RESERVED JUDGMENT

EMPLOYMENT TRIBUNALS

Claimant:	Mr C Newton
Respondents:	Quilter Financial Planning Solutions Limited
Heard at:	Leeds Employment Tribunal
Before:	Employment Judge Deeley, Ms Hodgkinson and Mr Howarth
On:	11-15 October 2021 (with parties) and 22 November 2021 (in private)

Representation

Claimant:	In person
Respondent:	Miss Souter (Counsel)

RESERVED JUDGMENT

1. The claimant's claim of unfair (constructive) dismissal under s98 Employment Rights Act 1996 fails and is dismissed.
2. The claimant's claims of:
   2.1 direct disability discrimination under s13 Equality Act 2010;
   2.2 discrimination arising from disability under s15 Equality Act 2010; and
   2.3 harassment relating to disability under s26 Equality Act 2010;

   fail and are dismissed.
3. The claimant's claim of failure to make reasonable adjustments under s20 and s21 Equality Act 2010 succeeds and is upheld.

RESERVED JUDGMENT

INTRODUCTION

Tribunal proceedings

1. This claim was case managed by Employment Judge Brain at a Preliminary Hearing on 6 April 2021.
2. We considered the following evidence during the hearing:
    2.1 a joint file of documents and the additional documents referred to below;
    2.2 witness statements and oral evidence from:
        2.2.1 the claimant;
        2.2.2 the claimant's witness, Mr Les Jackson (a former colleague); and
        2.2.3 the respondents' witnesses:

Name	Role at the relevant time
1) Mrs Elaine Finlay	Business Assurance Manager for the respondent
2) Mrs Lisa Swinney	Head of Business Assurance Service Delivery for the respondent
3) Mr Richard Fraser	Regional Financial Planning Director, Quilter Private Client Advisers

3. The respondent provided additional disclosure documents during the hearing consisting of notes and emails relating to Mr Fraser's conduct of the claimant's grievance appeal. The claimant did not object to the inclusion of these documents in the hearing file.
4. We also considered the oral submissions from the claimant and from the respondent's representative.

Adjustments

5. We asked the parties if they wished us to consider any adjustments to these proceedings. We noted that the claimant has chronic insomnia and may have difficulties in the latter part of the afternoon. We started the hearing at 9.30am from the second day of the hearing onwards and finished earlier each day to accommodate his condition.
6. We also noted that the parties and the witnesses could request additional breaks at any time.

CLAIMS AND ISSUES

7. The respondent accepted that the claimant has two conditions amounting to disabilities for the purposes of s6 of the Equality Act, both of which were connected to a brain injury that the claimant suffered following a car accident in 2017:

7.1 Scarring; and

7.2 Chronic insomnia.

8. The claimant brings complaints of:

   8.1 Disability discrimination:

      8.1.1 Direct disability discrimination;

      8.1.2 Discrimination arising from disability; and

      8.1.3 Harassment; and

   8.2 Unfair (constructive) dismissal.

ISSUES

9. Employment Judge Brain summarised some of the claimant's complaints in the April Preliminary Hearing. The respondent also prepared a draft list of issues.

10. We provided the parties with an updated draft list of issues at the start of this hearing, including a table of factual allegations. We discussed this with the parties in detail at the start of the hearing and provided them with two updated drafts, the second of which was sent to both parties on the afternoon of the first day of the hearing. Both the claimant and the respondent's representative emailed the Tribunal to confirm that the third version of the list of issues was agreed on the first day of the hearing.

11. It became apparent during the claimant's evidence that he was also seeking to plead that 'extra stress' caused by the review mechanism relating to his working hours from late 2020 was part of the substantial disadvantage that he alleged as part of his reasonable adjustments complaint. The respondent objected to this amendment to the list of issues. We considered oral submissions from the claimant and the respondent's representative on this matter and the potential prejudice to both parties, together with the other factors set out in *Selkent*. On balance, we concluded that the prejudice to the claimant of not allowing this issue to proceed outweighed the prejudice to the respondent in permitting this amendment. In particular, we noted that the respondent itself had not identified the 'substantial disadvantage' to the claimant in its draft list of issues and that the claimant was in fact seeking to amend the Tribunal's own list of issues provided on the first day of the hearing.

12. **<u>The final List of Issues is set out at Annex 1 to this Judgment.</u>**

13. **<u>A summary of the Relevant Law is set out at Annex 2 to this Judgment.</u>**

FINDINGS OF FACT

Context

14. This case is heavily dependent on evidence based on people's recollection of events that happened some time ago. In assessing the evidence relating to this claim, we have borne in mind the guidance given in the case of *Gestmin SGPS -v- Credit Suisse (UK) Ltd* [2013] EWHC 3560. In that case, the court noted that a century of

psychological research has demonstrated that human memories are fallible. Memories are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable, and believe our memories to be more faithful than they are. External information can intrude into a witness' memory as can their own thoughts and beliefs. This means that people can sometimes recall things as memories which did not actually happen at all.

15. The process of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially parties or those with ties of loyalty to the parties. It was said in the *Gestmin* case:

    "Above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

16. We wish to make it clear that simply because we do not accept one or other witness' version of events in relation to a particular issue does not mean that we consider that witness to be dishonest or that they lack integrity.

Background

17. The respondent is part of a publicly listed group of companies that provides financial advice, investment services and wealth management services to customers. The respondent's group of companies employs around 3000 employees and has shared HR services and in-house legal counsel. The respondent's financial planning services are regulated by the FCA.

18. The claimant was employed from 8 January 2018 by the respondent as a Business Assurance Assessor. The role of Business Assurance Assessors involved reviewing advice provided by third party firms' advisers to clients on financial planning and other matters. One of those third party firms was another group company of the respondent.

19. The respondent's managers and Quality Assurance team members relevant to this claim included:

Name	Role at the relevant time
1) Mrs Elaine Finlay, LV, RL and TA	Business Assurance Managers for the respondent
2) JC	Training and Competency Assessor, Quality Assurance team
3) SCG	Quality Assurance team
4) Mrs Lisa Swinney and NS	Joint Heads of Business Assurance Service Delivery for the respondent
5) SG	Governance and Analytics Manager for the respondent

Name	Role at the relevant time
6) CM	Head of Compliance Operations (LS and NS' reporting manager) for the respondent
7) JL	Operations Director for the respondent
8) Mr Richard Fraser	Regional Financial Planning Director, Quilter Private Client Advisers (part of the Quilter plc group, but a separate company to the respondent)

20. The claimant's colleagues (who were also Business Assurance Assessors) included:

Name	Role at the relevant time
1) ST	Level 6 adviser, based in EF's team for around 6 months during 2020
2) EM	Level 4 adviser, Financial Planner based in EF's team (focussed on equity release) since 2014
3) Mr Les Jackson	Level 6 adviser, based in LV's team

21. The claimant's contract stated:

"Place of Work

You will be based from home at your current home address. We may require you to work or visit various Company buildings or to transfer you to other Company office buildings from time to time….

Working Hours and Breaks

You will normally work 35 hours per week, Monday to Friday inclusive, starting at 9:00 and finishing at 17:00.

In order to meet the needs of the business, your working week may vary from time to time at your manager's request. You will be given reasonable notice of any changes wherever possible. You should make every effort to be flexible and your manager will seek to accommodate your personal preferences for working arrangements, subject to the needs of the business. From time to time it may be necessary to work extra hours in order to meet the needs of the business…

Compliance

The business is highly regulated and the penalties for both the Company and its senior management resulting from non-compliance with the regulatory rules in the countries we operate are potentially severe. It is vital that you adhere to the appropriate financial services rules and the relevant procedures set down by the Company. In particular, you must maintain your awareness of the 'Regulatory Obligations' set out in the Company's Policy Suite, as amended from time to time. Your role in ensuring the Company meets all its regulatory obligations should not be

under-estimated and any contravention of these obligations may result in disciplinary action."

22. The contract also referred to the respondent's incentive scheme, for which anyone with an individual of performance rating of 2 or more was eligible. An individual with a rating of 2 (Inconsistent Performer) could be eligible for a bonus of 0-2% of their base salary. This rose to 5-10% of base salary for an individual with a rating of 3 (solid performer) and to 15%+ for a rating of 5 (Exceptional Performer). Employees with a level 1 rating (Performance Improvement Required) were not eligible to receive a bonus.

23. The range of performance ratings from 1-5 was also set out in more detail in each of the claimant's review documents which he completed with his managers.

24. The claimant's job description included:

"Main purpose of role: *To provide an independent oversight of the effective operation of the core compliance and regulatory risk control activities undertaken at Quilter.*

Key responsibilities and scope of role:

Scoping, planning, delivering and reporting of Business Assurance Controls Checks and Business Assurance Reviews undertaken.

• Provide appropriate assurance oversight

• Updating internal systems to record progress and outcomes of reviews undertaken

• Demonstrate good customer outcomes.

• Contribute to building a great environment to work in.

• Operate efficiently —treat the business as if it's your own.

• Own decisions and tasks —decide and deliver.

• Build on own knowledge by self-learning, share knowledge and best practice with colleagues.

• Oversight and potential application of breaches at Adviser and Firm level in line with Breach procedure and advice standards

• Support with remediation cases where potential or confirmed customer

• Adherence to the Business Assurance key processes outlined through the Control Environment Operating Model (including the teams)

• Oversight and adherence to the Business Assurance feasibility process (where applicable)…"

Claimant's working arrangements

25. The claimant attended a two week induction course at the respondent's Newcastle office. After that time, the claimant worked from home on a full time basis, as part of LV's team. The respondent permitted its employees at that time to work flexible

hours, the times of which were informally agreed with line managers. The claimant chose to work from 7am to 3pm, because he suffered from insomnia. However, there was no formal agreement that the claimant would work from 7am to 3pm and his working arrangement was not recorded in writing.

26. The claimant held a Level 4 Financial Planning qualification when he joined the respondent. However, the claimant had to complete the respondent's internal accreditation training before he could start reviewing advisers' advice to clients. During 2018, the claimant was trained with the aim of becoming accredited to review advice on:

    26.1 Pension Switches cases; and

    26.2 At Retirement cases (also known as 'Drawdown' cases).

27. The claimant and LV completed a Mid-Year Review document in 2018. One of the categories in that review document referred to employees remaining "up to date with published advice standards and guidelines". The claimant commented that: *"I read all meeting minutes and compliance bulletins to ensure I* [am] *fully up to date".*

28. LV rated the claimant a level 2 (inconsistent performer) as at Mid-Year 2018, stating:

    "The indicative rating of 2 reflects that Chris is relatively new to the role and I have every confidence his productivity and quality will continue to lift over the coming months."

29. The claimant's end of year rating for 2018 remained at level 2. The claimant commented in the review document:

    "I would have a higher productivity if [..] the [At] Retirement training had not taken place whilst I was on honeymoon then a hospital appointment. It is not possible to produce the same numbers when only checking Pension Switches compared to people on the At Retirement work and it would not be fair for this to negatively impact me."

30. The claimant also stated:

    "I feel my productivity has been hindered by only working pension switches and the constant cherry picking that goes on."

Claimant's team move

31. The respondent restructured its Business Assurance department in early 2019. The respondent decided to move the claimant from LV's team to Mrs Finlay's team (which dealt primarily with Mortgage & Protection work).

32. The respondent decided to restructure its department, following a change in its systems. We accept Mrs Swinney's evidence that the decisions around the team moves following the new structure were as follows:

    32.1 Mrs Swinney, NS, SG and CM considered the data and analytics regarding the firms being assigned to each team, the type of work and the volume of work that were likely to be required of each team;

32.2 they then worked out the skillsets required in each team and the team's predicted volume of different types of work;

32.3 they then assigned individuals to each team, based on their skillsets.

33. Mrs Swinney said that she expected the existing and new team managers to discuss the team moves with any staff affected by the new structure. Mrs Finlay spoke to the claimant regarding his move into her team.

34. The claimant was unhappy with being moved teams because he perceived Mrs Finlay's team as being of a 'lower status' than LV's team. The claimant said that he had been 'segregated' into a lower team by being placed in Mrs Finlay's team because:

34.1 he believed that everyone else in Mrs Finlay's team was qualified and accredited at Level 3 or lower;

34.2 he accept that he carried on doing Level 4 work whilst in Mrs Finlay's team, but he thought that others in the department would view him as carrying out lower level work; and

34.3 he felt that he did not have the same access to Quality Assurance and colleague support as he had in his previous team.

35. The claimant said that the reason why he was being moved teams was because the respondent found out about his brain injury, after noticing his scarring. However, we have concluded that the claimant's condition had no impact on the decision that he should move teams. The key reasons for our conclusions are:

35.1 the claimant was unable to explain why he believed that Mrs Swinney, NS, SG or CM were aware of his scarring as at early 2019. We note that the claimant worked from home for the vast majority of his employment. The claimant said that some of his colleagues were aware of his scarring because they had worked with him at a previous company. Mrs Finlay also stated that she was aware of the claimant's scarring because RL had told her. However, Mrs Swinney denied that she was aware of the claimant's brain injury or any scarring until she received his occupational health report in 2020; and

35.2 even if Mrs Swinney were aware of the claimant's brain injury and his scarring, we accept Mrs Swinney's evidence that the restructure process was based on skillsets, rather than on individuals. The respondent did not decide which individuals should be place in each team – rather they looked at the skills needed and the volume of work in each team, based on the data provided by SG's Government and Analytics team.

Claimant's reviews - 2019

36. Mrs Finlay held the claimant's mid-year review in 2019 and rated him as a level 3 (Solid Performer).

"Summary

As per e-emails, great feedback from advisers and firms and [X] mentioned how helpful you were on a call.

You need to be aware of how some comments can land, when you're discussing cases with QC, you need to take a step back and discuss objectively…

…Some great behaviours, this needs to be delivered consistently".

37. Mrs Finlay also held a Year End review with the claimant in 2019 and again rated him as a level 3 (Solid Performer).

Respondent's Christmas party – December 2019

38. The respondent held a Christmas party for its Business Assurance team in December 2019. The claimant, many of his colleagues and managers attended the party which the claimant stated consisted of around 100-150 members of staff. The staff had a meal whilst seated at tables, followed by drinks and a disco. All of the witnesses agreed that the music after the dinner was quite loud. They said that it was possible to hear the person next to you if you 'leaned in' and shouted to them, but that it would be difficult to hear someone sitting across a table.

