EMPLOYMENT TRIBUNALS

Claimant: Mr C Burns

Respondent: Mace Limited

Heard at: **London Central (In person on 29 January 021, thereafter remotely by CVP)**

On:29, 30 November 2021, 1,2 and 3 December 2021
20 and 21 January (in chambers)

Before: Employment Judge Heath
Ms O Stennett
Mr D Carter

Representation
Claimant: Mr J Arnold (Counsel)
Respondent: Mr S Nicholls (Counsel)

RESERVED JUDGMENT

1. The claimant's claim of direct disability discrimination set out at paragraph 21(iv) of the List of Issues is dismissed on its withdrawal.

2. The claimant's remaining claims of unfair dismissal, direct disability discrimination, discrimination by failure to make reasonable adjustments and disability related harassment are not well founded and are dismissed.

REASONS

INTRODUCTION

1. The claimant was employed by the respondent, latterly as an Associate Director, from 2008 until he was dismissed on 1 July 2020. The respondent gave the reason for dismissal as redundancy . He claims that this dismissal was unfair and that the respondent discriminated against

him and harassed him in a number of respects because of his depression, which he asserts was a disability for the purposes of the Equality Act 2010 ("EA"). The respondent contends the dismissal was a fair one, does not accept the claimant was at the relevant time a disabled person, and, if he was, denies discriminating against him or harassing him.

THE ISSUES

2. The parties agreed a List of Issues at a Preliminary Hearing for Case Management before Employment Judge Elliott on 10 May 2021. This List of Issues is annexed to this decision, preserving the numbering of Employment Judge Elliott's Case Management Summary. This List of Issues also incorporates some clarification the claimant provided in Further and Better Particulars served on 16 June 2021.

PROCEDURE

3. The Full Merits Hearing of this matter was originally listed to be heard In Person. On the first day of the hearing the claimant, Mr Arnold, Mr Nicholls and the respondent's solicitor Mrs Pugh attended In Person. This was shortly after the first few cases of the Omicron variant of the coronavirus had been identified in the UK. The lay members allocated to the case had not travelled into London, with the overwhelming likelihood that the first day would be a reading day. The Employment Judge, with the agreement of both counsel agreed to deal with some "housekeeping" points sitting alone.

4. When discussing the arrangements for the hearing, it became clear that all respondent's witnesses proposed giving evidence remotely. Mr Arnold indicated that the claimant would wish for cross-examination to take place in person. He subsequently indicated that the claimant consented to a wholly remote hearing. The remaining days of the hearing were conducted remotely by CVP.

5. Counsel optimistically proposed the first morning be allocated as reading time. In the event, the tribunal took the full day to read into the case. Both parties agreed that the respondent should call its evidence first.

6. The following witnesses gave oral evidence for the respondent, having previously provided witness statements: -

    a. Mr Ged Simmonds, Managing Director – Commercial Offices and residential.

    b. Ms Andrea Robinson, former senior Employee Relations Manager.

    c. Ms Chantelle Patterson, HR Business Partner – HR Manager of Construct.

    d. Ms Samantha Hindhaugh, HR Director for Construction & Development.

    e. Mr Chris Harrison, Project Director.

f. Mr Graeme Latty, Preconstruction Director.

7. The claimant gave evidence on his own behalf, having provided a written statement. Mr Julian Bates, former Operations Director for the respondent gave evidence for the claimant on a witness summons. He too provided a witness statement.

8. During the course of Mr Simmonds' evidence various questions were put to him about people the claimant suggested should have been placed in a pool for redundancy with him. These individuals had not been identified in any pleading, witness statement or other document prior to cross-examination of Mr Simmonds, who struggled to recall the detail around these individuals. Mr Nicholls asked for permission to recall Mr Simmonds. On the last day of the hearing, with time running very short, the tribunal gave permission for Mr Simmonds to be recalled to give oral evidence about these individuals. We put a limit of 30 minutes for his evidence, and gave permission to the claimant to give further evidence in response. He had been previously been provided with a supplementary witness statement from Mr Simmonds, which we had not admitted into evidence.

9. We were provided with a 487 page agreed bundle, to which was added one further page, a text message provided by Mr Bates to both of the parties very shortly before the hearing. Mr Nicholls suggested that the claimant's solicitor's failure to disclose this document to the respondent under its continuing duty of disclosure called for explanation. The tribunal heard from Mr Bertin, the claimant's solicitor. He told us that this document had been sent to him by Mr Bates in the midst of a flurry of last minute trial preparation. He said the failure to disclose it to the respondent was an oversight rather than an attempt to suppress information. He apologised for this oversight. The tribunal noted that bundle preparation in this case was complicated by an admissibility issue which had been dealt with, until virtually the point of the hearing commencing, by another Employment Judge. In the circumstances, we had no reason to doubt Mr Bertin's explanation.

THE FACTS

10. The respondent is a global consultancy and construction firm which employs around 1600 people, and which last year had a turnover of £1.88 billion. It has four major divisions, one of which is a residential division which last year turned over £150 million.

11. At any one time, the respondent will have around 50 to 60 construction projects on the go. A major construction project will involve a number of different phases and will require different personnel at different times.

12. A construction project may take a substantial amount of time to complete. There is likely to be a design element, followed by the construction of the "shell and core", followed by "fit-out" of the interior which itself may involve an element of design, construction of fittings off-site, followed by their installation into the building.

13. There is a degree of fluidity about how people are deployed onto projects, how they work on them and what happens when their work on a

given project nears completion. Different phases will require different personnel, though projects may require individuals whose roles might span different phases.

14. The respondent has a resourcing department within each division, which appears to act in some ways like an internal employment agency. When an individual is nearing the completion of his or her work on a given project, a resource manager will take responsibility, together with the individual, to attempt to deploy them to another project. Individuals can also take the initiative to seek to move between projects.

15. The claimant has over 30 years' experience in the construction industry and has a trade background. He also has a degree in Construction Management and is a member of the Chartered Institute of Builders. He initially joined the respondent in 1999 and worked for them for the next seven years. He sought work elsewhere in 2006 but rejoined the respondent in February 2008.

16. In 2008 he was a Package Manager, but over time he was promoted to a Project Manager and then to Associate Director in July 2016. All the evidence the tribunal has seen points to the fact that the claimant was technically very good at his job, and his technical skills and expertise were highly rated. The evidence also shows that the higher an individual progresses up the career ladder the more important other skills become. Skills such as interpersonal ones and the ability to influence and bring a team with you.

17. Through his employment with the respondent the claimant underwent an annual health assessment with the private medical firm BUPA, which provided a Health Assessment Report. The BUPA report dated 13 April 2016, prepared by Dr Bettini, summarised some medical issues which the claimant faced. One of these was "*Stress and Low Mood*". The report made reference to the claimant having to deal with "*a lot of different issues*" at the time which were "*extremely stressful*". The report made reference to discussions about various options such as talking therapies and antidepressant medication. The claimant had said he was not keen on either of these options, but was given a referral letter to see a counsellor. Dr Bettini "*strongly advised*" the claimant to try counselling, and urged him to "*seek medical help immediately if you develop suicidal or self-harm thoughts*". The report made further reference to the claimant going through "*a very difficult time*" and suggested increasing his levels of exercise. The report also mentioned healthy eating as the claimant had mentioned that he was "*snacking in the evening*". The BUPA reports were provided to individual employees and were not shared with the respondent in any way.

18. The claimant did not follow up any suggestion to take antidepressant medication or to pursue counselling. From 2016 onwards he did not speak to his GP about any emotional or mental health problems. He appears only to have taken one day off sick in the last five years of his employment.

19. In around late 2016 to early 2017 the claimant worked on a £500M residential project at Chelsea Barracks. The claimant had a difficult

relationship with one of his colleagues on this project. In early 2017 Mr Harrison began the role of Project Director on the Chelsea Barracks project. He discussed with the claimant his difficult relationship with a colleague and spoke to the Managing Director of the respondent's Residential division to see if a different project could be found for him.

20. On 13 February 2017 the claimant joined another of the respondent's projects at Park Crescent West. He met Mr Latty while working on this project, and the two men became good friends. They had a shared interest in fitness, and they attended the same gym together. Over the course of their friendship, the claimant was able to open up to Mr Latty about some personal difficulties he was having. Mr Latty did not share those details with anyone.

21. The claimant gave evidence of one particular difficulty in his life which he did not share with his employer, and which does not need to be set out here. Also, around this time his mother was ill with cancer and was receiving chemotherapy and other treatments at a clinic in Harley Street. This was, understandably, an extremely difficult time for the claimant. He would often spend his lunch hours visiting the clinic to accompany his mother while she received her treatment.

22. Although the claimant made Mr Latty aware of difficulties in his home and professional life, he did not tell him that he considered he had a depressive illness or other mental health problem. For his part, Mr Latty, did not form the impression that his colleague and friend was experiencing such problems. We accept Mr Latty's evidence to that effect.

23. At some point in March 2017 Claimant approached Mr Latty to ask him if he would consider becoming his line manager. Mr Latty's role would not have naturally lent itself to having line management responsibilities of the claimant, but nonetheless, on 31 March 2017 line management responsibility was transferred to Mr Latty.

24. The respondent's role in the project at Park Present West came to an end in the spring of 2017, and the whole team transferred onto another project known as 1 Grosvenor Square ("1GS") on 24 April 2017.

25. 1GS was a £140M residential development of the former Canadian High Commission site in a prime location in Mayfair in central London. The respondent had been appointed the main contractor for the site by the developer. The project was extremely high profile, involving some of the highest value real estate in London. The developer was a demanding one and, as a matter of contract with the respondent, could dictate which of the respondent's staff worked on site.

26. Like any large-scale construction project, 1GS would have its different phases, and its manpower resourcing would need to be planned. Organograms and staff resourcing program documents were created to show staff structures and timelines of how manpower would be deployed over the lifetime of the project. The overall Project Director for 1GS was Mr Bates, and the claimant was the Fit-out Team Leader, also referred to as Fit-out Lead.

27. At the time the claimant joined the 1GS project it was in its design and Shell and Core phase. The plan was to leave the original building façade intact and, essentially, construct a brand-new building behind it. The Shell and Core phase would involve the "concrete and steel" construction of the building up until the point where it would be ready for the "Fit-out" phase where interior fittings would be installed.

28. Part of the respondent's appraisal process is a moderation process conducted by senior management before appraisal meetings take place between line managers and their direct reports. The results of this moderation process are, largely, not shared with the staff member in question.

29. An appraisal moderation process took place on 27 November 2017 respect of the claimant. Mr Latty attended with other senior leaders including Mr Bates and Ms Patterson, the HR Business Partner for residential. At this point in time 1GS was in its Shell and Core phase. While the claimant had, in the past, broad experience construction, he saw his primary expertise in a fit-out role. The claimant was given an indicative performance rating of 1 by Mr Bates and other senior managers, and an indicative promotion potential also 1. This is the lowest score, and indicates that he was viewed by senior management as underperformer.

30. Mr Latty conducted the claimant's 2017 appraisal on 25 January 2018, though Mr Bates sat in. This is an appraisal process separate from the above appraisal moderation process, and is conducted with the employee. The scoring for appraisals runs from 1 – "*most objectives not met, performance in role requires improvement*" to 4 – "*All objectives met and often exceeded, performance is outstanding with great results were stretching to achieve, employee also demonstrated excellent corporate behaviour*".

