EMPLOYMENT TRIBUNALS

Claimant: Mr Q Qu
Respondents: 1. Ms C O'Connor
2. Cosworth Electronics Ltd
3. Mr S Green

Heard at: Midlands (East) Region – Hybrid hearing

On: 10, 14, 15, 16, 17 and 18 June 2021
In Chambers: 17 August 2021

Before: Employment Judge M Butler
Members: Mrs K Srivastava
Mrs F Betts

Representation
Claimant: Mr R Downey of Counsel
Respondents: Mr D Northall of Counsel

Interpreter: Chao (renny) Liu Chen

Covid-19 statement:
This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that the claims of:

(i) automatic unfair dismissal;
(ii) "ordinary" unfair dismissal;
(iii) breach of contract;
(iv) direct disability discrimination;
(v) discrimination arising from disability;
(vi) failure to make reasonable adjustments;
(vii) being subjected to a detriment because of bringing to the Respondents' attention circumstances the Claimant reasonably believed were harmful, or potentially harmful, to health;
(viii) direct race discrimination;
(ix) harassment related to race; and

(x) victimisation

are not well-founded and are dismissed.

RESERVED REASONS

The claims

1. The Claimant was employed by the Second Respondent (Cosworth) as a Senior Engineer from 18 April 2018 until either 23 March 2018 or 28 April 2018 (the effective date of termination is in dispute). By a Claim Form submitted on 20 July 2018, after a period of early conciliation, the Claimant brought the claims set out in the Judgment above. In summary, the Respondents deny all claims. They say, in particular, that the Claimant was fairly dismissed by reason of his unreasonable and uncooperative conduct in connection with the capability procedure it was following; they had no actual or constructive knowledge of his disability, which is conceded as being anxiety and depression, and the Claimant was not discriminated against, harassed by virtue of his race, nor was he victimised.

2. On 22 July 2019, Employment Judge Brewer considered the issues and, in particular, the Claimant's breach of contract claim. He considered it had little reasonable prospect of success and ordered the Claimant to pay a deposit of £500 as a condition of continuing with this claim. The Claimant has paid the deposit.

3. Initially, the Claimant brought his claims against another named Respondent, Cosworth Group Holdings Ltd, but that claim does not proceed because that Company is a holding company and did not employ the Claimant. Accordingly, it was dismissed upon withdrawal.

The issues

4. The parties helpfully agreed a list of issues, which are summarised thus:

A. The effective date of termination.

1. What was the effective date of termination of the Claimant's employment with Cosworth Electronics Ltd?

B Jurisdiction / time limits

2. In respect of the Claimant's complaints brought under the Equality Act 2010 (EqA):

2.1 Which, if any of them, were presented outside the applicable primary time limit?

2.2 In respect of such complaints:

2.2.1 Was it reasonably practicable for the complaint to have been presented within the primary time limit?

2.2.2 If not, was the complaint presented within a reasonable period of time following the expiry of the primary time limit?

3. In respect of the Claimant's complaints brought under the Employment Relations Act 1999 (ERelA):

3.1 Which, if any, of them were presented outside the applicable primary time limit?

3.2 In respect of such complaints:

3.2.1 Was it reasonably practicable for the complaint to have been presented within the primary time limit?

3.2.2 If not, was the complaint presented within a reasonable period of time following the expiry of the primary time limit?

4. In respect of the Claimant's complaints brought under the EqA:

4.1 Which, if any, of them were presented outside the applicable primary time limit?

4.2 In respect of such complaints, would it be just and equitable to extend time?

C. <u>Automatic unfair dismissal (right to be accompanied and have meeting postponed)</u>

5. Did the Claimant seek to exercise a right to be accompanied under section 10 ERelA and in accordance with section 10(5) ERelA?

6. If so, was the reason or principal reason for the Claimant's dismissal that he sought to exercise a right to be accompanied under section 10 ERelA, thereby constituting an automatically unfair dismissal pursuant to section 12(3) of that Act?

D. <u>Automatic unfair dismissal (health and safety complaints)</u>

7. By:

7.1 making verbal complaints of how noisy it was for him to work in the room that he was in, and/or as to Cosworth's health and safety

duties as pleaded in the Grounds of Claim (GoC);

7.2 sending an email to Chris Sewell and Stephen Green on 29 March 2017, as pleaded in the CoC;

7.3 sending an email to Stephen Green and Alister Bailey on 11 April 2017, as pleaded in the GoC; and/or

7.4 sending an email to Stephen Green and Alister Bailey on 20 April 2017, as pleaded in the GoC,

did the Claimant, in accordance with section 100 of the Employment Rights Act 1996 (ERA) bring to Cosworth's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety?

8. If so, was the reason or principal reason for the Claimant's dismissal that he had done so, thereby constituting an automatically unfair dismissal pursuant to section 100 ERA)?

E. <u>'Ordinary' unfair dismissal</u>

9. If the Claimant had sufficient qualifying service to bring a claim for unfair dismissal:

9.1 What was the reason or principal reason for his dismissal?

9.2 If the Claimant was dismissed for a fair reason, in the circumstances did Cosworth act reasonably or unreasonably, in treating it as a sufficient reason for dismissing him?

9.3 If so, having regard to substantial merits and equity, did the Respondent act fairly in all circumstances?

F. <u>Breach of contract</u>

10. Was Cosworth's capability procedure a term of the Claimant's contract of employment, incorporated either by:

10.1 the offer letter dated 24 March 2016; and/or

10.2 clause 17.1 of the Claimant's 'Statement of Main Terms and Conditions of Employment'?

11. If so, did Cosworth breach the contract by dismissing the Claimant without following the full capability procedure?

12. Had Cosworth not have breached the contract, when would the Claimant have been dismissed?

13. Does the Claimant's breach of contract claim(s) fall within the '*Johnson* exclusion zone'?

G. Knowledge of disability

14. At the material times:

14.1 Did the Respondents have actual or constructive knowledge of the Claimant's disability by reason of the following alleged matters:

14.1.1 the Claimant having requested a three or four day week for '*personal reasons*' in July and December 2017;

14.1.2 *'daily interaction in the workplace'* with the Claimant and presentation of sick notes;

14.1.3 the Claimant presenting as '*anxious and tearful'* during a meeting held on 11 December 2017; and/or

14.1.4 an email sent by the Claimant to Ms O'Connor (the First Respondent) on 22 March 2018 at 11:30pm.

