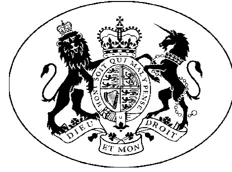
Case No: 2411597/2019



EMPLOYMENT TRIBUNALS

Claimant: Mr M Edmunds

Respondent: AM Fire Systems Ltd

Heard at: Manchester Employment Tribunal **On:** 5,6,7,8,9, 12 and 13 July 2021

Before: Employment Judge Dunlop
Mr A Murphy
Mrs C Titherington

Representation

Claimant: In person
Respondent: Mr N Grundy (Counsel)

RESERVED JUDGMENT

1. The claimant's claim of unfair dismissal is not well-founded. That means it does not succeed.

2. The claimant's claim of indirect disability discrimination (s.19 Equality Act 2010) is not well-founded. That means it does not succeed.

3. The claimant's claim of failure to make reasonable adjustments (s.20-21 Equality Act 2010) is not well-founded. That means it does not succeed.

4. The claimant's claim of disability-related harassment (s.26 Equality Act 2010) is not well-founded. That means it does not succeed.

5. The Tribunal has been unable to determine the claimant's claim in respect of accrued but untaken holiday pay, and will reconvene in order to hear further submissions from the parties as to this claim.

6. The claims which are not well-founded are dismissed.

7. The claimant has previously withdrawn claims in respect of underpaid wages. This Judgment does not dismiss those claims.

REASONS

Introduction

1. The respondent is a medium-sized family business which designs and installs sprinkler systems. The managing director is Arthur Edmunds, the company secretary is his wife, Carol Edmunds. In around 2005-6 they were joined in the business by their younger son, Andrew Edmunds, who was appointed a statutory director in 2007. In 2010 they were also joined by their elder son, Mark Edmunds, who also became a director in 2013. Mark Edmunds is the claimant in these proceedings.

2. It is necessary at this early point to set out something of the background to this litigation. A more detailed account appears in the 'Findings of Fact' section below.

3. In summary, Mr Edmunds commenced an absence from work following a meeting on 6 November 2018 during which he, Carol and Arthur were discussing distribution of directors' dividends. During this absence Carol and Arthur requested the return of Mr Edmunds's company phone and laptop but they were not returned. Mr Edmunds returned to work on 28 November but was asked to leave pending a return to work meeting on 29 November. What happened in that meeting is highly contentious, and will be discussed below, but it ended with the laptop in the possession of the respondent.

4. Following the meeting on 29 November Mr Edmunds was suspended and, as matters transpired, did not return to work. There was a grievance and disciplinary process which eventually resulted in his summary dismissal on 14 May 2019. Shortly after that Mr Edmunds commenced employment with another company. The respondent commenced proceedings in the High Court in which they sought disclosure of passwords to give them access to the laptop. We are told by the respondent (and this does not appear to be disputed by Mr Edmunds) that this was granted by interim injunction on 6 August 2019 and the mobile phone was returned as a result of a consent order dated 15 August 2019. Mr Edmunds began these proceedings in September 2019.

5. A High Court trial took place to determine whether Mr Edmunds had breached duties owed as an employee and a director in relation to the matters set out above. That trial took place in the week immediately preceding this hearing. We were provided with a sealed copy of the Order of the High Court (HHJ Pearce) which including the following preamble (references to 'the defendant' are references to the claimant in this case, and references to 'the claimant' are to the respondent in this case):

   AND upon it being recorded for the benefit of the Employment Tribunal due to hear the Defendant's claims against the Claimant for, inter alia, unfair

dismissal on 5 July 2021 that the following findings were made in the extempore judgement delivered on 2 July 2021 namely that:

(1) The Defendant was under a legal obligation to return the company laptop to the Claimant before 29 November 2018 and failed to do so.

(2) On 28 November 2018 the Defendant downloaded confidential business information from the company laptop onto an external hard drive for a reason other than the Claimant's business purposes and took the external hard drive away.

(3) The Defendant was in breach of duty by not allowing the Claimant access to the company laptop until after the Order of this Court made on 6 August 2019 and the Defendant was seeking thereby to obstruct the Claimant getting access to the company laptop

The Hearing

6. The hearing took place by CVP. For the most part, the technology worked very well and we consider that neither side was disadvantaged by its use. Mr Edmunds was not legally represented, although his claim had been professionally drafted and he had been professionally represented at the High Court trial. The panel did its best, so far as was appropriate, to assist Mr Edmunds in presenting his case, recognising that this is a difficult process for a litigant in person.

7. It was apparent from a brief discussion with the parties at the start of the hearing that there were several preliminary issues. The most important of these was that Mr Edmunds told us he wanted to apply to adjourn this hearing as he disagreed with HHJ Pearce's decision and considered that the respondent's witnesses had perjured themselves in the High Court hearing. He said the decision would be appealed. The Employment Judge specifically asked if there were any other grounds for requesting a postponement and Mr Edmunds stated that the application was entirely based on that point. The Employment Judge informed the parties that, before determining the application, the Tribunal would take the rest of the day as a reading day. This was because we did not, at that point, have a full understanding of the issues in the case which would be needed to take a view on the application. There were also other preliminary issues evident from the file and, again, the Employment Judge considered that the tribunal would be in a better position to deal with all matters having read into the case.

8. On the morning of day 2 we had a lengthy discussion which covered the following matters.

High Court proceedings/Adjournment

9. The Employment Judge discussed with the parties the impact of the High Court decision, explaining to Mr Edmunds the effect of the doctrine of issue estoppel and that we would be bound by the findings made if we proceeded, albeit that a successful appeal could potentially lead to a re-opening of this Judgement through either a reconsideration or an appeal. The Judge also

explained that a postponement, if granted, would lead to a very long delay in the case being re-listed. Following this discussion, Mr Edmunds confirmed that he did not, in the end, wish to pursue the application for an adjournment and wanted to go ahead. He made numerous references throughout the hearing to not accepting the decision of the High Court, and the Employment Judge repeatedly explained to him that we cannot 'go behind' those findings and that this is not the appropriate forum to challenge that decision. As part of this discussion, the Employment Judge canvassed whether it would be appropriate for the parties to produce an agreed note of HHJ Pearce's extempore Judgment. Mr Grundy was of the view this was unlikely to be agreed and confirmed that the respondent's reliance on issue estoppel went only so far as the matters set out in the preamble to the Order, set out above. We have therefore proceeded on the basis that we are bound by those findings but had no regard to other assertions made by the claimant (and occasionally the respondent's witnesses) about what may or may not have been established in the High Court hearing.

Bundles

10. There had been significant disagreement between the parties about documents in preparation for this hearing. The respondent had produced a bundle of what it considered to be the relevant documents from both parties. That filled two lever-arch files which we denoted as 'R1' and 'R2'. In addition, the respondent had put documents which the claimant wanted to include, but which it considered to be irrelevant, into a third file, which we denoted 'C1'.

11. Mr Edmunds had put together his own further bundle of additional documents and delivered hard copies of this bundle to the Tribunal. We denoted this bundle as 'C2'. He had provided the index to the respondent, but had not provided the copy documents to the respondent. He told us, when we discussed this briefly on the morning of day 1, that the respondents had the documents.

12. Attempting to seek a pragmatic way forward, and ensure that all parties were ready to start the evidence on Day 2, the Employment Judge arranged for the C2 bundle (which consisted of around 270 pages) to be scanned and sent as an electronic copy to the respondent. Whilst we were reading during the afternoon of Day 1, Mr Edmunds emailed the tribunal to complain that this had been done, as some of the documents were said to be "legally privileged". The Employment Judge directed that the respondent's representatives be asked to refrain from disclosing those particular pages to their clients, and that the matter would be discussed in the morning.

13. During discussions on Day 2, the Employment Judge confirmed that the Tribunal had not read the "legally privileged" documents and Mr Grundy confirmed that the respondent's representatives and witnesses had not either. The documents were physically removed from the panel's copies of C2. Mr Edmunds was content with this.

14. However, during the course of cross-examining the respondent's witnesses, Mr Edmunds purported to 'waive' his legal privilege and attempt to introduce some of those documents. It appeared from his description that they were

(or at least some of them were) documents to which legally privilege could not arguably attach – for example a letter to Mr Edmunds from HMRC in relation to a complaint he had raised about the respondent. We note that, although unrepresented, Mr Edmunds had had the benefit of significant amounts of legal advice during these proceedings and the High Court proceedings. Mr Grundy objected to the introduction of these documents as an attempt to 'ambush' his witnesses. This was essentially agreed by Mr Edmunds, who explained that he considered the respondent's witnesses were liars and he had therefore felt he had no option but to keep this material concealed. The Tribunal decided not to allow Mr Edmunds to admit the HMRC letter. Although Mr Edmunds considered that it went to a relevant matter, in that it demonstrated (in his view) that false statements had been made in the ET3, we considered that that was a satellite matter which was itself in dispute between the parties, we did not consider that it would help us to resolve the issues in dispute in the case.

