EMPLOYMENT TRIBUNALS

Claimant **Respondents**

Mr R O'Carroll **v** **Beever and Struthers (a firm)**

Heard at: London Central **On**: 29 – 31 March 2021
In chambers: 1 and 9 April 2021

Before: Employment Judge Lewis

Representation

For the Claimant: Mr S Sanders, Counsel

For the Respondents: Dr E Morgan, QC

RESERVED JUDGMENT ON LIABILITY

1. The following is the unanimous decision of the tribunal.

2. The claimant had the disability of anxiety and depression from 15 January 2020.

3. The respondents subjected the claimant to direct disability discrimination in the following actions:
    a. Expelling him from the partnership
    b. Not informing him that expulsion was being contemplated
    c. Not giving him an opportunity to make representations about his proposed expulsion
    d. Not engaging with the claimant in relation to any possible return to work by asking for information on the prognosis or what measures might be required to facilitate a return to work.

4. The respondents subjected the claimant to discrimination arising from disability in the following actions:
    a. Expelling him from the partnership

b. Not engaging with the claimant in relation to any possible return to work by asking for information on the prognosis or what measures might be required to facilitate a return to work

5. The above claims were presented in time. To the extent that any of the complaints prior to expulsion were outside the primary time-limit as individual actions, they comprise conduct extending over a period ending with the expulsion.

6. The claims that
   a. Not informing the claimant that expulsion was being contemplated
   b. Not giving him an opportunity to make representations about his proposed expulsion

   were discrimination arising from disability are not upheld. These were matters of direct discrimination.

7. The claims for direct discrimination and for discrimination arising from disability in respect of failing to offer support on the matters mentioned in sub-paragraphs 3d and 4d above are not upheld.

8. The claim for failure to make reasonable adjustments is dismissed on withdrawal.

9. Had the claimant not been expelled because of his sickness absence, there is no possibility that he would have been expelled for lack of trust.

10. The question as to whether and when the claimant's employment might have come to an end because of continuing ill health will be a matter for the remedy hearing.

11. The hearing for remedy will be held on CVP or Teams on **11-12 October 2021**. The tribunal has set aside a third day, 13 October 2021, to reach its decision.

12. The parties will be notified of a preliminary hearing on CVP or Teams to discuss directions for the remedy hearing. The parties should attempt to agree such directions in advance including regarding medical evidence.

REASONS

Introduction

1. Mr O'Carroll was a chartered accountant and fixed-share equity partner with the respondent firm of chartered accountants. He has brought claims for disability discrimination. The relevant disability was depression and anxiety, which affected the claimant very severely at the relevant time. The central claim concerns Mr O'Carroll's expulsion from the partnership and the way it

was handled, including a failure to get a medical report or consult with him in advance. The respondents said they acted for commercial reasons and, to some extent, in order to protect the claimant's dignity. The tribunal had to decide whether the respondents' actions were direct discrimination and/or discrimination arising from disability.

Claims and issues

2. The issues as originally agreed and applicable at the start of the hearing were set out in the case management letter dated 23 February 2021 and as appeared in the trial bundle starting on page 53.

3. The respondents initially disputed that the claimant had a disability at the material time and also that they knew or should have known that he had such disability. Both these matters were conceded at the start of the closing submissions. During the hearing itself, while the matter was still open, Dr Morgan cross-examined with sensitivity and did not go into private details more than necessary. Nevertheless, the documents were in the trial bundle and the claimant and his partner were open in their witness statements.

4. Also at the start of the closing submissions, the claimant withdrew his claims for reasonable adjustments. In turn, the respondents withdrew their points on time and accepted that events leading up to the expulsion formed part of a continuing act with the expulsion, though they said that ultimately this was a matter for the tribunal itself.

5. The issues remaining for the tribunal were therefore, in relation to direct discrimination:
   5.1. Did the respondents subject the claimant to the following treatment:
      5.1.1. Expelling him from the partnership
      5.1.2. Not informing him that expulsion was being contemplated
      5.1.3. Not giving him an opportunity to make representations about his proposed expulsion
      5.1.4. Not engaging with the claimant in relation to any possible return to work by asking for information on the prognosis or what measures might be required to facilitate a return to work
      5.1.5. Failing to offer support on the matters mentioned in the preceding sub-paragraph.

   5.2. If so, has the claimant proved primary facts from which the tribunal could conclude that the difference in treatment was because of the protected characteristic?

   5.3. If so, are the respondents able to prove a non-discriminatory reason for the treatment?

6. In relation to section 15, the issues were:
   6.1. Did the respondents subject the claimant to the treatment set out in paragraph 5.1 above?

6.2. If so, was that because of 'something arising' in consequence of the claimant's disability? The 'something arising' is said to be:
  6.2.1. Absence from work from August 2019
  6.2.2. Inability to do work tasks
  6.2.3. The need to communicate with the claimant through his partner when sending letters or making telephone calls.
6.3. If so, can the respondents prove the treatment was a proportionate means of achieving a legitimate aim? The respondents rely on the means and aims set out in paragraphs 6 and 29 of the grounds of response.

7. Were the claims brought in time? If not, should they be allowed in out of time?

8. It was agreed at the start of the hearing that the tribunal would listen to evidence and make decisions on matters relevant to Polkey/Chagger as part of the liability hearing. The issue was whether and when the respondents would have expelled the claimant from the partnership in any event for matters which came to light after his expulsion, essentially breach pf trust.

9. The other Polkey/Chagger question was not fully addressed in evidence or submissions and this will be left as an issue for the remedy hearing.

Procedure

10. This hearing was held remotely over a video platform (CVP). We are not aware of any difficulties with reception for parties, witnesses or representatives. The witnesses had access either to hard copies of their witness statements and the trial bundles, or to electronic documents on second screens.

11. The tribunal heard from the claimant and his partner, Elizabeth Baltesz. For the respondents, we heard from Caroline Monk, Maria Hallows and, briefly, Charles MacMillan.

12. There was an agreed trial bundle of 619 pages plus a 4 page supplemental bundle. The witnesses all provided witness statements. Dr Morgan and Mr Sanders each provided written closing submissions in support of their oral closing submissions.

Fact findings

13. The respondents are a firm of chartered accountants with roughly 200 partners and staff. Its head office is in Manchester. There are additional offices in London, where the claimant worked, Blackburn and, recently, Birmingham.

14. The claimant joined the firm as a chartered accountant on 1 September 2008. He became a fixed-share equity partner on 1 April 2012, at which time

he was also made head of the London office, responsible for its management and performance.

15. In the London office, at a level below the claimant, were Mr Tourville and Ms Hatchman, who were audit directors. They reported directly to him, though Mr Tourville had more experience. There was then a junior team of about 10 people plus an administrator.

16. The claimant's duties included assigning, monitoring and reviewing the work of his team; carrying out 6 month reviews; producing an annual budget with a staff establishment; hiring trainees and organising their training, and monitoring their compliance with the firm's exam policies.

17. The respondents had an HR Director, Jo Rigby, based in Manchester. The claimant frequently liaised with her on work matters. She did not give evidence in this case.

Partnership and profit share

18. The claimant had negotiated the terms on which he would become partner with the then executive team including Mr Porritt and Mr Roberts. Negotiations were protracted and the claimant says that over subsequent years he had difficulty getting the agreement honoured. In Spring 2018, he told the old executive team that he would resign if they continued to ignore the agreement.

19. On 1 September 2018, the claimant followed up by giving Mr Porritt and Mr Roberts notice of retirement on 31 March 2019. He felt this was a suitable time, as Mr Porritt and Mr Roberts were themselves retiring at the end of September, and a new executive team comprising Maria Hallows and Caroline Monk would be taking over. As he told Ms Hallows and Ms Monk shortly after, this was not a reflection on them, but the result of previous discussions with the old team and their failure to resolve outstanding issues, including regarding his profit share

20. As executive partners, Ms Hallows and Ms Monk had operational oversight of the respondent practice, with a mandate to make decisions and issue instructions to the other partners.

21. The other equity partners, including Ms Hallows and Ms Monk, had not been told by Mr Porrit and Mr Roberts of their agreement with the claimant. However, they agreed to honour the profit share agreement.

22. There were subsequent discussions about future profit share arrangements. There was some misunderstanding in that Ms Hallows and Ms Monk understood the claimant had withdrawn his resignation, whereas in his mind, he had not, and time was passing. Eventually matters were resolved. The claimant had been encouraged by Ms Monk and Ms Hallows to stay, and he did not want to leave the practice in the lurch by leaving at this point.

23. In a letter dated 15 March 2019, Ms Monk set out the profit share agreement that had been reached. She stated that she would like to agree a retirement date of 30 September 2021 (subject to the partnership agreement and no unseen events). She concluded:

> 'Our focus for the remaining two and a half years will be to work with you, supported by Lee [Cartwright], to ensure a smooth succession to Michael [Tourville] and Liz [Hatchman], with a strong team in place below them. I hope that we can find an arrangement that works for everyone, so we can focus on the further development of our very successful London office.'

24. Mr Cartwright was another partner who joined the respondent practice from another firm around this time. Though based in Birmingham, his role would be to help merge the practice nationally so that the various regional offices were more integrated.

25. Ms Monk made a note in her diary to keep close to the claimant moving forward. She perceived that he needed a high level of contact and reassurance as to his role.

26. Jumping ahead, Ms Monk told the tribunal that Ms Hallows and Mr Cartwright expressed their frustration to her on many occasions in relation to Mr O'Carroll's apparent resistance to any suggestion of change to his way of running the London office. Ms Hallows told the tribunal that the claimant appeared to support but in practice resisted opportunities to work as a national team. We were not given any more precise details in support of these assertions, and we will come back later to whether we accept them.

Mr Tourville and Australia

27. Mr Tourville's wife had obtained a 12 month secondment to a hospital in Melbourne. Mr Tourville told the claimant in January 2019 that he wanted to go with her. They discussed the options, eg leaving altogether, taking leave, or working for the practice in some way. Mr Tourville suggested that he work remotely from Australia, with occasional visits back to see his clients. The claimant was doubtful this was feasible in terms of clients or staff in the London office because of the time difference. When the claimant initially spoke to Ms Monk about it in January 2019, she had similar doubts. However, none of them wanted Mr Tourville to leave and none of the options were attractive. If Mr Tourville left, they would have needed to recruit a replacement 'responsible individual' urgently, as the claimant did not have those powers because of where he had obtained his qualifications.

28. The claimant therefore asked Mr Tourville to come up with a detailed plan day-by-day, client by client, to see how it could work. The claimant worked with Mr Tourville on the plan, which included three visits to London for the majority of his client work..

