# EMPLOYMENT TRIBUNALS

**Claimant: Mr D Scantlebury-Watson**

**Respondent: Protect My Property Services Ltd**

**Heard at: Newcastle (CVP) On: 11-15 and 20 (deliberations) October 2021**

**Before: (1) Employment Judge A.M.S. Green**
**(2) Mrs D Winter**
**(3) Ms S Mee**

**Representation**

Claimant: In person
Respondent: Mr D Wynn – In house solicitor

# RESERVED JUDGMENT

The unanimous decision of the Tribunal is:

1. The claimant's claim for discrimination arising from disability pursuant to the Equality Act 2010, section 15, is well-founded, and the respondent shall pay the claimant £44,432.13.

2. The claimant's claim for failure to make reasonable adjustments pursuant to the Equality Act 2010, section 20 is dismissed.

3. The Tribunal does not have jurisdiction to hear the claimant's claim for harassment related to disability pursuant to the Equality Act 2010, section 26 as it was presented out of time.

# REASONS

Introduction

1. For ease of reading we refer to the claimant as Mr Scantlebury-Watson and the respondent as Protect My Property.

2. We conducted a remote CVP hearing. We worked from a digital hearing bundle. The digital bundle was very large and verging on excessive given the proportion of documents that were actually referred to by the witnesses in their statements, in cross examination and during closing submissions. However, we remind ourselves that Mr Scantlebury-Watson is not only a litigant in person but disabled (he has Asperger's Syndrome) ("AS"). His AS means that he cannot control, and contributes to his tendency to include more than necessary in some parts of his particulars claim (they are very extensive) and in the hearing bundle and not enough in other areas.

3. Mr Scantlebury-Watson tendered additional documents for inclusion into the bundle which we admitted into evidence at the 11th hour. Mr Wynn did not object and we gave him time to review them and to take instructions.

4. The following people gave oral evidence:

    a. Mr Scantlebury-Watson;

    b. Mrs Danielle Makin

    c. Mr Simon Millward;

    d. Mr Sven Siddle;

    e. Mr Shawn Eglen; and

    f. Mr Craig Foot.

5. Mr Millward did not provide a witness statement and the Tribunal gave Mr Scantlebury-Watson permission to conduct oral examination in chief.

6. Mr Scantlebury-Watson and Mr Wynn provided the Tribunal with written representations and made closing oral submissions.

7. We made reasonable adjustments to accommodate Mr Scantlebury-Watson's AS which entailed giving him regular breaks and additional time to prepare his closing submissions after he had heard Mr Wynn's submissions. Regular breaks were also provided, at Mr Wynn's request to accommodate a medical condition that he has.

8. The Equality Act 2010 section 136 ("EQA") provides that once Mr Scantlebury-Watson has proved facts from which the Tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof 'shifts' to the Protect My Property to prove a non-discriminatory explanation. The standard of proof is on a balance of probabilities.

9. The Tribunal can only decide whether a party has discharged the evidential burden of proving their case once the evidence is complete and thus only after it has come to some conclusion about the quality of the evidence presented. This assessment involves ascribing weight to items of evidence to decide what influence (if any) such items bear on the matters to be decided. The question of the weight to be attached evidence is one for the Tribunal to decide as a fact-finding body or "industrial jury."

10. In reaching our decision, we have considered the oral and documentary evidence, the written representations, the closing submissions, and our records of proceedings. The fact that we have not referred to every document produced to the Tribunal in the bundle should not be taken to mean that we have not considered it.

11. We have adopted findings of fact relating to the Mr Scantlebury Watson's AS made by a different Employment Tribunal in an earlier case involving him but against a different respondent (**Mr Darren Scantlebury-Watson v Architectural Powder Coatings Ltd ET 250094/2016** (the "Earlier Decision)). The Earlier Decision was referred to in Protect My Property in their grounds of resistance and also by Employment Judge Garnon in his case management summary and orders dated 29 September 2020. Given the lifelong nature of the condition, these findings of fact in the Earlier Decision are relevant to this case.

The claims

12. Mr Scantlebury-Watson is disabled with AS. Protect My Property initially did not accept that he was disabled but has now conceded that point.

13. Mr Scantlebury-Watson presented his ET1 to the Tribunal administration on 15 August 2020. This followed a period of Early Conciliation which started on 1 July 2020 and ended on 16 July 2020. He made the following claims:

    a. discrimination arising from disability (EQA, section 15);

    b. failure to make reasonable adjustments (EQA, section 20); and

    c. harassment relating to disability (EQA, section 26).

14. Mr Scantlebury-Watson also claimed breach of contract and unauthorised deduction of wages, but these were dismissed, upon withdrawal at an earlier stage in these proceedings.

The issues

15. During the hearing, it was agreed that the list of issues prepared by the parties should be amended to provide greater clarity and focus on what the Tribunal must determine in respect of liability. We carefully discussed these, and we agreed the following.

*Discrimination arising from disability (EQA section 15)*

16. Did Protect My Property treat Mr Scantlebury-Watson unfavourably by:

    a. frequently accusing him of "overstepping the mark" or exceeding his authority or not meeting expectations;

    b. remarking upon or taking exception to aspects of Mr Scantlebury-Watson's behaviour or personality that were related to his disability; and

    c. dismissing Mr Scantlebury-Watson?

17. Did the following things arise in consequence of Mr Scantlebury-Watson's disability, the need for:

    a. order;

    b. routine;

    c. clarity and structure;

    d. regular feedback; and

    e. clear expectations?

18. Was the unfavourable treatment because of any of those things? Did Protect My Property dismiss Mr Scantlebury-Watson because of some or all of those things?

19. Was the treatment a proportionate means of achieving a legitimate aim? Protect My Property says that its aims were:

    a. the efficient and economic management of the business which resulted in dismissing Mr Scantlebury-Watson for redundancy; and

    b. the effective management of Mr Scantlebury-Watson to ensure that he performed the duties that were required of him.

20. The Tribunal will decide in particular:

    a. was the treatment an appropriate and reasonably necessary way to achieve those aims;

    b. could something less discriminatory have been done instead;

    c. how should the needs of Mr Scantlebury-Watson and Protect My Property be balanced?

21. Did Protect My Property know, or could it reasonably have been expected to know that Mr Scantlebury-Watson had the disability? From what date?

*Reasonable Adjustments (EQA sections 20 & 21)*

22. Did Protect My Property know, or could it reasonably have been expected to know that Mr Scantlebury-Watson had the disability? From what date?

23. A "PCP" is a provision, criterion or practice. Did Protect My Property have the following PCP: not providing Mr Scantlebury-Watson with a job description which clearly defined his role? Mr Scantlebury-Watson says that he did not know what his job was.

24. Did the PCP put Mr Scantlebury-Watson at a substantial disadvantage compared to someone without Mr Scantlebury-Watson's disability, in that a neurotypical person will likely not be unduly worried by a job description that does not reflect their role - or at least it will not affect their wellbeing. He says that a person with AS who interprets information in a concrete or literal way, would be unduly worried. He says people with AS have high moral standards; tell the truth even when the consequences may be unfavourable; they are punishingly hard on themselves - and, in the world of work, if they perceive that they are not doing what they are paid to do, moreover what that they have signed a legal document to say they will do, they tell themselves that they are failing in their legal and moral obligation to their employer. When that relationship is their only source of income and, ultimately, determines whether they are able to provide for their families That has a significant bearing on their psychological state.

25. What steps could have been taken to avoid the disadvantage? Mr Scantlebury-Watson suggests an accurate job description.

26. Was it reasonable for Protect My Property to have to take those steps and when?

27. Did Protect My Property fail to take those steps?

*Harassment related to disability (EQA, section 26)*

28. Did Protect My Property do the following things: questioning, "nit picking" and denigrating Mr Scantlebury-Watson to other members of the team including his own staff.

29. If so, was that unwanted conduct?

30. Did it relate to disability?

31. Did the conduct have the purpose of violating Mr Scantlebury-Watson's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for Mr Scantlebury-Watson?

<u>Findings of fact</u>

*Introduction*

32. The primary function of the Tribunal is to make findings of fact in relation to the issues. Once the Tribunal has done this, as an industrial jury, we then remind ourselves of the relevant law and apply this to the facts to determine liability.

33. In complex cases involving multiple claims, it is often more helpful to arrange the findings of fact according to themes (i.e. by relating them to the identified issues) rather than simply setting them out in a chronological narrative. This is what we have done in this case.

*Findings of fact in respect of Mr Scantlebury-Watson's evidence which was not challenged in cross examination.*

34. Mr Scantlebury-Watson's witness statement is nineteen pages and comprises 100 paragraphs of averments of fact. In terms of the issues associated with liability, Mr Wynn's cross examination of Mr Scantlebury-Watson was restricted to his claim for reasonable adjustments. He did not cross examine him on his averments of fact relating to his claims of discrimination arising from disability and harassment. Having considered the evidence carefully, we have no reason to doubt what Mr Scantlebury-Watson says in relation to those averments, and consequently we have made findings of fact in respect of his claims of discrimination arising from disability and harassment. However, for the reasons given below, the harassment claim is out of time and the Tribunal has no jurisdiction to uphold that claim.

*Credibility issues – covert recordings*

35. In his closing submissions, Mr Wynn invited us to make adverse credibility findings against Mr Scantlebury-Watson because he had made a series of covert recordings of meetings that he held with different employees at Protect My Property[1]. He did not invite us to rule the transcripts of those recordings as inadmissible. He submitted that on 11 October 2021, Mr Scantlebury-Watson confirmed that he had made covert recordings without permission. Mr Wynn referred to the fact that Mr Scantlebury-Watson justified this behaviour on the premise that he believed that it would help him given his disability, but he also stated that he had done so to protect his own interests. Mr Wynn submitted that Mr Scantlebury-Watson instructed a firm of solicitors to act on his behalf to conduct his appeal against his dismissal and, subsequently, in the conduct of the litigation. The gist of those instructions at an early stage was to make several requests for disclosure of documents including minutes of meetings. Mr Wynn suggested that Mr Scantlebury-Watson had been less than candid with his instructions to his solicitor given the fact that disclosure of minutes of meetings was unnecessary because he had recorded and transcribed the meetings. His behaviour was dishonest and undermined his credibility.

36. In his written submissions, Mr Scantlebury-Watson explained, in some detail, why he made the covert recordings. He said his AS comes with auditory input ('verbal learning and memory') and graphomotor issues, and that the act of

[1]7 recordings made in total: 30/10/2019 Siddle, Foot (pp. 523-533); 16/12/2019 Siddle (pp. 355-359); 24/02/2020 Siddle, Millward (pp. 418-422); 17/03/2020 Siddle, Gallagher (pp. 434-436); 18/03/2020 Siddle, Gallagher (pp. 437-438); 06/04/2020 Siddle, Gallagher, Walker (GMB) (pp. 454-462); 14/04/2020 Siddle, Gallagher, Walker (GMB) (pp. 472-476).

transcribing helps him to process the information being transcribed. This was the reason for the first two recordings that he made on 30 October 2019 and 16 December 2019. He asked the Tribunal to consider that he had freely and immediately confirmed all seven (of one-hundred-and-forty; 0.5%) documents as bring transcripts from covert recordings when asked to do so. He submitted that, had he been legally represented, his disclosure would have been procedurally correct as he has never made any effort to conceal those transcripts or to deny their origin. He reminded the Tribunal that he readily admitted that the remaining five covert recordings were made partially for that purpose but also to ensure there was some record of those conversations, and that this countered Protect My Property's assertion his character, honesty and integrity was questionable. To understand why he thought this course of action was necessary in the last weeks of his employment (the latter five covert recordings were all made after he was denied a return to work by the Protect My Property), Mr Scantlebury-Watson asked that the Tribunal compare the transcripts of his two Consultation Meetings with what purported to be the minutes of those meetings from Protect My Property, and especially to consider the credibility of an almost total absence of documentation held or produced by Protect My Property.

37. Mr Scantlebury-Watson submitted that he had alluded to Protect My Property's culture being one of 'leave no footprints'; the paucity of bundle documents, and the sheer weight of its evidence that was successfully challenged or found to be wanting by Mr Scantlebury-Watson when he referenced documents from the bundle, is a matter the Tribunal should consider in its deliberations. He suggested that the Tribunal should consider why Ms Gallagher was first listed as a witness for Protect My Property, then was not. He submitted that his reason for making the covert recordings was initially to assist with his disability; and then that but also - to quote the case law upon which he relied - because he was a "vulnerable employee seeking to keep a record or guard against misrepresentation".

38. Having considered the submissions we disagree with Mr Wynn. We find that covert recordings and subsequent transcription of the meetings was, at its highest, distasteful behaviour. However, in this case, we accept that the primary motivation on Mr Scantlebury-Watson's part was to assist him in his disability for the other reasons that he has given. We do not accept that his credibility was undermined by his behaviour. Furthermore, the accuracy of the transcriptions has not been challenged, and, indeed they assist the Tribunal in making findings of fact given their contemporaneous nature.

*Background to Protect My Property and the personnel relevant to the claims.*

39. Protect My Property is a leading national home security provider, installing and maintaining a range of burglar alarms, CCTV, and smart home systems. Its registered head office is in Newcastle. It is part of the MGroup group of companies. Protect My Property and Morrison Data Services ("MDS") are subsidiary companies in the group. Protect My Property and MDS are located in the same building. Protect My Property has Field Engineers, Contact Centre staff and a management team only. All other services such as Accounts, HR and Procurement are shared with MDS. IT for the whole group is outsourced to Pulsant. The Protect My Property and MDS emergency out of

hours services are also outsourced to Woven (formerly known as Direct Response).

40. The following personnel are relevant to this case:

    a. Ms Emma Barry is a Marketing & Communications Coordinator (MGroup).

    b. Mr Shawn Eglen is a Service Delivery Manager at Protect My Property. Mr Elgen started his employment at Protect My Property on 1 August 2018 and reports directly to Mr Sven Siddle. Mr Eglen manages a team of 14 employees nationally that undertake the duties of Smart Meter Support on both Domestic and Commercial Premises.

    c. Mr Craig Foot is a Service Delivery Manager at Protect My Property (as from April 2021). Mr Foot started his employment in June 2016. He was Operations Manager from May 2017 until April 2020 and Technical Innovations Manager from April 2020 until April 2021. During Mr Scantlebury-Watson's employment, both in his position as Operations Manager and subsequently as Technical Innovations Manager, Mr Foot was responsible for supporting the business regarding the technical aspects of Protect My Property's work streams and sourcing new and innovative products to ensure that they remained competitive, mainly preparing, and launching a new Smart Home Product.

    d. Ms Deborah Gallagher is Head of Employee Relations at Protect My Property.

    e. Mrs Danielle Makin was employed by MDS between 23 May 2011 and 26 March 2021. Her last role was as an HR Adviser. As part of her role, she provided HR support to Protect My Property as required by the business.

    f. Mr Simon Millward was employed by MDS as HR Business Partner for various businesses including Protect My Property. Mr Millward left MDS on 31 March 2020.

    g. Ms Nicola O'Shea is a Customer Service Team Leader at Protect My Property. Ms O'Shea reported to Mr Scantlebury-Watson.

    h. Mr Sven Siddle is Head of Protect My Property. He has been employed by Protect My Property since October 2006. He is responsible for the full end-to-end running of the business including, but not limited to full P & L responsibility, health & safety, resourcing and headcount, customer satisfaction, technical and regulatory compliance. Mr Scantlebury-Watson reported to Mr Siddle.

*Mr Scantlebury-Watson's disability*

41. Although Protect My Property accept that Mr Scantlebury-Watson is disabled, it is helpful to set out in some detail the nature of his disability. The fact that he has AS provides important context to the question of unfavourable treatment, substantial disadvantage, the impact of any PCP, reasonable

adjustments, and the harassment that he alleges he suffered because of his condition.

42. Mr Scantlebury-Watson was diagnosed with AS in 2015. He was in his mid-forties at the time. In paragraph 22 of his witness statement, which was not challenged in cross examination, he explains that effective communication is very important to him. He has the need for clear expectations and regular feedbacks. He is somewhat rule-based and can be rigid in his thinking. Uncertainty in the unfamiliar can cause him distress. Being unfairly judged or unjustly maligned affects him disproportionately and may trigger depressive episodes. He has a strong moral compass and work ethic and is harshly self-critical. In his oral evidence he explained that he is not an auditory person and finds it difficult to keep up with auditory information which is why he finds it important and necessary to record and transcribe discussions. He said the process of doing that helped him. When meetings are unexpected or sprung upon him, he finds it difficult to process and transcribe information. He also explained that he had very bad handwriting and finds it necessary to write everything in capital letters. If he makes a handwritten note, there is a good chance that he will not be able to read them later.