15. Later, Mr Edmunds applied to introduce another "legally privileged" document. That was said to be a near-contemporaneous account of the key meeting of 29 November given by Mr Edmunds to his solicitor. Unlike the HMRC documents, such evidence would, potentially, have been directly relevant to the issues we had to decide. There were three people in attendance at that meeting – Andrew, Arthur and Mr Edmunds. At the time when Mr Edmunds made the application Andrew had already given evidence and Arthur was part way through his evidence. Mr Grundy objected to the evidence being introduced. He pointed out that throughout the disciplinary and grievance procedure this account of the meeting had never been produced, despite the fact that Mr Edmunds was asked repeatedly to put forward material in support of his case. It had deliberately not been disclosed at any point during the proceedings and an attempt was now being made to introduce it when the respondent's representatives were hampered in taking instructions as Arthur was in the middle of his evidence. Further, Andrew would need to be recalled to deal with it. In the particular circumstances of the case, including the fact that Mr Edmunds had not only failed to disclose this note himlsef, but had actively objected to its inadvertent disclosure by the Tribunal, we concluded that this did indeed represent an attempt to 'ambush' the respondent's witnesses and that, in all the circumstances, it was neither appropriate nor proportionate to allow the evidence to be introduced at this late stage.

16. In summary, therefore, all of the documents Mr Edmundsed 'LP' in the index to bundle C2 were removed and not considered by the Tribunal in reaching our decision.

Issues

17. The discussion about the issues to be determined by the Tribunal is recorded separately below.

Witness Statements/Witness Order

18. Mr Edmunds's witness statement was served one day late in circumstances where Employment Judge Buzzard had indicated at an earlier case management hearing that deadlines for compliance were only to be varied

by a Judge. Despite drawing attention to this default in correspondence, the respondent did not object to the statement being admitted into evidence, and we duly did so.

19. The Tribunal file also indicated that Mr Edmunds had made an application for a Witness Order which Regional Employment Judge Franey had directed would be given further consideration at the outset of this hearing. As it transpired, Mr Edmunds did not pursue this application as he had, in the meantime, come to understand that he would be unable to cross-examine a witness produced in this way.

Claimant's supporting witnesses

20. This point was not discussed in detail on Day 2, but after lunch on Day 3. However, it is convenient to deal with it in this part of the Judgment. The claimant had produced 7 statements from supporting witnesses. For the most part, these were not formal statements with statements of truth, but were in the form of letters. Most, although not all, were signed.

21. Mr Edmunds informed us that he would be unable to produce two of the witnesses: Maureen Roberts, whom he had lost contact with and Paul Kennedy, who had sadly passed away since giving his statement. The respondent had no knowledge of whether Paul Kennedy had passed away, but did not object to the tribunal reading those statements and placing such limited weight on them as it felt appropriate given that the witnesses could not be produced.

22. In respect of the other five witnesses (one of whom was Mr Edmunds' wife, Mel Edmunds), Mr Edmunds intended for them to attend the hearing and we discussed the timings when they were likely to be needed. Four of these statements (including Mel's) were of the type often seen in Tribunal cases. They were witnesses who offered opinions of marginal relevance on Mr Edmunds's performance at work and issues between him and the respondent. However, the fifth proposed witness, Amanda Haddock, gave different evidence. The statement purported to be a character statement in support of Mr Edmunds but actually said nothing about Mr Edmunds's character. Rather, Ms Haddock made very detrimental comments about Arthur and Carol Edmunds, to whom she lives (or lived) next door. The context of her comments being a dispute about property renovations which was itself the subject of litigation. The tribunal, of its own volition, raised a concern about this statement and, having given parties the opportunity to comment, decided to exclude it altogether. Boundary and property disputes are notorious for creating ill-feeling, and undoubtedly Carol and Arthur Edmunds would have their own version of events in respect of this one. The panel were satisfied it would be entirely wrong for us to allow this statement to be admitted and risk being drawn into an entirely separate dispute.

23. The four remaining supporting witnesses, therefore, were Mel Edmunds, David Hopley (a former fitter), Dave Woodworth (and engineer/supervisor) and Shane Dunne-Smith (fitter's mate). Mr Grundy volunteered that he would have no questions for those witnesses. Whilst he did not necessarily accept their evidence, he considered it was not relevant and did not propose to challenge it. The panel confirmed that we also would have no additional

questions for these witnesses. On that basis, Mr Grundy proposed and Mr Edmunds agreed that the statements could be admitted into evidence and given the same weight as would have attached to them if the witnesses had attended and confirmed their statements on oath. The Tribunal agreed to proceed on that basis, and paid careful attention to each of those statements.

24. Having dealt with the preliminary matters, the Panel heard evidence from the following witnesses on behalf of the respondent:

    April-Jane Barnes (external consultant, disciplining officer)
    Andrew Edmunds
    Lisa Gower (external consultant, grievance officer)
    Arthur Edmunds
    Carol Edmunds

25. The Panel then heard evidence from Mark Edmunds, the claimant, whose evidence in chief comprised a witness statement prepared on the issue of disability status and a separate witness statement prepared for this final hearing, and admitted the additional statements from the witnesses named above.

26. At the end of the evidence, on the afternoon of Day 5, we received written submissions from Mr Grundy, who expanded his skeleton argument with further oral submissions. The respondent had helpfully agreed to reverse the usual order of submissions, so that Mr Edmunds could have the benefit of the last word, and also have the opportunity to consider Mr Grundy's submissions overnight before preparing his own. The Employment Judge informed Mr Edmunds that he could provide a written document to the tribunal if he wished to do so, and then speak to it, or simply make his submissions orally. Overnight, he produced a detailed written document. We delayed the start of the hearing on Day 6 in order to carefully read that document in full. When the hearing resumed, Mr Edmunds confirmed that he had said everything he wanted to say in writing and had nothing to add by way of oral submissions.

27. The Panel reserved its decision.

The Issues

28. Mr Edmunds claims are for unfair dismissal, indirect disability discrimination, failure to make reasonable adjustments, disability-related harassment and holiday pay.

29. Originally, Mr Edmonds' claim form included wages claims. These arose from the fact that Mr Edmonds received a relatively low monthly salary through the PAYE system and received most of his remuneration by way of dividends. Disregarding the dividend payments, he asserts (and it would appear to be correct) that he was not being paid in full for the hours worked and/or he was being paid at rates below national minimum wage rates. The wages claims were withdrawn by the solicitors then acting for Mr Edmonds at an earlier stage of these proceedings. They were not dismissed as there was an indication that Mr Edmonds may seek to pursue those claims or similar claims in the civil courts. No such claim forms parts of the High Court

proceedings last week - I am told that an application to add a counterclaim was rejected. Mr Edmonds indicated that he may still seek to pursue such claims. The Employment Judge indicated that no judgement dismissing the wages claims would be issued before the end of this hearing. As the judgement was reserved there was no opportunity for the parties to comment on this issue at the conclusion of the case. For reasons set out below, this hearing will reconvene in any event to hear further submissions in relation to holiday pay. The parties will have the opportunity to address the dismissal of the wages claims at that point.

30. A list of issues was set out at a case management hearing conducted by Employment Judge Hoey. The parties agreed that this list (amended to remove the withdrawn wages claims) continued to reflect the issues to be determined in the surviving claims. It is set out as an annex to this Judgement.

Findings of Fact

31. All of the key people referred to in this Judgment have the surname ‘Edmunds’. For that reason, and without intending any disrespect to any of them, they are all referred to by their first names throughout this part of the Judgment.

32. The respondent is a medium-sized family business which designs and installs sprinkler systems. The managing director is Arthur Edmunds, the company secretary is his wife, Carol Edmunds. In around 2005-6 they were joined in the business by their younger son, Andrew, who was appointed a statutory director in 2007. In 2010 they were also joined by their elder son, Mark, who became a director in 2013. Mark is the claimant in these proceedings.

33. Immediately prior to the events in question, the shareholdings in the business were split as follows: Arthur 34%, Carol 33%, Andrew 20%, the Claimant 13%. Although Arthur and Carol continued to hold the largest shareholdings, they had stepped back from the business in the few years running up to 2018. Carol’s day-to-day financial work had been taken over by office staff, particularly Gina Bestwick, whilst Arthur’s work in dealing with clients and supervising the operations of the business had passed to his sons. However, we find that they both did remain actively involved in the business to a reasonable degree. The amount of work that they did would vary on a week-to-week basis depending on what was happening in the business.