31. Mr Latty awarded claimant an overall score of 2 – "*All objectives met, performance is good to meet the expectations of the role*". Mr Latty commented that "*the initial part of 1GS (Shell & Core) was outside the comfort zone Chris and his enthusiasm was lowered in this role and eventually was limited to scoping packages mainly*". However, Mr Latty went on to state that the claimant had "*since built on the initial procurement strategy by developing the document, feeding into the Tender Event Schedule and assessing the Trade Contractures capable of delivering 1GS*".

32. The claimant's low scoring in the moderated appraisal process was i) at a time when he was operating out of his comfort zone, and ii) not shared with him. The appraisal carried out by Mr Latty and shared with the claimant and agreed by him, was more positive, as by that point he was operating more in his comfort zone and performing to a higher standard.

33. Mr Latty had taken time to get to know the claimant, and he viewed him as a friend as well as a colleague. He recognised that the claimant was an ambitious person who sought to progress through the ranks at the respondent company. Mr Latty tried to focus the claimant on fulfilling his ambition. Mr Latty recognised that there were certain things holding the claimant back. The claimant was details-oriented and delegation did not

come easily to him. He could appear negative and pessimistic. Mr Latty considered that the claimant pigeonholed himself as a "fit-out man" who did not put himself forward to work outside of his comfort zone. Less experienced colleagues with different personalities and approaches to work (being open to a broad range of work) appeared to progress through the ranks more swiftly than the claimant, and the claimant appeared to resent this.

34. On 4 January 2018 Ms Patterson, HR Business Partner – HR Manager of Construct, emailed Mr Latty to introduce herself and to suggest a "*catch up… regarding the performance of Chris Burns. He scored a 1 in his appraisal and I was advised on a performance improvement plan. I will give you a call at some point today to discuss what conversations you have so far and next steps*".

35. At this point Mr Latty had not carried out the claimant's appraisal. Ms Patterson would have been referring to the moderated appraisal score of 1. Ms Patterson did have conversations with Mr Bates and Mr Latty about the claimant's performance and the possibility of formally managing performance issues. Mr Bates and Mr Latty preferred, however, not to place the claimant on any formal procedure. Part of the reason for this was that his performance issues were seen "behavioural" rather than his technical ability to do the job. Another part of the reason for not formalising any performance concerns was, as Mr Latty set out in the appraisal documentation, that the claimant began to operate in his comfort zone.

36. On 29 June 2018 the claimant was provided to another report from BUPA after undergoing a health assessment. The report notes claimant's "*feeling of anger within and disinterest with work*". The author of the report noted that the claimant was in very good health and felt well. He commented at one point "*I hope you enjoy your new motorbike*". The report referred to the fact that the claimant had had "*a number of life events over the last couple of years*" and referred to an option for "*something like cognitive behavioural therapy (CBT) to help manage the feelings that you briefly described to me today*". The report noted the claimant's "*fantastic lifestyle changes*" and noted his "*activity level is ideal*" but observed that he was "*going through a very difficult time*". The report made reference to the claimant "*snacking in the evening*".

37. Towards the end of 2018 the claimant's mother's health took a turn for the worse. Her care was transferred to a hospice in Crystal Palace. In December 2018 the claimant was told that his mother did not have long to live. On 3 December 2018 the claimant took bereavement leave to spend time with his mother. She passed away on 17 December 2018.

38. On 4 December 2018 Mr Bates texted the claimant "*Morning Chris had picked up your email and have spoken to Dan [Foreman] and Ollie this morning, so sorry to hear that your mum's health has worsened. Don't worry about things here we have covered all items here take care Julian*". Later that day the claimant responded "*thanks I'm very lucky to work for an understanding company like Mace. It's appreciated I think moving forward its better that Dan runs with the fit-out as a whole. The doctors talk a lot about end-of-life treatment at the moment but my mum is a fighter and isn't going to go quietly or quickly Chris*".

39. Mr Bates emailed Ms Patterson, moments after texting claimant, to let HR know of the claimant's circumstances and that he would in all likelihood not be back before Christmas, and that workloads had been divided up. Ms Patterson responded a couple of days later to suggest to Mr Bates that he should remind the claimant that he could seek confidential support through the respondent's Employee Assistance Programme.

40. Mr Bates, who no longer works for the respondent, and who gave evidence for the claimant on a witness summons, gave evidence, which we accept, that although he obviously knew of the claimant's bereavement, he was not made aware, and did not know that the claimant may have been experiencing depression or any mental health problems. The claimant accepted in cross-examination that he had not told anyone that he was depressed.

41. In early December 2018 Mr Bates, Mr Garrett (the division managing director) and other senior managers carried out a "9 – box grid" evaluation of the claimant as part of the appraisal moderation process. He was given a 9 box rating of 9, the lowest score, indicating an underperformer. He was also given an indicative performance rating of 1, again the lowest score. Neither of these scores were communicated to him at the time.

42. The claimant remained on bereavement leave throughout December 2018, not knowing precisely when he would return. In the event, he came back to work in the first week of January 2019.

43. In the claimant's absence the Fit-out Lead role had been transferred to Mr Jeffreys on an interim basis by Mr Bates. The reason that Mr Bates transferred the role to Mr Jeffreys was because the claimant had suggested in his text of 4 December 2018 that someone else (albeit Mr Foreman) take on overall responsibility for the Fit-out. It was also not known at that time when the claimant would be returning. Although Mr Bates clearly knew that the claimant was spending time with his mother at the end stages of her terminal illness and that he was obviously affected by this, he had no cause to believe that the claimant had a mental health problem. His transfer of the role was not influenced by any thoughts about the claimant's mental state at the time, but purely by practical considerations prompted by the claimant's text.

44. On his return to work claimant was responsible for individual "packages" for the Fit-out. These were kitchens, joinery, timber flooring, carpets, timber canopy, joinery 2, back of house fit-out and wardrobes. He would be responsible for the procurement and delivery of these packages of work.

45. On 21 January 2019 the claimant's 2018 appraisal took place. Line management had been transferred from Mr Latty to Mr Bates in the summer of 2018 but Mr Latty sat in on the appraisal meeting which was conducted by Mr Bates.

46. In the appraisal documentation the claimant comments that "*I have come back to work in January 2019 and I have been removed as lead for the fit-out project with no clear explanation as to why*". Mr Bates awarded

the claimant a scoring of 2. He commented that as one moved up management levels "*it's all about an individual's management style and the softer skills to get the best out of team members and also broadening your level of the project from commercial, MEP and planning these areas I feel Chris still needs to work on if we are to see the best of him on this project*". He suggested that claimant should challenge himself in order to progress his career. The claimant's comments included his feeling that he felt himself "*continually held back*". He felt his assessment was unfair.

47. On 19 March 2019 the claimant filled out a document called a Duty of Care Assessment. One of the questions was "*Do you have any personal well-being or general health considerations (including a disability) or are you an expectant nursing mother?"* which he answered *"No".* He also answered no to the question *"Are you experiencing excessive pressure or stress through work?*"

48. In April 2019 Mr Bates was removed from the 1GS project at the developer's request. Mr Harrison replaced him as a Project Director. Prior to this formal appointment to the role he had been working behind the scenes since February 2019. There was no formal handover from Mr Bates to Mr Harrison, however, Mr Bates mentioned that there were a number of staffing issues in the project and some performance concerns regarding the claimant.

49. On 15 April 2019 Mr Harrison was involved in an Instant Messenger exchange with a colleague Ms Kersse. At one point Mr Harrison wrote "*did you know [x] has said she has anxieties so will be hard to get rid of her!!*" A couple of minutes later he wrote "*chris burns is now asking what people have [~~not~~] told him his performance is poor, getting ready to do something when we get rid of him as well*".

50. We find that Mr Harrison had formed the impression, presumably from previous projects he worked on with the claimant and also through discussion with Mr Bates and possibly other managers, that the claimant was not a team player and was something of a negative drag on the project. The reference to getting rid of the claimant, we find, was not an indication of a plan to dismiss the claimant from the organisation, but perhaps moving him on to a different project.

51. Shortly after Mr Harrison was appointed Project Director on 1GS, he had a conversation with the claimant in which he told him about his low scoring in the moderated appraisal system. The claimant had never before been told moderated assessment scores, and his appraisal scoring had never been low. At some stage, possibly around the same time, Mr Harrison had a conversation with the claimant in which the claimant said he wanted to be Fit-out Lead on the 1GS project. Mr Harrison said the claimant was not the right person for the role because it involved a good deal of interface with the client and other team members which was not one of the claimant strengths. He offered him some other roles, which he refused.

52. During this conversation, or possibly at another one around this time between the claimant and Mr Harrison, there was discussion about Mr

Jeffreys being fit-out lead and Mr Harrison wanting to bring some of his own team onto the 1GS project.

53. On 30 April 2019 the claimant emailed Ms Patterson as he wished to meet her and discuss why he had been "*sidelined and overlooked on this project*". He said that he been told he had scored low on a scoring matrix in November 2018, which had gone against what he had scored in his appraisal. He said that he had asked for a response from Mr Harrison and got none. Ms Patterson replied to the claimant the following day to say that she would call him shortly when she had contacted Mr Harrison to arrange a meeting.

54. We find that Mr Harrison had been brought in as Project Director as something of a "troubleshooter" at the instigation of the client developer, after the developer's concerns about how the project was progressing under Mr Bates's leadership. Mr Harrison was given something of a free hand to bring in personnel onto the project, and he did so. Mr Harrison viewed the claimant as "*technically the best package manager*" that he knew. He also had formed the impression that the claimant had significant shortcomings, such as not being a team player and being difficult to work with. At the time he formed these impression Mr Harrison did not suspect the claimant had any health difficulties, and he made decisions about deployment of staff based on a hardheaded business-oriented view about how to get the job done for the client.

55. For his part, the claimant saw Mr Harrison as sidelining him and favouring others. The relationship between the two men was not good.

56. During the conversations between the claimant and Mr Harrison, but on dates difficult to establish, Mr Harrison offered the claimant opportunities for different or additional roles. He offered the claimant the opportunity of running the spa element of the 1GS project, and also a couple of floors. The claimant refused to take on the work with the spa on the basis that it had previously been offered to someone else. He also declined the opportunity to take on additional roles in respect of additional floors.

57. Although Mr Harrison considered that there were performance concerns with the claimant, he did not seek to formalise this with any performance management process. The reason for this was that the claimant's perceived shortcomings were behavioural rather than technical. Mr Harrison felt the most appropriate way to address these perceived deficiencies was to offer the claimant the opportunity to see an external coach. At some point during 2019, again on dates difficult to establish, the claimant had several sessions with an external coach, which he found very useful. From Mr Harrison's perspective, he saw an improvement in what he perceived to be the claimant's behavioural shortcomings, at least for a short while.

58. One of the packages that the claimant was responsible for was wardrobes. Some of these were manufactured in Italy. In May 2019 a trip to Italy to meet with the manufacturers was proposed, which the claimant assumed would require him. On 9 May 2019 he emailed a colleague to say that he would attend the meeting with the client in Italy and would

provide his passport number. Very shortly after this, Mr Harrison emailed the claimant and Mr Dan Foreman to say "*as Dan is technical lead and managing the remaining design with EPR he should attend these visits. Dan, are you available?*"

59. The developer had previously insisted that Mr Foreman should be the sole point of contact dealing with a design firm called EPR. Mr Harrison felt that it was not his place to override the client's instructions, and accordingly made the decision that Mr Foreman was to go on the Italian trip. The claimant was unaware of any such instruction, and, understandably, felt undermined by having what he felt was his work unaccountably being given to others.

60. In September 2019 Mr Simmonds took over responsibility for 1GS (and several other projects) as Managing Director of Commercial Offices and Residential. Although he had very briefly worked with the claimant on a previous project, he had little knowledge of either him or Mr Harrison.

