



THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant

and

Respondent

Mr C O'Neill

Currency Solutions Limited

Held at London South (By CVP Video)

On 24-26 May 2021

**BEFORE: Employment Judge Siddall
 Ms P Barratt
 Mr R Shaw**

Representation

For the Claimant: Ms S Butler

For the Respondents: Mr B Large

RESERVED JUDGMENT

The unanimous decision of the tribunal is that:

1. The claim for direct discrimination because of the protected characteristic of disability under section 13 of the Equality Act 2010 does not succeed.
2. The claim for discrimination arising from disability under section 15 of the Equality Act 2010 does not succeed.
3. The claim for breach of contract (wrongful dismissal) succeeds.

REASONS

1. The Claimant claims wrongful dismissal and also brings two claims for discrimination because of the protected characteristic of disability: a claim for direct discrimination under section 13 of the Equality Act 2010 and a claim for disability-related discrimination under section 15. The Respondent concedes that the Claimant was a person with a disability (PTSD) at the relevant time but denies that they had knowledge of this. The specific details of the claims are set out in a List of Issues which we refer to below.
2. The hearing took place by video. It was not possible to hold a face to face hearing as a result of pandemic restrictions. None of the parties objected. Once the hearing began, no significant problems occurred. One witness had to telephone in due to video connection problems (Mr Birch). Two witnesses gave evidence from overseas. We heard evidence from the Claimant himself, from his partner Samantha Butler (who also represented the Claimant) from his mother Beverley O'Neill and from Simon Birch. The Respondent's witnesses were Simon Geoghegan, Ekin Envers, Hakin Envers and Amelia Dale.

Background

3. The facts that we have found and the conclusions that we have drawn from the evidence of both parties are as follows.
4. The Respondent is in the business of providing a foreign exchange service to both private individuals and companies. It is a family business which has been operating for over eighteen years and employs around 76 people. Mr Hakan Enver is the Chief Executive Officer and his brother Mr Ekin Enver is the Private Sales Director.
5. Claimant commenced work on 20 October 2015 as a foreign exchange broker described as a '360 dealer'. His job involved marketing the services of the company, obtaining new leads, servicing existing clients and complete currency deals.

6. The Claimant was issued with a Statement of Particulars of Employment (page 41 of the bundle). The section on 'Disciplinary Procedure, Code of Conduct and Company Rules' refers to a Disciplinary procedure in the handbook and states that 'the company reserves the right to discipline or dismiss an employee with less than twelve month's continuous service without following company procedures'. It is not in dispute that at the date of his dismissal the Claimant had been employed for just under two years.
7. On page 48 of the bundle there is a provision that requires the Claimant to devote the whole of his time to his duties for the Company during working hours, and which prevents him from engaging in similar or competitive activity outside his working hours whilst employed by the Respondent.
8. At page 50 it is stated that the Employee Handbook forms part of the written contract of employment. In a decision dated 6 June 2018 Judge Baron found that the Respondent's Disciplinary Procedure is 'capable of having contractual effect'. That procedure begins at page 53 of the bundle.
9. On 27 October 2016 the Claimant was involved in a serious road traffic accident. He suffered whiplash, a fracture of his jaw, PTSD and carpal tunnel syndrome. He was absent from work from 31 October 2016 to 3 February 2017. His sick notes covering that period all refer to the fact that he was suffering from PTSD as well as other injuries caused by the crash.
10. At the time of the Claimant's return to work he was covered by a sick note that ran from 3 February to 10 March and which stated that he was fit to work from 6 February on a phased return basis. The medical conditions described on that certificate include 'whiplash injury, PTSD, carpal tunnel, jaw fracture and concussion due to severe RTA'. On his return to work he was continuing to experience back pain and sciatica, and pains in his jaw.
11. The Claimant returned to work on 6 February 2017 but his 'return to work meeting' was delayed and was held on 1 March 2017. The Claimant reported

that he was still suffering a lot of pain. The notes record 'mentally feels better at work as it gives him something to focus on'. He did not request any adjustments. Mr Ekin Enver said in his oral evidence that at the time he felt the Claimant still seemed very unwell. He said that the Claimant appeared to be in pain, was struggling to walk and was struggling mentally but he permitted him to come back as he was so keen to return.

12. The Claimant went off sick again from 6 May 2017. Around this date the Claimant had collapsed and been admitted to hospital.
13. It is not in dispute that Mr Steve Geoghegan visited the Claimant in hospital in May 2017. The Claimant said that Mr Geoghegan updated him on the fact that he was looking after the Claimant's clients and also told him that 'Ekin had been moaning about me for being off sick'. Mr Geoghegan said that he did not say this. However it was the evidence of Ms Samantha Butler who is the Claimant's partner that she was present and that the statement was made. It was put to her that this conversation never took place, which she denied. She was asked what motive Mr Geoghegan would have had for informing the Claimant about Mr Enver's concerns whilst he was ill in hospital. She replied 'exactly – why say it'. She also stated that she did not think that Mr Geoghegan made this statement maliciously and that he was trying to 'rally' the Claimant. We prefer the evidence of Ms Butler and the Claimant on this point. We accept that Ms Butler was present and she gave clear evidence on this matter including expressing her bemusement as to why the comment had been made. We have noted that she is in a relationship with the Claimant but that does not mean that her evidence is not credible.
14. Following his admission to hospital the Claimant was signed off work again. He was initially signed off for 'Brachial plexus'. On 22 June 2017 the sick note records 'prolapsed disc'. In July and August the sick notes refer to Cervicalgia and neck pain/brachial neurites. There is no reference to PTSD on sick notes from May onwards.