14.2 Alternatively, did the Respondents perceive the Claimant to be disabled by reason of the matters listed above?

H. Direct disability discrimination

15. In deciding to terminate the Claimant's employment, did Cosworth because of (a) his disability of depression/anxiety, or (b) a perception that he was disabled by reason of depression/anxiety, treat him less favourably than it treated or would treat others? The Claimant relies on a hypothetical comparator.

I. Discrimination arising from disability

16. Was the Claimant's refusal to attend the capability meeting scheduled for 23 March 2018 something that arose in consequence of his disability?

17. If so, by terminating the Claimant's employment and/or not postponing the meeting until 29 March 2018, did Cosworth and/or Ms O'Connor treat him unfavourably because of something arising in consequence of his disability?

18. If so:

18.1 can Cosworth show that it did not know or could not reasonably have been expected to know that the Claimant had that disability;

and/or

18.2 was the treatment a proportionate means of achieving a legitimate aim?

J. Failure to make reasonable adjustments

19. Did the application of (a) a capability procedure, and/or (b) a requirement to attend meetings as part of a requirement to follow reasonable instructions, put the Claimant, as a person with a disability, at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

20. The substantial disadvantage alleged by the Claimant is "*exacerbating his [mental health] condition, that making it far more difficult in addressing the Respondent*".

21. If so, did the Respondents know, or could they reasonably have been expected to know:

21.1 that the Claimant was disabled; and

21.2 that he was likely to be put at that disadvantage?

22. If so, did the Respondents fail to take such steps as it was reasonable for them to have to take to avoid the disadvantage. The Claimant contends that the Respondents ought to have done the following:

22.1 given him "*less tasks";*

22.2 provided him with "*longer periods of time to improve in the framework of the capability procedure";*

22.3 enquired by email what reasonable adjustments the Claimant required; and

22.4 postponed the termination meeting until 29 March 2018, when the Claimant's chosen companion would have been available to attend.

K. Health and safety detriment

23. By:

23.1 making verbal complaints of how noisy it was for him to work in the room that he was in, and/or as to Cosworth's health and safety duties as pleaded in the GoC;

23.2 sending an email to Chris Sewell and Stephen Green on 29 March

2017, as pleaded in the GoC;

23.3 sending an email to Stephen Green and Alister Bailey pm 11 April 2017, as pleased in the GoC.

23.4 sending an email to Stephen Green and Alister Bailey on 20 April 2017, as pleaded in the GoC;

did the Claimant in accordance with section 44 ERA, bring to Cosworth's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety?

24. If so, was the Claimant subjected to a detriment by Cosworth or Stephen Green on the ground that he had done so, contrary to section 44 ERA? The detrimental treatment complained of is:

24.1 in May 2017, providing the Claimant with faulty equipment, specifically a faulty temperature chamber;

24.2 conducting a performance development review (PDR) on 10 July 2017;

24.3 in respect of the PDR, seeking feedback from the Claimant's peers;

24.4 on 7 December 2017, by implementing a formal capability process;

24.5 conducting further review meetings with the Claimant on 18 December 2017, 8, 15 and 29 January 2018 and 5 February 2018; and

24.6 inviting the Claimant to a meeting on 23 March 2018.

L **Direct race discrimination**

25. Did the Respondents, because of race (specifically, colour), treat the Claimant less favourably than they treated or would treat others (namely white employees in materially the same circumstances), in any of the following alleged respects?

25.1 Mr Green and/or Cosworth giving Martyn Rayner a "significantly less noisy room to work in" than the Claimant, following the Claimant's complaints about noise levels in March and April 2017.

25.2 Ms O'Connor, Mr Green and/or Cosworth refusing to permit the Claimant to work four days per week, following requests made in August 2017 and on 11 December 2017. In respect of this

complaint, the Claimant relies on the following employees as actual comparators: (a) Alan Hamilton; (b) Derek Taylor; (c) James Greenford; (d) Robin Bullard; (e) Richard Davies; (f) Robert Pearce; and (g) William Kerridge.

25.3 Mr Green and/or Cosworth implementing a formal capability process before "informal management of capability in accordance to the capability process". In respect of this complaint, the Claimant relies on a hypothetical (white) comparator.

25.4 Ms O'Connor, Mr Green and/or Cosworth not complying with the capability procedure – specifically, by terminating the Claimant's employment at the end of stage one, in circumstances where he had "satisfactorily improved". In respect of this complaint, the Claimant relies on a hypothetical (white) comparator.

25.5 Ms O'Connor, Mr Green and/or Cosworth dismissing him. In respect of this complaint, the Claimant relies on a hypothetical (white) comparator.

M. <u>Harassment related to race</u>

26. In any of the alleged respects (as detailed in paragraph 28 below), did Mr Green subject the Claimant to unwanted conduct which had the purposes or effect of (a) violating the Claimant's dignity, or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, having regard to:

26.1 the perception of the Claimant;

26.2 the other circumstances of the case; and

26.3 whether it is reasonable for the conduct to have had that effect?

27. The harassing conduct complained of is:

27.1 conducting a PDR on 10 July 2017;

27.2 in respect of the PDR, seeking feedback from the Claimant's peers;

27.3 on 7 December 2017, commencing a capability procedure;

27.4 conducting further review meetings with the Claimant on 29 January 2018 and 5 February 2018;

27.5 inviting the Claimant to a further meeting on 23 March 2018;

27.6 in May 2017, providing the Claimant with faulty equipment,

specifically a faulty temperature chamber; and

27.7 terminating the Claimant's employment.

N. Victimisation

28. Did the Claimant do a protected act within the meaning of section 27(2) EqA? The protected act relied upon is the;

(i) presentation of an Employment Tribunal claim for race discrimination and victimisation against his previous employer, Landis Gyr, on 4 February 2015; and

(ii) Email from the Claimant to the Respondent claiming that he suffered from psychiatric injury on 22 March 2018.

