EMPLOYMENT TRIBUNALS

Claimant: **MR K CONNOR**

Respondent: **SELLAFIELD LIMITED**

HELD AT: Liverpool (by in person hearing and CVP) **ON:** 4, 5 & 6 January 2022 and 13 January 2022 (in chambers)

BEFORE: Employment Judge Shotter

Members: Mr Q Colborn
Mr J Murdie

REPRESENTATION:

Claimant: Ms S Johnson, counsel **Respondent:** Mr N Grundy, counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. It is not in the interests of justice to grant the claimant's application to bring into evidence new documents after the trial has finished. The application is refused.

2. The claimant was not paid less than the total bonus properly payable, and his claim for unlawful deduction of wages brought under section 13 of the Employment Rights Act 1996 is dismissed.

3. The claimant was not unfavourably treated under section 15 of the Equality Act 2010 and his claim for disability discrimination is dismissed.

REASONS

Preamble

The hearing

1. This has been a remote hearing by video which has been consented to by the parties. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that the Tribunal was referred to are in a bundle of 616 pages, the contents of which I have recorded where relevant below. In addition, the Tribunal was provided with a number of documents during the hearing, a bundle of witness statements, supplemental witness statements and written closing submissions/skeleton argument produced both parties together a list of issues agreed at the outset..

2. On the first day of the hearing Mr Grundy produced a draft list of issues which took Ms Johnson by surprise as she was unaware knowledge was to be one of the issues in this case. The respondent had conceded the claimant was disabled with depression and anxiety and there had been no reference to any knowledge issue until the draft list of issues at the preliminary hearings dealing with case management held on the 6 April 2020 and 18 September 2020 dated 16 April and 20 October 2020. Mr Grundy acknowledged the claimant and respondent's witnesses had not dealt with the issue of knowledge in their written statements. It was agreed between the parties supplemental witness statements would be produced by both sides dealing with the knowledge issue. Additional documents could also be produced with reference to the discrete issue of knowledge. Supplemental witness statements were exchanged on the first day of the hearing and counsel was given sufficient time to take instructions prior to the evidence being heard.

The claimant's application to introduce additional documents

3. The last day of evidence and final oral closing submissions was on 6 January 2022, and the parties were aware the Tribunal intended deliberate in chambers hearing on the 13 January 2022 when the evidence was still fresh in its mind. The Tribunal had arranged an early date specifically with this in mind and informed the parties at the liability hearing.

4. At the liability hearing Ms Johnson made two applications to introduce additional documents previously undisclosed which were withdrawn and no decision was made by the Tribunal.

5. At 17.05 on 12 January 2022 the claimant, who was by now acting in person, made an application to the Tribunal for rely on an unnumbered bundle of documents Titled "Jamie Reed messages from Oct 16" in addition to an exhibit purporting to be a text message to the claimant sent by Jamie Reed on 23 May 2018 at 15.14. The text messages in the bundle span from October 2016 to 17 November 2018, a period of 2-years and are numerous. The evidence had not been included in the trial bundle, had not been produced when supplemental witness statements dealing with knowledge were exchanged and nor had the documents or their existence been put to Jamie Reed in cross examination.

6. The claimant in his email to the Tribunal explained the "extra piece of evidence…is crucial, in the interests of justice. I am aware that this application comes beyond the 11th hour, but would point out that the document to which I refer has been in the respondent's possession since September 2019 and, in fact, some pages from it were included in the bundle that they produced for the hearing so, respectfully, this is not something which was not disclosed to them or of which they were not aware."

7. In the email the claimant referenced new evidence that had not been included in his written statement or mentioned in oral evidence to the effect that "On May 29th, he [being Jamie Reed] messages me to ask if we can talk, because Helen has spoken to him. I tell him that I am "struggling quite a bit at the moment" and we agree to meet for a coffee. Your honours will remember from the hearing last week that I had emailed Helen to talk about MHAW LFE/My own MH on May 25th, and that, in his evidence, Mr Reed said that he had not been aware of that email and, when questioned specifically on the point by Ms Johnson, again said that she had not talked to him about it, and that he had not been aware that I had any issues with my mental health before October…I would argue that, knowing they intended to change the grounds of resistance, and being in possession of this document, the respondents had a duty to have included this specific section of the document in the bundle themselves, given the clear relevance to the matter of knowledge."

8. The respondent objected to the claimant's application in two emails sent on 13 January 2022 arguing "that it would not be in line with the overriding objective nor in the interests of justice for the Tribunal to take into account this evidence…[it] has been presented too late and the inclusion of the evidence would cause unnecessary additional expense and delay to the proceedings; the Claimant has been represented throughout these proceedings by a leading and experienced firm of Claimant solicitors and was represented by an experienced Counsel at the hearing last week. As such the Claimant had the opportunity to produce this evidence before and put it to the Respondent's witnesses and be questioned upon it himself; there would be severe prejudice to the Respondent if the evidence was accepted as it has not been tested as neither the Respondent nor the Tribunal has had the opportunity to question the Claimant and the Respondent's witnesses on this evidence; the Respondent did not amend its Response as alleged by the Claimant but raised a point of jurisdiction in relation to knowledge; the Employment Tribunal gave both parties time to submit supplemental witness evidence in relation to this issue which the parties duly did. The Claimant had sufficient time to include the evidence which he now wishes to introduce in his supplemental witness statement but failed to do so; the Claimant has attempted on two previous during the hearing to introduce further documents which he subsequently withdrew; the bundle was agreed with the Claimant's representatives and all documents which they wished to include was put into the bundle and no reference was made to these message and the Claimant's List of Documents for this case did not include these messages (see attached the Claimant's List of Documents). The Tribunal will note from Item 4 of the attached List of Documents that the Claimant only disclosed text messages from 2019. This raises a separate question as to adequacy of the Claimant's disclosure."

9. Finally, the claimant responded by email "I accept that the evidence is late, and have explained why that is the case in my application. I can only apologise, but would stress again that the respondent has been in possession of the document since my original grievance investigation in September 2019. There is reference to me mentioning them, and them confirming that they want me to pass them on to them, on page 323 of the bundle, para 30 & 31, and in my appeal outcome Euan Hutton makes reference to having seen them (p435 of the bundle).

10. Despite the claimant's arguments to the contrary and indication that he had not seen the list of documents, which the Tribunal did not find credible, the documents the claimant

now wishes to bring into evidence have not been disclosed, are not in the final agreed bundle and are not referenced by the claimant or respondent's witnesses) statements. As a consequence there was no reference to the documents at the liability hearing, the respondent's witnesses were not given the opportunity to comment on them and how they should be interpreted within the factual matrix. The claimant via his counsel made two earlier applications to introduce documents not previously disclosed during this liability hearing. These applications were withdrawn, and at no stage did the claimant reference the documents he is now seeking to introduce late in the day after all the evidence has been heard and oral closing submissions made and explored. It was apparent from the claimant's email that he has dismissed his legal advisors, and the natural conclusion from this is that he believed the third attempt at introducing documents late into these proceedings would have a better chance of success from a litigant in person.

11. The Tribunal has read the additional documents produced by the claimant, and unanimously concluded that on a straight-forward reading of them they do not appear to assist the claimant in his attempt to prove Jamie Reed was aware of his disability in May 2018. It is notable the GP records reflect there was a doctor's appointment on 9 May 2018 relating to tonsillitis and stress was not flagged up until 5 October 2018. There is no express indication Jamie Reed had a discussion about the claimant's disability, and in direct contradiction of the claimant's communication at the time he was not "off to the doctors" about stress and/or depression. It is reasonable to assume the GP records are accurate, and there was no evidence before the Tribunal to the contrary. On the face of the new documents they do not assist the claimant who has not provided any evidence in chief concerning their effect on his case, and without additional evidence the documents appear to be irrelevant and point away from the case the claimant now wishes to put forward, raising possible issues of credibility for the claimant.

12. At the liability hearing when the claimant attempted to introduce additional documents the Tribunal emphasised the obligation on both parties to disclose relevant documents and yet the claimant has waited until after the liability hearing to do so, thus prejudicing the respondent and undermining the overriding objective.

13. Rule 41 of the Tribunal Rules confers upon employment tribunals a broad discretion to conduct their proceedings in the manner that seems most fair, they are not entitled to eschew the ordinary processes by which courts receive testimony and evidence. Allowing the claimant to introduce fresh documents at such a late stage in the proceedings denies the respondent the right to cross-examine on those documents, and for one of their key witnesses to deal with them in his evidence in chief. This amounts to a breach of natural justice for which a resolution would be to re-convene the final hearing following case management orders dealing with the new evidence, supplemental witness statements and additional closing submissions that would result in a delay. The parties are aware a great effort was made by the Tribunal to arrange its in chambers deliberations soon after the evidence was heard to ensure it was fresh in its mind. To adjourn and re-list at a much later date would defeat this objective. Natural justice does not require the Tribunal passively allow the claimant to introduce late and on the face of it, irrelevant evidence that had not been referenced by him in his witness statement, allegations that were not borne out by the evidence before the Tribunal who in any event found the claimant met the definition of disability in any event for the reasons set out below.