29. Contrary to what Ms Hallows says in her witness statement, the claimant did not tell Ms Monk and Ms Hallows that Mr Tourville had already resigned. We accept the claimant's evidence that he only told them he was worried Mr Tourville might resign if they did not put together an arrangement. Ms Monk confirms in her witness statement this is what the claimant said. Further, it makes no sense to us that Mr Tourville would resign before testing the options or that the clamant would suggest he had done so.

30. On 3 April 2019, Ms Monk and Ms Hallows met Mr Tourville and Ms Hatchman to discuss their futures with the firm. The claimant was not present. The claimant emailed Ms Monk in advance to give a 'heads up' on what they might want to discuss. He said he had had a number of discussions with Mr Tourville who was outstanding at his job, but needed assurance on his path to partnership and expected promotion on his return or shortly afterwards. The claimant concluded, 'I am sure you will want to give your own messages but I wanted to give you a heads up on what I had said and what is of concern to them'.

31. Ms Monk fed back to the claimant afterwards that she had stressed to both Mr Tourville and Ms Hatchman that they were were considered fundamental to success, but she could not and would not make promises about partner promotions. Mr Tourville had mainly wanted to discuss his plans for Australia. Ms Monk had told him she really wanted it to work, so that he came back full of enthusiasm for his future with the firm, but she did not want over-optimistic promising of what could happen at a distance.

32. Ms Hallows and Ms Monk now say that the claimant had at some point offered Mr Tourville a partnership and that he had no authority to do so. The claimant says he never made such an offer. He says that Mr Tourville frequently raised his desire to become a partner, but he had told Mr Tourville that it was outside his authority to make such a decision, especially as he would be retiring in September 2021. He told him it was a decision for the executive team. The claimant says that in any event, no firm would make promises to grant partnership two years ahead (which is what it would be by the time of Mr Tourville's return from his proposed trip).

33. We find that the claimant did not at any stage offer Mr Tourville partnership. We cannot believe someone of his experience would make promises outside his authority, when he knew he was retiring, and two years in advance. Most compellingly, the claimant's email prior to the 3 April meeting explicitly says it is for Ms Monk and Ms Hallows to give their own messages. Doubtless, the claimant had been encouraging about Mr Tourville's future. After all, his remit was 'to ensure a smooth succession to Michael and Liz'. But he clearly made no promises.

34. Ms Hallows and Ms Monk seek to rely on Mr Tourville's representations to them (which anyway do not go as far as explicitly and plainly saying the claimant made a promise of partnership, but rather, drop hints), when it is more than clear that Mr Tourville is (quite reasonably) doing everything

possible to advance his own cause in this respect. We discuss this further below under the heading 'Mr Tourville's ongoing requests for partnership'.

35. During this meeting, Ms Monk and Ms Hallows raised the possibility of a secondment to a partner firm in Melbourne. Mr Tourville said he was not interested in a secondment. He did not say anything about not having the necessary visa to work there.

36. Ms Monk complains that neither Mr Tourville nor the claimant told her that the reason he could not accept the secondment was that his visa did not allow him to work locally. There is no suggestion that the executive team asked Mr Tourville or the claimant this question. Nor is it clear why it should matter, given that Mr Tourville had anyway made it clear that he did not want to take up the secondment option.

37. Jumping ahead, in November 2019, Mr Tourville told Ms Hallows that he had been offered a position with an international construction company who would sponsor him to work locally in Australia. Mr Tourville commented that he thought Ms Hallows knew this. Ms Hallows says the claimant therefore obviously knew and withheld that information too, although Mr Tourville did not explicitly say that. The claimant told the tribunal that he did not in fact know this at the time.

38. Going back to Spring 2019, as well as discussions with Mr Tourville about the practicalities of his proposal, the claimant communicated with Ms Rigby about the employment law implications on the various options for Mr Tourville.

39. The claimant, Ms Monk, Ms Hallows and Mr Tourville met on 3 May 2019 for further discussions about Australia. Mr Tourville presented his detailed proposal and they discussed options, including reduced responsibilities and reduced salary while he was away. It was left that Ms Hallows would talk to the senior staff in London to seek their views.

40. On 26 June 2019, Ms Hallows told the claimant she was aware they hadn't followed up on this discussion and asked 'Did you have any thoughts on what salary he should have while on the other side of the world? I am imagining it will be significantly lower than he is receiving currently, but your thoughts would be helpful in making a final decision on how we proceed'.

41. The clamant was told that an arrangement should go ahead and he should draft a letter setting out the conditions of the move for the executive team to approve. The claimant drafted a letter with a 6-month break clause, which would enable both sides to review the situation. Various drafts went to and from the executive team over the next few weeks.

42. After the claimant provided his latest suggested draft, Ms Hallows replied on 17 July 2019 that they had all taken some persuading that the proposal that Mr Tourville work remotely would work. However, she was aware that he did have a track record of putting in a massive effort on a daily basis. His London colleagues appeared to be on board and supportive, but there would

inevitably be an impact. They felt an element of his salary should be redistributed to those who felt the impact. She felt the tone of the claimant's draft was too appreciative of what Mr Tourville wanted to do for them, whereas it was the other way round, as he had no prospect of working in Australia under his visa. Also the draft had no mention of travel costs and it should make it clear that Mr Tourville would bear those.

43. We note that by this time, Ms Monk and Ms Hallows had discovered (though not from Mr Tourville or the claimant) that Mr Tourville did not have a local work visa.

44. On 26 July 2019, Ms Hallows asked whether Mr Tourville had received the draft letter yet. The claimant said Mr Tourville was aware he was going to receive a letter but 'of course' he had not yet seen it.

45. The claimant, Ms Hallows and Ms Monk discussed this further at a meeting on 29 July 2019. Ms Hallows and Ms Monk agreed the proposal. However, Ms Hallows suggested a toughening up of the wording of the letter. The claimant agreed to and made all the wording changes.

46. Ms Hallows did not want to make an open-ended agreement to cover any travel costs back to London. The claimant said he would alter those aspects, though he had already reduced Mr Tourville's salary.

47. We find the claimant was not told at this stage that travel costs definitely could not be paid by the firm. As the notes of the meeting say – and indeed as Ms Hallows puts it in her own witness statement – that was their 'preference'. The claimant understood that Ms Hallows wanted him to reduce the outlay, and that he was now authorised to finalise the agreement with Mr Tourville and show him the final letter.

48. The claimant showed Mr Tourville the draft letter the next day and told him that Ms Hallows wanted him to pay his own airfares. Mr Tourville pushed back on that. His salary and particularly his bonus had already been reduced. They checked the cost of flights, which averaged £1000. The claimant agreed the firm would pay half of the cost of 3 return flights noted in the detailed operational plan. He estimated this would amount to a maximum of £1500. v

49. The claimant then issued the amended letter. He felt he had done a good job, that he had reached agreement in everyone's best interests in very difficult circumstances. The firm had managed to retain Mr Tourville on a lower salary and with a 6 month break clause.

50. On 31 July 2019, Ms Hallows emailed the claimant to say she was happy to redraft the letter as it was easier for her to get across the tone point. She also wanted to run it past Ms Rigby briefly just for her information.

51. The claimant replied shortly after that he had redrafted it already to pick up all the points discussed and he had gone through it with Mr Tourville the previous afternoon – 'this was the best I could do'.

52. Ms Monk told the tribunal that the claimant had 'overridden' their position on travel arrangements and their wish for the letter to be shown to Ms Rigby before issue.

53. We do not find that the claimant was told he must have his letter checked by HR before going to Mr Tourville. Ms Hallows' email on 31 July 2019 reads as if it is a new thought to run the email past Ms Rigby. We also note that Ms Monk's witness statement refers to the 31 July email as the basis for saying the claimant had been given this instruction. Further, we do not find that the claimant was told he had to show Ms Hallows and Ms Monk the letter again. The notes made of the meeting do not mention an instruction to show the letter to HR or indeed to come back to the executive team before finalising. The claimant understood he had authority to conclude the arrangement.

54. Our view is supported by the claimant's email response on 26 July 2019 to Ms Hallows' earlier enquiry as to whether he had yet shown the letter to Mr Tourville. At that point, the claimant said 'of course' he had not. So (prior to the 29 July meeting) the claimant understood he required final agreement from the executive partners and was abiding by that. We do not think it likely he would have moved from a willingness to check the letter with the executive partners to a deliberate failure to do so unless he believed he had been given authority after the further discussion on 29 July.

55. We find it a surprising and misleading portrayal of what happened to say the claimant had deliberately 'overridden' an instruction. At worst, we find it was a misunderstanding. But, as already explained, our interpretation is rather that Ms Hallows simply had further thoughts a few days after the meeting, when it was too late. Indeed, Ms Hallows says in her witness statement that the claimant had committed the firm to pay half of any travel costs with no limit to the number of visits or fares to be incurred. That is an exaggeration. The number of visits was limited in the plan to three.

<u>The 2 August 2019 email</u>

56. On 2 August 2019, Ms Hallows sent an email to the claimant. It is heavily critical of Mr Tourville and, more indirecty but unmistakeably, of the claimant. It starts, 'I want to be honest'. It refers repeatedly to Ms Hallows' 'disappointment'.

57. The claimant was extremely upset about the email. After speaking to his partner, Ms Baltesz, he telephoned Ms Monk. Ms Monk was driving at the time. She stopped the car to speak to him because she was so concerned about the state he appeared to be in. She understood he was hugely upset by Ms Hallows' email. He was not very coherent and she believed he was having a panic attack.

58. The claimant said he had done what had been asked of him and had used his discretion on the travel costs. He had offered to share the costs with Mr Tourville because it was important to the latter and Mr Tourville had accepted

a reduction in his salary. The claimant had taken into account that it was of great benefit to the firm to keep Mr Tourville. The claimant offered to pay the £1500, which Ms Monk said was not necessary. The claimant asked what more the executive team wanted from him. He had delivered on everything they had asked and had supported them completely since they had taken over, delivered record results and had kept a senior staff member in the firm. But then he had received what he saw as a 'vile' email over £1500.

59. Ms Monk was sympathetic. She said she had had no forewarning of the email and it was better if emails were banned.

60. Ms Monk told the tribunal that she had in fact seen the email before it was sent and that she agreed with it. We do not know whether that is the case. In any event, it is not what she told the claimant.

61. On her return to the office, Ms Monk told Ms Hallows and Ms Rigby about the call.

The impact on the claimant

62. The claimant became increasingly stressed and anxious about the situation over the weekend. He stayed in bed all day and did not eat. He stayed at home on the Monday. He did not hear from Ms Monk other than a message on the Friday night asking how he was.

63. The claimant went to his GP on Tuesday 6 August 2019. His GP prescribed him anti-depressants (Venlafaxine) and anxiety medication (Diazepam)and diagnosed him with anxiety, depression and work-related stress. She wanted to sign him off work, but at the claimant's insistence so he could attend some client meetings, she only gave him a certificate for reduced duties.