15. On 18 May 2017 the Claimant called Mr Ekin Enver to update him on his progress. The Claimant alleges that Mr Enver told him to 'man up' and that 'it was all in my head'. The conversation was overheard by Ms Butler on the speaker system in their car, whilst the Claimant was a passenger. Again we accept the Claimant's and Ms Butler's evidence on this point.
16. Medical evidence contained in the bundle provides some insight into the Claimant's health although this information was not available to the Respondent at this time. A letter dated 12 May 2017 from Silber Neurology describes the Claimant as 'quite distressed with pain'. A letter dated 6 July 2017 from Dr Serge Nolic states that the Claimant had severe pain and showed clear signs of 'advanced complex regional pain syndrome'. He goes on to say that 'understandably he is becoming increasingly frustrated and his mood is very low due to these ongoing symptoms and the impact it has had on his day to day life. He has had to move in with his mother who is helping him through this period. Although he is still employed he only gets paid when he is at work which understandably has significant psychological impact that aggravates the overall situation'.
17. A report by a consultant psychiatrist dated August 2017 concludes that 'following an accident in October 2016 Mr O'Neill has suffered a psychological reaction. Originally probably experiencing some traumatic distress this had by now resolved into a PTSD reaction which is severe.' Dr Fahey thought recovery was possible with therapy but that 'this outcome is however dependent on a satisfactory solution being found to his pain issue'.
18. The Claimant describes the effect of this condition upon him in a Disability Impact Statement provided to the tribunal. He described problems with fatigue, anxiety, lack of sleep and motivation. He said that he spent most days and nights reliving the accident. He said that PTSD increased his sensitivity to pain. There were many days when he could not get out of bed due to depression and pain.
19. It is not in dispute that during his absence over the summer of 2017 the Claimant kept in regular contact with his line manager Ekin Enver, updating him after his medical appointments. It is agreed that the Claimant was open with Mr Enver

about how he was feeling. Mr Enver described the Claimant as being 'fragile' over this period. He says that the Claimant was desperate to get back to work and was not doing well at home. We find that Mr Envers was aware that the Claimant was struggling both physically (with the injuries he had suffered and the pain) and mentally.

20. Mr Envers agrees that the Claimant asked him what he could do at home to prepare himself for a return to work. Mr Enver's evidence was that he advised the Claimant to concentrate on getting better. The Claimant said that Mr Enver encouraged him to come up with ideas to promote the business, and that he did so because he wanted to 'show his worth' and 'hit the ground running' on his return. We find it more likely than not that Mr Enver encouraged the Claimant to come up with some work ideas whilst at the same time suggesting he should focus on getting better. Mr Enver recognised that the Claimant was struggling and it is likely that he gave him something to think about with a view to him returning to work when he was ready.
21. Beverley O'Neill gave evidence and explained that the Claimant had obtained his job with the Respondent through her connection with C, the wife of Ekin Enver, who was her hairdresser. She said that while her son was staying with her she was present during a number of telephone conversations that he had with the Ekin Enver about both his physical symptoms and his PTSD. We accept that Mrs O'Neill is more likely than not to have witnessed conversations between her son and the Respondent in which he discussed both his physical and mental wellbeing.
22. Mrs O'Neill also said that she would meet C regularly and they would discuss how her son was doing following the accident. She states that C told her that her husband thought the Claimant was down or depressed and struggling mentally. We find that it is more likely than not that Mr Enver did discuss with his wife how the Claimant was doing as he was known to both of them and they would have been concerned for his welfare, and that C in turn discussed this with Mrs O'Neill.

23. Mr Steve Geoghegan kept in regular contact with the Claimant while he was off sick. Mrs O'Neill suggested that there may have been up to four visits and we accept what she says. He says that the Claimant was 'mentally very low'. In his witness statement he describes the Claimant as being 'very fuzzy' with slurred speech and problems with memory.
24. We find that Mr Geoghegan's last visit to the Claimant was at his mother's house on 20 July 2017 (not 9 August 2017 as asserted in his statement to the Respondent). The Claimant asserts that during this conversation Mr Geoghegan told him that Ekin Enver clearly wanted him out and had said that it was 'bullshit' that he had been off for such a long time. Mrs O'Neill said that she overheard the conversation as she was in and out of the room and that Mr Geoghegan had said that the Respondent 'wanted rid of him' which had made her upset. Following that conversation with Mr Geoghegan the Claimant messaged Ms Butler and said: 'oh apparently it's bullshit the amount of time I've had off work' (page 71 of bundle). In answer to a question from Ms Butler about who had said this, the Claimant replies 'Ekin'. In light of the corroboration from Mrs O'Neill and the almost contemporaneous reference to the comment in the Whatsapp message to Ms Butler, we find it more likely than not that comments along these lines were made.
25. There are two very differing accounts of what else happened during the meeting on 20 July 2017.
26. Mr Geoghegan says that the Claimant informed him at the meeting that he wanted to set up a competitor website to obtain leads that they would sell to currency companies and that he had been speaking to Simon Birch, a former employee of the Respondent. The Claimant invited Mr Geoghegan to become involved as he wanted him to 'steal the leads from Currency Solutions to be sold on to competitors'.
27. The Claimant's account is that Mr Geoghegan suggested that they create a website together which would generate leads for new business for the two of them, for the benefit of the Respondent. They jointly decided to ask Simon Birch for general advice about the proposal and in particular about search engine

optimisation. We have noted that in the Claimant's Whatsapp message to Ms Butler of the same day he refers to his meeting with Mr Geoghegan and says 'had a good catch up. Come up with few ideas for us when I am back at work'.