14. In conclusion, taking into account the balance of prejudice, the overriding objective and the particular circumstances of this case, the Tribunal balancing the interests of the parties and justice, is of the view adjourning this case to an additional 2-day hearing sometime in the future against a backdrop of difficulties finding early dates for hearings and lose the day in chambers allocated with the parties knowledge that the Tribunal intended to come to a decision with the evidence it had heard still fresh in its mind, it is not in the interests of justice to grant the claimant his application to introduce documents which on the face of them appear to be irrelevant, made so late in the day, and the application is refused.

The pleadings

15. In a claim form received on 27 September 2019 following ACAS early conciliation between 13 July 2019 and 27 August 2019 , the claimant, who at the time was employed as a senior communications officer brings a complaint of disability discrimination under section 15 of the Equality Act 2010 ("the EqA") and unlawful deduction of wages in the sum of £220 relating to a non-payment of bonus.

16. Mr Grundy confirmed the respondent was not relying on the defence of objective justification.

Agreed issues

17. The parties agreed the issues as follows:

1. Did R treat C unfavourably by

   1.1 Giving C an amber rating under the Performance Management Agreement for 2018/2019 ("The PMA") on or about 16.4.19 and/or

   1.2 Omitting to pay C the personal element of the bonus under the PMA on or about 15.5.19

   1.3 Awarding C the personal element of the bonus under the PMA of 1.66% of gross pay [rather than 2% of gross pay] on or about 15.6.19

2. If so, was the cause of or the reason for the unfavourable treatment "something arising" in consequence of C's disability [mental health impairment]. The "something arising" in consequence of C's disability is alleged to be "performance issues" during the year 2018/2019 [1.4.18-31.3.19].

3. Can R show that at the material time namely at the time of the alleged unfavourable treatment, it did not know and could not reasonably be expected to know that C had the disability.

4. Was there an unlawful deduction of wages in respect of the payment of the personal element of the bonus under the PMA on or about 15.6.19

Evidence

18. The Tribunal heard evidence under oath from the claimant, and took into account his impact statement and the two statements dealing with liability and knowledge.

19. On behalf of the respondent the Tribunal heard from Gary McKeating, head of development and community and the claimant's line manager and Jamieson Ronald Reed, head of corporate affairs who line managed Gary McKeating.

20. The respondent produced a witness statement signed by Gaenor Prest which the Tribunal read. As Ms Prest dealt with the claimant's grievance, which was not an issue in this case, the evidence of Ms Prest is not relevant, she did not give oral evidence and the Tribunal gave her statement no weight..

21. The Tribunal has considered the documents to which it was taken in the bundle, the agreed chronology incorporated into the finding of facts, written and oral submissions/skeleton argument which the Tribunal does not intend to repeat and has attempted to incorporate the points made by the parties within the body of this judgment with reasons, and made the following findings of the relevant facts having resolved the conflicts in the evidence on the balance of probabilities.

Facts

22. The respondent is in the business of decommissioning, reprocessing and nuclear waste management.

Respondent's policies and procedures relevant to this claim.

23. The respondent issued a number of policies and procedures including performance management policies and 'How to Manage Performance Guide.' The Tribunal had before it the 2017 Performance Management Process Guidance, the Performance Management Policy 2018 and documents relating to documents relating to performance management 2018/2019 referred to as the "PMA."

24. The Performance Management Policy dated February 2018 was applicable during the relevant period and it set down a process by which employees would have a two-way opportunity to discuss performance with their manager including agreeing job descriptions, key performance indicators ("KPI") and objectives in addition to development needs. The performance management process entailed an interim review and annual review which included a number of preparatory steps before the performance review discussions could take place, that included an agreement form setting out the "job purpose, "key accountabilities" in a specific format and "SMART" objectives that were specific, measurable, achievable, relevant and time-bound.

25. The claimant accepted it was his responsibility to complete, as part of the performance management process, the PMA template available to employees online and he had access to an "OPMS" form which remained opened throughout the performance year for comment by the claimant and manager. At the end of the performance year Gary McKeating, was responsible for a "final close" once the comments from both parties had been entered. There was a requirement that line managers and employees have "regular check in conversations" to discuss performance in addition to the two formal reviews. The "potential assessment must be recorded in OPMS by 31 October" and the end of year overall performance assessment "must be completed on the close out of the PMA by March 2019." The claimant was expected to take ownership of recording his performance on the OPMS, lobbying the manager for meetings and driving the performance management. The claimant was an experienced senior employee with managerial responsibility for others, and was well aware of the respondent's performance management processes which he was capable of fulfilling and had experience of doing so in the knowledge that his performance ratings could directly impact on pay and personal bonuses, and so the Tribunal found.

26. At the end of year performance review four ratings could be awarded; gold (the best for exceptional performance), green (the standard expected), amber when "performance objectives were partially met, some shortfall in achieving objectives…" and red where "performance objectives…are not met."

The claimant

27. The claimant commenced his employment with the respondent in February 2007 as a media relations manager until his promotion in March 2015 to senior internal communications manager, and he was experienced He was close friends with Gary McKeating who was not his line manager at the time and nor was he in Gary Keating's team until he offered the new role of senior communications manager in February 2018 when the claimant did not get on with his manager. Since issuing these proceedings the claimant resigned on 15 February 2021 and has since brought a complaint of constructive unfair dismissal which was not before this Tribunal and will be dealt with separately at another liability hearing as discussed with the parties.

The employment contract

18 The claimant was issued with an offer letter dated 18 June 2007 that set out a number of contractual terms, 'Notes on Conditions of Employment' and on 26 March 2015 written confirmation of his promotion to senior internal communications manager at a salary of £60,016 full time contract on grade 3. In addition, the claimant was entitled to be paid a bonus of 2% of salary if he met all of his objectives up to a maximum of £4000 and a 3 percent company bonus if the respondent achieved its targets that were not dependent on the claimant's performance. The claimant's salary was commensurate with his considerable experience and responsibilities. The claimant's unlawful deduction and discrimination complaint involves a claim for £220 unpaid bonus.

19 The claimant had been in receipt of a bonus payment under the PMA (the respondent's performance management system). He had attended a number of meetings dealing with bonus payments for the employees line managed by him, and understood the

discussion process that took place at Employment Development Group Meetings. The claimant criticised the respondent or not producing notes of the 2018/2019 meeting, however, there was no contemporaneous documentary evidence that notes were ever taken at Employee Development Group Meetings attended by the claimant in the past, and no adverse inference can be raised by the fact that the managers who discussed the claimant's grading and those of other employees, failed to record the conversation, limiting the note to outcome only.

Claimant's close friendship with Jamie Reed

20 The claimant had a long and close friendship with Jamieson Ronald Reed (known as "Jamie Reed") outside work which continued when Jamie Reed joined the respondent as head of development and community in or around June 2017. There is little doubt Jamie Reed, Gary McKeating and the claimant looked after each other's interests within the respondent's business and the claimant's expectation was that he would be given a considerable amount of leeway in contrast to how he was managed by Helen Connolly.

21 The claimant was originally line managed by Helen Connolly who took him to task for his underperformance, and there was a breakdown in the relationship which resulted in Jamie Reed moving the claimant into a role specifically created for him under the line management of Gary McKeating in July 2018.

22 The Tribunal found the claimant's close personal friend, Jamie Reed, "tailored" the new role to the claimant in an attempt to "professionally invigorate him" as he was aware the claimant was unhappy working with Helen Connolly. The claimant got on well with Gary Keating and under the overall line management of Jamie Reed, he worked with little if any managerial control and checks which was unusual for the respondent and in direct contrast to the line management by Helen Connolly who attempted to manage his performance, hence the claimant's move to a role specifically designed to ensure he was "managed" by Gary Keating with a very light if non-existent touch. The claimant, Gary Keating and Jamie Reed sat together and explored a whole range of matters including Labour party politics. The Tribunal on the balance of probabilities found the claimant at no stage gave any indication he was suffering from stress and depression, as far as Gary Keating and Jamie Reed was concerned the only issue was the "stress" the claimant felt over being managed by Helen Connolly for which a resolution had been found.

23 The claimant was required to complete the work he had been set by Helen Connolly and when he returned from paternity leave straddled both teams. On 1 April 2018 he was provided with a PMA form which the claimant never completed. The claimant was aware that not all the competencies under the PMA were relevant to his bonus. During this early period in 2018 the claimant gave no indication to Jamie Reed or Gary McKeating that he was experiencing mental health issues, and the Tribunal concluded that the reason for this was that the claimant did not get on with Helen Connolly and was unhappy with her managing his performance, which is a far cry from being disabled with anxiety and depression. In the bundle the claimant produced a number of text messages and there was no reference to any matters that could be construed

as a disability despite his close friendship and regular communications with Jamie Reed.

24 When he took over the new role the claimant was aware that he had "lots of things to do the most pressing being the comms audit" as confirmed by Helen Connolly in her email of 5 April 2018. He confirmed in an email to Gary McKeating sent on 4 April 2018 that "over the next few months, I will be doing some work for Gary, balancing helping the social impact team, alongside carrying on with a number of my current duties particularly the EDI work…" The claimant was aware Helen Connolly's view was he was underperforming and should have completed the Comms audit.