34. Both Mark and Andrew were employees as well as directors. Mark had an employment contract which dated from 2010 i.e. before he became a director. That provided for a salary of £60,000.00. No director’s service agreement was prepared when he became a director. However, at some point, the remuneration arrangements were changed and Mark began to receive a small nominal salary as an employee, and the majority of his remuneration in dividends. The Tribunal understands the same arrangements were in place for Andrew.

35. The response contends (and Mark did not dispute) that under this arrangement he received significant levels of remuneration. By example, for the three years up to and including 2018 the figures given were £223,500, £146,500 and £104,000 respectively. Part of the dividend was paid on a monthly basis, with a final payment agreed annually at a shareholder's meeting. Customarily, the same dividend was declared for the two brothers, notwithstanding their differing share holdings.

36. It appears that until around early 2018 the professional relationship between Mark and the rest of the family was a relatively good one. However, the personal relationship was not close. Mark had previously spend a period of time working and living in the south of England, and there had been little contact with either his parents or brother during this period. The relationship between the wider Edmunds family and Mark's wife, Mel, also does not appear to have been a good one. Mel has two sons, whom Mark refers to as his sons. Arthur and Carol are not close to these sons (now adults) at all. Through Andrew, they have two younger grandchildren whom they are close to.

37. The depth of the division in the family is illustrated by typed diary entries which were submitted into evidence from Mel's diary. They covered various dates between 2013 and 2015. Copies of the original diary were not disclosed and Mr Grundy emphasised that he was making no application for disclosure in respect of them. He did not challenge the authenticity of the extracts. Mark sought to rely on the extracts as demonstrating poor treatment of him by the other family members. We will not quote from the diary entries here, suffice to say that they are extremely vitriolic and scathing towards Carol, Arthur and Andrew. They also reveal a fear that Andrew and his children will be preferred when Carol and Arthur make arrangements to pass the business on.

38. In the three or four years leading up to 2018 the previously reasonable professional relationship between the family members also began to sour. Mark began to increasingly form the view that Andrew was not 'pulling his weight' in the business, and that he (Mark) was not being rewarded for the work he put in in comparison. This seems in part to have stemmed from the fact that the brothers had quite separate roles – Andrew was largely involved in providing quotations for potential new work, this was office based and involved little travel. Mark was mainly involved in supervising the live projects, which involved significant travel as many of the client sites were in the south of England.

39. Another bugbear was the number of holidays taken by Andrew, who had significant periods of time off to coincide with school holidays. Mark, in contrast, chose to take relatively few holidays. He did not go away but spent time working on his house. We are satisfied that this was Mark's choice, and that he managed his own time. We find that Arthur and Carol (and Andrew) would have been happy for him to take more time away from the business but Mark did not want to do that – in large part because of his

commitment to the business and its clients. Primarily, rather than wanting more time for himself, he resented the time that Andrew was taking. We accept the respondent's evidence that Mark was secretive about some of his work and reluctant to share details of it with Andrew or Arthur or allow them to cover for him. It occasionally seemed to be implied by the respondent (although not asserted) that Mark may have been secretive because he was acting against the interests of the business from an early stage. We make no such finding and simply find that that was the way that Mark preferred to work. It also reflected the fact that he had a low opinion of his brother.

40. During late 2017/early 2018 two of the respondent's project managers left. The project managers represented the tier of middle management between the directors and the fitting teams. They were not replaced and Mark and Andrew absorbed the work that they had been doing. However, this fell disproportionately to Mark given his role within the business. We find it likely that Mark attempted to raise this with the other directors but was brushed off. The respondent's witnesses referred to Mark's need to be more organised in managing his workload, but the only concrete example given was the suggestion that he should stay in hotels when he travelled to the south, rather than taking on two long drives in one day. We see the force in Mark's response that the driving time had to be accounted for, whether it was done in the same day or on consecutive days, and staying in a hotel would not give him more time to tackle the workload he faced. We accept Mark's evidence that his workload increased disproportionately as a result of the project managers leaving.

41. Unfortunately, the state of relations between the parties meant that they found themselves unable to discuss the work distribution issues in a professional, constructive or meaningful way. Instead, Mark's resentment about his position continued to fester, whilst the others perceived him as 'moaning' and gave little credence to his concerns. Mark's concerns were certainly genuine and, in the view of the Tribunal, are likely to have been legitimate, at least to some degree. However, we also find that his own perception was jaundiced by the poor personal relationships and that he, equally, was unable to recognise the validity of the views held by Arthur, Carol and Andrew about their contributions to the business and how it should be run.

42. At least from summer 2018 we find that a clear dividing line was emerging between the two factions. This resulted in tension and bad feeling in the office, the brunt of which was borne by the office staff who were not related to the family members and no doubt found themselves in a difficult position.

43. The company's financial year runs from July to July and in early November 2018 the company was in the process of finalising its accounts. This included the question of what final dividend would be declared for the directors. Mark's witness statement confirms that he had taken legal advice in the run up to this meeting. We find that the matters he was concerned about having taken this advice included the lack of director's service

agreements (which, in his view, would have clarified the division of responsibilities between himself and Andrew) and the fact that the PAYE salary he was receiving was below the level of the National Minimum Wage. On around 5 November 2018 there was a conference call to discuss the dividend. Carol and Arthur's proposal was that the brothers should take crica £35-40,000 each, whilst the parents would take circa £10-15,000 each. Mark indicated he was unhappy with this proposal but did not put forward any alternative. As a result, Carol and Arthur asked him to meet with them in person the following day. Andrew, at this point, was on a business trip to Luton.

44. The accounts of the meeting on 6 November are quite different. Mark says that he tried to raise his concerns about the pressure he was under and the uneven division of workload. His parents were angry – Carol banged the table and Aurthur called him "worthless". Carol and Arthur say that Mark was asked to put forward an alternative proposal on the dividend and he refused to do so, he also refused to respond to questions about whether they should dip into the company reserves to increase the dividend. They deny that they were angry or that Mark was called worthless, Arthur says that Mark told him "you think I am worthless" several times. Both parties agree that Mark got up and left the meeting without resolution being agreed. Arthur and Carol say that Mark told them he would be returning his laptop and phone the next day. Mark says he told them he would be putting something in writing as they were not listening.

45. We find that none of the witnesses' evidence is entirely reliable. This was a short and emotional conversation, now almost three years ago. Both sides are now seeking to present themselves in the best light and this is likely to influenced both their recollections and their evidence.

46. We find that Mark did try to raise the 'unfairness' issues as he saw them. We were somewhat surprised by Arthur's evidence that this wasn't the appropriate time to discuss these matters. It seems to the Tribunal that a discussion around the final dividend share would be an obvious catalyst to discuss respective contributions to the business. However, Arthur and Carol were not open to this discussion and simply wanted to agree a dividend figure, which would be equal vis-à-vis Andrew and Mark. We consider that their perception was that Mark was being greedy and that they were unhappy about that, as well about his failure to give a simple proposal as to the dividend figure. We are satisfied that the discussion became heated on both sides and we find that this involved a heated discussion about whether Mark was "worthless". We are satisfied that Mark genuinely understood Arthur to have called him worthless, although we note that Mark has a tendency to take things somewhat out of context or to jump to conclusions. We are satisfied that Arthur did not consider Mark to be worthless, but he did make a comment in the heat of the moment which was open to be construed in that way. This comment has been consistently repeated and referred to by Mark, and we find it had a profound impact on him. We also find that both comments said to have been made by Mark at the end of the meeting probably were said – both that the laptop would be returned the

next day, and that he would be sending something in in writing. The later emails referring to the laptop would make little sense if that hadn't been discussed, and we consider Mark already had in mind (and was perhaps working on a draft) a letter along the lines of the letter that would eventually be sent on 27 November 2018. He felt that he had to set out his concerns and proposals in writing as the others were not prepared to engage in a constructive discussion.

47. That evening there was a phone call between Andrew and Mark, in which Mark said he had "jacked". We find that he did say this and that Andrew took it to mean he was intending to resign. This was indicative of Mark's frustration at this time. Neither party relied on it as being an effective resignation given the subsequent dealings between the parties.

48. The 6 November was a Tuesday and the next contact between the parties was on Thursday 8 November. Arthur asked Carol to send Mark an email chasing the return of the phone and laptop. This email was sent in Arthur's name, from Carol's email account. It is very brief and simple. There is no mention of Mark having resigned – either to confirm or query that position – nor of his absence from work. It simply requests the return of the equipment and sets a deadline of 4pm that afternoon.

49. Mark did not return the laptop. There was no verbal communication between the parties during this period. We accept that Carol and Arthur may have attempted to call Mark once or twice, but that was all. The lack of attempts to speak to him, go to see him, or email him on a personal level indicate the very poor state of the relationships at this time.