43. We also note in an occupational health report dated 25 March 2020 [440] prepared by Ruth Meredith, an occupational health nurse, where she has stated that AS:

> *… is a spectrum condition. The characteristics of AS vary from one person to another but a person will usually be assessed as having significant difficulties with social communication and social interaction and restricted and repetitive patterns of behaviours, activities or interests to the extent that these impair everyday functioning. AS is associated with average or above average intelligence.*

44. In the case management summary and orders dated 29 September 2020, Employment Judge Garnon referred to the Earlier Decision [51]. He stated, amongst other things:

> *After 13 days of evidence and submissions and one day's deliberations in May and June 2017 and Employment Tribunal (ET) chaired by me found the claimant was at all material times a disabled person by reason of Asperger's Syndrome (Asperger's) a form of autism. It is a lifelong neurological, not physiological condition.*
>
> *…*
>
> *5. The claimant's disability has affects he cannot control and contribute to his tendency to include more than necessary in some parts of his particulars of claim and not enough and others. Also he raises matters which a lawyer would see as to be problematic, while not seeing easier options.*
>
> *…*
>
> *9. The earlier case has useful passages about the nature of the impairment which remain unchanged… There is no issue about*

*confidentiality as the judgment is a public document. The following extracts explain why the claimant has written so much in his claim and why it would be futile to order him to simplify or clarify it without giving him some guidance.*

***3. Disability, Symptoms and Outward Appearance, leading to Knowledge.***

*3.1. Autism is a lifelong development disability and a neurological condition. It is a "spectrum" condition meaning all autistic people share certain difficulties, but'' being autistic will affect them in different ways. Asperger's Syndrome is a term used since about 1990 and now more often encompassed in the diagnosis of "Autism Spectrum Condition".*

*3.2. It affects how a person perceives the world and interacts with others, which is differently to what the claimant calls "neurotypical" people. He accepts* ***he has none of their intuitive abilities that relate to behaviour and communication. He is reluctant to ask for help or explain why he needs it.***

*3.3. He says Asperger's is responsible for* ***communication difficulties*** *such as avoiding eye contact… We do not doubt the claimant's veracity on the vast majority of points. However his perception may be in question on many. Failure to make eye contact and delay in responding was simply not apparent in this hearing. His memory for detail was extraordinary. The claimant explained why. It is not a "social situation" and he had prepared extensively for it. He was the same when in a one-to-one meeting with a person at work…*

*3.4. Asperger's affected him in childhood. He was a target for bullying because he was "seen to be "different" (or "weird")" due to his literal thinking, obsessive behaviour and social awkwardness. He says "My formative years predated modern research into and diagnosis of Asperger's and even today, many years later, I still suffer from the effects of experiences I had before anyone even knew that my difficulties had a name".*

*3.5. He has low self-confidence, which, causes stress, anxiety, and depression. He has had depression to a varying extent since his teens. He avoids social gatherings as these aggravate the symptoms and he is perceived as aloof. He does not use public transport and shops by Internet or in the early hours in 24-hour supermarkets. Speaking of a work/social gathering he said "I went and hated every minute". Talking Therapies a course aimed at neurotypical people, conducted in groups, was therefore unsuitable for him, but it may have been even if one-to-one, as it is about enabling people with psychological impairments to change their behaviours. The claimant cannot.*

*3.6. Asperger's has especially impacted upon his education and study. He is articulate and of high intelligence: (a Stanford-Binet evaluation puts him in the ninety-eighth percentile) but his academic achievements are poor. Bullying at secondary school saw high levels of truancy and middling GCSE passes. He has excellent A level grades due to attending night classes at College. His attempts at Higher Education were spoiled by the*

*social requirements, he attained a Distinction in the foundation module of an Open University Psychology degree without attending lectures but was taken home mid-way through the compulsory residential school due to a serious panic attack. In September 2015 he left a Diploma in Management qualification after one session because of its group- based activities. He says, and we agree, that but for his Asperger's he would have a degree and" it would be a first".*

*3.7 He cannot interpret non-verbal communication, so finds it hard to 'read' others. His interpretation of language is over-literal which can cause confusion or offence. He gives an example where a colleague asked, "Do you have David's telephone number?': to which he answered "Yes, I do': without giving the number. We will call this* ***literalism****.*

*3.8. He can be seen to be abrupt and rude, eg not saying "good morning" to colleagues but going straight to his desk to start work. He is said to use dismissive hand gestures, eg a facing palm to indicate "Stop talking" though he is not conscious of doing so. We will call this* ***"rudeness****".*

*3.9. Asperger's causes him difficulty in accepting others' points of view; accepting changes in routine; understanding unwritten rules; dealing with situations where rules are broken; and organising his time without self reminders. His use of IT is exceptionally good. He is dependent upon the Calendar and Reminder functions on his mobile phone and Apple watch to remind him of even family commitments. He becomes angry and distressed at unforeseen events, last-minute changes to schedule or when arrangements are changed without him being informed. He has strong religious belief, in his words "a high moral compass", and a heightened sense of right and wrong, which causes the difficulty in dealing with situations where rules are broken. He says "I cannot readily come to terms with the fact others may not automatically feel or display the same viewpoint, which can be the cause of friction. I have been accused of being 'black and white' in my thinking." Before us, he demonstrated this trait often ... In this, and some other, respects, a difficulty for any neurotypical observer or person with whom he is working is that characteristics he associates with Asperger's, are matters he has in common with some people who are not on the Autistic Spectrum at all... Even the claimant had not heard "black and white thinking' - which is why he objected to others using the phrase, until he "Googled" during the hearing and found this article by a person who has Asperger's*

***Asperger's and "Black and White" thinking.***

*This topic was suggested to me by a friend of mine who also has Asperger's. I have touched on the tendency of people on the autistic spectrum to think in terms of absolutes-what other people call "black and white thinking," but this is the first time I have dedicated a whole blog post to it.*

*Personally, I have always thought in absolute terms and this has an impact on my whole life. Things are either right or wrong-there is no middle area for me. There is a very fixed and rigid way in which I think. I am frequently accused of being pedantic, particularly in terms of language. I sometimes find myself unable to resist correcting someone in their*

*speech if I know that they have not said something in the correct way. I have cut down on this particular habit a lot because I know that it annoys people and I don't wish to intentionally annoy anyone but sometimes it just slips out. It also affects my morals (in a good way, I hasten to add!) I have very absolute ideas of correct versus incorrect behaviour and I still struggle to comprehend why other people behave in ways which can be so cruel and, in my view, morally incorrect.*

*This type of extreme thinking also affects my emotions. I am always liable to assume the worst in any given situation because, in my mind, if something is not the best outcome it can be, it is automatically the worst outcome. My mind doesn't seem to recognise the so called "middle ground". As a result, my life is an emotional roller coaster a lot of the time because, if something isn't the best outcome it can be, I am dealing with my own emotional fall out about it for a long time afterwards. I believe this is also why a lot of people with Aspergers identify as perfectionists-that personality type seems to lend itself to "black and white" thinking. Of course, it is also a personality type that I believe lends itself to depression a lot of the time too and a lot of people with Aspergers also experience intense depressive episodes, whether they have diagnosed depression or not. The connection between "black and white" thinking and certain mental health conditions is an interesting one and I would like to see more research into it.*

*Of course the majority of the world does not think or work in absolutes. There is lots and lots of "middleground" -something that is not allowed in one situation is then allowed in an ever so subtly different situation. This really confuses us and means we have to learn ever more complex social rules which can then change on a whim. To me, if something is illegal, it is illegal .... I have a love for rules and would never knowingly break these, which is probably one of the biggest reasons why I was considered a "teacher's pet" during my school years.*

*I know this type of rigid thinking can make us come across as very irritating- I have heard people with Aspergers referred to as "precocious" and "insufferable" due to the way that we think. I would ask anyone who is reading this who doesn't think in the way we do to imagine just how exhausting life is for us when we view everything in such extreme ways and struggle to see the "middle ground" Please try and support us through the emotional roller coaster that this type of thinking can cause and please try and appreciate this type of thinking does have its advantages too-we are often incredibly loyal and honest because of the way in which we view things.*

*The description given is remarkably close to the behaviours of the claimant with which the respondent had real problems. They did not know, and could not reasonably be expected to without being told, that black and white thinking caused the claimant not to see, let alone accept, others point of view, not to tolerate even minor breaches of "rules" and be unbending in his handling of staff performance and conduct.*

*3.11. A major problem in this case is his compulsion to work extended hours without a break, so he says and thinks "with no reduction in output*

*or quality ". One day he told us he had worked on preparing for this case until 5.45 am on one day of hearing. Probably the most important aspect of Asperger's for this case, is what he terms by one of two nouns" perseveration" or "perseverance". The verb is "to perseverate" (not "to persevere'). In the claimant case the way it is pronounced causes difficulties he describes thus:*

*'"Perseveration" means to respond in the same way repetitively, although it is not only about doing the same thing over and over, it is also continuing to do that thing past the point where it is reasonable to stop. Perseveration causes me to fixate on a task, which is particularly evident in my work: I will draft and re-draft a piece of work but am rarely satisfied with the result; and I can dwell for many minutes on a single element of punctuation, or for hours on matters such as page layout that most will never even notice (I will be aware of even a one point change in text size, or in the spaces between text- a difference of one seventy-second of an inch). I always use formal terms in my writing even when I know it is long-winded and affects reading comprehension: for example, one of the Respondent's customers is known to everyone as simply, "Dortech'; but my own writing always used the formal, "Dortech Architectural Systems Ltd. " even though I am aware that the long form adds nothing useful (moreover, I must check the entire document to see that its use is consistent throughout). Perseveration means that I become "stuck," neither processing nor progressing through a thought pattern, affecting both the time taken to carry out an activity and the way in which that activity is carried out".*

*3.12. We repeat many of the claimant's symptoms appear in neurotypical people. During 2008, he told Mr Orchard his son had been diagnosed with Asperger's and said "I think I have Asperger's and this is why I do some things" He gave Mr Orchard extracts from 'The Complete Guide to Asperger's Syndrome' by Tony Attwood, annotated by himself as to how Asperger's affected his working life eg …The person with Asperger's syndrome may need initial and continuing support from his or her employer regarding job expectations ... The employee with Asperger's syndrome will also need regular feedback confirming success" As will be seen the respondent viewed his behaviour as typical of a person who was ambitious and exceptionally interested in making more money.*

*…*

*3.16. The claimant states "those with Asperger's Syndrome set themselves such high levels of attainment that anything that doesn't meet that level can cause them huge amounts of stress and anxiety. The smallest mistakes can upset a person with Asperger's Syndrome for days, and they can have a lot of difficulty forgiving themselves" We call this* ***"perfectionism"*** *... The respondent did not, and could not reasonably have been expected to know without being told, perfectionism, which many people not on the autistic spectrum at all exhibit, may have arisen in consequence of Asperger's.*

*3.17. Despite the lack of medical evidence we accept the extreme manifestations of the above traits probably are something arising form Asperger's. As will be seen, the claimant takes black and white thinking, perseveration and perfectionism , which many neurotypical people exhibit*

*to a much higher level, but not so much so as to alert the respondent to the possibility he has a substantial impairment.*

45. Not only do we adopt the findings of fact in the Earlier Decision relating to Mr Scantlebury-Watson's AS but we also concur with Employment Judge Garnon's observations and findings relating to how Mr Scantlebury-Watson's AS affected his behaviour as a witness and in preparing his case (e.g. attention to detail, tendency to interpret questions in a literal manner and to observe matters in "black and white", over preparation (i.e. "perfectionism") and need for direction and rules from the Tribunal). We also noted his phenomenal memory of events relating to his employment. He was courteous in his cross examination of witnesses and in his interaction with Mr Wynn and the Tribunal. We saw no evidence of rudeness.

*When Protect My Property first became aware of Mr Scantlebury-Watson's disability*

46. Mr Scantlebury-Watson applied for the position of Customer Service Manager and was invited to attend a job interview with Protect My Property on 28 February 2019. He was interviewed by Mr Siddle and Mrs Makin. He was asked to provide a 5-to-10-minute presentation on what he would implement in the first month to drive a first-class customer experience. He was also quizzed at some length during his interview about his then studies for a CIPD qualification. There is no evidence that Mr Scantlebury-Watson made either Mr Siddle or Mrs Makin aware of his AS at any time during the interview. Furthermore, there is no evidence that he asked Mr Siddle and/or Mrs Makin to make reasonable adjustments at his interview.

47. Mr Scantlebury-Watson started working at Protect My Property on 18 March 2019. He attended an induction which took place over several days. Mr Foot was in Newcastle for three or four days at the time of the induction and, in his oral evidence, he recalled that he spent several hours with Mr Scantlebury-Watson assisting him with his induction. Mr Siddle was also involved with the induction process by telephone. Mr Siddle was on leave at the time and his involvement with the induction was minimal.

48. There was no evidence to suggest that Mr Scantlebury-Watson made Mr Foot aware of his AS during the induction.

49. On 8 April 2019, Mr Scantlebury-Watson completed and MDS Equal Opportunities Monitoring Form [188]. He indicated that he considered himself to be disabled (i.e. by ticking the box "Yes"). In the form, if he ticked the box "Yes" he was asked to state the nature of his disability. He did not do that. Consequently whilst he said that he was disabled, he gave no indication of the nature of his disability. We note that the purpose of the form was stated as follows:

> *This information is used only for monitoring purposes. If you have a disability, or want to discuss any reasonable adjustments, please contact your line manager and/or the HR Department.*

50. The date upon which Protect My Property first became aware of Mr Scantlebury-Watson's disability is disputed. In the Amended Grounds of Resistance, Protect My Property says that it first became aware of Mr Scantlebury-Watson's disability in January 2020. Mr Scantlebury-Watson says that the first date upon which it became aware was 28 May 2019. We accept Mr Scantlebury-Watson's version of events for the following reasons:

    a. Notwithstanding the fact that Mr Scantlebury-Watson did not disclose the nature of his disability in the MDS Equal Opportunities Monitoring Form he subsequently told Mrs Makin about his disability. Mrs Makin was the first person at Protect My Property to know about Mr Scantlebury-Watson's disability. In her witness statement, she says that she cannot recall the date, but she remembered that it was very close to her leaving date (i.e. 31 May 2019 when she went on maternity leave). In her oral evidence, she said that she did not have her notes of the meeting at hand and could not remember precisely when the conversation took place. However, in his witness statement, Mr Scantlebury-Watson says that he met with Mrs Makin on 28 May 2019 and her told her then about his disability. Mrs Makin also recalled that because she was about to go on maternity leave, she told Mr Millward about her conversation. This was not challenged in cross examination, and we have no reason to doubt what Mr Scantlebury-Watson has said about the timing when Protect My Property first became aware of his disability.

    b. On 29 May 2019, Mrs Makin confirmed to Mr Scantlebury-Watson over the telephone that Mr Millward would be reaching out to him and disclosed that he was the Disability Champion from his previous role at Network Rail.

51. There were differences in perception about the extent of Mr Millward's expertise or training in disability related matters. In his oral evidence under cross-examination, Mr Millward denied that he had been a Disability Champion, but he admitted that he had written on disability awareness and that he had relatives who suffer from disabilities. He said that he had a keen interest on disabilities. He remembered having a conversation with Mr Scantlebury-Watson but could not recall when. In Mr Scantlebury-Watson's witness statement, the conversation is stated to have been on 10 June 2019 (this was not challenged in cross examination). Under cross examination Mr Millward did not remember the details of what was said, but he recalled that Mr Scantlebury-Watson spoke about reasonable adjustments and told Mr Millward that he had a really good "handle on it" (i.e. his disability).

52. There was disputed evidence about when Mr Siddle first became aware of Scantlebury-Watson's disability and whether there was any discussion about reasonable adjustments. Under cross-examination, it was suggested by Mr Scantlebury-Watson that he had disclosed the fact of his disability in the MDS Equal Opportunities Monitoring Form, and that Mr Millward had recalled speaking to Mrs Makin about the fact that a new Customer Service Manager (i.e. Mr Scantlebury-Watson) had a disability. It was put to Mr Siddle that in addition to disclosing his disability on the form, he had asked him for reasonable adjustments twice and Mr Siddle had been briefed by HR and did nothing. Mr Siddle denied this and said, in response, that the first that he had become aware of his disability was when it was mentioned to him in passing.

He understood that Mr Scantlebury-Watson had been tested for AS and then asked him what reasonable adjustments he could make to which Mr Scantlebury-Watson said that he had lived with the condition for 40 years and had developed coping strategies. By implication, what Mr Siddle was saying was that Mr Scantlebury-Watson did not need any reasonable adjustments to accommodate his disability. We accept Mr Scantlebury-Watson's version of events to be correct as there is a contemporaneous note of the discussion that made by Mr Scantlebury-Watson [528]. This is a record of a meeting that took place with Mr Siddle on 12 July 2019. Contemporaneous evidence usually carries more weight than recall of events months later as memories fade. Contemporaneous evidence is generally more reliable. The note appears to be an accurate summary of the discussion and reads:

> *Meeting with Stock Room with Sven to discuss Disability. Sven arrived unannounced-despite my having told Simon sudden change is especially difficult for me-and I was not prepared. I asked for feedback on my performance so far and was told "Everything is cracking, really like what you're doing". We discussed my disability and I mentioned the Adjustments that I had discussed Simon Millward. Sven intimates that he believes he has autistic traits also (he says, "Hey" then gesticulate towards himself; presumably he means, "Me as well"?) But does not elaborate further. Sven said that it wouldn't be an issue, I could choose to tell the other Managers or not, whichever I preferred, and on feedback said, "I don't micromanage, if you don't hear from me then everything is fine". I said that I needed more structure than that, that I didn't have a Job Description and that looking back at the job listing which I still had a copy of, that didn't relate to the duties I was carrying out. Sven Siddle said, "I'm sure you have a Job Description, we wouldn't have been able to advertise the role if not. Leave that with me and I'll sort it". I suggested regular updates, perhaps monthly, Sven Siddle said, "Send me what you want"- again not especially helpful. Expressed issues to date, gave suggested adjustment, same as per meeting with Simon, was in turn asked for "Top 10" things I require (but brief not explained beyond that and clarification sought over coming days).*

We are satisfied that Mr Scantlebury-Watson first made Mr Siddle aware of his AS on 12 July 2019 and raised the issue of reasonable adjustments during that conversation. There is nothing to suggest that he had been coping with the condition for 40 years as claimed by Mr Siddle. It is implausible that Mr Scantlebury-Watson would have said that given that he had been diagnosed with the condition in 2015 (i.e. approximately four years prior to the conversation taking place).

*Reasonable adjustments – the PCP of not providing Mr Scantlebury-Watson with a job description which clearly defined his role*

53. There is disputed evidence on whether Mr Scantlebury-Watson was provided with a job description which clearly defined his role. Protect My Property say that he was provided with an adequately defined job description. On the evidence, we agree with Protect My Property for the following reasons.

54. The starting point must be a workable definition of "job description." The online Oxford Dictionaries definition is:

*A job description is a formal account of an employee's responsibilities.*[2]

55. Another definition is:

*A job description is a document intended to provide job applicants with an outline of the main duties and responsibilities of the role for which they are applying*[3]*.*

56. On 22 February 2019, Candidate Source Limited, an advertising agency, posted an advertisement online for the position of Customer Service Manager for Protect My Property [157]. Mr Foot was asked to assist with putting together the job description for the role was advertised. In his witness statement at paragraph 16, he explains that Protect My Property has a recruitment process requiring senior management to sign off (i.e. agree) the position. He goes on to say that before any position can be advertised, internally or externally there must be a job description. Protect My Property's recruitment team will not recruit any position without the correct managerial sign off and without the correct paperwork including a full and detailed job description. Under cross-examination, Mr Foot explained that his role relating to the advertisement and subsequent restructuring exercise was limited to the technical aspects of the position.

57. We note that in the advertisement, the headline salary rate was £27,500 per annum and the position was located in Newcastle. The advertisement stated, amongst other things:

*Description*

*A growing security services business based in Newcastle upon Tyne is looking for a Customer Service Manager to have the overall responsibility for the function with a clear focus on retention and new sales.*

*You will be reporting to the head of the company and your line manager as well as providing support to marketing and sales initiatives. For doing this you will receive a range of fantastic benefits including a bonus scheme and a company pension scheme.*

*As a Customer Service Manager, your daily duties will include:*

- *Taking responsibility for PNL and managing the office budget.*
- *Accountability and ownership of contractual and regulatory KPI's and SLA's.*
- *Managing relationships with third parties and stakeholders.*
- *Interacting with corporate clients and consumers.*
- *Taking ownership of processes and procedures and continuously reviewing them to drive efficiencies.*
- *Resolving complaints.*
- *Having a clear focus on retention and new sales.*

[2] https://uk.search.yahoo.com/yhs/search?hspart=trp&hsimp=yhs-001&type=Y149_F163_202167_071621&p=definition+of+job+description&rdr=1
[3] <https://www.wikijob.co.uk/content/application-advice/job-applications/what-job-description

*To be a successful Customer Services Manager, you will have the following skills and experiences:*

- *Previous experience working with internal and external customers.*
- *Previous experience in conflict resolution.*
- *Previous leadership experience.*
- *A commitment to continuous improvement with a proactive approach to problem-solving and driving efficiencies.*
- *The ability to work well under strict SLAs and KPI's.*
- *The ability to work collaboratively with key stakeholders.*
- *Excellent verbal and written communication skills.*

58. We have no hesitation in finding that the advertisement for the position of Customer Services Manager was a job description. Whilst we accept that it is not something of a high-level description of what a successful candidate would be expected to do, if they took the position of Customer Service Manager it does, nonetheless, set out a formal account of the key responsibilities involved with the role. At that juncture, Mr Scantlebury-Watson would have understood what the job entailed notwithstanding his AS. After all, he had applied for the position and attended the job interview. He was quite capable of making an informed choice on applying for the role, based on the information set out in the advertisement.