25 In an email sent on the 16 April 2018 at 14.17 the claimant was chased by Helen Connolly to complete the PMA process as the claimant had not sent the PMA for her approval. The claimant apologised in a return email. It was apparent from the email sent on the same day at 7.55pm Helen Connolly had held discussions with the claimant about his performance stating "I have moved your PMA along, bypassing the interim review stage so that we can get this finished tomorrow. Over to you now….Then I add the rating which will be green, **but bear in mind conversation we had about that being close to amber because of the Comms audit – you really have to learn from that**…" [the Tribunal's emphasis]. The claimant was fully aware he was required to complete the PMA as [part of his performance management review, and this remained the case throughout the relevant period.

26 The claimant responded on the same day at 9.31 acknowledging "I accept I need to learn lessons from the missing objective, and have readily acknowledged that." At 12.02 Helen Connolly emailed "I have no visibility of progress against this objective and despite multiple opportunities to do something/address it together/help it remained that at the last minute there was nothing done. **This was a big part of your personal objectives**, and a piece of work we needed doing…**It's about your approach which we have discussed before. In previous years that indeed would be an amber rating and I did flag that up**"[the Tribunal's emphasis]. The final email in this email stream before the Tribunal was from the claimant sent at 12.53 "**I can understand your frustration at the Comms audit, I'm frustrated about it myself and disappointed both at the missed objective and the issues around it which you describe….Other than our working relationship which has disintegrated and the missed objective**, I'm not sure what's different…" [the Tribunal's emphasis]. It is notable that the claimant did not refer to any mental health issues and stated "I work at the same level most of the time and, the comms audit aside, I deliver not only what is required of me, but seek out new opportunities for the team and bring new ideas to the table." The Tribunal finds, contrary to the claimant's less than credible evidence, no mental health issues were brought to management's attention, the respondent did not have constructive knowledge and was not unreasonable for it to be expected to know the claimant had a mental impairment during this period.

27 The claimant was unhappy and at 5.15pm emailed Helen Connolly on the 15 May 2018 a lengthy response which was not copied to Gary McKeating or Jamie Reed and there was no evidence their attention was brought to this document, the Tribunal accepting on the balance of probabilities that it was not. The claimant referred to being

"close to breaking down" after the discussion, that he had slept badly thinking things over and "we should talk and be open about mental health, I should live this value and ensure as my line manager you know how I feel and the effect things are having on my mental health." The claimant referred to having gone to the doctors with a bad bout of tonsillitis (and not his mental health). The email reflects his unhappiness at work with Helen Connolly and the team, and feeling demotivated. In the final paragraph the claimant alluded to him going off sick "I don't want to feel any more down than I am at the moment." The Tribunal does not accept that this communication put the respondent on notice that he was disabled; the 8-page email reflects the claimant was unhappy at work and wanted something done about it. This state of affairs led to the shift to a different manager, Gary McKeating the claimant's friend, as a direct result and there is a sense of the organisation having listened to him even if it was not down to a disability. Jamie Reed line managed Helen Connolly and Gary McKeating, and as a close friend of the claimant he facilitated the move and generated a vacancy, eager to motivate the claimant again, which had no connection with any disability of which the respondent's managers had no knowledge.

28 In conclusion, the Tribunal found the claimant did not go so far as to inform Helen Connolly that he was suffering from mental health problems that could amount to a disability, he was upset and worried as a result of their earlier conversations about his poor performance and that was as far as it went.

Commencement of the claimant's mental health deterioration

29 When it was put to the claimant in cross examination that he was struggling with his performance long before any mental health condition when he had failed to perform the Coms audit in 2017 to 2018, the claimant's response was that he was not suffering from mental health at that point, and had different priorities. This evidence was in direct contrast to that given by the claimant to this Tribunal when he alleged he started to experience deteriorating mental health issues in early 2018 and was suffering with his mental health during discussions with Helen Connolly in May 2018. In the claimant's written statement at paragraph 3 reference was made to a decline in the claimant's mental health from July into August 2018. The claimant's impact statement at paragraph 1 confirmed prior to September 2018 he had been "relatively stable" and "like most people, I have experienced periods of low mood, but generally would have considered myself mentally resilient, and having trained in journalism and worked as a newspaper reporter, I respond well in times of stress and pressure. Up until September 2018 I was the kind of person you turn to in a crisis." When it was put to the claimant that the GP records in the bundle reflect the claimant's mental health condition came on acutely at the end of September/early October 2018 the claimant's response was semantics were being argued, and the Tribunal concluded on the balance of probabilities the claimant's evidence was unreliable and was not supported by the contemporaneous documents such as GP records and internal communications.

30 The Tribunal was satisfied, as conceded by the claimant in oral evidence, that Helen Connolly had flagged to the claimant he had not met the personal objective of the Comms audit in the performance year 2017-2018 and was close to getting an amber rating. The reason for this rating was that the claimant had not completed the Comms audit, an objective set by Helen Connolly, and the claimant was upset that Helen Connolly had criticised his

performance despite failing to meet the objective. This is a relevant point as the claimant continually failed to meet this objective, and his evidence that he had not agreed personal objectives when he moved to Gary McKeating's team was not supported by the contemporaneous documents and bought into sharp focus the claimant's lack of credibility.

31 The Comms audit was set as also a personal objective for the claimant in performance year 2018-2019, but this time he was to be assisted by an outside agency at the cost to the respondent of £100,000 and it was "most pressing" as agreed by the claimant under crossexamination. The claimant's evidence concerning whether the Comms audit was a personal objective or not was confusing, and the Tribunal concluded on the balance of probabilities the Comms audit was a personal objective of the claimant's in 2017/2018 and then up to the end of September 2018 and he had never achieved the objective. In oral evidence the claimant gave the reason for this as "commercial" and not performance issues, and on the claimant's own account his failure to meet the Comms audit objective was unconnected with his disability, and so the Tribunal found. It is notable the claimant's evidence concerning whether or not the Comms audit was a personal objective he was required to meet was less than reliable; he was incapable of giving a straight answer denying he had any personal objectives when the contemporaneous documents reflected the opposite.

32 In an email sent to the claimant and Gary McKeating by Helen Connolly at 10.56 on the 9 July 2018 reference was made to "recent conversations" and agreements reached including the transfer of the claimant's line management responsibilities, the Comms audit led by the claimant with the assistance of the external provider was described as "quite urgent as we need to be able to make recommendations in September." The claimant was to continue leading "on the communications aspects of EDI reporting to Helen Connolly and Comms production." The heading referred to "KC project work". With reference to the Comms audit the claimant's evidence was that the third-party company assisting him needed to be registered on the respondent's system and the time scale slid to the end of September 2018. He accepted under cross-examination EDI was a personal objective agreed with Jamie Reed in direct contrast to the written evidence and Ms Johnson's submissions.

Claimant's departmental move July 2018

33 The claimant moved across to be line managed by Gary McKeating in July 2018 in a role which collaborated with Helen Connolly's team. The claimant continued to work on projects ran by Helen Connolly for which she had responsibility, the Coms audit being one of the two projects the claimant was involved in. He was aware the Coms audit continued to be a personal objective that was "quite urgent" and so the Tribunal found.

Claimant's failure by September 2018 to complete the Comms audit.

34 By September 2018 the claimant had not completed the Coms audit and Gary McKeating wrote to the claimant in an email sent on 7 September 2018 at 9.31 "We need to look at some objectives for the rest of the year. I've been looking at the transition arrangements and we do have one that was a hangover from the transition so if we can get that boxed off it's a start." Three objectives were set out – "1 Work with Gatehouse agency to help develop a comms audit…helping Gatehouse to have access to SL channels and

materials…2 setting up a days training session and 3 execute the audit itself…in terms of timing I'd like that completed **by end of September**" [the Tribunal's emphasis]. The claimant's evidence before this Tribunal was that he could not do the Comms audit work and meet the deadline until Gatehouse were registered on the system, which was out of his control. This state of affairs had nothing to do with his disability and so the Tribunal found.

35 On the 18 September 2018 the claimant sent text messages to Gary Keating that he was not "doing very well at the minute" and "had a great four days off, came in refreshed and keen to crack on, and on one day back in and I was crying in my car at the end of it. Doing work for Helen is a big trigger to be honest." In another text message the claimant referred to going to see his doctor with suspected shingles, and on the 30 September taking leave the next day due to his wife's condition and looking after the children on the 1 and 2 October 2018.

36 The claimant went to see his GP on the 25 September 2018. The GP records reflect he had a rash on back of neck. There was no reference to "anxiety" until the visit on 5 October 2018.

37 In an email sent to Gary McKeating on the 4 October 2018 the claimant referenced his mental health problems as follows "As we talked about a couple of weeks ago, I've been battling some problems with my mental health and suffering from anxiety issues….Although our talk helped at the time thins haven't changed that much in the office…I'm not sleeping properly and am really struggling…Yesterday…I had to leave my desk twice because I was tearing up…"

Claimant's ill-health absence

38 The Comms audit that remained outstanding after the deadline date of end of September had not been completed by the claimant before he went off sick. By the time the claimant had returned to work the Comms audit was complete and there was nothing left for the claimant to do on it. The evidence before the Tribunal was that the claimant had not started the Comms audit before he went off ill, and the explanation given by the claimant for this was not linked to his disability but commercial considerations on which the Tribunal was unable to reach any conclusions as to their validity or otherwise. The Tribunal concluded on the face of the evidence that the claimant had not met objective and his failure was not linked to his disability.