28. That evening (20 July 2017) the Claimant set up a Whatsapp group which included himself, Mr Geoghegan and Mr Birch. The name of the group was 'Site'.
29. At this point it is probably helpful to say a little about the role of Simon Birch. He was a former Head of Marketing for the Respondent who had left in January 2017 without giving the required period of notice. The Respondent therefore described him as a 'bad leaver'.
30. The evidence which Mr Birch gave to the tribunal is that whilst working for the Respondent he advised their brokers on the setting up and design of websites and on search engine optimisation in order to make them as successful as possible and generate business leads.
31. The Claimant and Mr Birch had remained in touch. Mr Birch had offered support to the Claimant after the accident, especially with regards to his PTSD, a condition with which he was familiar. Mr Birch said that he was contacted by the Claimant and joined the Whatsapp group with him and Mr Geoghegan. He said that there was a three-way conversation between the three of them where they were kicking around ideas and he had provided advice on search engine optimisation. He stated that the advice he gave was aimed at a site that would benefit the Respondent, as he would have done previously whilst working for them. He did indicate that he thought he might receive a small payment for his services from the Claimant.
32. Mr Birch agreed that in 2018 the Respondent took legal action against him for recovery of a debt that remained unpaid at the date of leaving. It is the Claimant's position that these proceedings only started after the Respondent learned that Mr Birch was to be a witness for the Claimant in these proceedings. We had no written evidence as to the timing of these proceedings.

33. It is also relevant to note that in or around May 2017 two members of staff had left the Respondent and set up a competitive business.
34. It was the Respondent's case that Mr Birch was involved with this competitive business. He agreed that he did some contract work for the business for a few months in 2018. He was asked if he was in contact with the competitors around July 2017. He said that he was not sure, it may have been later. When he had left his employment with the Respondent he had taken on a marketing role in the pharmaceutical sector which was not competitive with the Respondent. He was in this role for two years.
35. Issues between the Respondent and the competitive business were eventually settled for a significant sum.
36. The tribunal have noted that neither the witness statement of Mr Ekin Enver or Hakin Enver refer to this competitor business nor do they suggest any connection between Mr Birch and that company. This matter was raised during cross-examination of Mr Birch and there is no documentary evidence relating to it in the bundle.
37. Returning to the events of July and August 2017, Mr Geoghegan's evidence was that having joined the Whatsapp group he did not participate as he felt uncomfortable with what was going on. His evidence is contradicted by that of the Claimant and Mr Birch who both say that there was a three-way discussion about possibilities.
38. On page 75 we see a screenshot of a message to Mr Geoghegan from the Claimant, whom he had named on Whatsapp as 'Charlie Queer Boy'. On 13 September 2017 the Claimant contacted Mr Geoghegan and said that he had spoken to Ekin and would be back on Monday. Mr Geoghegan replies 'Really that's awesome'. The Claimant goes on to say that he and 'Si' had not heard back from Mr Geoghegan. He adds: 'wish I wasn't still wanna jump off a building tbh'.

39. Aside from this exchange we have one screenshot of messages on the group called 'Site' (page 74). This shows that the group Site had been set up by the Claimant on 20 July 2017. The only message shown is from the Claimant dated 5 September 2017 where he says 'you guys wanna catch up this week'.
40. None of the three members of this group have been able to produce any of the messages sent on it. The Claimant says that he lost the messages when he changed his phone. Mr Birch said that he believed all his Whatsapp messages deleted automatically after one month. Mr Geoghegan stated that he had deleted all the messages after he received them as he was not comfortable with them.
41. Mr Geoghegan says that after he learned that the Claimant was coming back to work very shortly he decided that he had to report what had been going on to Mr Enver as he was concerned that the Claimant might be coming back to work to obtain data for the purposes of a competitive website. He told us that he provided Mr Enver with the screenshot from the group discussion at page 74 and that he was then asked to supply a written statement which is at pages 76 and 77 of the Bundle. In that statement he refers to visiting the Claimant on the 9 August although this is likely to have been the 20 July meeting. He states that the Claimant had proposed that he wanted to set up a competitive company that could be used to gather leads for foreign exchange brokers, that the Claimant had been in touch with Simon Birch and that they needed Mr Geoghegan so that 'I could pass leads from CS Ltd that could be sold to a competitor'. He says 'at the time I felt that Charlie was on a lot of medication and was not thinking straight'.
42. The statement provided by Mr Geoghegan to the Respondent in September 2017 differs from what he said in his witness statement provided to this tribunal. In the latter statement Mr Geoghegan goes further and says that the Claimant had been 'fantasising' about creating a competitive currency business for some time, and that he aimed to achieve a 60% commission on each lead rather than the 20% he would earn from the Respondent. However he describes the Claimant as being 'fuzzy' during these conversations with slurred speech and trouble with his recall.

