Claim no.s: 2301877/2019; 2302789/2019; 2304195/2019

EMPLOYMENT TRIBUNALS

Claimant:	**Mr D Foat**
Respondent:	**Department for Work and Pensions**
Heard at:	**London South Employment Tribunal (by CVP)**
On:	**31 January 2022 – 3 February 2022, 7 February 2022 – 8 February 2022, in chambers 1 March 2022**
Before:	**Employment Judge Dyal, sitting with Ms Carter and Mr Rogers**
Representation:	
Claimant:	Ms Mallick, Counsel
Respondent:	Ms Gordon Walker, Counsel

RESERVED JUDGMENT

1. The complaints of harassment related to disability succeed as follows:

    a. In February 2018 forbidding the claimant from driving in the course of his work;
    b. The conduct of the meeting of 26 April 2018;
    c. On 2 May 2019 insisting the claimant attend a twelve-month review meeting on the 23 May 2019 at the Ramsgate office;
    d. Constructively dismissing the claimant.

2. The complaint of breach of the duty to make reasonable adjustments succeeds as follows:

    a. The failure to offer workplace mediation.

3. The complaint of constructive unfair dismissal succeeds.

4. The complaint of failure to pay holiday pay succeeds.

5. The complaints otherwise fail and are dismissed.

CASE MANAGEMENT ORDERS FOR REMEDY

1. Remedy in respect of the successful complaints to be determined at a remedy hearing if not agreed.

2. The case is stayed until 1 June 2022 in order for the parties to try and agree remedy.

3. If remedy is not agreed the parties must liaise with each other and propose either a further stay or comprehensive case management directions for remedy (marked for the attention of Judge Dyal) by 8 June 2022.

REASONS

Introduction

1. The Claimant presented a total of 5 claim forms. At a Preliminary Hearing before Employment Judge Siddall it was agreed between the parties that claims 2302623/19 and 2302624/19 were superfluous and "could be treated as withdrawn". The other three claims 2301877/19, 2302789/19 and 2304195/19 were consolidated and are now before the tribunal.

The issues

2. The issues were identified at a Preliminary Hearing before Employment Judge Kelly on 16 September 2020. That list identified a handful of matters that the Claimant was required to provide further information about. The information that the Claimant subsequently provided was extremely lengthy. Much of it was voluntary rather than required by Employment Judge Kelly. At the outset of this hearing the parties were therefore asked to agree a final list of issues. Counsel indeed able to agree a final list of issues which the tribunal was grateful to adopt. The final list of issues is annexed hereto.

The hearing

3. *Documents before the tribunal*:

    3.1. Agreed bundle running to 1035 pages;
    3.2. Additional documents disclosed by the Claimant on 31 January 2022 and added to the bundle by consent;
    3.3. Additional document documents disclosed by the Claimant on 1 February 2022 and added to the bundle by consent;
    3.4. Additional documents disclosed by the Claimant on 7 February 2022 and added to the bundle by consent.

3.5. Letter of resignation and 4 page policy/procedure document in relation to reasonable adjustments.
3.6. Respondent's chronology and cast-list;
3.7. Respondent's opening submissions.

4. *Witnesses*:

4.1. The Claimant;
4.2. Wendy Beaddie, Higher Executive Officer.
4.3. Maria Skinner (written evidence only – did not attend because of a family bereavement);
4.4. Catherine Kirkpatrick (written evidence only – did not attend because of a family bereavement).

5. *Pre-Reading*: Both parties produced a reading list at the tribunal's invitation and we read all of the documents on both lists.

6. *Reasonable adjustments and the conduct of the hearing.* The Claimant has longstanding severe depression and anxiety which he continues to suffer from.

7. In January 2021, the final hearing of this matter had to be postponed on account of the Claimant's mental ill-health. By October 2021 the Claimant's health had improved to a degree. At a Preliminary Hearing careful thought was given to the adjustments that the Claimant would need in order to participate at this final hearing. It was agreed that:

7.1. For every 30 minutes of cross-examination of the Claimant would have a 10 minute break;
7.2. For every 45 minutes of cross-examination of the Respondent's witnesses the Claimant would have a 15 minute break;
7.3. There would be modifications to the style of cross-examination: it would need to proceed with a manner, tone and pace that took account of the Claimant's mental health problems and avoid any unduly aggressive or confrontational questions.

