



EMPLOYMENT TRIBUNALS

Claimant: Mr A Lawton

Respondent: Crystal Ball Limited

Heard at: Liverpool (by CVP)

On: 12, 13, 14, 15 and 16 April
and 18 May 2021

Before: Employment Judge Benson
Mr J King (CVP)
Ms S Moores-Gould (CVP)

REPRESENTATION:

Claimant: Miss A Travis, Claimant's Partner
Respondent: Mr J French of Counsel

JUDGMENT

JUDGMENT having been sent to the parties on 25 May 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and Issues

1. The claimant has brought claims of unfair dismissal and disability discrimination, being claims of discrimination arising from disability, a claim of a failure to make reasonable adjustments, a claim of harassment related to disability and a claim of victimisation. His claim of unfair dismissal is one of constructive unfair dismissal. He alleges that he resigned from his employment in response to the respondent's conduct which he says breached the implied term of trust and confidence.

2. The impairment upon which the claimant relies as a disability is complex regional pain syndrome in his lower left leg. Disability is conceded in these terms.

3. The respondent defends all claims. It says that the claimant did not resign in response to any unreasonable conduct of the respondent, but rather because he was faced with disciplinary action against him in respect of which he believed he would be dismissed. The respondent relies upon the potentially fair reason of conduct should it be found by the Tribunal that the claimant was dismissed.

4. The respondent denies all allegations of discrimination.

5. At the outset of the hearing, we discussed a List of Issues which had been agreed in draft following the Case Management Order of Employment Judge Dunlop. That list had been updated by Mr French to include slight amendments to the claim of unfair dismissal, and also the clarification of dates in respect of some of the allegations of discrimination. I explained to Miss Travis that the list would be the questions which the Tribunal would need to ask itself in order to reach its decision in this case. Miss Travis confirmed that the list was agreed.

Evidence and Submissions

6. We heard evidence from the claimant, Mr Lawton, and on behalf of the respondent Mr Raj Singh, the Managing Director; Mr Paul Maxwell, the System Application Developer; Ms Tracy Woolley, the Operations Director; and Ms Hazel Lynagh, an ex-colleague.

7. We were provided with documents in the form of four bundles, two of which contained the respondent's documents, one of which contained the claimant's documents, and a fourth bundle which had the Tribunal correspondence and documents. There were also some additional screenshots which had been provided by the claimant.

8. At the outset of the hearing, there was confusion as to page numbers and reference to documents and/or page number witness statements. As such it took some time for the Tribunal to read the witness statements and documents, not least because the bundles contained approximately 1600 pages in total. As such, the first day of the hearing was spent reading and the evidence commenced on 13 April 2021.

9. Submissions were made on behalf of both parties.

Findings of Fact

10. The claimant commenced employment with the respondent as its IT Manager on 2 March 2015. The respondent is a small technology company operating in the surveillance field. The company's business is underpinned by delivering an IT system to its customers at all times and maintaining a high standard of cyber security. It employs 12 staff and is based on the fifth floor of a modern office block in Stretford, Manchester.

11. The sole statutory director and owner of Crystal Ball Limited was Mr Singh. He had an Operations Director, Ms Woolley, and a PA, Ms Lynagh, who has since been made redundant. She is also the partner of Mr Singh and performed the HR function. Below the senior management level were the IT Manager, being the claimant, and a development team consisting of six staff, together with the Head of

Account Management and various accounts managers and sales staff. Mr Lawton's role was as IT Manager and to support all IT functions including product development and data protection compliance.

12. In February 2019 the claimant's knee buckled and he immediately started to suffer with constant pain within his lower left knee together with some light bruising. That was the commencement of his knee problems which, following various investigations, ultimately resulted in a diagnosis of complex regional pain syndrome ("CRPS"). In addition to the pain, the claimant suffers severe bruising under his skin and lesions can develop to his leg when anything touches it. This condition is ongoing. The claimant had difficulty walking and walking up and down stairs caused him pain and real difficulty.

13. The Respondent had a contract with BT which was due for renewal. On 23 March 2019 an audit was carried out and the respondent was required to install CCTV within the office and also provide evidence of qualifications of the IT members of staff including the claimant. The claimant had, when he joined the company, confirmed that he had the MCSE qualification. He had produced this certificate to the recruitment agency when he had been recruited for the role, but the respondent had not asked for it. They requested it on 24 April 2019. The claimant found a variety of certificates in his garage and put them in a PDF format. These were emailed to the claimant's email address at the respondent from his partner's email address and uploaded onto the BT site on 13 May. On that day the claimant also uploaded these certificates into his own personnel file, which he had no authority to do. He was able to access his personnel file as he was the IT manager.

14. We accept that the claimant had the qualifications detailed at the base of his email. Although the claimant was unable to find his certificates relating to two of the qualifications, these were not required for his role and we accept that the MCSE qualification could only be achieved if the earlier qualifications had been obtained. Although the claimant couldn't locate those certificates, we accept that he did try to obtain copies from Microsoft but for the reasons he explained relating to his change of email he was unable to do so.