64. The claimant also telephoned CABA which is a charity supporting the wellbeing of chartered accountants.

65. The claimant telephoned Ms Monk. He told her that if she did not do something about the matter, he would take it as a lack of confidence in him and he would resign. Ms Monk said she was busy and she would get back to him.

66. Later on 6 August 2019, Ms Monk emailed to say 'as we discussed, it is important we all meet' and to suggest Monday 12 August 2019.

67. The claimant also spoke to Jo Rigby, the HR Director, about the 2 August 2019 email. Ms Rigby said she was aware of a 'situation' but was not involved.

68. The claimant was very stressed at the thought of Ms Hallows also attending the meeting. On 7 August 2019, the claimant's personal partner, Ms Baltesz, rang Ms Monk on his behalf, By then, the claimant did not feel well

enough to speak to Ms Monk himself. Ms Baltesz suggested a well-managed exit would be a good idea. Ms Baltesz asked Ms Monk to come to London on her own to talk to the claimant. She said she and the claimant understood that at some point in the future he would need to meet Ms Hallows to resolve matters, but at the moment, seeing her would just exacerbate his condition. Ms Baltesz suggested Ms Monk seek the assistance of Ms Rigby on the matter.

69. The claimant went into the office to attend two meetings on 8 August 2019. He was shaking and found it hard to focus. When he came home, he could barely speak, was in a very distressed state, and was having bad dreams.

70. On 8 August 2019, Ms Monk emailed the claimant to say that she and Ms Hallows would prefer to wait until her return from holiday to meet and decide how to move forward. She realised this may not be what he wanted to hear now, but she felt it was best for everyone - 'we may not be at our most effective whilst we are all feeling so raw and hurt'.

71. This postponement of the proposed meeting made the claimant even more anxious. He deteriorated badly and Ms Baltesz took the claimant back to the doctor, who referred him for emergency psychiatric care with the local Islington Crisis Resolution Team ('Crisis'). For the remainder of the month, the claimant was very unwell indeed. During this period, the claimant attended intensive one-to-one sessions with Crisis.

72. Following the visit to the doctor on 8 August 2019, Ms Baltesz tried to telephone Ms Monk on several occasions without success and then left a voicemail message. On 9 August 2019, Ms Monk texted back to the claimant's phone, 'Sorry to hear Rory is worse. Please ask him not to worry about work/the office/staff, we will pick this up. Your message broke up as you were giving me your number, can you text it through. I would like to keep in touch.' [258] Ms Monk and Ms Hallows notified the partners and the London staff that the claimant was taking a month out and he should be allowed the time and space to recover.

73. On 13 August 2019. Ms Baltesz telephoned Ms Monk and informed her of the seriousness of the claimant's condition and that he had been referred to Crisis. Ms Baltesz said that delaying the meeting was not helpful and a quick apology from Ms Hallows may help. Nevertheless, Ms Monk said she would be in touch at the end of the month on her return from holiday. There was no discussion of any exit plans at this meeting.

74. Ms Baltesz said all communication with the claimant should be through her rather than directly to the claimant. Ms Baltesz never at any stage said that the respondents should not initiate approaches to the claimant, only that the contact should be made through her.

75. Ms Monk and Ms Hallows told the tribunal that they had understood from the claimant in the past that Ms Baltesz worked in the area of mental health.

This is not correct. Ms Hallows said in the tribunal she understood Ms Baltesz was a 'psychologist'. These were loose assumptions. They never sought clarification from the claimant or Ms Baltesz during the events in question and Ms Baltesz never held herself out as having any kind of relevant qualification. In fact, she has a Maters in Organisational Behaviour, which is a branch of applied psychology.

76. Towards the end of August 2019, Ms Baltesz contacted Ms Rigby to inform her of the nature and severity of the claimant's condition. She spoke to Ms Rigby in detail and told her about the treatment from Crisis. Ms Baltesz never spoke to Ms Rigby or anyone else from HR again and they never tried to make contact apart from leaving some voicemails asking for the fit notes.

77. Ms Baltesz also contacted Mr Tourville and Ms Hatchman to explain that the claimant was unwell and that any work queries should go through her.

78. On 31 August 2019, the claimant was discharged by Crisis. He was still taking medication. The claimant was referred to iCope Camden and Islington Psychological Therapies Services ('iCope'). Crisis had recommended a break before the next round of therapy. iCope assessed the claimant in November 2019 and he attended 18 sessions of cognitive behaviour therapy from 4 December 2019 – 24 June 2020 with them.

79. Ms Monk did not get in touch with the claimant or Ms Baltesz following her return from holiday.

80. On 23 September 2019, Mr Tourville and Ms Hatchman came to visit the claimant. Ms Baltesz did most of the talking, which was generally about non-work matters, though the claimant was asked to sign some accounts.

81. On 24 October 2019, Ms Baltesz texted Ms Monk:

> 'I thought you would like an update on Rory's situation. We have just seen the doctor, who is pleased with his progress. He is to continue with his medication. He is more engaged with life at home, but less so with the outside world. He has the first appointment for the next phase of treatment on November 11th, when the specialists will decide on the actual treatment. In the meantime he carries on with small steps each day.'

82. Ms Monk replied:

> 'Great that Rory is making progress, small but secure steps are best, I think? Also great he was able to see Liz [Hatchman] and Michael [Tourville] when he was over last month. Please let me know when Rory is up to visitors & in the meantime send him our best.'

83. On 14 November 2019, Ms Hatchman emailed Ms Rigby to say they had had a couple more accounts come in which the claimant had said he would sign. She had not had any contact at all with him this month. Was it OK for her to contact him via Ms Baltesz to see if he could sign them? Ms Rigby consulted Ms Hallows. They responded that it was fine for Ms Hatchman to

contact the claimant as he had been involved on other stuff whilst he had been off, but if he was not up to it, she should let them know and they would be able to sort it out.

84. On 27 November 2019, Ms Baltesz texted Ms Monk to invite her to come and have tea with them when she was next in London. She said the claimant had been having visitors for short periods and was starting his next round of therapy the following week. Ms Baltesz felt a visit was essential for the claimant to make progress with his recovery. Ms Monk replied that she did not think she would be in London before Christmas, 'but it would be great to see you both in the New Year, happy to put a date in the diary now or wait until nearer the time'.

85. The claimant was disappointed at Ms Monk's apparent lack of interest in his health. He was also despondent that he was still so unwell. He had hoped to feel well enough to return to work to before Christmas.

86. As we have said, the claimant's course of treatment with iCope started on 4 December 2019.

87. On 7 January 2020, Ms Baltesz texted Ms Monk again: 'Please do let me know when you will be visiting London, so that we can arrange to meet'. [323] Ms Monk responded that actually she was in London the next Monday if that worked. Ms Baltesz said that it did and suggested she come to the house. Ms Monk then texted to say diaries had changed and suggested 15 or 20 January instead. They settled on the 15th.

88. Ms Monk visited for about an hour on 15 January 2020. The claimant was quiet and most of the conversation was between Ms Monk and Ms Baltesz. Ms Monk was shocked to see the state he was in. He was wearing a dressing gown with a towel over his head. He was upset and on several occasions unable to communicate.

89. Ms Monk was surprised when Ms Baltesz and the claimant mentioned there had been communication from the team on work matters. They explained that this tended to be when clients had approached him direct on his personal email. Ms Monk said the claimant should not deal with any more work queries. She told the claimant to take all the time he needed to get better and not to worry about work. Her manner was kind and supportive.

90. We accept that Ms Monk told the claimant to take all the time he needed for a few reasons. Ms Baltesz specifically remembered her saying that, whereas Ms Monk simply could not remember. The GP notes for 17 January 2020 say 'The senior partner from work came to see him, which was reassuring, she is lovely and very understanding'. It strikes us as consistent with an understanding approach that Ms Monk would have said that. We find it very credible that she said that.

91. The claimant said he had really wanted to be in a position where he could contemplate returning to work by Christmas. He said the Christmas break had

not been helpful because of the break in routine, but he now had a new action plan which involved basic steps such as going swimming twice/week.

92. At the door as she left, Ms Monk expressed her shock at the claimant's appearance to Ms Baltesz. She suggested to Ms Baltesz that they have a chat the following week.

93. Ms Monk emailed Ms Hallows on 19 January 2020 to summarise the visit. She said the claimant 'did not give the appearance of being in a good place or ready to return to work anytime soon'. She said she had suggested to Ms Baltesz that she call her. She added to Ms Hallows, 'We need to broach the subject of Rory's retirement but we need to be mindful that without the goal of returning to work his recovery might be even harder'.

94. Ms Baltesz and Ms Monk spoke by telephone on 27 January 2020. Ms Baltesz said the claimant's goal was to be able to work again and he was working towards that. However, she had no idea as to the timescale for recovery. It was suggested that they have a further discussion in a couple of weeks and that it would be helpful to visit again. Ms Monk said she would do so at the end of February.

95. In the event, Ms Monk did not get in touch again until she telephoned the claimant on 3 April 2020 to tell him that he had been expelled from the partnership.

96. The claimant's GP's notes of his visit on 28 January 2020 record:

> 'looks much better than last time …. Improving depression. Long supportive discussion about getting back to work, doesn't feel able to cope with decision making pressure currently, we talked about phased return but I do agree that not ready yet, will continue to review. Stay on current does venlafaxine. Call in 2 weeks, tcb sooner if any worsening.'

97. On 11 February 2020, the record of a telephone consultation with his GP records 'things moving in the right direction. Agreed rv in a month, sooner if needs be.' The next entry in the GP notes is on 19 March 2020. It records 'stable currently, no crisis, discussed coping strategies. Continue as planned, book for rv in few weeks, knows can call us sooner if things deteriorate'.

98. The claimant did have ongoing symptoms through February and March 2020, though his counselling was helpful and he was starting to engage in small ways with the outside world. He would still have occasional panic attacks during outings and would retreat to darkened rooms if feeling stressed.

99. Going back to the claimant's mention during Ms Monk's January 2020 visit that he had been answering some work queries, this referred to a very limited exchange of texts between Ms Baltesz (as an intermediary) and Mr Tourville (and rarely, Ms Hatchman) since August 2019. This usually consisted of passing on messages, often for possible new work, from his clients to his

personal email account, or reminding Mr Tourville of particular deadlines. The content of the texts is minimal, and mainly of the nature of delegating actions. On a number of occasions, Ms Baltesz messaged that the claimant was unable to deal with a particular query because he was unwell that day. We accept the claimant's explanation that he was trying to be supportive to the firm as well as keeping up his own morale and preventing himself ruminating on undone tasks.