MED3

39 The claimant went to see his GP on 5 October 2018 and a MED3 was issued "not fit for work" and the diagnosis was "stress." The records reflect the claimant was struggling generally and found himself crying at work "no particular trigger…struggling to sleep."

40 The claimant was first prescribed anti-depressants on 18 October 2019; 50mg of sertraline, and signed off for a further two weeks. The GP record confirmed a MED3 was issued not fit for work "stress related problem." In his witness statement the claimant stated that before he went off sick he made Gary McKeating and Jamie Reed aware that he was taking anti-depressants, an incorrect statement of fact as the claimant was off sick when he was prescribed medication on 18 October 2019, underlining the claimant's unreliability as a witness.

41 The claimant was absence from work from 4 October to 20 November 2018. He underwent a counselling session on the 1 November 2018. In all, the claimant had 6 counselling sessions provided by the respondent.

Claimant's return to work

42 The claimant returned to work on the 20 November 2018, and after speaking to HR self-referred to occupational health who recommended a phased return of 4-hours per day on 21 November 2018 which the claimant started that day.

43 The respondent is a highly structured organisation because of the nature of its business activities, and the Tribunal was surprised there was no formal returned to work interview on the 20 November 2018 with Gary McKeating. The evidence before the Tribunal was that as the claimant, Gary Keating and Jamie Reed sat in a group and there were numerous informal chats, as one would expect between close friends and colleagues. There was no evidence of any informal return to work meetings and it took the claimant speaking with HR before self-referring to occupational health. Had a formal return to work taken place it is likely the respondent would have been informed the claimant remained on antidepressant medication and this would have raised a question mark over the seriousness of his condition and whether it was long term.

44 Occupational health reviewed the claimant and in an email sent on 30 November 2018 confirmed "he is starting to make progress. I would advise that he continues with his restricted hours up to the Xmas break. It would be beneficial to let him increase his workload to aid his recovery… I would avoid giving him tasks with a short timescale." The adjustments were complied with. There was no reference in the report to the claimant's medication. In the note "Medical Restrictions" occupational health confirmed that the adjustments were temporary. Reference was made to the Health and Safety at Work Act 1974 and no indication the claimant's condition could amount to a disability under the Equality act 2010.

45 The claimant continued to work with no issues and all of the restrictions were lifted on 31 December 2018.

46 By the claimant's return to his GP on 20 December 2018 his mood was described in the GP records as "much improved but still with some anxiety. Back to work on phased return. Work counselling has now finished." Sertraline dosage was increased to 100mg.

47 The claimant was reviewed by occupational health on the 11 January 2019 and it was confirmed "He has made good progress to date. I have advised him that he can resume 'normal hours' and resume his 'normal' workload." There was no further medical evidence

before the Tribunal concerning the claimant's medical condition described by the GP in records to be a "stress related problem" until 5 June 2019. Throughout this period the claimant continued to be prescribed Sertraline on a repeat prescription, and in oral evidence on cross-examination confirmed neither he or his GP knew how long for and whether it was for the short or long term.

48 On the 17 January 2019 the claimant was absent from work ill. The claimant through cross-examination questions put by Ms Johnson attributed his absence to his mental health, which was not supported by contemporaneous documents and the Tribunal found the claimant to have been an inaccurate historian who gave less than credible evidence. The claimant emailed Gary McKeating at 6:59 on the 17 January 2019 "Was sick through the night. I go to bed thinking things have cleared up and expecting to be in the next day but then don't sleep very well and wake up to vomit in the early hours…" In an email sent on 22 February the claimant referred to feeling ill "Just a bug…I've got a temperature and thumping head. Will be fine by Monday." It was reasonable for Gary McKeating to conclude the claimant's illness and absences was attributable to a bug, and there was no suggestion it was down to his mental health and the Tribunal finds that it was not.

49 During this period the claimant was involved in the "Social Impact Comms Campaign" with Gary McKeating and Jamie Reed which he found "very exciting."

Knowledge of disability

50 The claimant and Jamie Reed were engaging in extensive lengthy text messages during the working day concerning politics which culminated in the claimant texting at 11.32 on the 26 February 2019 "Jamie we need to stop this now…When we do this face to face its okay…but I'm struggling with this. Please remember that I'm on a heavy dose of medication for a mental health problem, part of which involves me massively over analysing things and being very paranoid. The medication helps but insomnia is a side effect. I know you've told me before that I'll be fine, but were going through a restructure and I'm still sat 8 months into a new job with no job descriptions or objectives, which means my anxiety is spiking already…I'm distracted all day and not able to concentrate on doing any work, and at worst I'm in a spiral and end up really ill again." Jamie Reed attempted to set the claimant's mind at ease and confirmed the four objectives that had been set for the claimant, offering to call him. He told the claimant to "think back to our walk and conversation, the agenda you are part of is critical to me and the company…" The claimant responded; "I'm probably hyper sensitive today because of lack of sleep." Jamie Reed did not follow up on the information given by the claimant about his medication and mental health either vie the GP or occupational health, and as a consequence it did not cross his mind that the claimant's condition was long-term and he could be disabled with depression, a condition that was likely to deteriorate if the medical was stopped.

The late March 2019 Employee Development Group Meeting

51 An Employee Development Group Meeting took place with managers to discuss the performance of individual employees. No notes were taken. The Tribunal finds it surprising that the precise date of this meeting is unknown bearing in mind the importance of the

decisions made concerning individual employees performance that directly impacted on bonuses.

52 The claimant's case is that he was singled out for an amber rating at this meeting due to his mental health rather than performance. He accepted he had not completed the PMA form prior to the meeting, which was his responsibility, and therefore there was no record of his performance. In oral evidence on cross examination the claimant disputed he had personal objectives that could be discussed with his line manager or at the meeting. The Tribunal found the claimant's evidence was not credible, and it is apparent from the contemporaneous emails exchanged that a number of objectives were set, one of the claimant's objectives had been and remained until the end of September 2018 the Comms audit in the performance year 2019 and he had not met that objective.

53 A member of the HR team was present at the Employee Development Group Meeting held late March 2019 and the respondent's evidence was that HR recorded the decision in relation to individual employees and not how the decision came about. No notes confirming the decision was produced and the Tribunal find it surprising that the discussion concerning whether the claimant was a red or amber rating were not documented, along with decisions taken in relation to other employees including one who was also rated amber. Gary McKeating's evidence was that "everybody" with the exception of Mr McKeating, thought the claimant should be allocated a red rating and he persuaded them to allocate an amber. Jamie Reed's evidence was that he always thought the claimant was an amber. The conflict in the evidence raises credibility issues as Gary McKeating, Jamie Reed and Helen Connolly were the only three higher level managers who could have any meaningful involvement in assessing the claimant with other managers being guided by their views. Had it not been for the claimant's evidence that he failed to meet the Comms audit as a result of commercial considerations, the Tribunal could have raised an adverse inference from the lack of record and conflicting evidence given by Gary McKeating and Jamie Reed resulting in a shift of the burden of proof.

The claimant's PMA (appraisal) 16 April 2019

54 Gary McKeating carried out the claimant's PMA for year 2018 to 2019 on 16 April 2019 in the knowledge that he had achieved an amber rating and would be upset by it. Unbeknown to Gary McKeating and Jamie Reed the claimant was aware he had been given an amber rating, and came into the meeting armed with this knowledge expecting Gary McKeating and Jamie Reed to change the rating to green with no argument and so the Tribunal finds. The claimant became upset because the meeting did not go as he anticipated and he remained on the amber rating.

55 Notes were not taken by either party, which the Tribunal found surprising. Jamie Reed attended the meeting to minimise the upset to the claimant as neither he nor Gary McKeating the claimant had been pre-warned. There is a conflict in the evidence as to what was said and whether the claimant cried at the meeting. Meeting notes would have assisted memories affected by the passage of time given it had taken place over two and a half years ago and perceptions often change over time to fit in with what people believe took place as opposed to the actual event. On the balance of probabilities the Tribunal preferred the respondent's evidence that the claimant did not cry.

17 April 2019 email

56 The claimant relies on an email sent to Gary Keating and Jamie Reed on the 17 April 2019, the day after the meeting, which he produced with assistance of an unknown person. The claimant described this email as a note of the meeting, when it clearly was not and so found the Tribunal. In the email the claimant recognised he was underperforming and had been supported in this by Gary McKeating and Jamie Reed who "genuinely care about me."

57 The claimant set out the grounds why he would not accept the amber rating. It is unclear as to what points were raised at the meeting and what points the claimant was raising subsequently with the assistance of an unknown person when blaming the respondent for the amber rating. The claimant acknowledged the key objectives he was responsible for included the Comms audit stating "at the point when I went off sick, at the beginning of October, no issues whatsoever had been flagged about my performance," which was not entirely correct given Gary McKeating's email dated 7 September 2018 that the Comms audit should be completed by the end of September 2018 and the claimant's continual failure to meet this objective.