50. There was a further exchange of emails on Monday 12 November. At 10.46am, Carol reminded Mark that the meeting with the respondent's accountant (at which instructions on the final dividend figures would be given) was due to take place the following day. That evening, Mark replied to say that he was taking legal advice and would revert by the end of the week. Later on in the evening Carol replied to repeat the request for the return of the mobile phone and laptop. Subsequently, Arthur and Carol approached Harrison Drury, the firm's current solicitors, on the recommendation of their accountant. Mr Grundy observed during his submissions that both sides had gotten "lawyered up" at an early stage and we agree that the correspondence after this date must be viewed in the light of that development.

51. Mark still did not return the laptop nor provide any assurances that he would do so. HJJ Pearce has found that this was in breach of duties owed to the respondent. Mark has attempted to argue that the respondent did not need the laptop to progress work on his projects as all the information would have been available elsewhere. Although this argument is not necessarily inconsistent with the High Court findings (as recorded in the preamble to the Order) we make our own finding of fact that this did leave the respondent 'in the dark', at least to a significant degree, about the status of Mark's on-going projects and that both Arthur and Andrew were put to some trouble to

try to establish the status of these projects and ensure that they continued to be progressed. As well as taking the steps necessary to keep the projects running, we consider that Andrew and Arthur were, by this point, actively looking for material which could be used against Mark in the context of the escalating dispute.

52. There was a brief telephone conversation between Mark and Arthur on Tuesday 13 November but Mark ended the call when Arthur attempted to talk about the business situation.

53. By email on Wednesday 15 November 2018, Carol repeated the respondent's request for the return of the laptop and phone and offered that these could be collected from Mark if that assisted.

54. By a Fit Note dated 14 November 2018, Mark was signed off work from 14 to 28 November with what is described as a "stress related problem". This fit note was delivered to the office and received on Friday 16 November.

55. The company sent a letter to Mark on 23 November 2018. It is much more detailed than the previous correspondence and was largely drafted by the company's legal advisors. The first substantive matter raised is the return of the laptop/phone.

56. Late on the 27 November Mark sent a letter by email to the other three directors. It is a detailed letter setting out Mark's views on the distribution of work and workload and proposals for how the control and remuneration structures within the business should be modified, to his advantage, going forward.

57. Mark returned to the office on 28 November (the final day covered by his sickness certificate). He did not inform the other directors that he planned to return on that date and, as found by HHJ Pearce, he illegitimately downloaded confidential information onto an external hard drive. He also moved men between projects in circumstances which he said made business sense but the respondent's witnesses hotly disputed.

58. Mark gave evidence that whilst in the office he received a 'pocket ring' from Carol's phone i.e. she called him inadvertently (and without realising she had done so) when her phone was in a pocket or bag, allowing him to overhear a conversation she was having with someone who was with her at that time.

59. We find that a 'pocket ring' did happen – Mark mentioned on many occasions that it was overheard by two staff in the office and they could have been called to disprove that but were not. When questioned about it, Mark said that the call lasted "2-3, maybe 5" second and that his mother was "ranting about the letter I'd sent". However, the only statements he was able to recall hearing were about his actions in moving men around that morning. Mark considered the pocket ring to be important. He considered the only person that Carol was likely to be talking to was Arthur, although

the respondent insists that Arthur was in London at the time. Mark also believes that it demonstrates that the other directors were resolved to "get rid of him" due to the letter. We consider that little turns on the pocket ring, or on where Arthur was at that point. The other directors read the letter during the course of the 28th. We are satisfied that they would have been unhappy about it and would have considered a response in due course had not events intervened.

60. At 13.30 Carol emailed Mark on behalf of Arthur asking him to "hold fire" on any jobs until the next day, when Arthur would be back in the office and able to "bring him up to speed".

61. On 29 November there was utility work going on outside the property which meant that there was no power in the business. A short team meeting was held and then staff were sent home or to go to site. Following this, at around 8.30am Andrew, Arthur and Mark sat down in the open plan office area for a meeting. As there was no lighting available the office was darker than usual. However, there was some daylight coming in from the windows and it was not too dark for a meeting to take place. Arthur and Andrew produced a return to work form, which was filled out in discussion with Mark. We find that this was not a normal process for the business, and reflects the fact that both sides were now looking to protect their positions. In that form Mark indicated that he had seen a GP on 14 November 2018 and that he was receiving no treatment, there were no side effects and that there were no on-going impacts of his illness. Mark has told us that his GP had advised him that the treatment he had received from his family was "abusive" and that he should remove himself from the situation. This is not reflected in the return to work notes nor in the GP records which have been disclosed. To the extent that such comments may have been made by the GP, we note that they would have been based entirely on Mark's account of events and probably reflect informal and supportive advice to Mark, rather than any objective conclusion as to the rights and wrongs of the dispute, or any medical diagnosis.

62. Andrew and Arthur's evidence is that they proceeded to "bring Mark up to speed about the projects". They deny that they got as far as highlighting concerns which had been identified in relation to Mark's work. This is in conflict with a letter sent to Mark later that day, which we shall come to below, which stated "*a conversation was initiated regarding some serious concerns about client contracts/project issues which had come to light in your absence. There was an attempt to outline to you the nature of the concerns and the required corrective actions*."

63. Again, we find that neither party's account of this meeting is entirely reliable and that each side has, from very shortly after the event, been seeking to frame it in a way which casts their own actions in a more favourable light. We find that Andrew and Arthur did seek to accuse Mark of being responsible for problems on certain projects and accept his evidence that 'it felt like a disciplinary' and that he wanted to leave, in line with his GP's advice to remove himself from difficult situations. When Mark made to leave,

Arthur was standing between him and the exit. Mark had his laptop clasped in his arms and Arthur asked him to leave it. We find that Arthur and Andrew would not have sought to prevent Mark leaving, but they were concerned that he should not take the laptop. There was a tussle, during which Arthur took the laptop from Mark. Mark then pushed past Arthur and Arthur was knocked to the floor. Mark continued to leave, with Andrew shouting at him. Both Arthur and Andrew then followed Mark out of the building and he drove off. We find that, in his evidence to us, Andrew exaggerated the extent to which Mark was still shouting abuse as he drove away from the scene. Although the laptop was left, Mark did not provide the password to enable it to be accessed.

64. Both Andrew and Arthur wrote statements shortly after the event. We accept those statements are near-contemporaneous but also find that they are, to a degree, self-serving and sought to exaggerate Mark's culpability and minimize their own. As noted above, it appears that Mark also made a statement to his own solicitors, but that was not admitted into evidence for the reasons set out above.

65. Following this episode, Mark went to the police station and the police called Arthur. There is a dispute about whether Mark was complaining about false imprisonment or about the theft of the laptop. We consider little turns on this and were not assisted by the evidence of the police involvement. Both parties agree that the police requested that Mark seek medical attention. That is indicative of the state of agitation he was in.

66. The respondent had a retainer with Ellis Whittam to deal with employment law and HR matters. There is a dispute between the parties as to whether or not Mark went to see Ellis Whittam on his own account around this time, thereby creating a conflict of interest. Again, we do not find it necessary to resolve that dispute – the respondent was entitled to use alternative advisors and there are a number of reasons why they may have chosen to do so in this particular situation. However, we do need to touch upon the fact that during his oral evidence Andrew stated words to the effect of "we knew you [Mark] had gone to Ellis Whittam because we found the evidence on the laptop". In the context of the questioning at the time, it sounded as if Andrew was stating that the 'evidence' (which actually amounted to nothing more than a newsletter sent to Mark's email address) was found on the laptop around November/December 2018. However, he then clarified that it was found when Mark provided passwords for the laptop following the court order in august 2019. Mark referred on numerous occasions during the remainder of the case, and in his submissions that Andrew had "admitted" that the respondent had actually had access to the laptop before the passwords were provided. We do not find that the respondent had access as asserted by Mark (such a finding would be in conflict with the High Court findings, but even setting that aside, there are no grounds for it on the evidence we heard). We do not consider that Andrew's evidence could reasonably have been taken as an admission that they did. This is an example of Mark jumping to conclusions that were not supported by the

facts of the case or the evidence and it is illustrative of the sort of stance he has adopted throughout the hearing.

67. We consider that at the time of the meeting of 29 November the respondent was already considering possible disciplinary action against Mark in relation to the performance concerns that were purportedly identified during his absence. That process was accelerated by the incident which took place on 29 and the respondent moved immediately to suspend Mark. A detailed suspension letter was sent the same day.

68. On 3 December 2018 Mark presented to A&E at Calderdale hospital with low mood and suicidal ideation. (None of the respondent witnesses were aware of this at the time, it is recorded in a psychological therapist's letter dated 28 May 2019 which was appended to the claim form.) He subsequently attended for a psychological assessment on 20 December and had ten sessions "to support him in overcoming his psychological crisis". The letter describes that "at the time" Mark was struggling to eat or sleep and to make sense of what was going on around him. The letter describes continuing distress related to the dispute with his family and work and opines that "his distress will continue until the matter is resolved." It records that he was taking anti-depressant medication and had been referred for further psychological support.