39. The claimant said that he had cut his hair shorter than usual because he had forgotten about the Christmas party, which meant that the scars from his car accident and brain injury were visible. The claimant stated that SW (a colleague based in another team) was talking to a group of managers (including Mrs Finlay, Mrs Swinney and RL) across the table from him. The claimant said that SW and the managers were 'gossiping' about him and that the managers encouraged SW to question the him about his injury. The claimant said that SW 'belted out' two questions across the table:

    39.1 *"What happened to your head?"*, to which the claimant answered *"I got hit by a car"*; and

    39.2 SW pointing to the equivalent part of his head to one of the claimant's scars, which the claimant described in his witness statement as looking 'like a diving frog' - *"What happened to that bit?"*, to which the claimant replied *"impact".*

    The claimant stated that SW then went back to talking to the managers.

40. The claimant said that he was sat next to other colleagues when SW questioned him. The claimant said that his colleagues did not mention the exchange and did not ask him any questions about his scars either during the Christmas party or after that time. The claimant also said that Mrs Finlay, Mrs Swinney and the other managers did not ask him about his scars.

41. The claimant did not raise any complaints with any managers regarding SW's behaviour either after the Christmas party or at any time prior to the Tribunal proceedings.

42. Mrs Finlay and Mrs Swinney both gave evidence and stated that they did not recall specifically speaking to the claimant or to SW during the party. They both stated that

they did not 'gossip' about the claimant and that they did not encourage SW to ask the claimant any questions about his scars. Mrs Finlay said that she was aware of the claimant's injury because LV told her before the Christmas party. Mrs Swinney said that she was not aware of the claimant's injury until she received a copy of his occupational health report in October 2020.

43. We find that:

    43.1 SW did ask the claimant about his scars and the claimant replied as set out above;

    43.2 SW did not discuss the claimant's scars with a group of managers and asked those questions of his own volition;

    43.3 the claimant thought that SW should not have asked those questions at the Christmas party, but he was not upset by them at that time.

44. The key reasons for our conclusions are:

    44.1 the level of noise at the party was such that it was unlikely that Mrs Finlay, Mrs Swinney or another of the other managers in the group talking at the other end of the table to the claimant would have overheard SW's comments;

    44.2 the claimant said that the colleagues he was talking to at his end of the table overheard SW's comments, but none of them mentioned it to him either at the party or after the party; and

    44.3 the claimant did not raise a complaint about SW's questions at any time during his employment with the respondent. We note in particular that this issue was not raised as part of the claimant's grievance in 2020. This was despite the fact that the claimant did raise a complaint regarding an email comment that he states JC made in reference to his insomnia (see our findings relating to the claimant's grievance below).

Pension Transfers and March 2020 stress risk assessment

45. The claimant also undertook training on Pension Transfers during 2019 and early 2020 (which related to defined benefit schemes). Pension Transfers were a Level 6 qualification. However, the claimant did not complete his accreditation for Pension Transfers. The claimant's 2019 reviews record that he was working with his Level 6 qualified team colleague on defined benefit schemes. However, the claimant and Mrs Finlay agreed as part of his stress risk assessment in March 2020 that he would no longer seek accreditation for Pension Transfers because he found the work stressful.

46. The claimant also raised his concerns during his March 2020 stress risk assessment that: he had struggled to get in touch with QA; QA sometimes had 'opposing views' and that the technical calls were not always consistent with the respondent's guidance. Mrs Finlay offered that the claimant could have one point of contact with QA. JC and SCG were nominated to be the claimant's main QA contacts.

Case allocation and productivity in the Business Assurance department

47. The respondent had a system of allocating cases to the teams within the Business Assurance department. Each morning, Mrs Swinney had a 'buzz call' with Mrs Finlay, RL, TA, LV and the other managers to decide which cases each team would focus on that day. The key ways in which cases were allocated included:

    47.1 **Rule 1** – cases for the team's assigned firms;

    47.2 **Rule 2** – cases for the team's assigned firms and any buddy team's assigned firms; and

    47.3 **Rule 3** – cases from any team's assigned firms.

48. We found that the claimant was often the only person in Mrs Finlay's team working on Rule 3 cases. However, we concluded that this was because he held a Financial Planning qualification. We note that the majority of the team members held a Level 3 qualification, which limited the type of cases that they could review. In terms of the other team members with Level 4 or above qualifications, EM focused on equity release cases and ST on defined benefit cases. Their typical workload differed significantly from that of the claimant because of their skillsets.

49. The claimant accepted during cross-examination that he did not know whether individuals in any other teams dealt with Rule 3 cases. Mr Jackson stated in evidence that he did not know what work the claimant did. However, Mr Jackson confirmed that before his accreditation for Level 6 defined benefit cases, he would work cases on the basis of Rule 1 or 2. Mr Jackson also that if there were not many Rule 1 or 2 cases, then he would also review Rule 3 cases. We concluded that individuals in other teams worked on Rule 3 cases from time to time, either on management instruction or if there were no other Rule 1 or Rule 2 cases for them to review at any given time.

50. In addition, the teams were given permission to prioritise cases for a variety of reasons. For example:

    50.1 a customer firm could ask for a case to be treated as a priority, for example if the customer involved was vulnerable or the matter was time sensitive (such as products with deadlines for applications or when dealing with customers who were terminally ill);

    50.2 cases may be allocated to Assessors who needed to undertake certain types of cases for training purposes or to be checked against performing certain types of cases for Quality Assurance purposes; and

    50.3 complex cases involving several product types may be allocated to particularly experienced Assessors who possessed all of the skills required to assess those product types.

51. The respondent's managers would speak to individual Assessors directly if they wanted them to deal with any priority cases. However, the fact that a case was given priority status would not necessarily be noted on the respondent's systems because

the matter had been dealt with and not all of the systems had the capability to add such detail.

52. The Assessors in each team would then pick up any priority cases or the oldest case for their rule that they were qualified to assess. The Assessors had access to the 'queue' for the whole of the Business Assurance department. At that time, the queue consisted of a live spreadsheet of cases which the Assessors could filter using the Rule that they were working under and their individual skills so that they could select appropriate cases to assess.

53. The role of the respondent's managers was to ensure that cases were being dealt with in an efficient manner and in accordance with the service levels agreed with the firms. The managers for each team did not necessarily have all of the technical expertise required to handle each type of case which the Assessors in their team would deal with.

54. Each Assessor's productivity was measured using the average time across all Assessors taken to complete particular types of cases. When dealing with individual cases, some may take longer than average and some cases may be dealt with more quickly than others. However, this was taken into account by using the average time taken to deal with the different types of cases. For example, the respondent expected that a Level 4 qualified Assessor would be able to complete on average:

    54.1 three pension switches cases in a day; or

    54.2 five at retirement cases in a day.

QA team contacts, technical presentation emails and invites to technical calls

55. The respondent had a Quality Assurance or Quality Control department ("**QA**") that provided training and guidance to the Assessors on technical matters relating to their product types and carried out checks on the assessments carried out by the Assessors.

56. The guidance provided by the QA department included:

    56.1 technical calls and emails (containing technical presentations which the Business Assurance Assessors were required to read);

    56.2 access to advice from the department by phone or by email;

57. Some of the QA team were allocated to support particular Business Assurance teams. However, the individual allocated would not necessarily have the technical skills to cover all product types that the Business Assurance team members advised on. For example, the QA contact in Mrs Finlay's team could not cover the claimant's and ST's pensions advice and the QA contact in Mr Jackson's team did not cover his Level 6 products.

58. Mrs Finlay arranged for the claimant to have nominated points of contact in the QA team (JC and SCG) as part of his March 2020 stress risk assessment. Mr Jackson's evidence was that he did not have any nominated points of contact. Mr Jackson said

that he was given a generic QA email address to raise any queries, but never received a response from the QA team.

59. The claimant was included on an email list sent by NC, a member of the QA team. NC and his colleagues sent out emails containing technical presentations, which included information relating to technical updates. They would then invite the Assessors to attend calls to discuss those presentations. These calls normally included a limited time for questions and answers from the assessors attending the calls. However, Assessors could also raise any questions that they had about any updates with the QA team after the calls.

60. The respondent expected all Assessors to read the emails as soon as possible after they received them in order that they kept up to date with any technical changes. They were expected to read them, regardless of whether or not they attended the calls. However, the claimant's evidence was that he did not normally read the presentations because he viewed this as a duplication of work – he thought it was sufficient just to attend the calls.

61. Mr Jackson took a different approach. Mr Jackson stated that he would normally receive the technical slides in the morning before the technical call in the afternoon. Mr Jackson said that if he had time, he would go through the slides before he joined the call. However, Mr Jackson said that if he was unable to join the call then he would read the slides and update the CPD log electronically to confirm that he had done read them.

62. The claimant stated that he was not invited to all QA calls. He could not remember the number of calls that he had not been invited to, but estimated that it was around 10 calls. Mr Jackson said that he had not been invited to one or two calls, but that he had been invited to all other calls.

63. We have concluded that:

    63.1 the claimant was responsible for ensuring that he read the technical presentations as soon as possible after receiving them, in order that he followed the latest guidance when carrying out assessments. The claimant was aware of the importance of reading technical updates. For example, he noted in his 2018 review that: *"I read all meeting minutes and compliance bulletins to ensure I [am] fully up to date"*;

    63.2 given the nature of the claimant's role and responsibilities, the claimant should also have taken the initiative and asked to be invited to technical calls if he had received a presentation but not a call invite, particularly if that happened on ten occasions; and

    63.3 it was reasonable for the respondent to expect the claimant to take the initiative to ensure that he was up to date on any technical guidance, due to the highly regulated nature of the respondent's business. In addition, the claimant was aware that if he did not keep up to date with any technical guidance, then he was at risk of carrying out advice reviews incorrectly.

64. We also found that the claimant had greater direct access to technical support from March 2020 than his peers, including Mr Jackson. The claimant was told that he could contact JC regarding any technical queries, either by phone or by email. Mr Jackson, by contrast, gave evidence that he had to send any technical queries to a general QA inbox. The claimant stated that he tried to call JC and did not receive a response. He said that he did not email JC. However, we note that he and JC exchanged several emails, including in relation to an appeal in April 2020. The claimant stated in relation to that appeal (more details of which are set out later on in this section of the Judgment):

    "Also as an extra point, thank you very much James for offering your support as you did, I will be using it, probably too much so my apologies in advance."

65. The QA team's responsibilities also included

    65.1 making sure all Assessors were properly trained and accredited to the respondent's standards, even if an Assessor had previously carried out similar work for other organisations (such as Mr Jackson);

    65.2 carrying out regular quality control checks on all assessors' work; and

    65.3 dealing with any complaints or appeals from the respondent's client firms.

66. The number of quality assurance checks carried out by the QA department on individual Assessors was set out in a QA framework. The QA framework set out different levels of quality checking, depending on factors including:

    66.1 the stage that an Assessor was at during their training on particular product types;

    66.2 the number of 'unfair outcomes' that an Assessor had received in a rolling period.

67. In addition, the Assessors could 'appeal' to the QA department if they were unhappy with any outcome given by the QA. The third party firms' advisers could also complain to the QA department if they were unhappy with the outcome of an Assessor's assessment of the advice that they had provided to their customers.

68. For example, the claimant received an 'unfair outcome' as a result of an appeal that took place in late March or early April 2020. JC (Training and Competency Assessor) dealt with the appeal and did not uphold the claimant's assessment. The claimant emailed JC on 4 April 2020 (copying in Mrs Finlay and SG-C) and stated:

    "I want to say thank you very much for your time in discussing the case yesterday. I found it very useful to have a discussion as we had.

    I also wanted to apologise for raising an appeal on the case because it turned out that my appeal was based on incorrect information. I thought about it a lot last night, I couldn't get it off my mind in fact. I based my appeal on information from my memory of the case rather than reading through it again. It turns out my memory was not good.

I pride myself on being able to own my mistakes which this was one, however although it was inaccurate, I think I benefitted greatly from being able to discuss a case like that as we did, due to the subjectivity of it.

So thank you very much for your time you spent with me when time is at a premium as it is right now.

My learning point from this is, don't raise an appeal without going through the case and what I have written exactly.

Also as an extra point, thank you very much James for offering your support as you did, I will be using it, probably too much so my apologies in advance."

69. JC responded to the claimant:

"I know the feeling of lying awake thinking of cases – I do it a lot.

Fair shout on the comments below though – it's always harder to admit mistakes than just move on silently. Regarding support, the way I see it, we all have the same goal. Competent files and good client outcomes. If we can get feedback to advisers on how to do this, our jobs become much easier and assessors are the forefront of educating the advisers on our processes through clear and well explained feedback. I'm always happy to help, even if it is just a chat. We work in an environment where we can't just turn to the person next to us for a quick opinion so picking up the phone/sending an email is important. I'm always happy to help out."

'Cherry picking' cases

70. The claimant complained that colleagues throughout the Business Assurance department were 'cherry picking' cases in order to increase their productivity (and therefore their appraisal ratings, which in turn were linked to their bonuses).

71. The claimant stated that cherry picking could take place in three key ways:

    71.1 Assessors selecting 'easier' cases (such as at retirement cases), rather than 'harder' cases (such as pension switch cases) because they were less likely to face problems when such cases were assessed for Quality Control purposes;

    71.2 Assessors avoiding certain firms (or advisers at those firms) whom they regarded as difficult to deal with (e.g. because the advisers had complained about previous assessments);

    71.3 Assessors selecting newer cases, rather than the older cases, for example when they were supposed to be working under Rule 3. The claimant believed that the oldest cases tended to be more complicated than the newer cases.

72. The claimant raised his concerns regarding cherry picking with his managers from early on in his employment with the respondent. The parties did not provide copies of any email complaints prior to 2020. However, we note that the claimant complained about cherry picking during his 2018 Mid-Year Review with LV, which we have referred to in our findings regarding that review. Four of the claimant's

colleagues, including Mr Les Jackson (who was a member of LV's team), also raised concerns regarding cherry picking with the respondent.