29. In any of the alleged respects (as detailed in paragraph 30 below), did the Respondents subject the Claimant to a detriment because:

29.1 he had done a protected act (as specified above);

29.2 the Respondents believed he had done a protected act (as specified above); or

29.3 the Respondents believed that he may do a protected act – specifically, that he "*may bring an equalities act claim against it with time [sic]*".

30. The detrimental treatment complained of is:

30.1 Mr Green and/or Cosworth conducting a PDR on 10 July 2017;

30.2 Ms O'Connor, Mr Green and/or Cosworth commencing a capability procedure on 7 December 2017; and

30.3 Ms O'Connor, Mr Green and/or Cosworth dismissing the Claimant.

The law

5. Section 97(1)(b) ERA provides:

"(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect".

6. Section 98 ERA provides as follow:

"**98 General**.

(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 subsection (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 subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) …, or

(d) …

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (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 reasonably 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".

7. Section 100 ERA:

> **"100 Health and safety cases.**
>
> (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—
>
> …
>
> (c) being an employee at a place where—
>
> (i) there was no such representative or safety committee, or
>
> (ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,
>
> he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety".

8. Section 108(1) ERA provides:

> **"108 Qualifying period of employment**.
>
> (1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination".

9. Section 111 ERA provides:

> **111 Complaints to employment tribunal.**
>
> (1) …
>
> (2) …., an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—
>
> (a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months".

10. Section 10 ERelA, provides:

"(1) This section applies where a worker –

(a) is required or invited by his employer to attend a disciplinary or grievance hearing, and

(b) reasonably requests to be accompanied at the hearing.

(2A) Where this sections applies, the employer must permit the worker to be accompanied to the hearing by one companion who –

(a) is chosen by the worker; and

(b) is within subsection (3).

(2B) The employer must permit the worker's companion to –

(a) address the hearing in order to do any or all of the following –

(i) put the worker's case;

(ii) sum up that case;

(iii) respond on the worker's behalf to any view expressed at the hearing;

(b) confer with the worker during the hearing.

(3) A person is within this subsection if he is –

(a) …,

(b) …, or

(c) another of the employer's workers.

(4) If –

(a) a worker has a right under this section to be

accompanied at a hearing,

(b) his chosen companion will not be available at the time proposed for the hearing by the employer, and

(c) the worker proposes an alternative time which satisfies subsection (5),

the employer must postpone the hearing to the time proposed by the worker.

(5) An alternative time must –

(a) be reasonable, and

(b) fall before the end of the period of 5 working days beginning with the first working day after the day proposed by the employer."

11. Section 12 ERelA provides:

"**12 Detriment and dismissal.**

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that he—

(a) exercised or sought to exercise the right under section 10(2A), (2B) or (4), or

(b) …

(2) …

(3) A worker who is dismissed shall be regarded for the purposes of Part X of the Employment Rights Act 1996 as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that he—

(a) exercised or sought to exercise the right under section 10(2A), (2B) or (4)…. ".

12. Section 11 ERelA applies the same time limit and reasonable practicability provision as for unfair dismissal mentioned above.

13. Section 4 EqA provides that race is a protected characteristic and section 9 ERA provides that race includes colour.

14. Section 13 EqA provides:

"**3 Direct discrimination**

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".

15. Section 20 EqA provides:

"**20 Duty to make adjustments**

(1) 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.

(2) The duty comprises the following three requirements.

(3) 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.

(4) …

(5) …

(6) …"

16. Section 21 EqA provides:

"21 Failure to comply with duty

(1) A failure to comply with the first, … 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.

17. Section 15 EqA provides:

"**15 Discrimination arising from disability**

(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."

18. Section 123 EqA applies the time limit of 3 months for the presentation of a complaint to an Employment Tribunal starting with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks just and equitable.

19. Section 26 EqA provides:

"**26 Harassment**

(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.

(2) …

(3) …

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

…

race;

…"

20. Section 27 EqA provides:

7 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) …"

21. In submissions, we were referred to a number of authorities and those we found relevant to the issues before us are discussed below.

The evidence

22. There was an agreed bundle of evidence and references to page numbers in this Judgment are to page numbers in the bundle.

23. We heard oral evidence from the Claimant and, for the Respondents from:

- Mr S Green, Head of Engineering;
- Ms E Fielder, former HR Manager;
- Ms C O'Connor, HR Director
- Mr T Buckler, Manging Director of Performance Electronics.
-

All witnesses produced witness statements and were cross-examined.

The oral evidence

24. The Claimant gave evidence for over 9 hours. We found that evidence to be unconvincing. He was at times argumentative and hesitant, on one occasion extremely rude to Mr Northall by telling him he was wasting everyone's time and was prone to speculation and making assumptions. On more than one occasion, when a document produced by the Respondents did not support his case, he alleged it was manufactured by the Respondents for their own purposes. He also admitted to covertly recording conversations contrary to the Respondents' policies and further admitted to removing confidential and highly sensitive documents from the Respondents' premises when he left, thereby breaching the undertaking he gave as to confidentiality at the commencement of his employment. His evidence was also at times inconsistent.

25. We bear in mind that we cannot make such assertions without giving examples.

26. A few weeks after he commenced employment with Cosworth, the Claimant wrote to Mr Green on 5 May 2016 (page 126) saying he was "thinking to make some adjustments" to his working days and wished to work on Monday, Tuesday and Thursday the following week. On 9 May 2016, he asked Mr Green if he could change his working hours so he could get back in time to pick up his daughter (page 127). Mr Green agreed to these adjustments which were not intended to be permanent as the Claimant was a full-time employee. In his witness statement, the Claimant says at paragraph 9: "I requested a shortened week because of personal reasons (of health)".

27. In his evidence, he confirmed he did not say that the requested adjustments were due to his health and he said also that in emailing Mr Green on 5 July 2016 (page 128) to say he was almost ready to move up to full-time, he did not refer to any health issues although he had asked Mr Green about a health issue before when he went down to 3 days. The Claimant's oral evidence was totally inconsistent with his written evidence and also the documentary evidence in the bundle. In paragraph 9 of his witness statement, he goes on to say that, at the commencement of his employment by Cosworth:

> "It was apparent that I was suffering from depression, as I was of apparent low mood etc … and therefore when I asked for a shortened week, it was obvious that the Respondent understood it was for health reasons and was seeking to accommodate me. In retrospect, I am confident that it is for this reason that (Mr Green) agreed to my working a shortened week"

Thus, the Claimant's evidence on this point was inconsistent and based on assumptions which are not supported by the documentary evidence.