69. Little else happened for the next three weeks. The respondent had identified an independent HR consultant to do an investigation, but that person did not have availability until the new year. We accept that this delay was genuine and that it is unsurprising that the respondent had some difficulties in engaging someone to do this work in the run-up to the Christmas period. We do not find that there was any deliberate intention to delay things. On 21 December Carol sent Mark what amounted to a 'holding' letter explaining that he would be contacted further in the new year. Mark took exception to this letter, believing that it was intended to humiliate him and spoil his Christmas. We do not accept this, it was good practice to inform Mark about the delay and to give him an update.

70. In the end, Carol conducted an initial investigation and prepared an investigation summary. This explored numerous areas, not simply the events of 29 November. There is a large collection of complaints about Mark's practice and dealings with clients, which are only superficially evidenced by statements taken from the directors and one member of staff (Gina Bestwick). For example, the statements make assertions that Mark customarily used bad language but no specifics are given of language used on particular occasions. Nor does the investigation cover whether such language was commonplace with the company or the industry generally (as might be suggested by the wording of one 'client complaint' which was also relied on.)

71. By letter dated 15 January 2019 Mark's solicitors wrote to Carol and Arthur seeking to raise grievances and asserting that the company has committed "numerous fundamental employment breaches". The first allegation is that

the reason given for the suspension (i.e. Mark's conduct on the 29 November) is unfounded. The letter makes reference to, but does not provide, a copy of the statement made by Mark to his solicitors in relation to the events of that day. The letter goes on to allege that Carol and Arthur are breaching their own fiduciary duties. It then makes reference to Mark's health and alleges a failure to make reasonable adjustments (without stating what these adjustments were). It then raises issues around the suspension and goes on to set out potential claims for unlawful deductions from wages and breaches of the Working Time Regulations 1998. The letter concludes by stating that Mark would like to return to his role, and seeks compensation under various heads.

72. Separate responses were sent from Harrison Drury (acting on behalf of Carol and Arthur) and the respondent. In the meantime, the respondent was still attempting to engage external support to move forward with the investigation.

73. A further letter from Mark's solicitors on 17 February 2019 stated, in respect of Mark's health "*my client is at the end of his tether, is under the Crisis team at the hospital after having suicidal thoughts, and is beyond stressed".*

74. There was further correspondence between the parties in which they re-stated their position and a formal request was made for passwords to be provided for the laptop.

75. Eventually, around 22 February the respondent managed to instruct Lisa Gower at Ubuntu HR Limited. She was provided with the investigation pack assembled by Carol and the solicitors' correspondence. In an email of 26 February 2019 Ms Gower sent out some questions in relation to both the potential disciplinary and the grievance letter of 15 January 2019. She noted that she had a few "initial concerns" although was unable to explain in her evidence what this comment related to. She subsequently attended the office to discuss the case with Carol. She proposed, and Carol agreed, that the grievance should be dealt with first. A letter inviting Mark to a grievance hearing on 6 March 2019 was sent to his solicitors on 27 February 2019.

76. Mark's solicitors spoke to Ms Gower and informed her that he was too unwell to attend the hearing. There was no indication given that he would belikely to be well enough to attend at some future point. Ms Gower wrote on 6 March 2019 to give Mark opportunity to put forward written representations, and indicated that she would delay her consideration of the grievance until 15 March 2019 to allow him to do so.

77. Ms Gower prepared a grievance outcome letter which was sent to Mark's solicitors on 22 March 2019. She did not uphold the grievances, although she acknowledged that Mark had, by this point, been suspended for "*an unusually long period of time*". The decision to progress the grievance before the disciplinary was, of course, a significant fact in the delay and was also in Mark's interests.

78. In their letter in response, Mark's solicitors complained about both the delay in moving the process forward *and* about Ms Gower's failure to postpone the grievance process until such time as Mark would be well enough to participate in it.

79. By email dated 26 March 2019 to Carol, Ms Gower explained that she was reluctant to proceed with the disciplinary process given Mark's solicitor's response to the grievance process. It was agreed shortly afterwards that another external consultant would be engaged. Given the delay and the difficulty in finding someone earlier on, the respondent and their solicitors decided that the disciplinary would be determined by April-Jane Barnes, who is a human resources manager at Harrison Drury. She is, from time to time, engaged by clients in relation to grievance or disciplinary matters.

80. Mark was very concerned about the use of someone from Harrison Drury, whom he considered could not properly be regarded as independent. We understand this concern and find that the respondent also shared it to an extent. We find that the respondent engaged Ms Barnes only because of the on-going delay and the difficulty in identifying anyone else to take up the work at short notice. We find that Ms Barnes approached the matter as an independent decision-maker and that the firm took steps to ensure that she was not exposed to information regarding the case, other than that which came to her in her capacity as the disciplinary decision-maker.

81. By letter dated 5 April 2019 Ms Barnes invited Mark to a disciplinary hearing on 12 April 2019. That letter, for the first time, formulated the allegaitons against him, which were based on the material in Carol's investigation pack. The allegations were as follows:

    1. **You have engaged in aggressive/inappropriate behaviour as follows:**
       1.1 use of foul language in the office on an ongoing basis (as referred to by a number of sources in the investigation summary).
       1.2 aggressive treatments of Mr and Mrs Knight as stated in Mrs Knight's letter of complaint dated 12 August 2018.
       1.3 Your aggressive and inappropriate behaviour during the 29 November 2018 return to work meeting which culminated in you pushing Arthur to the floor.
       1.4 Aggressive treatment of Carol over the course of 12 to 18 months (as referred to within Carol statements dated 21 January 2019).

    2. **You have caused a serious risk of damage to relationships with clients as follows:**
       2.1 argument with Mechanical Services in July 2018 re their tank preference
       2.2 over applying for payments from Adrian Murton at YPHS plus arguments about payments an accuracy of work progress
       2.3 complaints by Mark Fisher of Boon that *"he had been Fking raped"* on phoning for November application dates.**

    3. **You have caused loss to the Company in relation to the tank installation for MSP where there was a £40,000 cost to correct your error.**

    4. **You have consistently over applied for payments from clients, thus exposing the company to the risk of audit failure and accounting difficulties**

5. **You have repeatedly failed to provide business critical passwords for the Company Laptop.**

82. The letter informed Mark that these matters, if proven, may be considered to be gross misconduct and that dismissal was a possible outcome. It also informed him of his right to be accompanied and provided copies of the documents in the information pack. It offered him the opportunity to make written submissions.

83. By email dated 12 April 2019 (the date of the proposed hearing) Mark's solicitor wrote to say that he was unable to attend due to ill health. It was also stated that "he would be responding in more detail" but there was no suggestion of when he might be well enough to participate. Ms Barnes responded noting that the deadline for providing written representations had passed and that the hearing would be going ahead. There was further correspondence in which it was stated that the solicitor had herself been unwell and which referenced the fact that Mark had been having suicidal thoughts. Following this, Ms Barnes did postpone the hearing, which was ultimately rescheduled to 29 April 2019.

84. There was further voluminous correspondence in the run up to that meeting, including a request by Ms Barnes that letters be provided from the psychiatrist treating Mark commenting on his fitness to participate in the hearing. No such evidence was ever provided.

85. Mark attended that hearing, and covertly recorded it. We have had regard to two versions of the transcript which appear in the bundle. Mark did not put forward a substantive defence to the allegations. He commenced by indicating that the had only paid for an hour's parking and expected the meeting to be concluded in that time. He then attempted to question Ms Barnes as to whether she had authority to dismiss other directors and to express his doubts about her independence. He did not provide her with any documents, in particular the contemporaneous statement which he asserts he had made to his solicitor about the events of 29 November.

86. It is clear from the transcript that Mark was agitated in the meeting and that he wanted the meeting to be "called off". Ms Barnes declined to do that and Mark read out a prepared statement. Although there was a lengthy discussion about Mark's criticism of the process, he repeated on several occasions that he was not going to answer questions related to the allegations, despite Ms Barnes' repeated attempts to get him to do so.

87. Ms Barnes communicated her decision by letter dated 14 May 2019. She found that allegations 1.1 (foul language), 1.2 (aggression towards Mr and Mrs Knight), 1.4 (aggression towards Carol), 2.2 (over-applying for payments from YPHS), 2.3 (Mark boon complaint) and 3 (applying for overpayments) were proven and amounted to "unsatisfactory conduct". She found that allegations 1.3 (29 November meeting) and 4 (failure to provide passwords) were proven and amounted to gross misconduct. Allegation 2.1

(tank issue resulting in loss of £40,000) was not proven. Ms Barnes concluded that the claimant would be dismissed as a result of her findings.