73. We note that the claimant has suggest that the respondent failed to deal with his concerns regarding cherry picking throughout his employment because either:

    73.1 he did not receive a response from his managers to his concerns; and/or

    73.2 he did not accept the explanations provided. For example, in his response to Mrs Finlay's informal grievance summary (which we consider in more detail in later paragraphs in this Judgment), the claimant stated regarding his cherry picking concerns:

    "This has been an ongoing issue since the day I started with hundreds of emails being sent regarding it. There are no reasonable explanations to this, and only lies told….This is typical of the company dismissing this as an issue as it has done for almost 3 years and even on a grievance refused to accept this as an issue. Please speak to others to see if they think it is an issue, I can suggest some names if this helps. Simply denying it exists is not acceptable in this case as it is a lie."

74. The hearing file contained multiple emails from the claimant to the respondent, raising cherry picking emails from the Spring of 2020 onwards. We accept the claimant's evidence that he raised complaints about cherry picking around 1-2 times per week. Mrs Finlay said that she started to receive emails from the claimant about cherry picking concerns from the end of April 2020 onwards, although he had raised concerns with her during his March 2020 stress risk assessment. We also accept the respondent's witnesses' evidence that they considered the key concerns raised by the claimant and did not dismiss these out of hand. For example:

    74.1 the claimant complained to Mrs Finlay by email on 5 May 2020 that AA had taken an ad-hoc withdrawal case from the claimant's queue. Mrs Finlay responded on the same day to say that the team had reverted to Rule 3, which was why AA had picked up that case. The claimant then raised a further issue by email regarding taking cases out of order to which there was no email response. However, we accept Mrs Finlay's evidence that she spoke with the claimant by telephone regarding some of his concerns;

    74.2 the claimant complained by email to RL on 11 May 2020 that there were no cases left to take this morning. RL explained that they had been 'locked off' because the respondent had to send cases to its third party agent for review;

    74.3 the claimant complained to Mrs Finlay by email on 2 June 2020. He stated that a colleague from another team (PJ) was taking cases from their team's queue. Mrs Finlay responded saying:

    "You must remember that different managers are agreeing prioritisation and setting out different work queues where they have exhausted their own. I'll find out who his manager is and ask them what priorities were set today, sometimes it's not as simple to see as they're working with buddy

teams now for Rule 1, Rule 2 and then Rule 3, so he may have been specifically asked to do these."

74.4 the claimant raised further issue in a later email on 2 June 2020 and Mrs Finlay then stated:

"Others are now buddied up with our team, so likely [RL] and [TA]'s team are doing our workflow as there is only you doing it now that [X] has moved onto project, so we do need their help…".

74.5 the claimant raised a concern with RL by email on 15 September 2020 regarding an at retirement case that he stated *"appears to have been left and newer cases closed before it".* RL responded, stating: *"Those other cases have gone to TCC and they only do certain ones"*. We accepted the respondent's evidence that TCC is a third party to whom they outsourced the assessment of certain types of cases based on their contract with TCC;

74.6 the claimant responded on 15 September 2020 regarding the same matter stating: *"Fair enough. My luck is the worst. How can I end up catching up and then that monstrosity of a case be the next case when I'm supporting your team…It actually doesn't make any sense. Give the contractors the easy cases but leave the monstrosities for the employees."* RL in the meantime had responded stating: *"It's the pre apps lottery my friend – enjoy"*, to which the claimant responded: *"It's not a queue lottery. People will have not closed their previous cases to avoid picking this one up. It's cherry picking"*.

75. We note that in one email dated 9 December 2020, RL made a comment that the claimant was on the 'warpath' again. The claimant did not see a copy of RL's email or TA's response until after his resignation.

76. The claimant emailed RL on 9 December 2020 at 3pm, stating: *"There was no mention of jumping on* [Mortgage and Protection] *this morning. Any idea why two pension switches have been skipped for a quicker easier case? There are no comments on it."*

77. RL forwarded the claimant's email to TA, copying in Mrs Finlay and stated: *"Chris on the war path again"*.

78. TA responded to RL later that afternoon stating:

"Simple here

[X] *does At Retirement cases and given the limited resources in this area she is under instructions to not take Pension Switch cases so there are cases for colleagues who are only accredited in this area.*

It's the same with [Y]."

79. We accept the claimant's evidence that this explanation was not passed to him. However, the claimant was signed off on sick leave either on 10 December 2020 or shortly afterwards and did not return to work before his employment ended. Neither

the claimant nor the respondent was able to provide the precise start date of his sick leave, but both agreed that it started around one month prior to the claimant's resignation letter which he emailed to the respondent on 6 January 2021.

80. We find that the respondent's managers considered the claimant's concerns and attempted to explain to him on many occasions the reasons behind case allocation throughout his three years' employment with the respondent. We note that the claimant did not accept the explanations provided and continued to raise issues, including after the conclusion of his grievance and grievance appeal. We also note that the claimant's concerns around cherry picking were not limited to his colleagues but extended to the cases that the respondent sent to TCC (a third party) for assessment.

Claimant's grievance (submitted 17 August 2020)

81. The claimant submitted a grievance by email on 17 August 2020 to Mrs Finlay, following their meeting to discuss his Mid-Year Review in August 2020. The respondent was unable to find a copy of that Mid-Year Review, but the parties agreed that Mrs Finlay stated that the claimant was on track for an end of year rating of 2 (Inconsistent Performer) if he did not meet certain objectives. Mrs Finlay's evidence was that the key reasons for the claimant's potential rating included:

    81.1 the claimant had received a number of unfair outcomes as a result of QA checks and appeals during the first half of the year on his cases;

    81.2 she noted that the respondent's aim was that Assessors should have no more than two unfair outcomes in a year;

    81.3 the claimant's performance had deteriorated since his 2019 end of year review in which he was graded as 3 (Solid Performer).

82. The claimant said that he thought Mrs Finlay had included his defined benefit accreditation (Level 6) cases when reaching her view on his potential rating. He said that Mrs Finlay did this in order to 'punish' him because he did not achieve accreditation for the defined benefit work. Mrs Finlay said that they discussed whether it might be appropriate for the claimant to re-start his training on defined benefit cases at that time. She said that she did not include any defined benefit cases in his potential rating because he had not completed in his training on defined benefit cases. We concluded that Mrs Finlay did not include any defined benefit cases when providing an indicative performance rating at the claimant's Mid-Year Review in August 2020. Mrs Finlay and the claimant agreed that he did not need to continue with his Level 6 training as part of the claimant's March 2020 risk assessment and there was no indication that Mrs Finlay sought to 'punish' the claimant because he had not completed that training. We concluded that the reason why the claimant was subject to additional checks during late 2020 because of the number of unfair outcomes he had received that year (discussed in more detail later in this Judgment).

83. The claimant gave evidence that he thought that a rating of 2 was the lowest performance grade. He maintained this position during cross-examination, despite being taken to his contract of employment that clearly stated that a rating of 1 was

the lowest possible grade. The claimant said that he was given more complex work because the respondent wanted to make him *"look less capable because of the stigma attached to head injuries".* However, we note that an Assessor with an end of year rating of 2 was still eligible to receive a bonus. In addition, the claimant agreed that he was not placed on any form of performance improvement plan at any time during his employment.

84. The key issues raised by the claimant's grievance were that:

84.1 the claimant believed that insufficient action had been taken, following his stress risk assessment in March 2020;

84.2 he believed that his potential performance rating had been adversely affected because of the number and type of cases that he was dealing with. He stated that the objectives that he was given in the mid-year review were unfair and that his performance was affected by cherry picking by other staff, which he stated:

"Cherry picking has been a problem here since I started and absolutely nothing done to address. I know I am not the only person to have raised it, many people have..."

85. Mrs Finlay suggested that she treat the claimant's complaint as an informal grievance and the claimant agreed to this course of action.

86. Mrs Finlay met with the claimant and recorded their discussion in detail in her email of 26 August 2020, which the claimant commented on in his response of 27 August 2020. The key points discussed included:

86.1 discussions around the claimant's stress risk assessment and the actions taken to date, including the claimant's wish to reduce the 'confrontation' he faced when challenged by advisers;

86.2 the claimant's concerns around cherry picking:

86.3 the claimant's objectives, including the type of cases in the claimant's assessments.

87. The claimant also raised a concern about JC's comment about 'lying awake' at night in his email of April 2020, which the claimant believed was a reference to the claimant's own insomnia. The claimant stated that he believed confidential information regarding his insomnia had been shared with JC and that this was why JC referred to 'lying awake'. JC's comment was made in the context of the claimant receiving an 'unfair outcome' and is quoted in more detail at paragraph 69 above:

"I want to say thank you very much for your time in discussing the case yesterday. I found it very useful to have a discussion as we had.

I also wanted to apologise for raising an appeal on the case because it turned out that my appeal was based on incorrect information. I thought about it a lot last night, I couldn't get it off my mind in fact. I based my appeal on information from my memory

of the case rather than reading through it again. It turns out my memory was not good..."

88. JC responded to the claimant:

"I know the feeling of lying awake thinking of cases – I do it a lot.

Fair shout on the comments below though – it's always harder to admit mistakes than just move on silently…".

89. With respect to JC's comment, Mrs Finlay assured the claimant that no confidential information had been passed to JC regarding the claimant's insomnia. We accept Mrs Finlay's evidence on this point. We find that it is clear from the contents of the claimant's email and JC's response that JC's comment was made in the context of the claimant stating *"I thought about it a lot last night".* We concluded that JC meant that JC himself would 'lie awake' thinking of cases and was not aware of the claimant's insomnia resulting from his brain injury.

90. Mrs Finlay sought again to reassure the claimant that he had only been assessed on types of cases for which he was trained and accredited. She told him that the pension transfer cases were not included in his potential performance rating. However, the claimant did not accept Mrs Finlay's explanation.

91. We note that the claimant was not aware of the contents of the respondent's QA framework at that time. The claimant was subject to heightened checking because of the number of 'unfair outcomes' that he had received following appeals during the review period. The QA framework stated that the criteria for checking included:

Level	***Criteria***
New / Re-establishing (100% checking before communication is provided to an adviser)	- *Not previously accredited in task before* - *Absent from work or seconded into role which is not related to Business Assurance for greater than 3 months* - *Not completed task in last 12 months* - *More than 2 unfair quality assurance outcomes in previous quarter*
High (minimum of 8 checks per quarter)	- *Completed accreditation/re-establishment process* - *No more than 2 unfair quality assurance outcomes in previous quarter*
Medium (minimum of 5 checks per quarter)	- *No more than 1 unfair quality assurance outcome in previous quarter*
Low (minimum of 3 checks per quarter)	- *No unfair quality assurance outcomes in previous quarter*

92. Mrs Finlay stated in her email summarising their meeting that the next steps were as follows:

    92.1 the claimant would consider what steps he wanted the respondent to take regarding his health concerns;

92.2 the claimant would be provided with further information about the quality and performance assessment process.

93. Mrs Finlay and the claimant exchanged further emails over the next couple of weeks regarding their discussions at the meeting and the next steps. Mrs Finlay stated in her email of 4 September 2020 that she had picked out the key points raised and needed the claimant to confirm the next steps, i.e. to proceed with the grievance process or to work together using the objectives and next steps that she had outlined.

94. The claimant stated in his email to Mrs Finlay on 29 September 2020: *"I'll have to accept that I am not going to receive any answers and agree to disagree on other points in order to move forwards"*. The claimant was cross-examined as to what he meant by this statement. He stated that he was 'losing trust' in the respondent at this time with Mrs Finlay and all of the respondent's management team. He described his relationship with the respondent as 'breaking down' at that point in time.

95. However, the claimant did not raise any particular complaints regarding Mrs Finlay's handling of his informal grievance as part of this claim.

Claimant's formal grievance

96. The claimant decided to raise his grievance on a formal basis in November 2020. He said that the trigger for his decision to pursue his grievance on a formal basis was that he had undergone another QA check on 28 October 2020. NC carried out that check. The claimant received an unfair outcome from that QA check because his assessment did not take into account the changes highlighted by the technical presentation that was sent to him the day before he carried out the assessment. The claimant was not invited to the technical call to discuss the presentation by mistake, because NC was on annual leave that week. He did not read the presentation slides that were emailed to him.

97. The claimant appealed the outcome of the QA check. JC considered the claimant's appeal and rejected his appeal, concluding:

"Whilst I appreciate the guidance may not specifically confirm that the adviser should upload a screenshot of Companies House to show the persons of significant control, it does request that we obtain who the persons are and these should be recorded. An adviser providing information on the file, as with other aspects of a case, eve would expect this to be shown on file as to how they have validated this information. It was queried this with the AML team a couple of months back and they confirmed that evidence was required which we rolled out in a technical call on 15 September.

I do appreciate from our conversations, and your email, that you did not attend the call as [NC] was off and you did not receive an invite from the T&C assessor who covered the call. Whilst this is unfortunate and I will aim to ensure this does not happen again, I would note that the slides are sent to the Business Assurance distribution list, a copy of which is attached, along with the technical call being added to Competent Adviser. Where an assessor misses a call for whatever reason, we do expect the assessor to read the slides and any questions from this can be raised with another T&C assessor in your primary T&C assessor's absence.

Whilst I appreciate we couldn't fully agree on this one, I hope the above explains the reason for the grading and why, on this occasion, the appeal has been declined.

If you have any further questions on the above, I'm more than happy to discuss…"

98. The claimant said during cross-examination: *"I was thinking why was I getting so many checks, this was part of my informal grievance and not dealt with – I have to deal with it formally"*.