8. At the outset of this hearing we had a discussion of reasonable adjustments. Judge Dyal checked with Ms Mallick whether the adjustments agreed in October 2021 continued to reflect the Claimant's needs. She indicated that they did but added that there were certain triggers in the history of the case that may cause the Claimant particular upset. There was a discussion of what the best course take would be in that event and Ms Mallick explained that taking a break was the best response. Judge Dyal indicated that there would be no difficulty in taking unscheduled breaks for that or other reasons in addition to the scheduled ones. Judge Dyal made clear that he and the panel would do all they reasonably could to facilitate the Claimant's participation in the proceedings. He emphasised that he would do his best to respond to the Claimant's needs but that it may not always be apparent what they were. Thus the Claimant should feel free at any time to say if he needed a break or had any further needs as should counsel.

9. On the second day of the hearing, in the process of calling the Claimant to commence his evidence, Judge Dyal recapped the reasonable adjustments that had been agreed and asked if the Claimant had any questions. The Claimant said at that point that he thought the agreement was that he would have a 10 minute break for every 15 minutes of cross-examination. Judge Dyal explained that while that was not what had been agreed there was significant flexibility in the approach the tribunal could take. He suggested three options in light of what the Claimant said. That we proceed on the basis of:

   9.1. a 10 minute break after every 15 minutes;
   9.2. a 10 minute break after every 30 minutes but that after 15 minutes the judge check with the Claimant whether he wanted a break;
   9.3. continue with the adjustments as agreed before Employment Judge Barker in October 2021 and on day 1 of this hearing.

10. There was a discussion of these options and everyone (including the Claimant and his counsel) agreed that the second of them was the best course to take.

11. In addition to the above the tribunal did its utmost to make a dynamic assessment of how the Claimant appeared to be. This led to several additional breaks. On day 3 it also led to an early finish as the Claimant suddenly appeared to be tired. He closed his eyes a couple of times and his head lolled prior to answered what proved to be the final question of the day. Following a brief discussion we decided to bring proceedings to a close for the day.

12. The tribunal pre-read documents on day 1 and in the morning of day 2. The Claimant's case then took from the afternoon of day 2 to the close of play on day 4. Much of that time was (rightly and necessarily) taken on breaks. There were some additional delays not all of which merit individual mention.

13. The bundle had been supplied to the Claimant in electronic form. Before the hearing his wife (who is also his carer) had printed it at a copy shop. Unfortunately it was not bound and shortly before the hearing it fell on the floor and the pages got mixed up. This problem was compounded because the Chromebook the Claimant had bought for the purpose of the hearing did not work and so the option of working electronically, the back up plan, was scuppered. We lost around an hour and half on day 2 while the bundle was pieced back together. In the meantime, the Respondent couriered the Claimant hard copies of the bundle in lever arch files which arrived mid-morning on day 3.

14. The tribunal took a mid-morning break at 11.15 am on day 3. On resuming, Ms Gordon-Walker reported that she and the trainee solicitor assisting her had overheard the Claimant and his wife discussing the case during the break over the CVP connection. At the time the Claimant was under oath and part way through his cross-examination. Ms Gordon-Walker reported that what had been overheard included a discussion of the evidence that had been given and a discussion of what topics may yet come up. Mrs Foat was heard suggesting documents that may be useful ones in the Claimant's answers to come.

15. Ms Mallick had not been connected to the call at the time and therefore could not directly say what had happened and neither had the tribunal.

16. Judge Dyal asked both Mr Foat and Mrs Foat to give an account of what had happened. Although they did not accept what Ms Gordon-Walker had reported at its very highest, in the course of responding there were admissions from both that Mrs Foat had made references to what evidence may come up and suggested that particular pages in the bundle may be of assistance.

17. It is important to note that on Day 2, 1 February 2022, before breaking at the close of the day Judge Dyal gave Mr Foat, who was with Mrs Foat at the time, the usual warning to witnesses. Namely that he must not discuss the evidence in the case with anyone including Mrs Foat whilst he was under oath. Before doing so Judge Dyal had checked whether this was one of those rare cases in which it was necessary to adjust that usual warning as a reasonable adjustment. Ms Mallick indicated that it was not.

18. It is plain that there was inappropriate conduct during the course of the break. We decided that the correct response was to repeat the instruction to Mr and Mrs Foat that they must not discuss the evidence whilst the Claimant remained under oath and to warn them that if there was a repetition of that conduct there could be more significant sanctions for it. This was essentially the course that both counsel submitted was the proper one for us to take.