61. In October 2019 the Shell and Core phase of 1GS had completed. A staff resource program (a document setting out the people assigned to the project and mapping out when they would be working on it) that had been prepared a year previously showed that the claimant's role on the project was envisaged to end in December 2019. The claimant's package management work was beginning to wind down.

62. The next phase of the fit-out work on the project would be the installation of fittings into the building. This element of the project is when there are "*boots on the ground*", to use a term which cropped up frequently at the hearing. The claimant's role with his packages had largely been office based. He had given senior management the impression that he did not relish a "boots on the ground" role and at least one previous manager had observed that he had a "comfort zone" in fit-out.

63. On 15 November 2019 a further BUPA health assessment report was prepared. The author made reference to the fact that the claimant had raised "*stress at work*" and suggested a further assessment by a psychologist. The report mentioned that the claimant had injured his foot "*after some heavy gardening*". In a section headed "*Your specific concerns"* under a further heading *"Stress at work"* the author wrote *"Your screening psychological well-being questionnaires were suggestive of symptoms associated with mild depression and anxiety. The relevant background is that you were bereaved in December 2018 and have had periods of sickness absence following this…You reported being low in mood, tired most of the time with low self-esteem and periods of anxiety and irritability. You did not report suicidal ideas…However, as your symptoms are now having a negative effect on your home life, we discussed the potential benefit of cognitive behavioural therapy. I am pleased that you are willing to try this intervention* ".

64. The reference to "mild depression" in this report is the only reference in the bundle to depression, the condition he relies on as the disabling impairment for his claims under the EA.

65. As the claimant's role managing packages was winding down towards the end of 2019, thought was given to his next role. On 6 January 2020 Ms Corrie, the Resources Manager – Construction, who had a responsibility to assist with the deployment of staff to projects, contacted Mr Harrison to let him know that there was a possible role available for the claimant on a project in Battersea. Mr Harrison made the claimant aware of the role, and Ms Corrie contacted the claimant. However, the Battersea project re-organised, and the claimant was told there was not a role for him. Ms Corrie emailed Mr Harrison on 13 January 2020 that she would "keep trying".

66. On 27 January 2020 Mr Harrison carried out the claimant's 2019 appraisal. In the overall summary, the claimant considered that he had exceeded his role "*successfully delivering and handing over to the delivery team with technical design issues, sampling, benchmarking and coordinated interfaces completed*". Mr Harrison considered that the claimant's performance was "acceptable" basing this "*around attitude and the perception that Chris sometimes portrays which is not conducive to team ethos…He feels he has been overlooked and side tracked on the project and other people have been given opportunities without him being consulted or being made aware.*" He observed that "*grievances must be concluded to the benefit of all parties to allow Chris to move forward and perform with Mace on his next project*".

67. Mr Harrison also made reference to the claimant's attitude and interaction with team members and that he can bear a grudge. He said that "*finding the correct role and project for Chris following [1GS] is important and also understanding what he wants for his future career with Mace*". He also recommended that the claimant undertook further coaching to allow him to understand how his style is viewed by others.

68. While there are negative elements to Mr Harrison's appraisal, and the claimant did not accept those elements, it was clear that Mr Harrison saw a role for the claimant within the organisation and was concerned about finding the right next step to further his career.

69. Both the claimant and Mr Harrison found the appraisal process difficult. On the day of the appraisal Mr Harrison described the interaction as a "nightmare" to a colleague, and the claimant emailed Mr Simmonds the day after it to let him know that it had not gone well.

70. On 4 February 2020 the claimant, after seeing Mr Harrison's comments on his appraisal form, emailed Mr Simmonds setting out some of Mr Harrison's comments, and his own rebuttals. He said that "*my current line manager has never understood or taken on board my lead role as fit-out manager and aspirations to lead the fit-out through 2019".* He said he had had no support from his line manager and had been *"undermined and felt isolated with no help or guidance*" and was "*only recently having discussions about future roles*".

71. On 4 February 2020 a director called Mr Ward emailed Mr Simmonds asking if he had a project manager available to work on a project in Woolwich. Mr Simmonds replied suggesting the claimant. The

requirements of the project changed, and there was no role for the claimant at Woolwich.

72. Mr Simmonds forwarded the claimant's email to Mr Harrison inviting a discussion. Mr Harrison emailed back saying "*the first thing we need to do is move Chris from this project because he does not want to be here and is not good for overall moral[e]*". We find that there was nothing sinister in the reference to moving the claimant on from the project. The natural way of things within the respondent company was for employees to move on from projects when their work was completing. The claimant had, on 4 February 2020 actually been critical that discussion of future roles had only just started.

73. Having discussed the matter with Mr Harrison, Mr Simmonds emailed the claimant on 6 February 2020 and said that he agreed with Mr Harrison's score, giving some explanation of the appraisal scoring system. He pointed out Mr Harrison's positive assessment of the claimant's technical competence but observed that the claimant himself had acknowledged issues with his own management style. He went on "*I have been looking at potential projects for you and this comes back as a recurring comment from other managers who have worked with you previously. Actively supporting and engaging in a team ethos is an important part of a Project Manager's role and one which you have received feedback on over a period of time and acknowledge that you need to improve on*".

74. On 12 February 2020 Ms Corrie emailed the claimant suggesting that he contact a Mr Lever about a potential role at a project in Sumner Street. The claimant agreed to call Mr Lever and thanked Ms Corrie "*for the possible role opportunity*".

75. On 18 February 2020 Mr Ian Penlington contacted Ms Corrie to inquire whether she knew of a construction manager who could manage a 2 storey super-prime duplex apartment at 1GS. Mr Penlington was an independent contractor (sometimes called "contingent workers" by the respondent). He had worked with Mr Harrison on a previous project at Battersea where he had managed a townhouse. The developer of 1GS had been impressed with Mr Penlington's work and had requested that he be brought over to work on an element of the 1GS project called Townhouse 1. This was a dwelling for a high net worth individual with an earlier proposed completion date than the rest of the project. Mr Penlington was also the brother of one of the respondent's directors. On balance, we accept the evidence of Mr Simmonds that Mr Penlington was not the recipient of nepotism in his appointment to oversee Townhouse 1 or in any other respect relevant to the claimant's case. On the one hand, the claimant asserts nothing more than the fact of Mr Penlington's relationship with one of the directors. On the other, Mr Simmonds gave clear evidence, that was not undermined, that Ian Penlington's brother never mentioned the relationship, and the perception of nepotism is something that he would be aware of and would be astute to avoid.

76. Ms Corrie emailed Mr Penlington on 18 February 2020 saying "*I presume Chris Burns is too senior?*" Mr Penlington responded that the claimant would "*not fit this role I am afraid*". We accept the oral evidence

given by Mr Harrison (which corresponds with Ms Corrie's presumption) that the role in question here was a junior construction management role at assistant manager grade that would not have been suitable for the claimant. Additionally, we accept that the claimant did not enjoy a good working relationship with Mr Penlington and may have "clashed" with him.

77. On 19 February 2020 Mr Harrison emailed Ms Corrie to ask if there were any roles available for the claimant as it would be good to get him sorted in a new role as soon as possible.

78. On 19 February 2020 Mr Lever, the recruiting director for the Sumner Street role emailed Ms Corrie saying "*Chris divulged he would not be appropriate for the role yesterday as he is predominantly a fit-out manager*".

79. On 26 February 2020 Ms Corrie emailed Mr Harbord, the Director of Bidding and Estimating, to set out the claimant's circumstances. She set out his career with the respondent and said that he worked at 1GS. She mentioned that relations between him and Mr Harrison had "broken down". She mentioned that Residential said they did not have a role for him. She set out over a dozen roles that she had put the claimant forward for over the last few months with no success. She said she had no other options for the claimant who was not interested in working internationally and had told Mr Lever that the Sumner Street role was not for him. She asked what the next step should be.

80. On 1 March 2020 Mr Harbord forwarded Ms Corrie's email to Mr Lewis (CEO for Construction), Mr Lever and Ms Hindhaugh (HR Director for Construction and Development). He commented that he understood that the claimant had been "*unhelpful in terms of finding him his next role*".

81. Mr Lewis responded later that day "*I suggest we start a consultation with Chris, this situation is untenable*". We find that what Mr Lewis meant by this was that it was untenable that a member of staff could finish their role and not find another role despite significant efforts from Resourcing. He was suggesting that this might call for a redundancy consultation.

82. Mr Lever responded to the email chain later that day to say that the claimant had suggested that he was "*not suited to lead a construction site as he only did fit-out*".

83. By this point the claimant's work on 1GS had entirely finished and he was at home doing no work. On 18 March 2020 Ms Corrie wondered whether he could cover the paternity leave of a worker in Stevenage. Mr Simmonds was copied into this email chain and speculated that a role should become available to the claimant if the respondent was getting rid of all agency staff.

84. Mr Simmonds' comments came as the coronavirus pandemic was taking grip, and the following week the UK was put into lockdown.

85. On 1 April 2020 the claimant was furloughed.

86. The coronavirus pandemic had a huge impact on the respondent's business and the construction sector in general. Many of the respondent's

sites shut down, there was huge uncertainty as future pipelines of work dwindled. The respondent's turnover dropped by 25%. Like many other businesses, the respondent went into what Mr Simmonds described as "business survival mode". Senior management met daily to consider how best to safeguard the business. Independent contractors were largely dispensed with, and the Coronavirus Job Retention Scheme was used to retain staff. The respondent decided to top up salaries to 100%.

87. On 17 April 2020 a Ms Butler emailed Ms Patterson to provide a "*list of underperformers for Residential and Commercial Offices as requested by [Mr Simmonds]*". The claimant appeared on that list with 12 others.

88. In his witness statement Mr Simmonds stated that "*Each of the business units was asked to identify potential roles for redundancy. I began this process by looking at underperformers within Residential because this would be one of the criterion applied in a pooling situation*".

89. Under cross-examination on this point Mr Simmonds said that identifying underperformers was one part of the process the respondent was undertaking at the time. The respondent's senior management was meeting regularly in the early stages of the lockdown while the company was in business survival mode. It was assessing and regularly reviewing how deep cuts needed to be and was examining numerous options such as removing contingent workers. Looking at underperformers was just one part of this overall assessment. We find that looking at underperformers was just one of the many factors the respondent's senior management in general, and Mr Simmonds in particular with respect to Construction, were looking at in a complex and novel situation. We return to this matter in our conclusions below.

90. On 24 April 2020 the claimant's furlough period was extended.

91. On 21 May 2020 Mr Simmonds wrote to the claimant notifying him, following a discussion that day, that his role was at risk of redundancy. The reason given for this state of affairs was "*that your role has been identified as coming to an end on the project and we have been unable to locate an alternative role for you*". Mr Simmonds informed the claimant that their meeting that day was the first meeting of a formal redundancy consultation process which would end on 20 June 2020. He further invited the claimant to a formal meeting to discuss consultation on his position on 28 May 2020 via Teams. He was given the right to be accompanied by a colleague or trade union representative.