88. An appeal was intimated by Mark's solicitors but later withdrawn.

89. At a shareholder meeting on 5 July 2019 Arthur, Carol and Andrew voted to remove Mark from his office as a director.

90. The subsequent chronology in relation to litigation, so far as is relevant, has already been set out above.

Relevant Legal Principles

Unfair dismissal

91. Section 98, so far as relevant, provides as follows:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal and

(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this sub-section if it-

(b) relates to the conduct of the employee

(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonable or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case

92. The respondent bears the burden of proving, on the balance of probabilities, that the claimant was dismissed for a potentially fair reason: s. 98 (1) ERA. In considering the reason for dismissal and, in particular, the extent to which the tribunal should or could look behind Ms Barnes' decision, we considered the cases of **Royal Mail Group v Jhuti 2020 ICR 731** and **Uddin v London Borough of Ealing EAT 0165/2019**. This is discussed further below.

93. If a potentially fair reason is shown, then consideration must then be given to the general reasonableness of that dismissal under s.98(4) ERA.

94. In considering the question of reasonableness, the we have had regard to the decisions in **British Home Stores v. Burchell [1980] ICR 303**; **Iceland Frozen Foods Limited v. Jones [1993] ICR 17**; **Foley v. Post Office and Midland Bank plc v. Madden [2000] IRLR 82**.

95. In summary, these decisions require that we focus on whether the respondent held an honest belief that Mr Edmunds had carried out the acts of misconduct alleged, and whether it had a reasonable basis for that belief. The Panel must not, however, put itself in the position of the respondent and decide the fairness of the dismissal based on what we might have done in that situation. It is not for the panel to weigh up the evidence as if we were conducting the process afresh. Instead, the Tribunal's function is to determine whether, in the circumstances, the respondent's decision to dismiss the claimant fell within the band of reasonable responses open to an employer.

96. In conduct cases, when considering the question of reasonableness, we are required to have regard to the test outlined in the '**Burchell**' case. The three elements of the test are:

    a. Did the employer have a genuine belief that the employee was guilty of misconduct?

    b. Did the employer have reasonable grounds for that belief?

    c. Did the employer carry out a reasonable investigation in all the circumstances?

97. It was confirmed in **Sainsbury's Supermarket v Hitt 2003 ICR 111** that the 'band of reasonable responses' test applies equally to the employer's conduct of an investigation as it does to the employer's decision on sanction. Whilst an employer's investigation need not be as full or complete as, for example, a police investigation would be, it must nonetheless be even-handed, and should focus just as much on evidence which exculpates the employee as on that which tends to suggest he is guilty of the misconduct in question.

98. Sections 122(2) and 123(6) ERA respectively provide that the tribunal may reduce the amount of the basic and/or compensatory awards payable following a successful unfair dismissal claim where it is just and equitable to do so on the grounds of the claimant's conduct. In the case of the compensatory award, the Tribunal can only take into account conduct which caused or contributed to this dismissal.

99. Under the principle in **Polkey v A E Dayton Services Ltd 1988 AC 344** the Tribunal may reduce the amount of compensation payable to the claimant if it is established that a fair dismissal could have taken place in any event – either in the absence of any procedural faults identified or, looking at the broader circumstances, on some other related or unrelated basis.

100. Under the principle in **W Devis and Sons Ltd v Atkins [1977] ICR 662** an award may be reduced (or extinguished altogether) where an employee has been guilty of misconduct which was unknown to the employer at the time of dismissal (and therefore cannot have contributed to the dismissal) but which comes to light subsequently and which means that

it would not be just for the employee to be compensated in full for his unfair dismissal as he otherwise would be.

Disability discrimination

Disability status

101. Section 6 of the Equality Act 2010 deals with the question of 'disability status' i.e. when a person will be considered to be a disabled person for the purposes of the Act. It provides (as relevant) as follows.

6 Disability

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

102. S. 6 is supplemented by Schedule 1 of the Act which provides, amongst other things, that the effect of an impairment is "long term" if it has lasted, or is likely to last, for at least 12 months.

103. The term "likely" in this context (as in other contexts in which it is used in relation to disability discrimination) is not a balance of probabilities test. The threshold is lower than that; the Tribunal need only be satisfied that it is something which "could well happen" (**Boyle v SCA Packaging Ltd [2009] ICR 1056 HL**) The question of whether an impairment which has not lasted for 12 months is nonetheless likely to last for 12 months was recently considered by the Court of Appeal in **All Answers Ltd v W and Another [2021] IRLR 612**, which Mr Grundy drew attention to in his skeleton argument. We paid particular regard to the guidance offered by Lewis LJ at paragraph 26.

Indirect discrimination

104. Section 19 Equality Act 2010 deals with indirect discrimination and provides (as relevant) as follows:

19 Indirect discirmination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Reasonable Adjustments

105. Ss. 20-21 of the Equality Act 2010 provide (as relevant) as follows:

20 Duty to make adjustments

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

(3) The duty comprises the following three requirements.

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

(5) - (13) […]

21 Failure to comply with duty

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

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

(3) […]

106. Schedule 8 of the Equality Act 2010 deals with reasonable adjustments in the workplace and provides, materially, as follows:

20 Lack of knowledge of disability, etc

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) […]

(b) … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

107. Turning to case law, the starting point is the well-known decision in **Environment Agency v Rowan [2008] ICR 218** which identifies that the tribunal must begin by identifying the PCP before considering the nature and degree of disadvantage to the claimant (with reference to a hypothetical comparator if appropriate) and finally analysing the appropriate steps to avoid or ameliorate the disadvantage.

Harassment

108. Section 26 of the Equality Act 2010 provides (as relevant) as follows:

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

> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
> **(b) the conduct has the purpose or effect of—**
>
> > **(i) violating B's dignity, or**
> > **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**

Holiday Pay Claim

109. Regulations 13 and 13A of the Working Time Regulations 1998 of the Working Time Regulations 1998 set out a worker's statutory entitlement to paid annual leave. It is not necessary to rehearse those provisions.

110. Regulation 14 provides that where employment terminates part-way through a leave year in circumstances where the worker has accrued more annual leave than he has taken he is entitled to a payment in lieu of accrued but untaken annual leave.

111. Regulation 30 deals with remedies available where a worker has not been permitted to exercise his right to take paid leave (i.e. breaches of regulation 13) and where an employer has failed to pay a worker wages due in respect of accrued leave on termination of employment.

Submissions

112. Mr Edmunds struggled to address his submissions to the issues in the case. His written submissions were wide-ranging and focused on his contentions that (a) the High Court decision was wrong and would be appealed (b) the respondent's witnesses had lied on oath in this Tribunal and in the High Court (c) that he has been subjected to continued abuse from his family which has resulted in long-standing adverse effects to his mental health (d) that he was, in effect, solely responsible for the success of the business and that the other three directors contributed nothing or very little (e) the dismissal was pre-orchestrated between the respondent and its solicitors; the so-called independent external consultants were not independent at all.

113. Mr Grundy's submissions were structed around the list of issues. In relation to the **Burchell** test he proceeded on the basis that it was the knowledge and through-processes of April-Jane Barnes which we had to consider and anything beyond that was not relevant. He based his submissions around the two allegations which had been found by Ms Barnes to be gross misconduct, and said nothing about the other allegations which she had considered. He emphasised that Mr Edmunds had adopted an obstructive approach to the disciplinary proceedings in general and the meeting with Ms Barnes in particular. She could not be expected to expand

her investigation, or to have regard to potential mitigation, if it wasn't put before her at the time. Mr Grundy also submitted that if the dismissal was unfair then any compensation that would otherwise be due would fall to be entirely extinguished under **Polkey**, contributory fault and/or **W Devis.**

114. In relation to disability status, the respondent accepted that the claimant had shown that he had a mental impairment which had a more than minor or trivial effect on his ability to carry out normal day to day activities. Mr Grundy hung his hat on the longevity criterion, and submitted that it could not have been said at the time of the alleged discrimination that the impairment was likely to last for 12 months.

115. On the indirect discrimination and reasonable adjustments claims, the respondent accepted the application of its disciplinary and grievance procedures as a PCP. It disputed that there was disadvantage to the claimant and, in respect of the reasonable adjustments claim, that it had knowledge of that disadvantage. In any event, Mr Grundy submitted that the application of the procedures was justified and that the adjustments contended for would not be reasonable.

116. In relation to the harassment claim, the respondent submitted that the matters complained of were not related to disability and did not have the purpose or effect described in the statute.

117. The respondent also relied on time limit issues in respect of the discrimination claims.

118. Turning to holiday, Mr Grundy addressed this as a Regulation 30(1)(a)(i) claim, refusal to permit the claimant to take the holiday to which he is entitled under Regulation 13. He submitted that the evidence did not support such a "refusal". Although Mr Edmunds may have taken less than his statutory entitlement he managed his own time and could have taken what he wanted. Mr Edmunds could point to no evidence of a specific refusal and the reason he took relatively little holiday was due to his own working practices and personal choice.