19. The Claimant was most contrite. He offered for himself and Mrs Foat to take breaks separately to give additional comfort that were complying with the instruction henceforth. We were grateful for the offer but did not think that would be a sensible thing to impose:

    19.1. Mrs Foat is Mr Foat's carer and it was imperative that the caring arrangements continued as normal;
    19.2. Mr and Mrs Foat were free to speak while Mr Foat was under oath – just not about the case - and we did not want to take away that freedom;
    19.3. Realistically, such a rule could not be effectively policed in any event.

20. Ms Gordon-Walker indicated that she would be making submissions on credibility in closing and Ms Mallick indicated it was her right to do so.

21. When the evidence completed on 7 February 2022, Judge Dyal invited a discussion of the mechanics of closing submissions. It was agreed that each side would have approximately 50 minutes to make closing submissions and that we would take a break in between. Judge Dyal specifically checked with Ms Mallick whether the Claimant would be able to proceed for as long as 50 minutes without a break and she said he would.

22. On 8 February 2022, we heard closing submissions. Ms Gordon walker spoke for about 53 minutes at which point Judge Dyal called a break. The Claimant was unresponsive. He had just laid down and gone off camera. During the break Ms Mallick spoke to him and reported back that his wife had briefly thought he had lost consciousness but in fact he was feeling emotional. She reported that he was ready

to continue as did Mr Foat himself. Ms Mallick asked that we break after every 30 minutes thereafter which we readily agreed to. Ms Gordon Walker completed her closing submissions (she spoke for 1 hour 20 minutes in total excluding breaks). Ms Mallick then made her closing submissions. She spoke for 1 hour 25 minutes in total excluding breaks.

Findings of fact

23. The tribunal made the following findings of fact on the balance of probabilities.

Introduction: parties and background

24. The Department for Work and Pensions is a large employer. It maintains a suite of employee relations policies and procedures. These include:

24.1. Grievance policy and procedure;
24.2. Sick leave policy and procedures;
24.3. Attendance management procedures;
24.4. Annual leave.

25. The Claimant's employment commenced in May 1999 in the role of administrative officer. He transferred to the fraud team in 2001. In 2002 he was promoted to the grade of Executive Officer in the role of Investigations Officer and at that time was based at the Ramsgate office.

26. In closing submissions, Ms Mallick at times characterised the role as a largely administrative one albeit with some client facing elements. We do not accept that. No doubt there were some administrative duties but the essence of the Claimant's role was to investigate potential fraud by benefit Claimants and we would not characterise that as administrative work. This was a very responsible role. It included interviewing suspects under caution and building a case for possible prosecution. We think the job description before us gives the essence of the role. The Claimant worked in fraud for many years and accumulated a great deal of expertise. Many of his cases ended with successful prosecutions following criminal trials in which he was a witness for the Crown. He is rightly proud of that.

27. As regard holiday pay the Claimant's contract said this:

Paid leave

Your annual leave allowance will be 25 days per annum with pay. rising to 30 days with pay after 12 year's service. You will also receive a total of 8 days public and 2.5 days privilege holidays per year. You can find information about leave on the Employee Policy page of The Department and You Intranet site

If, when you finish your employment with us you still have some leave left, you may be paid for it. It will be calculated on a daily rate in accordance with your salary and the number of days in the month of payment.

28. The Respondent's Annual Leave Policy provides as follows:

5…. Payment for any days not taken from your entitlement will be made with your final salary [upon termination of employment].

18. Entitlement to statutory annual leave is not affected by periods of sickness absence (paid or unpaid).

19. You will continue to accrue contractual annual leave while you are off sick, providing you return to work at the end of your sickness absence.

29. In 2008 the Claimant's base moved to Margate.

30. The Claimant had and has a mental health profile that includes a history of mental health problems of a variety of kinds since 2008. This includes anxiety and depression which at times have been very severe. It also includes an eating disorder by which the Claimant is unable to eat or drink during hours of daylight.

31. In 2012, the Claimant experienced anxiety and depression that he attributed to work related events in which he felt he had been undermined and humiliated. He had a 12 week period of sickness absence. When he returned to work a number of reasonable adjustments were made including having a phased return and some alteration to duties. His manager at that time was Mr Don Elmore. In the course of a meeting with Mr Elmore the Claimant alluded to the possibility of resigning although he did not do so.