99. The claimant then sought to raise his grievance on a formal basis. Mrs Swinney considered the claimant's grievance and provided her outcome to the claimant in an email dated 11 November 2020. She did this by inserting her comments in the body of the claimant's email to Mrs Finlay. In relation to the respondent's grievance process, we found that:

    99.1 Mrs Swinney was an appropriate manager to hear the claimant's grievance. Mrs Swinney was Mrs Finlay's line manager and was therefore more senior than Mrs Finlay. She had previously been copied in on emails between the claimant and Mrs Finlay regarding the claimant's grievance, but she had not been involved in making decisions relating to the claimant's informal grievance;

    99.2 Mrs Swinney should have met with the claimant to discuss his grievance in line with the respondent's own grievance procedure. Her failure to do so was in breach of the respondent's internal policy. However, we find that there was no material additional information that the claimant could have provided to Mrs Swinney that was not already set out in the emails that he exchanged with Mrs Finlay. The claimant referred in cross-examination to his view that Mrs Swinney had not considered his complaints in the context of the policies, but he did not specify what additional information he would have been able to provide to Mrs Swinney; and

    99.3 Mrs Swinney admitted during her evidence that she did not read the specific emails re cherry picking and did not ask the claimant to provide the names of his colleagues who had complained about cherry picking. Mrs Swinney sought instead to provide the claimant with an overview as to how management allocated work. She stated that:

    "I think it will be useful to provide you with some background on how work is managed in Business Assurance to help you understand what as a management team we do to ensure good customer outcomes and service level achievements. Each morning we have a buzz call at 9.30am, this sets the agenda for the day and we spend time allocating assessors and looking at service levels across all teams. I don't believe from the queue you can see underlying case information and as such which cases are dual and require certain assessors to pick up, you are also unable to see urgent cases that managers have discussed with Advisers due to specific reasons. I would suggest that you leave me and my management team to look at service and the queues and you continue to follow the instructions set out to you by Elaine or [RL] *as agreed in our morning call."*

We found that it was appropriate for Mrs Swinney to take this approach because the claimant had not raised any specific points with Mrs Finlay's response to the cherry picking concerns in his original grievance email. The claimant had instead provided comments in which he accused Mrs Finlay of 'simply denying it exists' which he characterised as a 'lie':

"This has been an ongoing issue since the day I started with hundreds of emails being sent regarding it. There are no reasonable explanations to this, and only lies told….This is typical of the company dismissing this as an issue as it has done for almost 3 years and even on a grievance refused to accept this as an issue. Please speak to others to see if they think it is an issue, I can suggest some names if this helps. Simply denying it exists is not acceptable in this case as it is a lie."

99.4 Mrs Swinney commented in relation to the claimant's points regarding technical calls:

"These comments are very concerning for me to read and are very serious comments to make. You are responsible for reading emails that come out relating to guidance as are all assessors. Please note that as a team of circa.100 assessors not everyone can be on the technical call. The emails are sent to ensure you have the information to continue assessing and without your commitment to reading these and applying them to your assessing you will not move forward and make improvements to your QA. All assessors are expected to read updates and emails — I will be asking Elaine to confirm that you have read and understood all assessing related email going forward."

99.5 in relation to QA checks, Mrs Swinney stated:

"Elaine did provide you with a response which I have left in below however I would like to clarify the process in Business Assurance so that you understand it and what that means to you. Where QA identifies unfair customer outcomes the assessor will be placed into a process of heightened assessing, this will mean that more QA is completed and will continue until improvements have been made and sustained, it may mean the assessor moves into a reaccreditation phase and 100% checking. This is a department decision to apply this process to ensure we are correctly monitoring the assessors and ultimately protecting the customer —this process applies to all assessors."

100. Mrs Swinney concluded:

"In conclusion Chris I will not be upholding any of the comments you have raised within your grievance, I have 100 assessors within my department and they all follow the same process as you for guidance, standards and the QA framework."

Claimant's grievance appeal

101. The claimant emailed the respondent's HR team on 11 November 2020 stating that: *"I don't think my grievance has been at all investigated so I would like to take it*

further please." He also complained about the lack of a meeting with Mrs Swinney and suggested that she was not impartial because she was 'heavily involved' in his informal grievance.

102. The respondent's HR team responded by email on 13 November 2020 stating:

"I have read your email and all of the points raised in addition to the responses from your manager. Although I can see you are unhappy with the way in which your work is being checked and the way in which business updates are being communicated I am currently unable to understand why you believe this to be a formal grievance.

I think perhaps there may be some confusion as I understand the process of questioning an 'unfair' check in your business area is also called a grievance.

If you could please provide me with some further information as to why you believe you are being unfairly treated and why you believe this is a formal grievance I can reassess the case. It would be useful if you could advise what your desired outcome would be following a grievance review. I ask this because usual business protocols and quality assurance measures will still need to be adhered to.

I have attached the link to the grievance policy as this may help you explain your case and desired outcomes."

103. The claimant replied later that day, stating:

"Thanks for the email. Rather than me typing the same things again I have attached the outcome to my informal grievance. It might fill in some gaps, but even on the email below in red it explains far more than it just being about one check. Cherry picking (the fact it is just denied by management does not mean it does not exist), the numbers of checks I have had compared to my peers, which also transpires my accreditation checks following training are being counted as my unfair grades. The fact I am expected to do more than my peers because I am the only FP checker in my team and am therefore missed off lists. Did you not read those bits?

Based on the grievance policy which I have already read. This is at the appeal stage of the grievance policy, as previously raised an informal grievance which was responded to. Then as things were not resolved and continued or not answered, I raised it as a formal grievance which has been responded to without investigation by my managers manager (who was actually involved in the information grievance so not impartial (email below) with UK FM HR Advisors HRAdvisors@quilter.com email address to email if I wanted to take it further i.e an appeal. Therefore it would appear we are at the appeal stage. The fact no meeting ever took place or investigation and the policy not followed has nothing to do with me. So we cannot just skip back to this being raised as a formal grievance, that boat has sailed.

At the minute I am finding it difficult to think of a resolution as due to other concerns (I have an ongoing stress investigation and recent OH referral) and the fact my issues aren't being treated seriously, as per no investigation taken it is hard to think of one. What do you suggest?"

104. HR then replied on 16 November 2020, stating *"As requested, I will proceed with your grievance under the appeal stage".*

105. Mr Fraser was appointed to hear the claimant's grievance appeal because he was senior manager from another company within the respondent's group. Mr Fraser's role involved managing advisers whose advice was checked by the respondent's Assessors. This meant that he had some background knowledge as to how the assessment process worked.

106. The claimant and Mr Fraser had a video meeting on 26 November 2020. The claimant commented on the notes of the meeting which were provided after his appeal had concluded. Mr Jackson accompanied the claimant to his appeal meeting. The notes record that the appeal was not a 're-hearing' of the claimant's complaints.

107. The claimant provided Mr Fraser with additional information relating to his cherry picking complaint. This consisted of an email containing multiple examples of the claimant's email concerns to managers regarding cherry picking. We accept Mr Fraser's evidence that he read through all of the emails during the weekend after meeting the claimant. We accept that Mr Fraser's recollection of the contents of those emails during cross-examination was somewhat limited because he conducted the claimant's grievance appeal around a year before the Tribunal hearing.

108. Mr Fraser did not speak to the claimant's four colleagues whom the claimant stated had also complained about cherry picking. He said that he did not speak to them because the claimant had already provided scores of emails which the claimant said were evidence of cherry picking. In those circumstances, we accepted Mr Fraser's evidence that he believed he had sufficient evidence to consider the claimant's appeal. The claimant did not state (and Mr Jackson did not state) in their evidence what additional information the four colleagues could have provided which would have changed the appeal outcome.

109. Mr Fraser provided the claimant's appeal outcome to him in a letter dated 3 December 2020. Mr Fraser partially upheld the claimant's grievance appeal. His key conclusions were that:

109.1 he did not uphold the claimant's complaint that Mrs Swinney failed to investigate his formal grievance, for example by not arranging a meeting with the claimant to discuss his grievance

109.2 he rejected the claimant's complaint that the respondent failed to take his allegations of cherry picking seriously, having discussed the queue management system with Mrs Finlay;

109.3 he concluded that the claimant was properly subject to heightened checking because of the number of unfair outcomes that he had received, but that this had not been communicated properly to the claimant; and

109.4 the claimant's overall quality level was based solely on the tasks on which he had been trained.

110. The appeal outcome letter did not refer to the claimant's allegation that confidential information had been shared with JC about his insomnia, leading to JC's April 2020 email comment about 'lying awake'. Mr Fraser accepted during his evidence that he should have set out his conclusions on this point. However, we accept Mr Fraser's evidence that he was satisfied that Mrs Finlay had not shared information about the claimant's insomnia with JC in light of our conclusions set out at paragraph 89 above.

111. In relation to the claimant's grievance appeal, we find that Mr Fraser's conclusions on the claimant's appeal points (save for Mrs Swinney's failure to hold a grievance meeting with the claimant) were conclusions that were open to him to reach on the evidence presented by the claimant. We concluded that Mrs Swinney's failure to hold a grievance meeting with the claimant was a clear breach of the respondent's own grievance policy. However, we considered that Mr Fraser had investigated the claimant's other grievance appeal points thoroughly and had in effect 're-heard' the claimant's grievance (despite the note at the start of the appeal minutes stating that this was not a 're-hearing').

Claimant's monitoring allegations (August 2020 onwards)

112. The claimant's monitoring allegations were two-fold:

    112.1 that Mrs Finlay and Mrs Swinney checked that he read the technical presentations that were emailed to him after his grievance outcome; and

    112.2 that his Level 6 pensions transfer accreditation cases were included in his Mid-Year Review from August 2020.

113. Our findings in relation to the pensions transfer work cases is set out above under the section of our Judgment on the claimant's grievance.

114. We concluded that Mrs Finlay and/or Mrs Swinney did check that the claimant read his technical presentations after his grievance outcome. However, the reason for this is that the claimant had stated during his grievance that he had failed to read the presentations. As a result, the claimant was not complying with his own responsibilities to keep himself up to date with the respondent's technical guidance.

Claimant's occupational health report (October 2020)

115. The claimant met with the respondent's occupational health on 16 October 2020. The report stated that:

"…Mr. Newton had long term sickness in March 2020 and this was due to work-related stress. He attributes worsening problems with his sleep to perceived work-related stress (i.e. Lots of changes at work, poor communication, rules constantly changing to adapt to clients' needs rather than based on guidelines and lack of managerial support). He denies any ongoing personal stress during this period and attributes his symptoms solely on the work stress. Following worsening issues with his sleep, Mr. Newton reports that he went to see his GP…and was subsequently signed off work for a month. He has not been referred to counselling for additional support.

During today's consultation, Mr. Newton states that his sleep has improved as he is now sleeping 5-6 hours. His mood, concentration level and appetite are all normal. He continues to take medications to help him sleep and remains under the care of his GP. I understand that a work risk assessment was undertaken on his return to work in March. However, he states that no work adjustments were put in place to address the above work issues he identified which affected his health.

Mr. Newton reports that he has had Severe Traumatic Brain Injury after being involved in a road traffic accident (RTA) in 2017. He was in hospital for three months where he received therapy and surgical interventions. However, as a result of his three surgeries, he has been suffering from chronic insomnia. Mr. Newton reports that he managed his insomnia well until March 2020 due to perceived work-related stress.

At present, Mr. Newton reports of residual symptom from his brain injury (Chronic insomnia). He is managing his symptom with medications and looking into his sleep hygiene...

…Workwise, I understand that Mr. Newton is currently working from home undertaking his normal working hours and duties. He tells me that he has been with the company since 2018 and always worked from home between 7:00 am to 3:00 pm which works well for him because of his Chronic Insomnia."

116. The report concluded:

"Mr. Newton is fit to remain at work with adjustments. I would recommend that he continues with his current work hours when he is far more productive and he has time to catch up on lost sleep when he finishes early.

In view of the work-related issues identified, a stress risk assessment also needs to be completed so that Mr. Newton's health is not at risk. A stress risk assessment needs to be completed to explore what aspects of his role need adjustments and if training needs or changes in work processes and additional manpower need to be addressed. Areas of responsibility may also need to be clarified. These are management issues beyond my remit."

Claimant's search for alternative roles

117. The claimant was looking for other jobs around this time. He stated in his evidence that he always "kept an eye out on job boards" in order to keep his options open. We note that the claimant provided an email dated 19 October 2020 which stated that he was making arrangements for a job interview with another organisation via a recruitment agency. He continued looking for other roles in December 2020 and January 2021, after he went on sick leave.

Mitel phone system

118. The respondent first started using a Mitel phone system in its business in early 2020 to manage its customer support line. The Mitel phone system was such that anyone could dial a communal telephone number and it would ring everyone within a telephone group until one individual in that group picked up the call. The system

did not rely on a single 'plugged in' telephone in the office. Instead it meant that members of staff working from home could answer calls. The respondent rolled out the Mitel system during 2020, in part to meet the challenges of the Covid-19 pandemic lockdowns. The claimant's team first started to use the Mitel phone system in Autumn 2020.

119. Mrs Finlay occasionally sent emails regarding the Mitel phone system after she received management information statistics relating to the number of calls picked up by her team. For example, her email of 4 November 2020 stated:

"Stats for yesterday, a few more missed calls, these may have been across the technical calls. Please remember to use DND so it doesn't try to present calls to you when you're on other calls and hopefully will bounce back to someone who can take the call. Best result on At Retirement for yesterday, closely followed by mortgages."

120. We accept Mrs Finlay's evidence that there was one individual whose main role was to answer the support line calls, but that all other team members were expected to pick up calls if that individual was busy. For example, if the support line had a 'good day' then she would say 'well done' to everyone. However, if the support line had a 'poor day', then she would explain the importance of the support line.

121. We do not accept the claimant's evidence that the emails congratulating staff on how well they dealt with the support line stopped after his occupational health assessment. His evidence on this point was unclear and did not match the dates of the emails and his occupational health assessment. It is clear from Mrs Finlay's email to Mrs Swinney and HR on 4 November 2020 that she had received the claimant's occupational health report on 23 October 2020. We saw emails in the hearing file from Mrs Finlay congratulating the team on their call statistics that were sent after 23 October 2020. For example, Mrs Finlay's email of 2 November 2020 stated:

"A definite improvement on the couple of days prior to Friday, still at around the same level of calls coming in, but a lot more taken, thanks for all of your continued efforts!"

122. On 4 November 2020, Mrs Finlay sent an email to all of her team which summarised a team call that they had earlier that day. The email covered several topics including access to the office, year end reviews, expenses, sickness absence, team quiz and holidays. The email also stated:

• *"Future ways of working — In relation to return to office, we are looking at improvements to the environment and a continued flexible approach, including getting the right tools and technology to support and updating the office space to a more modern way of working, with flexible work spaces.*

…

• *Working hours — If Anyone is working hours outside of 9-5 or 8-4 as we re-set this a little time ago, so if anyone is working with historic agreements, please let me know."*

123. The claimant responded to Mrs Finlay's email on 5 November 2020, stating in relation to working hours:

"Doesn't apply to me as I have mentioned this several times that I've worked 7 til 3 from the start of my employment here and it has also been recommended by the OH report as a reasonable adjustment that I should continue to work these hours. It is my understanding that this is fine as it always has been and I know it has been agreed for others to work similar hours that is just for work life balance rather than a reasonable adjustment. I am also assuming this as haven't heard anything back since my OH report was received."