43. The Claimant had been due to return on 18 September but this was delayed until 19 September.
44. On 19 September the Claimant was called to a meeting with Hakan Enver and Ekin Enver at the start of the day. There is a note at page 78 but the Respondent agrees that this note was prepared by Hakan Enver's PA who was not at the meeting and to whom they relayed the information about what had happened. The notes are not agreed by the Claimant in their entirety. The Respondent's HR Administrator, Amelia Dale was not invited to the meeting.
45. It is accepted that the Respondents did not provide to the Claimant either a copy of Mr Geoghegan's statement nor of the screenshot on page 74 from the 'Site' Whatsapp group.
46. At the start of the note it is recorded by the Respondents that the Claimant appeared to be struggling physically and mentally. They expressed the view that the Claimant was not fit for work and that he should remain off for another two months. The Claimant suggested either a phased return or working from home.
47. Hakan and Ekin Enver then brought up the fact that the Claimant had joined a Whatsapp group with a view to setting up a competitive website. They noted that he had been working with Simon Birch who had left on bad terms.
48. The Claimant did not deny setting up a website but he did deny that it was going to be competitive with the Respondents. The Claimant stated in evidence (and Ekin Enver agreed) that he had tried to show them the messages on his phone but this had been declined. The Claimant asserts and we accept that he was told 'we have the messages'.
49. The meeting ended with Hakan Enver advising the Claimant to remain off work for a further 2-3 month period and said 'we will get back to you'.
50. Following that meeting the Claimant messaged Ms Butler stating that he had been told to get signed off for another 2 months saying 'basically it is so they can get rid of me'. He says that the Respondent knew that he had been speaking

with Mr Geoghegan and Mr Birch and they had accused him of stealing leads and setting up a company 'which couldn't be further from the truth all was going to do was open a website up'. He also reported that the Respondents were not interested in seeing the messages on the phone as they had seen them.

51. Following that meeting it appears that the Claimant went to see his GP who provided a fit note signing him off as unfit for work from 18 September 2017 for 28 days.
52. On 29 September Hakan Enver telephoned the Claimant and left him a voicemail message to tell him that his employment was being terminated 'due to the fact that we believe you are setting up a competing business for leads'. That decision is confirmed in a letter dated 29 September 2017 which (as was found at an earlier tribunal hearing) was received on 2 October 2017.
53. On 29 September Mr Birch messaged Mr Geoghegan saying 'still going to steal leads from cs? Dropping Charlie in to it you're a dirty bastard not fair Steve, karma and getting me involved, don't fall off your bike, see you soon fucker'.
54. On 3 October 2017 the Claimant contacted Ms Dale asking for the reasons for his dismissal, the evidence it was based on and whether he could appeal.
55. Ms Dale replied that the disciplinary procedure did not apply as the Claimant had less than 24 month's service. She confirmed that the Claimant's employment had been terminated on notice and that he had not been dismissed for gross misconduct. She goes on to say: 'while the company does not have any concrete evidence that you have set up in competition with Currency Solutions Limited, we have a reasonable belief that this is your intent'. (page 87 of bundle)
56. The Claimant commenced employment tribunal proceedings in December 2017.

Decision

The claims for Disability Discrimination

57. Before going on to consider the specific claims set out in the List of Issues, we consider two key evidential points as they are relevant to both claims.

Did the Respondent know, or could they reasonably have been expected to know that the Claimant had a disability namely PTSD?

58. Mr Haken Enver, Mr Ekin Enver and Ms Dale all asserted that they were not aware that the Claimant was suffering from PTSD at the time that he was dismissed. They point to the fact that the sick certificates from May 2017 onwards did not refer to this condition. They acknowledge receiving the earlier certificates which made reference to PTSD, but said that they had not read them.
59. We find that to be quite an extraordinary assertion. The Claimant had been involved in a serious road traffic accident. He reported directly to Mr Ekin Enver. We consider it highly likely that Mr Enver would have looked at the sick certificates when they arrived between October 2016 and February 2017 as he would have wanted to know about the Claimant's condition and how long he was going to be off work. We have also noted the return to work meeting that took place on 1 March 2017. At that stage the Claimant was still covered by a fit note that ran until 10 March and which had recommended a phased return to work. That sick note referred to PTSD. The Claimant's ability to return was discussed including the question of whether he needed any adjustments. We find it more likely than not that prior to the meeting Mr Enver would have been aware of the contents of the latest fit note. As he made clear in his evidence, the Claimant's fitness for work was a matter of concern to him at that meeting but he decided to permit the Claimant to return to work as he was so keen to do so.
60. If we are wrong and Mr Enver had overlooked the contents of either this latest fit note or the earlier fit notes we find that Ms Dale, as HR administrator should certainly have brought them to his attention on or before 1 March 2017. The reference to the discussion about adjustments at the meeting on 1 March demonstrates that the Respondent was aware of its duties towards a person with a disability. There is little point in discussing any possible adjustments if an employer is not aware of the nature and extent of the conditions from which an

employee is suffering. There was clear evidence available as at 1 March 2017 about the Claimant's physical and mental health in the form of the fit note. Even if Mr Enver had simply passed the fit notes on without looking at them (which we do not accept) it is inconceivable that Ms Dale would not have studied them herself and drawn them to Mr Enver's attention prior to the meeting.