58 The claimant alleged in his email Gary McKeating said; "in your judgment, my performance merits an amber because I've lost enthusiasm, don't seem as committed and 'my productivity is below the level expected to be.' All of these things are direct symptoms of my mental health." Jamie Reed's evidence was that they knew the claimant had "spikes, ups and downs" and he had volunteered he was not performing effectively and may have volunteered he had lost his enthusiasm, but could not recall. Gary McKeating in oral evidence denied he had made this comment to the claimant who was "putting words in my mouth." He made the comment that the claimant had appeared to have lost his enthusiasm but was not marked down for this, and told him he had a lot to offer the team. Gary McKeating stated he had informed the claimant he was not marked down because of lost enthusiasm and this was down to not meeting objectives. It is undisputed that there was a conversation around commitment, losing enthusiasm, the claimant's constantly using his mobile phone to which the claimant stated he would start leaving it in the car and the claimant's admission he was working at 30 percent productivity.

59 The Tribunal concluded, on the balance of probabilities, the claimant conflated what had been said at the 17 April 2019 meeting knowing when he was going into the meeting that he was an amber because he had heard this second hand and he believed his friends/colleagues would change the rating to green. The claimant had met the majority of objectives and had met two thirds of the failed objective; he was not far off meeting all of his objectives and believed this might suggest there were other factors in play in the assessment, namely the effects of his mental health and the fact that "when I went off sick, at the beginning of October, no issue whatsoever had been flagged about my performance. I was struggling with my mental health **but from a delivery perspective…things were okay**" [the Tribunal's emphasis]. In the 17 April 2019 letter it is notable the claimant referred to the "Comms Audit, up to the point I went sick…the project was slightly behind schedule, but this was due to commercial issues (getting Gatehouse registered on SAP) which was not in my control…"

60 The problem for the claimant was that the Comms objective was his main objective and he had failed to meet that objective for almost 2 years. Taking into account all of the evidence, the Tribunal concluded on the balance of probabilities that Gary McKeating used those some of the words as alleged and there was no causal connection with the decision to award the claimant an amber rating. The Tribunal did not accept the claimant had cried, preferring the evidence of Mr McKeating and Mr Reed to that of the claimant's less than credible version of events. The claimant was aware before the meeting of the amber rating and it was not a complete shock to him as he maintained at this liability hearing.

61 Gary McKeating and Jamie Reed did not respond directly to the claimant's email of 17 April 2019 sent at 14.30. Gary McKeating emailed HR at 15.59 "I'm now formally requesting HR support and advise on this. There are elements of this email that I have no knowledge of. I won't meet with Karl without a HR representative…at no point was the link made between performance and mental health issues. The amber was based on no output against objectives."

Payment of the company bonus

62 The Claimant was paid his 3% company bonus because this was not dependent upon any information provided on his OPMS form. The claimant was not paid his personal bonus on 15 May 2019 which amounted to 2 percent of his gross pay.

Changing the amber rating to a green rating meeting 31 May 2019

63 The was a delay in dealing with the claimant's objection to the amber rating which originally was to be dealt with informally, resulting from the time it took to get HR advice. The claimant emailed HR on the 25 April 2019 having discussed the issues with other people in the respondent organisation and he received advice. The claimant wrote that someone in the respondent had "already told me he didn't think they'd followed process and wouldn't have a leg to stand on." The upshot was HR advised due process had not been followed and a meeting took place between the claimant and Jamie Reed which resulted in Jamie Reed's email sent on 31 May 2019 sent at 15.44 confirming the discussion which included "You challenged your amber PMA rating for 2018/2019 on the grounds that process had not been adequately followed. Following discussions with HR your retrospective PMA grading for 2018/2019 is green and I will today instruct…to ensure that your bonus is paid as soon as possible, backdated…"

64 Arrangements were put in hand for a number of other matters to be resolved, including the claimant's concern about developing a PMA for 2019/2020 by a meeting taking place every Friday, and the claimant was issued with a verbal warning for an unrelated matter which he accepted.

65 There was an issue at the hearing whether the claimant was informed that he was to be paid his whole or part bonus, and the Tribunal concluded based on the contemporaneous documentation there was no reference to the claimant being paid in whole or in part. The email was neutral and the Tribunal found on the balance of probabilities the claimant was not informed all of his bonus would be paid bearing in mind it was undisputed the claimant's

Comms objective had not been achieved and it would be unrealistic for the claimant to interpret this email to imply he was being paid the full amount.

66 The claimant responded at 16.06 on the 31 May 2019 confirming Jamie Reed's email was accurate and "resolution of my grievance re my initial PMA rating 2018/2019 is a weight off my shoulders…this is a fantastic job…thank you (and you Gary) for your help and for your patience with my ongoing mental illness." This is a clear indication to the Tribunal the claimant had been arguing against the initial amber grading on the basis of due process not being followed and not disability discrimination, and once he achieved the green grading was satisfied with the outcome. The claimant's email was positive, and there was no hint Jamie Reed had acted in a discriminatory manner, the claimant's final sentence being "thank you (and you Gary) for your help and for your patience with my ongoing mental illness…"

67 The claimant alleged in these proceedings that at the 31 May 2019 meeting with Jamie Reed, Jamie Reed opened the meeting by saying "let's cut to the chase, HR said you're right and we are out of process, so your technically a green for last year – but let's be under no illusions, we know you're really an amber and you've got off on a technicality." Jamie Reed denies saying this, there was no reference to these words in any of the emails the followed, including the claimant. The Tribunal found it difficult to accept the claimant's oral evidence on this issue without any supporting contemporaneous documentation, and there was none which it found surprising given the content of the claimant's 17 April 2019email (above) when he alleged the respondent was "a significant contributor to my mental health issue…"

68 In the claimant's witness statement three paragraphs set out what had been allegedly discussed at the meeting with Jamie Reed on the 31 May 2019, allegations that had not been raised previously. The Tribunal found there was no hint of any sub-text in the claimant's email of the 31 May 2019, and no suggestion the claimant was taking steps to avoid inflaming the situation or that had he had been told by Jamie Reed that "this was the last chance to move in our relationship." The claimant was glowing in his thanks to Jamie Reed and Gary McKeating, and made a number of very positive comments. The Tribunal preferred the contents of the claimant's contemporaneous email sent on 31 May 2019 to the witness statement written with this litigation in mind, concluding the words had not been said as alleged.

<u>The first diagnosis of depression</u>

69 The claimant was absent from work the 3 June to 20 September 2019. On the 5 June 2019 the claimant was diagnosed with depressive disorder, the first time the GP referred to this condition. The claimant's medication was increased and it reflected "mood got worse recently when he was given an amber rating out of the blue for his performance at work which really set him back. In the last week he's felt low and struggling to get motivated."

<u>Jamie Reed's decision to pay part bonus</u>

70 Jamie Reed made the decision to pay the claimant 1.66 percent of gross pay based on the fact the claimant had met his objectives in part only and he took no account of the claimant's underperformance which the claimant attributed to his disability when

reaching this decision. Jamie Reed's assessment was based on the fact the claimant had not achieved the Comms audit by the end of September 2019.

71 Jamie Reed emailed the claimant on the 18 June 2019 informing him he had achieved 1.66 percent of the 2 percent maximum breaking down the achievements in to EDI comms 0.75%, ST strategy Launch achieved – 0.25% achieved and Comm audit – 1% (1.66% achieved." HR was notified and payment expected in July. The respondent's evidence was that the amber was given as a result of the claimant not achieving the Coms audit objective. However, as the claimant had achieved other objectives to the value of 1.66 percent out of the maximum 2% achievable the Tribunal questioned why an amber rating had been given in such a circumstance when the claimant had been given a green rating in the previous year when he had not achieved his Coms audit objective. The Tribunal was looking to see if an adverse inference could be drawn and reverse burden of proof applied. The Tribunal explored whether Jamie Reed and Gary McKeating's actions were tainted by disability discrimination on the balance of probabilities, and the claimant's general performance, lack of enthusiasm and low productivity were included in the mix, together with the fact that he had not met part of an objective, but had met the other two objectives in full, concluding on the balance of probabilities that they were not. The Tribunal was satisfied the claimant was awarded a amber rating following by green with payment of 1.66 percent on his bonus for one reason only and that was the claimant's failure to complete the Coms audit objective by the end of September 2019, an objective that had been ongoing since 2018 with a budget of £100,000 subsequently being granted to assist the claimant achieve it.

72 The claimant was upset that he had not been paid "in full" and on the same day responded in an email that " had you raised the not completed element of the communication audit I would have challenged the fact that it was not completed, and raised the mitigation that it was a management decision not to allow me to continue with that work following my period of absence i.e. I was not given an opportunity to finish it, therefore I am not responsible for the fact that it was not finished (by me), and should not be penalised…the guidelines state that the weighting, and indeed the objectives, should be agreed at the beginning of the PMA year. Had that been the case, for example, I would have insisted on finishing off the Comms audit on my return to work, had there been any indication from you or Gary that my bonus would be impacted." The arguments put forward by the claimant was in direct contrast to his oral evidence before this Tribunal. There were credibility issues as the uncontroversial evidence was that the Comms audit to be completed by the end of September; it was an urgent piece of work as confirmed in various communications to the claimant at the time and had been outstanding for a long time. The claimant's evidence before this Tribunal was that he did not complete the work by the deadline date due to commercial reasons and he understood fully it had not been completed, which is why an amber rating was narrowly escaped in performance year 2018.