15. CCTV was installed within the claimant's premises by the claimant and Paul Maxwell. The claimant had issues about privacy and the audio and visual CCTV. He was of the view that the company's intentions to have both video and audio recording was outside their own policies and in breach of the ICO's code. He raised this with Mr Singh who was uninterested and did not change his approach.

16. On 24 June 2019 the claimant arrived at work to find that the lift was not working. He had to climb the stairs to the office on the fifth floor. He was in considerable pain with his knee as a result. He did not raise this with the respondent at that time.

17. On 10 July 2019 the lift was again out of action and he had the same difficulties in getting to the office. He was again in pain as a result.

18. Throughout this period, it was clear to people within the office that the claimant was having difficulties with walking because of his knee and he regularly used a crutch when moving about the office.

19. The respondent's lift was out of order from 15 to 24 July 2019. The claimant attended for work on 15 July and in the absence of a lift walked the stairs to the fifth floor again. That again caused him considerable pain and discomfort in his left knee/leg.

20. The following day he was in such pain that he could not attend for work. He made enquiries of a colleague who confirmed that the lift was still not working, and he emailed Ms Lynagh, T Woolley and G Evans to say he was going to work from home that day. This was agreed.

21. On previous occasions when the claimant had to attend medical appointments the respondent had agreed that the claimant could work from home afterwards, as he had difficulties with flare ups to his knee from the treatment.

22. During that week, he continued to work from home with the respondent's agreement.

23. On 19 July 2019 the claimant received an email from Mr Singh (page 322). This started a sequence of emails which in our view showed that Mr Singh was frustrated by the claimant not being in the office. The claimant responded at 15:03 that day. There was a further response at 15:09 with information and Mr Singh emailed at 15:22 asking about work (pages 323, 324 and 325). The claimant emailed Mr Singh (page 326) asking why he should be penalised for circumstances outside his control.

Did Mr Singh email the claimant on 19 July 2019, which included the comment that the company had been "reasonable so far"?

24. In this email (page 327) Mr Singh made that comment. The respondent then emailed a further exchange of emails (page 328) indicating that he wanted a response to a request for information by the close of play that day, and there was further correspondence with the claimant who said he was distressed and disturbed (page 329).

25. At that time the claimant took advice from ACAS and an equality advice service. He wrote a detailed letter dated 19 July to Mr Singh outlining the difficulties he was having, the effect on his daily life and he made a request for adjustments. The adjustments he requested are at page 330. In summary these were to be able to work from home in the following situations: if the lift was out of order; after his weekly physiotherapy appointments; and if his condition flares up to the point he is struggling to carry out daily tasks. In that request the claimant made clear the problems he had and that he was in severe pain, which also occurred when driving. In this letter the claimant told Mr Singh that his condition was expected to last for at least 12 months, and he tells Mr Singh of his rights as a disabled person. The letter was accompanied by an email (page 332) of 20 July in which the claimant clarified his position regarding driving and his medication.

26. On 22 July MS Woolley made external enquiries about the claimant's points and was advised that if he did have a disability then there is a duty to make reasonable adjustments and even if not, it was a situation in which the respondent

should consider supporting him. It recommended obtaining Occupational Health advice.

27. On 22 July 2019 the claimant emailed Ms Lynagh to say that he would work from home again. Ms Lynagh replied to advise him that they had made arrangements for him to attend Trafford House which was a serviced office building half a mile away from the office. The claimant confirmed he would attend and did so the following day. On the morning of 23 July 2019 Mr Singh advised the claimant that he wanted to meet with him and his colleagues that day about IT issues, being the data migration, but as matters turned out Mr Singh did not attend.

28. We consider that it was at this stage that Mr Singh's attitude to the claimant changed. This is a small business which Mr Singh has grown from the beginning. There are a number of long serving loyal staff but there are also those who have come and gone more quickly. Mr Singh's management style is direct. Those people he works well with tend to stay with him and those who do not go. It could be described as authoritarian. Mr Singh does not appear to react well to challenges. We consider that he is loyal to those who are loyal to him. Mr Lawton by writing to Mr Singh advising him of his rights as a person with a disability, we consider was seen by Mr Singh as a challenge to his authority and to run his business as he wished.

29. An Occupational Health report was received on 6 August 2019 and recommendations were made in line with the request made by the claimant (page 381)

30. Mr Singh provide the claimant with a letter confirming the adjustments on 12 August commenting "if you want to go down the legal path that's fine, I can go legal all day". The letter (page 387) was stated to be conditional upon the claimant delivering set objectives and it was pointed out that there were practical implications of facilitating the arrangement long-term. We consider that this was putting the claimant on notice that the arrangement could not continue indefinitely, and it put the claimant under pressure to get back to his previous working arrangements.

31. Did Mr Singh comment in front of other members of staff, "I need to find myself a new IT Manager" in August 2019?

32. There was no clear evidence on this point from the claimant and it was denied by Mr Singh. Mr Singh made it clear in his evidence that he required an IT manager who worked on site at all times but on balance, we consider that this comment was not shown by the claimant to have occurred.

Did Mr Singh ignore the claimant when he came into the office on 9 August 2019?

33. We consider that on that day Mr Singh did ignore the claimant when he went into the IT office. At this time, Mr Singh had the Occupational Health report and was aware that he would have to make adjustments for the claimant which he was unhappy about. Although Mr Maxwell didn't notice anything, the claimant was in our view able to make that determination.