32. There followed an extended period of employment prior to the index events in this case that was relatively happy.

Material events commence

33. In around December 2015, a number of employees of Thanet Council transferred to the Respondent's employment. One of them was Ms Maria Skinner. She became the Claimant's line manager in 2016. Initially they had a good working relationship.

34. In 2016, the Claimant was put on a stress reduction plan. In the course of 2016 the Claimant lost a bag that contained some work sensitive items. He said he wanted to resign but was persuaded not to do anything rash.

35. In around 2016 at a staff conference, Mr Smith, Senior Executive Officer, gave a presentation on mental health issues. There is a dispute about what he said.

    35.1. The Claimant says that Mr Smith said that 49% of people would have mental health problems at some stage. He then said, with reference to one half of the room, words to the effect of, so you lot are 'nutters'.
    35.2. We understand the Respondent to deny that this was said or at least not to admit it. In the course of an internal grievance investigation (see below) Mr Smith denied making this comment. Indeed his position was that the Claimant was a "liar". The Claimant's then line manager and second line manager, Ms

Skinner and Mr Steve Allinson respectively, were also interviewed but did not recollect the comment.

36. We accept the Claimant's account. We found it credible and vivid. We also note that his position was and has always been that he complained of this comment in his course evaluation document. We think it implausible that this would have been his position were it not true. We accept that Mr Smith made the comment and we think the context shows that it was intended as a joke; it was an ill-considered one.

37. The Claimant's case is also that he complained of this matter to Ms Skinner but that she brushed it off, with words to the effect of '*That's what [Mr Smith] is like'*. She has no recollection of that, but again with think the Claimant's account was credible and is the best evidence before us, so we accept it.

38. On 25 October 2017, the Claimant fainted in the workplace. He did not come round for a few seconds. It was not clear then, and is not clear now, why he fainted. The Claimant had various tests which did not provide an answer.

39. At around this time Ms Skinner suggested to the Claimant that he see Occupational Health (OH). She was interested in getting some medical evidence on the Claimant's fitness to drive in light of him fainting. The Claimant was not keen to do so because he had a previous negative experience of OH. In essence, he had been unwell and the call with the OH advisor had been short and had focussed on his ability to return to work which he did not think was appropriate at that time.

40. On 22 November 2017, the Claimant emailed Ms Skinner and told her that he was on prescription diazepam. He explained said *"I am not sure if it is something that you need to know, but taking into account what happened the other week, and that you have shown concern I thought it was best."*

41. Diazepam is a drug that can cause drowsiness. There is no blanket ban on driving when taking diazepam; however it is unlawful to drive if unfit to do so by reason of taking diazepam (or indeed for any reason).

42. In early February 2018, the Claimant had a few days off work with a minor illness. During that illness he spoke to Ms Skinner a number of times.

43. On 5 February 2018, he told Ms Skinner that the pharmacist had made an error with his diazepam and he had thus been prescribed an excess dosage between 15 January and 1 February. He had brought this to his doctor's attention and was weening down to the correct dosage.

44. On around 7 February 2018, Ms Skinner told the Claimant that he was not permitted to drive during work hours. The reason for this instruction and the circumstances surrounding it are a matter of dispute in this litigation (and one which we resolve below).

45. In an email to Mr Allinson that day Ms Skinner said: *"I have told Darron that he is not to drive during work hours as I have a duty of care towards him and as he doesn't eat or drink during daylight hours and is also now taking Diazepam."*

46. On 9 February 2018, the Claimant had a return to work meeting with Ms Skinner. Ms Skinner's note of the meeting records, and we find, that the Claimant challenged the instruction banning him from driving and asked for mediation in relation to it. The note also states:

> *I replied that it was a decision I had made due to the combination of factors being that he wasn't eating or drinking during daylight hours, he was on diazepam (previous week had found out he had been taking over the double the dose he had been prescribed) and that he had previously fainted in the office and I was also aware he had fainted a couple of weeks ago when getting out of his car after driving to Gatwick. I was also aware that he had been falling asleep at work. (I was on leave the last time this occurred).*
>
> *I explained again that if he was to get a note from his doctor that taking all these circumstances into account he considered he was able to drive, that I would reverse my decision. He said that the doctor would only make a decision on what he told him and wouldn't be aware of the full circumstances, but I said that the doctor would be aware of all the circumstances as it would be in the notes, but that it was down to him to decide if he wanted to get the note.*

47. At the meeting the Claimant asked whether if he drove he would be 'put on a disciplinary'. Ms Skinner was unsure what to say so she did not give a direct answer. She then spoke to Mr Allinson after the meeting who advised her to say that 'there may be disciplinary action'. She telephoned the Claimant and relayed this to him. The Claimant said he was going to resign.