73 Jamie Reed's team was dealing with a programme involving communicating throughout the workforce on equality, diversity and inclusion headed by managers that had not undergone diversity training with the respondent, and whilst it does not impact the Tribunal's decision in this matter and the issues to be resolved, it perhaps casts some light on why Gary McKeating and Jamie Reed failed to recognise the possibility that the claimant was disabled, and they together with the claimant were

prepared to cut corners and not to keep records. The claimant, Gary McKeating and Jamie Reed supported each other as close friends and colleagues blurring the lines between their private lives, company responsibilities and equal opportunities until the claimant received the amber rating, followed by green and a reduction of £222 in the bonus payment as set out in the schedule of loss.

Law

Disability discrimination arising from disability

74 Section 15(1) of the EqA provides-

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

(a) A treats B less favourably 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.

75 Paragraph 5.6 of the Equality and Human Rights Commission: Equality Act 2010 Code of Practice provides that when considering discrimination arising from disability there is no need to compare a disabled person's treatment with that of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.

1.1 In order for the claimant to succeed in his claims under s.15, the following must be made out: there must be unfavourable treatment;

1.2 there must be something that arises in consequence of claimant's disability;

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

1.4 the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim

76 Unfavourable treatment is not the same as detriment. **The test is whether a reasonable worker would consider that the treatment is unfavourable** [the Tribunal's emphasis relevant to Mr Connor]. Useful guidance on the proper approach to a claim under s.15 was provided by Mrs Justice Simler in Pnaiser v NHS England and anor [2016] IRLR, EAT:

76.1 "A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B

unfavourably in the respects relied on by B. No question of comparison arises.

76.2 The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

76.3 The Tribunal examined closely the conscious and unconscious thought process of the respondent's witnesses who gave evidence before it, concluding the explanations they gave were untainted by disability discrimination.

76.4 Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises…"

76.5 The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

76.6 This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

77 Whether or not treatment is "unfavourable" is largely question of fact but this does not depend just on the disabled person's view that he should have been treated better - Williams v Trustees of Swansea University Pension and Assurance Scheme [2018] UKSC 65. Mr Grundy referred the Tribunal to paragraph 43 where the Court of appeal

addressed the question in unfavourable treatment *"Shamoon is not authority for the proposition for saying that a disabled person has been subject to unfavourable treatment within the meaning of S15 simply because he thinks he should have been treated better".*

78 Mr Grundy submitted the approach adopted by the Court of Appeal was approved in the Supreme Court. In the Supreme Court [2018] UKSC 65, Lord Carnwath held:-

> *"27. Since I am substantially in agreement with the reasoning of the Court of Appeal, I can express my conclusion shortly … I agree with her that in most cases (including the present) little is likely to be gained by seeking to draw narrow distinctions between the word unfavourably in s15 and analogous concepts such as disadvantage or detriment found in other provisions, nor between an objective and a subjective/objective approach. While the passages in the Code of Practice to which she draws attention cannot replace the statutory words, they do in my view* ***provide helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section.*** [the Tribunal's emphasis].
>
> *28. On the other hand, I do not think that the passages in the Code do anything to overcome the central objection to Mr Williams' case as now formulated, which can be shortly stated. It is necessary first to identify the relevant "treatment" to which the section is to be applied. In this case it was the award of a pension. There was nothing intrinsically "unfavourable" or disadvantageous about that …".*

79 There must be a measurement against "an objective sense of that which is adverse as compared to that which is beneficial" - T-System Ltd v Lewis UKEAT/0042/15 *(22 May 2015, unreported).*

80 Mr Grundy also relies on the EAT judgment in Basildon and Thoracic NHS Foundation Trust v Weerasinghe [2016] ICR 305 the EAT held:-

> *"The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them.* ***The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" – and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link.*** *These are two separate stages".*

81 In Sheikholeslami v University of Edinburgh [2018] IRLR 1090, the EAT held that the approach to this issue requires :An investigation of two distinct causative issues: (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.

82 The actual disability does not need to be the cause of the unfavourable treatment under s.15 but it needs to be "a significant influence" or "an effective cause of the unfavourable treatment" - Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893, EAT. It will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability. The more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact – Pnaiser cited above.

83 When considering the issue of causation under section 15 of the EqA, Mr Grundy also relies on the EAT judgment in Dunn v Secretary of State for Justice [2019] IRLR 298 and by the Court of Appeal in Robinson v Department of Work and Pensions [2020] IRLR 884. In the former case the EAT repeated that the correct approach to causation will typically involve establishing that the relevant related factor operated on the mind of the putative discriminator as part of his conscious or unconscious mental processes. In the latter case the Court of Appeal held that it is not enough for an employee to establish that but for their disability they would not have been in a position where they were treated unfavourably – the unfavourable treatment must be because of the something which arises out of the disability.

Knowledge

84 Guidance as to the requisite knowledge of "disability" when considering a claim under S15 was provided by the EAT in A Limited v Z [2019] IRLR 952 at paragraph 23. The Tribunal was invited to read the guidance at paragraph 23.

85 In determining whether the employer had requisite knowledge for section 15(2) purposes, the following principles are uncontroversial between the parties in this appeal:

85.1 There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment, see York City Council v Grosset [2018] ICR 1492 CA at paragraph 39.

85.2 The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of section 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long- term effect, see Donelien v Liberata UK Ltd UKEAT/0297/14 at paragraph 5, per Langstaff P, and also see Pnaiser v NHS England & Anor [2016] IRLR 170 EAT at paragraph 69 per Simler.

85.3 The question of reasonableness is one of fact and evaluation, see Donelien v Liberata UK Ltd [2018] IRLR 535 CA at paragraph 27; nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.

Burden of proof

86 Section 136 of the EqA provides: (1) this section applies to any proceedings relating to the contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

87 In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply, as affirmed in Ayodele v CityLink Ltd [2018] ICR 748 to which the Tribunal was referred by Mr Piddington. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that it did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondent and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case disability], failing which the claim succeeds.

Unlawful deduction of wages

88 Ms Johnson set out the undisputed law in her written closing submissions, reproduced below for which the Tribunal was grateful.

89 By virtue of Section 23(1) (a) of the Employment Rights Act 1996, the Claimant has presented a complaint to the Employment Tribunal for unlawful deduction from wages.

90 Pursuant to Section 24(1) of the Employment Rights Act 1996, the Claimant bring an unlawful deduction from wages claim, and part of that would be asking an Employment Tribunal to make a declaration as to his Terms and Conditions of employment, inclusive of pay, a declaration of there having been an unlawful deduction from wages, as well as an Order for Repayment.

91 Under Section 13(3) of the Employment Rights Act 1996, *"where the total amount of wages paid on any occasion by an employer to a worker … is less than the total amount of the wages properly payable … the amount of the deficiency should be treated … as a deduction made by the employer from the worker's wages on that occasion."*

92 Furthermore, in order to bring a claim in the Employment Tribunal for unlawful deduction from wages, the losses sought would have to be quantifiable by reference to the contract pursuant to the case of Coors Brewery v Adcock [2007] EWCA Civ 92.

93 In order to be classed as a deduction for the purposes of such a claim, the Claimant need only demonstrate that he has been paid something less than that which is properly payable.

Conclusion – applying the law to the facts

Burden of Proof

94 The claimant has not proved, on the balance of probabilities, facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent subjected him to the discrimination alleged and the burden of proof has not shifted. If the Tribunal is wrong in its application of the burden of proof, and the burden shifted to the respondent to prove on the balance of probabilities that the claimant's disability was no part of the reason: Igen cited above, it would have gone on to find the explanation given on behalf of the respondent was untainted by disability discrimination.

Section 15 complaint

Did R treat C unfavourably by giving C an amber rating under the Performance Management Agreement for 2018/2019 ("The PMA") on or about 16.4.19.

95 With reference to the issue 1.1 above, namely, did the respondent treat the claimant unfavourably by giving the claimant an amber rating under the Performance Management Agreement for 2018/2019 ("The PMA") on or about 16.4.19, the Tribunal found that it had not at that time because it reflected his actual performance when he had not met the standard expected of him. At the end of year review four ratings could be awarded; gold (the best for exceptional performance), green (the standard expected), amber when "performance objectives were partially met, some shortfall in achieving objectives…" and red where "performance objectives…are not met." The claimant was below standard because he had not completed the Comms audit by the end of September 2019.

96 A central plank in the respondent's defence was that the claimant was not treated unfavourably. Mr Grundy submitted that unfavourable treatment is a concept which is distinct from a "detriment" or "less favourable treatment." The Tribunal notes Lord Carnwath stated above "*in most cases…little is likely to be gained by seeking to draw narrow distinctions between the word unfavourably in s15 and analogous concepts such as disadvantage or detriment found in other provisions…the Code of Practice* provides helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section." The Code of Practice refers to an employee being put at a disadvantage it is necessary when assessing whether treatment by an employer was "unfavourable" to have some measurement against an objective sense of that which is adverse as compared to that which is beneficial. The case of Williams (above) the Court of Appeal addressed the approach to the question of unfavourable treatment. With reference to Mr Connor, an

underperforming employee, the Tribunal took the view that being assessed as amber when there was a shortfall in his performance unconnected to disability objectively assessed was not treating him unfavourably. In short, if key objectives are not achieved employees will not be awarded a gold or red rating under the respondent's performance management procedures, and will be awarded amber or red.