59. His job interview was successful, and he was offered the position of Customer Service Manager on 1 March 2019 and received his contract of employment and other enclosures on 8 March 2019 [158]. The commencement date of his employment set out in his contract of employment was 18 March 2019. His offer of employment was subject to the successful completion of a 3 months' probationary period. In other words, his probationary period ran from 18 March 2019 to 18 June 2019.

60. In paragraph 6 of his witness statement, Mr Siddle states, amongst other things, that during his probationary period, at no time did Mr Scantlebury-Watson ask him for a copy of his job description "not during individual or team meetings, not by email or by text message". Whilst Mr Scantlebury-Watson cross examined Mr Siddle on paragraph 6 of his witness statement he did not challenge that particular aspect of his evidence. We have no reason to doubt what Mr Siddle says regarding the job description.

61. On 15 March 2019 Mr Foot sent Mr Scantlebury-Watson an induction plan in preparation for starting his employment.

62. During his induction, Mr Scantlebury-Watson's job duties were expanded upon and confirmed by Mr Foot. We are satisfied that he had a job description which adequately set out his duties at that juncture.

63. During the meeting on 12 July 2019, Mr Scantlebury-Watson told Mr Siddle that he thought that he did not have a job description. However, we do not accept that this is correct. When he applied for the job, he would have seen the description of the role in the advertisement. Furthermore, we accept Mr Foot's evidence that he provided Mr Scantlebury-Watson with more detail about the job description during his induction.

64. In paragraph 8 of his witness statement, Mr Siddle states, amongst other things, that Mr Scantlebury-Watson saw the advertised role detailing the job description and elected to apply for the position. He goes on to say that he was fully aware of his role and responsibilities and if he was ever unsure, he had ample opportunity to obtain clarification and had demonstrated no difficulty in asking him or his colleagues questions about other matters. Mr Scantlebury-Watson cross examined Mr Siddle on paragraph 8 of his witness statement, but his challenge was not directed against that assertion but other issues such as the difficulties that a person with autism would have with coping with spontaneous meetings. However, we do accept that during the meeting on 12 July 2019, Mr Scantlebury-Watson told Mr Siddle that he did not have a job description. For the reasons that we have already given, as a matter of fact, that is incorrect. He did have a job description.

65. If there was any doubt about whether the job description provided to Mr Scantlebury-Watson in the advertisement or during his subsequent induction was inadequate, any such doubt was dispelled by 14 January 2020, at the latest, when he was provided with a further job description [383]. We have highlighted the additional information on responsibilities, duties and KPIs set out in this document in comparison to the original job advertisement. It states, amongst other things:

***Role Responsibilities***

*The Customer Care Manager will have the overall responsibility for the customer service function with clear focus on customer retention and new sales whilst providing direction to the Customer Service Lead. You will also provide support to marketing and sales initiatives. The Customer Service Lead will report directly into the Head of Protect My Property and will have the Customer Service Lead as a direct report.*

*In return, the successful candidate will receive a competitive package of:*

- *Basic salary of £27,500*
- *Bonus entitlement-on target bonus scheme*
- *Company Pension Scheme*
- *40 hours per week (core office hours with requirement to be flexible)*

***Duties***

- *A degree of PNL responsibility and managing office budget*
- *Accountability and ownership of contractual and regulatory KPIs and SLAs*
- *Relationship management of third party stakeholders*
- *Interaction with corporate clients and consumers*
- *Ownership of customer services processes and procedures*
- *Continuously reviewing processes and procedures to drive efficiencies within customer services*
- *Complaint resolution*
- *Clear focus on customer retention and new sales*

***KPIs***

- *Customer satisfaction scores*
- *Call handling statistics*
- *Complaints*
- *Cancellations and Retention*
- *New contract and product sales*
- *Industry regulatory KPIs*
- *Customer contractual KPIs*

66. During a return-to-work interview held on 18 March 2020, a transcript of which has been produced [437] and which was attended by Mr Scantlebury-Watson, Ms Gallagher and Mr Siddle, various things were discussed including Mr Scantlebury-Watson's job description. We note the following:

> *SS says the thinking is that DSW's role is in his JD, that there has been some progress with the team, there are lots of new faces in the team, we'd had to grow the team to take on the new business that has come on since DSW went on the sick, that Nicola [O'Shea, CSTL] obviously manages the team, and what he wants DSW to do is to manage Nicola based on KPIs and performance stats and he is there to drive CS improvements.*
>
> *…*
>
> *SS explains, that the remit is CS, and he doesn't want DSW getting dragged into other stuff that is going on, the new business particularly, unless it needs a CS focus, but that's a nice, not necessarily narrow scope, but a clear and well-defined scope of what we want to do is the way forward. DSW says that it is, but that the JD, "doesn't really bear any resemblance to the job as it has been to this point and it is possible to look at because, it's, for example, and-just give me a second I'll pull a document up-when I met with Simon on this just on the initial discussions around my disability and how I didn't quite gauge what I was supposed to be doing, he asked me if I could put down a document which was, what your job is and how it differs from the JD. Which, this was quite a long time ago and nothing was heard of thereafter, but…". SS says, "Okay, could you share that with me? Because that would definitely help" …DSW says he is looking for the document on his laptop as we speak, does not located, but says he can get it and share it with SS, and notes, "there was quite a considerable amount of difference between… Well, actually, it wasn't a JD at the time because I didn't have it, it was the Job Listing for the recruitment of my role and it did differ quite significantly, such as responsibility for P & L which obviously I haven't got, there were various things on there which really it didn't give me any basics to come from, so if I can get that over to you and you can look at that, and see what you think, that would be helpful". SS agrees with, "no worries."*

67. Finally, we think it important to refer to a line of cross examination pursued by Mr Scantlebury-Watson in respect of Mr Foot's evidence relating to his role in drafting the job description both at the stage when the position of Customer Service Manager was originally advertised, and in a subsequent restructuring exercise [156a-156f, 383]. We believe that the line of questions pursued by Mr Scantlebury-Watson by making a distinction between an advertisement,

which on the one hand refers to things such as the qualities that an ideal candidate should have and proposed salary, and on the other, a job description which only identifies duties and responsibilities is not meaningful. What we are concerned with is whether Mr Scantlebury-Watson had a job description. Clearly, an advertisement for a position will not only provide details of the job (i.e. duties and responsibilities) but also give an indication of the salary and other benefits together with the qualities that an ideal candidate should possess. It assists a potential candidate in deciding whether to apply for the job. We believe that an advertisement is perfectly capable of being labelled as a job description under such circumstances. The fact that subsequent iterations of the job description provided to Mr Scantlebury-Watson continued to refer to such matters as salary and the qualities that an ideal candidate should possess do not detract from the conclusion that it is still a job description if duties and responsibilities are also listed. At its highest, it could be said that Protect My Property failed to "clean up the document" to reflect the fact that Mr Scantlebury-Watson had moved from being candidate for to becoming the Customer Service Manager. This is no more than poor document management and does not detract from the fundamental nature of the document being an adequate job description.

*Harassment – issues between Mr Foot, Mr Siddle, Ms Barry and Mr Scantlebury Watson*

68. Mr Scantlebury-Watson has set out what he considers to be numerous examples of harassment in his diary of events, his witness statement and in his amended particulars of claim. We have reviewed these carefully. We have selected what we consider to be the main examples of harassing behaviour. However, for the reasons given below, this claim is out of time. However, our findings of fact are relevant in that they provide important context to the quality of the relationship that existed between Mr Scantlebury-Watson, Mr Siddle, Mr Foot and Mr Eglen and also in relation to his claim to have suffered unfavourable treatment arising from his disability.

69. In paragraph 26 of his witness statement, Mr Scantlebury-Watson states that on 26 April 2019, Ms O'Shea informed him that Mr Foot had been making disparaging remarks about him. Mr Scantlebury-Watson called Mr Foot's mobile to make him aware of that and that he would not accept him criticising him to anyone, especially not members of the same team. Mr Scantlebury-Watson explained that he preferred to meet such issues head-on, and that Mr Foot should come to him with any issues and not talk about him to others. Mr Scantlebury-Watson also informed Mr Siddle about the discussion. Mr Scantlebury-Watson goes on to say that Mr Foot called him on 29 April 2019 to apologize for his behaviour.

70. In paragraph 6 of his witness statement, Mr Foot acknowledges that he had "vented" out of frustration to Ms O'Shea because of an email that he had received from Mr Scantlebury-Watson. He also acknowledges that he apologised to Mr Scantlebury-Watson. However, he says the apology was for "venting" and not for making negative remarks as alleged. Under cross-examination, Mr Foot was unable to remember what the email was that caused him to "vent." Furthermore, he accepted that the alleged email was not in the hearing bundle, but he said, that from memory, Mr Scantlebury-Watson had always written long, and irrelevant emails and he could only

assume that it must have been one of those which he had found frustrating. Furthermore, he accepted that he had been close friends with Ms O'Shea for many years and that they had worked well together. However, when he was asked what her motivation would have been for saying that he had been making uncomplimentary remarks about Mr Scantlebury-Watson he was unable to answer the question. He was then cross-examined about what he meant by "venting." His response was to say that it was difficult to remember, and he once again referred to the many frustrating emails that he had received, and it was difficult for him to understand their relevance. Mr Scantlebury-Watson then put the Oxford English Dictionary definition of "venting" to Mr Foot which is to "express emotion" in a way that is "forceful and unfair." In response, Mr Foot said that he had not been unfair and said that he accepted that he was frustrated, and that he did not know about his disability. It was then put to him that he had ranted to colleagues and friends, one of whom was a direct report of Mr Scantlebury-Watson. Mr Foot accepted that. Having considered the evidence, we have no reason to doubt what Mr Scantlebury-Watson said in his witness statement and it was not challenged under cross-examination. We find that Mr Foot had been making disparaging remarks about Mr Scantlebury-Watson to Ms O'Shea, as claimed. Whilst we have not seen the long, rambling, and irrelevant email in question, we are prepared to accept Mr Foot's evidence that it was this that caused him to be frustrated and to "vent" to Ms O'Shea. It is also telling that in paragraph 11 of Mr Foot's witness statement he says:

> *It is fair to say that the Claimant and I, unfortunately, did not have a good working relationship. I believe the cause of this was due to the Claimant's own behaviour and actions.*

We believe that it is reasonable to infer from when Mr Foot speaks about what triggered his irritation and caused him to "vent," he was reacting to Mr Scantlebury-Watson's "own behaviour and actions" he was referring to his tendency to "Perseveration" and perfectionism which is an integral element of his AS. However, some credit must also be given to the fact the Mr Foot apologised to Mr Scantlebury-Watson for his behaviour. Nonetheless, given what triggered Mr Foot's irritation and the fact that he spoke about it to Ms O'Shea it was reasonable for Mr Scantlebury-Watson to find this conduct to be humiliating, hostile and degrading. It was clearly unwanted conduct.

71. Despite the apology, relations between the two men do not appear to have got into equilibrium and Mr Scantlebury-Watson wanted to resolve matters with Mr Foot. In his amended particulars of claim [107] Mr Scantlebury-Watson alleges that Mr Foot had been asking Ms O'Shea about his outputs and had said to her that Mr Scantlebury-Watson had been, "pissing people off in HR". In paragraph 37 of his witness statement, he describes these as "derogatory remarks about me". He then goes on to say that this was a gross distortion of a single email exchanged that he had had with James Fatherley, Head of Resourcing. In his amended particulars of claim, he then refers to further text messages that were uncomplimentary about Mr Scantlebury-Watson which had been sent to Ms O'Shea across the course of the day that she had complained to the Mr Scantlebury-Watson about, as these were causing her to feel uncomfortable. On 30 May 2019, he sent an email at 13:59 hours [298] in response to an email that he had received from Mr Foot at 13:45 hours same day. This related to the progress that Mr Scantlebury-Watson was making in his work. Mr Foot had said that he believed that they

were on track and making good progress and they needed to ensure that they would deliver what had been promised. In response Mr Scantlebury -Watson said:

> *I'm pleased to hear that. If I'm honest I have worried that you thought I was making excuses for the slow progress rather than having valid reasons for the same. We as a Team (and I include myself in that) have probably underestimated the amount of work involved post-reorganisation: trying to deal with the Woven issues, general personnel stuff in integrating and upscaling the teams, preparing for Nicola's SPL, up skilling Cliff, recruiting the missing to etc. I just have to be more disciplined and remove myself from the main office more often, because I can't be everywhere all of the time.*
>
> *Being frank, what are your frustrations? Feedback is a gift and I prefer to know where I stand.*

72. Clearly, Mr Scantlebury-Watson believed that he had been frustrating Mr Foot and wanted to know why. Mr Foot replied to that email on the same day at 15:20 hours. He said, amongst other things:

> *Don't worry, things are moving forward which is a positive. And if you do please call me or email me if I can help with anything.*
>
> *We are all busy and there is so much going on and so much change, I doubt that will ever stop to be honest with ongoing recruitment, marketing, new product and so on.*
>
> *I have many frustrations, I just want this business to move forward and be successful, there are often things in the way or people with other priorities, or building packs for Simon etc, I've long lost sight of what my day job is:)*
>
> *The only feedback I would give to you would be to try and present information back to Sven (and Myself) in a high level, brief format. I know from working with Sven for a long time that likes information being to the point, in a high level, brief format and the same sorta goes for me… Whilst I know there will be much detail in the background that can be called upon if needed, presenting a much more streamlined version of your requests, efforts or actions would help get the message across and things moving quicker.*

73. Mr Scantlebury -Watson replied to that email on the same day at 15:27 hours. He said:

> *Thanks Craig, I'll take that on board.*
>
> *Working on the retentions toolkit, I'm finding more opportunities to improve our figures but there ones that will need our T & C's rewritten. Include or exclude?*
>
> *Thank you*
>
> *Darren*

74. Mr Foot replied on the same day at 15:52 hours by simply pasting the link to the terms and conditions referred to by Mr Scantlebury-Watson.

75. In essence, what Mr Foot was looking for was more precise and shorter communications with himself. This corresponds with what he said under cross-examination that Mr Scantlebury -Watson was often prolix in his emails and needed to be more focused. Indeed, Mr Scantlebury-Watson acknowledged that feedback in his response at 15:27 hours. There is no suggestion in the tone of Mr Scantlebury-Watson's reply that he was in any way upset or regarded the feedback as unwarranted. Indeed, he accepts the comments and agrees to take them on board, and he thanks Mr Foot for providing that information.

76. Whilst the tone of the email exchanges between Mr Foot and Mr Scantlebury-Watson was businesslike, we note that Mr Wynn did not cross examine Mr Scantlebury-Watson on paragraph 37 of his witness statement concerning the derogatory remarks that Mr Foot had been making to Ms O'Shea. We have no reason to doubt that Mr Scantlebury-Watson was offended by what had happened particularly when he uses language such as "a gross distortion of a single email" and that he was "pissing people off in HR." We think it reasonable to infer that the level of the offence was such as to amount to being hostile and intimidating particularly regarding the fact that Mr Foot had made the remarks to Ms O'Shea who reported to Mr Scantlebury-Watson. It was clearly unwanted conduct it also undermined his position with Ms O'Shea.

77. In paragraph 53 of his witness statement, Mr Scantlebury-Watson states that Mr Foot would continue to make assumptions about or second-guess his duties. He also says that he continued to be difficult or argumentative without any reason to be so and refers to an email exchange that took place on 29 October 2019. The email exchange related to a technical manual. Mr Scantlebury-Watson had emailed Mr Siddle on 29 October 2019 21:47 hours in which he referred to Ms O'Shea mentioning in passing that Mr Foot would be writing a Technical Training Manual. He then goes on to say that he had finished the new Woven manual on Monday which ran to approximately 5500 words, much of which was technical, and he suggested that it could be reused to save work (i.e. incorporated into the technical manual). At 22:23 Mr Foot responded in an email in which he said:

    *First I've heard of this?*

    *Darren, if you have written a technical manual for woven then by all means re use it.*

    *Regards*

    *Craig*

78. At 22:50 hours on 29 October 2019, Mr Scantlebury-Watson emailed Mr Foot in the following terms:

    *Hello Craig,*

*It's a generic OOH manual (so: Customer Engagement; Tesseract; Technical support, National Grid, LRP) and where Technical Support is concerned only goes as far as what we want Woven to do.:*

*[A table is reproduced in the email]*

*It's a good foundation for a Technical Manual, but it isn't a replacement for one.*

*kind regards*

79. Mr Foot replied on 29 October 2019 at 22:51 hours in which he wrote:

*I'm sure what you are asking Sven in your original email in that case, as the content and questions in the email seem aimed at me?*

80. At 22:55 hours 29 October 2019, Mr Siddle replied saying "Chill, I'm on it".

81. Because of this email exchange, Mr Scantlebury-Watson telephoned Mr Siddle the following day to complain about Mr Foot's behaviour. In paragraph 53 of his witness statement, Mr Scantlebury-Watson said that he had suffered ill-treatment for months but was not prepared to continue to do so any longer. He says that if Mr Siddle did nothing to address the matter, he would consider making a formal complaint. This aspect of Mr Scantlebury-Watson witness statement was not challenged under cross-examination and we have no reason to doubt the strength of feeling about Mr Foot's behaviour that he was feeling.