92. On 28 May 2020 the first consultation meeting took place on Teams attended by the claimant, Mr Simmonds and Ms Hindhaugh. The following issues, among others, were covered:

    a. the claimant was told that his role had come to an end and the respondent had been unable to locate an alternative.

    b. The pandemic had resulted in fewer projects, less work and reduced turnover. A range of efforts had been made to address this, such as termination of contingent workers, except for those with specialist skills, overhead reductions and changes in ways of working.

c. The claimant would be given the opportunity throughout the consultation period to put forward any proposals to avoid redundancy, and any comments he put forward would be considered.

d. The respondent would search for alternative roles for the claimant, and he was asked to confirm his skills matrix was up-to-date, which he did. All current opportunities would be put on the respondent's internal information system (Infomace), and the claimant was asked to look at internal vacancies. He confirmed he had seen a role of Fit-out Package Manager role that he was interested in, and Ms Hindhaugh confirmed she would talk to the recruitment team about the role. The claimant also mentioned he had talked to Mr Latty about a datacentre project in Belgium, and that he would be interested in working in Europe but not further afield. Mr Simmonds confirmed the claimant could be put forward for any opportunity he was interested in. He was given the contact details of Ms Dodd in the recruitment team

e. The consultation period was anticipated to end on 20 June 2020, but would be extended, or reduced, if alternatives to redundancy were found or likely.

f. The claimant indicated that he thought the chance of getting another role quickly was remote, and he was disappointed to find himself in this position.

g. The claimant mentioned that he thought his role had been taken from him 12 months previously and given to others, and that is why he found himself in this position.

93. On 29 May 2020 the claimant emailed Ms Dodd applying for the Fit-out Package Manager role that had been discussed at the first consultation meeting.

94. At some point in early June (the date is not clear, but sometime before 8 June 2020) the claimant applied for a Procurement/Supply Chain Manager position on a the HS2 project.

95. On 11 June 2020 the second consultation meeting took place on Teams, again with the claimant, Mr Simmonds and Ms Hindhaugh present. Discussions included the following:-

a. The claimant confirmed he had applied for a couple roles but felt he was unlikely to be offered them. In the case of a joint-venture role he had applied for, the project was reducing staff and the role was unlikely to continue.

b. The claimant was reminded to keep on looking on the internal vacancy list as roles were added to it. The claimant again said that he would not be in this position had not been for what had happened 12 months previously.

c. The reasons for redundancy were reiterated.

d. The claimant mentioned external consultants still being engaged, and said that there was no reason why he could not do that one role carried out by a consultant.

e. The claimant said he appreciated what Mr Simmonds had tried to do, but said that "*his health and well-being has been impacted significantly*".

f. The claimant wanted to know why he was given the lead fit-out role on the 1GS project. Mr Simmonds said that change had been requested by the client, a new leader had been brought in and the team had been restructured the respondent had been looking for alternative roles for the claimant since then.

g. The claimant said he would not work with Mr Harrison again.

h. The claimant said he would be taking legal advice.

i. The claimant mentioned several roles he felt he should have been able to move to. The minutes read as follows "*These were at a lower level than his current grade and GS ran through how we wouldn't normally consider junior roles outside of an at risk consultation. CB did not accept that the roles were [m]ore junior*".

96. On 16 June 2020 Mr Simmonds emailed the claimant about possible opportunities on data-centre projects, but said that the roles required knowledge of the products being built. The claimant responded that he did not have data-centre experience but had worked in most sectors across Mace and felt data-centres did not offer anything he could not overcome in terms of his experience. On 18 June 2020 Mr Simmonds said he would speak with a colleague, but flagged up another consideration which was that people were being asked to move to the continent for longer periods of time due to travel restrictions. The claimant responded the same day to say he was not keen on moving to the continent for longer periods, but this depended on how long the periods were, when travel restrictions might be relaxed and what country he would be likely to be based in.

97. On 25 June 2020 Ms Patterson emailed Ms Hindhaugh expressing concern that the company would potentially be giving notice redundancy to the claimant when a contingent worker, Ian Penlington, was still working on the project. She wrote "*I discussed with Chris Harrison and the role is likely to be required until the end of the year. I didn't really get a proper explanation as to why the employee at risk could not do this role. He is looking after townhouse two and three and he is working with the client to get early sales completions done and handed over with the client. He had been working closely with the client since the start of the project may have a good relationship. This is clearly [a] risk as I'm not convinced the employee at risk couldn't do that role. Could you please flag it with Gareth and let me know what he wants to do. The third consultation is on Tuesday. Let me know if there is anything I need to do on this. I would speak to [Mr Simmonds] but given the situation, I'm not sure it's in his control either*".

98. On 30 June 2020, the final consultation meeting took place with the same personnel as were involved in the previous two. Mr Simmonds

outlined the process, confirmed what consultation had been done and outlined that alternative roles had been considered and that the claimant had been unsuccessful in finding an alternative role. Mr Simmonds outlined that the respondent had been unable to identify an alternative to redundancy, and that the claimant was being issued notice to terminate his employment the reason of redundancy. The notice would be given that day and took effect from 1 July 2020. The meeting covered the redundancy package and payment in lieu of notice. The claimant was notified of a right of appeal. The claimant expressed concern that there were contingent workers still in place and he believed he could carry out their role. Mr Simmonds confirmed that all contingent workers had been reviewed, and all had been exited apart from a small number with specialist skills or knowledge of the project or that their assignment was coming to an end shortly. The claimant did not accept that this was the case. He again said that he would not have been in this position but for the action of the project director some 12 months previously. Mr Simmonds disputed this, saying that the situation arose because of business recovery following the pandemic.

99. At some point in June 2020 the fit-out phase of 1GS was completed.

100. Mr Simmonds gave evidence, which we accept, about what happened to certain other individuals who worked on the 1GS contract.

a. Mr Finnegan was a chartered engineer at associate director level (one grade below the claimant) who worked on shell and core. He left 1GS in November 2019 to work on the structural aspects of a project at 78 St James's which the claimant was not equipped to do.

b. Mr Duignan was a construction manager dealing with packages operating two grades below the claimant. He also went to 78 St James's in June 2020 working under the supervision of someone else, and earning around half the claimant salary.

c. Mr Bull was a chartered engineer construction manager responsible for floors and dry lining at 1GS. He was two grades below the claimant. He left the project in November 2022 work on another one at 81 Newgate. His package work ended in spring 2020, but he was put on a fee-based arrangement at the request of the client to close out the project and deal with snags and aftercare. The client would not have considered paying for someone at the claimant's seniority to have undertaken this role.

d. Mr Foreman had a degree in design and construction. He was the technical director at 1GS, primarily focusing on design, and was described by Mr Simmonds as "the glue across the management function". He was one grade more senior than the claimant and left 1GS in summer 2020.

e. Mr Jeffreys was the construction lead at associate director level. He led the fit-out in a construction manager role being responsible for multiple elements of the fit-out. He left the project in October to

November 2020 latterly being responsible for considerable technical issues relating to a car stacker within the project.

f. Mr Penlington left 1GS on 19 April 2022 work in a construction management role at the Battersea Power Station project, which he is still working on.

101. On 1 July 2020 the claimant was given written notice of termination of his employment. The latter set out how this would take effect, and set out some obligations and entitlements. He was reminded of his right of appeal.

102. On 2 July 2020, the claimant appealed against his dismissal. His grounds were "*Issues with the decision process. Incorrect reasons and unfair selection grounds*".

103. Hearing of the appeal was delayed for a period of time as the claimant wished to take legal advice. On 18 August 2000 the claimant had a meeting over the telephone with Ms Robinson, Senior Employee Relations Manager, who was allocated by the respondent to hear the appeal. Ms Robinson has substantial experience and expertise in employment law and human resources. The meeting took an hour and a half, and covered a number of matters, including the following :-

a. The claimant, when asked why he was selected for redundancy, said that he had handed over his role to an external consultant Mr Penlington, and that he had handed over his role to other people. He said that this was a "*conspiracy theory that dates back to 2019".*

b. The claimant discussed his bereavement and how he did not feature in the project on his return. He asserted that Mr Harrison had been looking to "*cull people of the project*", and that Mr Harrison had told him he had no future with the respondent or on the project.

c. He spoke at length about his concerns about Mr Harrison's running of the project and in discussing this he mentioned that he "*was suicidal*" and said "*mentally it broke me*".

d. The claimant mentioned that he applied for a number of roles, and that colleagues have been furloughed at a similar time but had found roles. He said that he was given the opportunity for other interviews but the roles were not for him as they were "*outside of my skill set".* He mentioned that he had spoken to someone in recruitment about data-centres in Holland, but data-centre experience was being sought.

104. Ms Robinson met with Ms Patterson on 24 August 2020. She was questioned about Mr Penlington's role. Ms Patterson told Ms Robinson that she had raised concerns about Mr Penlington being retained while the claimant's role had come to an end. She said that the claimant had not told her that he was handing over work to a contingent worker. The meeting covered performance issues, and Ms Patterson said that any performance issues that have been discussed were unrelated to the claimant's selection for redundancy. The reason for redundancy was that the claimant's role had come to an end on the project at 1GS.

105. Ms Robinson met with Mr Latty on 24 August 2020. Mr Latty talked about line managing the claimant and transferring this responsibility over to Mr Bates. Mr Latty said that the claimant "*wasn't operating at the level he was expected to operate*", and cited communication issues and the fact that "*he wasn't portraying the behaviours he should have*". He said that the claimant was "*carrying baggage from other projects*". Mr Latty went on to say "*Because I knew him personally, I knew some of the issues he was dealing with outside of work, e.g. his mum and the condition she was in would have an impact on any person. I believe this is a key thing, [the claimant] was dealing with a lot of personal issues. That's how I knew him personally*". Mr Latty said that when he found out the claimant was on furlough he spoke to Mr Jackson to see if there were any other opportunities, but that the claimant used to say that he was a joinery specialist and that "*Datacentre work didn't fit well, and all he wanted to do was the fit-out part of [1GS]*".

106. On 25 August 2020 Ms Robinson met Mr Harrison. Mr Harrison set out the history of how he had taken over the 1GS project. He raised performance issues which were behavioural rather than technical. He mentioned that he had set up coaching for the claimant, which worked for a while before the claimant reverted to previous behaviours. Mr Harrison mentioned that he told the claimant he was not a team player and his attitude had to change. He mentioned that he had tried to place the claimant in a number of jobs between Christmas and March, but no one took him on as they did not think he was suitable. Mr Harrison said that the claimant did not do construction work and because of where the project was the claimant's position was up for reallocation a long time before Covid 19. He explained that it was not just the claimant's role that had been lost. Mr Harrison explained that Mr Penlington had not taken the claimant's role, as he was the senior construction manager dealing with on-site process. He said that the client had requested Mr Penlington, and that he was critical to the completion of the job. Mr Penlington was not doing any of the claimant's activity, and was not looking after packages at the claimant have looked after. He said that Mr Foreman was there because he was doing completion design and hand over. Mr Foreman technical service director, higher than the claimant.

107. Ms Robinson met with Mr Simmonds on 26 August 2020. The meeting only lasted half an hour. Mr Simmonds described the claimant as "*erratic his behaviour is difficult to manage*". He described how the client at 1GS had requested changes in personnel, and how Mr Harrison had been brought in to get things back on track. Mr Harrison had restructured the team, and the claimant was doing a project management role. Mr Penlington was a construction manager "*boots on, out on site not in the office. [The claimant] was more in the office, design meetings etc. very different roles*". Mr Simmonds described how the claimant was on the available list and how he was offered a number of jobs but was not successful. He said that people did not believe that the claimant was suitable for any of the roles available. He believed that the claimant did turn down a role.

108. Ms Robinson prepared a draft report, which she provided to the claimant. She met the claimant for a second time on 28 August 2020. The purpose of this meeting was to see if there was anything else Ms

Robinson needed to do before concluding her investigation. She found the meeting very difficult, with the claimant going back over historic issues, which was Robinson felt were not relevant to his redundancy.