61. We therefore find that as at 1 March the Respondent knew or could reasonably have been expected to know that the Claimant was suffering from PTSD.
62. However the 'relevant date' in this case is the date of the decision to dismiss the Claimant in late September 2017. Did the Respondent know at this time that the Claimant was still suffering from the effects of PTSD?
63. We accept that PTSD disappeared from the sick notes from May 2017 onwards.
64. There is however ample evidence that the Claimant's mental health continued to suffer after this time and that the Respondent was aware of this. We have noted:
 - a. The reference in the notes of the meeting of 1 March 2017: 'mentally feels better at work as it gives him something to focus on'.
 - b. The evidence of Mr Enver that at this meeting he considered that the Claimant still seemed unwell both physically and mentally.
 - c. The undisputed evidence that the Claimant kept in regular contact with Mr Ekin Enver following his return to work and during his second sickness absence and our finding that the Claimant was open with him about his ongoing struggles to recover from the accident. We have found that it is highly likely that during these conversations the Claimant would have shared with Mr Enver how he was doing mentally as well as physically. His ongoing mental health symptoms are clearly set out in the medical evidence he has produced, referred to above. Although the Respondent would not have seen this at the time, we do not consider that the Claimant would have held back from communicating his mental struggles to Mr Enver.
 - d. Mr Enver's references to the Claimant being 'fragile' over this period.

- e. The conversations that Mrs O'Neill had with Mr Enver's wife where C reported that Mr Envers was concerned that the Claimant was 'down'.
- f. Mr Geoghegan's evidence that during his meetings with the Claimant he seemed 'fuzzy' and was struggling to recall what he had just said
- g. The Claimant's Whatsapp message to Mr Geoghegan on 13 September 2017 when he referred to wanting to jump off a bridge.
- h. The observation of Mr Hakan and Mr Ekin Enver recorded in the minutes of the meeting that took place on 19 September 2017 that the Claimant was struggling being at home and 'this came across in both a physical and mental aspect'.

65. We conclude that there was a significant amount of evidence available from 1 March 2017 onwards to demonstrate that the Claimant continued to struggle with symptoms of a serious mental illness as well as pain and ongoing physical problems. The Respondent was aware, or ought to have been aware that the diagnosis of these mental health problems in the months after the accident was 'PTSD' which is a serious illness. We find that it is highly likely that as at September 2017 the Respondent knew that he continued to suffer from PTSD. If we are wrong on that, given the extent of their concerns about his mental health and the evidence available to them, we find that they might reasonably have been expected to know that he still had this condition.

What was the reason for the Claimant's dismissal?

66. The List of Issues makes clear that the dismissal of the Claimant is put forward as both the sole act of less favourable treatment for the purposes of the direct discrimination claim, and the unfavourable treatment for the purposes of the claim for discrimination arising from disability. We had considerable discussion between the tribunal members about the reason for dismissal.
67. In relation to the burden of proof regarding this matter we have reminded ourselves of the provision of section 136 of the Equality Act 2010. There is also clear guidance in case law to the test that we must apply.

68. Mr Large referred us to the case of **Dunn v Secretary of State for Justice [2018] EWCA 1998**, which we see was approved in the later case of **Robinson v DWP [2020] EWCA 859**. These cases remind us that both section 13 and section 15 ask whether the treatment complained about is ‘because of ‘the protected characteristic of disability. To answer this question we must consider the thought processes of the decision makers. Since the hearing took place we have also considered the very recent case of **Cummins Ltd v Mohammed UKEAT/0039/20**. This states that the tribunal must reach a proper conclusion about the employer’s reason for dismissal and that a ‘but for’ test is not appropriate.
69. We have paid particular attention to paragraph 54 of the judgment of Her Honour Mrs Justice Simler at paragraph 54 of the judgment in **Dunn**:
- ‘Nonetheless, the statutory test requires a tribunal to address the question whether the unfavourable treatment is because of something arising in consequence of disability. As we have said, it need not be the sole reason, but it must be a significant or at least more than trivial reason. Just as with direct discrimination, save in the most obvious case an examination of the conscious and/or unconscious thought processes of the putative discriminator is likely to be necessary.’*
70. We turn to the facts of this case in order to apply that guidance.
71. We have found that as at 15 September 2021 when Mr Geoghegan drew to the attention of the Respondent the conversation he had with the Claimant on 20 July, the Respondent knew or ought to have known that the Claimant continued to suffer with PTSD alongside serious physical symptoms from the car crash. We have also accepted the evidence of the Claimant, Ms Butler and Mrs O’Neill and found that Mr Geoghegan reported to them on two occasions that Mr Ekin Enver had expressed frustration with the Claimant’s sickness absence; as well as telling the Claimant to ‘man up’. It seems to us more likely than not that in September 2017 Mr Enver was increasingly concerned about the Claimant’s lengthy absence from work which had begun in May.

