we do not think that a recurrence of the Claimant's disc herniation was identified as one of the risks. On a fair reading the risk identified is essentially that the Claimant's ongoing back pain, which is characterised as being a quite low 2 – 3 out of 10 pain might be aggravated. However, that is distinct, we think from suffering a recurrence of disc herniation. We think this is a material distinction not just a nominal one. There is a real difference between making a moderate pain a bit worse on the one hand and causing the recurrence of a debilitating back injury on the other.

164. *If* it is the case that the lack of auxiliary aids would/did put the Claimant at the substantial disadvantage in issue, we do not think the Respondent *ought* reasonably to have known this either. It took all reasonable and appropriate steps to understand the workplace risks associated with the Claimant's back condition. There was thorough consultation with him in which he duly disclosed the details of his back problems. This led to two occupational health referrals. The Claimant gave the occupational health advisers a fair history of his back problem. The advisors duly reported and their reports did not in our view identify that the Claimant would be at risk of a recurrence of disc herniation if the said auxiliary aids were not provided.

165. In case we are wrong about all the foregoing we go on to consider whether the Respondent failed to make reasonable adjustments by not supplying the auxiliary aids in question.

166. We think it was entirely reasonable to use a WSA to decide what if any auxiliary aids were needed. The Occupational Health advice of 15 May 2019 was that a referral for a standard WSA should be completed "*on commencement*" of the Claimant's employment. The advice plainly therefore envisaged the Claimant commencing work, prior to the WSA being done and prior to any auxiliary aids being identified, approved, sourced, delivered, installed, the Claimant being trained in using them and thus them becoming operational. We think it was perfectly reasonable to take this approach given that is what OH advised and it was on the face of it rational advice.

167. As a matter of fact the OH advice of 15 May 2019 was not passed on to HMRC or if it was, it was not received. That is unimpressive. However, the fact is that HMRC's induction procedures were sufficiently robust that the Claimant's needs were in any event almost immediately picked up once he arrived at HMRC because, in effect, the screening procedures were repeated. As a result, a further referral to occupational health was made swiftly, the need for a WSA was identified swiftly, the referral was made swiftly and an attempt was made to fix an appointment on 24 July 2020.

168. The original OH advice was that the referral should be made on "*commencement of employment*". In terms of timeframe that expression is imprecise. However, in our experience it is perfectly normal for employee inductions to last three or four weeks and this is the sort of thing that needs to be done during that commencement period. In our view the referral, made within 16 days of the Claimant starting employment, fell within the parameters of what might reasonably be regarded as the commencement of the Claimant's employment. The triage and attempt to arrange the appointment then happened swiftly. In all the circumstances, those were reasonable timescales. The WSA did not happen because the Claimant went on sick leave. But there was no failure to take reasonable steps to provide them by that stage.

169. If we are wrong about that and the referral ought to have been made, say, in the first week, it is extremely improbable that auxiliary aids could or would have been in place by 23 July 2020. Using our experience and industrial common sense we think that the following is most optimistic timetable consistent with reality:

    169.1. week 1: referral and triage;
    169.2. week 2: arranging appointment for WSA and WSA itself;
    169.3. week 3: WSA report. Given the Claimant's back condition, we think it is indeed likely that it would have recommended a specialist ergonomic chair for him and perhaps a sit/stand desk;
    169.4. week 4: management consideration of report; requests made to purchasing department and auxiliary aids ordered;
    169.5. week 5: delivery of auxiliary aids;
    169.6. week 6: installation of auxiliary aids and training of the Claimant.

170. We consider even that timetable to be improbably optimistic and it is our collective experience that auxiliary aids, such as ergonomic chairs and sit/stand desks, usually take weeks rather than days to arrive. Thus, even if it is right that the Respondent ought to have moved more swiftly than it did in accordance with the above timetable, we consider that there is no realistic prospect that auxiliary aids could have been in place by 23 July 2019. Thus for those reasons also, as at 23 July 2019, the material date, there had been no failure to make reasonable adjustments.

Claim 2: reasonable adjustments and absence management (p122-123)

171. The PCP relied upon is the Respondent's absence management policy. The Respondent has an absence management policy that is specific to probationers and this is what was applied to the Claimant. We accept it was a PCP. The policy is set out in the documents HR15002 and HR15008.

172. HR15002 says this: "*For permanent staff on continuous sickness absence, the manager would hold an informal review after 14 consecutive calendar days' absence and a formal review at 28 days. Treat probationers proportionately by taking account of the length of their service when considering when to address their sickness absence so that they are not treated less favourably than others. For example, if the probationer is on continuous absence during the first six months of service, you should consider*

inviting them to an informal review once they've been absent for 7 consecutive calendar days and a formal review meeting at 14 days to discuss the matter…"

173. HR15008 provides as follows:

    173.1. *If the probationer has been or is likely to be absent for more than 7 days, you must… ensure that effective keeping in touch arrangements are in place…*

    173.2. *A probationer's attendance is giving you cause for concern but hasn't reached the trigger point: … There can be a number of reasons for poor attendance and it is your responsibility, as a manager, to explore these fully with the probationer through informal discussions… Arrange an informal meeting with the probationer to discuss your concerns regarding their attendance.*

    173.3. The trigger point for a formal review meeting is set at 8 working days absence or 4 separate spells.

174. The Claimant contends that the application of these policies put him at a substantial disadvantage compared to others who are not disabled in that applying the policy caused him mental distress and necessitated his resignation. We accept that the absence management did cause him mental distress and that this was related to his disability in that his back pain was severe and was heightening his emotions. This did go beyond the distress that other employees who were not disabled would be likely to experience if invited to such meetings.

175. We do not accept that the absence management in any way necessitated the Claimant's resignation. He formed the view that absence management was being used as a way of managing him out of the business. However, we do not agree nor do we agree there was a reasonable basis for that view. It was being used to try and review his absence. The prime objective was actually to explore what could be done to get the Claimant to return to work. There was no pre-conceived plan that absence management would be used to manage the Claimant out of the business.

176. As we understand it, the Claimant's case is that a reasonable adjustment would have been to amend the trigger points so as to delay or halt the onset of absence management. The Claimant correctly points out that the Respondent's policy gives managers a discretion to do this including in disability cases.

177. The pleaded complaint in the final table relates to delaying/halting *formal* absence management. The Claimant's skeleton argument however focuses on delaying/halting *informal* absence management. For the sake of completeness we will deal with both. Whilst the pleaded case is all that is actually before the tribunal for the sake of completeness we deal with both.

178. We do not agree that the adjustments claimed are ones the Respondent ought reasonably to have made:

    178.1. The Claimant's sickness absence commenced on 24 July 2020.
    178.2. On 30 July 2020 he had a telephone call with Ms Thomas. The Claimant is of the view that this was an acceleration of the policy because he had not been absent for more than 7 days and it was the 7th day of absence. On a very literal interpretation of HR15002 that is true. However, it is trivial given the nature of the telephone call that followed on 30 July 2020 which was supportive not punitive. Further, the very literal interpretation of that policy is not the right one. The actual principle in play is that probationers should be treated proportionately

and the example of contacting the probationer after 7 days absence is just an example of proportionate treatment. It does not preclude contact on the 7th day where that is proportionate (and it was here). In any event, there is a written policy justification for the telephone contact namely the terms of HR150008. It was clear that the Claimant's absence was likely to last more than 7 days (he was signed off until 4 August 2020) and there was clear reason to be concerned about his absence. So it was a good idea to telephone him to keep in touch and explore his absence.