28. The Claimant also seeks to rely on the fact that he brought Employment Tribunal proceedings against his previous employer. He asked Ms Fielder for

certain information regarding his terms of employment with Cosworth, saying in evidence that he suspected that upon requesting the information from Ms Fielder that HR: "undertook research" and found out about his previous claim. At paragraph 11 of his witness statement, he said: "I believed that Stephen Green found out about [the previous claim] either through a Cambridge Network or through HR". There is no evidence that Mr Green or HR had any information about this previous claim and Mr Green confirmed he was not a member of any Cambridge Network. Ms Fielder recalls that the Claimant may have mentioned requiring the information in relation to something about his daughter and an insurance claim. Neither of them said they searched the Government website to ascertain whether the Claimant had previously taken proceedings against a previous employer. In his oral evidence, the Claimant accepted: "This is complete speculation on my part".

29. At pages 145 and 175 are emails from Mr A Bailey and Mr D Taylor which were critical of the Claimant's competence and capability. The Claimant's answer to this criticism was that both emails were written at the behest of Mr Green. He does not state on what basis he makes this assumption.

30. In relation to complaints he made about noise levels in the test room in which he worked, the Claimant referred to page 140, which is part of his performance development review saying it makes clear that the noise will damage his health. Put simply, it does not. What he says is: "The noise in the chamber room was horrible particularly when more than one oven were (sic) on, and server, and others". This is an example of the Claimant attributing meanings to documents which are simply not supported by the documents themselves.

31. After the lunch adjournment on the first day of the Claimant's cross-examination, the Employment Judge had to speak to him at length about his propensity to fail to answer questions put to him with a straightforward answer. He constantly went off at a tangent, giving answers that bore no resemblance to the questions put to him. This was the fourth time in a relatively short period that the Employment Judge raised this issue with the Claimant.

32. Mr Bailey's email of 18 July 2017 to Mr Green (page 145C) is critical of the Claimant's performance. This was part of the peer review required for the performance development review of employees. The Claimant's evidence was that the contents of the email contradicted his experience with Mr Bailey, was completely untrue and: "I don't know if this is fabricated".

33. On 29 March 2017 (page 131), the Claimant emailed Mr C Sewell claiming that the vibration jig and steering wheel in the workshop in which he was working needed to be moved as it was too noisy and really hurt his ears; he could not focus on what he was doing and it was unsafe to have "so many stuff" in such a small room. The Claimant repeated his concerns to Mr Green by email of 11 April 2017 (page 132). Cosworth supplied ear defenders, which the Claimant then said he had already tried without success.

34. In paragraph 51 of his witness statement, the Claimant talks about a regular Friday team meeting in which he asked Mr Green whether the team would get presents at Christmas, to which a Mr C Sewell replied: "If you are lucky, you will have a job next year". In his oral evidence, the Claimant said that at the time he thought this was a joke but now thinks it was planned and was a clear sign that Messrs Sewell and Green were working together to make him leave Cosworth. The Claimant provided no evidence to support his assumption that Mr Sewell had any influence over such matters.

35. At pages 161 to 165 are notes of the capability meeting on 11 December 2017 chaired by Mr Green with Ms Fielder taking notes and Mr Taylor accompanying the Claimant. In his evidence to the Tribunal he said he did refer to his mental health in this meeting and then immediately that he did not specifically mention it. This was an example of the Claimant attributing meanings to documents which were simply not apparent from them.

36. The Tribunal also felt that the Claimant attempted to muddy the waters in respect of his own failings and, in particular, his alleged inability to work unsupervised on a project. He supplied many documents which delved into the minutiae of the project on which he was working illustrating, by way of example, that he had finished certain stages of the project on time. Whilst this may have been the case, it did not address the failings in his work generally, identified by the Respondents.

37. We have also had concerns regarding the Claimant's credibility. He claimed not to have received the email confirming his dismissal sent in the evening of 23 March 2019. He simply said he did not receive it but produced no evidence to substantiate this by way of screen shots of his inbox and/or deletions. He said this was the first time he had failed to receive an email. Ms O'Connor consulted Cosworth's IT team who confirmed that the message had been sent and had not been returned as undelivered. We felt it was highly relevant that, in claiming not to have received this email, the Claimant could then argue that his employment had been extended beyond the required 2 years of continuous service thereby enabling him to claim unfair dismissal. Again, we found this evidence to be questionable in that he said when he eventually received the letter of dismissal, which was also posted to him, he did not open it for 3 days.

38. The Claimant's credibility was also damaged by his answers to questions about his attempts to seek legal advice when he was offered a settlement agreement by the Cosworth. He could only remember that the name of the solicitor he was due to meet was Ms Paul. He could not remember if his appointment was confirmed by letter or email. He then said his meeting with his solicitor was postponed because they said they needed more time to look at it. He then said he spoke to them and they told him the matter was more complicated than they thought and that it might have something to do with his race as he is Chinese. When he was being pressed by Ms Fielder for a decision on the settlement agreement, the Claimant said he had contacted his solicitors again but he could not remember when or the name of the lady he

spoke to or what she told him. He then apparently consulted Ms Mallick of Counsel and gave her details to Ms Fielder with confirmation that she could contact Ms Mallick. Nine minutes later (page 216), he sent an email changing his mind but said he could not remember why he changed his mind. He then said he made a payment to Ms Mallick's chambers and Ms Mallick advised him, but he could not remember when. Our very strong impression was that the Claimant was attempting to conceal whether he actually took advice from anyone and did so in an attempt to remain employed for more than 2 years.

39. In contrast, we found the evidence of the Respondents' witnesses to be straightforward, concise and honestly given. We detected no prevarication or attempt to confuse the Tribunal by reference to minute project details. There was no attempt to elaborate on their answers. We acknowledge that Mr Green's evidence was sometimes a little confused over dates and other details of the project on which the Claimant was working, but we did not consider this affected the issue of the generality of the Claimant's performance.