109. On 7 September 2020 the claimant began ACAS Early Conciliation.

110. On 21 September 2020 Ms Robinson finalised her investigation report which she sent to the claimant the following day. Ms Robinson set out a background, and findings, which included: -

a. The claimant was among 12 employees on the 1GS project who were placed on the furlough scheme. All were placed at risk of redundancy.

b. Mr Penlington was not given the claimant's role, but a dedicated role at the request of the client. Mr Simmonds said that he was a "boots on" construction manager, rather than an office worker like the claimant. The claimant disagreed with this.

c. The business understood that the claimant could do "boots on the ground" construction management, but preferred not to. The claimant however denied this.

d. The decision to place the claimant at risk of redundancy was based on his role coming to an end on the 1GS project. Prior to the redundancy process the claimant was unallocated and "on the bench". Efforts were made to find the claimant an alternative role, which were unsuccessful.

e. The considerable focus of the appeal investigation had been the claimant's performance, which in the view of Ms Robinson had no relevance to redundancy.

111. Ms Robinson's conclusion was that there was no evidence to support the allegation that a fair process was not followed. The process followed was standard process followed by the business. There was insufficient evidence to suggest that the claimant was unfairly selected for redundancy.

112. On 21 October 2020 the ACAS Early Conciliation certificate was issued. And on 12 November 2020 the claimant presented his claim to the tribunal.

113. On 30 June 2021 the claimant commenced new employment.

THE LAW

114. We were referred to numerous authorities and statutory provisions and guidance by both counsel in their helpful submissions. We have not referred to all materials that they put in front of us in the summary of the law below, but we have considered everything drawn to our attention.

Disability discrimination

Employment provisions

115. Section 39(2) EA provides as follows: -

> *An employer (A) must not discriminate against an employee of A's (B)—*
>
> *(c) by dismissing B;*
>
> *(d) by subjecting B to any other detriment.*

Disability

116. Section 6 EA provides: -

> *(1) A person (P) has a disability if— (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities*

117. Schedule 1 Part 1 Paragraph 2 of the EA provides: -

> *1) The effect of an impairment is long-term if—*
>
> *(a) it has lasted for at least 12 months,*
>
> *(b) it is likely to last for at least 12 months, or*
>
> *(c) it is likely to last for the rest of the life of the person affected.*
>
> *(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.*

118. Part 2 of the same schedule obliges tribunals to take account of such guidance as it thinks is relevant. The "*Equality Act 2010 Guidance: Guidance on matters to bet taken into account in determining questions relating to the definition of disability*" (May 2011) (the "Guidance") was issued by the Secretary of State pursuant to s. 6(5) of the EA 2010.

119. Unlike Disability Discrimination Act 1995, the EA does not set out what day-to-day activities might be. Section D of the Guidance is some assistance and gives some examples. The Appendix of the Guidance also gives an illustrative and non-exhaustive list of factors which would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities, and a list of factors it would not be reasonable to regard as having a substantial adverse effect on normal day-to-day activities.

120. The relevant point in time in assessing whether the claimant is disabled under section 6 EA is the time of the alleged discriminatory acts (*Cruikshank v Vaw Motorcast Ltd [2002] ICR 729*).

121. In *J v DLA Piper UK LLP UKEAT/0263/09/RN* the EAT observed at paragraph 42: -

> *The first point concerns the legitimacy in principle of the kind of distinction made by the Tribunal, as summarised at para. 33 (3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness – or, if you prefer, a mental condition – which is conveniently referred to as "clinical depression" and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or – if the jargon may be forgiven – "adverse life events".[We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians – it is implicit or explicit in the evidence of each of Dr Brener, Dr MacLeod and Dr Gill in this case – and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most laypeople, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para. 40 (2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for twelve months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common-sense observation that such reactions are not normally long-lived*

Direct discrimination

122. In respect of direct discrimination, Section 13(1) of the Equality Act provides as follows:

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

123. Section 23(1) of the Equality Act deals with comparisons, and provides:-

> *On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.*

124. The EAT in *Chief Constable of West Yorkshire v Vento [2001] IRLR 124* made clear that using examples of individuals who were not true comparators was a proper way of constructing a hypothetical comparator.

125. The burden of proof provisions (which apply equally to harassment) are set out in section 136 Equality Act 2010:-

> *(1) This section applies to any proceedings relating to a 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 provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

126. When considering direct discrimination, the tribunal must examine the "reason why" the alleged discriminator acted as they did. This will involve a consideration of the mental processes, whether conscious or unconscious, of the individual concerned (*Amnesty International v Ahmed [2009] IRLR 884*). The protected characteristic need not be the only reason why the individual acted as they did, the question is whether it was an "effective cause" (*O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School and anor [1996] IRLR 372*).

127. Guidance on the application of the burden of proof provisions of the Sex Discrimination Act 1975 (which is applicable to the Equality Act 2010) were given by the Court of Appeal in *Igen v Wong [2005] IRLR 258*:

> *"(1) Pursuant to s 63A of the SDA 1975, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s 41 or s 42 of the SDA 1975 is to be treated as having been committed against the claimant. These are referred to below as "such facts".*
>
> *(2) If the claimant does not prove such facts he or she will fail.*
>
> *(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".*
>
> *(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.*

(5) It is important to note the word "could" in SDA 1975 s 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s 74(2)(b) of the SDA 1975 from an evasive or equivocal reply to a questionnaire or any other questions that fall within s 74(2) of the SDA 1975.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s 56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

128. Tribunals are cautioned against taking too mechanistic an approach to the burden of proof provisions, and that the tribunal's focus should be on whether it can properly and fairly infer discrimination (*Laing v Manchester City Council [2006] ICR 1519*). The Supreme Court has observed that

provisions "*will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence, one way or the other*" (Hewage v Grampion Health Board *[2012] UKSC 37*).

129. The Court of Appeal has emphasised that "*The bare facts of a difference in treatment, without more, sufficient material from which the tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination"* (Madarassy v Nomura International plc *[2007] IRLR 246*). "Something more" is needed for the burden to shift. Unreasonable behaviour without more is insufficient, though if it is unexplained then that might suffice (Bahl v Law Society *[2003] IRLR 640*).

Harassment

130. Section 26(1) Equality Act 2010 provides: -

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

131. Section 26(4) Equality Act 2010 sets out factors which tribunals must take into account: -

> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
>
> *(a)the perception of B;*
>
> *(b)the other circumstances of the case;*
>
> *(c)whether it is reasonable for the conduct to have that effect.*

132. Section 212(1) Equality Act 2010 provides that conduct amounting to harassment cannot also be direct discrimination.

133. The Court of Appeal in Richmond Pharmacology v Dhaliwal *[2009] IRLR 336* stated:-

> *"an employer should not be held liable merely because his conduct has had the effect of producing a proscribed consequence. It should be reasonable that that consequence has occurred. The claimant must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created, but the tribunal is required to consider whether, if the claimant has*

experienced those feelings or perceptions, it was reasonable for her to do so….We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

134. The Court of Appeal again emphasised that tribunals must not cheapen the significance of the words of section 26 Equality Act 2010 as "*they are an important control to prevent trivial acts causing minor upsets being caught up by the concept of harassment*" (*Land Registry v Grant [2011] ICR 1390*).

135. A single incident may be sufficient to create an "environment" for the purposes of section 26, provided the effects are of a sufficient duration (*Weeks v Newham College of Further Education UKEAT 0630/11*).

Reasonable adjustments

136. Section 20 sets out the duty to make reasonable adjustments, which comprises three requirements, the first of which is: -

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

137. "Substantial" is defined in section 212(1) as meaning "more than minor or trivial".

138. Section 21 EA provides that a failure to comply with any of the requirements in section 20 is a failure to comply with the duty to make reasonable adjustments. A person or body subject to the EA discriminates against a disabled person if they or it fails to comply with that duty in relation to that person.

139. EA Schedule 8, Part 3 paragraph 20(1)(b) provides: -

> *A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—*
>
> *(a)…*
>
> *(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.*

140. What is required for knowledge is the for the employer to know of the facts of the disability (the impairment, the long-term substantial adverse effect on the ability to carry out day to day activities). There is no need for the employer to know of a cause or diagnosis (*Gallop v Newport City Council [2014] IRLR 211, Urso v Department for Work and Pensions [2017] IRLR 304, Jennings v Barts and the London NHS Trust [2011] All ER (D).*)

Limitation

141. Section 123 Equality Act 2010 governs time limits and provides: -

> *(1)… proceedings on a complaint within section 120 may not be brought after the end of—*
>
> > *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
> >
> > *(b) such other period as the employment tribunal thinks just and equitable.*
>
> *…*
>
> *(3) For the purposes of this section—*
>
> > *(a) conduct extending over a period is to be treated as done at the end of the period;*
> >
> > *(b) failure to do something is to be treated as occurring when the person in question decided on it.*
>
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
>
> > *(a) when P does an act inconsistent with doing it, or*
> >
> > *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

Unfair dismissal

142. Section 139 Employment Rights Act 1996 ("ERA") provides:

> *For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—*
>
> > *(a)…*
> >
> > *(b) the fact that the requirements of that business—*
> >
> > > *(i) for employees to carry out work of a particular kind, or*
> > >
> > > *(ii) for employees to carry out work of a particular kind in the place where the employee*

was employed by the employer,have ceased or diminished or are expected to cease or diminish.

143. Under section 98(1) Employment Rights Act 1996 ("ERA") it is for the employer to show the reason for dismissal and that such reason was potentially fair one under section 98(2). Redundancy is one such potentially fair reason.

144. Section 98(4) ERA provides that:-

> *"the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
>
> > *(a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
> >
> > *(b)shall be determined in accordance with equity and the substantial merits of the case".*

145. Tribunals are entitled to satisfy themselves that the redundancy situation is genuine, but it is not their function to go behind or examine the commercial merits of the decision to reorganise a business.

146. General principles relating to fairness in redundancy process emerge from *Polkey v A E Dayton Services Ltd [1988] ICR 142* where it was held that an employer will not be acting reasonably unless it:

a. Warns and consults affected employees or their representatives;

b. Adopts a fair basis on which to make selections for redundancy; and;

c. Takes reasonable steps to avoid redundances.

147. In *Williams v Compair Maxam Ltd [1982] ICR 156* guidance was given on the factors which the tribunal should consider when assessing fairness within a redundancy process: -

a. The employer should seek to give as much warning as possible of impending redundancies to employees;

b. It should consult them or their unions about the best means of achieving redundancies, including the applicable criteria in selecting for redundancies;

c. That criteria for selection should, so far as possible, not depend solely on the subjective opinions of decision-makers;

d. Selection is made fairly according to the criteria; and

e. The employer will take reasonable steps to offer alternative employment instead of dismissing.

148. In looking at all these elements it is not for us to substitute our own view, but to assess whether the employer's actions fell within a range of reasonable responses open to a reasonable employer.

The pool

149. In terms of establishing a pool, the employer is to be given considerable latitude. Identifying the pool is primarily a matter of the employer and the pool does not have to be confined to employees doing the same or similar work. It is difficult to challenge the establishment of the pool if the employer had genuinely applied its mind to the consideration (*Taymech v Ryan UKEAT/663/94, Capita Hartshead Ltd Byard [2012] IRLR 814).*

150. A pool of one is permissible, and it may be the case that an employer might fairly focus on one individual employee without considering the development of the pool *Wrexham Golf Co Ltd v Ingham UKEAT/0190/12*.

151. Under the principal in *Polkey v AE Dayton Services Ltd [1987] IRLR 503* where there is a failure to adopt a fair procedure at the time of dismissal, dismissal would not be rendered fair just because the procedural unfairness did not affect the end result. Compensation can be reduced to reflect the chance of dismissal taking place had a fair procedure been adopted.