178.3. In any event, whether there was an acceleration or not, we do not think that delaying or abandoning the telephone call was a step that the Respondent ought reasonably to have taken. The written correspondence with Mr Taxworth-Dagless of 24 – 26 July 2019 had become tense and a somewhat combative on the Claimant's side and it was an excellent idea to have a sympathetic telephone call to just speak to the Claimant, find out what was going on and offer a supportive ear. That is exactly what Ms Thomas attempted.

178.4. The Claimant points out that in his email of 26 July 2019 to Mr Taxworth-Dagless he said that all being well he would arrange a time for a telephone call on Monday. He says that all was not well, he did not arrange a time and therefore he should not have been called. We do not accept that. Firstly, that was correspondence with Mr Taxworth-Dagless and this was a call from Ms Thomas. We do not accept that there was a red flag in the Claimant's correspondence banning all telephone contact the following week from all employees of the Respondent. Ms Thomas had previously spoken with the Claimant and he had shared his back issues with her on his first day. Secondly, Ms Thomas left the Claimant a voicemail. He chose to call her back; if he was so opposed to speaking to her, he could have sent an email explaining that he was not willing to talk to her. Thirdly, Ms Thomas approached the call sensitively and sympathetically.

178.5. The Claimant also relies on the fact that Ms Thomas, in the telephone call, appeared to think that the 30 July 2020 was his 8th day of absence whereas it was his 7th. We see no significance in that. The call was appropriate regardless of whether it was the 7th or 8th day of absence. Given that this was an informal call this counting error on Ms Thomas' part was trivial.

179. The next manifestation of the absence management procedure was that on 2 August 2019 when Mr Taxworth-Dagless emailed the Claimant and invited him to a formal sickness absence review meeting on 7 August 2018. The attached letter was dated 1 August 2019. The Claimant complains that this was an acceleration of the policy because the letter was dated 1 August 2019. However, we think the important thing is the date of the proposed meeting itself. That was 7 August 2018, which would be the 14th day of absence. HR15002 states "*formal review meeting at 14 days to discuss the matter [the absence]".*

180. In any event, we do not think inviting the Claimant to this formal review meeting was a step that ought reasonably to have been deferred. It should be recalled, of course, that inviting the Claimant to the meeting was as far as things got because, through his trade union, he declined to attend. The meeting was then, indeed, deferred. It was, in our view, perfectly good management practice to attempt a formal review meeting with the Claimant at this time. He had been absent for two weeks and the informal absence management call had been cause for concern, showing that his negative thoughts were spiralling.

181. On 15 August 2019, Mr Taxworth-Dagless emailed the Claimant attaching a letter and inviting him to a rescheduled formal review meeting on 23 August 2019. Once again

we do not think that the Respondent ought reasonably to have deferred or halted the very basic efforts it was making to manage the Claimant's absence:

181.1. The Claimant had been absence for a long time now without any formal review. The informal review with Ms Thomas had been cause for concern.
181.2. It was a really good idea to have a meeting with the Claimant to discuss what might be done to support him back to work and that was the prime purpose of this meeting.
181.3. Plenty of notice of the meeting was given particularly in circumstances in which the preceding meeting had been cancelled at the request of the Claimant and his trade union.
181.4. The Claimant and his trade union left it late to attempt to cancel this rescheduled meeting.
181.5. The meeting clashed with a doctor's appointment but this was an appointment to, in the Claimant's word, "*secure a fitnote*". It was perfectly reasonable to prioritise meeting with the Claimant over securing a further fit note.
181.6. The Claimant's trade union representative said that she was unable to attend. However, one of the main reasons the previous meeting had been cancelled was because she could not attend and she had not proposed an alternative date.
181.7. The Claimant objected to Mr Taxworth-Dagless being the chair of the meeting. This does not appear to feature in Claim 2. If we have misunderstood that we in any event explain elsewhere in these reasons why we consider it was appropriate and reasonable for Mr Taxworth-Dagless to chair this meeting and that reasoning would apply equally here.

Direct discrimination

Claim 3: Direct discrimination and events of 23 July 2019 (p102-6)

182. The complaint here is Ms Leathers' treatment of the Claimant on 23 July 2019. He complains in particularly that she shouted at him the words "*Will you stop clicking that bloody chair! For God's sake, you're getting on my nerves"* and the words "*Well go and get another chair then".*

183. We have made detailed findings of fact about the events of 23 July 2019. Ms Leathers did say words to the effect of those alleged but not with the volume and hostility alleged.

184. We are fully satisfied that the reason why Ms Leathers said the first set of words was not because of the Claimant's disability at all (which she did not even know about), but because he was making a repetitive noise when trying to adjust his chair that she found irritating. We find this far the most plausible explanation and see no basis for inferring a discriminatory reason.

185. There were two reasons why Ms Leathers said the second set of words. Firstly because she was still irritated by the chair noise and did not want it to resume. Secondly, because the Claimant was evidently having problems with his chair and getting another chair was an obvious potential solution. Again, she had no idea that the Claimant had a disability or a history of serious back problems and she did not treat the claimant as she did because of disability.

186. We have no doubt that if another employee in the room, who was not disabled, had been making the same repetitive noise Ms Leathers would have treated her/him in just the same way.

Claim 4: direct discrimination: unfair grievance investigation by Mr Taxworth-Dagless (p106-112)

187. The essence of the complaint here is that Mr Taxworth-Dagless did not investigate the Claimant's complaints about the events of 23 July 2019 fairly and this was because of the Claimant's disability. It was clear in the course of the trial, including from the Claimant's skeleton argument, that by 'fairly' he meant 'as a formal grievance'.

188. It is true that the Mr Taxworth-Dagless did not approach the complaints that the Claimant raised as if they were grievances to be dealt with at the formal stage of the grievance procedure. However we are entirely satisfied that this was not in any way because of the Claimant's disability. We are also satisfied that a hypothetical comparator, another employee who was not disabled but who raised complaints in the same way and terms that the Claimant did, would have been treated the same.

189. The short answer to the question *'what was the reason why Mr Taxworth-Dagless acted as he did?'* is that he did not understand the Claimant to have invoked the formal grievance procedure and did understand it to be applicable. This had nothing to do with the Claimant's disability.

190. The Claimant considers that he raised a formal grievance by his email of 25 July 2019 in which he provided the context (as requested) for his request for the grievance policy. He certainly gave a short written account of what had happened on 23 July 2019 in that email and made it very clear that he was unhappy about it.

191. The Claimant points out that the content of his complaint was such that it passed the '*Grievance Test'* (p313-4). That is true, however that simply means it was a matter that was capable of forming the basis of a formal grievance. The issue then is whether the Claimant was invoking the formal grievance procedure (i.e., making clear he wanted this dealt with as a formal grievance), and most importantly of all, whether Mr Taxworth-Dagless understood this to be what he was doing.

192. It is true that, under the terms of the grievance procedure, not much formality is required for the employee to raise a formal grievance (see p293-4). For instance, there is no particular form that must be used. That said, the Claimant's correspondence did not meet such formalities as there were since it did not state what outcome was sought. That is quite a technical point. A more important and general point is that it was simply not clear from the Claimant's correspondence that he was invoking the formal grievance procedure or that he wanted the employer to treat his complaints under the formal grievance procedure:

192.1. The Claimant made clear in his email of 25 July 2019, that the reason he wanted a copy of the grievance procedure was so that he could decide for himself what course of action it was appropriate for him to take. In the circumstances, it did not appear that the Claimant was invoking the formal grievance procedure in that email or generally in the email exchanges with Mr Taxworth-Dagless on 25 and 26 July 2019. Rather, the appearance was that the Claimant was angry about what had happened and was reflecting on how best to proceed. He was not sure whether or not he wanted to raise a formal grievance and was considering his position. We note that the Grievance Policy itself does not require that in every instance a complaint of bully, harassment and discrimination be dealt with under the formal process. See the answer to Q26 *Can Bullying, Harassment and Discrimination (BHD) complaints be dealt with informally?* In sum, the answer is that BHD complaints can be dealt with

informally but must always be taken serious. The way they should be dealt with depends in part on how they are raised (p307).