82. Matters developed quickly because in paragraph 54 of his witness statement, Mr Scantlebury-Watson refers to a meeting that took place on 30 October 2019 in the stockroom. Mr Siddle and Mr Foot were present at the meeting. Mr Scantlebury-Watson kept a diary of events from 28 February 2019 and an extract is referred to in his witness statement which is relevant to that meeting [530]. The relevant extracts from the entry are as follows:

*Sven says: "Yeah, we just need to make sure that we…we're all the same page and no more falling out, we're too small a bloody team." I say, it's not falling out, and, to Craig "if you don't mind me saying so, the majority of interactions between you and I are -ones and everything I send through to you is an opportunity for you to instantaneously come back to me and pick fault with it and I wonder what the problem is. Sven is here, so I might as well get it out in the open"*

*"where's the picking fault"*

*"if we have, if I am asked to do something, will take the review of the documentation as an example, I get an instantaneous answer with what I've done wrong, but no feedback on the rest of it. Or, if I find out there's a training manual to be written and I offer you 5500 words worth of work, that somehow is a negative".*

*…*

*"I'm not asking you to set policy, I'm asking for your opinion because it's valued, and we are a management team so if it's a policy that affects how we deal with things, I would expect us all to have an input."*

*"Me answer is then to not respond straight away and read everything in one long email which takes a long time to get through so yeah I can do that."*

*"There is a level of detail there that is necessary because it's a detailed document. I don't have any parameters that I'm supposed to be working in either so I answer everything that I think is relevant. If you want to set me smaller parameters, no problem, I'll work within those".*

*"Well that's not my place to do so is it? So…"*

*"Okay. [exasperated] Even now I feel there some kind of barrier… I really need to know what the problem is Craig because I… There something that you don't like and I'd rather find out what it is and what I can do differently because I've been here before and I've had exactly the same conversation which is, if I'm doing something wrong then tell me how I can improve, if there's something you don't like then tell me and I can change it, but what I can't have is this feeling of literally every interaction seems to be negative and instantaneous, like, there's another opportunity to point out the bad stuff. That may be my perception but that's how it feels."*

*"Okay, I get how you feel, it's just me giving my point back, negative, as my opinion is going to be negative as you put it because it's a different opinion isn't it?*

*"Okay, well, if I've picked it up wrong…"*

*"I do respond to emails quickly especially ten o'clock at night, so maybe getting them at 10 o'clock at night isn't a great idea".*

*"It isn't, but if it's my choice to do…"*

*"You can Schedule Send though, if you want to, so people aren't seeing them that time of night."*

*"If you want me to do that I can do that, but I will work when I work, I'm not expecting anybody to answer any time other than in work hours."*

*…*

*"And my reaction late at night maybe it's different because it's late, I've had a hard day, I've done what I've done and I see something and perhaps I give a reaction, I know fire off on emails I know I do, you know uuurrr, so you know, don't send the 10 o'clock".*

*"Okay I can do that."*

*"But it's no way negative at you, I'm just commenting on things I see that our…"*

*"Wrong? I don't take offence at the word wrong. If they're wrong, they're wrong. It's fine"*

*"… And I tend not to comment on things that I think none of my business. My problem is I get dragged into everything* ***and I'm not sure what is my business and is not any more I suppose sometimes."***

***"****that's a fair point because* ***I'm the same, I don't know where any job in here, particularly the Management team, begins and ends. Shawn's is reasonably well defined; the rest, well,*** *I've done a training manual, you're apparently going to do a training manual, we've got a Training Manager, as one small example. Were either all involved, someone is involved or whatever, and this may be because of where I've worked in the past but for me a Management team works together, we all share, we collaborate, we ask each other's opinions, we draw on each other's experience and that's what I try and do but I feel it's kind of, "What are you asking me for?".*

*Sven: "Completely. I'm a bit baffled as to why you've done [the training manual] because I would have batted it straight back to Kevin "the manual you've created Kevin ain't fit for purpose, it's not doing X, Y and Z, can you take it away and have a look at it". Just to save you the time. I wouldn't have put that on your shoulders. Great that you've done it, don't get me wrong, but I'd have passed that to Kevin. Or Craig, being Technical."*

*Craig: "I don't even know where that's come from."*

*Me: "well, that's come from Nicola, who came to me on what was coming up and said you were working on one. Another thing she said was and please don't take this the wrong way but I don't know why these questions are coming to me, they should be coming to you. And I say, I don't have a problem with them coming direct but that's awkward because she doesn't see where she fits in the whole thing as well, that's difficult for her".*

*Sven: "This was only mentioned in passing around Woven where she said, I don't think the training manual is that great. There was no great discussion."*

*Me: "I think I did say in my email, "in passing." My position here is, as it always will be, "hold on, I've done a body of work here, let's save someone else that work."*

*Sven: "And I would be the [same?] And I think you are both similar in that. I would say, "does this sit with me and where does it belong"?*

*Craig: "I'm trying to do the same, the point I'm making is I'm not commenting because I don't want to get involved…"*

*…*

*Sven: "two things we need to do better. Communication, I wasn't aware you were doing that particularly and Craig wasn't."*

*Craig: "I think we've been totally sidetracked with Woven stuff for three or four months."*

*Sven: "So there's a communication piece to work on their. And also, using the stakeholders we have got in the business to best advantage. There is some of that no doubt you would or could have struggled with from a technical perspective, and we've got Craig here who is DSC technical for God knows how many years. So we need to use our best resources and to work as a team, that's to take away from it. We're too small a business… So we need to draw a line in the sand and move on and try to work better together."*

*Craig: "I haven't fallen out with nobody there is no personal issue, there is no personal thing, I'm not having a dig at you, I'm just doing what I do, I'm sorry if you feel that way."*

*Me: "well, I'm sorry about the way it has been perceived. But, and I would rather get it out in the open, this is against a background of, "I don't know what he does all day" which is quote-unquote what you have said to Nicola in the past. Which is when I'm up to my eyes and working…"*

*Sven: "have we got an issue here with Nicola?."*

*Me: "no, we have not got an issue with Nicola. Nicola has an issue that she has a boss who really values her contribution and get on really well with her; and we have Craig who she has known for years and has a really good personal relationship with. And she feels in the middle of it. So, when something like that comes back she feels duty bound to say, "Do you realise? … But keep me out of it" or whatever; but keep me out is very difficult when it is something as, you know, what the Hell do I do all day. Okay, "hell" is my addition there; but "what the Hell I was doing all day" Craig, was that I was trying to reorganise the whole Contact Centre and if you want to see how many hours I had to put in to get that job done, then you're more than welcome to look at my timesheets. If you've got a problem, come and talk to me about it. Don't talk to anyone else about it, and especially don't talk to my staff about it because, even on a personal level, I don't want that getting back to me. I put a bloody good shift in and I don't have to justify myself to anyone other than (points to Sven) and that guy there. And I'm pretty confident he's happy with what I'm doing.*

*…*

*Me: "I'm being flippant there, but you know, if it's wrong I know I'll hear from you. You Craig, not so much. Again I gave everybody the option, do you want to be on the circulation list or not, I get the feeling it has been driving you and Shawn mad, Shawn does need to be (on" a little bit and you probably not with everything else you have on, so the option was there for you to say take me out which we did, but the fact that you are out doesn't exclude you from this is a big policy decision guys, am I doing anything wrong here?".*

*Craig: "no, my out on the daily emails was if there is something that happens I'm sure I'll get to hear about it so it's pointless getting an email every day where I sort of go (gestures screwed up face…"*

*Me: "and again, trying to keep the emails down and succinct, on that one it sort of is this right on the Technical stuff? So if you'd said may be, I think you're being a bit too easy on them in month one because they should be doing that anyway, then I would take that on board.*

83. The extract quoted above clearly indicates that there was a robust discussion between the three men. It also points to problems with communication between Mr Foot and Mr Scantlebury-Watson. We also note that there was a continuing issue with Mr Scantlebury-Watson's emails which he recognised that he needed to keep down and succinct. In paragraph 54 of his witness statement we get an insight into the "temperature" of the meeting which could not be conveyed purely in terms of the transcript. Mr Scantlebury-Watson says that during the meeting, he was conciliatory and constructive whereas Mr Foot was sullen and combative, though he did improve as the conversation progressed. Mr Scantlebury-Watson is critical of Mr Siddle in that he accuses him of playing little part in the discussion other than trying to wind it up with saying that the business was too small, and they needed to draw a line in the sand and move on and try and work better together. Mr Scantlebury-Watson saw that as de-personalising the issue away from Mr Foot and when he raised the manner of what Mr Foot had been saying to Ms O'Shea rather than addressing it with Mr Foot, Mr Siddle asked "have we got an issue here with Nicola?." Mr Scantlebury-Watson characterises this response as deflection and goes on to say, "that I could not quite believe then, and still cannot now". He also says that at the end of the meeting Mr Siddle said to him that he should let him know if he had any more problems with Mr Foot. In other words, he was acknowledging that Mr Scantlebury-Watson had a problem with Mr Foot and that it had been ongoing. Mr Scantlebury-Watson was not cross examined on this aspect of his evidence and we have no reason to doubt the strength of feeling that he felt regarding the meeting. Deflection of the issue and playing it down in the manner suggested quite clearly offended Mr Scantlebury-Watson and continues to offend him.

84. In paragraph 56 of his witness statement, Mr Scantlebury-Watson alleges that in early December 2019 he was alerted to an internal vacancy by a colleague. He believed that the role was similar to the listing for his own role, but it had a 17% higher starting salary. He applied for the position and was shortlisted but heard nothing further. After his employment ended, he made a Subject Access Request only to find that the job application was not in his HR file. He goes on to say, "it remains my position that Mr Siddle had been made aware of my application and that it was he who ensure that it would go no further." This is a serious allegation, and we would have expected Mr Siddle to address it in his witness statement. He has not done that. Furthermore, Mr Scantlebury-Watson was not cross examined on the allegation. We have no reason to doubt that he applied for the position and that he was shortlisted. We find it suspicious that his application and the decision to shortlist him was no longer in his HR file as claimed. We are prepared to accept that Mr Siddle had decided that the application would go no further as claimed.

85. In his amended particulars of claim [105], Mr Scantlebury-Watson alleges that on 9 December and into 10 December 2019, Mr Foot made unreasonable demands of him as to the readiness of a new product launch (for a launch date that was never previously advised to him) and gave a wholly misleading impression of that situation in the circumstances leading up to that point to Mr Siddle that led Mr Scantlebury-Watson to respond:

> *If you are unhappy with any aspect of my performance or if you feel that I have in any way neglected my duties then I suggest you raise your concerns with Sven.*

86. Mr Scantlebury-Watson then alleges that he made efforts to discuss the situation with Mr Millward on 9 December 2019 but had not been made aware that he was on annual leave and his Hangout (i.e. message facility) went unanswered. He claims that he made Mr Siddle aware that there were concerns around his team's ability to support the new launch as no one had had been given even basic sight of the website that was apparently due to go live within three days. He alleges that when he informed Mr Siddle that he had asked Mr Foot to share that information back in October 2019 he had been rebuffed with the following response:

> *I do not… see the benefit this would bring to your team and planning process*

87. Mr Scantlebury-Watson then alleges that the following morning he received an email from Mr Siddle asking for the "technical pack for your training team" which he had already given to Mr Foot the day before which was not finalised. Mr Scantlebury-Watson alleges that this was an example of Mr Foot trying to deflect and cause him yet further inconvenience. We have no reason to doubt that.

88. In paragraph 12 of his witness statement, Mr Siddle addresses the allegation. He says that Mr Foot's demands were not unreasonable and any criticism of Mr Scantlebury-Watson were well-founded. He states that in October 2019, Mr Scantlebury-Watson was informed of the new product launch and underwent training for this. It was then his responsibility to ensure that his team were trained before the launch took place. He alleges that this did not happen and Mr Scantlebury-Watson was still training his team after the launch date. He goes on to say that when Mr Scantlebury-Watson was being questioned about this failure in making sure that his team were prepared for the launch he made excuses such as, the training and compliance manager was not involved in the training sessions in October 2019. These excuses and claims were unsubstantiated and wholly untrue in Mr Siddle's opinion. Mr Scantlebury-Watson claimed that Mr Foot had deliberately given Mr Siddle an incorrect and misleading impression that things Mr Scantlebury-Watson was responsible for were not in order and ready for the launch. Mr Siddle states that Mr Foot did not mislead him in any way and was right to point out that Mr Scantlebury-Watson was in fact entirely unprepared for the launch when everyone else was. He says Mr Scantlebury-Watson was trying to mislead Mr Siddle that the situation was well in hand when in fact it was not. Mr Foot raised his concerns with Mr Siddle. In an email string between Mr Foot, Mr Scantlebury-Watson and Mr Siddle [347] we note that the three men discussed the level of preparedness for the product launch, and it is clear that training was provided for Mr Scantlebury-Watson to implement. From both Mr

Foot and Mr Scantlebury-Watson about any deficiencies in the training, Mr Siddle sent an email to Mr Scantlebury-Watson on the 9 December 2019 at 17:46 hours in which he said:

> *Thanks Darren*
>
> *That's good to hear, please could you outline exactly what gaps you can foresee, we can stick a plaster over those aspects into the alarm.com can support*
>
> *Regards*
>
> *Sven*

The tone of this particular email cannot be construed as being hostile, intimidating degrading or humiliating. Mr Siddle had been asking both Mr Foot and Mr Scantlebury-Watson for an update on the state of training and preparation for the product launch. Furthermore, we do not accept that the tone of Mr Foot's emails were hostile, intimidating, degrading, or humiliating. They indicate a level of frustration about the lack of preparedness for the product launch and the belief that training had been facilitated for Mr Scantlebury-Watson to implement.

89. In paragraph 59 of his witness statement Mr Scantlebury-Watson refers to a team meeting on 11 December 2019. Mr Siddle made a presentation showing the Management Team Structure which showed Ms Barry joining Mr Siddle, Mr Foot, Mr Eglen, Mr Hunt and Mr Turner (Training and Compliance Manager) at the top level, with Mr Scantlebury-Watson at a lower level alongside Protect My Property's Lead Engineers and his own direct report, Ms O'Shea. This was done without any forewarning and contradicted the long established, formal team structure. Mr Scantlebury-Watson's contributions at the meeting were largely dismissed. He was very irritated by this. This aspect of his evidence was not challenged in cross examination, and we have no reason to disbelieve what Mr Scantlebury-Watson says in his witness statement.

90. In paragraph 60 of his witness statement, Mr Scantlebury-Watson states that the following day, he asked Mr Siddle for a meeting to discuss the matter. On 16 December 2019 at the two men met, but rather than discussing what had happened at the team meeting, Mr Siddle told Mr Scantlebury-Watson that he had allegedly received "negative press" about Mr Scantlebury-Watson from someone in the team. Mr Scantlebury-Watson subsequently found out that this was not the case, and it was Ms O'Shea who had recounted a remark that Mr Scantlebury-Watson had made in jest to Mr Siddle because she thought he would find it funny, and Mr Siddle had seemingly fabricated the "negative press" element. He goes on to say that Mr Siddle told him that there were issues between himself and Mr Eglen. Mr Scantlebury-Watson describes feeling nonplussed by that because he had a good relationship with Mr Eglen, and they were collaborating towards a common goal and he told Mr Siddle that. Mr Scantlebury-Watson goes on to say that he raised the issue of his disability and the lack of understanding of his challenges again, but Mr Siddle once again failed to offer any assistance reducing matters to "You seem really stressed at the minute" and affecting to have contacted HR about his working hours. He raised the matter of the slide presentation at the team

meeting but, in Mr Scantlebury-Watson's opinion, his answer was wholly unconvincing. The meeting continued in that vein, and he left it feeling utterly demoralised. This aspect of Mr Scantlebury-Watson's evidence was not challenged under cross-examination, and we have no reason to doubt what he says.

91. In paragraph 62 of his witness statement, Mr Scantlebury-Watson states that he asked Mr Siddle for the specific negative feedback he had received about him and Mr Eglen. He never received this and when he later spoke to Mr Eglen about it, he told and that he had provided no such feedback to Mr Siddle. In other words, Mr Siddle had made up the story about negative feedback. This aspect of Mr Scantlebury-Watson's witness statement was not challenged under cross-examination, and we have no reason to doubt what he is saying.

92. In his amended particulars of claim, Mr Scantlebury-Watson alleges that on 18 December 2019, he was required to attend a conference call for Utility Warehouse Limited with the Bid Manager Adam Harrop with only four minutes' notice, and with papers for the meeting only issued to him two minutes before the meeting commenced. Mr Harrop is alleged to have said that he had asked Mr Siddle whether he should be on call, but he hadn't responded so he had invited him anyway. Mr Scantlebury-Watson alleges that he was asked several questions in the call but, being totally unprepared, he could not answer them. Throughout the day, Mr Siddle and Mr Foot were testing the website's Live Chat function timing, the team's responses, unbeknown to anyone. The Live Chat function had been added despite Mr Scantlebury-Watson's protestations due to available resource, without any documentation being made available, without any training being organised, and with a three tier of the Chat platform being used that was not conducive to its use across a team. Mr Scantlebury-Watson has said nothing further about this in his witness statement and we were not taken to any documentary evidence in support of this. Notwithstanding this, accept that what he says would amount to harassment. It is reasonable to infer that that this was deliberately poor communication. Mr Scantlebury-Watson had inadequate notice to prepare for the meeting thereby undermining his position and setting him up to fail at the meeting.

93. In paragraph 63 of his witness statement, Mr Scantlebury-Watson says that over the coming days and weeks, he was placed under intense scrutiny by Mr Siddle and also Mr Foot, with seemingly every decision questioned, and every issue that arose being his personal fault. This applied even when alleged decisions were not decisions but merely discussions. He goes on to say that Mr Foot was quick to report issues to Mr Siddle as "customer service" issues, even when he was the person who would made Mr Foot aware of them, that were already in hand, and that concerned Field Engineer performance, and not Contact Centre failings. This element of Mr Scantlebury-Watson's witness statement was not challenged in cross examination, and we have no reason to doubt what he is saying.

94. In paragraph 65 of his witness statement, Mr Scantlebury-Watson says that he sensed at that time that Ms O'Shea was being given his management, rather than her own team leader duties, such as branding; and an important visit to EAL that Mr Siddle made clear he did not want him to do, even though he was highly experienced in Account Management and Business

Development, whereas Ms O'Shea had no experience in those areas whatsoever. In other words he is saying that he was being sidelined and undermined by this behaviour. This element of Mr Scantlebury-Watson's witness statement was not challenged in cross examination, and we have no reason to doubt what he was saying.

95. Mr Scantlebury-Watson's mood began to worsen with what he saw to be the pressure, secrecy and enmity which ultimately culminated in his dismissal, and he found himself at a low ebb. He talks about this in paragraphs 71 to 73 of his witness statement to the effect that he was aware that Ms O'Shea had left her desk on several occasions to have conversations which he believed related to him. On 21 January 2020, he noted that Ms O'Shea was once again away from her desk for a long time without updating the In/Out Board and he overheard her talking to Jessica Arnell, a technical agency, saying "it's the only place I can get signal" suggesting that she was calling someone to discuss matters but out of earshot. Ms O'Shea was being given answers to questions that Mr Scantlebury-Watson had already asked of Mr Siddle that he did not respond to. He refers to his diary entry which says "This is a developing pattern, i.e. I am ignored, whereas Sven appears to be in constant contact with Nicola." He then notes that on 23 January 2020 the "Mgmt Team Update" was moved by Mr Siddle but when Mr Scantlebury-Watson tried to review his calendar to see whether any time had been set aside for the same day that might be the "Darren one-to-one meeting" he found that his viewing privileges had been revoked and the calendar reported only "calendar cannot be shown". Mr King tried to view Mr Siddle's calendar and was able to do so. This element of Mr Scantlebury-Watson witness statement was not challenged under cross-examination, and we have no reason to doubt what he says. He was being deliberately excluded.

96. The cumulative effect on his health was negative and he was signed off work with depression. We have discussed this in more detail below. Suffice to say, the impact of this is best illustrated by Mr Scantlebury-Watson's own words in paragraph 76 of his witness statement:

> *I have clearly been in denial until this point, as my receiving a diagnosis of depressive order and having to recount how I had been affected by the events at work had a marked effect on me-I became very distressed and my depression worsened compounded by the side-effects of my medication that included insomnia. Most of my days were spent in bed without getting dressed. This improved somewhat after 28 January 2020 as my Sertraline dose was halved and I was prescribed Mirtazapine to help with the insomnia, although I continue to be depressed and far from my "usual self".*

This element of Mr Scantlebury-Watson's witness statement was not challenged under cross-examination, and we have no reason to doubt what he says. Indeed, we formed the strong impression that the treatment he received had upset him deeply. When he was giving oral evidence on how he felt about this, he became very upset and needed some time to compose himself. Clearly his emotions were still very raw more than 18 months after the event.