Discussion and conclusions

Unfair dismissal

119. The first question for the Tribunal is "what was the principal reason for dismissal?". The respondent submits that the reason was conduct and, specifically, the two matters found by Ms Barnes to have constituted gross misconduct. The claimant had suggested in his witness statement that the reason was related to 'whistleblowing' or that he had raised concerns that he was not being paid the national minimum wage. We clarified at the start of the hearing that no 'automatic' unfair dismissal claim had been presented. Mr Edmunds did not seek to amend his claim, but the Panel accepted that evidence of an alternative reason for dismissal may be relevant in challenging the respondent's contention that the reason for dismissal was conduct. For that reason, we gave Mr Edmunds some latitude in exploring the question of pay and his perception of there being unequal contributions

in terms of effort and reward amongst the directors. However, although Mr Edmunds spent considerable time trying to establish the value of his own contributions with the respondent's witnesses he failed to develop those points into a clear case of an alternative motive for dismissal.

120. The Tribunal considered that, in the circumstances of this case, it was necessary to consider not simply what Ms Barnes' reason for dismissal was, but also the directors' reason for commissioning the disciplinary process. We had regard to paragraph 60 of the Supreme Court judgment in **Jhuti** and considered that, if he had been legally represented, the argument would most likely have been put on Mr Edmunds' behalf that Ms Barnes' decision was for a "bogus" reason as she had been duped by the three directors. Such a submission can be inferred from Mr Edmunds' forceful challenges to Ms Barnes' (and Ms Gower's) independence and by his argument that he had been the victim on 29 November, and was not to blame for Arthur's "fall", which was an accident that the respondent had cynically sought to capitalize on.

121. However, having considered this argument, we reject it. We believe that the inclusion in the disciplinary process of the other matters, which were (as Ms Barnes appears to have recognised) very much subsidiary to the allegations of physical assault and withholding of the laptop password and were also, in many cases, relatively stale, demonstrates that the respondent was most likely considering what grounds it may have for a conduct dismissal during Mr Edmund's November absence. This conclusion is strengthened by the speed at which the respondent was able to suspend the claimant and the detail of the letter which was issued on the same day (with its reference to a conversation about "serious concerns" being discussed at the 29 November meeting, although Andrew and Arthur denied there had been such a discussion).

122. Against that backdrop, the respondent may well have been relieved when the opportunity to pursue more serious, clear-cut allegations presented itself. However, the fact that an employer may have its own reasons for welcoming an opportunity to dismiss, does not mean that it cannot rely on that matter as providing the reason for dismissal.

123. Although we find that Andrew (and, to a lesser extent Arthur) somewhat exaggerated their account of the events of the 29 November in the statements they provided at the time and in their evidence to the Tribunal, there is no question of this incident being a sham or a set-up. As we have found, the conflict on 29 November arose not because Mr Edmunds wanted to leave the meeting, but because he wanted to leave and take the laptop with him. The respondent was entitled to require him to leave the laptop and his reluctance to do so was the reason the tussle ensued. Arthur fell to the floor has a result of Mr Edmunds making contact with him, regardless of whether that is described as a 'push' or a 'barge'. The fact that a younger or healthier man may not have fallen as a result of that contact is not relevant – we reject Mr Edmund's contention that this was a mere fall, unrelated to his own actions, and we are strengthened in that conclusion by the fact that, on all accounts, Mr Edmunds immediately left the premises rather than assisting his father or checking he was okay.

124. Those circumstances were the immediate cause of Mark's suspension and of the matter being referred (ultimately) to Ms Barnes to conduct a disciplinary hearing. They are reasons related to Mr Edmund's conduct and as such would represent a potentially fair reason for dismissal. It is irrelevant, in terms of determining the reason for dismissal, whether Andrew and Arthur might also have been at fault to some degree. We find that the respondent genuinely passed the matter over to Ms Barnes for determination and is subsequently entitled to rely on her beliefs, investigation and decision as being that of the employer. Ms Barnes's own reason for dismissal was both Mr Edmund's conduct on the 29 November and the later failure to provide passwords to the laptop. These, again, are both reasons related to Mr Edmund's conduct and therefore the respondent has shown a potentially fair reason for dismissal within s.98(2).

125. The Tribunal then went on to consider the **Burchell** test, which is replicated at paragraph 2 of the List of Issues. In respect of the claimant's conduct on 29 November 2018, we found that Ms Barnes did genuinely and honestly believe in Mr Edmunds' guilt. Mr Edmunds argued strongly that she should have investigated more thoroughly, by challenging supposed discrepancies in Andrew and Arthur's statement, and by visiting the office to assess the physical credibility of the various accounts of the fall. Whilst the Tribunal had some sympathy with Mr Edmund's position, Ms Barnes was limited in her investigation by the fact that Mr Edmunds refused to engage with her. The alleged discrepancies in Andrew and Arthur's statement were not evident on the face of the documents, nor was what Mr Edmund's described as the "physical impossibility" of the encounter having taken place as they described it. Ms Barnes' rejection of some of the other allegations shows that she was prepared to make independent decisions and the Tribunal is satisfied that if Mr Edmunds had engaged with the disciplinary process and raised these points to her, she would, at least, have made efforts to investigate them further. Because he did not do so we cannot say that her investigation was unreasonable.

126. In relation to the second gross misconduct allegation, the conclusion is much more straightforward. Mr Edmunds has no answer to the allegation that he refused to hand over the password. His only argument is that the respondent already had the password and so the allegation is spurious. We cannot accept that argument as it is in conflict with the findings of the High Court. We also consider that the argument is simply not credible in light of the correspondence between the respondent and the forensic IT specialists about obtaining access, as well as the respondent's subsequent actions in obtaining a High Court order to compel disclosure of the password. On that basis, Ms Barnes was fully entitled to form the view that he had committed this act of gross misconduct, and there was no other investigation that could have been done.

127. Although not expressly identified in the List of Issues, we also considered whether the sanction of dismissal was within the band of reasonable responses. We are satisfied that it was, and are also satisfied that the sanction of dismissal would have been the outcome if Ms Barnes had found only one of the two allegations to have been established, and that that also would have been within the band of reasonable responses.

128. Finally (again, despite the fact this was not identified in the List of Issues) we considered the fairness of the dismissal process, including certain procedural criticisms that had been raised by Mr Edmunds. Our conclusions on this were:

128.1 We did not accept that Ms Barnes' alleged lack of independence made this dismissal unfair. Where a small business is dealing with misconduct allegations that have been made by, or involve, its directors, it faces a Catch-22 situation. If the directors take disciplinary decisions themselves, they will be accused of lacking independence, if the commission external support, they will be accused of having paid for the decision they wanted in the first place. Having consider Ms Barnes' correspondence and her evidence we are content that she approached this task with an independent mind and was not tainted by the fact that she was employed by the respondent's solicitors. If she had not been satisfied of the evidence of misconduct, she would not have made the findings she did.

128.2 The delay in this case was unfortunate and unhelpful. The main factors behind this were (1) the respondent's difficulty in securing external support (2) the claimant raising a grievance and Ms Gower's decision that the disciplinary should be 'paused' whilst it was dealt with (3) the claimant's illness. We do not consider that either party was at fault in relation to any of these matters. They are simply the things that happened in the course of this process. We do not consider that the delay made the dismissal unfair. In particular, there is no evidence that Mr Edmunds could, or would, have engaged more fully with the disciplinary process if the hearing had happened earlier. The medical evidence showed that he was in mental health crisis from 3 December 2021, essentially immediately after the events of 29 November. There was therefore no lost window of opportunity to secure his engagement with the process.

128.3 Overall, we were content that a reasonable process had been followed in the difficult circumstances of this case.

129. For all of these reasons, we concluded that the claimant's unfair dismissal claim could not succeed.

130. As the parties had been asked to address us on the question of possible reductions to compensation in the event of a finding of unfair dismissal, we also considered that matter during our deliberations. We were content that, even if we had found the dismissal to be unfair, we would have made a reduction to the basic and compensatory awards of 100% based on the claimant's conduct on 29 November and in withholding the passwords and would have made the same reduction on the alternative grounds of his actions in downloading confidential information, in accordance with the principle in **W Devis**.

Disability Discrimination

131. We first considered whether Mr Edmunds was, at any material time, a disabled person within s.6 Equality Act 2010. It is for Mr Edmunds to establish this, and we had regard to the statement that he put forward, as well as to the medical records in the form of GP records and the letter from

Ms Balquis. Mr Edmund's statement largely consisted of criticism of the treatment he had allegedly received from his parents and brother in the years running up to November 2018, and how this had made him feel.

132. As noted above, the only part of the test for disability which Mr Grundy contended had not been met, was the requirement that the impairment has lasted, or is likely to last, for 12 months.