Did the respondent make threats of disciplinary action on 14 August 2019?

34. On 14 August Mr Singh sent an email to the claimant and to one of his colleagues Ajay concerning their punctuality. It was accepted by the respondent that the claimant had punctuality issues for at least six months and maybe longer. These had never been raised with him previously. Mr Singh decided that as their manager these were issues which needed to be raised with them. We consider that the timing of this issue when it had never been raised before, just a few days after the Occupational Health report allows us to draw an inference that the two were linked.

Did Mr Singh make a comment about the claimant being the last to get to the bottom of the stairs during the fire evacuation drill on 20 August 2019?

35. During a Fire evacuation drill on 20 August, the claimant had walked down the stairs and having reached the bottom, Mr Singh commented that the claimant was slow. The claimant gave some detail as to what Mr Singh was doing at the time and we accept the claimant's recollection in preference to that of Mr Singh.

Did the respondent ask the claimant to provide a detailed schedule of tasks for homeworking on 3 September 2019?

36. On 3 September, the claimant emailed the respondent requesting that he be allowed to work from home for at least a couple of days, as he had been at Accident and Emergency because his knee had flared up. Mr Singh responded by email of 3 September (page 415) and confirmed he was agreeable on this on occasion and requested that the claimant provide a detailed Schedule of tasks/jobs that he had carried out. He had not previously asked the claimant or the Systems Architect, Mr Evans, who worked one day a week from home, to provide such a list. Mr Singh was not happy with the claimant working from home and made a point of requiring him to account for his time.

37. In 2018 the respondent had invested in a new data centre/server which required the migration of all of the respondent's data from one server to another. As IT manager the claimant was responsible for the migration and Mr Evans was responsible for the software aspect of the migration. The project had stalled for a time when Mr Singh was unwell, but it was costing the respondent £1000 per month whilst it was running two servers. Mr Singh was keen to have the project completed and was disappointed at its pace. Although the claimant was in part reliant upon outside contractors there were issues which it was appropriate for Mr Singh to raise and discuss with him.

Did the respondent fail to provide a footstool and evacuation chair to the claimant?

38. In September 2019, the claimant found it helpful to raise his leg when sitting. Ms Lynagh offered to provide him with a footstool, but he confirmed that he preferred to use a chair which he found was at the right height.

39. As no risk assessment was carried out for the claimant, it was not identified that he would have difficulties using the stairs to evacuate the premises in an emergency. There was no personal evacuation plan for him and no thought had been given to the provision of an evacuation chair, even after he had identified that he had a disability.

Did Mr Singh send the claimant a strongly worded email in relation to forgetting to inform the respondent of his dates for physiotherapy on 13 September 2019?

Did Mr Singh send an email to the claimant criticising him for working 40% of his working hours in September from home on 8 October 2019?

Did Mr Singh make intimidating comments about how much the claimant had worked from home on 8 October 2019?

40. The claimant was having regular appointments with his physiotherapist. Over the period July to December 2019 he had 18 appointments. On each occasion that he requested to work from home afterwards, it was permitted. He was asked to provide details of his appointments in advance to the respondent. He initially did this but forgot to send those for September. On 13 September Mr Singh wrote to him (page 445) as follows: 'WFH Robustly monitored and must seek prior approval'.

41. It is clear that Mr Singh was not happy with the ongoing adjustment to work from home after such appointments. Although there had been earlier more supportive correspondence between the claimant and Mr Singh, in September, concerning the diagnosis and treatment of his condition, this later approach was unsympathetic and intimidatory. This continued with Mr Singh's email of 8 October when he emailed the claimant criticising him for working 40% of his working hours in September from home.

42. Did Mr Singh question the claimant about his medication on several occasions, most notably on 5 November 2019?

43. There was no clear evidence on this point from the claimant and other than general enquires and suggestions during this period from Mr Singh, we consider that this was not shown by the claimant to have occurred.

Did the respondent commence a disciplinary investigation in relation to the claimant's conduct on 8 November 2019?

44. On 30 September 2019 there was a security breach of the respondent's server. The server was being used to relay thousands of emails which caused holdups to the respondent's clients' and customers' emails. Mr Singh requested Ms Woolley carry out an investigation. On 11 October, the claimant was advised that an investigation was to be undertaken. On 22 October she commenced the investigation into 4 allegations (page 664). These were that: he had neglected his duties and responsibilities in ensuring the company had a secure email server at all times: neglected his responsibilities in not reporting this "extremely serious" risk immediately he became aware of it; he deliberately misled the Managing Director when questioned about the actual cause of the email queue and he exposed the company to serious reputational damage. On 28 October the claimant made a request to vary his hours of work so that he had a later start time. On 31 October the claimant made a subject access request.

Did Mr Singh question the claimant about his toilet breaks on 4 November 2019?

45. On 4 November Mr Singh questioned the time that the claimant had taken in the toilet. He challenged the claimant on this as he walked past his office and the

claimant felt he had to explain by saying he suffered constipation as a result of his medication. He felt humiliated by this and that his whereabouts were being monitored. We accept the claimant's evidence on this point in preference to Mr Singh's.