192.2. The Claimant also considers that he raised a grievance in his telephone conversation with Ms Thomas in which he complained about the incident with Ms Leathers. In one sense that is true: he certainly complained. However, he did not in that telephone call indicate that he wanted his complaint to be dealt with formally and indeed one of the main things exercising him in that call was that he had not yet been sent the grievance policy. The action point from the call was to send the Claimant the grievance policy documentation (among other things) for him to consider his position. In short, we accept that neither Ms Thomas nor Mr Taxworth-Dagless understood the Claimant to be invoking the formal grievance procedure on this call. Again the appearance was that he wanted the policy to decide what to do.

192.3. The Claimant then joined the PCS and involved them in the dispute. The steps he and they decided to take were to go down the HRACC1 and the VI01 routes. These forms are certainly formal, and are a way of raising an issue formally. But the formal processes they raise are processes all of their own rather than the formal grievance procedure. So again it was not clear that in completing these forms the Claimant wanted or was expecting the formal grievance procedure to be invoked; quite the reverse he was activating other processes.

192.4. In any event, Mr Taxworth-Dagless did deal with each of those two forms formally. When dealing with form HRACC1 he conducted an investigation. This involved considering what the Claimant had said on the form and gathering evidence as set out above before reaching the conclusions that he did. Certainly this was not the only way that the matter could have been investigated and a more or less thorough investigation might have been done. However, he did not approach the investigation in the way that he did because of the Claimant's disability. We are satisfied that in completing this investigation Mr Taxworth-Dagless was simply doing his best. He was entirely inexperienced in such matters and that is why the investigation was of a moderate standard rather than of high quality. Two further matters are worth commenting on this point:

192.4.1. The Claimant criticises Mr Taxworth-Dagless for failing to obtain the Teams messages. We think he could have done more to obtain them but we accept that he did try to get them from Mr Weston. He accepted Mr Weston's account that he was unable to provide them. Mr Taxworth-Dagless did not take the matter further because he was a novice investigator. It was certainly not because of disability.

192.4.2. Mr Taxworth-Dagless investigated whether the pain pen was a controlled substance in the course of this investigation. We think that is explained simply by the fact that he thought it might be a controlled substance and, if it was, that would be a serous issue to deal with. So he considered the point. The pen was not a controlled substance and that was the end of that.

192.5. Mr Taxworth-Dagless also dealt with form VI01. We accept that he did not understand it to be applicable to the circumstances of the Claimant's case and that, not disability, is why he did not pursue it. The form is titled *HR VI01: Abuse, violence or threats to staff*. We accept that Mr Taxworth-Dagless did not believe the incidents of 23 July 2019 to fall into any of those categories. We accept this because we found his evidence credible, because we accept it is what he was advised by HR and because objectively it is a stretch to categorise the events of 23 July 2019 as abuse, violence or threats to staff.

193. Overall then, in our view the reason why Mr Taxworth-Dagless did not follow the formal grievance process was because, with good reason, he did not understand the formal grievance process to have been invoked or to be applicable. He would have treated an employee who was not disabled but had like complaints raised in a like way, in exactly the same way.

Discrimination arising from disability

Claim 5: Ms Leather's conduct in incident of 23 July 2019 (p113-114)

194. We consider that in saying to the Claimant, "*Will you stop clicking that bloody chair! For God's sake, you're getting on my nerves!"* and irritably saying the words "*Well go and get another chair then"* Ms Leathers did treat the Claimant unfavourably.

195. As set out above, the threshold for what counts as unfavourable treatment is relatively low. The threshold is crossed because Ms Leathers was quite rude to the Claimant and this was in front of others. The Claimant found the treatment to be unfavourable and objectively it was. It was apt to cause some annoyance and embarrassment.

196. We consider that the treatment was because of something arising in consequence of disability and we reject the Respondent's argument that there are 'too many links in the chain'. The chain of is short. The Claimant was trying to adjust his chair because he had back pain. Back pain was a feature of his disability. The chair made a repetitive noise that irritated Ms Leathers and caused her to speak to him as she did.

197. We accept that there was a legitimate aim for the treatment: to maintain a work environment without a distracting noise. However, we do not accept that the treatment was a proportionate way of achieving the aim. It was not reasonably necessary to be even a bit rude to the Claimant to bring an end to the noise. Ms Leathers could simply have politely and discreetly asked the Claimant to stop making the noise with the chair. This would not have cost anything material by way of management time or effort and would not have cost anything at all by way of money. The aim could easily and more effectively have been achieved whilst avoiding the discriminatory affect of hurting the Claimant's feelings.

198. The Respondent conceded that the knowledge requirement of s.15(2) EqA was met. It's position was that although Ms Leathers did not know and there was no reason why she ought reasonably to have known that the Claimant was disabled, the employer knew that the Claimant was disabled and that was sufficient for these purposes. Mr Weiss made this concession in its skeleton argument and confirmed it in discussion with the Employment Judge.

Claim 6: failure to call first aider (p114-5)

199. The unfavourable treatment complained of is that Ms Leathers did not call a first aider. It is true that Ms Leathers did not do this. However, this was not unfavourable treatment. We think it is highly unlikely that there is anything a first aider could have done to assist the Claimant. Indeed, when he was pressed on this point in cross-examination the Claimant himself was unclear on what a first aider could have done by way of first aid.

200. The Claimant may also be complaining her that Ms Leathers, "*failed to show any regard or provide any assistance in any fashion in response to the Claimant's verbal complaint of being in pain"*: We do not agree that Ms Leathers treated the Claimant in this way. She made the practical suggestion that the Claimant try a different chair and

she also asked the Claimant whether or not he had had a DSE assessment. The treatment complained of is not made out.

201. The treatment complained of was not in either case because of something arising in consequence of disability:

201.1. The reason Ms Leathers did not call a first aider were firstly that she herself was a first aider so there was no reason to call one and secondly she did not perceive any need for or role for first aid in the circumstances.

201.2. In terms of Ms Leathers not showing any regard or providing any assistance in any fashion in response to the Claimant's verbal complain of being in pain, we reject that allegation on the facts. But more generally, the reason that Ms Leathers responded in the way that she did was because she did not perceive any need for any further or deeper assistance than that which she offered. It did not appear to her to be either a first aid situation or an emergency of the sort that might require obtaining medical assistance for the Claimant.

Claim 7: failure to report incident (p115-6)

202. The unfavourable treatment complained of is that Ms Leathers did not report a workplace incident following the events of 23 July 2019 on form HRACC1 or at all. This is factually true but we do not accept it was unfavourable treatment. The general scheme of the HRACC1 form is for the employee who was involved in the incident to complete the first part of it and then send it to their manager for investigation. This is in fact what happened in this case. It was always open to the Claimant to report the incident (as he did). No doubt a manager *could* initiate the HRACC1 process by asking the employee to complete the first section. The fact Ms Leathers did not do that was in no way unfavourable treatment.

203. In any event the treatment was not because of something arising in consequence of disability. The reason Ms Leathers did not report the incident is that she did not perceive that there was anything to report. She did not perceive there to have been a workplace accident or near miss or anything of that kind. Of course she was aware that the Claimant experienced back pain while at work, but she did not understand that to be the result of a workplace incident or accident.