Findings of fact

40. In relation to the issues before us, we find the following facts:

(i) After having a number of jobs in the previous 6 years, the Claimant commenced employment with Cosworth as a Senior Engineer on 18 April 2016. Cosworth develops and manufactures electronic devices for a range of motor vehicles.

(ii) After two or three weeks of full-time employment, the Claimant spoke to Mr Green and followed this up with a written request to work a 3 or 4 day week for what he described as personal reasons. For the avoidance of doubt, at no time did the Claimant advise Mr Green that his reduced working was due to his mental health issues. Mr Green granted this request. Subsequently, the Claimant asked for a change in his working hours due to heavy traffic experienced in driving to and from work, which presented difficulties in collecting his daughter each day. Again, this request seems to have been granted.

(iii) During the first few months of his employment, the Claimant was engaged in finding and repairing faults in various pieces of equipment. After about a year of employment, Mr Green, who was the Claimant's Line Manager, began to have concerns about the Claimant's performance. He spoke to the Claimant regarding these concerns on an informal basis on several occasions. There being no significant improvement in the Claimant's performance, Mr Green arranged a meeting pursuant to Cosworth's capability procedure to consider whether a formal performance process was required. The Claimant was notified of this meeting on 6 December 2017 and it was to take place at 11 am on 11 December. At 10:58 am on that day, the Claimant

emailed Mr Green to confirm that Mr Taylor would accompany him to the hearing. The notes of this meeting, which were taken by Ms Fielder, begin at page 161. Mr Green explained to the Claimant that he did not think he had met the expectations of a senior engineer and explained how the Claimant could achieve those expectations which, inter alia, was to work collaboratively with other senior personnel. He explained that he thought the Claimant was struggling with the project design solution and iteration on the CDU7 project, which was consequently taking too long. The Claimant was able to ask questions and give his point of view and said that, whilst the discussion was valuable, it did nothing to reduce his concerns or mitigate them. The Claimant was sent a copy of the notes by Ms Fielder and was able to respond to them.

(iv) Mr Taylor, who had attended the meeting as the Claimant's companion, then emailed Mr Green and Ms Fielder expressing his surprise at some of the dates the Claimant had given in the meeting and setting out eight dates which differed from those given by the Claimant. He also outlined the assistance he had given the Claimant and confirmed areas in which the Claimant needed help.

(v) On 15 December 2017, Ms Fielder wrote to the Claimant (page 179) attaching the objectives he had to achieve between 18 December 2017 and 2 February 2018. She confirmed that Mr Green would meet with him weekly to discuss progress and offer feedback and support. She also attached to this email (page 181) details of the areas of performance concerns Mr Green had with him, which were:

- ability to work to a high enough standard and without significant help and supervision;
- competently lead a medium sized project;
- ability to understand complex information in an efficient timeframe; and
- insufficient demonstration of the ingenuity and investigative skills to find information for yourself.

Ms Fielder also advised the Claimant that, if his performance was not meeting the objectives set, the end of the review period may be brought forward.

(vi) When Mr Green had identified concerns with the Claimant's performance in July 2017, he sought feedback from Mr J Williamson and Mr A Bailey. A number of concerns were raised in that feedback (pages 145A, 145B and 145C).

(vii) On 20 December 2017, the Claimant emailed Mr M Raynor complaining that one of the ovens he had to use was faulty. He did not say it was unsafe (page 184). Mr Raynor replied that both ovens (chambers) had been repaired and noted that the one the Claimant was using had a

blown fuse which meant the heater was not working properly.

(viii) On 29 January 2018, Mr Green met with the Claimant to review his performance against the objectives he had been set. Mr Green confirmed (page 189) that some objectives had been met but progress in other areas had been slower that expected. Mr Green set out the detail of the concerns he had with some suggestions for moving the project forward. This followed on from an earlier meeting on 18 December 2017 (page 191A) where much the same issues were identified.

(ix) During a further meeting with Mr Green on 9 February 2018, the Claimant suggested that he might wish to consider a settlement agreement whereby his employment would terminate on terms. Mr Green, who had no authority to either propose or be involved in settlement agreements, notified Ms Fielder who arranged a meeting with the Claimant and Mr Green on 9 February 2018 when she gave the Claimant a draft settlement agreement under cover of a without prejudice and subject to contract letter of the same date (page 197). This proposed that the Claimant's employment would terminate on 22 February 2018. The Claimant was advised that the Second Respondent would pay his legal fees up to £250 plus VAT and that he needed to take independent advice as to those terms. He was given paid leave to consider the agreement.

(x) On 19 February 2018, Ms Fielder wrote to the Claimant (page 204A) to remind him that the deadline for signing the settlement agreement was fast approaching and if he did not wish to sign it, he should return to work. The Claimant replied that he had made enquiries and the cheapest fee he could find for advising him on the settlement agreement was £350, which Ms Fielder agreed to.

(xi) On 21 February 2018, the Claimant wrote to Ms Fielder saying that it was taking longer than anticipated (page 204D) and he was going to his lawyer's office on Monday afternoon to get advice and the decision would be made the following day. He had been placed on paid leave in order to give consideration to the settlement agreement and, in this email, he requested a further 3 days' paid leave. He made clear that if this could not be agreed, he would "have to leave the agreement".

(xii) On 27 February 2018, Ms Fielder wrote to the Claimant suggesting that Friday had to be the final deadline to see a legal adviser. This was in response to an email from the Claimant saying his meeting which was due to take place on the previous Monday had been postponed to Friday.

(xiii) On 6 March 2018, having heard nothing from the Claimant, Ms Fielder emailed him and enclosed details of firms in the Claimant's area who could advise on settlement agreements.

(xiv) There then followed emails displaying some prevarication on the part of the Claimant. On 13 March 2018, the Claimant emailed Ms Fielder to say she could contact his legal adviser, Ms Mallick of No 5 Chambers, confirming that Ms Fielder had no right to influence Ms Mallick (page 215). Nine minutes later, he emailed Ms Fielder withdrawing his consent for her to speak to Ms Mallick (page 216). At pages 217, 218, 219 and 220, are copies of email correspondence between Cosworth's solicitors and Ms Mallick and her Chambers, in which she is saying in no uncertain terms that she was not instructed by the Claimant.