124. There was no evidence to support the claimant's allegation that this email was directed at him in particular because of the recommendation in his occupational health assessment that he continue working from 7am to 3pm. We accept the respondent's evidence that the review of working hours was driven by the need to ensure that they had adequate staff cover for the Mitel phone system.

Claimant's working hours and flexible working request

125. The respondent informed the claimant that he could continue to work from 7am to 3pm, subject to a review every 2 months.

126. The claimant queried this by email on 10 November 2020, stating that he had worked those hours for the past three years. He said that he knew of another employee who worked from 7.30am to 3pm and was not subject to any reviews. That employee was subsequently named as Mr Jackson.

127. Mrs Finlay responded to the claimant stating that she was unable to comment on other employees' situation. She said that:

"The decision for changes to working hours was decided by Neil and Lisa (our Heads of Business Assurance) some time ago, the decision was not made lightly and was in order to best support the advisers and firms. Not being available from 3 - 5 is not an option when the core adviser and firm population work 9 - 5 and beyond. As a function, our core hours are also 9 — 5 and we are here to provide advisers and their support functions with a service, ensuring we are available to support them is key. Unfortunately you seem to have not been moved to these hours and now with the occupational health referral advising these hours currently work best for you, we will accommodate this and review regularly to ensure it works for all parties on a continuous basis."

128. The claimant then submitted a formal flexible working request by email on 10 November 2020. He said:

"I have had this health issue for almost 4 years now so I'm not how it is thought this might change in 2 months or what changes are going to be made to the business that suddenly make this unworkable when it has worked fine for almost 3 years.

To support the reasonable adjustment recommendation I have now attached a flexible working request form although I have had to doctor it as it is about changing a working patten when my request is to continue my normal working hours. As having a rolling 2 month review cycle will only work to make my issue worse, thinking am I going to be made to work hours that are not suitable for me and make it more difficult

to perform in my roll [sic] *in causing me to the worry and extra stress every two month."*

129. The respondent's representative stated during cross-examination that the claimant's complaint appeared to be that he had to send in a flexible working request and that was subject to a trial period. The claimant stated in response:

"Initially I was told it would be on a two month rolling review, I said that would cause extra stress. That's why I had to put a flexible working request in even though I was not asking for a change."

130. The respondent's representative did not put to the claimant that the 'extra stress' that he stated he suffered from would only take place at the time that any review happened, rather than on a continuing basis. We note that cross-examination took place before the claimant was permitted to amend his claim to plead that the review of his working arrangements caused him additional stress, linked to his insomnia. The respondent's representative asked if the Tribunal intended to recall the claimant to provide evidence. We confirmed that we did not intend to recall the claimant and adjourned the hearing in order that the respondent's representative could take instructions .

131. The respondent's representative did not request to recall the claimant in order to deal with this issue. Instead, the respondent requested to recall Mrs Finlay to deal with this issue. The respondent's representative referred Mrs Finlay to the claimant's email of 10 November 2020 and asked what her view was on the claimant's reference to 'extra stress'. Mrs Finlay said: *"He looks to be complaining about the fact that it will be reviewed on a 2 monthly basis"*. Mrs Finlay stated that by way of contrast, working arrangements approved under the respondent's policy on flexible working request are subject to a one-off three month review (after which a permanent contractual change may be made). Mrs Finlay said that in fact the claimant was never subject to a review of his working arrangements. This was because his formal flexible working request was submitted before two months had elapsed, he went on sick leave and then resigned before the three month period under the flexible working policy elapsed.

Claimant's second stress risk assessment (November 2020)

132. EG (a manager) carried out a stress risk assessment with the claimant on 11 November 2020, which the claimant commented on by email on 13 November 2020. Mrs Finlay attended the assessment but did not complete the document. The claimant did not agree to all of the wording of the assessment. However, the points that were agreed included:

132.1 that the claimant would continue to work from 7am to 3pm and that he would make an official flexible working application;

132.2 management would ensure that the claimant was invited to every technical call and that the claimant would ensure that he took the time to read the slides and raise any questions with QA if he were unable to attend the call.

133. The points that were not agreed included:

133.1 the claimant asserted that the respondent had taken ‘zero action’ to correct cherry picking and referred to his view that managers had provided a ‘consistent denial of its existence’;

133.2 the claimant was unhappy with the way that QA checks were carried out and the way that appeals were handled in some instances;

133.3 the claimant thought that when there was conflict between himself and an adviser: *“the default stance* [is] *that the adviser is right/truthful”*; and

133.4 the claimant also raised other issues that were set out in his grievance.

Flexible working request meeting and outcome (December 2020)

134. The claimant attended a meeting (accompanied by Mr Jackson) with Mrs Finlay and Mrs Swinney on 2 December 2020 to discuss his request. After the meeting, Mrs Finlay confirmed in her email of 8 December 2020 that his working pattern would change to 7am to 3pm, Monday to Friday. She stated:

“As per our flexible working policy (attached), the agreement will be subject to a 3 month review…”.

135. The claimant questioned the need for a review, stating that he had already been working those hours for 35 months without complaint. Mrs Finlay responded by email on 9 December 2020, stating:

“We did discuss this yesterday…This is part of our published policy…we did say we can’t predict what our future strategic business needs may be, but a couple of examples given were a pandemic such as we’re currently experiencing, a change to our available hours for adviser contact, which may affect all of Business Assurance.”

136. The claimant said that other staff were allowed to work reduced hours without any review. He compared himself to Mr Jackson. Mr Jackson made a formal application to reduce his working hours in early 2019. Mr Jackson’s request to reduce his working hours from full time to working 28 hours over 4 days per week was granted with effect from 1 May 2019. Mr Jackson’s confirmation letter stated:

“The working arrangement detailed above will be for a trial period of 3 months to allow both parties to trial the new working pattern. If during this trail period either party decides they do not wish these arrangements to continue, either can bring it to an end by giving one month’s notice. If at the end of the 3 months both you and the company are happy with the new working pattern, they will be confirmed on a permanent basis.”

137. Mrs Finlay confirmed in her email to the claimant of 8 December 2020 that the claimant’s contracted working hours would change to 7am-3pm, subject to a 3 month review. Her email stated:

“As discussed, confirmation that the contractual change to your working patter of lam to 3pm -Monday to Friday has been agreed as per your flexible working request.

As per our flexible working policy (attached), the agreement will be subject to a 3 month review, I will place a diary marker for us both for this. Also in line with our flexible working policy, the business reserves the right to terminate the arrangement, or revert to former contractual arrangements, prior to which discussions would take place to see if a compromise could be reached."

138. HR also provided the claimant with a formal letter recording the contractual change which also stated:

"The working arrangement detailed above will be for a trial period of 3 months to allow both parties to trial the new working pattern. If during this trial period either party decides they do not wish these arrangements to continue, either can bring it to an end by giving one month's notice. If at the end of the 3 months both you and the company are happy with the new working pattern, they will be confirmed on a permanent basis.

This arrangement will be subject to the following conditions:

- *The company reserves the right to review the arrangement and change it with one months' notice should you change to a different role or join a different team.*

- *Should this arrangement have a detrimental impact on your performance the company reserves the right to cancel the arrangement and for you to return to your previous working pattern.*

- *Upon request from yourself we will cancel the arrangement and allow you to return to your previous working pattern."*

Claimant's sickness absence and resignation

139. In the meantime, the claimant received a further unfair outcome following a QA check by JC as part of the respondent's competency checks. JC noted that this was the claimant's second unfair outcome that quarter and that he should submit his next case to QA before giving feedback to the adviser.

140. The claimant also sent a further email on 9 December 2020 to RL regarding his concerns re cherry picking, detailed at paragraph 75 to 79 of this Judgment. The claimant stated in his email to RL later that day: *"[X] has closed the case, I didn't get any response so no action has been taken in relation to cherry picking".*

141. The claimant was absent on sick leave shortly after sending that email and provided the respondent with a GP's fit note. He did not return to work and provided a further GP's fit note for one month. The claimant resigned with notice on 6 January 2021.

142. The claimant's resignation letter stated:

"I would like to officially give you my 1 month notice starting today making the end of my contract with you Friday 5 February 2021.

I have genuinely tried to make my employment with you work by raising issues, via stress tests and grievances however, even with the clear and compelling evidence I

have put forward, in respect of both of these, the company/HR/Management deny that these issues exist and will not take any responsibility or commit to future actions. So with this lack of trust I have in the organization and the constant Discrimination & Victimization that I have to endure in my employment, it is not conducive to good mental health through the stress and anxiety caused.

So even at this time of my life when I am expecting a baby in June 2021 and moving home in the next month or so, I am willing to gamble on myself in the job market rather than endure anything further with the company, as I know this will be better for my mental health than working with Quilter FP, if am even capable of further employment due to my treatment by this company which has made my position untenable."

143. The claimant stated in the conclusions section in his witness statement that the reasons for his resignation were as follows:

"I have shown on several different occasions Quilter cannot be trusted to follow its own policies, unless it's higher management and HR want to use it to make their own point and to make staff do as they say but not do as they do. Even when it is pointed out to them that they have not followed their own policy, they have no interest in correcting the mistake. Quilter has clearly therefore destroyed any trust between myself and the company by doing so. There is no way I could continue with my contract in such a company and therefore had no choice but to resign."

144. The claimant started a new role with a different employer in March 2021. He had previously searched for alternative roles outside of the respondent's organisation and had been invited to attend an interview in October 2020.

RELEVANT LAW

145. **The summary of the relevant law is set out at Annex 2 to this Judgment**. A draft copy of this summary was provided to both parties on the fourth day of this hearing and we provided them with the opportunity to comment on the summary. The respondent's representative asked us to confirm that the *Malik* test applied to our conclusions as to the conduct of the grievance process.

APPLICATION OF THE LAW TO THE FACTS

146. We will now apply the law to our findings of fact.

DISABILITY DISCRIMINATION COMPLAINTS

147. We will set out our conclusions on the claimant's disability discrimination complaints. Our conclusions on the claimant's constructive dismissal claim are subject to different legal tests and are set out separately later in this Judgment.

Allegations of direct discrimination and discrimination arising from disability

148. The claimant has pleaded direct discrimination and discrimination arising from disability in relation to the allegations set out below. The legal tests for each of these claims is different and we will consider each test in relation to the allegations.

Allegation 1 – claimant's move to Mrs Finlay's team in 2019

149. We concluded that the claimant's transfer from LV's team to Mrs Finlay's team in 2019 did not amount to less favourable treatment (for the purposes of his direct discrimination claim) or unfavourable treatment (for the purposes of discrimination arising from disability. The key reason for our conclusions were that:

149.1 the claimant's perception that Mrs Finlay's team was of a 'lower status' than LV's team was incorrect. Each team was made up of individuals with differing levels of qualifications, but the teams were organised according to the skillsets required to deal with the needs of the firms assigned to the teams. In addition, the claimant accepted that he continued to perform work of the same level that he performed in LV's team;

149.2 Mrs Finlay arranged for the claimant to have named contacts in the QA team, which provided him with better access to QA than Mr Jackson (who had to contact a QA email inbox); and

149.3 in terms of 'less favourable treatment' (for the purposes of the direct discrimination claim), we concluded that a hypothetical comparator with the claimant's skillset who did not have the claimant's disability would also have been moved teams. (Mr Jackson was not an appropriate comparator for these purposes because he was qualified to assess Level 6 pension transfers related to defined benefit schemes). The reason for the claimant's team move was due to the respondent's restructure of its entire Business Assurance department. The restructure was based on the skillsets required in each team and did not take into account individuals' circumstances.

150. In the alternative, if our conclusion that the team move was not 'unfavourable treatment' (for the purposes of the discrimination arising from disability claim) was incorrect, then we also concluded that the respondent did not treat the claimant unfavourably because of the 'something arising from his disability'. The key reasons for this conclusion are:

150.1 as stated above, the reason for the claimant's team move was due to the respondent's restructure of its entire Business Assurance department. The restructure was based on the skillsets required in each team and did not take into account individuals' circumstances. We found that no account was taken of any matters linked to the claimant's scarring or chronic insomnia (referred to at paragraph 9 in the list of issues); and

150.2 in any event, we concluded that that the managers involved in the restructure which led to the team move (including Mrs Swinney) were not aware of the claimant's disabilities or the things that he states arose from those disabilities during 2019.

Allegation 2 – work allocation

151. We concluded that the allocation of work did not amount to less favourable treatment (for the purposes of the claimant's direct discrimination claim) or

unfavourable treatment (for the purposes of discrimination arising from disability. The key reason for our conclusions were that:

151.1 work was allocated to the teams in accordance with their skillsets as part of a 'buzz call' each day, led by Mrs Swinney, based on the needs of the business (including any training or QA check requirements) and their customer firms' demands;

151.2 the claimant was performing work that he was qualified to do and required to do under his contract of employment, regardless of which 'Rule' the claimant was working under that day;

151.3 we accepted that the claimant was the only person in his team working under Rule 3 on a regular basis. However, this was due to his particular skillset compared to the skillsets of other team members;

151.4 we concluded that other individuals within the wider department worked under Rule 3, for example Mr Jackson;

151.5 in terms of 'less favourable treatment' (for the purposes of the direct discrimination claim), we concluded that a hypothetical comparator with the claimant's skillset who did not have the claimant's disability would also have worked under Rule 3. (Mr Jackson was not an appropriate comparator for these purposes because he was qualified to assess Level 6 pension transfers related to defined benefit schemes).

152. In the alternative, if our conclusion that the team move was not 'unfavourable treatment' (for the purposes of the discrimination arising from disability claim) was incorrect, then we also concluded that the respondent did not treat the claimant unfavourably because of the 'something arising from his disability'. The claimant said that he was given Rule 3 work (which he regarded as more 'complex' work) because the respondent was in effect 'setting him up to fail'. However, there was no evidence that the respondent was trying to set him up to fail. For example:

152.1 work was allocated according to business needs (including any training or QA check requirements) and customer firms' demands in accordance with the teams' skillsets, rather than on an individual basis;

152.2 the claimant did not produce any evidence to support his assertion that older cases (picked up under Rule 3) were inherently more complex than cases dealt with under Rules 1 and 2 (based on the firms assigned to the team and/or their buddy teams);

152.3 Mrs Finlay agreed in the claimant's March 2020 stress risk assessment that the claimant did not have to complete his Level 6 pension transfer accreditation because he found it too stressful; and

152.4 we found that the reasons for the drop in the claimant's 2020 Mid-Year Review potential performance rating to a grade 2 (as opposed to the grade 3 that he received at the end of 2019) was due to the number of unfair

outcomes that the claimant received on the cases that he was qualified to assess during that period.