97. During a return-to-work meeting, which Mr Scantlebury-Watson covertly recorded on 24 February 2020, we were able to gauge the degree of his

frustration with his relationship with management [418] and with Mr Foot in particular. The accuracy of the transcript has not been challenged and it provides valuable insight into Mr Scantlebury-Watson's state of mind at the time. He attended the meeting with Mr Siddle and Mr Millward. We note the following:

> *SM asks if there is anything else DSW wishes to raise with he and SS today.*
>
> *…*
>
> *DSW says the feedback is really important and you get from his team which helps and is good, but-and-he apologises to SS, but notes it has to be said-he does not get enough from above, whether good or bad, and that it is months between cycles of feedback and what probably brought him to the point where it became too difficult was where he had gone months with no feedback and then, all of a sudden all this feedback comes, and it's all negative"; and I'm on a one-to-one ahead of schedule, and emails are coming in saying services going down - most of which is attributable to parts of the business that I have no control over-and it seems like we are looking for a scapegoat at that point in time; and that he is not saying that is the intention but how it is felt. SM asks-if DSW is happy to go into it-what sort of feedback this was. DSW says that there was "bad press" from all other managers, or at least another manager, that when he spoke to that manager said that there was no such "bad press." SS ask whether that was Craig [Foot] or Shawn [Eglen]? DSW says it was Shawn. DSW says the Craig situation, even when he and SS did meet about it, SS's words were, "you [DSW] have a problem with Craig," when DSW says he has never had a problem with Craig, but that it is very evident that Craig had a problem with him. SS says he tried to mediate, neither was getting on with the other, DSW says the difference is that he (DSW) does not discuss any issues [he might have] with staff without anyone else, and certainly not with the staff of the manager concerned, which Craig does in which he has been asked twice to not to do, expressing opinions to others, particularly Nicola [O'Shea] about what DSW is doing or not doing-which is incredibly unprofessional. DSW notes that he has asked SS to intervene only once, that he tried to manage that situation himself for months, that he has tried to see what his problems are, that SS can go through DSW's emails and he will see that he has taken responsibility for things that he has not done for the good of the team, that he has asked for feedback and how he and Craig might communicate better, and he gets nothing like that in return. It is a, "continual stream of criticism but has no consistency" and gives an example that he and Sara [Liversidge] were trying to sort out a problem with the supply of high-gain aerials and Craig asked DWS why he was speaking with a supplier because that is Craig's remit, that DSW had never been told. So DSW apologised, said that it had been duly noted. DSW then had a problem with another supplier two days later so asked Craig if he would like to be involved, to be told by Craig that he (Craig) didn't need to be involved and why was DSW even asking. SM asks SS if he is aware of this. SS says he is, "aware of some of it, yeah. I'm aware there have been issues with Craig and I got some feedback from Shawn around interaction with Darren and I'm aware of Nicola*

*feels stuck in the middle between Darren and Craig". SM asks DSW if that is an accurate reflection, how he sees it. DSW says, "Shawn no, because I asked him and he said there was nothing, he hadn't fed back anything negative, and anything he said might mean from one conversation we had when we were trying to bring our teams closer together, which he and I have done since the outset. Which is why it comes such a surprise because Shawn and I have worked-or at least I thought we have worked-very well together and towards a common goal which was less "them and us" between Field and Contact Centre. We had a fairly robust conversation there about how we can make our respective teams appreciate the other team more in a practical way, me sending my guys out with an engineer, and for Shawn's guys to sit in the contact centre and we put the ground working for that and it was happening". DSW says to Sven, "part of the problem is that you say, "We've had negative press" and that was it-not what it was, or what I can do about it, or what he wanted me to do about it-, "We've had negative press"". DSW is a is that if there something he can do to improve he will do it, but with that, "do I go with Shawn? Will that make it worse? Do I wait until it comes to me? Do I do nothing? How do I fix it? I can't because you haven't told me what it is I should try to fix that's not helpful".*

*DSW says, "The Nicola thing, you're right, Sven, she is in the middle, but-and I don't know how much of it you know-but there came a point in time where Craig was in her ear all of the time and I asked for what he was saying, but I thought to myself, "This is completely wrong, because now I'm fuelling the fire" and I took Nicola to one side-and she will vouch for this-and I said, "I'm really sorry, I shouldn't have put you in that position where I was asking you what was being said. It's not right that you're being put in this position and if other individuals want to do that, that's up to them, but I'm not doing this, so please don't tell me anything any more [if I disengage, you're no longer in the middle]. That's not a conversation I want to be having with my number 2; but it [was] going on all of the time and it's not right". DSW notes that the week before he went off sick, Nicola was markedly different in dealings with him to the extent of arguing with him in front of the team. DSW had to take to one side and say, "We will have differences of opinion. I value your input. But we cannot do this". DSW says that, "Me being me and looking from a well-being perspective I say, "This is out of character for you, Nicola, is everything okay?", She just come back from holiday. And she's disappearing for hours at a time and is not checking herself out in the In/out Board, and I find out she is with Craig. Now that may be completely innocent; but why is he talking to my number 24 hours at a time without me knowing anything about it? And invariably the question follows, why are they talking about this off-site? That doesn't help" SM asks SS, "is there a logical reason Craig would need to do that?". SS replies, "There's a lot of projects going on at the minute, as you know there's a lot of new business Craig, Shawn, etc. are all working on, so they'll all go directly to Nicola with certain things. One of the things I think it's important to understand as regards structure is that, where people's roles start and finish, [It's a] very small business, so a lot of people get involved in a lot of things, and, yes, in a larger business they would be rigid lines of demarcation where someone's role starts and finishes, but they do overlap and when you*

*take on extra work like we are doing like the Smart Homes piece, people tend to have to lock-in". SS admits, "I'm not aware of all the Craig and Nicola thing, rightly or wrongly a lot of these can come down to "he said, she said" and you end up stuck in the middle between people, it's only what people are saying, there's no real evidence to it. So I've not got that involved." DSW understands SS has other things to deal with, but these things do not help the situation. SS says he knows there were issues which is why he, "wanted to sit down with DSW and Craig, and by the end of it you were maybe not building bridges but starting to head in the right direction. There certainly didn't seem to be any animosity between you at the end of the meeting, I think you cleared the air and quite a few things, but following that I'm not aware of any issues". DSW says that the small company thing goes to some extent, but says that the point in restructuring was surely to give structure so people know where their responsibilities begin and end? SS says, "Completely." DSW says, "So when I asked for it months and months ago and it still doesn't come, the small example I gave you there of Craig wanting to be over something and then not wanting to be over something in the space of two days is not untypical, Sven". Sven says, "I need those things flagging. If you don't tell me about them, I don't know about them, and I can't do anything about it". SS says Craig and Nicola have worked together for years and they have a strong friendship, so there will always be conversations there. DSW says that's fine, "but the conversations shouldn't be about Nicola's boss and in a derogatory manner, which is what they have been". SS asks if Nicola has told DSW these conversations. DSW says she has, because she feels [unintelligible]. SM says, "and in fairness, irrespective of your position Darren, you shouldn't have situation where one colleague is talking about another derogatorily anyway". SS says, "Absolutely, will take [unintelligible]." DSW says, "The problem with that is, I think she will be mortified if you discuss it with her because-she's never used the words, "off the record," I don't think she knows what that means and that's not being dismissive. SM interjects, "I'm not sure in a formal sense could be off the record if someone is behaving like that, Darren. It needs to be understood and appropriate action taken doesn't it? So yeah we will need to take that [unintelligible]."*

*…*

*DSW says that he collaborates often with Shawn and they are working towards that melding of the team; but he has no input from Kevin and when he asked Kevin's staff that is definitely in a training remit, he doesn't get answers; and from Craig he just gets criticism and, "why are you not doing this, why are you not doing that" and getting overruled on staff.*

*…*

*DSW says that the way Emma speaks to him at times is, "unbelievable" and suggests that may be because, "Craig has had her ear" and they tend to, "a gang up" on DSW and DSW has been ground down by this.*

*…*

*DSW says, "she talks to me like shit on the phone as well," DSW recounts more specifics of the issue for SM's benefit as an example of the, "kind of stuff that wears you down." SM asks DSW whether DSW has been influenced by Craig, DSW says that he has "entertained the possibility." SS asks DSW, "if there are any other examples of this sort of stuff, DSW says, "nothing to that extent," nothing that, "in my 30 years of business I have never read an email like that, ever.*

98. The tenor of this lengthy extract from the transcript of the meeting of 24 February 2020 indicates that the problems between Mr Scantlebury-Watson and Mr Foot were ongoing and he was angry and distressed. They also were agreeing that it was unacceptable for Mr Foot to be speaking about Mr Scantlebury-Watson in a derogatory manner with Ms O'Shea. Clearly, there had been several discussions between Mr Foot and Ms O'Shea to the extent that she was absent from her workstation for several hours at a time without officially marking herself out which indicates the clandestinely nature of the discussions. It is understandable why Mr Scantlebury-Watson would find that state of affairs to be hostile and undermining. As at 24 February 2020, the matter had not be resolved and Mr Millward accepted that appropriate action needed to be taken.

*Overstepping the mark, exceeding his authority, or not meeting expectations*

99. Much is said about whether Mr Scantlebury-Watson was accused of overstepping the mark and exceeding his authority or not meeting expectations. We believe that there is evidence of this, and the following examples are noteworthy:

    a. Relations between Mr Scantlebury-Watson and Mr Eglen had not been good from early on in Mr Scantlebury-Watson's employment. In paragraph 4 of his witness statement, Mr Eglen says that most of his interactions with Mr Scantlebury-Watson were few and far between and limited to team meetings, some phone calls and generally when passing each other in the office. Most of those interactions were not of a positive nature. Under cross-examination, Mr Eglen admitted that both men had a run-in early on when he had told Mr Scantlebury-Watson to manage his own team and Mr Elgen would manage his. He felt that Mr Scantlebury-Watson was trying to tell him how to manage his own staff which he took exception to. In his oral evidence, Mr Eglen said that Mr Scantlebury-Watson was telling him how to do his job in relation to managing a particular individual who had been causing difficulties. Mr Scantlebury-Watson had questioned how tactfully and appropriately Mr Eglen had handled the matter. Mr Eglen had been speaking to HR and managed people for 18 years. Under cross-examination, he said "I did not need your help, no disrespect." Notwithstanding this, it was clear to the Tribunal that Mr Scantlebury-Watson's interference was unwelcome and irritating. This is an example of Mr Scantlebury-Watson seen to be exceeding his authority and overstepping the mark.

    b. Mr Eglen states in paragraph 6 of his witness statement that Mr Scantlebury-Watson believed that he was part of the Senior Leadership Team, which he was not. He did not attend the Senior

Leadership Team meetings and Mr Eglen did not believe that he was ever invited to do so by Mr Siddle. He refers to a PowerPoint presentation setting out the proposed management structure [209] which showed the correct organisational structure with Mr Siddle at the top as Head of Protect My Property. Mr Scantlebury-Watson's reporting line was into Mr Siddle with Mr Eglen and Mr Foot also reporting to Mr Siddle. This had always been the arrangement even prior to Mr Scantlebury-Watson joining the organisation. Mr Scantlebury-Watson was subordinate to Mr Eglen and Mr Foot. This is an example of Mr Scantlebury-Watson seen to be exceeding his authority and overstepping the mark.

c. In paragraph 9 of his witness statement, Mr Siddle states that between the months of March 2019 and June 2019 there had been a couple of times when Mr Scantlebury-Watson had frustrated his colleagues by failing to complete work that was being requested of him and there was a consistent theme of miscommunication from him. Under cross-examination he expanded on this to say that this related to marketing activity which involved putting customer focus on web development and there had been delays. There had also been a lot of issues with social media and digital marketing which required Mr Scantlebury-Watson 's input which was very slow. He also said that he got differing versions of events from Mr Foot and Ms Bell from what Mr Scantlebury-Watson had been telling him. The gist was that they had not been kept in the loop with what Mr Scantlebury-Watson been doing with the project and why there had been delays. This is an example of Mr Scantlebury-Watson being seen to be not meeting expectations.

d. On 23 December 2019, Mr Scantlebury-Watson emailed Mr Siddle at 01:00 hours [551]. He referred to 3 projects: Smart DCC, Utility Warehouse Ltd and Energy Assets Ltd. In his witness statement, Mr Siddle states at paragraph 16 that this was another example of Mr Scantlebury-Watson being seen to be overstepping his authority and remit and becoming involved in work and projects when he was not asked or required to be. Under cross-examination he expanded on this and said that Mr Scantlebury-Watson had tried to become involved in business decisions to pursue new work. The Utility Warehouse project was the most commercially sensitive and was purely at the preliminary discussions phase with the client. He could not say where Protect My Property was with the DCC project, but he remembered that they were talking of using their own data for that project where they would be potentially 60-million-meter readings to be done for the work. He questioned why Mr Scantlebury-Watson would need to be involved at that stage because there was no customer service remit. In other words, given Mr Scantlebury-Watson's role as Customer Service Manager, he had no business, in Mr Siddle's opinion, to involve himself with that project at that stage.

*Mr Scantlebury-Watson's sickness absence - return to work meetings and referral to Occupational Health*

100. On 22 January 2020, Mr Scantlebury-Watson made an emergency appointment with his GP because he was suffering from low mood which was

worsening. The previous evening he had arrived home from work and his wife, a trained Mental Health First Aider, had strongly urged him not to return to work and to make an appointment with his GP. After making his appointment, Mr Scantlebury-Watson called Mr Siddle to notify him of his absence and left a voicemail. Mr Siddle responded by telephoning Mr Scantlebury-Watson's wife's mobile expressing concern that he had not attended work.

101. Mr Scantlebury-Watson's GP diagnosed depressive order and he was given a fit note and advised to take four weeks sick leave. He was prescribed Sertraline which is used in the treatment of major depressive orders and was advised to register with Talking Therapies which he did on the same day [403].

102. On 17 February 2020, Mr Scantlebury-Watson contacted Mr Siddle on his mobile to request a meeting to discuss his return to work. He left a voicemail. Mr Siddle did not reply to the voicemail message. Mr Scantlebury-Watson emailed Mr Siddle on 24 February 2020 [417]. Mr Siddle replied later the same day at 10:10 hours. Mr Millward emailed Mr Scantlebury-Watson and Mr Siddle at 10:16 hours on 24 February 2020 confirming that a face-to-face catch up would be helpful given that Protect My Property would be looking to consider any reasonable adjustments as well as a start to gain a better understanding of anything that had contributed to Mr Scantlebury-Watson's absence so that "we can establish what we can do about those too" [417].

103. The return-to-work interview took place on 24 February 2020. This was recorded covertly and transcribed by Mr Scantlebury-Watson [418]. We have already referred to the transcript in relation to Mr Scantlebury-Watson's harassment claim. The transcript is also relevant to what was in the parties' minds at the time of the meeting. It clearly shows that Protect My Property intended Mr Scantlebury-Watson to return to work and they were discussing what steps should be taken to facilitate that. The following examples are noteworthy:

> *…*
> *SS asks DSW what his thought process is about returning to work, what kind of things he has thought about. DSW asks SM what he means. SM suggests, "What kind of timescales?." DSW says next week, that, "the longer it is being away, the harder it is to come back"; and that he was hoping to come in for at least part of next week.*
>
> *…*
>
> *SM asks what it was that made DSW take some time off, was there anything specific with work? DSW says nothing specific, it was cumulative. SM asks what that might include. DSW says general lack of direction, not knowing what his role was, the pressure of putting hard-working but not knowing whether [ those duties were] what he should be doing.*
>
> *…*
>
> *SM says that one thing discussed was that the business would potentially like to seek some guidance from occupational health to make the right*

*support mechanisms are in place. DSW says he has no objection to this, that he will give a form of authority for medical records if required. SM says if OH think they get enough from just speaking with DSW that will be enough. SM says that this is probably something needs to be in place prior to looking at a return to work if that is okay with DSW. DSW says fine. SM says that is probably the next step, SS says that it is.*

*…*

*SM says the next logical question, DSW having talked about structure and purpose and objectives quite a lot, is, "one of the things we talked about was, Protect My Property joined Installation Services about a year ago so we are as a business about to embark on a review of the structure and it would be good to get your input on that so we get the next situation is near to what's necessary is possible; but the other thing from my perspective sitting outside which I've heard lots from Darren from yourself today was that you wanted clearer direction, clear objectives, clear scope. I guess one of the questions when we go through this review of the structure is to look at the role and the scope of the role and the parameters of the role and really identify whether that fits with you personally or not, and to an extent to put reasonable adjustments in, but if the role is a leadership role within almost a matrix management is what you're describing, with multiple people in multiple departments in multiple teams and differing levels of accountability but wholly together that's when you take responsibility between you, if that sort of operation exists; if that's suitable for you as an individual".DSW responds, "I've worked in matrix structures before, that's not an issue…".*

*…*

*SM says we have another half hour to talk, and whilst he does not think anything discussed today has not been helpful, he would like to know from DSW specifically whether there is anything that would be helpful to cover now in advance of OH so things can be moved toward DSW returning to work.*

*…*

*SM says that next steps will be to talk to OH. SM asks DSW if he would mind if he gets a form sent that will help expedite matters. DSW says anything that will help is fine and confirms his email address and mobile number.*

104. On 28 February 2020, Mr Scantlebury-Watson emailed Mr Millward (copied to Mr Siddle) thanking them for their time at the return-to-work meeting and updating them on health matters. He informed them that he was hoping to meet with his GP on 2 March to obtain a Fit Note for his return to work. He sent a PDF of his second sicknote and evidence of his medication (50 mg of Sertraline and 50 mg of Mirtazapine). He also confirmed that he was in the Gateshead Talking Therapies Service. He had attended his second appointment earlier the same day and his next appointment was scheduled for 13 March 2020. They were one-to-one sessions taking a blended CBT/ACT approach. He checked his voicemails with Mr Siddle which indicated on 18 February that the assumption was that the week commencing

17 February therapy was being considered as sickness absence rather than annual leave. Although Mr Siddle asked him to confirm this he was unable to do that because he had not received the message until that week. He confirmed he received his latest payslip showing 74% of his usual net salary for that month and he queried this separately with payroll. He also said that he had not seen any consent form by email and asked for confirmation about the order of events required of him. He wanted to know if the consent email came before the requirement to provide a fit note [424].

105. On 2 March 2020, Mr Scantlebury-Watson emailed Mr Millward (copied to Mr Siddle) [425]. He attached his Med 3 given to him by his GP. He confirmed that his GP was happy for Mr Scantlebury-Watson to return to work with the reasonable adjustments for his AS which was first requested on 24 May 2019.