46. On the same day the claimant had a meeting with Mr Singh about his request to change of hours. Mr Singh confirmed his agreement to this by letter dated 7 November but stated that no further changes would be facilitated. He also made reference to the claimant's punctuality issues. The claimant's difficulties in attending work on time were a combination of his difficulties in driving in his manual vehicle with his knee problems and traffic congestion.

47. We consider that the chronology itself of events from this time forward are relevant to our decision.

48. On 5 November the claimant attended an investigatory meeting with Ms Woolley with regard to the server issues.

49. On the same day, Ms Lynagh brought to Mr Singh's attention that a PDF of the claimant's certificates had been placed on his personnel file without authorisation. She said she had noticed it in September but had asked Ms Woolley whether she had placed it there. She said that she had not. In evidence she explained that the reason for the delay in notifying Mr Singh was she needed to check with Ms Woolley but she was on holiday for part of the time and Ms Lynagh was working from home. She said she had no particular concerns at the time, but the file was named in a different fashion than she or Ms Woolley would normally use, which had drawn her attention to it. The significance of this issue is that that it was brought to Mr Singh's attention at the same time as the server disciplinary issue was being investigated and some two months after the certificates issue had been noticed.

50. On 7 November Mr Singh raised this with the claimant. The fact that there was a conversation is referred to in a letter from Mr Singh of 11 November, but we do not accept, as alleged by Mr Singh, that during that conversation the claimant told him that he had the permission of Ms Lynagh to scan the documents to his file and that he had scanned them in her presence. This matter was not put to the claimant in the investigatory meeting on 19 November with Ms Woolley (as part of the a new investigation which Mr Singh had asked Ms Woolley to undertake). Although she asked some questions, that particular allegation was not put to the claimant. The claimant as an IT manager would know that there would be no need to scan documents that had already been sent to him by email. The first occasion that the claimant was aware therefore of Mr Singh's allegation that he had changed his story was on 13 December when he received the investigatory pack with Mr Singh's statement in it.

51. On Friday 8 November the claimant attended an investigation meeting with Ms Woolley concerning the allegations relating to the security breach on the server. That was the final part of Ms Woolley's investigation and she provided a report on 22 November recommending that two allegations against the claimant be taken to a disciplinary hearing. Those were neglecting his duties and responsibilities as an IT manager and failing to report the server breach immediately. (page 649).

52. On Monday 11 November, she met with Mr Singh concerning the allegations relating to the claimant's personnel file and the claimant was informed that another investigation would be taking place in relation to this.

53. Ms Woolley met with the claimant again on 19 November, 21 November, 25 November and then on 5 December 2019. Initially the claimant could not provide an explanation as to how the certificates had got into his personnel file and said he wouldn't have put them there without permission, however in early December, having tried to find an explanation he notified Ms Wooley that he had recalled how they had reached the file and a further meeting took place on 5 December to explore this.

Did Mr Singh make a belittling comment in a meeting with other colleagues, "we haven't all got a good memory, have we?" on 19 November 2019?

54. On 19 November Mr Singh made a comment that 'we haven't all got a good memory, have we?' Although we accept that this comment was made, we do not believe that it was directed at the claimant.

55. The report on the investigation into the security breach allegation was produced on 22 November. The claimant was invited to a meeting by letter of 22 November (page 649). He was advised that the allegations were misconduct and it warned that it may be necessary to take disciplinary action including dismissal

56. On 26 November the claimant emailed Ms Woolley and asked that the next meeting be postponed because having several meetings in quick succession was impacting upon his mental health. The claimant at this stage was being put under considerable pressure by the respondent having two disciplinary issues ongoing at the same time with a number of different allegations. The claimant told Ms Woolley that he didn't have time to prepare. The respondent rescheduled the meeting.

57. The respondent on the same date wrote to the claimant asking him to respond about possible change of hours.

58. On 27 November 2019, Ms Woolley wrote again to the claimant pressing him for production of the certificates that they said were missing but the claimant had previously explained he could not obtain.

59. On 30 November the claimant lodged a grievance with the respondent. This complained about discriminatory treatment because of his disability and also referenced being taken through disciplinary proceedings for issues only since being disabled and that he felt that the company was trying to find a legal way to dismiss him or push him to resign.

60. A disciplinary hearing took place before an external HR consultant on 2 December in respect of the security breach allegation. One allegation was found proved, and the claimant was issued with a first written warning.

61. During this meeting the claimant alleged that the security settings on the server had been tampered with by the respondent. We do not accept that this was done. We consider that no employer would deliberately leave its email system open and unsecure, particularly one which is in the IT business however we believe these

various issues were impacting upon the claimant's mental health and this reflects his state of mind at that time.

62. On 2 December, the claimant lodged a formal grievance. His complaints were in line with the complaints raised in these Tribunal proceedings.

63. On 5 December a further investigatory meeting took place with the claimant at his request concerning the personnel records. In this meeting, the claimant said that he had his memory jogged by when reviewing his emails and accepted that he uploaded the certificates to his own personnel file, but he said that Mr Singh gave him permission to do so at the time that the certificates were also being transferred to BT on 13 May.