Allegation 4 –technical calls and QA support

Technical calls

153. We found that the claimant received the emails containing the respondent's technical presentations. We found that he did not receive invites to every technical call. On one occasion, this was due to NC's absence on leave. The claimant said that he did not receive invites to the technical calls on around 10 occasions. Mr Jackson said that he also did not receive invites to the technical calls on one or two occasions.

154. We concluded that the missing technical call invites did not amount to less favourable treatment (for the purposes of his direct discrimination claim) or unfavourable treatment (for the purposes of discrimination arising from disability. The key reason for our conclusions were that:

    154.1 the claimant knew that he was required to keep up to date with technical guidance and stated in his 2018 review that he read the compliance materials;

    154.2 the claimant could have spoken with his managers and/or the QA team to ensure he received invites to the technical calls but he failed to do so. The claimant could also have raised any questions, having read the presentations, directly with the QA team;

    154.3 in terms of 'less favourable treatment' (for the purposes of the direct discrimination claim), we concluded that a hypothetical comparator with the claimant's skillset and working in Mrs Finlay's team would also have been missed from the invite list to the technical calls. We note that Mr Jackson (who was not disabled) was also missed from the invite list to one or two calls.

155. In the alternative, if our conclusion that this was not 'unfavourable treatment' (for the purposes of the discrimination arising from disability claim) was incorrect, then we also concluded that the respondent did not treat the claimant unfavourably because of the 'something arising from his disability'. The QA team's failure to invite the claimant to some of the technical calls was due to human error, rather than 'something arising' from the claimant's disability. For example, we saw emails stating that NC had failed to invite the claimant to one call because NC was on holiday.

QA support

156. We also concluded that the fact that Mrs Finlay's team did not have a QA assessor linked to her team did not amount to less favourable treatment (for the purposes of his direct discrimination claim) or unfavourable treatment (for the purposes of discrimination arising from disability). The key reason for our conclusions were that:

156.1 some of other teams also did not have a QA assessor linked to their team. Other teams had a QA assessor who did not have the technical skills to deal with particular types of cases (e.g. Mr Jackson's team);

156.2 the claimant was initially in the same position as Mr Jackson, Mr Talbot and others who did not have a nominated point of contact within the QA team. However, Mrs Finlay arranged as part of the claimant's March 2020 risk assessment for him to have nominated contacts within the QA team (i.e. JC and SCG). This placed the claimant in a better position than Mr Jackson who had to email the QA inbox with any queries.

Allegation 6 – increased monitoring (technical presentations and accreditation cases)

Monitored on reading technical presentations:

157. We concluded that Mrs Finlay and Mrs Swinney did monitor whether the claimant read the technical presentations from March 2020 onwards. However, we concluded that:

157.1 this did not amount to less favourable treatment (for the purposes of his direct discrimination claim) because a hypothetical comparator who was not disabled but had informed Mrs Swinney that he had not read the technical presentations would have been treated in the same manner. (Mr Jackson was not an appropriate comparator for these purposes because his evidence was that he read the technical presentations and/or attended the technical calls); and

157.2 even if this did amount to unfavourable treatment (for the purposes of discrimination arising from disability), the claimant's reading of the technical presentations was not monitored because of the things that he stated arose from his disability (as set out at paragraph 9 of the List of Issues). The claimant was monitored because he told Mrs Swinney during his grievance that he did not read the technical presentations and instead relied on the technical calls to keep him updated.

Mid-Year Review 2020 – accreditation cases

158. We concluded that Mrs Finlay did not include the accreditation cases when providing the claimant with a potential end of year rating of 2 (Inconsistent Performer). We accepted her evidence that the claimant's rating was based on the number of unfair outcomes that he had received during 2020, as detailed in our findings of fact.

Harassment allegation

Allegation 3 – Christmas party December 2019

159. We found that SW (an Assessor based in a different team) did ask the claimant the questions set out below at the December 2019 Christmas party:

159.1 "What happened to your head?", to which the claimant answered "I got hit by a car"; and

159.2 SW pointing to the equivalent part of his head to one of the claimant's scars, which the claimant described in his witness statement as looking 'like a diving frog' - "What happened to that bit?", to which the claimant replied "impact".

160. However, we found that SW did not discuss the claimant's scarring with the respondent's managers before he asked those questions or after he asked them. We also found that:

160.1 no one else overheard SW asking the questions, with the possible exception of the claimant's colleagues sat next to him due to the volume of the music and the number of people talking at the party;

160.2 the claimant's colleagues who were sat next to him had worked with him previously and were already aware of his accident and brain injury; and

160.3 the claimant did not raise any complaints at any time regarding this matter, including during his grievance in late 2020.

161. We have concluded that the purpose of SW's questions was not to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

162. We have also concluded that SW's questions did not have the effect of violating the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In reaching our conclusions, we have borne in mind the guidance provided by the Employment Appeal Tribunal in two key judgments set out below.

163. In *Dhaliwal*, the EAT considered the question of whether unwanted conduct violated a claimant's dignity and held that:

"while it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct…it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…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."

164. The EAT in *Dhaliwal* also stated that:

"Not every…adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended".

165. The EAT in *Weeks v Newham College of Further Education* (UKEAT/0630/11) considered the question of whether unwanted conduct created an intimidating, hostile, degrading, humiliating or offensive environment. The EAT held that:

    "…although we would entirely accept that a single act or single passage of actions may be so significant that its effect was to create a proscribed working environment, we also must recognise that it does not follow that in every case that a single act is in itself necessarily sufficient and requires such a finding.…An 'environment' is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the workplace."

166. In addition, we have also concluded that the claimant was significantly outside of the relevant time limits to bring a complaint of harassment. The claimant submitted his claim form on 26 January 2021, following ACAS early claim conciliation from 6 January 2021. The normal time limit of 3 months means that a claim relating to events that happened before 7 October 2020 would potentially be brought outside the normal time limits.

167. The claimant did not provide any evidence as to why he had delayed for over a year before submitting his claim of harassment. We note that the claimant is an educated and skills professional who is used to dealing with rules and legislation, albeit in the context of the financial services environment. We also note that the claimant did not seek to raise any complaint regarding this matter during his employment, despite bringing a detailed grievance regarding other concerns in August 2020. We found that SW acted alone in this matter and that the claimant is not bringing any other complaints (whether or harassment or otherwise) relating to SW. We also note that the claimant has not brought any other complaints of harassment against the respondent. We have therefore concluded it would not be just and equitable to extend the time limits for the claimant to submit a harassment complaint.

Failure to make reasonable adjustments allegation

Allegation 7 – review mechanism for working hours arrangements

168. We concluded that the respondent failed to make reasonable adjustments in relation to its decision to permit the claimant to continue to work from 7am to 3pm, subject to a review mechanism.

169. The respondent did not dispute that it operated the following PCPs (as defined in the list of issues):

    169.1 carrying out rolling two monthly reviews of reasonable adjustments made on occupational health advice; and

    169.2 making it a requirement under its flexible working policy that any approved flexible working requests were subject to a three month review before an employee's contractual working hours were amended permanently.

170. We found that:

170.1 the claimant had chosen to work from 7am to 3pm since his employment started in 2018 because his chronic insomnia meant that he became fatigued in the afternoon. The claimant's working hours were agreed with LV on an informal basis and this arrangement was not recorded in writing. The respondent obtained an occupational health report on the claimant in October 2020, which recommended that the claimant should continue to work from 7am to 3pm;

170.2 however, in Autumn 2020, the respondent decided to 'audit' Mrs Finlay's team's working hours to ensure that they had sufficient cover for the customer support line Mitel phone system. Mrs Finlay asked all team members to confirm if they had any working hours, other than 9am to 5pm;

170.3 the respondent then agreed that the claimant could continue work from 7am to 3pm as an adjustment to his working hours, but subject to a two month rolling review mechanism (on the advice of HR);

170.4 the claimant was required to submit a flexible working request and go through the respondent's standard flexible working process in order to change his contractual working hours to 7am to 3pm on a permanent basis. The respondent agreed to this request, but stated that it would be subject to a 3 month review period (in accordance with its flexible working policy; and

170.5 the claimant informed the respondent of the additional stress related to the review mechanisms;

170.6 the respondent was aware that the claimant's chronic insomnia and stress were inter-related (see, for example, the occupational health report and stress risk assessments).

171. There was no dispute that the respondent was aware of the claimant's chronic insomnia as at Autumn 2020. There was also no dispute that the respondent operated a review mechanism for any persons whose working hours were adjusted or changed, in line with that imposed on the claimant in late 2020.

172. The claimant submitted that the review mechanism caused him substantial disadvantage in that it placed 'extra stress' on him because:

172.1 he found it more difficult to work from 9am to 5pm, due to his insomnia; and

172.2 his insomnia results in him having difficulty in handling stress.

173. The respondent submitted that the review mechanism would only place the claimant under additional stress at the point in time when his working arrangement would have come under review. The respondent's case was that:

173.1 the original two month review was superseded by the claimant's flexible working request;

173.2 the claimant resigned before the three month review took place; and

173.3 therefore the claimant was never placed at a substantial disadvantage.

174. The point here rests on the interpretation of the claimant's email of 10 November 2020 regarding this issue. The claimant did not refer to this issue in his witness statement and provide oral evidence on this point for the reasons set out at paragraph 11 of this Judgment. However, the claimant did refer to his email of 10 November 2020 which stated:

"I have had this health issue for almost 4 years now so I'm not how it is thought this might change in 2 months or what changes are going to be made to the business that suddenly make this unworkable when it has worked fine for almost 3 years.

To support the reasonable adjustment recommendation I have now attached a flexible working request form although I have had to doctor it as it is about changing a working patten when my request is to continue my normal working hours. As having a rolling 2 month review cycle will only work to make my issue worse, thinking am I going to be made to work hours that are not suitable for me and make it more difficult to perform in my roll [sic] *in causing me to the worry and extra stress every two month."*

175. We concluded that the review mechanism did place the claimant under additional stress from the point where reviews were put in place (initially on a two monthly basis and then (under the flexible working policy) a one-off three month review). The key reasons for our conclusion are:

175.1 the claimant's email of 10 November 2020 stated that: *"As having a rolling 2 month review cycle will only work to make my issue worse, thinking am I going to be made to work hours that are not suitable for me and make it more difficult to perform in my roll* [sic] *in causing me to the* [sic] *worry and extra stress every two month."* the 'issue' that the claimant referred to earlier in his email was his 'health issue', i.e. his chronic insomnia, which was a condition that the claimant experienced on an ongoing basis;

175.2 we found as fact that the claimant suffered from additional stress at the prospect of his working hours being reviewed (either every two months or as a one-off after three months). The respondent's representative argued in submissions that the claimant would only suffer additional stress at the point of the review itself, based on the wording of the claimant's email of 10 November 2020. However, the respondent's representative did not put the respondent's interpretation of that email to the claimant during cross-examination; and

175.3 the respondent required the claimant to make a flexible working request in order to avoid the 2 monthly review cycle. As a result, the claimant had to fill in the flexible working form and attend additional meetings regarding his working arrangements, which resulted in additional conflict with his managers (as set out in our findings of fact).

176. We concluded that the respondent could have changed the claimant's working hours (either as a reasonable adjustment or after his flexible working request)

without including a review mechanism. We concluded that it would have been reasonable for the respondent to do so for the following key reasons:

176.1 the claimant had worked from 7am to 3pm throughout his employment and the respondent had not raised any issues relating to his working hours until November 2020;

176.2 we note that the respondent's policy was to include review mechanisms for any adjustments made and/or flexible working requests granted. However, the claimant's medical condition was stable and was unlikely to change, according to the respondent's occupational health report;

176.3 the respondent did not present any specific evidence about the impact on the ability of the rest of Mrs Finlay's team (or the department as a whole) to answer the customer support line if the claimant were to continue working from 7am to 3pm or on the ability of the respondent's business needs as a whole; and

176.4 whilst the respondent argued that it was of benefit to the claimant to be able to change his working hours to 9am to 5pm, we find that this 'benefit' to be of theoretical value only. The claimant was adamant throughout his employment that he working from 7am to 3pm enabled him to manage his medical condition. There was no realistic prospect that the claimant would seek to revert to his original working hours as part of any review mechanism, given the nature of his condition.

CONSTRUCTIVE DISMISSAL CLAIM

177. All of the claimant's discrimination allegations also form part of his claim for constructive dismissal. However, we have dealt with the complaints separately because the test for establishing a breach of contract for the purposes of constructive dismissal is different to that for establishing detriment for the purposes of a protected disclosure complaint.

178. We will consider whether each individual allegation that we have found took place on the facts amounted to a breach of contract before we go on to consider whether any of those acts (taken collectively) amounted to a breach and the other issues relating to the issue of dismissal

179. Our conclusions on allegations 1-4 and 6 are set out below:

179.1 **Allegation 1** – the claimant's team move from RL's team to Mrs Finlay's team was not a breach of contract. The reason for the claimant's team move was due to the respondent's restructure of its entire Business Assurance department. The restructure was based on the skillsets required in each team and did not take into account individuals' circumstances. The claimant perception that Mrs Finlay's team was of a 'lower status' than LV's team was incorrect. Each team was made up of individuals with differing levels of qualifications, but the teams were organised according to the skillsets required to deal with the needs of the firms assigned to the teams. In addition, the claimant accepted that he

continued to perform work of the same level that he performed in LV's team.

179.2 **Allegation 2** – the allocation of work was not a breach of contract. The claimant was performing work that he was qualified to do and required to do under his contract of employment, regardless of which 'Rule' the claimant was working under that day.