106. On 10 March 2020, Mr Millward emailed Mr Scantlebury-Watson to record his understanding of a conversation that they had on the telephone earlier the same day [427]. Of relevance of the following:

*…*

- *You believe that you are now fit to return to work. I've explained that your GP has proposed that you may be fit with some restrictions/adjustments, in this circumstance, the business would need to review this and consider if any adjustments are reasonable and can be accommodated (I've provided the DWP guide to help with any additional information that may be helpful to you, if I can help with further clarity please let me know.*
- *Given that you may be fit note doesn't provide clarity other than "workplace adaptation" this is more reasons to seek guidance from our OH team.*

*…*

- *We agreed in our last meeting to look to the OH services for guidance on your rehabilitation, fitness to work in guidance on how we might support your rehabilitation/return.*
- *I'm not best placed to help facilitate this given the levels of concern that you outlined in relation to you not understanding your role, the remit or purpose of the role etc.*
- *you have been clear with me that you believe the direction, guidance and confirmation needs to be supplied by your line manager, they will be back at work Monday next week.*
- *I have proposed that we look to facilitate some annual leave and potentially topping up any gaps with additional pay that is outside the usual Contractual arrangements with the aim of ensuring that you are not experiencing any financial hardship*
- *you stated that you feel not returning immediately will not be helpful-I'd be happy to explore other things that might help with a useful/meaningful such as personal development if you'd like that Darren?*
- *I will reach out to APL to secure the next available appointment to progress the OH report. I did attempt to review the referral and I received an error report from the system so I'm not in a position to provide an update right now*

*Warm regards*

*Simon*

107. There was another return-to-work interview on 17 March 2020 which was also covertly recorded and transcribed by Mr Scantlebury-Watson [434]. Mr Scantlebury-Watson attended as did Mr Siddle and Ms Gallagher. The interview was conducted using videoconference facilities. The following are noteworthy:

*…*

*SS says, "coming back to work, then. We definitely need to talk about your role, nail down exactly what it is you're doing because I know you did say that was causing you some anxiety, and you weren't exactly sure where your role started and ended and that kind of thing, so we definitely need to bottom that out. There are definitely some things that I want you to start to be involved with, there are some things that I want you to stop being involved with if you already are because they aren't particularly in your remit and you don't need to be involved, you may become involved with them as and when you need to be from a customer service perspective day-to-day there are certainly some projects and things ongoing at the minute that you don't need to be on, and certainly we won't be putting any extra pressure on you. We need to make sure that whatever hours you are working are relevant, fit for purpose and not excessive because we had discussions between us in the past about the hours you do, how hard you're working and I have expressed concerns that would put you in a place you didn't need to be and there were risks associated with that. So definitely no excessive hours. Are there any alterations and adaptations that we need to make to the working environment, to the work you're doing that you can think of from the top of your head that I haven't covered here?." DSW says, "Just the ones that we discussed last time round Sven, which gives me a second, I've done a little bit of guidance here, a little bit of prep…"*

*DG says, "Darren, just while you're looking for that information, can I just double check with you, Simon has updated that he has referred you for an up-to-date OH appointment. Have you received confirmation of that yet?." DSW says not. DG says, "Fine, so just so you're aware I'll pick that up as an action as we need to follow that up. So just to give you a bit of an overview of what normally happens in a return to work scenario, if your GP advises that you may well be fit to return to work which is obviously what has been detailed on your most recent fit note with some reasonable adjustments and as part of our normal protocol we would just refer to individual to OH, which is obviously what Simon has done just you haven't quite had your appointment yet. Ordinarily we would work with OH to have you assessed and then get back a report from them and then they would pretty much confirm for us what reasonable adjustments we would need to make in the workplace for you. Now ordinarily we would do that before you come back to work but given you haven't had your appointment yet, I think what Sven is talking about is that while you wait for your appointment to come*

*through if we today between the three of us agree what reasonable adjustments we need to make combined with what reasonable adjustments you think we might need to make when it means we can potentially get you back to work a little bit sooner if that's what you're looking to do before your OH appointment. Does that make sense?." DSW says that it does make sense and asks what the timescale for an OH referral is and asked whether this is the Fit to Work Service, or MDS's own. DG says that the user designated third-party provider and says, "One thing I want to be really clear on all conscious of this that none of us are medically qualified and the reason we use OH, Darren, and that it supersedes the GP, is because they've got the benefit of understanding more about the job you do at the company combined with your health conditions as well, so ordinarily when we make a referral it should generally be that you have an appointment within roughly round about a week. So, because Simon is on holiday today I'm not quite sure what the hold-up on that is so I'll take the action to kind of re…" [Unintelligible]. DSW say, "Just for your benefit on that Deb, this was first mooted three weeks ago tomorrow." DG confirms that DSW definitely should have had an appointment by now; that Simon is on leave today and tomorrow but she will put in a call and, "if they haven't quite scheduled that appointment I will ask them to do so as a matter of priority".*

*DG says, "That leads to the next part of the conversation which is, it's kind of got to be driven by you really, depending on how you are feeling-it's great you are feeling better-do you want us to kind of progress with the conversation about bringing you back to work without having that appointment would you kind of want to wait until we can get you assessed and then you have the benefit of knowing what OH would recommend before you come back?". DSW replies, "What I don't want to do, which is obvious, is to come back and then find that we haven't done the necessary work to allow me to perform at my best and then we have a relapse. So I'm happy to be guided by you. I didn't think that not going to OH was an option, or certainly that was implied by Simon: that would have to be done. And it has been a source of my frustration that I'm having to chase this down… With three weeks on now and conceivably I could have been back to work a couple of weeks ago." DG acknowledges DSW's frustrations, cannot explain the delay and apologises for it; DSW says that this was for DG's information and that he appreciates DG is new in post and will have had much to do in our large organisation. DG says, "To your point, I would say that I would rather we do as much as we possibly can with the benefit of as much medical and OH knowledge before you came back into the business, too, to your point, to give you that fighting chance of making that return successful." DSW says, "that is why is, but the issue for me at the moment is one of wages, there is no other way I can express that, the last payroll run-which I'm not sure if you're aware of or not but I better make you aware of it-I had some annual leave booked in for one of the weeks and it was uncertain whether than was to be taken as sickness absence or as holiday and in fact what Payroll have done is paid it is neither". DG asks if DSW has effectively had a deduction from his last salary. DSW says, "Yes, I have." DG asks if DSW has picked that up with anybody as she can pick it up. DSW says, "That sat with Simon as well. There's that, and the fact that*

*because the OH referral has taken so long and-I'm not wishing to be obstructive or combative in any way-but I took advice from my Union on it, from the hardship angle, but I only had sixteen days' pay last month, or perhaps less, because they got the date of my first absence wrong; and subsequently speaking with Simon he says this is going to be unpaid, whereas my Union say that because my employer is effectively blocking my return to work-with the best intentions, don't get me wrong-I should be on full pay and not either contractual sick pay or SSP. So again, I've taken that up with Simon and I haven't had any answer on that. That is not the reason for wanting to return to work-but nevertheless I have a family to support and we are in a bit of a situation at the moment." DG says, "I completely and absolutely understand. Could I make a couple of suggestions… To keep this moving in a kind of progressive way for you, Darren? So-I think there's a couple of different points-so I will pick up the point with Payroll this afternoon and get clarification of exactly what has been going on there and if there is something for us to correct I will pick it up and make sure we get it corrected as soon as possible. Give me literally this afternoon to speak to our OH provider to understand where you're at in your referral process and how quickly they can get an appointment scheduled for you. And I think once we got that information, if it's all right with you and Sven, that we meet at the same time tomorrow. Because at that point what will then have. Darren, is enough information for you to make that decision yourself about whether we agreed to a kind of more informal return to work in the absence of that OH piece, or whether given the timescales will hopefully find out about this this afternoon, whether it's worth kind of you hanging on and waiting for that appointment. Does that sound sensible?." DSW says that it does. SS confirms to DG but it also works for him.*

108. The transcript then goes on to discuss arrangements for handling Mr Scantlebury-Watson's email prior to his return to work and other matters.

109. It was agreed that Mr Scantlebury-Watson would be referred to an occupational health specialist and the parties would meet again the following day.

110. Mr Scantlebury-Watson, Mr Siddle and Ms Gallagher had another return-to-work meeting on 18 March 2020. We note that Ms Gallagher set out expectations regarding return to work as follows:

*DG explains the business position on the Covid-19 situation and managing risk and explains that efforts are being made to limit as much as possible the number of people in office-based roles who are attending the office and, though not linked to DSW's return to work, she is looking to manage expectations and whatever that return to work may look like DSW may be asked to work remotely for a period of time. DSW says he understands and that he has a good home office so if that is the case it will not be an issue. DG asks DSW to have a think around ways of working if he is asked to work remotely for an undefined period of time, as that would be helpful in planning. DSW suggests only a risk assessment.*

111. Ms Gallagher referred Mr Scantlebury-Watson to Protect My Property's nominated occupational health specialist, Smart Clinic by APL Health ("APL"), on 18 March 2020.

112. Mr Scantlebury-Watson attended Ms Ruth Meredith, at APL, on 25 March 2020. Ms Meredith produced a report on the same day [440]. In her report, she stated that Mr Scantlebury-Watson had been referred as he had been absent from work from 22 January 2020 due to depressive disorder. She referred to his AS in the section headed "Health background."

113. In the section entitled "Impact on work" Ms Meredith states:

> *Darren explains that he has been in his role for a year but he did not receive a job description until he had been in the role for over 10 months and still does not have clear and measurable objectives or receive regular feedback on his performance. I understand that his team which had been mainly focused on security, share the building with the wider business. Recently they have become involved in other aspects of the business which has changed the focus of his team and he has found out much of the information via other managers, rather than directly. He reports that he has received criticism second-hand without detail and when he has tried to address this it has been denied.*
>
> *There is a further concern that a fellow manager has criticised Darren to other managers and to a member of Darren's own team. Darren has tried to address this with his line manager and that matters did not improve. The final trigger was a team meeting in which Darren felt he had, without warning, been effectively demoted in front of his peers, followed by a proposed 1:1 meeting where he felt that he would be measured against objectives that he had not been given.*
>
> *I appreciate that these comments reflect Darren's view of the situation and that management may well take a different view, but it seemed important to set out his concerns are that you are aware of them.*

114. There then follows a section entitled "Recommendations and responses to questions raised" as follows:

> *Is the member of staff fit to return to work? If not, is there a foreseeable return to work and if so when is this likely e.g. within a month, 3 months, 6 months, 12 months?*
>
> *In my view, Darren is fit to return to work and he is keen to do so.*
>
> *Is the member of staff receiving appropriate treatment, will it aid their recovery and if so, when?*
>
> *Darren is taking appropriate medication and has recently accessed, and been discharged from, talking therapy which she has found helpful. With regards to his mental health, he has recovered; however, his AS is a lifelong condition.*

*Are there any underlying problems causing or contributing to the absence?*

*As above, the absence has been attributed to factors which have made it difficult for Darren to cope in the workplace. There were no personal concerns reported.*

*Are there any short-term accommodations to work tasks or environment to assist the member of staff in work or in returning to work? E.g. temporary amended duties, alteration to ours, phased return plan?*

*Darren would benefit from a discussion with his manager and HR around his difficulties at work and an agreement as to how he can be supported at work. Darren also suggested that he meet face-to-face with the manager who has been critical of him, with a member of the HR team present to facilitate, in order to discuss their respective positions. Completion of a wellness action plan (WAP) would also be helpful…*

*Such support is likely to be required long term (see below) due to the nature of his condition.*

*In your view is it likely that the member of staff's condition and/or effects could be considered within the scope of the disability provision of the Equality Act 2010? If so, are there any specific adjustments for management to consider?*

*In terms of compliance with the Equality Act; you will be aware that ultimately this decision is a legal one and not medical. However, to provide guidance in this matter; it is my opinion having considered the definition of disability that Darren is likely to be considered within the scope of the act on a historical basis.*

*In terms of adjustments for management to consider, the WAP would help to focus this. It is likely to centre around a clear job description/objectives/regular performance review and job chats.*

*Mr Scantlebury-Watson's dismissal*

115. On 31 March 2020, Mr Siddle wrote to Mr Scantlebury-Watson to notify him that his role was at risk of redundancy [446]. Mr Scantlebury-Watson lodged a grievance on 8 April 2020. On 14 April 2020, Mr Siddle wrote to Mr Scantlebury-Watson to notify him that he was being dismissed for redundancy. His effective date of termination of employment was 14 April 2020 and he would receive payment in lieu of notice [619]. Mr Scantlebury-Watson appealed the decision in writing on 24 April 2020 [620]. In the grounds of his appeal, he states the following, amongst other things:

> *That the redundancy is automatically unfair in that it was not for the stated reasons but was instead an act of disability discrimination that followed previous acts such as the company's failure to accommodate reasonable adjustments, amounting to a repudiatory breach that I did not accept. This is covered in greater detail in my grievance of 8 April 2020.*

*…*

*That the rationale for making the Customer Service Manager role redundant when considered against the paucity of information provided does not withstand any reasonable scrutiny…; And additionally when the loss of the Company's Customer Care Champion on 28 April 2020 (and their replacement sometime in March 2020-note that the replacement has not been replaced at the time of consultation) is taken into account. Attempts to discuss this further in the consultation process was stymied by Sven Siddle who refused to discuss the company's plans for the Customer Service function, hardly the "open as possible" approach advocated in ACAS' good practice-which again cause me to be unable to engage fully in the consultation process.*

116. Mr Scantlebury-Watson's appeal was unsuccessful, and the decision was confirmed by Mr Colin Cox, Head of Energy in a letter dated 2 June 2020 [634]. The effective date of termination of Mr Scantlebury-Watson's employment was 14 March 2020.

117. There was disputed evidence concerning the operative reason for Mr Scantlebury-Watson's dismissal. In paragraph 19 of his witness statement, Mr Siddle says that over the months it had become increasingly evident that Mr Scantlebury-Watson's role was not required in the company structure. He goes on to say:

*I was often unsure on what the Claimant was doing on a day-to-day basis yet he would allege to be doing excessive overtime not completing work on projects he had been assigned, was responsible and where the fundamental basis of his role. After a review of the structure I decided the position was no longer required and made the decision to remove the role of Customer Services Manager from the team structure. The Claimant was consulted on his potential redundancy and due to there any suitable alternative positions available with the Respondent, the Claimant was made redundant.*

118. On cross-examination, Mr Siddle was asked over how many months it had become increasingly evident to him that Mr Scantlebury-Watson's role was not required within the company structure to which he replied, "probably 6 to 9 months". The evidence does not support this conclusion for the following reasons:

a. In paragraph 88 of his witness statement, Mr Scantlebury-Watson says that on 30 March 2020, he was invited to a meeting by Mr Siddle entitled "DSW Review & Steps". Mr Scantlebury-Watson describes this as a subtle change in wording dropping the previous use of RTWI (i.e. Return to Work Interview). He had not noticed it at the time, and he was fully expecting the meeting to be one confirming the circumstances of his return to work. Instead, he was informed that his position was "at risk" and the consultation would take place in three days. We have seen no evidence to suggest that there had been a material change in Protect My Property's circumstances to the effect that Mr Scantlebury-Watson's role had become at risk. This element of

Mr Scantlebury-Watson was not challenged under cross-examination, and we have no reason to doubt it.

b. Mr Scantlebury-Watson goes on to say in paragraph 89 of his witness statement that at the consultation meeting on 6 April 2020, Mr Siddle claims that the reason for the Customer Service Manager role being made redundant was, in part "we were looking at our structure and how to rationalise it", this was despite the discussions of 17 and 18 March 2020 being focused on clearly defining Mr Scantlebury-Watson's role, and facilitating his return to work in that role. Mr Siddle also said that they had discussed reviewing the structure in the December team meeting which Mr Scantlebury-Watson says was untrue. The option of furloughing Mr Scantlebury-Watson was discussed and Mr Siddle is recorded as saying that it would not have been the right thing to have done morally because it would have been "very very unlikely" that the same role would be required in the future. Given the alleged importance of customer service to Protect My Property, the multiple challenges still to be overcome in the customer service area that were already proving beyond that which could be achieved in the hours worked by a single FTE, and the fact that Protect My Property had lost its Customer Care Champion yet continued to receive an average of 82 customer complaints per month, did not make any sense. It is also noted that Mr Siddle said that the Contact Centre team of 10 would be reduced to 6 "and wouldn't be going back up to ten", but that four of those staff were furloughed, meaning, as Mr Scantlebury-Watson pointed out in the second consultation meeting, "Your furloughing at least one or two [people] where there is no job for them, [which is] the reason you have given for not furloughing me"[472-476]. Other managers had already been furloughed. This element of Mr Scantlebury-Watson's witness statement was not challenged under cross-examination, and we have no reason to doubt it.

c. In paragraph 90 of his witness statement, Mr Scantlebury-Watson states that furlough was dismissed as an option for his role which was the best indicator that the purpose of the consultation meeting was not to avoid his role being made redundant but the opposite. This element of Mr Scantlebury-Watson's witness statement was not challenged under cross-examination, and we have no reason to doubt it.

d. In paragraph 91 of his witness statement, Mr Scantlebury-Watson states the following:

> *I believed then, and still do now, that my requested Factual Amendments to my Occupational Health Report were a significant factor in Mr Siddle making me/my role redundant. Prior to the issue of the Report there was no written record of my disclosure of disability, my request for reasonable adjustments, the bullying I had endured, the harassment I had endured, or of the Respondent's failure to comply with its duty to make reasonable adjustments, and until that point discussions were seemingly cordial. Immediately after issue of the Report, my role/I was placed "At Risk," something not lost on my Union Officer [454-462].*

This element of Mr Scantlebury-Watson's witness statement was not challenged in cross-examination, and we have no reason to doubt what he is saying. Indeed, it is reasonable to infer that the operative reason for deciding to place his role "at risk" was the occupational health report which clearly refers to Mr Scantlebury-Watson's autism and expresses an opinion that he is disabled. Prior to that report, the discussions between himself and Mr Siddle at the return-to-work interviews was precisely about that: returning to work. After the report, and, in a matter of a few days, return to work was no longer on the agenda. Instead, his position had been placed at risk of redundancy. There is no evidence to suggest that his role was indeed redundant. Three return to work interviews were conducted. Mr Siddle attended those interviews with Mr Scantlebury-Watson. The transcripts of those meetings are detailed, and, on any reading, it cannot be said that it had become increasingly evident that Mr Scantlebury-Watson's role was no longer required within the company structure. The tenor of the meetings was to discuss the arrangements for Mr Scantlebury-Watson's return to work. Redundancy simply does not feature in the discussions. If, as claimed, it had become increasingly apparent that Mr Scantlebury-Watson's role within the company was no longer required, why would there have been a discussion about arrangements for his return to work if there was no job to him to return to? What Mr Siddle is saying is, frankly, implausible.

e. In paragraph 94 of his witness statement, Mr Scantlebury-Watson describes what happened at his second consultation meeting on 14 April 2020 when he was informed by Mr Siddle that his role was redundant. He quotes what Mr Siddle said which was:

> *Okay? If there's nothing else changed then Darren, unfortunately we've got no option but to make y… Make the role of Customer Service Manager and yourself redundant then.*

Mr Scantlebury-Watson describes this as a barely concealed Freudian Slip that he felt was telling. Mr Siddle then announced by internal email that Mr Scantlebury-Watson was no longer in the business with immediate effect. He did that on 15 April 2020 before any appeal period had been exhausted [477]. His dismissal was a fait accompli. This element of his witness statement was not challenged under cross-examination, and we have no reason to doubt what he was saying. We agree that it was a reasonable inference on his part from what was said by Mr Siddle.

f. On 21 April 2020, Mr Scantlebury-Watson appealed his redundancy dismissal, and he was invited to an appeal meeting on 7 May 2020 which was rescheduled to 11 May 2020 at his request. In paragraph 96 of his witness statement he says that his appeal was hampered by his active grievance "despite there being no evidence that the Respondent was doing (or would do) anything with that grievance". He wrote in his contemporaneous notes "The appeal hearing is held but the outstanding grievance and the need to keep the two separate renders it neutered at best, farcical at worse." The appeal was not upheld [489-500]. This element of Mr Scantlebury-Watson's witness statement was

not challenged in cross examination, and we have no reason to doubt what he is saying.