CONCLUSIONS

152. We will take the issues out of the order in which they appear in the list of issues, and will deal with disability discrimination first. We have also taken the issues in chronological order rather than the order they appear in the list of issues.

Was the claimant a disabled person?

153. The period the tribunal determines this question is the period in which discrimination is alleged, namely between 1 January 2019 and the date of dismissal 1 July 2020. However, examining evidence from outside this period can help with that determination.

154. The claimant's Disability Impact Statement ("DIS") is notably short. He refers to the fact that he had suffered depression and workplace stress over a number of years, and that this was identified in his BUPA annual health assessments. He sets out briefly how his day-to-day activities were impacted. He says he became "*entirely reclusive and closed down*" and avoided socialising with friends or at work. He said he lost interest in gardening, and in classic car and motorbike restoration. The said he went off his food and lost interest in eating. He said he exercised obsessively in the gym as an anger displacement strategy. He says his sex life was affected.

155. The claimant's witness statement refers very briefly to his bereavement and consequent absence. He also says that he referred to the strain of

bereavement in an appraisal meeting on 21 January 2021, which he says was mentioned in Mr Latty's meeting with Ms Robinson when she investigated the claimant's appeal against dismissal. He finally refers to Mr Harrison being aware of his mental health stresses in his January 2020 appraisal. There is nothing further. The claimant has not set out in his witness statement how his mental impairment had a substantial and long-term adverse impact on his ability to carry out normal day-to-day activities. In fact, the bulk of the evidence about the impact on day-to-day activities emerged from cross examination.

156. Although the first issue in the statutory definition of disability is whether the claimant has an impairment, we bear in mind the observations of the EAT in *J v DLA Piper* that the tribunal need not address the four elements of the definition of disability in rigid consecutive stages, and that addressing the question of the impairment by considering the whether the claimant's ability to carry out day-to-day activities has been adversely affected on a long-term basis is often a helpful approach. We take care to look at the overall picture, and not to disaggregate the four elements of the statutory definition of disability.

157. The claimant had said in his DIS that he became reclusive and closed down. In cross examination he said that he did not go to any social events and would clam up and not interact with people, but that this was sporadic. It was difficult to tell from the evidence whether this was the state of affairs that arose at any one point in time, or whether it was more of an enduring character trait. On balance, we find that the evidence did not support the activity of socialising being substantially adversely affected.

158. He also asserted in his DIS that he had "lost any interest in gardening". Under cross examination he, at first, agreed that he had stopped gardening. He then suggested that it was a gradual loss of interest, before saying he did necessary gardening but was not doing it as a hobby. He explained that he maintained his garden, for example, by cutting grass and doing "light gardening". He was taken to his 2019 BUPA report in which he claimed that he had hurt his foot doing some "*heavy gardening*". The evidence is unsatisfactory, a little contradictory, and insufficient for us to find that the claimant's ability to carry out this particular activity was substantially adversely affected.

159. The claimant was asked about car and motorbike restoration. There was some evidence from Mr Latty that car parts were sent to work, but the time period was not clear. The claimant said that he sold off his cars and motorbikes but could not be certain when this was, beyond saying that it was sometime between 2016 and 2019. We note also the reference in the 29 June 2018 BUPA assessment to the claimant enjoying his new motorbike. Again, the evidence is slightly contradictory, and certainly not persuasive enough for us to find that this particular activity was substantially adversely affected.

160. The DIS sets out that the claimant lost interest in eating. In cross examination the claimant was taken to a BUPA assessment in which it was set out that he was "*snacking in the evening*". The evidence also strongly suggested that he was later pursuing the fitness regime which included healthy eating, which helped him lose four stone in weight. Again,

the evidence was slightly contradictory, and we were not persuaded that this particular activity was substantially adversely affected.

161. The DIS set out that the claimant "*used the gym and exercised obsessively mainly as a way to displace my anger*". It is difficult to see what day-to-day activity is being affected here. In any event, the BUPA assessments appear to suggest that the claimant's eating and use of the gym were "*fantastic lifestyle changes*". Again, we are unable to find that the claimant's ability to carry out any particular activity was substantially adversely affected here.

162. For understandable reasons there was virtually no evidence that the claimant's sex life was affected. The claimant's assertion was not challenged and we can accept it. The fact that there was practically no evidence about this issue makes it virtually impossible for the tribunal to link it with any potential impairment that we might find.

163. Standing back from the individual activities, it is fair to say that, despite opening up to some degree about his difficulties with the BUPA doctors, there is no evidence within the BUPA assessments that the claimant made reference to any of these activities being impacted. He also opened up to Mr Latty, who became his friend, about his difficulties. Mr Latty's evidence, which we accept, was that the claimant never told him about, and he himself did not observe, any adverse effect on the claimant's ability to carry out these or any other day-to-day activities.

164. On balance we find that there is no reliable evidence of any substantial and long-term adverse effect on the claimant's ability to carry out normal day-to-day activities during the period in which he claims to have been discriminated against. The overall picture presented by the claimant was a little confused and contradictory, and not supported by much, if any contemporary evidence.

165. This, therefore, is not one of those cases mentioned in *J v DLA Piper,* where a finding of a long-term adverse effect illuminates the question of impairment.

166. Our conclusion that there was no substantial and long-term adverse effect on the claimant's ability to carry out normal day-today activities disposes of the question of whether the claimant was disabled. However, we will nonetheless return to the question of impairment.

167. We will now examine the medical evidence to see if this assists, question of impairment. As stated in our findings of fact, the claimant never once sought advice from his GP about depression or any other mental health condition. His explanation that he had a phobia of doctors is difficult to reconcile with the fact that he would see one on an annual basis for his BUPA health assessment.

168. The claimant clearly did variously mention to the BUPA doctors stress, low mood, work stress, anger, going through a difficult time, difficult life events, low self esteem, anxiety and irritability between 13 April 2016 and 15 November 2019 in his assessments. Additionally, in his 15 November 2019 health report the author, Dr Addy, reported that his psychological well-being questionnaires were suggestive of symptoms associated with

mild depression and anxiety. He commented that "*the relevant background is that you were bereaved in December 2018*". This is the high point of the medical evidence of disability.

169. The Duty of Care Assessment also gave the claimant the opportunity to set out that he had a personal or general health issue or disability, but he indicated he did not have one. He indicated that he felt he might be disadvantaged at work if he disclosed a mental health problem or a disability, and this is entirely understandable. Mental health conditions, including depression, are still stigmatised despite changing attitudes, and the claimant would be very much not alone in fearing the consequences of such a disclosure.

170. It is also right to say that the claimant never sought treatment, medication or talking therapy, for any mental health problem. On this issue he did say under cross-examination that a family member took antidepressants, and that he was resistant to the idea of taking them himself. He also said his solution was to throw himself into work.

171. We have also looked at what the claimant told Ms Robinson in his appeal interview on 18 August 2020. He spoke of having been suicidal and mentally broken during the period he was working with Mr Harrison, and he spoke of there having been a conspiracy dating back to 2019.

172. We stand back and look at the evidence as a whole. The impression we formed of the claimant was that he was deeply dissatisfied with aspects of his work, especially with, as he saw it, his being marginalised at the expense of others less technically proficient and experienced than himself. This made him stressed, angry and demoralised. He had difficulties outside of work, and in or around 2018 his mother had a terminal illness. Cumulatively, this gave rise to various symptoms including stress, low-mood, anxiety, low self-esteem etc. This state of affairs persisted between 2016 (possibly before) until the end of 2019 (possibly continuing after that date). In November 2019 his psychological well-being questionnaire responses were suggestive of symptoms of mild depression.

173. We do not understand the EAT in *J v DLA Piper* to have been drawing a crude distinction between, on the one hand, reaction to "adverse life events", which do not indicate an impairment, and "clinical depression" on the other, which is "unquestionably and impairment under the Act". Paragraph 42 recognises the blurred lines, and how such a distinction might be questioned. The point that the EAT makes is that if someone's ability to carry out day-to-day activities had been substantially impaired for 12 months or more, in most cases a tribunal is likely to conclude that the person was experiencing "clinical depression" rather than an adverse reaction to circumstances. The EAT points out that this is a common-sense observation as reactions are normally not long-lived.

174. The situation in the claimant's case, on our findings, appears to be that the claimant experienced external stressors (or "adverse life events") on a fairly persistent basis over a number of years. But we have found that his ability to carry out normal day-to-day activities was not substantially affected on a long term basis. The *J v DLA Piper* guidance does not seem

a perfect fit for this scenario, but we observe that the EAT spoke of it being appropriate in most cases.

175. It may have been that expert evidence may have assisted. It may be that a finding that a conclusion that the claimant had an impairment, possibly something that might be characterised as mild depression and anxiety during 2018 and 2019, would have been open to us. It may also be the case that, given our conclusions about substantial and long term adverse effect on the ability to carry out normal day-to-day activities, any conclusions on impairment are academic. Nonetheless, on balance, and looking at the totality of the evidence, we find that the claimant has not discharged the burden of demonstrating that he had a mental impairment.

176. As we have already set out, if he did have an impairment (in the nature, possibly, of mild depression and anxiety) it did not have a substantial and long-term adverse effect on his ability to carry out day-to-day activities.

Knowledge of disability

177. While we have not found that the claimant was a disabled person, had we made such a finding, we would not have concluded that the Respondent knew, or (for the adjustments claim) could reasonably be expected to have known that he was disabled.

178. We accept the evidence outlined above that the claimant did not tell anyone of any mental health problem that he had. It is also the case that none of the BUPA reports were shared with the employer, and it was not suggested that the respondent should have been fixed with the knowledge of anything in those reports.

179. On the question of actual knowledge, which is required to establish direct discrimination, Mr Arnold reminded us in his written submissions that the respondent has to know of the facts of the disability, and should focus on the effects of the impairment. In support of this he cites what we might term the "behavioural concerns" raised at various points about the claimant which he sets out between paragraphs 31 and 44 of his written submissions. These include the claimant reacting negatively to learning of low score, criticisms about the claimant's attitude and interaction with the team, having a "nightmare" appraisal, not wanting to be on the 1GS project and being bad for morale, him being difficult person to deal with at work (not just after the death of his mother), being erratic and difficult to manage and being challenging as a consultation meeting.

180. Putting this together and standing back to look at the entirety of the evidence, the impression here is more of the various people in the respondent company finding the claimant a difficult person to work with, rather than knowing of the facts of and effects of a disabling mental impairment. If we are wrong in finding the claimant did not have a disability, we find the respondent did not have actual knowledge of such.

181. In terms of whether the respondent could reasonably be expected to have known that the claimant had a disability (if such was our finding), Mr Arnold points in his written submissions to a series of missed opportunities

to make an Occupational Health referral, and to information brought to Ms Robinson's attention during the appeal.

182. However, the claimant himself never requested a referral to Occupational Health, the witnesses did not believe there was a need to make such a referral based on what they observed. These witnesses are obviously not medical professionals. We were particularly impressed with the evidence of Mr Latty, who considered the claimant a friend, and whose evidence we found both sensitive and balanced. He told us in clear terms that in his dealings with the claimant, both as his manager and as a friend "*mental health was not something that came straight to my mind*".

183. Perhaps the high point in terms of disclosure of mental health concerns came during the claimant's meeting with Ms Robinson on 18 August 2020. However, this post dated all of the alleged acts of discrimination. Even if the tribunal were to find that at this stage the respondent ought to have known of a disability, such knowledge came too late.

184. In a sense, having found that the claimant's ability to carry out normal activities was not substantially adversely affected, it is difficult for the tribunal to find that the respondent should have pieced together all this information and ought to have known the claimant was disabled.