The expulsion

100. In February 2020, Ms Monk and Ms Hallows took legal advice.

101. The reasons they gave the tribunal for making their decision was that the claimant was absent; that Mr Tourville was saying he did not believe the claimant would be returning to work; and that a key selling point for the firm compared with its very large competitors was dedicated partner contact. They said matters were more difficult because the claimant's role was to manage an office where he was the only partner and that the second most senior member of the London team was absent in Australia. Also, Ms Monk said that Mr Cartwright felt his progress in integrating the teams was meeting resistance from Ms Hatchman and Mr Tourville because they were concerned the claimant would be upset about any changes made to how the London office would be run. Ms Hallows said that although initially supportive, the claimant resisted the national agenda.

102. Paragraph 18 of the Partnership Deed sets out the basis on which a partner can be expelled. The parts relevant to these proceedings are as follows.

> '18.1 If any partner shall:
>
> …
>
> 18.1.3 Act in any manner inconsistent with good faith required between the Partners; or …
>
> 18.1.8 Absent himself from the Firm for more than twenty six weeks consecutively on the grounds of sickness
>
> Then and in any such case the other Partners may by Special Resolution give notice in writing to him …. [to] determine the Partnership as far as he may be concerned …'

103. On 14 February 2020, the claimant's position was discussed at a partners' meeting at the start of an away day. The advance agenda simply referred to a 'verbal update' on him. Ms Hallows and Ms Monk deliberately gave no more detail and did not write a paper on the situation because they were concerned that the claimant still received partners' papers and would see what they were going to say. They did not want him to find out about the suspension and expulsion process until after the decision had been made.

104. Regarding the failure to provide a written paper, Ms Monk said she did not want to put in writing how shocked she had been to see the claimant's appearance on her visit. She says she was being sensitive to the claimant. Ms Hallows said the reason was to preserve the claimant's dignity.

105. Ms Monk gave no explanation in her witness statement or in her oral evidence on a different question - why they had taken steps to ensure the claimant did not find out in advance of the partners' meeting that his expulsion was being contemplated. In cross-examination, all she was able to say was that the discussion was around following the process in the partnership deed which was a 'fact', so it would have made no difference if the claimant had been forewarned. It was put to Ms Monk that the reason she did not tell the claimant she was thinking of invoking the expulsion clause was that the claimant had a mental health issue. Ms Monk accepted the proposition.

106. Ms Hallows gave no explanation in her witness statement either. Under cross-examination, she said 'that would not have been the way they wanted to claimant to find out'.

107. The minutes of the meeting were circulated to everyone including the claimant. The minutes simply record:

> 'Rory O'Carroll update provided, agree Maria to confirm the position with Paul Lockett, and then B&S to write formally to Rory to plan exit route. Discussions focussed on wish from all partners to keep the momentum seen in bringing the London business closer to Manchester/Birmingham, so we can operate one public sector team. Concerns raised that Rory might not embrace this change in approach.'

108. There is a complete lack of transparency regarding what the partners were told and what was discussed and decided on 14 February 2020. Ms Monk and Ms Hallows understood that there was a provision in the partnership deed for automatic suspension prior to a discretion to make this permanent by expulsion. It now seems this is incorrect and was based on a draft admission deed which was never executed. At the time, they believed, or had been advised, that the automatic suspension expired on 4 February 2020 and that the equity partners had a discretion to make this permanent. In reality, under the effective Partnership Deed, there is no suspension period and a partner 'may' be expelled at any point after 6 months' absence because of ill health (few have quoted the precise wording elsewhere). From the point of view of these proceedings, the key point is that Ms Monk and Ms Hallows understood the equity partners had a discretion whether to terminate the claimant's partnership permanently or not.

109. Ms Monk says in her witness statement that an email was sent to all partners other than the claimant on 26 March 2020 confirming that, following his automatic suspension, they would now proceed to resolve to terminate his partnership. This email was not in the trial bundle or, in any event, we cannot recall having been shown it.

110. Because of the lack of proper documentation of these matters, we have no confidence that the claimant's decision was fairly considered and discussed on 14 February 2020 or that the minutes accurately reflect the reasons for the decision. The agenda and minutes were deliberately lacking in transparency. We have no idea what 'verbal update' was provided. We suspect it was brief. The tenor of Ms Monk's and Ms Hallows' evidence to the tribunal throughout was that the Partnership Deed allowed expulsion after 6 months' sickness. They spoke and behaved as if that was an inevitable process, giving only token recognition to the word 'may' in the deed. We question how much thought was given by the partners to the fact that they had a discretion.

111. Indeed Mr MacMillan, who gave evidence, was one of four equity partners who passed the resolution to expel on 31 March 2020. He told us that he simply acted on the decision made by the wider partner group on 14 February 2019. As to that, he said he went on what Ms Monk and Ms Hallows told him. He said he had not seen any medical documents and Ms Monk and Ms Hallows were 'guarded' in how they described matters. They said there were mental health issues, and that they wanted to protect the claimant's dignity and privacy, 'but they made it quite clear he was not coming back in the short term'.

112. In cross-examination, Mr MacMillan conveyed a detachment, indifference and lack of responsibility towards his part in the decision to expel a long-standing partner after only 6 months' ill health. He had had no input from the clamant. He was happy just to go along with the small amount of information he had been given that there were mental health issues and the claimant would not be coming back in the short term.

113. On 31 March 2020, the equity partners passed a resolution to expel the claimant.

114. On 2 April 2020, Ms Monk texted the claimant via Ms Baltesz: 'conscious we have not spoken for a bit, things have been a bit crazy recently, can't think why …. Would you (Rory) be up for a call tomorrow…'

115. Ms Monk had a script for the telephone call, which she was checking over with Ms Hallows. Ms Monk says the reason or having a script was that she didn't want to allow for any 'real conversation' to take place. The script starts:

> '1. Apology for not being in contact since the end of January when I last visited, admit shock at how poorly Rory was when I visited and wanting to allow him the space, and dignity, he clearly still needed and then the virus overtook;
>
> 2. Ask after health now, which leads to one of two places
> - Either clear has improved, to which express pleasure and relief, though upset that this had not been communicated to us; or
> - Is not apparently improved, so express continued sympathy.
>
> 3. Reminder before Rory went on sick he wanted to revisit his retirement plans, previously we were working to September 2021, wit the appropriate transition time within this timescale ..

…..

9. The partnership agreement as drafted means that with an absence of over 26 weeks Rory's position as a partner is automatically suspended, this came into effect on 4 February 2020;

10. Mindful of the need to manage Rory's retirement, that the transition has advanced so far by virtue of his absence and the change in partnership strategy as discussed above, and added to all of this the virus position that means unlikely there will be any physical return to work within a period that could extend past the summer, the partners have come to an extremely tough decision that Rory's partnership now ceases on a permanent basis.'

116. The script went on to say that if the claimant had declared improved health at the outset, they would look to manage any final succession issues with clients as smoothly as possible. If he had not improved, she would not raise that matter.

117. It is clear from the script that even if the claimant answered that he was considerably better, the decision had already been made.

118. Ms Hallows commented on the script by return of email and Ms Monk then added her further comments in red. This includes the following from Ms Hallows:

'My biggest worry is that he has been in the partner email group and I suspect still is because I cannot remove him ….. he might have seen all the away day papers, various emails to partners about him. I have not had tome to check but I think you need to be prepared for him to throw something in that maybe we didn't think he knew.'

Ms Monk replied:

'I think he has …. The original papers just had Rory down with the narrative 'verbal update to be provided'. So is OK I think. The notes following refer to you confirming the position with LLM. So again I don't think anything inappropriate …. So up to the point that we sent out the letters and resolution all was OK. So done nothing wrong, treated him with dignity in fact.'

119. The claimant and Ms Baltesz assumed the purpose of the call was to discuss the claimant's progress and possible return to work. Ms Monk was rather incoherent about whether the claimant was automatically suspended or expelled, and whether it was an automatic consequence of the partnership deed or whether a discretion had been exercised. However, she eventually got across the message that the claimant's partnership was terminated as of 31 March just gone. Ms Baltesz felt the conversation was artificial and had been scripted by a lawyer. Indeed Ms Monk, after some initial pleasantries, had gone through the script, deliberately not allowing pauses for the claimant or Ms Baltesz to comment.

120. Ms Baltesz and the claimant were in shock and the claimant was reduced to tears. Immediately after the news, he regressed into his non-verbal state for the rest of the day.

121. Ms Baltesz said towards the end of the conversation that the claimant's condition had been brought about by work pressures. Ms Monk says in her witness statement that she was not in a position at the time to confirm or deny that as she had not seen any of the medical records.

122. Ms Monk then sent the claimant two letters following the conversation, with a cover note dated 3 April 2020 apologising for their formality. One letter dated 31 March 2020 referred to clause 18.1.8 of the partnership agreement:

> 'The Partners are aware that your absence through sickness exceeded twenty-six consecutive weeks on 4 February 2020. Accordingly we write to give you notice that the Partners have, by Special Resolution, resolved that your position as Partner should immediately cease …… Accordingly, your position as Partner of the Firm terminated on 31 March 2020.'

123. The second letter dated 3 April 2020 says:

> 'I hope your health is continuing to improve. …. Such a formal notice does not convey the difficulty we had in making this decision, given your significant contribution to Beever and Struthers over many years. Unfortunately, your continued poor health has taken us to this point……'

124. Ms Monk said in her witness statement that the claimant had made it clear through Ms Baltesz his resistance to the respondents contacting him. We find that is not true. There is a difference between Ms Baltesz saying communications should go through her and saying that approaches should not be made at all. We see no reason why Ms Baltesz would have discouraged approaches. The whole point was that she was able to act as gatekeeper and shield the claimant if necessary. Indeed we can see that in her management of the texts with Mr Tourville. There is no evidence at all of any occasion when she expressed resistance or discouraged an approach from Ms Monk. Her tone on all occasions when she had contact with the respondents was open and friendly. On several occasions she had to chase Ms Monk and urge that meetings take place sooner. The only resistance at any stage was right at the beginning, when the claimant wanted to see Ms Monk alone and not with Ms Hallows. Indeed, during cross-examination, Ms Monk accepted that Ms Baltesz had not said Ms Monk could not get in touch with her as opposed to with the claimant directly.

125. We address now our fact findings on a few further relevant issues, which are clearer put separately than in the chronological flow above.

<u>Mr Tourville's ongoing requests for partnership</u>

126. Mr Tourville emailed Ms Hallows on 30 January 2020 saying he thought it was the claimant's initial intention for him to get some headspace after so many years at the firm before coming back and taking over the London office

from him. He said he could not see the claimant returning to work in any capacity and Mr Tourville felt the claimant would be happy to hand over to him so that he (the claimant) could move on. Mr Tourville added 'I feel I'm ready for Partner and was having discussions around that with Rory when Chris Porritt was around but with the Australia shift wanted me to take stock first'. … I feel that a promotion to Partner now will also keep me motivated to keep everything going for the next 6 months..'