179.3 Allegation 3 – we found that SW made the comments alleged to the claimant. However, we concluded that SW was a colleague of the claimant's from a different team and that no managers had suggested he make those comments. We concluded that SW's comments were not calculated or likely to destroy or seriously damage the relationship of confidence and trust between the claimant and the respondent. Even if we are incorrect in that conclusion, the claimant waived any such breach by SW by continuing to work for a further year for the respondent without raising any complaints about SW's conduct.

179.4 **Allegation 4** – we concluded that the respondent did not breach the claimant's contract in relation to the technical invitations. We found that the claimant received the emails containing the respondent's technical presentations. He did not receive invitations to all of the technical calls. However, the claimant could have read the presentations provided and contacted his managers and/or the QA team ensure he received invites to the technical calls. The claimant also had the opportunity to raise any questions directly with the QA team.

179.5 **Allegation 6** – we concluded that the respondent did not breach the claimant's contract by monitoring whether he read the technical presentations. It was part of the claimant's contractual duties to ensure he kept himself up to date on technical matters. The monitoring was only put in place because the claimant admitted during his grievance that he did not read the presentations independently, unlike Mr Jackson.

Allegation 5

180. At Allegation 5, the claimant alleged that the respondent failed to consider his grievance properly occurred. We concluded that there were errors in the way that the respondent handled the claimant's grievance process, for example:

180.1 Mrs Swinney's failure to meet with the claimant (in breach of the respondent's internal non-contractual policy); and

180.2 Mr Fraser's failure to set out his conclusion on JC's 'lying awake at night' comment in the appeal outcome letter.

181. However, we concluded that the respondent did consider the points raised in the claimant's grievance. In particular, we found that:

181.1 Mrs Finlay (at the informal grievance stage), Mrs Swinney and Mr Fraser each considered the issues raised by the claimant. The claimant did not

raise any complaints as part of this claim regarding the way in which Mrs Finlay handled his informal grievance;

181.2 Mrs Swinney did not meet with the claimant, but we concluded that he would not have provided her with any additional information at that stage that would have had a significant impact on the grievance outcome. This was because the claimant did not comment on his specific allegations of cherry picking in his emails with Mrs Swinney. Instead, the claimant provided comments on Mrs Finlay's response to his informal grievance, in which he accused Mrs Finlay of 'simply denying it exists' which he characterised as a 'lie';

181.3 we also accepted Mr Fraser's evidence that he went through all of the emails regarding cherry picking that the claimant provided to him before reaching his decision on the grievance appeal. Mr Fraser in effect 're-heard' the claimant's grievance, even though the appeal meeting notes stated that it was not a re-hearing.

Allegation 7

182. At Allegation 7, the claimant stated that the respondent had failed to permit him to continue working from 7am to 3pm (as he had done since the start of his employment), despite occupational health advice. The respondent instead agreed to occupational health's suggested adjustment that the claimant continue to work to 7am to 3pm, subject to a two monthly rolling review. The claimant had to send in a flexible working request for a permanent change to his working hours, which was granted subject to a one-off three month review. The facts of these matters were not in dispute.

183. The claimant also said that Mrs Finlay stopped sending emails regarding the good performance of his team's customer phone service and that this was done with the intention of forcing him to return to work from 9am to 5pm. We concluded that this was not the case. Mrs Finlay received the claimant's occupational health report on 23 October 2020 and we saw copies of emails after that date where she congratulated the team on their call response statistics, including an email dated 2 November 2020.

Calculated or likely to destroy or seriously damage the relationship of trust and confidence

184. We reminded ourselves that we needed to decide whether the respondent's conduct that we found to have occurred was such that the respondent had behaved in a way that was calculated or likely to destroy or seriously damage its relationship of trust and confidence with the claimant.

185. We concluded that the respondent's handling of the claimant's grievance contained procedural errors, but that it was not calculated or likely to destroy the relationship between the parties. In particular, we note that

185.1 the issues that the claimant raised regarding cherry picking (which formed the central part of his grievance) were not new matters. The claimant had

raised concerns regarding cherry picking with the respondent throughout his employment and the respondent had responded to the majority of those concerns both before and after the claimant raised his informal grievance in August 2020, as set out in our findings of fact; and

185.2 Mr Fraser considered all of the information that the claimant raised as part of his grievance appeal.

186. We concluded that the respondent's handling of the claimant's working arrangements was also not calculated to destroy the relationship between the parties. The respondent was following its own policies, but it did so without regard to the claimant's individual circumstances. We considered that it did damage the claimant's relationship with the respondent but that the damage was not likely to destroy the relationship between the parties.

Why did the claimant resign? Did he affirm the contract?

187. However, if our conclusions on whether the respondent's handling of the claimant's grievance had his working arrangements are incorrect, we have also considered whether these matters led to the claimant's resignation and also whether he affirmed the contract before resigning.

188. The claimant stated during his oral evidence that the reason that he resigned was due to cherry picking. He stated in response to a question as to why he resigned on 6 January 2021:

"Because I'd lost all trust in them. Even though been through informal grievance, grievance and appeal – I was back at work, someone came on to my queue and cherry picked my retirement case (AA). I sent an email asking why AA came onto my queue – it said Rule 1 for everyone. I emailed RL asking why AA taken that case and skipped two pension switch cases. There were no notes on the case to say it was expedited. I never received a response. I was done with Quilter – I couldn't trust them any more. They were never going to correct cherry picking. I couldn't sleep. The doctor signed me off, I resigned at the end of my sick period."

189. The claimant's resignation letter also referred back to 'other issues' that were dealt with as part of his grievance. His resignation letter stated:

"I have genuinely tried to make my employment with you work by raising issues, via stress tests and grievances however, even with the clear and compelling evidence I have put forward, in respect of both of these, the company/HR/Management deny that these issues exist and will not take any responsibility or commit to future actions. So with this lack of trust I have in the organization and the constant Discrimination & Victimization that I have to endure in my employment, it is not conducive to good mental health through the stress and anxiety caused."

190. The claimant's witness statement also referred to internal policies, stating:

"I have shown on several different occasions Quilter cannot be trusted to follow its own policies, unless it's higher management and HR want to use it to make their

own point and to make staff do as they say but not do as they do. Even when it is pointed out to them that they have not followed their own policy, they have no interest in correcting the mistake. Quilter has clearly therefore destroyed any trust between myself and the company by doing so. There is no way I could continue with my contract in such a company and therefore had no choice but to resign."

191. The claimant did not state expressly in his resignation or in his written and oral evidence to the Tribunal that he resigned because of the one-off three month review of his working hours, after his flexible working request was granted. We note that the claimant had arranged a job interview on 19 October 2020,which was before the issue regarding his working arrangements arose. The key reason why the claimant resigned was due to his perception that the respondent had failed to address the 'cherry picking' issues that he had been raising throughout his employment.

CONCLUSIONS

192. In summary, we have reached the conclusions set out below.

193. The claimant's claim of unfair (constructive) dismissal under s98 Employment Rights Act 1996 fails and is dismissed.

194. The claimant's claims of:

194.1 direct disability discrimination under s13 Equality Act 2010;

194.2 discrimination arising from disability under s15 Equality Act 2010; and

194.3 harassment relating to disability under s26 Equality Act 2010;

fail and are dismissed.

195. The claimant's claim of failure to make reasonable adjustments under s20 and s21 Equality Act 2010 succeeds and is upheld.

Employment Judge Deeley
13 December 2021

ANNEX 1 – FINAL LIST OF ISSUES

Tables Key:

CD = constructive dismissal

DRD = direct disability discrimination

DAFD = discrimination arising from disability

HRS = harassment

Paragraph references are to EJ Brain's preliminary hearing summary dated 16 April 2021.

Table A – factual allegations for discrimination (relating to claimant's brain injury/scarring only) and constructive dismissal complaints				
Date	**People involved**	**Allegation**	**Relevant complaint(s)**	**Comparators (Direct discrimination complaints only)**
1. [para 10, 11] During 2019	Elaine Finlay, Lisa Swinney, Lesley Vitty, Tim Andrew, Rosalind Lister	The claimant was moved from Lesley Vitty's team with several people with same level of qualification as himself (level 4 with some level 6 qualifications) to Elaine Finlay's team (all of whom had level 3 qualifications) without any explanation.	DDA DAFD	Les Jackson/ hypothetical comparator

RESERVED JUDGMENT

Table A – factual allegations for discrimination (relating to claimant's brain injury/scarring only) and constructive dismissal complaints				
Date	**People involved**	**Allegation**	**Relevant complaint(s)**	**Comparators (Direct discrimination complaints only)**
2. [para 8, 9] From team move onwards	Elaine Finlay, Lisa Swinney, Lesley Vitty, Tim Andrew, Rosalind Lister	Management would have a meeting every morning to decide how work would be divided up. There were several occasions when the claimant was the only person in the department who was told to take Rule 3 cases (the oldest cases in the queue, which were more complex work). The rest of the department were told to work Rule 1 or Rule 2. The claimant raised this with management but it was ignored.	DDA DAFD	Les Jackson/ hypothetical comparator
3. [para 7] Christmas party, December 2019	Stuart Walton Elaine Finlay, Lisa Swinney, Lesley Vitty, Rosalind Lister	The claimant was asked a direct question regarding his scarring by Stuart Walton across the table on behalf of a group of managers (Elaine Finlay, Lesley Vitty, Rosalind Lister and Lisa Swinney). The respondent's managers were "gossiping" about the claimant at the Christmas party.	Harassment	N/A

Table A – factual allegations for discrimination (relating to claimant's brain injury/scarring only) and constructive dismissal complaints				
Date	**People involved**	**Allegation**	**Relevant complaint(s)**	**Comparators (Direct discrimination complaints only)**
4. January 2020 onwards	Elaine Finlay, Lisa Swinney, Lesley Vitty, Tim Andrew, Rosalind Lister	The claimant did not receive invites to weekly technical calls because he moved teams, but instead received an email summary. The claimant was not given the opportunity to ask any questions or clarify any points that were not clear. The Quality Assurance assessors were linked to the teams – the claimant did not receive any QA support because no assessor was linked to his team. The claimant received a "fail grade" in 2020 on an issue that he was not given the opportunity to discuss.	DDA DAFD	Les Jackson/ hypothetical comparator
5. [para 24] 17/8/20	Lisa Swinney, Richard Fraser	The respondent failed to consider the claimant's grievance properly, in that: a) Lisa Swinney did not meet with the claimant to discuss his grievance (as required under the respondent's policy); b) Lisa Swinney failed to investigate the claimant's grievance; c) Richard Fraser ignored the claimant's complaints about the	CD	

Table A – factual allegations for discrimination (relating to claimant's brain injury/scarring only) and constructive dismissal complaints				
Date	**People involved**	**Allegation**	**Relevant complaint(s)**	**Comparators (Direct discrimination complaints only)**
		lack of the meeting with Lisa Swinney and her lack of investigation; d) Richard Fraser failed to investigate matters, including failing to speak to any of the witnesses suggested by the claimant.		
6. August 2020 onwards	Elaine Findlay, Lisa Swinney	The claimant was subject to increased monitoring by Elaine Findlay and Lisa Swinney, by: - checking that the claimant had read emails and presentation from technical calls; and - including accreditation cases in the claimant's mid-year performance review (in addition to the standard competence checks); with the objective of managing the claimant out of the business by	DDA DAFD	Les Jackson/ hypothetical comparator

Table A – factual allegations for discrimination (relating to claimant's brain injury/scarring only) and constructive dismissal complaints				
Date	**People involved**	**Allegation**	**Relevant complaint(s)**	**Comparators (Direct discrimination complaints only)**
		giving him the lowest possible performance review.		
7. November 2020 onwards	Elaine Findlay	The claimant states he worked from 7am to 3pm for around 35 months. Occupational Health then suggested working hours of 7am to 3pm as a reasonable adjustment. Elaine Findlay agreed to Occupational Health's suggested adjustment of working 7am to 3pm but said that this would be on a 2 month rolling review basis. The claimant had to send in a flexible working request – it was agreed the claimant could continue working on that on a 3 month trial basis with a review at the end of 3 months. The respondent also stopped sending emails regarding how well the phone service was performing, which the claimant thought was done with the intention of forcing him to return to work 9am to 5pm.	DDA DAFD	Les Jackson/ hypothetical comparator

Table A – factual allegations for discrimination (relating to claimant's brain injury/scarring only) and constructive dismissal complaints				
Date	**People involved**	**Allegation**	**Relevant complaint(s)**	**Comparators (Direct discrimination complaints only)**
8. [para 24] 6 January 2021	Claimant	The claimant resigned with one month's notice.	DDA DAFD RA CD	Les Jackson/ hypothetical comparator

Table B – reasonable adjustments complaints (relating to claimant's insomnia only)				
PCP	**Dates when PCP applied to claimant**	**People involved**	**Substantial disadvantage alleged**	**Steps that the claimant alleges should have been taken**
1. [para 18] Provision of a review mechanism regarding the claimant's working hours	November 2020 onwards	Elaine Findlay	The claimant found it more difficult to attend work during office hours due to his insomnia.	Permitting the claimant to continue working from 7am to 3pm without a review mechanism.

Table B – reasonable adjustments complaints (relating to claimant's insomnia only)				
PCP	**Dates when PCP applied to claimant**	**People involved**	**Substantial disadvantage alleged**	**Steps that the claimant alleges should have been taken**
			The review mechanism also placed 'extra stress' on the claimant (the claimant states that his insomnia results in him having difficulty handling stress).	

Unfair (constructive) dismissal – s98 ERA 1996

1. Was the claimant dismissed?

   1.1 Did the respondent do the things set out in Table A?

   1.2 Did those events (taken separately or together) breach the implied term of trust and confidence? The tribunal will need to decide:

      1.2.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

      1.2.2 whether it had reasonable and proper cause for doing so.

1.3 Did the claimant resign in response to the breach? The tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

1.4 Did the claimant affirm the contract before resigning? The tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

2. If the claimant was dismissed, the respondent does not plead a potentially fair reason for dismissal.

Disability discrimination – Equality Act 2010

3. The Respondent accepts that the Claimant's disfigurement as a result of scarring following a brain injury in 2017 amounts to a disability within the meaning of section 6 of the Equality Act 2010 in respect of his direct discrimination claim, claim of discrimination arising from disability, and claim of harassment as detailed in the ET Order dated 16 April 2021.