185. In the circumstances, had we found the claimant was a disabled person we would not have found that he respondent knew or could reasonably have been expected to know that the claimant had a disability.

Direct disability discrimination and harassment

General observations

186. In cross examination the claimant was asked whether he was alleging that he had been less favourably treated because of his actual depression or because of behaviour arising from his depression. His response (Judge's note) was "*I am not saying that they did something to me because they knew I was depressed or because of the fact of my depression*". He was asked "*Are you saying that your performance was impacted, and they did something because they knew of the performance*?" His response was "*Partially*".

187. While it is difficult for claimants to know what is going on in the mind of the alleged discriminator, it did seem, at times, that the claimant's case was being run on the basis of a section 15 discrimination arising claim, rather than a direct discrimination claim. Additionally, as we have found above none of the respondent's managers (or anyone else in the organisation) had actual or constructive knowledge of the claimant's disability. Without actual knowledge, the tribunal could not conclude that disability was the reason why the respondent acted as it did. Nonetheless, we will consider the various complaints of direct discrimination, together with harassment.

On 1 January 2019 on return from bereavement leave telling the claimant that he had been removed as lead manager from the project.

188. This matter was withdrawn by the claimant following disclosure of the text exchange between him and Mr Bates on 4 December 2018. We dismissed this on its withdrawal.

189. Despite his withdrawal, we do make reference to it because it is an assertion made by the claimant which is undermined by contemporaneous documentation. We do not consider the claimant was trying to mislead us, but consider that he is very much invested in a narrative which has him as being deprived of his work for no good reason. The reason why he was removed from the manager role was because he suggested it when he went off on bereavement leave. It had nothing to do with his state of health.

190. The other point to make is that the claimant made a suggestion that Mr Foreman ran with the fit-out as a whole. No timescale was suggested. As it happened, Mr Jeffreys took up the Fit-out Lead role. The evidence advanced by the claimant as to what might happen in the future concerning this role was a little confused and inconsistent. On the one hand he said that he questioned Mr Bates about why the role had been taken away from him but at one point he said he had been reinstated to the role, neither of which were mentioned in his witness statement.

Gradual removal of his responsibilities.

No role for the claimant to progress to on new organigrammes

191. We confess we did not find the evidence surrounding the organigrammes easy to follow. For example, criticism is made by the claimant that he is not on the organigrammes on page 216. Mr Harrison in evidence said that these were construction management roles. The claimant however did appear on the organigramme on page 217. There is nothing in the claimant's witness statement which helps to understand this issue. The claimant, as we have set out, relinquished the Fit-out Lead role in early December 2018. We are puzzled about what progression he should have made from here. At paragraph 11 of his witness statement the claimant gives evidence about packages of work being taken from him and given to other members of the project team. We were not taken to any contemporaneous evidence of this, however. Page 217 appears to show the claimant being in charge of a number of fit-out packages.

192. The suggestion is made in Mr Arnold's closing written submissions that the claimant was gradually having responsibilities removed and was being marginalised because Mr Harrison wanted him off the project. The reason given for Mr Harrison wanting claimant of the project was "due to his mental health issues and their behavioural manifestations".

193. We do not draw the conclusion from the rather confused evidence we were presented. On the other hand Mr Harrison gives clear evidence, which we accept, that there was a conversation between the claimant and himself shortly after the claimant returned from bereavement leave. In this conversation the claimant indicated he wanted to be Fit-out lead, but Mr Harrison said that he was not suitable. We find that Mr Harrison took this view not because he knew of a disability but, for pragmatic business

reasons, he felt the claimant's client care and teamwork skills were not up to it.

194. These decisions were not because of, nor related to, the claimant's alleged disability. The direct discrimination and harassment claims are not upheld.

On 9th May 2019 the Claimant was advised by Chris Harrison that Daniel Foreman would be handling design work with the architect, as technical director.

195. Again it is not entirely clear from the claimant's witness statement how this matter was put, beyond the bald assertion in the Further and Better Particulars. Mr Foreman had a design and construction degree. Mr Harrison at paragraph 16 of his witness statement sets out Mr Foreman's appointment to the role of Technical Service Director. The reason why he was appointed into the role related to his suitability to do it, and had nothing to do with the claimant's alleged disability. The direct discrimination and harassment claims are not upheld.

The Italian trip

196. As we have found, the reason why Mr Foreman was sent on the Italian trip rather than the claimant, was that the client had insisted that there be a sole point of contact or dealings with the design firm. The fact that this was Mr Foreman and not the claimant had nothing to do with the claimant's alleged disability. The claims of direct discrimination and harassment are not upheld.

In week commencing 10th May 2019 Chris Harrison reallocated various responsibilities of the Claimant and told him he had no future role on the project.

197. The claimant deals with this very briefly in paragraph 11 of his witness statement. He essentially simply says that Mr Harrison on 10 May 2019 stated there was no role on the project and he had no future at the respondent. He said he began to isolate him from the client and other members of the team and exclude him from the project.

198. The claimant did not elaborate on this and in cross examination when inconsistencies between that, his Grounds of Complaint and Further and Better Particulars were put to him he said he had no comment to make. The contemporaneous evidence, for example an email from Mr Harrison on 24 April 2019, suggests that Mr Harrison was actually trying to engage with the claimant to see how best to deploy his skills. Any discussion with the claimant about his role, any diminishment of it would have been in the context of the natural life cycle of the project. We have not found that the claimant was told by Mr Harrison that he had no future on the role. There was no less favourable treatment and any decisions or communications relating to the claimant's role had nothing to do with his alleged disability. The claims of direct discrimination and harassment and not upheld.

His selection for redundancy.

199. We will deal with the issue of redundancy in some depth in our conclusions on unfair dismissal. However, we will examine the reason why the claimant was selected for redundancy and made redundant.

200. As we have found, construction projects have a life-cycle. The claimant's role, being responsible for various fit-out packages, was always going to come to an end on 1GS, and was, we have found, winding down by the end of 2019. The normal state of affairs, would have been for steps to have been taken by the resourcing department, in conjunction with the claimant, to seek another project. Our findings above are that this is what happened. Ms Corrie identified a number of possibilities which were explored with the claimant at the start of 2020. Sadly these efforts did not bear fruit.

201. Ms Corrie brought this state of affairs to Mr Harbord's attention on 25 February 2020, and he brought this to the attention of senior managers and human resources. During the course of an email chain it was established that the claimant had not been helpful in terms of finding in his next role and had not got one role as he had said that he only did fit-out. Mr Lewis wrote on 1 March 2020 "*I suggest we start the consultation with [the claimant], this situation is untenable*". We considered that this is an important piece of evidence. It shows that a senior manager considered that a redundancy consultation was in order at this point in time because of the claimant's role coming to an end and him not finding a further role.

202. A few weeks later lockdown happened, the claimant was furloughed and further attempts to find a new contract were unsuccessful.

203. Had the claimant run a section 15 claim, and had we been satisfied that any performance issues arose from the alleged disability, we can see that Mr Simmonds' focus on underperformance at the start of the redundancy exercise could have been an issue. We do not, however, see how this feeds into a claim for direct discrimination or harassment.

204. We conclude that the reason why the claimant was selected for redundancy and later dismissed for redundancy was because his role on the 1GS project had come to an end and a further role had not been found for him. These decisions were not because of, or related to his disability. His claims for direct discrimination and harassment are not upheld.

Unfair dismissal

Reason for dismissal

205. Mr Arnold in his submissions appeared to accept that the claimant's work was coming to an end in June 2020. He submits, correctly, that it is possible to have a genuine redundancy situation but with a dismissal "mainly attributable" to something other than the redundancy situation. Mr Arnold suggests the reason the claimant was dismissed was the respondent's concerns about his behaviours.

206. Our conclusions are there was what is often termed a genuine redundancy situation here. As we have set out in a number of places in this decision, the claimant's fit-out work was naturally coming to an end towards the end of 2019 and it had not been possible for his to secure an alternative role despite the assistance of the resourcing department.

207. Mr Simmonds, by his own admission, "*began [the redundancy] process by looking at underperformers within Residential because this would be*

one of the criterion applied in a pooling situation". He had asked for a list of underperformers from human resources on 17 April 2020. This, submits Mr Arnold, is the wrong approach and suggests Mr Simmonds is using the redundancy exercise as an excuse to get rid of perceived underperformers, including the claimant. He points also to the fact that the claimant was not the subject of performance management processes, and that the respondent has an "underhanded" method of approaching underperformers through their appraisal moderation process.

208. We can see how identifying underperformers could provoke cynicism and scepticism. First, employers do use redundancy exercises to weed out underperformers. Second, the proper primary focus in a redundancy exercise is the roles rather than the individuals and their performance.

209. However, we also take account of Mr Simmonds' evidence that the backdrop to all of this was the pandemic, that the senior management were considering different issues as they kicked into "business survival mode" and also Mr Simmonds' evidence that performance actually would have been a criterion for selection had the claimant been placed in a wider pool. Crucially, the evidence that on 1 March 2020 Mr Lewis had suggested that a consultation be started as the situation was untenable demonstrates the claimant was considered at least to be on a path towards redundancy by senior management well before any reference to underperformers was made by Mr Simmonds.

210. Mr Arnold also made reference to the pool of one, the retention of Mr Penlington and the role secured by other of the claimant's colleagues as undermining the reason for dismissal. We will deal with these matters below, but we conclude that the facts known to the respondent or beliefs held by them that caused them to dismiss were that the claimant's role came to an end and no further work was found for him. We find that the reason for dismissal was redundancy.

Fairness

Selection of underperformers

211. Mr Arnold relied on the selection of underperformers rather than roles as being part of the unfairness of the dismissal. We have considered this matter above under the reason for dismissal. We have not concluded that Mr Simmonds selected the claimant because of any question of underperformance.

Consultation

212. The adequacy of consultation was not challenged by the claimant and not covered in Mr Arnold's submissions. However, the authorities suggest it might be considered to be in issue in every case, and it is prudent for us to consider it, albeit briefly.

213. The claimant was invited to, and attended, three consultation meetings spanning over a 30 day period with Mr Simmonds. The rationale for the redundancy exercise was explained to him as was his opportunity to input into the process in order to avoid redundancy. It was explained to him that there would be a search for alternative roles, and again he was given

information about how he could liaise with the recruitment team to pursue alternative roles.

214. The evidence shows, for example, that during the second consultation meeting the claimant questioned why external contractors were still being engaged when employees were being considered for redundancy. Ms Patterson investigated this issue and showed herself willing not simply to accept explanations at face value. Although this issue was not resolved in the claimant's favour, it does show that the respondent engaged meaningfully with issues raised by the claimant during the process. We consider that the consultation undertaken by the respondent fell within the range of reasonable responses.

The pool

215. As set out above, Mr Simmonds was recalled to give evidence about pooling. The tribunal considered the interests of fairness required this as the very first time that the issue of potentially defective pooling had been raised was during Mr Simmonds' cross examination. He returned to give the evidence we set out in our findings at paragraph 100 above.

216. Standing back and looking at the entirety of the evidence, the primary reason why the claimant was in a pool of one appeared to be related to the way individuals were deployed onto contracts within the respondent's business. The situation here did not seem akin to the situation commonly encountered by tribunals where there is a more "static" workforce, perhaps within settled teams or departments, where it is simpler to identify similar types of employees to make up a pool. Here there was a fluidity to the way workers were deployed onto a contract to fulfil a specific role at a specific point in the lifetime of the contract before they would, generally, move on to a different contract based on their expertise, experience and the availability of suitable work on other contracts.