*Mr Scantlebury-Watson's attempts to mitigate his loss after his dismissal and the impact of his dismissal on him personally*

119. In paragraph 99 of his witness statement, Mr Scantlebury-Watson states that he was out of work for 10 months following his dismissal which was a particularly testing in his life. He has only ever held nonmanagement positions since his employment with Protect My Property primarily because his self-confidence had been broken by their actions. He continues to struggle with depression and low self-esteem and has to take Sertraline and cannot foresee a day when he will cease to do so. He goes on to say that his faith in the private sector and its treatment of disabled employees has been fundamentally shaken by Protect My Property and his career prospects have been adversely affected as a result. He will now only consider public sector employment where he believes diversity is embraced, and where he will be fairly treated with a focus on positive aspects of his differences. When we asked Mr Scantlebury-Watson Protect My Property's treatment of him had affected his mental health and his feelings, he became very upset and needed time to compose himself.

120. Since his dismissal, Mr Scantlebury-Watson told the Tribunal that he had applied for 258 positions and had looked for employment every day. He had only had a smattering of interviews. He was still suffering from depression, but it was not as debilitating as it had been previously. He had good and bad days, but he was not the same person as he had been. He said that he felt broken. He has three sons with the same condition, and he wanted to set them a good example and he did not feel that he had done that because of what had happened. He said that his wife had had to cope with him, and it had been very difficult for the family. He is engaging with Talking Therapies. These lasted for six weeks. He is also having one-to-one ACT therapy which is a kind of CBT. It is more person centred and he has found it very beneficial. He said that his therapist had told him not to apologise "for being you" and it had really helped to have someone to talk to.

121. Mr Scantlebury-Watson told the Tribunal that he had moved to a new position in December 2020 and then to another one in March 2021. The initial position was in the NHS and was any temporary helping with Covid control. He is now working at Durham University. He is taking a course in part-time vocational training (CIPD 3 & 5).

122. Mr Scantlebury-Watson was not cross-examined other than to be asked to provide his last three months of payslips.

Applicable law on liability

*Time limits*

123. The general rule is that a claim concerning work-related discrimination under Part 5 of EQA (other than an equal pay claim) must be presented to the Tribunal within the period of three months beginning with the date of the act complained of (EQA, section 123(1)(a)).

124. Much of the case law on time limits in discrimination cases has centred on whether there is continuing discrimination extending over a period of time or a series of distinct acts. Where there is a series of distinct acts, the time limit begins to run when each act is completed, whereas if there is continuing discrimination, time only begins to run when the last act is completed. This can sometimes be a difficult distinction to make in practice.

125. The leading case is **Barclays Bank plc v Kapur and ors 1991 ICR 208, HL**, which involved a pension scheme that allegedly discriminated against a group of Asian employees. The argument on time limits centred on whether the operation of the pension scheme was a continuing act that subsisted for as long as the employees remained in the bank's employment (in which case their complaints were presented in time) or whether it was a single act that took place when the bank decided not to credit the employees' service in Africa for the purpose of calculating pension entitlement (in which case their complaints were time-barred). The House of Lords found in favour of the employees and ruled that the right to a pension formed part of their overall remuneration and, if this could be shown to be less favourable than that of other employees, it would be a disadvantage continuing throughout the period of employment. It would not be any answer to a complaint of race discrimination that the allegedly discriminatory pension arrangements had first occurred more than three months before the complaint was lodged.

126. Crucially, their Lordships drew a distinction between a continuing act and an act that has continuing consequences. They held that where an employer operates a discriminatory regime, rule, practice, or principle, then such a practice will amount to an act extending over a period. Where, however, there is no such regime, rule, practice or principle in operation, an act that affects an employee will not be treated as continuing, even though that act has ramifications which extend over a period of time.

*Discrimination arising from disability*

127. EQA, section 15(1) provides that 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.

128. EQA, section 15(1) goes on to state that section 15(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.

129. In establishing unfavourable treatment, there is no requirement to have a comparator.

130. We are reminded that in **Secretary of State for Justice and anor v Dunn EAT 0234/16** four elements must be made out for Mr Scantlebury-Watson to succeed:

c. There must be unfavourable treatment.

d. There must be something that arises in consequence of Mr Scantlebury-Watson's disability.

e. The unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability; and

f. Protect My Property cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate end.

131. Unfavourable treatment is what the alleged discriminator does or says, or omits to do or say, which then puts the disabled person at a disadvantage. Dismissal can amount to unfavourable treatment.

132. The discriminatory treatment must be something arising in consequence of Mr Scantlebury-Watson's disability not his disability itself. There must be something that led to the unfavourable treatment and this "something" must have a connection to Mr Scantlebury-Watson's disability. In **Basildon and Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305, EAT** Mr. Justice Langstaff, the then President of the EAT, explained that there is a need to identify two separate causative steps in order for a claim under section 15 EQA 2010 to be made out. The first is that the disability had the consequence of 'something;' the second is that Mr Scantlebury-Watson was treated unfavourably because of that 'something.' According to Langstaff P, it does not matter in which order the Tribunal approaches these two steps: 'It might ask first what the consequence, result or outcome of the disability is, in order to answer the question posed by "in consequence of", and thus find out what the "something" is, and then proceed to ask if it is "because of" that that A treated B unfavourably. It might equally ask why it was that A treated B unfavourably, and having identified that, ask whether that was something that arose in consequence of B's disability.'

133. In **Dunn** Simler J stated:

> *[Counsel for the claimant asserts] that motive is irrelevant. Moreover, he submits that the claimant did not have to prove the reason for the unfavourable treatment but simply that disability was a significant influence in the minds of the decision-makers. We agree with him that motive is irrelevant. Nonetheless, 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*.

The enquiry into such thought processes is required to ascertain whether the 'something' that is identified as having arisen as a consequence of that claimant's disability formed any part of the reason why the unfavourable treatment was meted out.

134. We are also reminded that in **Hall v Chief Constable of West Yorkshire Police 2015 IRLR 893, EAT**, the EAT clarified that a claimant needs only to establish some kind of connection between the claimant's disability and the unfavourable treatment. A section 15 claim could succeed where the disability had a significant influence on, or was an effective cause of, the unfavourable treatment. The EAT's approach in **Hall** clearly required an influence or cause that operates on the mind of a putative discriminator, whether consciously or subconsciously, to a significant extent and so amounts to an effective cause. Anything less would be insufficient.

*Duty to make reasonable adjustments*

135. The EQA 2010, section 20 imposes a duty on employers to make reasonable adjustments to help disabled employees and former employees in certain circumstances. The duty can arise where a disabled person is placed at a substantial disadvantage by:

a. An employer's PCP.

b. A physical feature of the employer's premises.

c. An employer's failure to provide an auxiliary aid.

136. If Mr Scantlebury-Watson is to succeed his claim that Protect My Property has failed to make reasonable adjustments based on the first requirement, he must clearly identify the PCP to which it is asserted adjustments ought to have been made. Furthermore, Tribunal must only consider the claim that has been made to it by him. For the reasons given below, we do not think that he has identified a valid PCP and this is why we have not set out a full exegesis of the law on reasonable adjustments beyond the requirement for a PCP.

137. We remind ourselves that in **Griffiths v SSWP [2017] ICR 160 CA**, Elias J held that [44-47]:

*When considering the question of reasonable adjustment, it is critical to identify the relevant PCP concerned and the precise nature of the disadvantage which it creates by comparison with its effect on the non-disabled. The importance of this is that until the disadvantage is properly identified, it is not possible to determine what steps might eliminate it.*

138. We are also mindful that in in **Nottingham City Transport v Harvey UKEAT/0032/12/JOJ**, Langstaff J held that:

*It is not sufficient merely to identify that an employee has been disadvantaged, in the sense of badly treated, and to conclude that if he had not been disabled, he would not have suffered; that would be to leave out of account the requirement to identify a PCP [17]*

*"Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability. Indeed, if that were not the case, it would*

*be difficult to see where the disadvantage comes in, because disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply [18]*

*A one-off application of the respondent's disciplinary process cannot in these circumstances reasonably be regarded as a practice; there would have to be evidence of some more general repetition, in most cases at least [20].*

139. The identification of the PCP is not without limits. In **Ishola v Transport for London [2020] EWCA Civ 112**, Simler LJ said:

*In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.*

140. An employer will not be obliged to make reasonable adjustments unless it knows or ought reasonably to know that the individual in question is disabled and likely to be placed at a substantial disadvantage because of their disability.

*Harassment*

141. Harassment claims must be made within three months of the act complained of or the last of a series of acts.

142. The general definition of harassment set out in EQA section 26(1) applies to all protected characteristics except marriage and civil partnership and pregnancy and maternity. It states that a person (A) harasses another (B) if:

a. A engages in unwanted conduct related to a relevant protected characteristic — section 26(1)(a); 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 — section 26(1)(b).

143. There are three essential elements of a harassment claim under EQA, section 26(1):

a. unwanted conduct

b. that has the proscribed purpose or effect; and

c. which relates to a relevant protected characteristic.

144. Mr Justice Underhill, then President of the EAT, expressed the view that it would be a 'healthy discipline' for a Tribunal in any claim alleging unlawful harassment specifically to address in its reasons each of these three elements (**Richmond Pharmacology v Dhaliwal 2009 ICR 724, EAT**).

145. The word 'unwanted' is essentially the same as 'unwelcome' or 'uninvited'. This is confirmed by the EHRC Employment Code (see para 7.8). The EAT in **Thomas Sanderson Blinds Ltd v English EAT 0316/10** pointed out that unwanted conduct means conduct that is unwanted by the employee. The necessary implication is that whether conduct is 'unwanted' should largely be assessed subjectively, i.e. from the employee's point of view. This could possibly become an issue where employee B is alleging that he or she has suffered harassment by virtue of having witnessed harassment suffered by employee C. Depending upon the circumstances, the employer might be able to argue that although the treatment was unwanted by C it did not affect B and therefore was not unwanted conduct so far as B was concerned.

146. In order to constitute unlawful harassment under EQA section 26(1), the unwanted and offensive conduct must be 'related to a relevant protected characteristic'. However offensive the conduct, it will not constitute harassment unless it is so related.

147. Whether or not the conduct is related to the characteristic in question is a matter for the appreciation of the Tribunal, making a finding of fact drawing on all the evidence before it (**Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and anor EAT 0039/19**). The fact that the complainant considers that the conduct related to a particular characteristic is not necessarily determinative, nor is a finding about the motivation of the alleged harasser. Nevertheless, in any given case there must still be some feature or features of the factual matrix identified by the Tribunal which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged in the claim. In **Aslam**, the Tribunal failed to make a finding that a comment made in the claimant's hearing about ISIS was related to her British-Asian Indian race. It focused only on whether the claimant perceived the remark to be related to race, but this was not determinative of the question. The Tribunal had to decide that for itself.

148. In practice, harassment claims are usually brought on the basis of 'effect,' as it is generally considered easier to prove that conduct has a particular effect than to prove the purpose behind it. That said, the intent with which something is said or done can be relevant when assessing its effect. In addition, a claimant who is unaffected by particular conduct is arguably less likely to consider bringing a claim and may struggle to demonstrate that the conduct was unwanted. However, harassment can arise regardless of intent and regardless of whether or not the alleged harasser knows that the victim has a particular protected characteristic. For example, in **Noble v Sidhil Ltd and anor EAT 0375/14** the EAT held that even where an employer had no reason to know that an employee was depressed, it could still be liable for harassment in respect of comments that he was 'weird', 'a fucking idiot', 'stupid' and 'not well in the head'.

149. In deciding whether the conduct has the effect referred to in EQA section 26(1)(b) (i.e. of violating a person's (B) dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B), each of the following must be taken into account:

    a. the perception of B;

    b. the other circumstances of the case; and

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

150. The test therefore has both subjective and objective elements to it. The subjective part involves the Tribunal looking at the effect that the conduct of the alleged harasser (A) has on the complainant (B). The objective part requires the Tribunal to ask itself whether it was reasonable for B to claim that A's conduct had that effect.

151. Under the antecedent legislation there was a slightly different emphasis. Conduct was regarded as having the proscribed effect only if, 'having regard to all the circumstances, including in particular the perception of that other person [i.e. the alleged victim], it should reasonably be considered as having that effect.' Therefore, the old law arguably placed greater emphasis upon the claimant's perception for the purposes of assessing effect. That said, there is likely to be little practical difference in the way the test is applied by Tribunals.

152. The EAT in **Richmond Pharmacology v Dhaliwal 2009 ICR 724, EAT**, gave some guidance as to how the 'effect' test should be applied. It noted that the claimant must actually have felt, or perceived, his or her dignity to have been violated or an adverse environment to have been created. If the claimant has experienced those feelings or perceptions, the Tribunal should then consider whether it was reasonable for him or her to do so. If the Tribunal finds that there was no such effect, then that will be an end to the matter. However, that guidance was given in relation to the Race Relations Act 1976, section 3(2)A which was worded in slightly different terms to EQA, section 26. In **Pemberton v Inwood 2018 ICR 1291, CA**, Lord Justice Underhill, who sat as the President of the EAT in Dhaliwal, revised his guidance thus: 'In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a Tribunal must consider both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.'

153. The above guidance was considered by the EAT in **Ahmed v Cardinal Hume Academies EAT 0196/18**, where A appealed against an employment Tribunal's rejection of his claim that a headteacher had subjected him to

disability-related harassment at a meeting held to discuss the effect of A's dyspraxia on his ability to teach. A argued that the Tribunal had erred by determining the claim on the basis that it was not reasonable to regard the headteacher's questioning as having the effect of violating A's dignity, rather than treating reasonableness as just one of the three mandatory factors set out in S.26(4) to be taken into account in determining whether the conduct had the effect proscribed by S.26(1)(b) (i.e. of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her). Rejecting A's appeal, the EAT took the Pemberton guidance to mean that, as under the antecedent legislation, the question of whether or not it is reasonable for the impugned conduct to have the proscribed effect is effectively determinative – it was difficult for the EAT to conceive of a situation where conduct could have the proscribed effect even though it was not reasonable for it have that effect. The Tribunal had considered A's perception of the conduct and the other circumstances of the case before concluding that it was not objectively reasonable for the conduct to have the proscribed effect, so its approach disclosed no error of law.

154. It seems likely that the 'other circumstances' of the case to be taken into account under EQA, section 26(4) will usually be used to shed light both on the complainant's perception and on whether it was reasonable for the conduct to have the effect. The EHRC Employment Code notes that relevant circumstances can include those of the complainant, such as his or her health, including mental health; mental capacity; cultural norms; and previous experience of harassment. It can also include the environment in which the conduct takes place (see para 7.18).

155. Where an employee draws the alleged harasser's attention to the effect of his or her conduct and the conduct continues, it will be hard for the harasser to argue that he or she did not have a malicious intent. In **Krupinska v Stone Gate Pub Co Ltd ET Case No.2700757/14** K, who was Polish, was happy for S to help her with her English if she got things wrong. However, over time her relationship with S deteriorated and S began correcting her pronunciation in a mocking fashion, deliberately mispronouncing her name, and repeating Polish obscenities. K complained and asked S to stop but she persisted. A Tribunal held that her conduct amounted to harassment related to K's race.

156. Although it is possible for an employee's dignity to be violated by a single incident, it is more common for an individual to claim harassment on the back of a number of separate incidents. The EAT in **Reed and anor v Stedman 1999 IRLR 299, EAT**, gave some guidance as to how Tribunals should approach such cases for the purpose of assessing effect. It counselled against carving up a case into a series of specific incidents and then trying to measure the harm or detriment in relation to each. Instead, it endorsed a cumulative approach and quoted the following passage from a USA Federal Appeal Court decision: 'The trier of fact must keep in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes' (see USA v Gail Knapp (1992) 955 Federal Reporter, 2nd series). This approach was approved by the EAT in **Driskel v Peninsula Business Services Ltd and others 2000 IRLR 151, EAT** and, although both cases were decided before the specific statutory provisions on harassment were introduced, there is no reason why the same approach should not apply under the EqA.

157. The objective aspect of the test is primarily intended to exclude liability where B is hypersensitive and unreasonably takes offence. As noted by the EAT in **Richmond Pharmacology v Dhaliwal 2009 ICR 724, EAT**, 'while it is very important that employers, and Tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the… legislation…) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase'. It continued 'if, for example, the Tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the Tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question.'

*Evidential matters*

158. We remind ourselves that if there is a preponderance of evidence on one side, as against a lesser amount of equally good or bad evidence on the other, a Tribunal may well be impressed simply by the volume of evidence in favour of one party. Put simply because, say, five witnesses are called to give evidence on the same point does not necessarily enhance a party's case. Generally, it is quality not quantity that matters most when assessing the weight to be given to the parties' evidence.

159. The advantage of hearing and seeing witnesses give oral testimony is never underestimated by Tribunals. For that reason, written statements and submissions unaccompanied by oral testimony are always regarded as second-best evidence if, indeed, they are accepted at all. Factors such as the demeanour of a witness and the coherence of his or her evidence are taken into account by the Tribunal in assessing credibility. There is no requirement for any evidence given to be corroborated: it is simply for the Tribunal to assess, as a matter of common sense and judgement, the extent to which it finds the evidence of a witness satisfactory and reliable.

160. The inroads that can be made into revealing the strengths or weaknesses of a witness's testimony depend largely on the effectiveness of the examination and, even more so, the cross-examination of the witness. If a crucial matter is not raised in cross-examination, the Tribunal may take such omission into account — although, of course, it may always question the witness itself on any matter not raised by either of the parties and may recall a party who has already given evidence for this purpose.

161. As a general rule, a party who fails to cross-examine a witness upon any matter tacitly accepts the truth of the witness's evidence in chief on that matter, and will not thereafter be entitled to challenge or contradict it by other evidence,[ or invite the jury to disbelieve him in that regard] (**R v Hart (1932) 23 Cr App Rep 202).** An exception to this rule is cases in which it is perfectly clear to the witness that his evidence is disputed, or is inconsistent with evidence that has gone before, and in which no injustice would be done by failure to cross-examine him.