204. In his skeleton argument, Mr Doherty seeks to broaden the allegation that there was an unlawful failure to complete HRACC1 to impugn Mr Taxworth-Dagless and Mr Doddy. We do not accept that this is the way the claim is put in the Final Tables and therefore do not accept these claims are before us.

205. In any event we do not accept that the Claimant was unfavourably treated by either Mr Taxworth-Dagless or Mr Doddy in not completing form HRACC1. It was open to the Claimant to complete that form at any time if that is what he wanted and that is in fact what he did.

206. Further, we do not accept the suggestion at paragraph 66 of the skeleton argument that if Mr Taxworth-Dagless or Mr Doddy had completed HRACC1 this would have served to begin formalising the Claimants grievance and thereby remove his anxiety. The HRACC1 process and the grievance process are distinct processes. If either Mr Taxworth-Dagless or Mr Doddy had got the ball rolling in terms of HRACC1, that would simply have involved asking the Claimant to complete the first part of it. There is no good reason to think that this would have caused either of them to also invoke the formal grievance process.

207. There is also no reason to think that Mr Taxworth-Dagless's and Mr Doddy's 'failure' to complete that form was because of something arising in consequence of disability. In Mr Doddy's case, the matter was explored in cross examination and in essence his answer was that contemporaneously his understanding was that the Claimant had suffered from back pain which began at work. He did not understand there to have been an accident or similar and did not understand the form HRACC1 therefore to be applicable. We accept that evidence. In Mr Taxworth-Dagless's case the matter was not explored in cross-examination and, since it was not one of the agreed issues, it was not otherwise explored. However, there is no basis to think Mr Taxworth-Dagless's reason for not initiating the form HRACC1 process himself was because of something arising in consequence of the Claimant's disability.

Claim 8: unfair grievance investigation (p116)

208. The unfavourable treatment complained of here is that Mr Taxworth-Dagless showed no sign of willingness to address and resolve the Claimant's grievance.

209. We do not accept this. Mr Taxworth-Dagless gave several indications of willingness to take steps to resolve the complaint that the Claimant had about the events of 23 July 2019:

209.1. by his email of 24 July 2019, he asked for context of the Claimant's request for the grievance policy and indicated that "we aim to resolve issues informally first before exploring formal options";
209.2. he investigated the Claimant's HRACC1 form;
209.3. he considered the VI01 form but on advice considered it was inappropriate;
209.4. he told the Claimant in his letter of 16 August 2019 that he thought the matter should be approached under the Grievance Procedure, in the first instance informally. He also indicated that mediation could be arranged.

210. In any event we do not think that the way in which Mr Taxworth-Dagless dealt with the Claimant's complaints arose in consequence of the Claimant's disability. Rather, Mr Taxworth-Dagless understood himself to be correctly following the Respondent's policies. He did not understand the Claimant to have invoked the formal grievance procedure and that is why he did not follow the formal grievance procedure. He investigated the HRACC1 to the best of his ability, which with respect was of a moderate standard. He did not pursue the VI01 because he understood on advice that it was not an appropriate process. None of his reasons were because of something arising in consequence of disability.

Claim 9: refusal to provide relevant documents (p118-9)

211. The pleaded complaint appears to relate to Mr Taxworth-Dagless failing to provide the Claimant with a complete copy of the grievance policy: the complaint is dated to 25 July 2019 and the narrative suggests this. Dealing then with the pleaded complaint:

211.1. It is true that Mr Taxworth-Dagless did not provide the Claimant with a complete copy of the grievance policy but rather only provided him with part of it. This certainly deeply upset the Claimant. While the Claimant's depth of feeling about this matter was completely out of proportion, a sense of minor annoyance was justified. We think it is very borderline but this just about crosses the threshold of unfavourable treatment.

212. The reason for this treatment however was not because of something arising in consequence of disability. Rather, it was a simple mistake on Mr Taxworth-Dagless's part. It was an understandable one. The complete grievance policy is huge (over 80 pages). It is split into about 15 different documents each with their own document code. Each document is accessed separately on the intranet by following a part specific hyperlink. Not all of the parts appear to be aimed at employees – they provide management guidance. So in reality the grievance policy is not a single document but a family of about 15 related documents.

213. In the Claimant's skeleton argument, the complaint is put differently and the failure to provide documents that is said to be s.15 EqA discrimination, relates to the documents requested in the Claimant's DSAR which was included in part of his letter of resignation. Again, this is not the pleaded case but we will deal with it for completeness.

214. There was quite a mixed response to the various data requests that the Claimant made which of itself is not surprising because the Claimant requested a diverse range of data. Dealing with the case as it is put in the skeleton argument:

214.1. *Failure to provide policy documents*: these documents were not provided by Mr Taxworth-Dagless. The Claimant accepts that they were not personal data and that they did not fall to be provided pursuant to a DSAR. He also accepts he was provided the documents when he made a subsequent Freedom of Information Act request. We do not think that Mr Taxworth-Dagless's refusal to provide the policy documents in response to the DSAR was unfavourable treatment. On any view they did not fall to be provided pursuant to the DSAR. Further, the Claimant was by this point a former employee so the employment relationship was no longer a reason to provide the documents.

214.2. *Failure to provide chat logs between Claimant and Mr Weston*: these documents were not provided by Mr Taxworth-Dagless. We think it is quite likely that if Mr Taxworth-Dagless had sought IT assistance they could have been. We think the Claimant had a legitimate interest in seeing the chat logs and the failure to provide them was unfavourable treatment.

214.3. *Failure to provide any of the Claimant's work emails*: none of these were provided. It seems inevitable that some of them would have contained personal data that the Claimant was entitled to. Given the timing of the Claimant's DSAR we think it was unfavourable treatment that these emails were not preserved and those that contained personal data sent to the Claimant (redacted as required).

215. None of the failures to supply documents were because of a matter arising in consequence of disability:

215.1. The reason that Mr Taxworth-Dagless did not provide policy documents was because he did not believe that the Claimant was entitled to them in response to a DSAR request.

215.2. The reason that Mr Taxworth-Dagless did not provide the chat logs is because he had been unable to obtain them and believed that they were no longer available. Mr Taxworth-Dagless's understanding and belief was that the messages were not stored centrally so he could not obtain them from a central source: this is what he was getting at in his letter of 17 September 2019 when he said *"the application you used to engage in this chat does not log chats".* He did not explain his point very well but we do not think he meant that Teams

never keeps any record of any chat. It would be so obvious to any Teams user that that is not right that we find it highly implausible that this is what Mr Taxworth-Dagless meant. Mr Taxworth-Dagless tried to get the messages from Mr Weston. Mr Weston told Mr Taxworth-Dagless that he was unable to export them from Teams. To be clear, we accept the documentary evidence adduced by the Claimant that indicates that it is in fact possible to export chats from Teams. However, we accept that Mr Weston told Mr Taxworth-Dagless that he was unable to export them and that Mr Taxworth-Dagless in turn accepted this. Mr Taxworth-Dagless therefore asked Mr Weston to send screenshots but Mr Weston reported to him that the messages were no longer there. It is unclear why the messages would no longer be there, but we accept that this is what Mr Weston reported to Mr Taxworth-Dagless and that Mr Taxworth-Dagless accepted this. Mr Taxworth-Dagless did not take the matter further because he thought he had taken such steps as he needed to try and obtain the documents and he was not experienced in these matters.

215.3. The work emails were not provided for two reasons: firstly, because the Claimant's email account was password protected and Mr Weston did not have the password. And secondly, because the Claimant's IT user account was withdrawn when his resignation was processed. Given that the Claimant had requested data in his letter of resignation, this state of affairs is unimpressive. However, we accept Mr Taxworth-Dagless's evidence that when he processed the Claimant's resignation he did not appreciate that it would have the effect of his IT account being withdrawn with the consequences that had for the data. Whilst we find the reasons that Mr Taxworth-Dagless did not provide the data to be unimpressive we also find that they were not because of something arising in consequence of disability.