127. On 17 February 2020, Ms Hallows had a conversation with Mr Tourville who apparently said he did not think the claimant would return to work, and that the London office needed the clarity of him (Mr Tourville) being partner. He said he did not think he could motivate himself through the next 6 months unless he was made a partner.

128. As the claimant observed and Ms Monk admitted, Mr Tourville was not reticent in self-marketing himself. We mean no criticism by saying this. Simply that it was obvious, and his communications must surely have been read by Ms Monk and Ms Hallows with an awareness of that.

129. Further, the letter of 30 January 2020 refers to discussions in the past. It does not say that the claimant had offered partnership. At most, it says that the claimant's 'initial intention' was for him to get some headspace by going to Australia before coming back and taking over the London office from the claimant and 'I still think that is his intention'. This is consistent with the claimant's remit as set out in Ms Monk's 15 March 2019 letter.

Restructuring and changes

130. Ms Hallows and Ms Monk wanted to change the structure of the firm, making it more coordinated nationally, so that London was less of an independent office working in isolation. For example, not-for-profit clients tended to operate nationally. The appointment of Mr Cartwright was intended to facilitate that integration.

131. Ms Hallows and Ms Monk say that the claimant was obstructive to this approach, and that was one reason why expelling him from the partnership came at a good time. We were not given any concrete evidence that convinced us the claimant was obstructive. Ms Hallows and Ms Monk cited the fact that Mr Tourville and Ms Hatchman would support suggested changes one minute and oppose them the next, sometimes suggesting the claimant would not agree with them. They did not give any clear or reliable example as to when the claimant had done this. Ms Monk said Mr Cartwright had privately expressed concern that Mr Tourville and Mr Hatchman might be upset at changes he made to the London office. Again, no precise examples were given. The clearest example of Mr Tourville objecting to Mr Cartwright's role came in Ms Hallows' note of her conversation with Mr Tourville on 17 February 2020, where he apparently had said he had had conversations with many clients who did not think Mr Cartwright would give them the quality

service that they were used to. This was in the context of Mr Tourville advocating for himself to become partner in the London office.

Fit notes

132. On 9 August 2019, the claimant's GP issued a fit note from 6 August to 10 September 2019 stating he was not fit for work because of 'severe anxiety and depression. Work related stress.' He was provided with a further fit note up to 31 October 2019 stating 'Anxiety and depression. Work related stress'. On 24 October 2019 he was provided with a fit note up to 2 January 2020 stating the same thing. On 2 January 2020, this was extended to 31 January 2020, again stating 'anxiety and depression. Work related stress'. On 28 January 2020, a further fit note was issued until 1 March 2020 for 'Depression'. The final fit note issued prior to the claimant's notification of his expulsion is dated 2 March 2020 until 17 April 2020, again for 'Depression'.

133. Ms Baltesz sent in the fit notes to the respondents as soon as she was able to. This was not always easy as she had to go and collect them and then post them at a time when she was nervous about leaving the claimant on his own at home. We do not know on what date each was received, but the respondents confirmed that as at 31 March 2020, the latest fit note they had was the one dated 2 January 2020.

Expulsion of partners for breach of trust

134. As mentioned above, there is provision in the Partnership Deed for expulsion for breach of trust.

135. The only occasion we were told about when the firm had previous expelled a partner was 12 – 15 years previously when the partner had engaged in very serious misconduct. Ms Monk told us it involved ethics issues, potentially earning money outside the business relationship, and borrowing and lending money.

136. We give no credence to the evidence of Mr MacMillan, one of the four equity partners in the firm. Indeed, we find his evidence of some concern. He admitted he scarcely knew the claimant or his side of the business, yet his witness statement is heavily critical of the claimant's actions, often based on inaccurate facts. For example, he says the claimant had agreed that Mr Tourville could spend 12 months in Australia, without noting that the decision was discussed with Ms Hallows and Ms Monk, who were the ones to make the decision. He says Mr Tourville had been promised two first class air trips to return to the UK if necessary, which is simply inaccurate. He adds, 'To my knowledge Rory had gone far beyond his authority in agreeing this to Michael without seeking partnership approval'. It was not to his knowledge. He had no first-hand knowledge of this at all, but he is prepared to say that he was 'appalled' at the 'breach of trust'.

Law

137. We were supplied with a joint bundle of authorities in support of those referred to in the written closing submissions.

Direct discrimination

138. Under s13(1) of the Equality Act 2010 direct discrimination takes place where, because of disability, a person treats the claimant less favourably than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case. Under s23(2), where the protected characteristic is disability, the circumstances relating to a case include a person's abilities.

139. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of disability. However in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as she was. (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285)

140. This is repeated in Aylott v Stockton on Tees Borough Council [2010] IRLR 994, CA:

> 'The question of less favourable treatment than an appropriate comparator and the question whether that treatment was on the relevant prohibited ground may be so intertwined that one cannot be resolved without at the same time deciding the other. There is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? Once it is found that the reason for the treatment was a proscribed one, there should be no difficulty in deciding whether the treatment on that ground was less favourable than the treatment that was or would have been afforded to others…That does not mean that a hypothetical comparator can be dispensed with altogether. It is part of the process of identifying the ground of the treatment and it is good practice to cross check by constructing a hypothetical comparator. But there are dangers in attaching too much importance to the construct and to less favourable treatment as a separate issue, if the tribunal is satisfied by all the evidence that the treatment was on a prohibited ground.'

141. Decisions are frequently reached for more than one reason. Discrimination may be because of disability even if it is not the sole ground for the decision, if it had a significant influence on the outcome. (Nagarajan v London Regional Transport [1999] IRLR 572, HL.)

Discrimination arising from disability

142. Section 15 of the Equality Act 2010 prohibits discrimination arising from disability. This occurs if the respondents treated the claimant unfavourably because of something arising in consequence of the claimant's disability. The respondents have a defence if they can show such treatment was a proportionate means of achieving a legitimate aim.

143. The respondents will not be liable under section 15 if they show that they did not know, and could not reasonably have been expected to know, that the claimant had the disability.

Burden of proof

144. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that the respondents have contravened the provision concerned, the tribunal must hold that the contravention occurred, unless the respondents can show that they did not contravene the provision.

145. The guidelines set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof (in the context of cases under the then Sex discrimination Act 1975) are as follows:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

146. The tribunal can take into account the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

147. The Court of Appeal in Madarassy, a case brought under the then Sex Discrimination Act 1975, states:

> 'The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

148. In a direct discrimination claim, a false explanation for the less favourable treatment added to a difference in treatment and a difference in [sex] can

constitute the 'something more' required to shift the burden of proof. (The Solicitors Regulation Authority v Mitchell UKEAT/0497/12.]

149. The individual employee who carried out the act complained of must have been motivated by the protected characteristic. If he or she is innocent of any discriminatory motivation but has been influenced by information supplied or views expressed by another employee whose motivation is discriminatory, the correct approach is to treat the supply of information or view expressed by the other employee as the discriminatory action. The loss caused ultimately to the claimant by the latter employee's actions can still be claimed. (CLFIS (UK) Ltd v Reynolds [2015] EWCA Civ 439.)

Time-limits

150. The relevant time-limit is at section 123(1) Equality Act 2010. Under section 123(1)(a), the tribunal has jurisdiction if the claim is presented within three months of the act of which complaint is made. By subsection (3), conduct extending over a period is to be treated as done at the end of the period. A series of different acts, especially where done by different people, does not (without some assertion of link or connection), constitute conduct extending over a period. In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96, the CA held that 'an act extending over a period' can comprise a 'continuing state of affairs' as opposed to a succession of isolated or unconnected acts

Polkey / Chagger

151. In assessing compensation for a discriminatory dismissal, it is necessary to ask what would have occurred had there been no unlawful discrimination. If there is a chance that dismissal would have happened in any event, that must be factored into the calculation of loss. (Abbey National plc v Chagger [2010] IRLR 47, CA.) The same principle would obviously apply to expulsion from a partnership.

Statutory requirement

152. The stay requirement exception in Schedule 22 paragraph 1(1) of the Equality Act 2010 applies where a person does anything he must do pursuant to a requirement of an enactment or a relevant requirement or condition imposed by virtue of an enactment'.

Conclusions

153. We now apply the law to the facts to decide the issues. If we do not repeat every single fact, it is in the interests of keeping these reasons to a manageable length.

154. We mention at this stage that we were very conscious that the claimant was a partner and not an employee. We have applied our minds to what would be expected in relation to a partner in these circumstances.

155. We further add that we are conscious the issue is not whether the respondents acted 'fairly'. We have borne in mind the legal definitions in relation to each claim.

Direct discrimination: issue 5

Expulsion: issues 5.1.1, 5.2 and 5.3

156. The first question was whether the respondents did expel the claimant from the partnership. There is no dispute that the respondents expelled the claimant from the partnership with effect from 31 March 2020 and that he was not informed that his expulsion was being contemplated or given an opportunity to make representations about that. Indeed the respondents deliberately did not inform him of this and prevented him making representations.

157. We then applied the burden of proof and asked ourselves, as stage 1, whether the claimant had proved facts from which the tribunal could decide, in the absence of any other explanation,, that the expulsion was direct disability discrimination. We find that they did.

158. Ms Monk and Ms Hallows started to put in motion the expulsion process at the first opportunity to invoke the clause in the partnership deed which allowed expulsion on health grounds after 6 months. They gave no consideration to any extension of time. They did not forewarn the claimant. They did not discuss the possibility with him. They did not ask him for permission to contact any of his doctors or counsellors for a medical prognosis. They did not initiate any contact with him throughout his illness. They did not try to explore a managed exit with him, even though he and Ms Baltesz had floated the possibility when he first went off sick. In short, there was a striking lack of engagement.

159. The decision to expel was made on the basis of impressions and assumptions regarding the claimant's likely prognosis. The respondents did not at any stage attempt to obtain a prognosis from any medical source. They had a range of options: the claimant's GP, the Crisis Team, iCope, an independent consultant or an occupational health doctor. Instead they relied on Ms Monk's impressions from a single visit two and a half months before the expulsion resolution; some comments from Mr Tourville – also from a single visit, some limited other contact and in a context where he was arguing for his own promotion; some observations from the claimant's partner to whom they gave weight because they had once been told she was a 'psychologist' (but they made no effort to check this misapprehension during the course of the relevant events); and information contained in three fit

notes, the latest of which was 3 months' old at the date of the expulsion resolution.