217. We find that it is unlikely that Mr Simmonds posed the question to himself "Which individuals are appropriate to be placed in the same pool for selection as the claimant?" in those terms. However, we find that Mr Simmonds applied his mind to the overall fluid picture of the 1GS contract within the context of the respondent's overall construction work and reasonably determined that the claimant should not be pooled with anyone else. The claimant, during consultation, had not identified anyone suitable for pooling with him. He had made reference to contingent workers, Ms Patterson had raised this issue and Mr Simmonds, in the third consultation meeting, had determined that all contingent workers, apart from a small number with specialist skills or his assignment were coming to an end, had been dispensed with. It is not appropriate to consider self-employed contractors as part of the pool, but this was the closest the claimant had come to suggesting an alternative pooling scenario.

218. Notwithstanding this, we examine the circumstances of other individuals who have been flagged up to us as potentially being suitable to be pulled with the claimant.

a. The claimant accepted that Mr Finnegan should not have been pulled with them. We consider him no further.

b. Mr Duignan was two grades below the claimant and receiving around half of his pay. The claimant did not suggest to the respondent at the time that he should have done. The role that he moved onto was a junior one requiring supervision, and was not one suitable for the claimant.

c. Mr Bull, again, was two grades below the claimant, and was retained beyond April 2020 on a fee paid role at the client's request. This would not have been a role the claimant could have carried out because the client would not have paid for someone of his seniority.

d. Mr Foreman's training, expertise and experience was in design and construction. He was operating at a level one grade more senior to the claimant at the time the claimant was put at risk of redundancy. It would not have been appropriate to pool the claimant with somebody operating at a higher level and doing a job with a different focus.

e. Mr Jeffreys, again, was carrying out a more senior and different role to the claimant. He was the construction lead rather than a package manager.

219. In all the circumstances, placing the claimant in a pool of one was within the range of reasonable responses.

220. While not suggested at the time, in the claimant's pleadings or in his witness statement, Mr Arnold submits that consideration should have been given to "bumping" Mr Bull and Mr Duignan. Even if he had proposed at the time, it is unlikely that a decision not to bump these employees would have fallen outside the range of reasonable responses. As he did not even suggest it, the respondent not considering bumping these employees fell within the range of reasonable responses.

Selection from pool

221. Given this was a pool of one, selection for redundancy more or less inevitably follows if no alternative employment is found.

222. This may be an appropriate heading under which to examine the retention of Mr Penlington, which the claimant suggests renders his dismissal unfair.

223. We have found that as part of operating in "business survival mode" the respondent dispensed with the services of a number of independent contractors. Mr Penlington, however, had been brought into the 1GS project on the client's request to undertake a discrete project within a project. He went on to carry out a construction manager ("boots on the ground") role on the Battersea Power Station project when his work at 1GS finished. We do not find, in these circumstances, that the decision to retain Mr Penlington fell outside the range of reasonable responses.

Alternative employment

224. Because of the way the respondents project-related work operated, this was a slightly odd case where a search for alternative employment

was actually taking place before the claimant was put at risk of redundancy.

225. On 6 January 2020 Mr Harrison was liaising with Ms Corrie in resourcing to explore a possible role for the claimant at the Battersea project. On 26 February 2020 Ms Corrie mentioned the numerous roles the claimant had been put forward for with no success. In this email chain it was discussed that the claimant had been unhelpful in terms of finding him his next role. Mr Lever pointed out that the claimant had clearly said "he only did fit-out". It is this "untenable" state of affairs which may well have started the ball rolling in terms of progress towards redundancy.

226. We found Mr Latty an impressive witness who balanced his feelings of friendship towards the claimant, and his high regard for his technical skills with a realistic assessment of things which did not come easily to the claimant. We find the claimant did operate within a "comfort zone" and pigeonholed himself as a "fit-out man". We also accept Mr Harrison's evidence that the claimant's technical skills and experience in fit-out were second to none. We also found that there was a perception within the respondent organisation that the claimant's interpersonal skills presented challenges.

227. The significance of all of this is that it created difficulties, or limiting factors, in the claimant securing alternative employment both before and after being put at risk of redundancy.

228. The authorities stress that an employer need only make reasonable attempts to find alternative employment, not every last attempt. We consider, in all the circumstances, that the respondent did in fact take reasonable steps to attempt to find alternative employment for the claimant. A combination of factors, including the way the pandemic affected the construction sector, and factors more personal to the claimant himself meant that unfortunately alternative employment could not be found.

Appeal

229. Mr Arnold criticised Ms Robinson's appeal on a number of bases.

230. It is said that interviewing Mr Simmonds, the decision-maker, for only half an hour in which there was no exploration of redundancy consultation process was "woefully inadequate". "Basic questions" such as failure to explore the consultation process and an "almost unbelievab[le]" failure to explore the pool of one were criticised, as was a failure to prefer the claimant's evidence about his wishes to do construction management.

231. What this criticism entirely overlooks is the way the claimant approached the appeal process. The claimant took legal advice during the consultation process, and prior to the appeal, and yet he himself failed to raise these "basic questions". The "failure" of Ms Robinson to explore the pooling is entirely believable given the fact that the claimant did not raise the issue himself. In this litigation this issue was not addressed until Mr Simmonds' cross-examination. During the appeal process, the claimant was focused on what he saw was a historic conspiracy.

232. Ms Robinson preferring the evidence that the claimant did not wish to do construction management work is also a finding open to her as a decision-maker. We would comment that, although the scope of the evidence she heard is different to that which we had, her findings fit with ours. We have found that the claimant saw himself as “a fit-out man” and that he operated within a professional comfort zone.

Overall conclusion on unfair dismissal

233. We find that the requirement for the work that the claimant was carrying out ceased or diminished, or was expected to do so prior to and at the time of his redundancy. We find that the reason the claimant was dismissed was that he was redundant. We conclude that in all the relevant circumstances, the respondent acted reasonably in treating the reason for his dismissal as sufficient reason for dismissing him. In determining this we have considered the size and administrative resources of the respondent, which are considerable. We have taken into account the nature of the consultation with the claimant, the question of selection (including pooling) and the search for alternative employment to avoid the need for dismissal.

234. In assessing the factors set out in the paragraph above, we have not sought to substitute our own opinions, but have considered whether the employer’s actions, approach and decision-making fell within the range of reasonable responses. We have found that they all fell within this range. Accordingly, we find that the claimant was unfairly dismissed, and we do not uphold his claim of unfair dismissal.

Employment Judge **Heath**

28 February 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

01/03/2022.

FOR EMPLOYMENT TRIBUNALS

APPENDIX

The issues (as set out in Case Management Summary of Employment Judge Elliot of 10 May 2021 with additions provided by Further and Better Particulars of 16 June 2021)

Jurisdiction

(12) Does the Tribunal have jurisdiction to determine the complaints insofar as they relate to alleged acts of discrimination which occurred more than three months prior to the date of presentation of the claim on 12 November 2020 subject to any extension of time by participation in ACAS Early Conciliation?

(13) In relation to the alleged acts of discrimination, has there been any discriminatory conduct extending over a period for the purpose of s123(3) Equality Act 2010 ("EqA 2010")?

(14) Would it be just and equitable to extend time under s123(1)(b) EQA 2010 in relation to any alleged acts of discrimination which are out of time?

Unfair dismissal

(15) Was the claimant unfairly dismissed contrary to sections 94 and 98 of the Employment Rights Act 1996 ("ERA 1996")?

(16) Was there a potentially fair reason for the dismissal? The respondent's case being the potentially fair reason was redundancy. The claimant’s case is that there was no genuine redundancy situation, and that he was dismissed due to disability.

(17) If there was a genuine redundancy situation, was the decision to dismiss the claimant substantially and/or procedurally fair in particular:

(i) Was there fair selection for redundancy in placing the claimant in a pool of one?

(ii) Did the respondent carry out proper consultation with the claimant about the redundancy.

(iii) Did the respondent search for and offer any suitable alternative employment for the claimant?

(18) Was dismissal within the range of reasonable responses open to the respondent?

Disability

(19) At the material time which is from 1 January 2019 to 12 November 2020 was the claimant a disabled person as defined by section 6 of the EQA 2010? The claimant relies upon a depressive condition. Did this condition have a substantial adverse effect on his ability to carry out normal day-to-day activities and was the condition long term?

(20) If, and to the extent the claimant was disabled within the meaning of section 6 of the EQA 2010, did the respondent know or ought it reasonably have known of the claimant's disability?

Direct disability discrimination

(21) The less favourable treatment relied upon by the Claimant is:

(i) His selection for redundancy

(ii) His dismissal for redundancy

(iii)

(iv) On 1 January 2019 on return from bereavement leave telling the claimant that he had been removed as lead manager from the project.

(v) Gradual removal of his responsibilities.

- On or about 1st April 2019 Chris Harrison assumed the role of Project Director and issued new organigrammes that showed no role for the Claimant to progress on the 1GSQ.

- On 9th May 2019 the Claimant was advised by Chris Harrison that Daniel Foreman would be handling design work with the architect, as technical director. This role Chris Harrison earlier advised would not be available to Daniel Foreman on the 1GSQ project as the project was too well advanced for this role to be introduced. The technical director was a new role, rolled out within Mace but the job role had not been widely offered to others or the Claimant.

- In early 2019 the Claimant had been due to attend on a Supplier visit in Italy for materials. Chris Harrison took it away from him and allocated it to Daniel Foreman. This undermined the claimants credibility with both the contractor and the client who was due to attend the factory visit in Italy.

- In week commencing 10th May 2019 Chris Harrison reallocated various responsibilities of the Claimant and told him he had no future role on the project.

(22) The claimant’s comparators were:

a) Ian Penlington an outside consultant with similar duties to the Claimant and brother of a board director whose contract could have been terminated without payment of redundancy but was retained.

b) As the Claimant was to the best of his knowledge the only person selected for redundancy with equivalent duties to him the comparator is any hypothetical associate director in construction management without a disability

(23) Did the respondent treat the claimant less favourably because of disability

contrary to section 13 EQA 2010?

Discrimination arising from disability

(25) The claim for discrimination arising from disability was withdrawn during [the Preliminary Hearing on 10 May 2021].

Failure to make reasonable adjustments

(26) The provision, criterion or practice is the redundancy process. Did the respondent apply that PCP?

(27) Did the respondent know/could the respondent reasonably have been expected to know both that the claimant had a disability and that he was likely to be placed at a substantial disadvantage in comparison with persons who are not disabled? The substantial disadvantage relied upon is the placing of the claimant in a pool of one resulting in a redundancy dismissal.

(28) The claimant contended for an adjustment that included the consideration of others in the pool. The claimant says for example that consideration should have been given to an outside contractor having his contract terminated.

Disability related harassment

(29) The claimant relies on the same acts relied upon for direct disability discrimination in the alternative as harassment.

(30) Did respondent engage in the alleged unwanted conduct relied upon by the claimant?

(31) If so, was this (in each case) related to disability?

(32) If so, did that conduct have the purpose or effect of violating the claimant's dignity; or creating an intimidating, hostile, degrading, humiliating or offensive environment for him having regard to: (i) his perception; (ii) the other circumstances of the case; and (iii) whether it was reasonable for the conduct to have that effect?

Remedy

(33) If any of the claims are upheld by the Tribunal what financial compensation is appropriate in all of the circumstances?

(34) Should any compensation awarded be reduced in terms of Polkey v AE Dayton Services Ltd [1987] ICR 142 and, if so, what reduction is appropriate

(35) Should there be an injury to feelings award?

(36) Has the claimant mitigated his loss?