Claim 10: failure to follow Absence Management Policy on 1 August 2019 (p119-120)

216. The Claimant's pleaded complaint (p119-120) is that Mr Taxworth-Dagless treated him unfavourably by accelerating the absence management policy on 1 August 2019 in order to quickly and quietly dismiss the Claimant. 1 August 2019 is the date of Mr Taxworth-Dagless's letter at p493 inviting the Claimant to a formal absence review meeting on 7 August 2019. For the reasons given above we do not accept that his was an acceleration of the absence management policy or if it was it was trivial. Nor do we accept that Mr Taxworth-Dagless had any agenda of manoeuvring the Claimant towards dismissal. It was a first formal absence review meeting that was intended to be supportive. We do not accept that this was unfavourable treatment.

217. In the Claimant's skeleton argument, the focus is on Ms Thomas' telephone call of 30 July 2019. It is said that Ms Thomas accelerated the absence management policy by contacting the Claimant on the 7th day rather than the 8th. In our view, even if this call happened a day earlier than envisaged in the absence management policy it was not unfavourable treatment. On the contrary, it was favourable treatment. Ms Thomas was nothing if not kind, caring, sympathetic and supportive on the call. She also made no issue of that fact that the Claimant had lost his composure on the call including by using the 'f' word. In any event we do not think that this was an acceleration of the policy. Firstly, it was in accordance with the terms of HR15008. Secondly, the example the Claimant relies upon in HR15002, in which the probationer is contacted after 7 days absence, is just an example of proportionate management of a probationer's absence. The actual principle the policy is getting at is that probationer's absence should be managed in a proportionate way. There was nothing disproportionate in this case in Ms Thomas contacting the Claimant when she did. A telephone call was an excellent idea and she conducted the call nicely. Finally, even if we are wrong in that analysis of the

policy and there was an acceleration it was a benign, indeed, trivial one (an informal call on the 7th day rather than after the 7th day) and did not amount to unfavourable treatment.

Harassment related to disability

Claim 11: Ms Leathers' conduct on 23 July 2019 (p129-130)

218. This complaint replicates claim 3 but puts the complaint as one of harassment rather than direct discrimination.

219. It is clear that Ms Leathers' conduct was unwanted.

220. Ms Leathers conduct did not have the purpose of creating a proscribed environment or violating the Claimant's dignity. The purpose of Ms Leathers' conduct, making the comment "*Will you stop clicking that bloody chair! For God's sake, you're getting on my nerves!"* was to try and stop the Claimant from making a noise which she found irritating and disturbing to the working environment. The purpose of Ms Leathers saying "*Well go and get another chair then"* was to suggest a solution to the problem the Claimant was having with his chair.

221. We found it difficult to discern a precise test for deciding whether or not conduct relates to a protected characteristic in cases in which it is less than obvious. Doing our best we concluded that the conduct was related to the Claimant's disability. We appreciate that Ms Leathers did not know the Claimant was disabled. However, while that is a relevant factor it is not determinative. We think the conduct was related to the Claimant's disability because the reason he was making noise with the chair - which is what prompted Ms Leathers' words - was disability related back pain.

222. We reached the view that the conduct did not have the effect of creating a proscribed environment nor the effect of violating the Claimant's dignity. We did so for the following reasons:

222.1. We had firmly in mind the fact that the Claimant's perception was one of a proscribed environment and a violation of dignity. However, we consider that his depth of feeling was, objectively, out of all proportion to what had actually happened.

222.2. We accept that the incident was not wholly benign and think it is material that the Claimant was a new starter, that peers were there and that Ms Leathers was more senior.

222.3. Ms Leathers was quite rude and certainly could have handled the situation more politely. However, it was apparent that she was speaking out of frustration and the cause of the frustration was clear. The Claimant had been making a repetitive noise with his chair having previously made a repetitive noise with the pain pen. We acknowledge that he was not doing this gratuitously but rather because he had back pain – so we are not criticising him. But the fact remains it was repetitive noise in an open plan office that was apt to be irritating to others concentrating on their work and thus liable to attract attention and draw comment.

222.4. It is significant that the focus of Ms Leathers' first comment was the noise the Claimant was making and it's impact on her. It was not a personal comment about the Claimant, his back or his disability. She was not in any respect insulting, mocking or pocking fun at him or anything of that nature.

222.5. It is significant that the second comment of 'go and get another chair then' was a good and practical idea. It could have been offered in a more polite way but fundamentally it was sensible.
222.6. This was a situation in which it was clear that any offence was unintended. It was a heat of the moment exchange.
222.7. Ms Leathers did not know that the Claimant was disabled or that he had a serious back condition.
222.8. Ms Leathers' conduct on 23 July 2019 was a one-off in the sense that neither she nor anyone else had spoken to the Claimant in that way before. Indeed the Claimant's prior experience of talking to colleagues about his back were positive. Nobody spoke to the Claimant in a similar way afterwards either.

223. Overall, we found it straightforward to say that Ms Leathers' conduct did not violate the Claimant's dignity and that it is not reasonable to regard it as having done so. Her conduct was simply not of that order nor close.

224. We found it more difficult to decide whether the conduct in question had created a proscribed environment because we think it was closer to the borderline. However, we remind ourselves that the word used is "environment" and that an environment is a state of affairs. It may be created by a single incident but the effects are of longer duration. In this case we do not think that the incident did create a proscribed environment. We think it was reasonable for there to be a transitory feeling of annoyance/embarrassment on the Claimant's part but not at anything like the level he in fact experienced. In all the circumstances it would not be reasonable to conclude the conduct complained of created a proscribed environment.

225. We are conscious that we have taken the view that Ms Leathers conduct did amount to unfavourable treatment but that it did not amount to a violation of dignity nor did it create a proscribed environment. We do not consider those divergent holdings to be inconsistent because, simply, the applicable statutory tests are different. We considered it important to apply the respective statutory tests wherever they took our conclusions.

Claim 12: absence management process (p133-137)

226. The first matter complained of here is that in response to the Claimant's first request for the grievance policy Mr Taxworth-Dagless told the Claimant by his email of 24 July 2019 at 5:10pm that the grievance policy was available on the intranet and that he would need to be on site to visit those pages. This was unwanted conduct.

227. The conduct did not relate to the Claimant's disability. It was a simple statement of fact about where the grievance procedure was stored (the intranet) and where one needed to be to access it. The Claimant imputes to Mr Taxworth-Dagless a malicious motive, namely to get the Claimant back to work and brush the incident of 23 July 2019 under the rug. We do not accept that. Nothing about Mr Taxworth-Dagless's correspondence suggested that. It was perfectly sensible to ask for some context, point out that there was a preference for trying to resolve grievances informally and point out where the grievance policy was kept. It is extremely implausible that this response was aimed at rushing the Claimant back to work or to brushing the incident under the rug. It is notable also that in very short order, following a further request from the Claimant and expression by him that he could not come into the office, Mr Taxworth-Dagless provided the Claimant with the most material parts of the grievance policy, namely the grievance procedure. All in all we do not think that Mr Taxworth-Dagless's conduct here was related to the Claimant's disability at all.

228. The Claimant perceives that Mr Taxworth-Dagless's conduct created a proscribed environment and violated his dignity. We take his perception into account but reach a different view. We consider that Mr Taxworth-Dagless's email to the Claimant, set in its context, was reasonable and indeed benign. It could not reasonably have the effect of creating a proscribed environment or violating dignity.