72. We then turn to the statement which Mr Geoghegan provided to the Respondent dated 15 September 2017. This contained very serious allegations, namely that the Claimant wished to set up a company to gather leads to sell to exchange brokers and that the Claimant had asked him to 'pass leads from CS Ltd that could be sold to a competitor'.
73. Two members of the tribunal in particular had reservations about the evidence of Mr Geoghegan.
74. First he had deleted the messages exchanged within the 'Site' Whatsapp group. When questioned by Mr Enver, the only message he was able to produce was that on page 74 of the bundle which is in itself entirely innocuous.
75. Second the witness statement dated 15 September 2017 refers only to one conversation with the Claimant about the competing business, which he says took place on 9 August 2017 (although the timing of the setting up of the Whatsapp group suggests this must have happened on 20 July 2017). The witness statement provided to the tribunal goes into much greater detail, states there had been other discussions, and refers to a proposed commission rate of 60%. None of this was referred to in the document at page 76 and 77 of the bundle.
76. Third, in both statements Mr Geoghegan refers to his observations about the Claimant's poor mental health when he spoke to him and his view that he was 'not thinking straight'. Despite his concerns for the Claimant's wellbeing, he suggests that when he learned that the Claimant was due to return to work he reached the conclusion that the Claimant was only doing so in order to 'steal' data for the competing business. This concern seems to us to have little basis.
77. Nevertheless we accept that Mr Geoghegan's allegations would have caused considerable alarm to both Mr Envers and suggested to them that the Claimant may have been acting in fundamental breach of his contract of employment.
78. There was some conflict in the evidence over the exact nature of their concerns.

79. Mr Large suggested that due to the recent departure of two employees to set up in competition, the Respondent would have been 'highly sensitive' to any suggestion of competitive activity by anyone else. The Respondent has also suggested that the involvement of Mr Birch was suspicious as he was believed to have worked with the competing business.
80. We note that the minutes of the meeting with the Claimant on 19 September 2017 simply note that he had been working with 'Simon Birch who is an ex-employee who left on bad terms is not great'. Mr Ekin Enver at one stage that the involvement of Mr Birch was not significant but during re-examination said that it was.
81. There is no evidence that the Respondent was engaged in legal proceedings over a debt with Mr Birch in September 2017. Having heard from Mr Birch on this matter we find it more likely than not that these proceedings did not start until 2018.
82. We have noted that neither Mr Ekin Enver nor Mr Hakan Enver make any mention in their witness statements about any threat from a prospective competing business formed by two former employees around September 2017. Mr Birch says he did no work for that business until 2018. Although the suggestion was put to him, he did not accept that he had been in contact with the new business around July 2017. There is no evidence in the bundle or the witness statements which suggests either that he was in contact or that the Respondent believed him to be. We conclude that there has been an effort on behalf of the Respondents to provide additional justification for the dismissal 'after the event'.
83. We have also noted the Respondent's reluctance to investigate the allegations against the Claimant in detail. If the Respondent perceived a genuine threat to their business from the Claimant's activities, why did they decline to examine the messages within the Whatsapp group on the Claimant's phone when given the opportunity to do so? By doing so they would have been better informed as to the extent of any threat.

84. We are therefore not surprised that in her email of 4 October 2017 Ms Dale stated that the Claimant's employment had not been terminated for gross misconduct as the Respondent did not have 'concrete evidence'.
85. We are not however considering a claim for unfair dismissal as that claim has been dismissed on the basis that the Claimant did not have two year's service. Whilst we may have concerns about the extent of the Respondent's investigation, and its assertion of a 'reasonable belief' that he was engaged in competitive activity, we must turn back to the question of the motivation behind the Claimant's dismissal. We find that this was a joint decision made by Mr Hakan Enver and Mr Ekin Enver who conducted the meeting with the Claimant on 19 September 2017, following which a decision to terminate his employment was made. We therefore consider what was in their minds at the time of dismissal.
86. We accept that on 15 September 2017 Mr Geoghegan made a serious allegation against the Claimant which the Respondent took at face value. Their evidence was that Mr Geoghegan was a long-serving employee in whom they had confidence and they had no reason to disbelieve what he said. Save for putting the allegation to the Claimant, who denied that he had intended to set up a competing operation, they did not investigate it any further. They did not believe that they were required to do so – they were aware that the Claimant had less than two years' continuous service and considered that therefore there was no requirement to carry out a full disciplinary process. We accept that this provides some rationale for the decision not to investigate.
87. We have also found that by September 2017 Mr Ekin Enver was becoming frustrated with the length of the Claimant's sickness absence and had expressed his views to Mr Geoghegan.
88. We have considered carefully whether the fact that the Claimant had a disability and was absent from work contributed to the decision to dismiss him. We have taken careful note of the words of HHJ Simler quoted above that the disability/something arising need not be the *sole* reason for dismissal. However it must be a *significant or at least a more than trivial reason*'.