4. The Respondent also accepts that the Claimant's condition of chronic insomnia amounts to a disability within the meaning of section 6 of the Equality Act 2010 in respect of his reasonable adjustment claim, as detailed in the ET Order dated 16 April 2021, the Respondent having become aware of his condition on receipt of a return to work form dated 30 March 2020.

Direct disability discrimination

5. Did the Respondent do the things at Table A?

6. Was that less favourable treatment?
   The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

   If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

   The claimant relies on Mr Jackson and/or a hypothetical comparator.

7. If so, was it because of the claimant's disability?

Discrimination arising from disability

8. Did the Respondent treat the Claimant unfavourably by doing the things at Table A?

9. Did the following things arise in consequence of the claimant's disability:

    9.1 **Scarring** – the stigma related to the claimant's head injury and/or the respondent's perception that the head injury may effect your ability to perform the work;

    9.2 **Chronic Insomnia** – the claimant became fatigued in the late afternoon and struggled to concentrate, communicate as effectively, handle stress.

10. If the Respondent did treat the Claimant unfavourably was this because of 'something arising' in consequence of the claimant's disability (as set out at paragraph 9 above)?

11. Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were to:

    11.1 ensure that work is allocated to staff in an appropriate manner taking into account the role in which they are employed, and that all matters relating to its workforce are addressed in accordance with the relevant legal requirements and its responsibility to act appropriately as an employer; and

    11.2 ensure that the Claimant carried out his duties to an appropriate standard and in an appropriate way, allowing for the identification of any issues and ensuring that they were addressed in a suitable manner.

12. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? If so, from what date?

Reasonable adjustments

13. Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person at the relevant times?

14. Did the respondent operate a provision, criterion or practice (**"PCP"**) set out at Table B?

15. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? *The respondent accepts that a requirement to work from 9am to 5pm would place the claimant at a substantial disadvantage. But the respondent does not accept that a review mechanism in respect of his flexible working hours would put him at a substantial disadvantage.*

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

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

    The burden of proof does not lie on the claimant. However, the claimant alleges that the respondent should:

    17.1 not have introduced the review mechanism in November 2020; and/or

    17.2 not have applied the review mechanism to him.

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

Harassment on grounds of disability (s26 EQA)

19. Did the respondent do the things set out at Table A?
20. If so, was that unwanted conduct?
21. Was the unwanted conduct related to the claimant's disability (scarring)?
22. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

23. If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Time limits

24. The claimant submitted his claim form on 26 January 2021, following ACAS early claim conciliation from 6 January 2021
25. The normal time limit for submitting complaints of disability discrimination is 3 months. Any complaint about something that happened before 7 October 2020 may not have been brought in time.
26. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

    26.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

    26.2 If not, was there conduct extending over a period?

    26.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

    26.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

    26.4.1 Why were the complaints not made to the Tribunal in time?
    26.4.2 In any event, is it just and equitable in all the circumstances to extend time?

ANNEX 2 - RELEVANT LAW

Unfair (constructive) dismissal under Part X (Chapter 1) of the Employment Rights Act 1996 ("ERA")

Dismissal claims

27. The right not to be unfairly dismissed is set out in s94 of the ERA.

Constructive dismissal

28. In order to bring a claim for unfair dismissal under s98 of the ERA, the claimant must first show that his resignation amounted to a 'dismissal', as defined under s95(1) ERA.

> ***s95 - Circumstances in which an employee is dismissed***
> *(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) and section 96, only if)—…*
> *…*
> *(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

29. The claimant must show the following key points to demonstrate that his resignation amounted to a dismissal under s95(1) of the ERA:

    29.1 that a fundamental term of his contract was breached;

    29.2 that he resigned in response to that breach; and

    29.3 that he did not waive or affirm that breach.

30. Employees sometimes rely on a particular act or omissions as being the 'last straw' in a series of events. In the case of *Omilaju v Waltham Forest Borough Council* [2005] IRLR 35 it was held the last straw may not always be unreasonable or blameworthy when viewed in isolation. But, the last straw must contribute or add something to the breach of contract.

Implied term of mutual trust and confidence

31. The implied term of mutual trust and confidence was held in the cases of *Malik v Bank of Credit and Commerce International SA* [1997] IRLR 642 (as interpreted by the EAT in *Baldwin v Brighton and Hove City Council* [2007] IRLR 232) to require the following:

    "The employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

32. It is not necessary for the employer to intend to breach the term of trust and confidence (*Leeds Dental Team Ltd v Rose* [2014] IRLR 8*)*:

    "The test does not require an ET to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If

the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence then he is taken to have the objective intention…".

33. For the avoidance of doubt, the Tribunal must apply the *Malik* test when determining whether the allegations complained of by the claimant (taken separately or together) amount to a fundamental breach of contract.

34. In *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833, Underhill LJ considered previous caselaw and held that the Tribunal must consider the following questions:

"(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part…of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation…)

(5) Did the employee resign in response (or partly in response) to that breach?"

Reason for dismissal

35. The respondent in this case has not pleaded that it had a potentially fair reason for any dismissal or that they had followed a fair procedure. If the Tribunal finds that the claimant was dismissed, then the dismissal will be unfair.

Disability discrimination claims under the Equality Act 2010 ("EQA")

Direct discrimination (s13 EQA)

36. Section 13 of the Equality Act 2010 provides that:

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

37. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur in the employment context, which includes the employer dismissing the employee or subjecting the employee to any other detriment.

Comparators

38. To be treated less favourably implies some element of comparison. The claimant must have been treated differently to a comparator or comparators, be they actual or hypothetical, who do not share the relevant protected characteristic. The cases of the complainant and comparator must be such that there must be no material difference between the circumstances relating to each case (section 23 Equality

Act 2010 and see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285).

39. It is for the claimant to show that any real or hypothetical comparator would have been treated more favourably. In so doing the claimant may invite the tribunal to draw inferences from all relevant circumstances and primary facts. However, it is still a matter for the claimant to ensure that the tribunal is given the primary evidence from which the necessary inferences may be drawn. The Tribunal must, however, recognise that it is very unusual to find direct evidence of discrimination. Normally, a case will depend on what inferences it is proper to draw from all the surrounding circumstances.

40. When considering the primary facts from which inferences may be drawn, the Tribunal must consider the totality of the facts and not adopt a fragmented approach which has the effect of 'diminishing any eloquence the cumulative effects of the primary facts' might have on the issue of the prohibited ground (*Anya v University of Oxford* [2001] IRLR 377).

Discrimination arising from disability (s15 EQA)

41. The right not to suffer discrimination arising from disability is set out at s15 of the EQA:

15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

<u>Something arising from disability</u>

42. The EAT in *Sheikholeslami v University of Edinburgh* [2018] IRLR 1090 (paragraph 96) held that s15 requires the Tribunal to consider "two distinct causative issues" when considering whether the 'something' alleged arose in consequence of B's disability. The EAT set out the issues as follows:

    "(i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability?

    The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the 'something' was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence."

<u>Proportionate means of achieving a legitimate aim</u>

43. The Tribunal must apply an objective test when considering whether there was a proportionate means of achieving a legitimate aim, having regard to the respondent's workplace practices and organisation needs (see, for example, the EAT's decision in *City of York Council v Grosset* (UKEAT/0015/16), as approved by the Court of Appeal ([2018] EWCA Civ 1105).

44. We note that the Tribunal must make its own assessment as to whether 'proportionate means' have been used to achieve a legitimate aim.

Failure to make reasonable adjustments (s20 and 21 EQA)

45. The legislation relating to a claim for failure to make reasonable adjustments is set out at sections 20 and 21 of the EQA:

20 Duty to make adjustments

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

(2) The duty comprises the following three requirements.

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

…

21 Failure to comply with duty

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

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

…

46. We also note that 'substantial' in the context of 'substantial disadvantage' is defined at s212(1) of the EQA as: *"more than minor or trivial"*.

47. The Tribunal must assess whether the respondent applied a provision, criterion or practice (a "**PCP**") which placed the claimant at a substantial disadvantage in comparison to those employees not sharing his disability. If so, the duty to make reasonable adjustments is engaged.

48. The Tribunal must then consider whether a reasonable adjustment might have eliminated or reduced that disadvantage.

49. We note that an employer will not be liable for a failure to make adjustments if it: "*does not know, and could not reasonably be expected to know'* that a PCP would be likely to place the employee at a substantial disadvantage" (paragraph 20(1)(b), Schedule 8 EQA). The employer's state of knowledge is assessed at the time of the alleged discrimination (*Tesco Stores Ltd v Tennant* UKEAT/0167/19/00).

50. We must therefore consider whether the respondent had knowledge of both:

50.1 the claimant's disability; and

50.2 the substantial disadvantage that the claimant states that they faced.

51. The burden of proof is on the claimant to establish the existence of the provision, criterion or practice and to show that it placed the claimant at a substantial disadvantage (*Project Management Institute v Latif* [2007] IRLR 579). The claimant must also identify the potential reasonable adjustments sufficiently to enable them to be considered as part of the evidence during the hearing. These are not limited to any adjustments that the claimant brought to the respondent's attention at the relevant time. The respondent must then show, on the balance of probabilities, that the adjustment could not reasonably have been achieved. It is not necessary, at the time, for the claimant to have brought the proposed adjustment to the respondent's attention.

52. The reasonableness of the steps to be taken to avoid the disadvantage is to be determined on an objective basis (*Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160). In order for an adjustment to be "reasonable", it does not have to be shown that the success of the proposed step was guaranteed or certain. It is sufficient that there was a chance that it would be effective. Guidance as to the considerations that are relevant in assessing reasonableness is provided in paragraph 6.28 of the Employment Statutory Code of Practice.

53. The public policy behind the reasonable adjustments legislation is to enable employees to remain in employment, or to have access to employment. The Tribunal has to carry out an objective assessment to consider whether any proposed adjustment would avoid the 'substantial disadvantage' to the employee caused by the PCP (*Royal Bank of Scotland v Ashton* [2011] ICR 632).

54. In *Leeds Teaching Hospital NHS Trust v Foster* UKEAT/0552/10, the EAT held that if there is a real prospect of an adjustment removing a disabled employee's disadvantage, that would be sufficient to make the adjustment a reasonable one.

55. In addition, the Tribunal needs to consider the implications of any proposed adjustments on a respondent's wider operation (*Lincolnshire Police v Weaver* [2008] AER 291, decided under the former Disability Discrimination Act 1995).

Harassment

56. The provisions relating to harassment are set out at s26 of the EQA:

26 Harassment

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

…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
  (a) the perception of B;
  (b) the other circumstances of the case;

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

(5) The relevant protected characteristics are – …disability;
…

57. There are three elements to the definition of harassment:

    57.1 unwanted conduct;

    57.2 the specified purpose or effect (as set out in s26 EQA); and

    57.3 that the conduct is related to a relevant protected characteristic: see *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336, as updated by reference to the EQA provisions in *Reverend Canon Pemberton v Right Reverend Inwood* [2018] EWCA Civ 564.

58. A single act can constitute harassment, if it is sufficiently 'serious' (cf paragraph 7.8 of the EHRC Code).

59. The burden of proof provisions apply (see below). When a tribunal is considering whether facts have been proved from which it could conclude that harassment was on the grounds of a protected characteristic (such as disability), it is always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on the grounds of that characteristic. The context may, for example, point strongly towards or strongly against a conclusion that harassment was on the grounds of that characteristic. The tribunal should not leave the context out of account at the first stage and consider it only as part of the explanation at the second stage, after the burden of proof has passed: see *Nazir v Asim & Nottinghamshire Black Partnership* [2010] IRLR 336 EAT.

60. In considering whether the conduct had the specified effect, the Tribunal must consider both the actual perception of the complainant and the question whether it is reasonable for the conduct to have that effect. The Tribunal must consider whether, objectively, it was reasonable for the conduct to have that effect on the particular complainant.

61. In *Dhaliwal*, the EAT considered the question of whether unwanted conduct violated a claimant's dignity and held that:

    "while it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct…it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…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."

62. The EAT in *Dhaliwal* also stated that:

"Not every…adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended".

63. The EAT in *Weeks v Newham College of Further Education* (UKEAT/0630/11) considered the question of whether unwanted conduct created an intimidating, hostile, degrading, humiliating or offensive environment. The EAT held that:

"…although we would entirely accept that a single act or single passage of actions may be so significant that its effect was to create a proscribed working environment, we also must recognise that it does not follow that in every case that a single act is in itself necessarily sufficient and requires such a finding.…An 'environment' is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the workplace."

Burden of proof

64. The burden of proof is set out at s136 EQA for all provisions of the EQA, as follows:

136 Burden of proof

…

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

…

(6) A reference to the court includes a reference to -

(a) an employment tribunal;

…

65. The Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 approved guidance given by the Court of Appeal in *Igen Limited v Wong* [2005] ICR 931, as refined in *Madarassy v Nomura International plc* [2007] ICR 867. In order for the burden of proof to shift in a case of direct disability discrimination it is not enough for a claimant to show that there is a difference in disability status and a difference in treatment. In general terms "something more" than that would be required before the respondent is required to provide a non-discriminatory explanation.

66. Mummery LJ stated in *Madarassy*: *"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination"*

67. In addition, unreasonable or unfair behaviour or treatment would not, by itself, be enough to shift the burden of proof (see *Bahl v The Law Society* [2004] IRLR 799). The House of Lords held in *Zafar v Glasgow City Council* [1998] IRLR 36) that

mere unreasonable treatment by the employer "casts no light whatsoever" to the question of whether he has treated the employee "unfavourably".

68. The guidance from caselaw authorities is that the Tribunal should take a two stage approach to any issues relating to the burden of proof. The two stages are:

    68.1 the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This can be described as the prima facie case. However, it is not enough for the claimant to show merely that he has been treated less favourably than those identified or than he hypothetically could have been (but for his disability); there must be "something more".

    68.2 if the claimant satisfies the first stage, out a prima facie case, the burden of proof then shifts to the respondent. Section 123(2) of the Equality Act 2010 provides that the Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. The standard of proof is again the balance of probabilities. However, to discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever because of the protected characteristic.

69. However, we note that the Supreme Court in also stated that it is important not to make too much of the role of the burden of proof provisions. Those provisions will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they are not required where the Tribunal is able to make positive findings on the evidence one way or the other.

Time limits

70. The provisions on time limits under the EQA are set out at s123 EQA:

123 Time limits

(1)… proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

…

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.