97 Ms Johnson submitted unfavourable treatment is being worse off because of the way you have been treated, not paying an employee their bonus does amount to unfavourable treatment, paying an employee less than their entitlement does amount to unfavourable treatment and giving an employee an amber rating does amount to unfavourable treatment. The Tribunal took the view that not paying an employee their bonus could amount to unfavourable treatment in some circumstances, but it was unlikely to cover an employee who had failed to meet his or her key personal objectives which informed the rating.

98 The Tribunal concluded that the claimant was fully aware he had not met the Comms audit objective; he had got away with it in the past after a near miss almost awarded an amber rating, and he expected his friends would not enforce the rating and when it was given at the meeting held end of March, change it to the claimant's favour. A disabled person has been subject to unfavourable treatment within the meaning of S15 simply because he thinks he should have been treated better" (above) and had the claimant looked at his performance objectively he should have realised that (a) he had missed a key objective and (b) this could affect his rating together with the personal performance bonus and as a consequence against a backdrop of the communications manager on a substantial salary failing to meet his objective there *"was nothing intrinsically "unfavourable" or disadvantageous about that …"* (Lord Carnwath above) the amber rating being given in circumstances where the respondent's policy provided for this and the claimant was fully aware of it.

99 The claimant relies on the 17 April 2019 email as evidence that the amber rating was unfavourable and disadvantaged him because it was based on his performance as a consequence of his mental health. Mr Grundy described the 17 April 2019 email as "carefully crafted to fit a narrative which the Claimant wished to advance. It is not a note taken at the time of the meeting and it appears that his later note was amended or altered and there was an email exchange with another work colleague to agree what should be said. The emails and the original note have not been disclosed." The Tribunal accepted Mr Grundy's observations coupled with Mr McKeating's oral evidence supported by his email to HR after meeting the claimant when he said, "there are elements of this email I have no knowledge of."

<u>Did R treat C unfavourably by omitting to pay C the personal element of the bonus under the PMA on or about 15.5.19</u>

100 With reference to issue 1.2, namely, did the respondent treat the claimant unfavourably by omitting to pay the claimant the personal element of the bonus under the PMA on or about 15.5.19, the Tribunal found that it had not.

101 Mr Grundy submitted that the Claimant was paid his 3% company bonus because this was not dependent upon any information provided on his OPMS form. The delay or omission in the payment at that time was because the Claimant hadn't entered anything on the OPMS

form. It is undisputed between the parties the claimant had not entered his PMA on to the respondent's system, and there was no evidence either Jamie Reed or Gary McKeating had given instructions to the effect that the claimant's personal bonus payment should be delayed and not paid on the 15 May 2019. The claimant's evidence was that in May 2019 Gary McKeating was off work on sick leave, he had been told Jamie Reed was "having to do 3 peoples jobs" and struggling, Jamie Reed cancelled leave to deal meet with the claimant on 31 May 2019 who was informed at that meeting the bonus would be paid in the June payroll.

102 Ms Johnson submitted that on the 15 May 2019 the Claimant did not receive the personal element of the management bonus, which other staff received and this was less favourable treatment. The Tribunal took the view that if other staff had completed their PMA and entered the information on the OPMS system when the claimant had not, and as a direct consequence he had not been paid any personal bonus, there was no less favourably treatment. In any event, there is no question of a comparison – Paisner above. The Tribunal considered whether the claimant had been treated unfavourably, concluding on the balance of probabilities that he had not. On the evidence before it the Tribunal accepted Mr Grundy's submission that the delay or omission was a consequence of the claimant's inaction and does not amount to unfavourable treatment by the respondent, coupled with the time pressures on Jamie Reed after the 15 May 2019 which the claimant was fully aware of.

103 Mr Grundy argued that the delay or omission had nothing to do with any "performance" issues and it did not arise in consequence of the claimant's disability. No personal bonus was paid at that time because the information was not available to those who processed the payment, and if there was fault on the respondent's part in not providing the relevant information prior to 15 May 18 that has nothing to do with anything arising in consequence of the Claimant's disability. The Tribunal agreed acknowledging the "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it. Objectively assessed, there was nothing arising in consequence of the claimant's disability that had any significant influence on the respondent not paying the claimant the personal element on his bonus on 15 May 2019, and there was nothing to suggest the claimant was unable to complete his PMA and enter the information on the respondent's system due to his disability.

Did R treat C unfavourably by awarding C the personal element of the bonus under the PMA of 1.66% of gross pay [rather than 2% of gross pay] on or about 15.6.19.

104 With reference to issue 1.3 above, namely, did the respondent treat the claimant unfavourably by omitting to pay the claimant the personal element of the bonus under the PMA on or about 15.5.19, the Tribunal found that it had not. The green rating triggers the payment, and an amber rating triggers the non-payment. The claimant was aware from the previous performance year that he was near an amber rating but on that occasion given the benefit of the doubt and awarded a green rating and a bonus payment. In order to achieve his full bonus the claimant would need to meet all objectives and he had not.

105 The Tribunal accepts that being paid part of a bonus and losing out on £220 can amount to unfavourable treatment. In the claimant's case it did not as the reason came back to his failure to meet the Comms audit objective which had a direct impact of bonus valuation,

as acknowledged by the claimant at the time. The Tribunal focused on the reason in the conscious and unconscious thought processes in the mind of Jamie Reed when he assessed the bonus at 1.66 percent and not 2 percent of gross salary – Pnaiser above, concluding the claimant's failure to meet the Comms audit was the only significant influence on the decision and so amounted to an effective reason for it against a backdrop of underperforming employees failing to meet personal objectives not achieving full personal bonus payments under the respondent's performance management procedures.

106 In conclusion, with reference to issue 1.2, namely, did the respondent treat the claimant unfavourably by awarding him the personal element of the bonus under the PMA of 1.66% of gross pay [rather than 2% of gross pay] on or about 15.6.19, the Tribunal found that it had not. Failing to pay the claimant on the Comms audit objective, which he had achieved in part, was not unfavourable based on the evidence before the Tribunal.

If so, was the cause of or the reason for the unfavourable treatment "something arising" in consequence of C's disability [mental health impairment]. The "something arising" in consequence of C's disability is alleged to be "performance issues" during the year 2018/2019 [1.4.18-31.3.19].

107 Having found that there was no unfavourable treatment, the Tribunal is not required to deal with the cause or reason of the unfavourably treatment referenced in the next agreed issue. If the Tribunal is wrong in its analysis of unfavourable treatment, in the alternative the Tribunal has dealt with the remaining issues. With reference to whether the cause or the reason for the claimant's treatment (which for the avoidance of doubt was not found to have been unfavourable) the Tribunal found it was not "something arising" in consequence of claimant's disability [mental health impairment]. The "something arising" in consequence of the claimant's disability is alleged by the claimant to be "performance issues" during the year. There were performance issues with the claimant in 2017/ 2018 in respect of the Comms audit but these were unconnected to the claimant's mental health and concerned the fact that the Gary McKeating and Jamie Reed took the view he had not met his objective in both performance years in respect of the Comms audit. On the claimant's own evidence his failure to meet that specific objective was not something arising in consequence of his disability, but a commercial matter.

108 The evidence before the Tribunal that there were other performance issues primarily when the claimant returned to work after his sickness absence having been prescribed Sertraline in October with an increase in medication in December, which suggested, as submitted by Ms Johnson, that the claimant's condition was getting worse. It is undisputed between the parties that from his return to work onwards the claimant had at times difficulty concentration, self-motivation and was working at a reduced level. The Tribunal looked closely at whether the decision to award the claimant the amber rating and then change it to green with a £222 reduction in his bonus was "something" in consequence of the claimant's disability and the Comms app failure on the claimant's part was used to justify the decision when in reality it had not significantly influenced the amber rating and reduction in bonus.
The Tribunal also examined whether the information provided by Gary McKeating and Jamie Reed at the Employee Development Group Meeting related to the claimant's sickness absence and/or underperformance as opposed to his failure to meet the Comms audit objective.

109 In relation to the Comms audit it is undisputed the claimant failed to achieve that objective. The claimant did not assist himself the Employee Development Group meeting by his failure to complete the PMA form which, if the claimant's analysis is correct, would have reflected he had not met the Comms audit target due to commercial issues. There is no getting away from the fact that Helen Connolly and Gary McKeating had set the claimant a target date, which was the end of September 2018, both expressing the urgency of the work and deadline, and the claimant had not met this target in two performance years. The respondent had spent £100,000 on consultants to assist the claimant meet his target, and it had still not been achieved. There is no suggestion the Employee Development Group Meeting took into account the claimant's disability or any underperformance on the part of the claimant resulting from his disability when he failed to meet the objective by the end of September 2019, a period when the claimant was working. The claimant's evidence was that he failed to meet the objective in relation to the communication audit and this was due to system problems preventing Gatehouse from getting on the system and starting the work.

110 Taking into account Gary McKeating and Jamie Reed's state of mind when they made decisions concerning the claimant's rating and bonus payment, the Tribunal was satisfied on the balance of probabilities problems with the claimant's performance other than his failure to meet the Comms audit objective was not the reason, either consciously or unconsciously. The sole reason was the Comms audit, which was the only effective cause for the decisions taken - Hall above.