64. On 6 December another meeting took place.

65. Mr Singh produced evidence in the form of telephone and phone location data to this Tribunal that at the time that the claimant says he was sitting with Mr Singh, Mr Singh was not in the office. This information was provided to Ms Woolley as part of the investigation. Although we have some concerns about these records in that they have no phone number attached to them and appear to have overlapping phone calls, on the balance of probabilities we accept that these, together with the location record, show that Mr Singh was not present at the time the claimant says he gave him permission. We find therefore that the claimant uploaded his certificates to his personnel file without permission to do so.

66. On 9 December his grievance was acknowledged.

67. On 9 December Mr Singh wrote to the claimant asking him to provide a formal written complaint of his allegation that someone had tampered with the security settings. He was requested to provide evidence to 'substantiate such a serious allegation.'

68. On 9 December the claimant was signed off with stress for one week.

69. On 13 December the claimant received the outcome report from the investigation into the personnel file. The claimant was required to attend a further disciplinary meeting to face further allegations being in summary: unauthorised access to the electronic folders where personnel files were stored; abuse of his position as IT manager by accessing this restricted folder; storing unvalidated documents on his own personnel file; inappropriately provided access to other employees thereby potentially leaving the company open to a serious data breach. (page 944) and an additional allegation of dishonesty in respect of his explanation of how the certificates were uploaded to the personnel file.

70. On 13 December the claimant attended a meeting set up for his grievance (page 950). That day the claimant handed in a resignation letter, (page 956) resigning with immediate effect. He stated reasons for leaving were that he considered the relationship had irrevocably broken down particularly as there had been a breach of trust and confidence by the respondent. His reasons were in line with the matters raised in his grievance and to this Tribunal, including unlawful disability discrimination, bullying and humiliation, harassment, unfounded allegations

of poor performance or misconduct, a failure to provide reasonable adjustments for his disability, being subjected to unreasonable treatment and being forced to work in breach of health and safety laws.

The Law

Discrimination Arising from Disability

71. Section 15 of the EQA provides that

- (1) *A person (A) discriminates against a disabled person (B) if —*
 - (a) *A treats B unfavourably because of something arising in consequence of B's disability, and*
 - (b) *A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
- (2) *Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

72. In Secretary of State for Justice and anor v Dunn EAT 0234/16 the EAT (presided over by Mrs Justice Simler, President) identified the following four elements that must be made out in order for the claimant to succeed in a S.15 claim:

- (1) there must be unfavourable treatment;
- (2) there must be something that arises in consequence of the claimant's disability;
- (3) the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability; and
- (4) the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

73. If the employer can establish that it was unaware and could not reasonably have been expected to know that the claimant was disabled, the claim cannot succeed.

74. The key question in deciding whether the unfavourable treatment was because of the something that arises in consequence of the disability is whether the 'something' operated on the mind of the alleged discriminator, consciously or unconsciously, to a significant extent. Mrs Justice Simler in Secretary of State for Justice and anor v Dunn (above) noted "the statutory test requires a Tribunal to address the question whether the unfavourable treatment is because of something arising in consequence of disability... [I]t need not be the sole reason, but it must be a significant or at least more than trivial reason. Just as with direct discrimination, save in the most obvious case, an examination of the conscious and/or unconscious thought processes of the putative discriminator is likely to be necessary'.

Duty to make reasonable adjustments

75. By section 20 of Equality Act 2010 the duty to make adjustments comprises three requirements.

76. The first requirement, by section 20(3), incorporating the relevant provisions of Schedule 8, is a requirement, where a provision, criterion or practice of the employer's puts a disabled person at a substantial disadvantage in relation to the employer's employment in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

77. A disadvantage is substantial if it is more than minor or trivial: section 212(1) Equality Act 2010.

78. Paragraph 6.28 of the EHR Code lists some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

- (1) Whether taking any particular steps would be effective in preventing the substantial disadvantage;
- (2) The practicability of the step;
- (3) The financial and other costs of making the adjustment and the extent of any disruption caused;
- (3) The extent of the employer's financial and other resources;
- (5) The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
- (6) The type and size of employer.

79. Claimants bringing complaints of failure to make adjustments must prove sufficient facts from which the Tribunal could infer not just that there was a duty to make adjustments, but also that the duty has been breached. By the time the case is heard before a Tribunal, there must be some indication as to what adjustments it is alleged should have been made.

80. Harassment

81. Section 40(1)(a) prohibits harassment of an employee. The definition of harassment appears in section 26, for which disability is a relevant protected characteristic, and so far as material reads 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...*
- (4) *In deciding whether conduct has the effect referred to sub-section (1)(b), each of the following must be taken into account -*
 - (a) *the perception of B;*
 - (b) *the other circumstances of the case;*
 - (c) *whether it is reasonable for the conduct to have that effect.*

82. Chapter 7 of the EHRC Code deals with harassment.

Victimisation

83. Section 27 Equality Act provides protection against victimisation.

- (1) *A person (A) victimises another person (B) if A subjects B to a detriment because —*
 - (a) *B does a protected act, or*
 - (c) *A believes that B has done, or may do, a protected act.*
- (2) *Each of the following is a protected act —*
 - (a) *bringing proceedings under this Act;*
 - (b) *giving evidence or information in connection with proceedings under this Act;*
 - (c) *doing any other thing for the purposes of or in connection with this Act;*
 - (d) *making an allegation (whether or not express) that A or another person has contravened this Act.*
- (3) *Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*
- (4) *This section applies only where the person subjected to a detriment is an individual.*
- (5) *The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.*

84. It is clear from the case law that the Tribunal must enquire whether the alleged victimisation arises in any of the prohibited circumstances covered by the Act, if so did the employer subject the claimant to a detriment and if so what that because the claimant had done a protected act. Knowledge of the protected act is required and without that the detriment cannot be because of a protected act.