(xv) By this time, we find that the Claimant had either been advised of the requirement for 2 years' continuous service in order to bring an unfair dismissal case or had discovered this himself. He had begun to embark on a course of conduct which had the sole aim of maintaining his employment beyond 2 years. We also find as fact that, at this stage, the Respondents had no idea that the Claimant had brought a claim in the Employment Tribunal against his previous employer and had concealed the true purpose of requiring confirmation of his terms of employment from Ms Fielder.

(xvi) Also, by this stage, the Respondents had formed the clear view that the Claimant was prevaricating with the sole intention of maintaining his employment beyond 2 years. We do not accept that Mr Green was aware of his claim against his previous employers, either through any professional network or otherwise.

(xvii) On 15 March 2018, having heard nothing of substance from the Claimant, Ms Fielder wrote to him inviting him to a meeting with Ms O'Connor and Mr Green on 20 March 2018 at 11 am. He was advised of his right to be accompanied by a work colleague or a member of the Employee Representative Group (page 221). The Claimant replied on 19 March saying that the meeting needed to be on the "afternoon 29 April 2018, not tomorrow". The Claimant had by this stage sent in fit notes from his GP citing insomnia and/or work-related stress as the reason for his absence.

(xviii) The Respondents seem to have assumed that the Claimant's reference to a meeting having to take place on 29 April 2018 should have been 29 March 2018. On 20 March 2018, Ms O'Connor confirmed this and rescheduled the hearing for 23 March at 10 am (page 223). The Claimant responded by email sent at 23:30 on 22 March indicating that his companion could not make a meeting on that Friday and it would have to be the following Thursday afternoon. In this email, he said:

> "Since 2015 I have suffered from psychiatric injury and I have been taking medicines since."

This is the first time he mentioned any mental impairment to the

Respondents.

(xix) Having heard nothing from the Claimant, Ms O'Connor emailed the Claimant at 10:16 pm on 23 March 2018 to advise that he had been dismissed because he had:

> "failed to co-operate with us during this process, the Company believes that there is no alternative other than to terminate your contract of employment and dismiss you with immediate effect." (page 226).

The letter went on:

> "You are entitled to receive 3 months' notice of termination of your employment. You are not required to work out your notice period but will be paid in lieu of this. We therefore confirm that the date of termination of your employment will be today, Friday 23 March 2018. This is your last day of service with the Company."

The letter advised the Claimant of his right of appeal.

(xx) On 16 April 2018, the Claimant wrote to Ms O'Connor saying:

> "I have not heard anything from you, since last time on 22 March 2018, I proposed a new meeting date on 29 March 2018, so I could have somebody accompany me in the meeting (sic)."

He continued:

> "I won't be able to go back to Cosworth to work or attend meetings with you until I get better." (page 227)

Ms O'Connor responded to that email on 18 April 2018 enclosing a copy of the termination letter "that was emailed and posted to you" (page 229).

(xxi) On 9 May 2018, the Claimant wrote to Ms O'Connor saying: "I have recently received the letter of termination of employment. I wish to appeal" (page 230). Despite the deadline for the Claimant's appeal being long overdue, Ms O'Connor wrote to the Claimant on 14 May 2018 giving a date of an appeal meeting on 25 May (page 232). The Claimant attended the appeal meeting before Mr Buckler, Managing Director, but his appeal was dismissed. He was advised of the outcome by letter dated 31 May 2018 (page 237).

(xxii) We find as fact that the Claimant received the email from Ms O'Connor on 23 March 2018 and then deliberately refused to accept the copy of the dismissal letter sent by post. Accordingly, his effective date of

termination was 23 March 2018 when he received the email from Ms O'Connor.

Submissions

41. Both parties made oral submissions at the close of the evidence. They then made written submissions pursuant to an Order of the Tribunal to do so. These submissions were long and are briefly summarised below. We confirm that the Tribunal considered all of the detailed submissions in reaching our conclusions.

42. For the Respondents, Mr Northall's verbal submissions were that the Claimant was a deeply unimpressive witness. He submitted that the Claimant had received the email attaching the letter of dismissal on 23 March 2018. Further, the only claim that was in time was for unfair dismissal. In relation to the discrimination claims, the Claimant had not explained why his claims were submitted late or why it was just and equitable to extend time; this despite being well aware of his rights and being professionally advised. In relation to the ordinary unfair dismissal claim, there had been a genuine assessment of the Claimant's ability and performance which were supported by evidence produced by the Respondents. It was the Claimant who first proposed the settlement agreement. In relation to victimisation, no one at the Respondents knew about the Claimant's previous Tribunal proceedings so this could not be a protected act.

43. For the Claimant, Mr Downey noted that the Respondents concede that the Claimant has a disability. The effective date of termination is when the dismissal is communicated to an employee and it had not been clear to the Claimant that the Respondent was exercising its contractual right to pay in lieu of notice. Accordingly, the effective date of termination was 28 April 2018. The Claimant had been subjected to a continuous course of detrimental treatment. Mr Downey was highly critical of Mr Green's evidence and said it could not be relied upon. There was no evidence of the informal procedure Mr Green said he followed. The Claimant had explained his various attempts to get legal advice and no legal adviser would have advised him to sign the proposed settlement agreement. The Respondents were clearly aware of the previous Employment Tribunal claim. It was far from clear that Ms O'Connor had any reason for dismissing the Claimant.

44. In relation to the written submissions, Mr Downey sought to take issue with the Respondents' reliance on evidence surrounding the proposed settlement agreement between the parties. We found this to be a curious development for a number of reasons. It was the Claimant who first raised the issue of the settlement agreement in his grounds of complaint. The Respondents specifically waived any privilege attaching to the proposed settlement agreement. We assume that the purpose of introducing this new line of argument, which was not referred to either in the list of issues or in the evidence, was to seek to persuade us that there was no deliberate delay on the part of the Claimant in order to extend his period of continuous service.

For the record, we cannot accept this line of argument nor, incidentally, do we consider that it has a significant bearing on the factual background and subsequent legal arguments.