160. Subject to any explanation, we cannot imagine such a reliance on subjective impressions, slender evidence and out-of-date fit notes if the nature of the claimant's illness was physical or if the claimant was not disabled and was long-term absent from some other reason.

161. We are also struck by the ascribing of authority to Ms Baltesz because she was a 'psychologist' without having been told that formally in this context or making any enquiries. Indeed Ms Hallows said she had assumed Ms Baltesz was 'a mental health practitioner' purely from the fact that the claimant had in the past referred to her as a 'psychologist'. There is even an assumption that this was the correct profession to speak on the claimant's particular mental health condition. We cannot imagine that the respondents would have relied on some vague past reference to the claimant's partner's medical expertise if the claimant had a physical disability. Equally, if the claimant was not disabled and was long-term absent for another reason, we cannot imagine the respondents would have relied on a vague memory of his partner's apparent expertise in the relevant field as a reason not to make direct enquiries themselves. At the very least, we are sure the respondents would have asked the claimant's partner or the claimant precisely what relevant expertise she had.

162. In our experience, mental health issues are not easily discussed in the workplace. It is still a taboo in our society, though matters have improved. Failure to engage and avoidance is something we do sometimes see when employers are confronted with mental health issues.

163. We also find it indicative that the respondents were unwilling to engage and face the claimant's emotions head on from the outset. Ms Monk was aware of the mental health aspects from the beginning. She described the claimant's phone call on 2 August 2019 as a panic attack. She was asked to come down to see him immediately and on her own to talk through the situation, but she postponed it until after her holiday even though she knew it was not what the claimant wanted. She did not want to engage 'whilst we are all feeling so raw and hurt', despite the fact that the claimant and his partner had made it clear that engagement was exactly what was needed, however uncomfortable.

164. Ms Monk never took any further initiative to see the claimant or even to get in touch. She responded in a kind and emotionally supportive manner if Ms Baltesz contacted her, but never initiated or even set a plan for getting in touch regularly. She did not get in touch after her return from holiday in August 2019. She prompted no contact before Ms Baltesz texted on 27 November 2019 inviting her to come for tea. This was nearly three and a half months after her last telephone conversation with Ms Baltesz. Even then, Ms Monk did not make an effort to come and visit before the New Year, which again Ms Baltesz had to chase up by text on 7 January 2020.

165. As we have said, if unexplained, this approach can be seen as avoidance, of a kind we recognise can occur when people have to deal with mental ill health. Ms Monk's responses when she was prompted and when she did eventually visit were supportive in that they were personally friendly and told the claimant not to worry about work and to take his time to recover. We would characterise her approach as offering 'tea and sympathy'. Again, this is something we would associate more with how an organisation might react to a partner with a mental health disability. We cannot imagine such a hands-off reactive approach if a partner did not have a mental health disability and was absent through long-term sickness or for other long-term reasons of uncertain duration.

166. Ms Monk and Ms Hallows were not the kind of people who did not take a detailed interest in matters and how they would develop. For example, in relation to Mr Tourville's planned 1 year absence to go to Australia, they took active interest in the detailed arrangements. We appreciate Mr Tourville was an employee, and a senior one, and that his absence was not a matter of health. But even though Mr Tourville had a partner managing him (the claimant, who was not unwell at the planning stage), Ms Monk and Ms Hallows wanted to know all the details.

167. We are aware there are cases where employees ask not to be disturbed when they are absent with mental ill health. But this was not such a case. Ms Baltesz was always amenable. She never said not to contact the claimant through her.

168. As part of this pattern, the respondents made a deliberate decision not to consult with the claimant or Ms Baltesz regarding the claimant's future with the firm. They did not consult with the claimant. Indeed, Ms Monk and Ms Hallows took a deliberate decision to conceal their intentions from the claimant until after the decision was made. They secured the agreement of the other partners on very little information in what appears to be a relatively brief discussion. They made sure the claimant and Ms Baltesz had no opportunity to get a word in when the decision was communicated to them. This last – the deliberate reading of the script straight through so the claimant could not get a word in – is so extraordinary that it suggests to us a fear of having a painful conversation with a person with mental health difficulties.

169. Again, we just cannot imagine that if a fellow partner, who did not have the claimant's mental disability, had been absent for 6 months for other reasons, including a physical disability, and if there was still no clear return date, that the respondents would have failed to talk to him about when he might come back, investigate the circumstances which might determine that, and discuss the matter generally before expelling him from the partnership.

170. We also find it very surprising that the respondents' HR Director, Ms Rigby, was so little involved. We appreciate this matter concerned a partner and not an employee. But Ms Monk had reported the claimant's initial panicky phonecall on 2 August 2019 to Ms Rigby. Ms Baltesz had asked Ms Monk to seek the assistance of Ms Rigby at the very early stage when the claimant

was wanting a quick meeting with Ms Monk. Ms Rigby appears to have done little more than leave a few voicemails chasing up fit notes. We would contrast this with Ms Hallows' emphasis on the importance of running the letter to Mr Tourville past Ms Rigby. This again suggests a disengaged 'tea and sympathy' approach unaccompanied by a professional approach which we would normally expect to see in such a situation.

171. The final question is whether, the burden of proof having shifted, the respondents can prove that the expulsion was in no sense whatsoever because of disability. We find that they cannot.

172. Again, it is impossible to look at the expulsion in isolation from the way it was carried out, the general lack of engagement, and the avoidance of communication with the claimant.

173. The respondents did not provide any explanation for hiding the possibility of his expulsion from the claimant. When pressed to explain, Ms Monk admitted it was because the claimant had a mental health issue.

174. The main explanation put forward to the tribunal for the claimant's expulsion was that his absence and continued poor health caused commercial difficulties. The respondents said the commercial difficulties needed the appointment of dedicated personnel in the London office to meet client demand and ensure continuity of service, which could not be achieved with the claimant in post but absent, with all the uncertainty regarding services to clients. They said matters were more difficult because the claimant's role was to manage an office where he was the only partner and that the second most senior member of the London team was absent in Australia. Moreover, they felt he was an obstruction to their goal of a general restructure that integrated the local offices into a more national approach, because he did not agree with this approach and Mr Tourville and Ms Hartman would not buy into the approach because they feared his disagreement. They say they also had in mind that his retirement date was not that far away (September 2021) and he had occasionally indicated a desire to leave earlier.

175. We are not satisfied these comprised the respondents' genuine reasons at the time.

176. Mr Cartwright was able to help with the London office. He had no portfolio when he arrived and was covering the claimant's clients. Mr Tourville, though based in Australia, was also able to provide significant help. There was no evidence that clients were in fact disturbed by not knowing when the claimant would return. When the claimant was expelled, the respondents did not take steps to appoint a new partner in the London office to replace him. The arrangements just carried on.

177. In so far as the respondents say the claimant resisted the national agenda, we were given no clear examples to show that this was the case. Nor

were we given any evidence that he was picked up on it by Ms Hallows and Ms Monk if this was a major issue.

178. Nor was there any reliable evidence that Mr Tourville or Ms Hartman were obstructing Mr Cartwright and the goal of national integration because they feared the claimant would oppose it. Mr Tourville's emails show he was his own man. His basis for expressing concerns about Mr Cartwright was that Mr Tourville believed clients did not like Mr Cartwright's approach. It must have been clear to the respondents from the tone of the emails and previous conversations, that Mr Tourville had strong aspirations to be partner and to lead the London office in due course, and what he said must have been viewed in that light. If Mr Tourville believed the claimant was unlikely to come back, as apparently he later stated, it is extremely unlikely that any opposition to Mr Cartwright's plans would have been based on concern about what the claimant thought.

179. As regards the fact that the claimant's retirement date was not that far away, there were still 18 months to go. We do not think this was why the claimant was expelled when he was. The respondents had thought the claimant's input valuable enough to persuade him to retract his resignation only one year earlier, before he became ill. At that stage, they had wanted to agree a fairly distant retirement date, ie September 2021.

180. We are concerned in general about shifting explanations and a build up of criticism of the claimant in defending this case. We discuss this further below in relation to Polkey and the matters raised there. The claimant had worked for the firm for over 10 years. He had successfully headed up the London office. He had been persuaded to retract an earlier resignation and given a remit to help with succession planning. Yet the respondents' three witness statements seek to criticise the claimant strongly on a number of matters, several of which strike us as exaggerated, for the purpose of defending these proceedings and justifying the respondents' actions. It has caused us to lose a degree of confidence in the evidence as to the way matters were really perceived at the time.

181. We are further unhappy at the lack of transparency regarding the discussion at the partnership meeting on 14 February 2020. Not only is it not properly documented to keep the information away from the claimant, we as a tribunal are also unable to scrutinise it. Mr MacMillan's evidence is disturbing in its lack of grasp of accurate facts. This adds to our concern about shifting explanations and justifications, first as provided by Ms Hallows and Ms Monk towards the partner group as a whole, and then in the course of defending these proceedings.

182. The respondents have therefore not satisfied us that the decision to expel the claimant was in no sense whatsoever because of his disability. We find that his expulsion was direct disability discrimination.

Not informing the claimant that expulsion was being contemplated

Not giving the claimant an opportunity to make representations about his proposed expulsion
Issues 5.1.2, 5.1.3, 5.2 and 5.3

183. It is admitted that the claimant was deliberately not told his expulsion was being contemplated or given the opportunity to make representations about the proposal.

184. We find the burden of proof is shifted in relation to these matters for the same reasons that we found it shifted on the expulsion. The matters all inter-relate.

185. Alternatively, were we to take into account the respondents' lack of explanation at stage 1 of the burden of proof, that would also shift the burden.

186. It is therefore for the respondents to prove that their actions were not direct discrimination.

187. The respondents provided a reason for not providing a written paper for the partners meeting, ie to preserve the claimant's dignity by not spelling out their perception of his mental condition in writing. However this explanation does not explain why they did not privately forewarn him that the subject of his expulsion would be under discussion.

188. As we have said, Ms Monk and Ms Hallows simply could not explain this, Ms Monk just repeated that the power under the partnership deed was a fact, which does not answer the question. Eventually, when pressed, she admitted it was because the claimant had a mental health issue.

189. Both because of the respondents' inability to explain, the burden of proof having shifted to them, and because of Ms Monk's admission, we find these matters to be direct disability discrimination.

190. We comment below in relation to the section 15 claim on Dr Morgan's fleeting suggestion that failing to consult or engage with the claimant was pursuant to a statutory requirement. We do not accept this argument. In any event, the respondents' reasons for not informing the claimant in advance were not in order to protect his health and safety.

Not engaging with the claimant in relation to any possible return to work by asking for information on the prognosis or what measures might be required to facilitate a return to work
Issues 5.1.4, 5.2 and 5.3

191. The first question is whether the respondents subjected the claimant to the treatment in issue 5.1.4, ie not engaging with him in relation to any possible return to work by asking for information on the prognosis or what measures may be required to facilitate a return to work.. We find that they did.