Burden of proof

85. Section 136 of Equality Act 2010 applies to any proceedings relating to a contravention of Equality Act. Section 136(2) and (3) provide that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

86. We are reminded by the Supreme Court in Hewage v. Grampian Health Board [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

Constructive dismissal

87. To succeed in a claim of unfair dismissal, the claimant has to establish that he was dismissed by the employer. In a case of constructive dismissal, a claimant has to show that he terminated the contract by resigning, whether with or without notice, but in circumstances in which he was entitled to do so by reason of the employer's conduct.

88. The relevant section of the Employment Rights Act 1996 is section 95(1)(c). The leading case is Western Excavating (ECC) Limited v Sharp [1978] ICR 221. In that case the Court of Appeal ruled that for an employer's conduct to give rise to a constructive dismissal, the employee must establish there was a fundamental breach of contract on the part of the employer, that the employer's breach caused the employee to resign and that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

89. In order to identify a fundamental breach of contract on the part of the employer, it is first necessary to establish what the terms of the contract are. Individual actions by an employer that do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of, for example, undermining the trust and confidence inherent in every contract of employment. A course of conduct can therefore cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident.

90. The 'last straw' does not by itself need amount to a breach of contract. Lewis v Motorworld Garages Ltd 1986 ICR 157, CA.

91. The existence of the implied term of mutual trust and confidence was approved by the House of Lords in Malik v Bank of Credit and Commerce

International SA (in compulsory liquidation) 1997 ICR 606, HL. There, their Lordships confirmed that the duty is that neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

92. As the claimant relies upon the implied term of trust and confidence, in deciding whether there has been a fundamental breach, The Tribunal must look at the respondent's conduct which the claimant says caused him to resign. In doing so it must look at each of the allegations:

- to consider if the respondent did what the claimant says it did; and
- to consider if either individually or as a whole the respondent had reasonable and proper cause for doing each these things; and
- if they did not have reasonable and proper cause, then was the conduct calculated or likely to destroy or seriously damage trust and confidence.

93. It is only if the claimant can show that there has been a fundamental breach of that implied term of his contract the Tribunal is required to consider the remaining parts of the test and whether any dismissal was unfair within the provisions of Section 98 Employment Rights Act 1996.

Decision

94. We make reference to the burden of proof above. This is something that we have considered and applied where appropriate. In respect of each of the complaints, unless we indicate otherwise, we have found that claimant has discharged his burden and shown facts from which we could decide, in the absence of any other explanation, that the respondent has subjected him to disability discrimination of one of the types set out in the Equality Act 2010. Further that unless indicated otherwise, the respondent was unable to show a non-discriminatory reason for its actions. We have in our conclusions only made specific reference to section 136 where we feel that it is necessary to do so.

95. Section 15 Discrimination Arising from Disability

96. We find that the claimant having difficulty in coming into the office and requesting to work from home arose as a consequence of his disability.

97. We don't accept that the claimant being unable to attend for work punctually was a consequence of his disability. He had punctuality issues generally, but his explanation, certainly initially was traffic congestion. Although sitting in congested traffic may have caused him some discomfort and pain, he has not shown that it affected his ability to get to work on time.

98. We do not find that any issues which the claimant may have had with memory or concentration arose from his medication for his disability. There was no medical evidence to this effect, and he confirmed that his GP had told him in November 2019 that he was fit for work and his medication did not affect his ability to process and articulate.

99. Did the respondent treat the claimant unfavourably as set out in the list of issues and repeated below? Did the respondent treat the claimant unfavourably in any of those ways because of the claimant's difficulty in coming into the office and requesting to work from home? If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

Alleged Unfavourable Treatment

Did Mr Singh send the claimant a strongly worded email in relation to forgetting to inform the respondent of his dates for physiotherapy on 13 September 2019?

Did Mr Singh send an email to the claimant criticising him for working 40% of his working hours in September from home on 8 October 2019?

Did Mr Singh make intimidating comments about how much the claimant had worked from home on 8 October 2019?

100. We find that Mr Singh's correspondence with the claimant in this sequence of emails and comments concerning his working from home were intimidating in nature. Their purpose was to make it clear to the claimant that Mr Singh did not want him working from home and considered that he was spending too much of his time there. Mr Singh himself in his evidence confirmed that he wanted his IT manager in the office all of the time. He referred to it as in his gift to decide whether his IT manager could work from home. He said he considered it was not relevant whether he was disabled.