48. We break from the chronology to resolve a factual dispute: whether Ms Skinner asked the Claimant to see occupational health or not, whether the Claimant refused and if so when this all happened. The evidence around this is confused and confusing. The main evidence is as follows:

48.1. The Claimant's evidence to the tribunal is that he does not recollect ever refusing to see OH;
48.2. Remarkably, Ms Skinner does not say either way in her witness statement whether or not she asked the Claimant to see OH;
48.3. Ms Skinner's contemporaneous documents from around the time of the instruction to the Claimant to cease driving make no reference occupational health. On the contrary, where it deals with medical advice it indicates that she was asking the Claimant to get a letter from his GP (see p196; notes of conversations during the Claimant's sickness absence in early February 2019 (p202-3); note of return to work discussion p204-5).
48.4. There is an email from the Claimant to Mr Allinson on 27 March 2018 in which he says: "*Especially having been told I refused OHS, I though[t] concerned managers could insist."*
48.5. The Claimant's letter of grievance of 16 May 2018, rather cryptically in a context that is hard to follow says *"I believe the department could justify some of the treatment that I have had to endure on my failure to accept a OHS referral despite a bad experience in the past, as has many others."*

48.6. On 17 May 2018, Ms Lilley emailed Mr Cornwall reporting a conversation that she had with the Claimant a couple of days previously. Her email records *"At some point, his LM [line manager] did ask him to take part in OH referral, which he refused. I don't know if it was explained to him that the Business will make decisions without medical advice and it's beneficial for him to attend."*

48.7. The Claimant was asked in the grievance interview on 6 June 2018 whether he had been asked to see OH and he said (p350): *"I told MS that I have little faith in the OHS system. Previously being of, suffering a breakdown, having a 20 minute call with OHS who kept asking when I would be fit enough to return to work was not helpful. I kept asking for something from HR for my GP to be able to clarify, its not come, so nothing is moving on."*

48.8. Ms Skinner told Ms Pollard in the grievance interview, that she had asked the Claimant to see OH and he refused (421). She said much the same thing in an interview (we assume a disciplinary interview) in March 2018.

49. Making such sense of this as we can we think the most likely course of events is as follows:

49.1. Ms Skinner did ask the Claimant to see OH but this was back in October or November 2017 after he fainted. At that time there was no driving ban instruction and the request, we think, was made lightly without indication of consequence and that is why the Claimant has no enduring recollection of it.

49.2. Ms Skinner did not ask the Claimant to see OH in or around February 2018 or thereafter when she actually imposed the driving ban.

49.3. In February 2018, Ms Skinner did ask the Claimant to get a letter from his doctor stating his fitness to drive. The Claimant asked his doctor for such a letter but his doctor did not provide it. The Claimant in turn asked Ms Skinner for a letter to the doctor from the Respondent, on headed paper, requesting advice. Ms Skinner never produced such a letter.

50. We find that *before* giving the Claimant the instruction that he could not drive during work time we find that Ms Skinner had been informed of the following matters:

50.1. That the Claimant had fallen asleep at his desk and in an interview with a suspect in the course December 2017 and January 2018. This information came from Mr Young and Ms Franklin who were members of the Claimant's team. The information was, we find, truthful. It was put in writing to Ms Skinner in emails dated 14 February 2018. We find that the information was put in writing at this time at Ms Skinner's request. She requested that information previously given to her orally be put in writing; she did not ask for false information to be put in writing. The reason Ms Skinner did this was because it was by now clear that the instruction to the Claimant was controversial and he was challenging it.

50.2. Mr Hewitt told Ms Skinner that the Claimant had told him that in January 2018, the Claimant had bent down to pick something up as he got out of his car and that he had fainted.

51. On 27 March 2018, the Claimant wrote a lengthy email to Ms Skinner. The Claimant explained the impact of not being able to drive both in terms of extending

the working day and meaning that he had to incur the initial cost of public transport and taxis before being reimbursed and having to wait for the same.