89. Whilst there is some evidence that Mr Ekin Envers' patience over the Claimant's illness and absence was wearing thin, we note that as at September 2017 neither he nor anyone else from the Respondent had taken any steps to bring the Claimant's employment to an end due to the length of his sickness absence. We note the evidence that the Respondents had supported other members of staff through serious illness and long-term sickness absence, and that they had paid the Claimant his full pay for two months.
90. We find that the predominant factor in the minds of both Mr Envers at the point at which they dismissed the Claimant was that Mr Geoghegan had alleged that he was making plans to engage in competitive activity. We find no evidence that in September 2017 the Respondents had formed any specific intention to bring the Claimant's employment to an end because of his health. We cannot rule out the possibility that his absence of around five months was in the 'back of their minds' following the meeting on 19 September – in fact at that point they had sent him away, telling him that he did not seem fit enough for work and suggested that he remain off sick for another couple of months. However we find that it is more likely than not that the reason for sending him home was to give themselves time to consider the allegations made by Mr Geoghegan and to take advice, before reaching the decision to dismiss him. This decision was made on or before 29 September 2017 when they phoned him to leave a telephone message notifying him of the termination of his employment. The short manner in which they dealt with the allegations was also influenced by the fact that the Claimant had less than two year's employment. On the evidence presented to us we are not able to conclude that either the Claimant's mental health or his absence from work contributed significantly to this decision.
91. Having reached this finding we turn to the specific claims as set out in the List of Issues.

Direct Discrimination claim

92. We turn to the agreed List of Issues at paragraphs 1.1-1.4. The Respondent has accepted that the Claimant was at the relevant time disabled by reason of PTSD. The less favourable treatment complained of is the Claimant's dismissal. There is no named comparator and it is understood that the Claimant relies upon a hypothetical comparator.
93. Did the Respondent dismiss the Claimant because he suffered from PTSD? We have not had submissions on this point but we consider what happened to the Claimant in comparison with a hypothetical member of staff with less than two years' service who faced similar allegations to those made by Mr Geoghegan. There is no evidence from which we can infer that such a person would have been treated any differently. We conclude that such a person would certainly have been dismissed. We find that there is no evidence of less favourable treatment. Applying section 136 of the Equality Act 2010 we are not able to find that a contravention of section 13 occurred.

Was the Claimant dismissed because of something arising in consequence of the Claimant's disability?

94. We turn to paragraphs 2.1 to 2.7 of the List of Issues. The Claimant has PTSD. He asserts that the 'thing arising' from his disability is his absence from work. The medical evidence makes it clear that the Claimant was off work because of a combination of his physical and mental health problems including PTSD. These were compounded by the considerable pain he was experiencing which, as Dr Fahey confirms, was having a significant impact upon his mental health. The unfavourable treatment complained of is the dismissal of the Claimant.
95. The claim brought under section 15 of the Equality Act 2010 has caused us greater difficulty and was the subject of considerable discussion by the tribunal. Ultimately for the reasons set out above we are not able to conclude that the Claimant's absence from work was a significant cause of his dismissal. Whilst this had been quite lengthy as at the end of September 2017, we find that the overriding concern in the minds of both Mr Hakan and Mr Ekin Enver was the

statement made by Mr Geoghegan and the serious allegations that this contained.

96. Both disability discrimination claims therefore fail.

Breach of Contract/Wrongful Dismissal

97. We turn to paragraphs 3.1 to 3.6 of the List of Issues. As stated above the Respondent's disciplinary procedures were found by an earlier tribunal decision to be contractual in light of the fact that the Claimant had more than 12 month's service.
98. In her submission Ms Butler points to numerous breaches of the written procedure. We have to agree with much of what she says. The Respondent did not set up a Disciplinary Meeting in accordance with the process set out on page 57 of the bundle, and it declined the Claimant's request for an appeal. In the circumstances of this case, these amount to breaches of contract.
99. Issue 3.4 invites us to consider how long it would have taken the Respondent to conclude a disciplinary and appeal process and whether any loss suffered by the Claimant would have ceased at this point.
100. We had some discussion around this. Had a disciplinary procedure been followed it is likely that the Respondent would have carried out further investigation including examination of the Claimant's mobile phone. That may have led on to further enquiries being made of Mr Geoghegan and perhaps others. We considered that this process may have taken a couple of weeks at least. We find that the Claimant would certainly have appealed any decision to dismiss him or impose a lesser sanction upon him (as he tried to do so). We also take into account the fact that the Claimant was signed off sick for a further period of 28 days after the meeting on 19 September. He may have been too unwell to attend a disciplinary hearing over this period. We conclude that the disciplinary and appeal process is likely to have taken at least four weeks.

101. Would any loss have ceased at the end of this process? Mr Large invites us to conclude that the Claimant would certainly have been dismissed for gross misconduct at this point. He agrees that for the purposes of this claim the tribunal must consider, as an objective matter, whether gross misconduct had occurred on a balance of probabilities.
102. In considering this question we find that we are hampered by a significant lack of evidence. The Whatsapp messages exchanged between Mr Geoghegan, Mr Birch and the Claimant are likely to have been highly relevant to the question of what the Claimant was planning to do. They are not available to us.
103. The Claimant says that he was not planning to set up in competition with the Respondent. He says that he was considering creating a comparison website, with the assistance of Mr Birch, with the aim of driving leads to himself and Mr Geoghegan for the purposes of the Respondent's currency exchange operations, so increasing his own commission. He says (and we accept) that it was Mr Ekin Enver who suggested that he came up with some business ideas while he was absent. He wanted to prove himself upon his return and 'hit the ground running'.
104. The Claimant's version of the meeting is supported by the contemporaneous message he sent to Ms Butler stating that he and Mr Geoghegan had come up with some ideas for 'when I am back at work'. This goes against Mr Geoghegan's assertion that the Claimant planned to set up an activity falling outside the duties of his employment and in breach of his duty of fidelity.
105. The Claimant's account is also supported by Mr Birch who says that all that the Claimant and Mr Geoghegan were doing was the sort of activity he had assisted with before, and that he was merely advising on search engine optimisation to increase the number of leads that could be obtained from any new website.
106. We treat Mr Birch's evidence with some circumspection. He left the employment of the Respondent on bad terms. He has now found himself embroiled in legal proceedings with the Respondent over an alleged unpaid debt. We found his evidence to be careful and limited. We conclude that he would not want to say anything that would create further trouble between himself and the Respondent.