101. Mr Singh was the sole Director of his company and in our view although he had been advised that he was required to comply with the Equality Act, he took it upon himself to remind the claimant that this was not something which suited him or the business and was at best an inconvenience to him. This caused the claimant to be unable to be secure in the adjustments which had been agreed with him.

102. We find that this reference to his hours of work and working from home by Mr Singh was intimidatory and amounted to unfavourable treatment and further that it arose as a consequence of his disability.

103. The respondent argues that they had the legitimate aim that an IT manager needs to be present in the office to fulfil the role. The claimant was not asking to work from home permanently. He only needed to do so when he had a flare up or was attending physio appointments. As such he was present in the office most of the time. The respondent has not demonstrated that its aim was a legitimate one. It was purely a personal preference of Mr Singh. By pressing the claimant about his attendance through these comments, the respondent was in any event not taking a balanced or proportionate approach, even if it was an aim which could be sustained. This aspect of the section 15 claim succeeds.

Did Mr Singh ignore the claimant when he came into the office on 9 August 2019?

Did the respondent make threats of disciplinary action on 14 August 2019?

Did the respondent ask the claimant to provide a detailed schedule of tasks for homeworking on 3 September 2019?

104. We consider that the timing of these matters allows us to draw inferences that both Mr Singh ignoring the claimant and threatening action in respect of his punctuality and requiring a schedule of tasks were as a consequence of his request for reasonable adjustments on 20 July and the OH recommendations. As indicated in findings, we consider that Mr Singh's attitude towards the claimant changed at this point. What he saw was the claimant dictating to him matters which he considered were his prerogative and he did not like this.

105. We find that the claimant was treated unfavourably by the actions of Mr Singh and that this was a consequence of something arising from his disability. There is no justification argument for ignoring or threatening an employee in the manner that Mr Singh did.

106. Although we accept that it was reasonable for Mr Singh to be kept informed of what the claimant was doing and his workload, we not accept that was the principle motive in Mr Singh's mind when he made that request. Mr Singh did not ask Mr Evans to do this and it was only after the claimant had made his request for reasonable adjustments that Mr Singh took this approach. This was unfavourable treatment. The project had been behind for some months, but it was only at this time that he started to put this additional pressure on the claimant.

107. Although it would be a legitimate aim to manage staff, in this case, the request which was made was not proportionate and was excessive in the circumstances as he was only likely to be absent for a very short period. This aspect of the section 15 claim succeeds.

Did Mr Singh email the claimant on 19 July 2019, which included the comment that the company had been reasonable so far?

108. We consider that this comment was made as Mr Singh was frustrated and unhappy at the claimant's continued absence from the office. In that regard we refer to tone of the email particularly the comments 'it is most inconvenient' and the requirement for him to decide if he was taking time off as 'sick leave or annual leave' and the reference to there being a need 'to discuss the ongoing arrangement concerning his physio appointments and ongoing medication' which we consider was threatening and that 'it prevented the claimant from carrying out his contractual responsibilities'. We consider that this email including the words 'reasonable so far' was intimidatory and intended to be so by Mr Singh. This email was in response to the claimant's difficulties in him coming into the office whilst the lift was broken and the claimant asking to be able to work from home. We find that writing to the claimant in those terms was unfavourable treatment and that Mr Singh's email was sent because of the need for the claimant to work from home which arose as a consequence of his disability. This aspect of the section 15 claim succeeds.

Did Mr Singh question the claimant about his toilet breaks on 4 November 2019?

109. Our findings are that Mr Singh did do this. This occurred a few days after the claimant had made a further request to change his hours and to work from home after a physio appointment and had made a request for a SAR. The meeting to discuss the change of hours happened that day. Again the timing of the events allow us to draw inferences that Mr Singh's decision to monitor the claimant and speak to

him when he returned was motivated to a more than trivial extent by the request to change his hours in addition to the other ongoing issues. At this time the various ongoing issues influenced Mr Singh and his attitude to the claimant. This was unfavourable treatment which arose as a consequence of the claimant's disability. Again, for the reasons stated above the respondent's arguments that they had a legitimate aim which was achieved by proportionate means is unsustainable. This aspect of the section 15 claim succeeds.

Did the respondent commence a disciplinary investigation in relation to the claimant's conduct on 8 November 2019?

110. Although any employer has the right to investigate potential issues of misconduct and take disciplinary action, we must consider whether the respondent's decision (in this case that of Mr Singh) to commence disciplinary action was because of the claimant's difficulties in coming into the office and requests to work from home.

111. We consider in investigating an increasing number of allegations against the claimant over two sets of overlapping disciplinary proceedings, Mr Singh's motivation was his frustration that he wanted to be able to require his IT manager to work from the office at all times. Because the claimant was disabled and was entitled to have adjustments made for him, he could not impose that wish. This took control of his business in respect of this issue out of his hands and he did not like this.

112. As such the claimant's difficulties in coming to the office and his need to work from home, were a significant influence on the Mr Singh's decision to invoke the disciplinary action. Although the respondent had a legitimate aim of managing and disciplining their staff, in this instance Mr Singh's motive and manner of doing so were not proportionate. As such these claims under section 15 succeed.