111 Ms Johnson submitted, reflecting the claimant's evidence. that the claimant's job description was the responsibility of the respondents to deal with, and moving to a new role as the claimant did, should have prompted a complete review and update of objectives. The respondent, she maintained, completely failed in this regard. The setting and agreement of objectives was a two-way street for employer and employee. It was not solely the responsibility of the employee, as suggested by the respondents. As a result, the claimant's PMA could not be updated and Gary McKeating and Jamie Reed did not chase the claimant up about the PMA. Without written agreed objectives, Ms Johnson further submitted, the claimant made a valid point about how he cannot be measured and then rated. The Tribunal took the view that these are all matters, whether justified or not, were unconnected with the claimant's disability. It found the claimant's treatment was not because of the something which arises out of the disability.

Can R show that at the material time namely at the time of the alleged unfavourable treatment, it did not know and could not reasonably be expected to know that C had the disability.

112 With reference to the issue of knowledge, namely, can the respondent show that at the material time namely at the time of the alleged unfavourable treatment, it did not know and could not reasonably be expected to know that claimant had the disability, the Tribunal found on the balance of probabilities that it could have reasonably expected to know that the claimant had a mental health impairment that fell under section 6 of the EqA i.e. the impairment has a substantial and long-term adverse effect on the claimant's ability to carry out normal day-to-day activities.

113 The Tribunal found by respondent had turned a blind eye to evidence of disability. Whilst the EqA does not impose an explicit duty to enquire about a person's possible or suspected disability, the EHRC Employment Code states that an employer must do all it can reasonably be expected to do to find out whether a person has a disability (see para 5.15). It suggests that 'Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person"' — para 5.14. The guidance covers an employee, such as the claimant, who did not know how long he would be on medication for and adversely affected by anxiety and depression.

114 Ms Johnson drew the Tribunal's attention to the example of depression given in the EHRC Employment Code and submitted that failure to enquire into a possible disability is not by itself sufficient to invest an employer with constructive knowledge. It is also necessary to establish what the employer might reasonably have been expected to know had it made such an enquiry. Ms Johnson referred to A Ltd v Z [2020] ICR 199, EAT, Z was dismissed by A Ltd due to her poor timekeeping and numerous sickness absences, which she explained by reference to various physical ailments. In fact, the absences were due to mental impairments – stress, depression, low mood and schizophrenia – which amounted to a disability. An employment tribunal upheld her claim for discrimination under S.15. In its view, A Ltd had constructive knowledge of Z's disability because before dismissing her it had received GP certificates and a hospital certificate indicating that there was a real question about her mental health. It was therefore incumbent on A Ltd to enquire into Z's mental wellbeing. Its failure to do so precluded A Ltd from denying that it ought to have known that Z was disabled. The EAT held that the tribunal had erred because it had not taken into account what the employer might reasonably have been expected to know had it made enquiries.

115 Ms Johnson also referred the Tribunal to Baldeh v Churches Housing Association of Dudley and District Ltd EAT 0290/18 in which the EAT held that a tribunal had erred by rejecting B's claim that her dismissal was discriminatory contrary to S.15 on the basis that the employer did not know about her disability when it reached the decision to dismiss her, without also making a finding as to whether the employer had gained actual or constructive knowledge of her disability by the time it rejected her appeal against dismissal. On the facts of the case, B's complaint of unfavourable treatment in her dismissal had to be taken as referring both to the employer's initial decision to dismiss and to its subsequent rejection of her appeal. In Reynolds v CLFIS (UK) Ltd [2015] ICR 1010, CA, the Court of Appeal held that allegations of discrimination relating to a decision to dismiss and a decision on appeal were distinct claims that must be raised and considered separately. In the EAT's view, that approach applies equally to claims under S.15 EqA. It is important to consider whether the employer had the requisite actual or constructive knowledge at the time of the impugned treatment; knowledge acquired only at a later point is not sufficient. The Tribunal was also referred to two first instance decisions which it has taken note of but is not bound by.

116 Ms Johnson referred the Tribunal to the Court of Appeal's decision in Gallop v Newport City Council [2014] IRLR 211, CA (considering reasonable knowledge under S.4A DDA) Lord Justice Rimer stressed that the key question is whether the employer had actual or constructive knowledge of the facts constituting the claimant's disability: it was an error of law for the tribunal to allow the employer to deny relevant knowledge by relying on its

unquestioning adoption of occupational health advice. Rimer LJ rejected the notion that an employer can simply 'rubber stamp' an occupational health adviser's opinion. Instead, it must make its own factual judgement as to whether the employee is disabled.

117 Finally, Ms Johnson reminded the Tribunal that while lack of knowledge of the disability itself is a potential defence to a S.15 EqA claim, lack of knowledge that a known disability caused the 'something' in response to which the employer subjected the employee to unfavourable treatment is not - City of York Council v Grosset [2018] ICR 1492, CA, the Court of Appeal held that, where an employer dismisses a disabled employee for misconduct caused by his or her disability, the dismissal can amount to discrimination under S.15 EA 2010.

118 Applying the law to the factual matrix set out above, the Tribunal concluded the respondent did not have actual or constructive knowledge until the email of 26 February 2019, which was before the impugned treatment. Upon receipt it was incumbent on the Jamie Reed enquire into the claimant's mental wellbeing and his failure to do so precluded the respondent from denying that it ought to have known that the claimant was disabled – A Ltd above.

119 At the time of the impugned treatment the respondent had failed to enquire into a possible disability, which is not by itself sufficient to invest it with constructive knowledge. Had it made the inquiry after the 26 February 2019 email the respondent might reasonably have been expected to know that prior to September 2018 the claimant had been "relatively stable" and "like most people, I have experienced periods of low mood, but generally would have considered myself mentally resilient" with no hint of any mental impairment that fell under section 6 of the EqA. The claimant's mental health condition came on acutely at the end of September/early October 2018. The respondent might reasonably have expected to know the claimant was "battling" with mental health issues and first prescribed antidepressants on 18 October 2019; 50mg of sertraline, had undertaken 6 counselling sessions provided by the respondent, on his return to work occupational health recommended a phased return of 4-hours per day and had a formal return to work taken place it is likely the respondent would have been informed of the fact that the claimant remained on antidepressant medication. All of this information coupled with the contents of the 26 February 2019 email raised a question mark over the seriousness of the claimant's condition and whether it was long term. By the claimant's return to his GP on 20 December 2018 his mood was "much improved but still with some anxiety. Back to work on phased return. Work counselling has now finished." Sertraline dosage was increased to 100mg, the claimant continued to be prescribed Sertraline on a repeat prescription, and in oral evidence on crossexamination confirmed neither he or his GP knew how long for and whether it was for the short or long term. Had the respondent asked him the question at this time this would have been the claimant's answer, and it was not an unreasonable response bearing in mind the question was more appropriate for the claimants' GP and/or occupational health, neither of whom were consulted on how long the claimant was likely to be unwell and prescribed antidepressants when they should have been.

120 Following the email sent at 11.32 on the 26 February 2019 when the claimant wrote "Please remember that I'm on a heavy dose of medication for a mental health problem, part of which involves me massively over analysing things and being very paranoid. The

medication helps but insomnia is a side effect. …I'm distracted all day and not able to concentrate on doing any work, and at worst I'm in a spiral and end up really ill again" had Jamie Reed followed up on the information given by the claimant about his medication and mental health, sought medical advice from the GP and/or occupational health, it may have dawned on him that the claimant, having been signed unfit for work over a substantial period, was still unwell and by the end of March 2019 this had been ongoing for approximately 6months with an increase and not a decrease in medication. These factors point to the likelihood that as at the end of March 2019 the claimant's mental impairment would continue long-term into the future and he was disabled with depression. The respondent, who has failed to meet the burden of showing that it was unreasonable for it to be expected to know the claimant suffered an impediment to his mental health, or that that impairment had a substantial and (c) long- term effect - Donelien above. is precluded from denying that it knew the claimant was disabled when the alleged discriminatory acts took place.

Unlawful deduction of wages
Was there an unlawful deduction of wages in respect of the payment of the personal element of the bonus under the PMA on or about 15.6.19?

121 With reference to the issue, namely, was there an unlawful deduction of wages in respect of the payment of the personal element of the bonus under the PMA on or about 15 June 2019 the Tribunal found that there was not for the reasons stated above. The claimant had failed to meet his Comms audit objective. Jamie Reed made the decision to pay the claimant 1.66 percent of gross pay based on the fact the claimant had met his objectives in part only based and had not achieved the comms audit by the end of September 2019. The claimant had achieved 1.66 percent of the 2 percent maximum breaking down the achievements to "EDI comms 0.75%, ST strategy Launch achieved – 0.25% achieved and Comm audit – 1% (1.66% achieved.)" As the claimant had achieved other objectives to the value of 1.66 percent out of the maximum 2% achievable he had not been paid less than that which was properly payable.

122 Ms Johnson submitted that the Claimant need only demonstrate that he has been paid something less than that which is properly payable. The Tribunal concluded on the balance of probabilities the respondent was entitled to reduce the bonus from 3% to 1.66% on the 15 June 2019, the claimant was not paid less than that which was properly payable to him and there was no unlawful deduction of wages

17.2.2022
Employment Judge Shotter

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON
21 February 2022

FOR THE SECRETARY OF THE TRIBUNALS