229. The next pieces of conduct relate to the Claimant being telephoned by Ms Thomas and the build up to that call.

    229.1. On 25 July 2019 Mr Taxworth-Dagless emailed the Claimant and asked to discuss his absence, but did not mention discussing the Claimant's grievance. We accept that in the Claimant's mind he had raised a grievance and Mr Taxworth-Dagless asking to speak to him without expressly mentioning the grievance was unwanted conduct.
    229.2. The Claimant declined the phone call by his email of 26 July 2019, asked for his contract of employment and some policy documents. He said he would review over the weekend (17 – 28 July 2019) and all being well would organise a telephone call after the weekend. Mr Taxworth-Dagless did not provide that documentation over the weekend. That omission was unwanted conduct.

230. The Claimant did not organise a telephone call after the weekend because he did not consider all was well having not received the requested documents. Ms Thomas then left a message for him and he felt obliged to call her back and thus had a telephone conversation he did not want to have. We accept that the Ms Thomas contacting the Claimant by telephone was unwanted conduct.

231. As to whether the conduct related to disability:

    231.1. Mr Taxworth-Dagless did not mention the Claimant's grievance when asking to have a call, because he did not understand the Claimant to have raised a grievance. This omission to mention the grievance was not related to disability.
    231.2. Mr Taxworth-Dagless's omission to send the contract and policy documentation over the weekend was not related to the Claimant's disability. The correspondence had become rather heated on the Claimant's part so Mr Taxworth-Dagless passed the matter to Ms Thomas to deal with as a more experienced manager (though in the event this did not help at all and he resumed dealing with the Claimant himself).
    231.3. Ms Thomas' call to the Claimant and the subsequent telephone conversation they had were related to disability. The purpose of these communications was primarily to discuss the Claimant's absence which was disability-related.

232. Although we acknowledge that the Claimant considers these matters created a proscribed environment or violated his dignity, we do not agree and it is not reasonable to so regard them:

    232.1. As regards Mr Taxworth-Dagless's conduct, it was benign. He wanted to have a call with the Claimant. That was part of the absence management policy. No doubt the Claimant could have raised the concern about Ms Leathers on the call if he wanted to (had the call gone ahead). When matters got fraught the matter was passed to a different manager. The Claimant's perception of it is very much out of proportion.

    232.2. As regards Ms Thomas: we repeat our analysis of the telephone message and telephone conversation. It was an appropriate call for Ms Thomas to

make. She then conducted the call in an appropriate way. Further she left a message for the Claimant and he chose to call her back. He did not have to, he could have sent an email declining to speak or asking to defer the conversation. The Claimant was left feeling ashamed of his conduct on the telephone call. However, that was his conduct not Ms Thomas' in circumstances in which, in our view, she did nothing wrong in telephoning him and is not to blame for the feelings of shame the Claimant felt. Indeed she did all she could to mitigate those feelings by being nice on the telephone call and then making no issue of the Claimant's conduct of it.

Claim 13: absence management meeting: Mr Doddy (p138-9)

233. Reading Claim 13 as it is set out at p138-9 together with the Claimant's skeleton argument it appears that the complaint here is the Respondent's requirement that the Claimant attend a formal absence management meeting and that the meeting be chaired by Mr Taxworth-Dagless. This implicates Mr Doddy since the Claimant asked Mr Doddy to postpone the meeting and for it to have a different chair. This was certainly unwanted conduct.

234. It was also conduct that related to disability. It was all about management of the Claimant's sickness absence which was disability related.

235. Although the Claimant perceived these matters to violate his dignity and to create a proscribed environment we do not agree. In all the circumstances and having regard to whether it is reasonable to so regard those matters we do not think they violate dignity or create a proscribed environment. In our view it was sensible and reasonable for this meeting to go ahead:

    235.1. It had previously been postponed because of, among other things, the unavailability of the Claimant's trade union representative and the Claimant's inability to attend;
    235.2. The absence had protracted for a significant period of time;
    235.3. A meeting to discuss the Claimant's absence was just what was needed. Matters were escalating out of all proportion in the Claimant's mind and a face to face meeting had a good prospect of pouring oil on troubled waters. The Claimant's view that there was a sort of conspiracy to manage him out of the business may well have been assuaged. His pre-sickness absence experiences of speaking with Mr Taxworth-Dagless face to face had been very positive.
    235.4. The meeting had been arranged on a decent period of notice and the attempt to cancel it was rather last minute.
    235.5. Although the Claimant's representative was unable to attend and that was far from ideal this was the second occasion on which that had happened;
    235.6. The meeting would mean missing a medical appointment but it was, on the Claimant's own account, in order to obtain a further fit note. That was not ideal either but it was reasonable to prioritise meeting with the Claimant over him obtaining a fit note.

236. We also think it was appropriate and reasonable for Mr Taxworth-Dagless to be the chair of the meeting:

    236.1. He was the Claimant's line manager;
    236.2. The Claimant's objections to him chairing the meeting were, in our view, understandable but not very weighty. Dealing the points made in the Claimant's skeleton argument at paragraph 93:

236.2.1. *"Ignored the context the Claimant initially provided in relation to his grievance against Ms Leathers"*: We do not agree. When the Claimant initially asked for the grievance policy Mr Taxworth-Dagless asked the Claimant for the context and indicated that generally efforts were made to resolve grievances informally. When the Claimant provided the context in his email of 25 July 2019, he indicated that he wanted to make up his mind for himself what action to take. It was reasonable for Mr Taxworth-Dagless to therefore wait and see what action the Claimant wished to take.

236.2.2. *Conducted an unfair grievance investigation into HRACC1*: we have analysed this above. The investigation was not a grievance investigation it was an HRACC1 investigation and it was conducted to a moderate standard, which was Mr Taxworth-Dagless's best effort at the time. This was a different process that Mr Taxworth-Dagless remained a suitable person to conduct.

236.2.3. Disregarded the Claimant's emotional and psychological wellbeing in ignoring the Claimant's request to not be contacted by telephone when he allowed Mrs Thomas to call the Claimant. As above we do not think it was clear that the Claimant was against being called by anyone from work. In any event, the call was objectively a good and supportive idea.

236.2.4. Had not considered any amendments to the absence management process. As above we think the steps taken in the absence management process were reasonable ones. Further, an amendment was made to the absence management process in that the first attempt at a formal meeting was deferred at the Claimant's request. If the Claimant had attended a formal absence management meeting, there could have been a discussion of what amendments if any were needed. Further, as below, Mr Doddy did consider amending the absence management process – he (reasonably) decided against doing so.

236.2.5. Wilfully ignored the disability component in the 16/07/19 OH report in his HRACC1 investigation. The HRACC1 does not refer to the fact that the OH report identifies the Claimant as probably being a disabled person within the meaning of the Equality Act 2010. However, the OH report itself is referred to as is the fact that the Claimant declared a pre-existing condition (which obviously is a refence to his back problem), as are the main recommendations of the OH report. In the circumstances we do not see that it was necessary to repeat the OH advisor's opinion on disability status nor that the omission to do so was significant. The Claimant places some weight on the fact that HRACC1 says that there is no mention of mental health in the fit notes or OH referral. That is true but is not significant either. The observation is there because the Claimant said in box 4 that his mental health had been affected and it was relevant to consider the medical evidence in relation to that.