Reasonable Adjustments

113. The respondent accepted it applied a PCP that employees in the claimant's role were required to work from the office and not from home and it caused the claimant a substantial disadvantage in that he found it difficult to attend the office on occasions due to flare ups of pain and/or the need to attend medical appointments on the same day. The respondent says that it had knowledge of this from 8 August 2019 when it received the OH report.

Permitting the claimant to work from home on request during periods of 'flare- up';

Permitting the claimant to work from home on days when he had medical appointments.

114. We find that whenever the claimant requested to work from home after a medical appointment or because he had a flare-up he was allowed to do so. That agreement occurred both before and after the 8 August 2019 and although Mr Singh may not have been happy agreeing to do this, the adjustment was made.

115. As part of our reasoning we have had regard to the difference in tone of emails from Mr Singh personally and those which were more formal and written having taken advice.

116. The claimant has not discharged his burden under section 136 and this claim does not succeed.

Physical Adjustment: Trafford House

117. It was accepted by the respondent that when the lift was unavailable, having an office on the 5th floor was a physical feature which put the claimant at a substantial disadvantage. There were two occasions when the claimant was required to work from Trafford House. That was a reasonable option for the claimant as it was a serviced office where he could work for short periods (being no more than a day or two at a time). The purpose of an adjustment is to relieve any substantial disadvantage and in this case it allowed the claimant to continue to work. Although Mr Singh's reasoning for needing the claimant to work from Trafford House rather than home was questionable, the adjustment was one which was in our view a reasonable one to allow the claimant to continue to work.

118. This claim does not succeed.

Auxiliary Aids

Footstool

119. In view of our findings of fact this claim the claimant has not discharged his burden under section 136 and this claim does not succeed.

Evac Chair

120. Although this wasn't requested by the claimant, it was an adjustment which it was reasonable for the respondent to have made. They failed to carry out any risk assessment for the claimant when they were aware of his mobility difficulties (and we find that there was sufficient evidence before they received the OH report which should have alerted them to the fact that the claimant was likely to be a person with a disability). Had they done so we consider that with the claimant's mobility issues an Evac chair would have been recommended to alleviate the substantial disadvantage which the claimant suffered in being unable to go down five flights of stairs without pain in the event of an emergency on which the lifts were unable to be used.

121. As such this claim succeeds.

Harassment

Toilet Break

122. The conduct of Mr Singh in questioning the claimant about the reason he spent an extended time in the toilet was unwanted conduct which we consider had the purpose and the effect of violating the claimant's dignity and was humiliating. We have again drawn inferences from the timing of events as set out earlier and we find that Mr Singh's conduct was related to the claimant's disability for the reasons set out above. This claim succeeds

Medication Issue Comment

123. In view of our findings that this was not shown by the claimant to have occurred. The burden has not shifted to the respondent and this claim does not succeed.

Fire Drill Comment

124. We accept that this occurred and that it had the purpose and effect of making the claimant any feel humiliated. This was related to his disability as that was the reason for him taking some time to come down the stairs. This claim succeeds.

Memory Comment

125. Although the claimant felt humiliated by this comment, it was not directed at him and the claimant has not shown that his medication for his disability had any impact upon his memory.

126. The claimant has not discharged his burden under section 136 and this claim fails.

Victimisation

127. It was accepted by the respondent that the letter requesting reasonable adjustments dated 20 July 2019 was a protected act within the meaning of section 27 Equality Act 2010.

128. We refer to our decision on the claim of discrimination arising from disability set out above. As we have explained, we consider that Mr Singh attitude towards the claimant changed when he submitted his request for reasonable adjustments. The detriments which the claimant suffered and we which we have found to be proved above flowed from Mr Singh's unhappiness with the claimant in having to accommodate adjustments for his disability when he wanted an IT manager who present in the office.

129. As such in respect of those allegation we have found proved (other than the email on 19 July which was before the protected act) we find that they were because the claimant had requested adjustments on 19 July. This had a significant influence upon Mr Singh's decisions and conduct.

130. These claims therefore succeed.

Constructive Dismissal

131. We have found that Mr Singh had a discriminatory reason for instigating disciplinary procedures against the claimant. This is supported by the number of disciplinary allegations and the intensity of the investigatory meetings. We consider that Mr Singh had an agenda to remove the clamant from the business. This was a progressive situation which intensified over time as Mr Singh became more frustrated. Although Mr Singh had reasons to carry out his investigation into the security breach and the claimant's accessing his personnel file, Mr Singh's underlying objective was removing the claimant from the business such that he could regain control over where his IT Manager worked. As such, this conduct coupled with the findings of discrimination, were likely to seriously damage the relationship of trust

and confidence in that they were calculated and likely to destroy or seriously damage trust and confidence and the employment relationship. The claimant responded to that breach by resigning. He had found himself another role but upon receiving the investigation pack on 13 December 2019 resigned with immediate effect.

132. We do not consider that the claimant affirmed the contract. As such the claimant was dismissed. The Respondent has not shown that the reason for the dismissal was the claimant's conduct and therefore the claim of unfair dismissal succeeds.

Contributory Conduct/Polkey

133. These matters were not addressed in submissions and they will therefore be considered at the remedy hearing.

Employment Judge Benson
Date: 1 October 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
5 October 2021

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.