45. In relation to the effective date of termination, Mr Downey, following the decision in ***Société Générale, London Branch v Geys [2012] UKSC 63***, said that the Claimant was not aware he was being dismissed summarily with a payment in lieu of notice since the letter of dismissal was ambiguous and it must be clear to an employee that the payment made to him is a payment in lieu of notice. Mr Northall counters that argument by saying that the Claimant has taken sections of the ***Geys*** Judgment out of context. If a payment in lieu of notice is not made immediately upon termination of employment, Mr Northall argues it becomes a debt and does not delay the effective date of termination.

46. Both parties made submissions in relation to the alleged performance issues of the Claimant and, given his argument that the Claimant did not learn of his dismissal until 28 April 2018, Mr Downey's arguments are more detailed.

47. In relation to automatic unfair dismissal under section 10 ERelA, Mr Downey submits there is no test of reasonableness attaching to a request to delay a disciplinary hearing notwithstanding section 10(1)(b) which uses the phrase: "reasonably requests to be accompanied at the hearing". Mr Northall also refers to section 10(5) which states that an alternative time proposed by a worker must –

> "(a) be reasonable, and
>
> (b) fall before the end of the period of five working days beginning with first working day after the date proposed by the employer".

This follows section 10(4) which provides that an employer must postpone the hearing to the time proposed by the worker if –

> "(b) his chosen companion will not be available at the time proposed for the hearing by the employer, and
>
> (c) the worker proposes an alternative time which satisfies subsection (5), …"

In these circumstances, the employer must postpone the hearing to the time proposed by the worker. Mr Downey refutes the Respondents' argument that the time proposed by the Claimant was not reasonable in the light of previous attempts to convene the meeting, the reasons for the chosen companion's unavailability and the availability of alternative companions.

48. Regarding the claim under section 100 ERA, Mr Northall submitted that the issues raised by the Claimant did not meet the definitions in section 100(1)(c) ERA and, in any event, the principal reason for his dismissal was his

performance.

49. The claim of breach of contract turns on whether the capability procedure of the Cosworth was contractual with the Respondents saying it was not and the Claiming saying it was.

50. Turning to disability, Mr Northall submitted that the Respondents did not have actual or constructive knowledge of the Claimant's disability whereas Mr Downey submitted they did as a result of the Claimant's interaction with his colleagues, the fact that he worked three or four days a week shortly after commencing employment, became tearful at a meeting with Mr Green and sent sick notes referring to insomnia and stress to Ms Fielder.

51. The claim for failure to make reasonable adjustments was not really pursued by the Claimant with the Respondents' witnesses and Mr Northall submitted that there was no medical evidence that the application of the capability procedure or requirement to attend meetings placed the Claimant at any disadvantage.

52. In relation to the direct race discrimination claim, the Claimant submitted that he was treated less favourably than white colleagues in relation to where he was required to carry out his duties and was denied flexible working whereas white colleagues were granted it.

53. The parties made brief submissions in relation to harassment and victimisation.

Conclusions

54. The Tribunal members were unanimous in concluding that the Claimant's argumentative approach to giving oral evidence, his speculation and assumptions without foundation that the Respondents' witnesses were untruthful, his inconsistency and hesitancy in giving his evidence and his refusal to accept any criticism, cast a shadow over the reliability and credibility of his evidence.

55. Dealing firstly with the effective date of termination, we had no hesitancy in finding that he was dismissed with immediate effect on 23 March 2018. The events leading up to his dismissal were delaying tactics with the sole intention of extending his period of employment beyond 2 years. As already stated, we did not accept the Claimant's evidence that he did not receive the email attaching the letter of dismissal, which was sent by Ms O'Connor on 23 March 2018. In ***Gisda Cyf v Barratt [2010] IRLR 1073***, the Supreme Court held that where an employee is dismissed by letter, the time limit for bringing a claim of unfair dismissal runs from the date when the employee has actually read the letter or has a reasonable opportunity of reading it. On the facts, the Claimant received the email on 23 March 2018 and read it. He then refused to accept delivery of the letter which was sent by post until after his 2 year period of employment would have expired. We do not accept Mr Downey's

arguments surrounding the decision in ***Geys***. This case can clearly be distinguished on its facts. The Claimant received an unambiguous letter from Ms O'Connor stating that he was dismissed with immediate effect and would be paid in lieu of notice. The fact that he may not have been paid immediately, and we were given no indication of when he received his notice pay, is immaterial. In ***Geys***, it was not altogether clear precisely what the employee was being paid for when he received the money paid into his bank account. In such circumstances, termination was held not to have been effective until he understood how the payment was made up. In the Claimant's case, he was to be paid in lieu of notice so was well aware of what he would receive.

56. Accordingly, since the Claimant did not have 2 years' continuous employment, the Tribunal has no jurisdiction to hear a claim of ordinary unfair dismissal under sections 94 and 98(4) ERA. We simply did not accept his evidence in relation to receipt of Ms O'Connor's email dismissing him.

57. In relation to the alleged failure to allow the Claimant to be accompanied to a meeting to discuss his dismissal, under section 12 ERelA, we do not accept the Claimant's argument. Having already sought a postponement of the hearing by 9 days, the Claimant emailed Ms O'Connor at 11:30 pm the day before the hearing (page 224) saying:

> "…
>
> The person is going to be with me in the meeting cannot make this meeting this Friday.
>
> It has to be next Thursday afternoon.
>
> …"

We note the Claimant makes no reference to the identity of his companion and the request, although it is more in the way of a direction, came over 5 weeks after he had attended his last meeting with Mr Green and Ms Fielder at which he suggested a settlement agreement. In the circumstances, we do not consider that he acted reasonably in relation to the request to be accompanied or in relation to the alternative time he proposed. We accept Ms O'Connor's evidence that, in all the circumstances, she believed the Claimant was prevaricating deliberately in order to extend his employment and had no confidence he would actually attend the meeting on 29 March 2018. In any event, we have already found that his dismissal was not due to any breach of section 10 ERelA but due to capability and his conduct in the weeks leading up to his dismissal.