236.2.6. Informed the Claimant the VIO1 form would not be progressed, after the business head, Cheryl Mason rejected the form. Mr Taxworth-Dagless decided not to progress the form further upon advice from HR that it was not applicable and upon Ms Mason agreeing that it should not be progressed. The Claimant was unhappy with that decision. The fact that Mr Taxworth-Dagless had made a decision the Claimant did not like did not disqualify him from managing the Claimant's sickness absence or in our view nor

make it unreasonable for him to do so. The Claimant's assumption is that Mr Taxworth-Dagless had a wider plan to manage him out of the business and that his decision on the VI01 form is evidence of that. We did not agree that Mr Taxworth-Dagless had such a plan or that such a plan was behind the decision on the VI01.

237. All in all we do not think it would be reasonable to consider that these matters violated dignity or created a proscribed environment.

238. We emphasise that in considering the harassment complaints as in considering all of the complaints we have considered the particular complaints not only on their own terms but also in the context of the evidence as a whole before reaching our conclusions.

Victimisation

Protected acts

239. The first alleged protected act is the Claimant's exchange with Ms Leathers. In essence the Claimant firstly said "*I'll just sit here in pain then*" in response to Ms Leather's comment about the chair noise, and secondly, in response to her question "*have you had Occupational Health referral and DSE assessment*" the Claimant said words to the effect that he had had occupational health but was waiting on a DSE assessment.

240. We do not think the Claimant did a protected act here. His first comment was simply a sarcastic response to Ms Leathers' remarks about the chair noise. The second comment did indicate that a DSE referral was awaited but again this was simply a direct factual answer to the question posed. The Claimant was not implying that there had been a breach of the Equality Act 2010 nor was he saying what he said for the purposes of or in connection with the Equality Act 2010. He was simply answering a question without an agenda for doing so.

241. The second alleged protected act is the Claimant's 'context' email of 25 July 2019. The Respondent admits this was a protected act and we agree.

242. The third alleged protected act is the Claimant's conversation with Ms Thomas on 30 July 2019. In particular the Claimant says that he made a complaint in that call that a DSE assessment had not been done. We do not agree that he made such a complaint. There is an exchange about a DSE assessment at p467 but it does not involve the Claimant making any complaint. Ms Thomas asks if he has had a DSE assessment and he says that he has not. Even set in context, he does not make any actual or implied complaint about that. We do not think he thereby did a protected act. The analysis is materially the same as the first alleged protected act.

243. The fourth and fifth alleged protected acts are the content of forms HRACC1 and VI01 as complaint by the Claimant/his union. The Respondent admits that these are protected acts and we agree.

Claim 14: investigation of HRACC1 (p147-8)

244. This claim is titled and mainly focussed upon the investigation of the HRACC1. However, it appears not to be the only matter raised.

245. Reference is made to Mr Taxworth-Dagless not addressing the complaint the Claimant made by email on 25 July 2019. We think the Claimant has an unjustified

sense of grievance about this. The impression from his correspondence in July was that he wanted to decide how to progress this complaint for himself and in particular whether to invoke the formal grievance policy. It is not surprising therefore that the complaint as shortly and relatively informally expressed in the email was not initially the subject of any particular action. Matters then swiftly moved on. In short order the Claimant raised essentially the same complaint again but with more detail and more formality first on form HRACC1 and second on form VI01. Those forms were dealt with. There was no sense in returning to, and no need to return to, the Claimant's email of 25 July 2019. The alleged detriment was not a detriment.

246. The reason the 'context' email was not dealt with was because matters had moved on meaning there was no point in, or need to, return to that email itself.

247. In relation to the HRACC1 investigation the complaints and our analysis are as follows:

247.1. *The investigation was 'farcical':* We do not agree. It was an investigation of a moderate standard but it was not a farce. For instance, it is evident that there was background research as to the Claimant's declarations about his back condition, OH evidence, OH recommendations and so on. The accounts four relevant witnesses were taken. Sensible recommendations were made.

247.2. *The conclusions are replete with inconsistencies and lies*: We do not agree. The Claimant and the witnesses that Mr Taxworth-Dagless spoke to did not speak with one voice and there were inconsistencies between their accounts. The findings that Mr Taxworth-Dagless made were supported by witness evidence. However, since the witness evidence did not speak with one voice it is not surprising that many of the findings were supported by some witness evidence and contradicted by other witness evidence. It is also quite normal for there to be differences between six peoples accounts of the same event. The differences in this case are within the normal range in our experience.

247.3. *Mr Taxworth-Dagless went to great lengths in order to attempt to marginalise and cover up the abusive behaviour of Ms Leathers*: We do not agree since Mr Taxworth-Dagless did not do this. He conducted the investigation and wrote up his findings as best he could given the skills he had. He was not attempting a cover up or anything similar. However, we can see that from the Claimant's point of view the description he gave was detrimental because it did not accept the Claimant's account because it largely accepted Ms Leathers' version of events over his.

247.4. *Mr Taxworth-Dagless insinuated the Claimant was a liar and planning to abuse the Respondent's sick pay provisions:* Mr Taxworth-Dagless did not insinuate that the Claimant was a liar or that he was planning to abuse the Respondent's sick pay provisions. The completed HRACC1 simply does not do either of those things. It is a moderately drafted document. There is an observation that the Claimant's OH referral and sick notes do not refer to mental health. The observation was correct and relevant for the reasons given above. it does not however have the malign meaning the Claimant sees in it.

248. We do not think that the feature of the HRACC1 investigation the Claimant objects to and considers detrimental were because of any protected act. We do not think that Mr Taxworth-Dagless was aggrieved, put out, upset, or adversely disposed towards the Claimant so we do not think it at all likely that the matters the claimant complains of were because of any protected act. He conducted the investigation in the way that he did because he had no experience of doing an investigation and this was his best effort at one. He did not have the skills to conduct a better investigation than he did.

Claim 15: absence management (p148)

249. The pleaded complaint is that Mr Taxworth-Dagless subjected the Claimant to the detriment of accelerating the absence management policy by drafting the invitation to a formal meeting on 1 August 2018 rather than on or after 2 August 2018. For reasons given above we do not accept that this was an acceleration of the absence management policy. If it was, it was trivial, given that it was clear that the Claimant's absence would continue beyond the trigger point and date the proposed meeting was beyond the trigger point. The Claimant's sense of grievance is unjustified and this was not a detriment.

250. In any event, the impugned letter was not written because of any protected act. It was written simply to invite the Claimant to a meeting in accordance with its terms.

251. This complaint is not pursued in the Claimant's skeleton argument. Instead the focus is put on Ms Thomas' call to the Claimant on 30 July 2019. For the reasons given above we do not think this was an acceleration of policy, if it was it was trivial, and the phone call was in any event a good idea and fully justified. The Claimant's sense of grievance is unjustified and this was not a detriment.

252. The call was not made in because of any protected act. It was made in order to keep in touch with the Claimant and informally review his absence.

Claim 16: withdrawn.

Claim 17: response to data requests (p150).

253. Our analysis of this claim is as follows (we are brief as we dealt with the topic at claim 9):

253.1. Chat logs with Mr Weston: it was a detriment for these not to be provided. However, the reason they were not provided was nothing to do with any protected act. As above Mr Taxworth-Dagless attempted twice to get these from Mr Weston. He accepted Mr Weston's account that they could not be provided. He did not probe further because of inexperience in dealing with matters of this sort.

253.2. Work emails: these were not provided and that was a detriment. Mr Taxworth-Dagless did not appreciate that the data would be lost upon the Claimant's resignation being processed. Again, this was due to inexperience.

253.3. Policy documents: these were not provided pursuant to the DSAR but were later provided pursuant to the FOIR. This was a not a detriment as they did not fall to be provided pursuant to the DSAR and the Claimant was no longer employed. The reason why the policy documents were not provided by Mr Taxworth-Dagless was simply that he did not understand them to be personal data and thus did not think they fell to be provided.