107. Then we have the evidence of Mr Geoghegan. It is his word against that of the Claimant in relation to what was discussed on 20 July 2017. He made a serious allegation. He also said that at the time the Claimant was 'not thinking straight', was 'fuzzy' and had 'diminished capacity' and kept forgetting what he had said. We are not sure on what basis Mr Geoghegan leaped to the conclusion that the Claimant was coming back to work to 'steal data' – as opposed to being desperate to get back to work to return to full pay and to provide distraction from his symptoms. We also find it strange that Mr Geoghegan chose to delete the Whatsapp messages before deciding that what was discussed was so serious that it needed to be reported to the Respondent.
108. We are therefore faced with a significant conflict of evidence between Mr Geoghegan on the one side and the Claimant and Mr Birch on the other.
109. Taking all the evidence into account we are not able to conclude that it is more likely than not that the Claimant was planning an activity that would amount to a fundamental breach of his contract of employment.
110. We have found that the Claimant was finding things very difficult at home and was desperate to get back to work. We have accepted that Mr Ekin Enver told him to 'come up with some ideas' for his return.
111. We have noted that following the meeting on 20 July the Claimant messaged his partner to say that he and Mr Geoghegan had come up with some ideas for when he returned to work.
112. We have noted that the Claimant offered to show his phone to the Respondent at the meeting on 19 September 2017. He would not have done this if the messages would have contradicted his statement that he was not setting up in competition.
113. We have noted the differences between the account of the meeting given by Mr Geoghegan in his statement dated 15 September 2017 and his more elaborate account given in his witness statement for these tribunal proceedings.

114. Given what Mr Geoghegan said about the Claimant's state of mind at the meeting on 20 July we find that there is a very real risk that there was confusion about what the Claimant was actually planning to do. The Whatsapp messages may have shed a different light on the matter but they are not available to us and the Respondent chose not to investigate them.
115. We therefore find on the balance of probabilities that the Claimant was not in breach of the express term to devote himself to his duties during working hours. Clearly the Claimant was off sick at the time and relieved of this duty; but even if it applied, we find it more likely than not that he was thinking about an activity that would be of benefit to the business once he was back at work.
116. We further find that the Claimant was not in breach of the contractual term not to engage in similar or competitive activity outside his working hours.
117. Finally we find on the balance of probabilities that the Claimant was not in breach of the implied duty of fidelity or of trust and confidence.
118. We therefore find that the Respondent dismissed the Claimant in breach of contract by failing to follow a contractual disciplinary procedure. We find that any loss resulting from such breaches would not have ceased at the conclusion of this process as there is insufficient evidence that the Claimant had committed gross misconduct.
- 119.** At paragraph 3.5 of the List of Issues, Mr Large invites the tribunal to conclude that there is later evidence to demonstrate that the Claimant was engaged in competitive activity, namely the email from Mr Birch to Mr Geoghegan on 29 September 2017 (page 83). He asserts that this demonstrates that there was a repudiatory breach or gross misconduct prior to the Respondent's breach (**Boston Deep Sea Fishing Ansell [1888] Ch D 339** and **Williams v Leeds United FC [2015] IRLR 383**). If so no losses should be awarded to the Claimant in relation to the Respondent's breach.
- 120.** The Respondent's case is that this email amounts to an admission by Mr Birch that improper activity had been considered ('still going to steal leads from cs').

Mr Birch said that he was being sarcastic. The email is clearly written in anger following the Claimant's dismissal.

121. We prefer the evidence of Mr Birch on this point. We find it more likely than not that the message refers to Mr Geoghegan's *allegation* that the Claimant wanted him to 'steal leads' in a sarcastic manner. If this had been a real intention we find it highly unlikely that Mr Birch would have referred to it in a Whatsapp message as he would have incriminated himself.
122. The Claimant will be entitled to damages for breach of contract. We will wish to consider whether those damages should be assessed in accordance with **Edwards v Chesterfield Royal Hospital NHS Foundation Trust [2011] UKSC 58**.
123. A remedy hearing has been listed for 10am on **Thursday 22 July 2021 by CVP**. Joining details will follow.
124. We will make the following comments in passing to assist the parties. We have noted that the Claimant remained unfit for work for 28 days from 19 September 2017 and no loss may arise over that period save possibly for a sum equivalent to statutory sick pay. We note from the Schedule of Loss that the Claimant was out of work for just three months. No award for injury to feelings will arise as the discrimination claims did not succeed. The ACAS uplift will not apply to a breach of contract claim. It seems to us that it should be a comparatively easy matter for the parties to agree on a figure for compensation, in which case of course a remedy hearing would not be necessary.

Employment Judge Siddall
Date: 8 June 2021