192. The respondents did not engage with the claimant at any time in relation to a possible return to work. Ms Monk simply did not discuss it with him. She did not ask what measures he thought might facilitate his return to work.

193. The respondents never engaged on the topic of work-related stress. They knew that Ms Hallows' email had been the trigger for the claimant's illness, and that he and Ms Baltesz felt it important to discuss this quickly with Ms Monk. But the respondents refused to accede to the request for a quick discussion about the email and never addressed it at any later point. The fit notes referred to 'work-related stress'. This was not followed up. In the final conversation on 3 April 2020, Ms Baltesz said towards the end of the conversation that the claimant's condition had been brought about by work pressures. Ms Monk says in her witness statement that she is not in a position to confirm or deny this because she had not seen the medical records at the time, which serves to highlight again her lack of engagement. She could have asked for medical information.

194. The respondents never asked for a prognosis. They did not ask the claimant when he thought he might be able to come back. They never asked for any report from the claimant's GP, Crisis, iCope or an occupational health doctor.

195. The next question is whether the claimant has proved facts which shift the burden of proof. We find that he has. Essentially these are the same facts as those set out in relation to the expulsion. As we have said, these matters were all interrelated.

196. Alternatively, were we to take account of the respondents' explanation at stage 1, we would say this also shifted the burden of proof. The respondents said it was the claimant who did not engage with them. As we discuss below, this is a complete reversal of the true picture.

197. We then considered whether the respondents had satisfied us that their failure to engage was not direct disability discrimination. We find that they have not.

198. Ms Monk said in her witness statement that as at February 2020 the claimant had not provided any medical evidence, had not engaged in any conversation with them and had made it clear through Ms Baltesz his resistance to them contacting him. This is simply not true. At no stage did Ms Baltesz or the claimant say that the respondents should not contact the claimant, albeit through Ms Baltesz. At no stage had he been asked to provide medical evidence or indicated he would not want to. Ms Baltesz had been very open on his behalf about his condition and treatment, and the respondents had also by now received three fit notes.

199. The respondents suggest that the arrangement was that the claimant or Ms Baltesz contact them and not vice versa. There is no evidence that there was any such one-way arrangement. Ms Baltesz had given Ms Monk her mobile phone number. She never said she did not want to be contacted. Ms

Monk's email of 2 April is a revealing example. It says 'conscious we have not spoken for a bit, things have been a bit crazy recently, can't think why …. Would you (Rory) be up for a call tomorrow?' This suggests that Ms Monk was aware the onus to make contact was at least as much on her as on Ms Baltesz. Indeed the script for the conversation starts with an apology for not being in contact since the end of January. We do not accept this was mere politesse as Ms Monk tried to claim in her evidence. If the arrangement was that only Ms Baltesz would initiate contact, the apology would not make sense.

200. Ms Hallows also says they were simply giving the claimant the time he needed to improve his health. We do not think this was the reason for non-engagement. In January 2020, the respondents' sympathy was 'front-facing', but in reality, behind his back, they were putting in motion an expulsion. He was told at the January visit to take his time. Ms Baltesz was told there would be a further conversation and another visit at the end of February. Instead, the respondents took advice on invoking the Partnership Deed and took steps to ensure the claimant did not know that was going to happen.

201. If the respondents were genuinely motivated by a desire to enable the claimant to improve his health, they would not have handled matters in the way they did. They would not have shocked him with no forewarning with a fair accompli. They would at the very least have let him down gently. They might at least have considered the possibility of a managed exit. The exchange over the script for the final conversation and the way the script was read out show that the non-engagement was not done to protect the claimant, but to prevent him saying anything.

202. The respondents have therefore not satisfied us that their reason for non engagement was not direct disability discrimination.

Failing to offer support on the matters mention in the preceding sub-paragraph. Issues 5.1.5, 5.2 and 5.3

203. We find the word 'support' too vague in issue 5.1.5 and we do not find that the respondents subjected the claimant to treatment described in this issue.

Discrimination arising from disability: issue 6

Expulsion: issues 6.1 – 6.3

204. The reason the respondents expelled the claimant was because of his absence and continued poor health. This is in effect what they said to him verbally on the telephone and in the formal and informal written notifications which he received.

205. The claimant's absence was something arising in consequence of his disability. He was off sick because of his disability, ie his mental ill health.

206. The respondents did not want to deal with the claimant's absence and prognosis in any structured way.

207. Dr Morgan argued that the reason for dismissal was commercial reasons and that the claimant's 6-month sickness absence was simply the catalyst for the operation of clause 18. We do not find this to be the case. We have explained why we believe the reason to be the claimant's absence. Further, as we explain below, we do not think the respondents were in reality prompted by commercial reasons.

208. The next question is whether the respondents can justify the expulsion as a proportionate means of achieving a legitimate aim. We first considered what were the respondents' aims in expelling the claimant.

209. As we have said in our section on direct discrimination, we believe the aim was simply not to have to deal with the situation; to invoke the expulsion clause in the Partnership Deed when that became possible, and to move on. We do not find that a legitimate aim. The claim that the expulsion was contrary to section15 is therefore upheld.

210. The respondents say they had two main commercial aims: in summary, to give stability and permanence to the London office and its clients, and to ensure they had buy-in to their strategy of national integration. We do not think these were the respondents' aims at the time, partly for the reasons we have set out in our findings on direct discrimination and in the preceding paragraph, and partly because we are not convinced there was evidence of any notable commercial problem before the respondents at this time, so it cannot have been their genuine aim.

211. Regarding the first reason, we were not given any examples of client unhappiness regarding arrangements while the claimant was off sick. We know that the claimant had passed on some client approaches on his personal email with new business to Mr Tourville to follow up. Mr Cartwright had joined with no portfolio of his own clients and was available to cover. Mr Tourville was already embedded in the London office and had client relationships. He was carrying out work from Australia. After the claimant was expelled, Mr Cartwright and Mr Tourville just carried on. No new partner was recruited. We therefore think this was not a genuine reason existing at the time.

212. Regarding the second reason, we were again not convinced this was a genuine reason because we were given no concrete reliable evidence that the claimant was in fact obstructing this national strategy. Moreover, it makes no sense to us that the claimant would have obstructed the strategy - he knew he was retiring in the relatively near future so it would not affect him. He clearly saw his role at that point as enabling the transition after his retirement. It is also not consistent with his remit set out in the 15 March 2019 letter.

213. Nevertheless, for completeness, we shall consider whether the commercial reasons the respondents put forward in these proceedings would have been justified had we thought them the genuine reasons.

214. Firstly, were these legitimate aims?

215. It would have been legitimate for the respondents to want clear organisational structures in the London office so that client work was properly looked after and clients were happy with how things were being managed. It would also be a legitimate aim to have in place systems to cover work and keep clients informed and happy if their primary contact (the claimant) was off sick.

216. The respondents were entitled to reorganise their business to put in place a more unified national structure, and they were working on this. It made sense in relation to the not-for-profit work in the London office, because most of the not-for-profit clients were national organisations.

217. Secondly, was expelling the claimant a proportionate means of achieving those aims? We would say that it was not.

218. Considering first the respondents' needs, they would have been able to achieve those aims without expelling the claimant. Although in Australia, Mr Tourville was proving himself adept at covering the situation together with Mr Cartwright. Mr Cartwright had no portfolio when he joined the firm and was in any event working on the integration of the London office with the new Birmingham office and nationally. There was no evidence that clients were suffering or complaining about lack of service. Indeed this was an opportunity to start with certain transitions which would occur on the claimant's retirement. After the claimant was expelled, the respondents did not rush to appoint a new partner in his place. Mr Tourville and Mr Cartwright covered the work. We therefore cannot see the need to expel the claimant at this point.

219. There was never any attempt by Ms Monk or Ms Hallows to discuss with the claimant how to manage client expectations. If anything, the text messages between the claimant and Mr Tourville suggest that the claimant was being cooperative in passing on contacts from his clients.

220. This is before we weigh in the balance the impact of expulsion. Expelling people with a mental health disability from a partnership is likely to have a severe adverse effect, depriving them of their job, their self-esteem and goals for recovery. It is a serious step. In the claimant's case, even though he was due to retire in September 2021, it was important to his self-respect and mental health that he could go back before that happened. As Ms Monk recognised, the goal of returning to work was very important to the claimant's recovery. He had told her during her visit in January 2020 that he had hoped to be able to return in December. The claimant had also told his GP that he was thinking about a return to work. Ms Monk told the claimant during her visit to take all the time he needed to get better. On 27 January 2020, she agreed it would be helpful to have a further discussion in a couple of weeks and that

she would visit again at the end of February 2020. She did not do this. Instead, the claimant was told in April 2020, after the event, that he had been expelled.

221. The claimant was not even offered the alternative of a managed exit with dignity. He was expelled. It was hidden from him that expulsion was under consideration and he was told after the event in a conversation deliberately designed to stop him getting a word in. He was not let down gently. He was ambushed. He was given no dignity at all.

222. The claimant was devastated by his expulsion. He cried when he was told on the telephone and was in a very bad way for the rest of the day.

223. Balancing the severe impact of the expulsion with no real urgency for the respondents (even if this was their aim), we find that expulsion was not proportionate.

224. We have also considered as a separate matter – and jointly with the 'stability' aim - whether expulsion would have been proportionate in relation to the aim of pursuing the respondents' project of national integration.

225. We find it would not. There was no reliable evidence that the claimant had been causing any active obstruction to this project or that it had been set back because of him. The respondents made some assertions to that effect in the proceedings and apparently in the partners' meeting in February 2020, but we have little confidence in the reliability of such assertions – partly because we were given no concrete first-hand example of problems and partly because throughout this case we have found examples of negative exaggeration by the respondents about the claimant's conduct which we have felt unwarranted by the facts. We have mentioned many such examples in these reasons.

226. Winning round local staff to a new way of working, ie Mr Tourville and Ms Hatchman, would in any event be necessary and one would expect a degree of resistance in an exercise of this kind, but there was no evidence that the claimant was blocking matters, as opposed to their own reservations.

227. Even if the claimant's attitude had been causing a problem, or a blockage with other staff, this could have been discussed with him. There was no attempt to do so.

228. Again balancing this against the negative impact of expulsion, we find the expulsion was not proportionate.

229. Therefore we find the claimant's expulsion was discrimination arising in consequence of his disability.

Not informing the claimant that expulsion was being contemplated
Not giving the claimant an opportunity to make representations about his proposed expulsion
Issues 6.1 – 6.3

230. These two actions go together. The respondents did not give any reason for this approach other than Ms Monk's concession that it was because of the claimant's mental health. This was direct discrimination. The claim under section 15 is therefore not upheld.