254. However, we have stated the reasons for this treatment above. It was not because of any protected act.

Claim 18: withdrawn.

Constructive discriminatory dismissal

255. The key question in this case is whether the Respondent was in breach of the implied term of trust and confidence.

256. At the outset of the hearing it was agreed that the Claimant's case was that the Respondent breached the implied term of trust and confidence by discriminating against him in the manner alleged in the Final Tables. Only one of the allegations in the Final Tables succeeded, namely claim 5 which relates to Ms Leathers' conduct on 23 July 2019.

257. As set out above in the passage quoted from ***Amnesty*** it does not automatically follow from the fact that a complaint of discrimination has succeeded that the Respondent was in breach of the implied term of trust and confidence. The tests are different.

258. In the event, we do not think that Ms Leathers' conduct on 23 July 2019 was a breach of the implied term:

258.1. She did not have reasonable and proper cause to be rude.
258.2. However, her conduct was not calculated to seriously undermine or destroy trust and confidence. There was no such calculation at all. Ms Leathers' conduct was to stop the Claimant from making an irritating noise and, in suggesting he get another chair, to suggest a solution to the problem he was having with his chair.
258.3. Ms Leathers' conduct was also not likely to seriously undermine or destroy trust and confidence. The test is a severe one (*Gogay*) and it an objective one. In our view whilst it is true that Ms Leathers was quite rude to the Claimant, her conduct was not severe enough or of an order that it objectively could be said it could undermine or destroy trust and confidence. We reach that conclusion essentially because of the same factors that led us to the conclusion that Ms Leathers' conduct did not violate dignity or create a proscribed environment. We find those factors relevant and weighty when applying the *Malik* test and we therefore repeat and rely on them.

259. We are of course aware that the implied term can be breached not only by a single event but by the cumulation of events. We have asked ourselves whether that happened in this case. We do not think that it did. In concluding that rely upon our analysis above of the claims in the Final Tables and the following matters:

259.1. *Auxiliary aids*: there was reasonable and proper cause for the same not being in place by 23 July 2019 if indeed they were needed (see our reasons above on the reasonableness of awaiting the commencement of the Claimant's employment for referring for a WSA and timescales for getting aids in place). In the meantime the Claimant was able to choose from the available chairs, sit or stand as he preferred and take posture/micro-breaks. Objectively there was nothing to destroy or seriously undermine trust and confidence.
259.2. *Ms Leathers' other conduct on 23 July 2019*: not calling first aider and not reporting incident on HRACC1. For the reasons given above she had reasonable and proper cause for this: it was not apparent that there was any need for first aid, first aid would not have been useful. It was not apparent that there was an incident to report and reporting the incident whether on HRACC1 or otherwise would not have made any difference, not least since the Claimant could report it himself. Objectively there was nothing to destroy or seriously undermine trust and confidence. We also repeat our analysis for completeness of Mr Doddy/Mr Taxworth-Dagless not initiating HRACC1.
259.3. *Absence management*: for the reasons given above there was reasonable and proper cause to manage the Claimant's absence in the way it was managed and objectively there was nothing about the absence management that was capable

of destroying or seriously undermine trust and confidence. It was objectively reasonable conduct.

259.4. *Refusal to provide relevant documents*: in so far as this relates to pre-resignation matters, it is limited to the grievance policy and possibly the attendance management policy. Mr Taxworth-Dagless accidentally sent the Claimant only part of the grievance policy. Within a couple of days Ms Thomas sent the Claimant an overview of both the policies he requested and an offer to provide any further parts he wanted. Mr Taxworth-Dagless made a small mistake that was objectively very minor indeed. He sent the most important part of the policy and within days Ms Thomas acted as above. This was objectively a very minor matter that could not seriously damage or undermine trust and confidence or contribute anything material to breach constituted by a combination of matters.

260. This leaves the Claimant's concerns about the way in which his complaints about the incident of 23 July 2019 were dealt with:

260.1. As to the formal grievance policy not being followed by the Respondent, we think there was reasonable and proper cause for this. As above it did not understand the Claimant to have raised a formal grievance. This was objectively reasonable. Rather, the Claimant appeared initially to be considering whether to raise one but then invoked the HRACC1 and VIO1 processes instead. Objectively there was nothing to destroy or seriously undermine trust and confidence.

260.2. The HRACC1 investigation. We think that there was reasonable and proper cause to assign the investigation to Mr Taxworth-Dagless notwithstanding his inexperience. He was the Claimant's line manager, he was not involved in the incident of 23 July 2019 and it was not the most complex of matters. Objectively, his investigation was not of high quality, it was moderate. It was not of such a low standard that it could destroy or seriously undermine trust and confidence. It did however, make it important for there to be some further avenue for seeking redress.

260.3. Rejecting the from VI01. There was reasonable and proper cause for this. The matter complained of did not fit well with the purpose of the form namely to deal with *Abuse, Violence or Threats to staff.* In any event, provided that there was another way of seeking redress for the matter complained of, we do not think this rejection was something that could destroy or seriously undermine trust and confidence or contribute to a breach of the implied term.

261. This brings us to the matter that gave us particular pause for thought: the Claimant's overriding sense that there was no way for him to seek redress for the events of either 23 July 2019 or his unhappiness with the way in which Mr Taxworth-Dagless had managed him and his case.

262. The Claimant's huge frustration in all of this was in large part the product of his view that there had repeatedly been a failure to invoke the formal grievance process. However, for the reasons we have given a number of times we do not agree with his analysis.

263. In our view, objectively speaking, even at the point of the Claimant's resignation there was a clear further route for redress. Namely, to in terms raise a formal grievance in relation to the events of 23 July 2019 and, given his feelings about Mr Taxworth-Dagless, about Mr Taxworth-Dagless. This is exactly the course of action that the Claimant's trade union suggested. The Claimant did not pursue it because he was so totally convinced that he already had raised a formal grievance and that there was a sort of conspiracy

afoot to manage him out of the business using the absence management process. We did not agree with him on these points for reasons given above.

264. If the Claimant had followed his trade union's proposed course of action and raised a formal grievance, complaining of the events of 23 July 2019 and complaining about Mr Taxworth-Dagless's management of him, we have no doubt that the formal grievance process would have been invoked. Further, we have no doubt that Mr Taxworth-Dagless would not have been the decision maker. Not least, he would have been one of the subjects of the grievance.

265. The Claimant also considers that because Ms Mason had approved the decision not to progress the VI01 form, and because she was a senior person, this also meant that in effect his grievance outcome had been pre-empted and he had nowhere to turn. This is because he considers himself to have raised a formal grievance (among other things) by lodging the VI01 form. We do not agree. The VI01 process and the formal grievance process are distinct separate processes. Thus the fact Ms Mason considered the VI01 was not applicable did not, in our view, pre-empt the outcome of a formal grievance.

266. In any event and for the sake of completeness, if the Claimant was seriously concerned by Ms Mason's, Mr Doddy's or Ms Thomas' involvement in his case to date, they too could have been the subject matter of the grievance and no doubt would not therefore have been the decision maker.

267. We therefore think that there was a clear further formal avenue for seeking redress and the Claimant's deep sense that there was not, was mistaken when matters are looked at objectively.

268. Returning squarely to the question of whether the Respondent, without reasonable or proper cause, acted in a way that was calculated or likely to destroy trust and confidence, we do not think that it did. We reach this conclusion having stepped back from the evidence and considered the picture in the round including the cumulation of events.

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Employment Judge Dyal

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Date 28.04.2021

SENT TO THE PARTIES ON

29 April 2021

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FOR EMPLOYMENT TRIBUNALS