133. In calculating this 12-month period, we reject the suggestion of any 'starting date' for the impairment before 6 November 2018. Although Mr Edmunds mentioned physical problems with his joints, which he blamed on stress, there is no medical evidence to support this, nor is there any real evidence of an impact on day to day activities prior to his sickness absence. There is no evidence of previous depressive episodes nor any contention that this was a recurring condition.

134. Projecting forward from 6 November, Mr Edmunds would not satisfy the 12-month criterion until 5 November 2019, unless he can establish that at some earlier date it became "likely" to last that long i.e. if "it could well happen".

135. When Mr Edmunds was diagnosed with a 'stress related problem' in mid-November 2018, there was no reason to suspect that this would develop into a long-term problem. From 3 December 2018, when he experienced his mental health crisis, presenting to the hospital with suicidal intent, there is a basis to conclude that this was a more serious problem, and not simply a transient episode of "stress". As the condition persisted (and Mr Edmunds reminds us that he continues to suffer from it to date) there would come a point before November 2019 when it could properly be said to be "likely" that it would continue for at least that period. The question of when that point was will generally be a matter of medical evidence.

136. We do not consider Ms Balquis's letter to be helpful in this respect. There is no indication of the qualifications or training that she has, and it is evident that the letter is largely a rehearsal of what she has been told by Mr Edmunds. It was written in the context of an entrenched dispute which involves Mr Edmund's family life as well as his employment. We do not consider that the comment that his "distress" will continue until the matter is resolved can be equated with a medical opinion that he will continue to suffer an impairment which has a substantial effect on his ability to carry out day-to-day activities for a 12 month period.

137. That statement is the highpoint of Mr Edmund's case on this point. The dismissal took place on 14 May 2019, almost exactly six months after the onset of this impairment. We do not consider that on the basis of that statement the claimant has shown it was "likely" (even in the **Boyle** sense) that he would be affected in the required way for at least 12 months.

138. Our conclusion on disability status means that there is technically no requirement for us to consider the substantive discrimination claims. Nonetheless, we did go on to do so and have set out our conclusions briefly below.

139. We consider the indirect discrimination claim to be unsustainable. The PCP under attack is "the application of the grievance and disciplinary procedures". For the claim to succeed we would have to find that the use of such procedures generally (not just in the case of this claimant) is a discriminatory practice which cannot be justified. That plainly cannot be correct. We note that indirect discrimination claims will rarely be apt in disability cases, where the better cause of action is almost invariably a claim of failure to make reasonable adjustments. That is the case with this claim.

140. Turning then, to the reasonable adjustments claim; as noted above the respondent has conceded that the application of its disciplinary and grievance procedures was a PCP. We do not find that the claimant has established any particular disadvantage to him due to the application of those procedures. Further, we find that if there was such a disadvantage the respondent was not aware, and could not reasonably be aware, of it. In terms of the specific adjustments contended for at paragraph 15 of the List of Issues, we do not understand how the respondent could have "progressed matters quicker before suspending the claimant" as the suspension was put in place immediately after the events of 29 November. We do not consider that it would have been reasonable to adjourn the proceedings and await the claimant's fitness to participate given that the proceedings were already delayed for other reasons, there was no medical evidence available to the respondent (including anything to indicate when the claimant would be likely to be able to participate in the processes) and this was a serious matter with profound implications for the whole business.

141. Finally, in relation to the harassment claim, even if the claimant was disabled we did not consider that any of the impugned conduct set out at paragraph 20 of the List of Issues was related to his disability.

Unpaid Annual Leave

142. As alluded to above, at the outset of the hearing Mr Grundy noted that the case appeared to be one under Regulation 13 and 30(1)(a)(i) WTR. That would have been a reasonable assumption based on paragraph 7.3 of the Particulars of Claim, which is ambiguous despite the fact that it was professionally drafted. The parties each gave evidence and directed questioning to the practice of taking annual leave (both in relation to the claimant and to Andrew). Based on the findings of fact set out above, the Tribunal concluded that there had been no refusal to permit Mr Edmunds to take his annual leave during the course of his employment, and therefore that any claim under Regulation 30(1)(a)(i) must fail.

143. However, in reconsidering the List of Issues whilst deliberating, the Panel noted that the case was framed by EJ Hoey as being one involving Regulation 14 (and, therefore, by implication, brought under Regulation 30(1)(b)) i.e. a claim of failure to pay accrued holiday pay on termination of employment.

144. Notwithstanding our conclusion that there was no refusal to permit Mr Edmunds to exercise his right to take annual leave, it appears to the Tribunal that there is very likely to have been outstanding accrued holiday

pay due to the claimant on termination of employment. Given that Mr Edmunds was representing himself during this hearing, and that this claim had been clearly identified by EJ Hoey in the list of issues, it appears to us to be necessary in the interests of justice to give proper consideration to the claim put in this way.

145. In particular, according to documents in the bundle, the respondent's holiday year ran from 1 January to 31 December. Between 1 January 2019 and 14 May 2019 Mr Edmunds was suspended. It was not suggested by either party that he had taken annual leave during this period. It therefore appears to the Tribunal that he will have accrued approximately 13 days statutory leave entitlement in that period. There may be room for argument as to whether any accrued days from the previous year (or at least the portion of that during which he was suspended) may also be carried over. Both these points are squarely reflected in EJ Hoey's List of Issues.

146. The Tribunal further notes that Ms Barnes' dismissal letter informed Mr Edmunds that "You will receive payment in respect of any accrued, untaken holiday". Mr Edmunds' payslip for May 2018 shows no holiday pay payment (although it does show his full PAYE salary for the month of £719.00). Again, there is room for argument about the rate at which accrued holiday would fall to be paid, given the particular payment arrangements in this case.

147. In all the circumstances, the Panel considers that we are, unfortunately, not in a position to make a determination of the claimant's holiday pay claim on the information currently before us. We therefore propose to reconvene the hearing to hear further submissions on this part of the claim. A notice of the reconvened hearing will be sent to the parties in due course.

Employment Judge Dunlop
Date: 16 July 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
20 July 2021

FOR EMPLOYMENT TRIBUNALS

ANNEX

LIST OF ISSUES

Time limits / limitation issues

(i) Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA")? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a "*just and equitable*" basis; when the treatment complained about occurred;

Unfair dismissal

(ii) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's conduct.

(iii) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

a. Did the respondent genuinely believe in the claimant's guilt
b. Was that held on an honest basis
c. Was as much investigation carried out as was reasonable?

Remedy for unfair dismissal

(iv) If the claimant was unfairly dismissed and the remedy is compensation:

a. if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway including subsequently discovered misconduct? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8;
b. would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

c. did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

Disability

(v) Was the claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times (namely September 2018 to May 2019) until because of anxiety and depression?

EQA, section 19: indirect discrimination

(vi) A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP: The application of the grievance and disciplinary procedures?

(vii) Did the respondent apply the PCP to the claimant at any relevant time?

(viii) Did the respondent apply (or would the respondent have applied) the PCP to persons who did not have the disability the claimant had?

(ix) Did the PCP put *perso*ns with whom the claimant shares the characteristic*,* at one or more particular disadvantages when compared with persons with whom the claimant does not share the characteristic, in that the claimant was unable to effectively participate in the proceedings?

(x) Did the PCP put the claimant at that/those disadvantage at any relevant time?

(xi) If so, has the respondent shown the PCP to be a proportionate means of achieving a legitimate aim? The respondent relies on the following as its legitimate aim: to resolve an employee's grievance and to address disciplinary matters.

Reasonable adjustments: EQA, sections 20 & 21

(xii) Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person?

(xiii) Did the respondent have the following PCP: The application of the grievance and disciplinary procedures?

(xiv) Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who

are not disabled at any relevant time, in that the claimant was unable to effectively participate in the proceedings?

(xv) If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

(xvi) If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage?

a. To have progressed matters quicker before suspending the claimant and to have avoided unnecessary delay; and
b. Once the claimant became ill, to have adjourned proceedings and await the claimant's fitness to participate before progressing matters.

(xvii) If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

EQA, section 26: harassment related to disability

(xviii) Did the respondent engage in conduct as follows:

a. Suspending the claimant, demanding his mobile phone and laptop and excluding him from his employment and workplace;
b. Unreasonably delaying the investigation of the allegations against him; and
c. Proceeding with the grievance and disciplinary procedure when or because he was disabled?

(xix) If so was that conduct unwanted?

(xx) If so, did it relate to the protected characteristic of disability?

(xxi) Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Unpaid annual leave – Working Time Regulations and contract

(xxii) When the claimant's employment came to an end, was he paid all of the compensation he was entitled to under regulation 14 of the Working Time Regulations 1998 and/or his contract of employment with regard to accrued annual leave? The claimant argues he is due 23 days for 2 years, namely 46 days,

Remedy

(xxiii) If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.