58. Regarding the health and safety issue under section 100 ERA, the Tribunal noted that the complaints about noise made by the Claimant were made around 10 months prior to his dismissal. Whilst the Claimant maintains that another employee was allowed to move from the noisy room in which they

worked, we accept the Respondents' evidence that this employee took it upon himself to be proactive and find another room in which to work. There were also significant issues in moving very heavy machinery from the room as it required a solid floor. We find no evidence that these complaints genuinely referred to the Claimant's health other than him saying the noise hurt his ears. We do not conclude that the verbal or written exchanges the Claimant had in relation to noise levels formed any part of the reasoning which led to his dismissal.

60. The breach of contract claim can be quickly dealt with and is already the subject of a deposit order. Whilst the Claimant has submitted a rather manufactured and convoluted argument as to why the capability procedure is contractual, the evidence before us shows quite clearly that it is not. The Claimant conveniently omits from his Claim Form, where he sets out the capability procedure, the sixth paragraph of clause 1.1 of the Capability Procedure which states:

> "This procedure does not form part of any employee's contract of employment and it may be amended at any time."

Clause 16.5 of the Claimant's Contract of Employment provides:

> "The Disciplinary, Grievance and Bullying & Harassment Procedures do not form part of your terms and conditions of employment." (page 115)

We do not accept the Claimant's evidence that Mr Green and "HR" confirmed the capability procedure was part of his contractual entitlement.

61. The claim of breach of contract must be dismissed.

62. Moving on to disability discrimination, the Claimant's case rests on his allegation that the Respondents had knowledge or constructive knowledge of his disability. He does not really pursue an argument that the Respondents had actual knowledge of his disability. Instead, he argues that the Respondents had constructive knowledge of his disability by reason of his request to work three or four days early on in his employment, became upset and tearful in a capability meeting with Mr Green and Ms Fielder and sent to the Respondents fit notes which refer to the reason for his absence being insomnia and stress. We find that none of these matters gave the Respondents constructive knowledge of his disability. The Claimant clearly stated that the reason for working three or four days was in connection with his family and subsequently made reference to picking his daughter up. Nothing in the correspondence we have already referred to suggests that the Respondents should have concluded he was disabled. In relation to the meeting with Mr Green, any capability meeting would be stressful and upsetting for an employee. Again, there is nothing in the Claimant's evidence, which we do not accept in any event, which would have led an employer to conclude he was disabled.

63. The reference to the fit notes is also unconvincing. He said in correspondence that he suffered a psychiatric injury and was taking medication. He did not elaborate on this and produced no medical evidence other than fit notes which do not touch on the question of disability. There is no evidence before us that the Respondents would have assumed the Claimant was disabled for the purposes of section 6 EqA.

64. We also mentioned the fact that the Claimant, in developing his constructive knowledge of disability argument, makes reference to his interaction with colleagues as an indicator that he was disabled. The Claimant did not develop this argument at all. He makes no reference at all to any conversation or correspondence from which knowledge of disability could be implied. As Mr Northall points out, pursuant to the Judgment in ***Department of Work and Pensions v Hall UKEAT/0012/05***, there were simply no red flags from which an assumption of disability could have been raised.

65. It follows that we find the Respondents had no actual or constructive knowledge of the Claimant's disability and his claims under sections 13, 15 and 21 ERA fail. Even if we are wrong in this conclusion, following ***Herry v Dudley Metropolitan Borough Council UKEAT/0100/16/LA***, the Claimant has given no indication, other than difficulty sleeping (of which there is no corroborating evidence), to illustrate he satisfies the definition of disability in section 6 EqA.

66. In relation to race discrimination, the Claimant's claim is based on section 13 ERA. Pursuant to section 9 EqA, the Claimant relies on his colour as he is of Chinese ethnicity. He relies on giving another employee a significantly less noisy room to work in, which we have already discussed above. He further refers to not being permitted to reduce his working days in August and December 2017 but we accept the Respondents' evidence that this was due to the needs of the business during those periods. The circumstances of his comparators were clearly set out by Ms O'Connor and the Claimant has done nothing more than assert that just because they may not have worked full-time and he was required to, this must amount to race discrimination.

67. The Claimant also relies on a failure by the Respondents to pursue informal performance management before instigating the formal capability procedure. However, we accept Mr Green's evidence that he had a number of informal conversations with the Claimant before the formal procedure commenced.

68. Accordingly, we do not find there is any evidence of direct race discrimination against the Claimant from which we could find there has been race discrimination thereby passing the burden of proof to the Respondents.

69. The claim of harassment relating to the Claimant's race is only made against Mr Green. We find that the pursuit of the capability procedure by Mr Green did not in any way satisfy the threshold in section 26 EqA. What Mr Green did was to pursue the formal capability procedure in circumstances where the

Claimant's performance had not sufficiently improved as against the objectives that he had been set. It is clear from the notes of the meetings that, far from creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, he participated fully in each of the meetings and argued his corner with enthusiasm. For these reasons, the harassment claim fails.

70. The claim of victimisation under section 27 EqA rests on his assertion that the Respondents were aware of the tribunal proceedings he brought against his previous employer. He implies that the Respondents could have easily found out about these proceedings and that Mr Green became aware of them through the "Cambridge Network". We accept Mr Green's evidence that he was not a member of any such network and, in fact, was unaware of its existence. Further, there is no evidence that the Respondents were aware of those earlier proceedings. Indeed, we do not accept the Claimant's evidence that Ms Fielder, in particular, might have been aware of the proceedings when he asked for confirmation of his terms of employment which, on the balance of probabilities, he did tell Ms Fielder was due to an insurance claim in relation to his daughter.

71. The Claimant also seeks to rely on his email of 22 March 2018 wherein he refers to his psychiatric injury. This is not a protected act. The claim of victimisation fails.

72. As can be seen from our findings of fact and conclusions, we did not find the Claimant to be a reliable witness. We do not repeat here the comments we have already made but suffice it to say his evidence and arguments do not substantiate his claims. This is further illustrated by the fact that he covertly recorded a conversation with Mr Green and, in breach of his confidentiality undertaking, took highly sensitive information belonging to the Respondents before he was dismissed.

73. All of the claims are dismissed.

_____

Employment Judge M Butler

Date: 1 November 2021

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