162. In **Olalekan v Serco Ltd UKEAT/0189/18/RN** the EAT said at paragraph 24:

> *In my judgment, in the present case, the absence of cross-examination meant that the Tribunal was left with unchallenged evidence from a witness, who was otherwise found to be credible, that these comparators' circumstances were materially different. The Tribunal's conclusion that the comparators were in a materially different position therefore has a sound evidential basis and the claimant is not able to contend that the Tribunal erred in so concluding.*
>
> *The decision in King does not assist the claimant for two reasons:*
>
> *a. First, the approach taken in King was adopted in the case where a litigant-in-person had failed to cross-examine a witness. It is readily apparent that a less generous approach will be taken where a professional representative opts not to cross-examine a witness on a relevant issue;*
>
> *b. Second, the absence of cross-examination was significant in this case. The claimant's case was that there were sufficient similarities with the comparator cases for them to have some evidential value or for them to be used to provide the building blocks to construct a hypothetical comparator. However, those alleged similarities were not put to the respondent's witnesses. It seems to me that where the claimant's case is based on alleged similarities with the comparator cases, it was incumbent upon him to put that case to Mr Chambers, who was asserting that the cases were dissimilar.*

Discussion and conclusions - liability

*Discrimination arising from disability (EQA section 15)*

163. Mr Scantlebury-Watson's claim is well-founded for the following reasons:

a. Protect My Property knew about Mr Scantlebury-Watson's AS from 28 May 2019 when he first notified Mrs Makin. Subsequently, both Mr Millward and Mr Siddle were made aware of his AS. The something arising from his disability was order, the need for routine, clarity and structure, regular feedback and clear expectations. He did not believe that he knew precisely what his role was, and this prompted him regularly to ask for feedback and send lengthy emails to Mr Foot.

b. As a consequence of this, he was treated unfavourably in several ways. The principal unfavourable treatment was his dismissal. Given our findings of fact, we do not accept that the operative reason for his dismissal was redundancy. Everything points to the occupational health report which was commissioned by Protect My Property and identified him as having AS and also suggested that this could be a disability for the purposes of statutory employment protection. Prior to that report, the discussion with Mr Scantlebury-Watson was focused on the premise that he would be returning to work. There was no

discussion about potential redundancy. In fact, that was the whole purpose of referring him to occupational health was to facilitate his return to work. Within a matter of days of the report, all talk of return to work had gone and he was placed at risk of redundancy. The unfavourable treatment was not simply limited to his dismissal but also extended to accusations that he had overstepped the mark, exceeded his authority or failed to meet expectations. We refer to our findings of fact above in this regard particularly in respect of Mr Siddle and Mr Foot. Mr Foot, in particular, found Mr Scantlebury-Watson long winded emails irritating which eventually caused him to "vent off" to Ms O'Shea. The tendency to prolixity was a direct manifestation of Mr Scantlebury-Watson's AS. Problems between Mr Foot and Mr Scantlebury-Watson continued thereafter and was still an issue as late as 24 February 2020 when he raised them with Mr Siddle. The were also problems with Mr Eglen as described in not respecting boundaries as an example of overstepping the mark.

c. We do not think that Protect My Property's unfavourable treatment could possibly be characterised as a proportionate means of achieving a legitimate aim for the following reasons:

    i. Mr Wynn submitted that Protect My Property relied upon the efficient and economic management of the business resulted in dismissing Mr Scantlebury-Watson for redundancy. That is potentially a proportionate means of achieving a legitimate aim, but we do not accept that his position was redundant and that was not the operative reason for his dismissal.

    ii. Alternatively, Mr Wynn submitted that the effective management to ensure that Mr Scantlebury-Watson performed his duties that were required of him was a proportionate means of achieving a legitimate aim. In theory, we agree. However, dismissing a person cannot be effective management to ensure that they perform their duties required of them. They cannot perform their duties if they are no employed.

*Reasonable Adjustments (EQA sections 20 & 21)*

164. The claim for failure to make reasonable adjustments is dismissed. We do not believe that not providing Mr Scantlebury-Watson with a job description which clearly defined his role can amount to a PCP. We can only decide the case as presented by him. Had he identified the generic job description of the role of Customer Service Manager, that could have amounted to a PCP and the reasonable adjustment might have been to provide more detail about the role. He has not done that. Instead, he has relied upon a negative. However, if we are wrong and he has correctly identified the PCP, we do not accept that the role was not clearly defined. For the reasons given in our findings of fact, he had an adequately defined job description.

*Harassment related to disability (EQA, section 26)*

165. The claim for harassment related to disability was presented out of time. Given our findings of fact, the last potential date for an act of harassment was 24 February 2020. He would have to have presented his claim to the Tribunal on or before 23 May 2020. We note that he did not engage in early conciliation within the three-month period and time cannot be extended accordingly. Furthermore, we have not been presented with any argument to justify extending time on the principal that it would be just and equitable to do so.

166. We have, however, made our findings of fact in relation to the allegations of harassment and many of these are well-founded. Had the claim been presented in time or extended on the principle of it being just and equitable to do so, we would have upheld it. We think it is important, nonetheless, to have recorded what we have identified as acts of harassment as it provides important context into the state of the relationship between Mr Scantlebury-Watson, Mr Foot and Mr Siddle. Their behaviour was clearly unwanted, it upset him, and he found it humiliating and degrading. It was connected to his AS. For the record, we believe that Mr Millward behaved sympathetically and Ms Gallagher that took a balanced and fair approach to Mr Scantlebury-Watson in her dealings with him.

Discussion and conclusions - Remedy

167. EQA, section 124 provides that if the Tribunal finds that an employer has discriminated against an employee, it may, amongst other things, order the respondent to pay compensation to the complainant. The remedy is discretionary, although it is highly unusual for a remedy not to be awarded. Any award of compensation will be assessed under the same principles apply to torts (EQA, sections 119 (2) & 124 (6)). The central aim is to put a claimant in the position, so far as is reasonable, that they would have been had the tort not occurred. The sum is not determined by what the Tribunal considers just and equitable in the circumstances it would do an unfair dismissal award, though the two approaches will often generate the same result. Causation and remoteness limit the damages available to a claimant. Only those losses caused by the unlawful act will be recoverable. Non-financial losses are also recoverable including aggravated damages, injury to feelings physical and psychiatric injury. The types of financial loss that are recoverable are in general the same for an unfair dismissal compensatory award, and will include the value of lost earnings and benefits. The calculation of the financial losses the claimant has suffered will also be broadly similar to awards for unfair dismissal.

168. The central matters that the Tribunal will need to determine are the “old job” facts and the “new job” facts it will need to compare the financial benefits had Mr Scantlebury-Watson not been treated unlawfully with the financial benefits he has been able to obtain or will be able to obtain in the future. Factors that will be considered include whether his employment would have terminated anyway, whether he would have been promoted or received a pay rise, what employment has been or will be obtained, what the financial rewards will be and whether these will increase to meet the losses currently being suffered at some point in the future. The Tribunal can take into account

the chance of the original employment not continuing, and the chance of any particular employment arising in the future. Interest can be awarded. Mr Scantlebury-Watson is under a duty to mitigate his loss. Recoupment of state benefits does not apply to compensation for discrimination.

169. We have upheld Mr Scantlebury-Watson's claim for discrimination arising from disability and we are minded to make an award of compensation. We have the benefit of a schedule of loss and a counter schedule of loss. Having considered these, we make a compensatory award as follows:

**Past Losses**

| | |
|---|---|
| Loss of earnings as at 31/12/2020<br>Week's pay (£528.85)<br>34.714 weeks x £528.85<br>Mr Scantlebury-Watson started his new job on 14 December 2020 | **£18,358.50** |

**Future Losses**

Mr Scantlebury-Watson says that he found the task of finding new employment difficult because of the following reasons:

- The debilitating effects of a recognisable psychiatric illness in depressive disorder that required medical attention including psychiatric medication and ACT therapy and that he considers Protect My Property to be responsible.
- His age; he is 49
- His recent employment history, with two periods of unemployment within the previous three years, both of which were of six months duration
- His AS that requires reasonable adjustments to enable him to work
- His caring responsibilities; Mr Scantlebury-Watson has four children, three of whom are disabled, of which two have

had serious mental health issues in the past 12 months that of required intervention from CAMHS and the Local Health Authority's Crisis Team

Mr Scantlebury-Watson sought to mitigate his loss both by lowering his salary expectations and improving his employability prospects by attending part-time vocational training at his own expense. He did not delay in his doing so, being mindful of the effect of the Covid 19 pandemic on the labour market.

Mr Scantlebury-Watson started new employment on 14 December 2020 and moved employer on 15 March 2021 with a new position with the latter employer due to commence on 31 August 2021. All positions have afforded lower remuneration than that which he received from Protect My Property and the cumulative remuneration from his subsequent positions from the 12-month period to 13 December 2021 is

14/12/2020 to 14/03/2021-90 days at an annual salary of £21,141
15/03/2021 to 30/08/2021-168 days at an annual salary of £21,236
31/08/2021 to 13/12/2021-104 days at an annual salary of £23,754

**Total** **£5,744.51**

We are satisfied that Mr Scantlebury-Watson has mitigated his loss.

**Total Compensatory award**

We have applied a 10% uplift to this amount in view of the fact that Protect My Property did not follow the ACAS code on discipline and grievance as set out in the schedule of loss. We are entitled **£24,103.01**

to do this.

**Uplift**

| | |
|---|---|
| £24,103.01 x 10% | **£2,410.35** |
| **Total** | **£26,513.31** |

**Interest on compensatory award**

The Tribunal is able to award interest on awards of compensation made in discrimination claims to compensate for the fact that compensation has been awarded after the relevant loss has been suffered.

The Tribunal may award interest on the following types of discrimination award:

- Past financial loss;
- Injury to feelings;
- Aggravated and exemplary damages;
- Physical and psychiatric injury.
- The interest rate for injury to feelings

The interest rate is 8% per year. Interest on the compensatory award is from the midpoint of the date of the act of discrimination complained of and the date the Tribunal calculates the award. The mid-point date is the date halfway through the period between the date of the discrimination complained of and the date the Tribunal calculates the award.

The earliest date that we can pinpoint from when a discriminatory act took place was 26 April 2019 in respect of Mr Foot's "venting".

The date of discrimination is 26 April 2019, and the date of the award is 5 November 2021. This is 924 days

| | |
|---|---|
| 924/2 x 0.008x1/365x £26,513.86 | **£2,684.80** |

**Injury to feelings**

Injury to feelings awards compensate for non-pecuniary loss. Injury to feelings awards are available where a Tribunal has upheld a complaint of discrimination (EQA, section 119 (4). The award of injury to feelings is intended to compensate the claimant for anger, distress and upset caused by the unlawful treatment they have received. It is compensatory, not punitive. The Tribunal has a broad discretion about what level of award to make, which can only be overturned on appeal of the figure chosen is obviously wrong.

Injury to feelings awards should not be too low, as that would diminish respect for the policy of the antidiscrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches.

Awards should bear some broader general similarity to the range of awards in personal injury cases not to any particular type of personal injury but of the whole range of such awards.

The Tribunal should take into account the value in everyday life of the sum they have in mind, by reference to purchasing power or by reference to earnings.

The Tribunal should bear in mind the need for public respect for the level of awards made.

The matters compensated for by an injury to feelings award encompass subjective feelings of upset, frustration, worry, anxiety, mental stress, fear, grief, anguish, humiliation, unhappiness, stress and depression (**Vento v Chief Constable**

**of West Yorkshire Police (No 2) [2003] IR LR102**. In **Vento** the Court of Appeal identified three broad bands of compensation for injury to feelings:

- Top band where the sum is awarded in the most serious case such as where there has been a lengthy campaign of discriminatory harassment on the grounds of sex or race. Currently £27,000-£45,000

- The middle band to be used for serious cases which do not merit an award in the highest band. Currently £9,000-£27,000

- The lower band which is appropriate for less serious cases such as where the act of discrimination is an isolated or one-off occurrence. Currently £900-£9000.

The figures for each band are regularly updated. Within each band there is considerable flexibility allowing the Tribunal to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.

Mr Scantlebury-Watson has asked for an award to be made in the middle band and is seeking £18,000. We disagree with that figure, and we consider it to be too high. It was not the first time that he had encountered discrimination in the workplace and whilst his feelings were hurt, he could have reacted more quickly to what was going on and return to work approximately to 4 to 5 weeks after going on sick leave.

**Injury to feelings - Aggravated damages**

Mr Scantlebury Watson seeks aggravated damages on the basis that Protect My Property's discrimination

proceeded from prejudice, animosity, spite or vindictiveness and was otherwise high-handed, malicious, insulting or oppressive. He says that this caused distress, anger and affront. He goes on to say that Protect My Property were aware that his actions were unlawful and that it acted inappropriately in the course of defending the claim, adopting a stance of obstructive notes, denial and obfuscation that is contrary to the overriding objective and despite compelling evidence of his disability.

Aggravated damages are available in discrimination claims. They are an aspect of injury to feelings, and are awarded only on the basis, and to the extent that the aggravating features have increased the impact of the discriminatory act on the claimant and thus the injury to his or her feelings. They are compensatory not punitive. The appropriate acts include:

- Where the act was done in an exceptionally upsetting way.

- The discriminatory conduct must be evidently based on prejudice or animosity, or which is spiteful or vindictive or intended to wound and is likely to cause more distress than if done without such a motive, for example as a result of ignorance or insensitivity. Naturally, the claimant has to be aware of the motive in question.

- Subsequent conduct, for example conducting the trial in an unnecessarily oppressive manner, failing to apologise, or failing to treat the complaint with the requisite seriousness.

The Tribunal must be aware of the risk of double recovery, and consider whether the overall water injury to feelings and aggravated damages is proportionate to the totality of the suffering caused the claimant.

Mr Foot harassed Mr Scantlebury Watson, there was evidence of him being short with people. There was an element of dismissiveness on the part of Mr Foot and Mr Siddle. Mr Scantlebury-Watson was sidelined by Mr Siddle, he did not deal with his internal job application and he was overly scrutinised. On one occasion he was deliberately told about a meeting at very short notice and not properly briefed which undermined him. In contrast, we believe that Ms Gallagher was trying to take an open-minded view. Finally, the way in which they acted in relation the Mr Scantlebury Watson so soon after the occupational health report resulting in his dismissal was insensitive. We have awarded £500

We have awarded £7,500 plus £500 in aggravated damages which is towards the top of the lower band. **£8,000**

**Injury to feelings - Increase for failure to follow the ACAS code**

Mr Scantlebury Watson has sought a 10% uplift on the injury to feelings award. We have already covered this and there may be an element of double recovery. Consequently, we have not made an award under this head.

**Interest in injury to feelings**

Interest is awarded on injury to feelings from the date the act of discrimination complained of until the date on which the Tribunal calculates the compensation.

We have taken the start date as 26 April 2019 to 5 November 2021 which is 924 days.

924 x 0.008 x 1/365 x £8,000 **£1,620.16**

**Aggravated damages - Increase for failure to follow the ACAS code**

Mr Scantlebury Watson has sought a 10% uplift on the injury to feelings award. We have already covered this and there may be an element of double recovery. Consequently, we have not made an award under this head.

**Psychiatric injury**

Mr Scantlebury Watson submits that in subjecting him to discrimination on the grounds of his disability, Protect My Property failed in its common law duty implied into his contract of employment and its statutory duty under the Health and Safety Act 1974 and other legislation. He submits that there was a real risk of injury that was reasonably foreseeable.

Mr Scantlebury Watson further argues that in causing him to sustain a recognisable psychiatric illness, a depressive order, he was required and continues to require medical attention including psychiatric medication and ACT therapy. He considers that Protect My Property is responsible for his psychiatric injury. His psychiatric injury is indivisible, and he should be entitled to a full award. He submits that his vulnerability should be a factor when considering any award of compensation because he is disabled.

He claims a £7,000 under this head of loss.

Claimants can claim damages for personal injury caused by unlawful discriminatory acts. However, it is not always easy to identify where injury to feelings ends and physical and psychiatric injury starts and there is a risk of double counting.

Although there is no absolute requirement for medical evidence to establish a claim for personal injury, obtaining such evidence is advisable where possible, especially where

claims are complex and there are issues of causation or divisibility (**Hampshire County Council v Wyatt UKEAT/0013/6**).

In some cases, issues may arise where a claimant has suffered an injury through multiple causes. In such cases, the Tribunal will need to consider whether the harm is "divisible" or "indivisible".

Divisible harm is where there are different acts because of different damages, or quantifiable parts of the damages. In these cases, the Tribunal must establish and award compensation only for that part of the harm for which the respondent is truly responsible.

Indivisible harm is where multiple acts result in some damage. These are usually:

- Monocausally where all of the acts operate in the same way to cause the damage, only one act could have actually caused the damage, but it is impossible to tell which of them was the actual cause; or

- Multicausally where a single conditional harm is caused by a combination of separate acts or factors. For example, where the cumulative effect of their separate acts crosses a threshold that gives rise to that damage, or distinct acts combined to produce a single form of damage.

If the harm is indivisible, any respondent whose act has been proximate because of the injury must compensate for the whole of it. That others had a part to play in the injury is a matter for contribution, not apportionment.

The Judicial College has published

guidelines for the assessment of general damages in personal injury cases. The latest 15th edition was published in November 2019. According to the College, the following factors need to be taken into account when valuing claims for psychiatric injury:

- The injured person's ability to cope with life and work.
- The effect on the injured person's relationships with family, friends and those with whom he comes into contact.
- The extent to which treatment would be successful.
- Future vulnerability.
- Prognosis.
- Whether medical help is being sought.
- Whether the injury results from sexual and/or physical abuse and/or breach of trust; and if so the nature of the relationship between victim and abuser, the nature of the abuse, its duration and the symptoms caused by it.

There are four categories of award:

- Less severe: between £1,440 and £5,500. Where the claimant has suffered temporary symptoms that have adversely affected daily activities.
- Moderate: between £5,500 and £17,900. Where while the claimant suffered problems as a result of the discrimination, marked improvement has been made by the date of the hearing and the prognosis is good.
- Moderately severe: between £17,900.50 £1460. Moderately severe cases include those where there is work-related stress resulting in a permanent or long-standing disability preventing a return to

comparable employment. These are cases where there are problems with factors identified above, but there is a much more optimistic prognosis than severe.

- Severe: between £51,460 and £108,620. Where the claimant has serious problems in relation to the factors identified above and the prognosis is poor.

The award can be adjusted to allow for the extent to which the act of discrimination because the illness. So, if it is found that the discriminatory act because the illness to the extent of 30%, the award will be reduced by 70%.

Injury to feelings and physical and psychiatric injury are distinct heads of loss, but the Tribunal is mindful of avoiding double counting.

We note Mr Scantlebury Watson is not claiming a Personal Independence Payment and has not provided medical evidence. He obtained and a new job fairly easily. He was able to navigate his grievance. The discriminatory treatment caused him to suffer depression it is indivisible but multicausal resulting in his depression- he had to take anti-depressants and he still requires them. We have made an award of £5,500 (Moderate). **£5,500**

**Interest on psychiatric injury**

Mr Scantlebury Watson is entitled to interest on his award.

924 x 0.008 x 1/365 x £5,500 **£1,113.86**

**Total Award**

**£44,432.13**

Employment Judge Green

Date 5 November 2021