Not engaging with the claimant in relation to any possible return to work by asking for information on the prognosis or what measures might be required to facilitate a return to work
Issues 6.1 - 6.3

231. The respondents state there was no point in having this kind of discussion with the claimant because it was clear he would be unable to return. We have already explained that we think this kind of assumption was made because the claimant had a mental health disability and thus was direct discrimination.

232. Considering the matter under section 15, an assumption or view that the claimant would be unable to return because of his mental ill health, would also be something arising from his disability.

233. Again, we think the respondents' aim in doing this was not to have to engage with someone who was mentally ill. We have said this was direct discrimination. However, looking at the section 15 claim, that is not a legitimate aim. The claimant never said that he did not want to be contacted (through Ms Baltesz). Ms Baltesz never said the respondents should not approach the claimant, but only that they should do so through her.

234. Avoiding unnecessarily distressing the claimant would have been a legitimate aim, but we do not think that was the respondents' aim. The respondents were not concerned about distressing the claimant by letting him know about his expulsion after the event with no forewarning, or by not exploring a managed exit. They took no steps to prepare the claimant or Ms Baltesz for the call. Moreover, Ms Hallows and Ms Monk's exchange about the script of the final conversation shows that their motivation was more about closing down difficult conversations.

235. Dr Morgan floated in his oral closing submissions that Ms Monk and Ms Hallows were acting in pursuance of a statutory requirement under the Health and Safety at Work Act by taking steps to protect the claimant from distress. He did not develop the argument beyond this. We do not find that this exception applied. First of all, we were given no specifics of the alleged requirement. Second, there were a number of ways the respondents could have made contact with the claimant through Ms Baltesz which need not have unnecessarily distressed him. We can say no more because the argument was not properly put to us.

236. The failure to engage was not proportionate. The impact on individuals of not engaging with them regarding prognosis or measures to help them to return to work before dismissing them or expelling them from a partnership is self-evidently extremely severe. It gives them no chance of arguing for the

retention of their job or to be given more time. The impact on the claimant was severe because he had in mind the goal of returning to work. It gave him no chance of discussing and exploring whether it could work.

237. The respondents had a route for getting in touch with the claimant through Ms Baltesz. Ms Baltesz would have said if such an approach was undesirable and would have unnecessarily distressed the claimant. The respondents tried to argue that they were at an 'impasse' and the claimant or Ms Baltesz were somehow blocking contact. That simply was not true.

238. The claim that not engaging with the claimant in relation to any possible return to work by asking for information on the prognosis or what measures might be required to facilitate a return to work was discrimination arising from disability contrary to section 15 of the Equality Act is therefore upheld.

Failing to offer support on the matters mention in the preceding sub-paragraph. Issues 6.1 - 6.3

239. We find the word 'support' too vague and we do not find that the respondents subjected the claimant to treatment described in this issue.

Time-limits: issue 7

240. It is accepted that the claims regarding expulsion were brought in time. The other matters are all conduct extending over a period culminating in the expulsion. Failure to inform the claimant that expulsion was being contemplated and not giving him an opportunity to make representations about his proposed expulsion are clearly linked to the expulsion itself. Not engaging with the claimant in relation to any possible return to work by asking for information on the prognosis or what measures might be required to facilitate a return to work is also closely connected with the expulsion and also continued right up to the expulsion. As we have stated throughout this decision, we regard all these matters as inter-related. We therefore find that the claims were all brought in time.

Polkey/Chagger: lack of trust

241. The respondents argue that had the claimant not been expelled from the partnership because of ill health, the partnership would seriously have considered expelling him for loss of trust, ie for withholding information about the options available to Mr Tourville in Australia (this seems to be a reference to allegedly not telling them that Mr Tourville did not have a local visa) and misleading them about Mr Tourville's intentions by allegedly telling them Mr Tourville had resigned. There also appears to be a complaint that the claimant did not tell them that Mr Tourville had been offered sponsorship by an international construction company. Further, it is said the claimant made promises to Mr Tourville about partnership which were not within his power to make; that he agreed unreasonable terms with Mr Tourville to satisfy his own

objective rather than for the firm's benefit, and further that he communicated regularly with Mr Tourville about work-related matters while off sick while making no attempt to communicate with his fellow partners.

242. Regarding the matter of the local visa and the international sponsorship, it is notable that the respondents blame the claimant for knowing and holding back this information from them, when the more obvious person to blame would be Mr Tourville, who discussed Australia with them directly in April and May. The claimant had not even been present in April. They ask us to believe that the claimant withheld the information about the international construction company, when the claimant did not even know, when Mr Tourville did not categorically say the claimant knew, and even if he had, Mr Tourville could have forgotten what he had said to whom, or even be covering up his own failure to provide full information at the time.

243. The claimant never told them that Mr Tourville had resigned. He said that one of the options was that Mr Tourville might resign. It is illogical to us that Mr Tourville would resign without first trying to negotiate for what he wanted. He had ambitions for progress within the firm to head up the London office and be made a partner. It is highly unlikely he would have resigned first and discussed the matter second. Also, as already stated, Mr Tourville spoke direct to Ms Monk and Ms Hallows about his Australia proposal in April and May 2019, and he did not say anything about resigning.

244. The alleged unreasonable terms appear to relate to the sharing of the airfares. We are struck by the suggestion that the claimant had agreed these terms to satisfy 'his own objective' as head of the London office rather than for the firm as a whole. Even if the claimant had deliberately gone against the instructions of the executive partners in offering these terms (which we do not accept), why would that have been for the claimant's 'own objective'? How would the claimant benefit? He was about to lose his main assistant for a year. He did not have long after that before retirement. He had been given a remit to ensure a smooth succession so they could focus on the further development of the very successful London office. Ms Monk and Ms Hallows also recognised the importance for the firm of keeping a high performer like Mr Tourville. Why make a gratuitous allegation now that the claimant had somehow agreed terms for his own objective?

245. Ms Hallows and Ms Monk agreed that Mr Tourville was a valuable employee who they would want to keep. The claimant accepted Mr Tourville had put them in a difficult position. What was required was to make the best of it. The claimant had the firm's interests in mind in retaining Mr Tourville. He negotiated a reduction in pay, particularly bonus. He inserted a 6 month break clause in case the firm was not happy with how things worked out. It is hard to understand what objective of his own the claimant would have been trying to satisfy.

246. As we have already stated in our fact findings, we do not accept that the claimant went against concrete instructions not to pay anything towards air fares and to show the letter to Ms Hallows, Ms Monk and Ms Rigby before it went out. The claimant believed Ms Hallows and Ms Monk had signed off the letter subject to the changes in tone he had agreed to do. He understood he had a discretion regarding finalising on the air fares although it was their preference not to pay towards those. He was not told to run the letter past Ms Rigby until two days later, by which time it was too late.

247. We believe the allegations against the claimant in respect of Mr Tourville have been exaggerated in these proceedings. There is a casual inaccuracy in the witness statements over the matter. Ms Hallows says the claimant reached an uncapped agreement. Mr MacMillan says the claimant had agreed to pay two first-class air fares back. Neither was true. The firm's maximum exposure was in the area of £1500. All this in the context that the claimant had negotiated some reduction of salary, no bonus and a break clause to protect the firm's interests.

248. Putting it at its absolute worst against the claimant, it may have been perceived as a misunderstanding as to how things were left after the 29 July 2019 meeting.

249. In her witness statement, Ms Hallows criticises the claimant for engaging with Mr Tourville in detail about management of clients, yet 'choosing' not to engage in conversation with any of his fellow partners. We are surprised that this is a matter of criticism when the claimant was clearly trying to be helpful to the firm and to Mr Tourville in covering his work, and by passing on new business from clients. Ms Hallows is incorrect when she says she and Ms Monk were not aware of 'any of this until August 2020'. Ms Hallows and Ms Monk knew Ms Hatchman had asked the claimant to sign accounts on a couple of occasions. They knew Mr Tourville and Ms Hatchman had visited the claimant. The claimant was open about the communications in Ms Monk's January 2020 visit. The communications with Mr Tourville were all very minor in the scheme of things and not inconsistent with the claimant's general desire to avoid work. The purpose of the engagement was to an extent therapeutic and also to help junior colleagues maintain continuity with clients. There was nothing untoward. As regards the claimant's engagement with the partners, it was their failure to initiate any contact with him. This is one more example of exaggerated criticism of the claimant in these proceedings which we find of concern.

250. As regards the allegation that the claimant offered Mr Tourville partnership without authorisation to do so, we have also discussed this in our fact findings. The claimant did not offer Mr Tourville partnership. Ms Hallows and Ms Monk cannot reasonably have thought that he did. Apart from anything else, the claimant referred a discussion about partnership to Ms Hallows and Ms Monk in their 3 April 2019 meeting with Mr Tourville.

251. We cannot see how any of this amounts to a breach of trust, much less something which the partnership group would accept warranted expulsion.

252. The only occasion we were told about when the firm had previous expelled a partner was 12-15 years previously when the partner had engaged in very serious misconduct, involving ethical issues and earning money outside the business relationship. That shows not only the rarity of expulsion, but the level of seriousness one would expect to see when expelling for breach of trust. In any partnership, we would imagine there are disagreements and difficulties from time to time which no one ever imagines could lead to expulsion.

253. We can see no chance whatsoever that the claimant would have been expelled for any reason other than his health including his conduct regarding Mr Tourville. The vast majority of the allegations against him in that respect do not stand up. Those that do have some factual basis are not of a kind that would support any more than a discussion between partners. The claimant was head of a very successful London office. He had line management of Mr Tourville, a very hard-working and effective director who was an asset to the firm and who the firm wished to keep going forward. Indeed the claimant had specifically been asked to secure succession planning to Mr Tourville and Ms Hatchman. Mr Tourville was ambitious and promoted himself and his cause to be a partner. He fought hard to be allowed to go to Australia. None of these observations are any criticism of him. But the firm should and would have recognised that when fighting his corner, he would naturally portray matters in a certain light. Even then, he never explicitly said he had been promised a partnership by the claimant or that he had given certain information to the claimant. But to the extent he might be understood to have hinted such things, it is hard to understand why Ms Hallows and Ms Monk should believe him rather than the claimant. We believe the criticisms of the claimant in relation to Mr Tourville have been exaggerated far beyond Ms Hallows' initial annoyance – primarily with Mr Tourville – in the 2 August 2019 email. We believe this has been done to justify the respondents' treatment of the claimant including by way of an attempt to defend these proceedings. It does not reflect well on the respondents that this picture has been put forward.

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Employment Judge Lewis

Dated:09/04/2021

Judgment and Reasons sent to the parties on:

12/04/21..

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For the Tribunal Office