52. In the email the Claimant identified and challenged each of the reasons that had been given:

52.1. After he collapsed at work he had tests and they had shown no issues;
52.2. He had fallen asleep however there had only been one such incident, and he suggested it had been due to sitting in a hot room;
52.3. The pharmacist had made an error with the dosage of his medication. As soon as he became aware of this he contacted his doctor and was given advice on reducing to a safe amount;
52.4. He had read the labels on his medication and only one of the medications said anything about driving. He had carried out his own risk assessment and identified no concern;
52.5. He had had an eating disorder for years and had travelled tens of thousands of miles including in the official work vehicle with no problems;
52.6. He also explained that the driving ban made him feel isolated from colleagues;
52.7. Excess medication due to an error by pharmacy he had been given the incorrect medication as soon as he had been aware of this the error was corrected.

53. The Claimant asked Ms Skinner to provide him with the advice she had sought, the advice she had been given from anyone providing her with advice and confirmation from HR that they were aware that the Claimant had not been given any information in writing in respect of the ban, that he was informed he may be subject to disciplinary if he used his own vehicle to travel during work time. He repeated his view that mediation would be a good idea.

54. Ms Skinner responded on 28 March 2018. In her response she did little more than reiterate what she had previously told the Claimant. She did not engage in any meaningful way with the detail of the points he had made. She also repeated that if the Claimant obtained a note from his doctor confirming his fitness to drive he could do so.

55. On 4 April 2018, the Claimant emailed Mr Weller who was a trade union representative asking for a discussion. He told Mr Weller that he had drafted a letter of resignation.

56. On 12 April 2018, the Claimant made application to reduce working hours on the basis of ill-health.

57. On 17 April 2018 ,the Claimant contacted Debra Koritsas asking for mental health support and complaining about the way he had been treated. He was given the contact details for a mental health first aider.

58. On 17 April 2018, the Claimant wrote to the HR Mediation and Investigations Service and said he was considering resigning and claiming constructive dismissal. He asked if this was a situation that might attract a face to face mediation rather

than an investigation. Ms Danni Hudson responded, offering to speak the Claimant and discuss options. She provided links to various policy documents. That Claimant responded saying it was difficult to talk in an open plan office. He expressed concern about the confidentiality of grievance processes.

59. On 19 April 2018 Mr Smith attended the Margate office to conduct an appraisal of Ms Skinner. Ms Skinner informed him that the whole team wanted to speak to him regarding problems within the East Kent Team. The team came into the office and told him that the Claimant had been bullying Ms Skinner by undermining her instructions and authority. Mr Smith told Ms Skinner to gather statements from the team and then pass the matter to HR.

60. On 19 April 2018, Teresa Nicholson, Mr Hewitt, Adam Young and Mark Cubbage, all members of the Claimant's team approached Mr Smith. They complained that the Claimant had been bullying and harassing Ms Skinner. Subsequently, Mr Hewitt, Ms Nicholson, and Mr Young produced statements in which they complained about various aspects of the Claimant's behaviour.

61. The Claimant suggests that his team-mates were coerced into providing complaints about him. In our view this is implausible. It is more likely, we think, that these statements were provided because the Claimant's team-mates had some concerns about his recent conduct. We think it notable that one of the team-mates that produced such a statement was Mr Hewitt who was a longstanding friend of the Claimant's. More generally we think the allegation of coercion is lacking in cogency. Neither Ms Skinner nor Mr Allinson nor Mr Smith appear to have had any leverage over these individuals beyond usual management relationships.

62. On 26 April 2018, the Claimant was called into an interview with Ms Skinner and Mr Allinson. Ms Skinner planned this meeting to challenge the Claimant about his behaviour.

    62.1. No notice was given of the meeting or its content. It was conducted by two senior managers.
    62.2. At the outset, Mr Allinson was styled as a note-taker. However, in fact he asked the Claimant lots of the questions.
    62.3. The Claimant expressed reservations about continuing with the meeting because he had not given notice of it and was not accompanied. However, he was told that it was an informal meeting so he was not entitled to notice.
    62.4. The meeting was not informal at all, indeed at the very outset the Claimant was told that his behaviour was in breach of the DWP's Equality & Diversity Policy and Standards of Behaviour.
    62.5. In reality, the Claimant was ambushed with a range of complaints about his behaviour towards various members of staff particularly Ms Skinner. He was told that it was having a big impact on the team.
    62.6. During the course of the meeting, which lasted 3 – 4 hours, the Claimant became extremely distressed at times.
    62.7. At one stage the Claimant said he felt suicidal in the meeting and he told Ms Skinner and Mr Smith exactly that. Essentially their response was to ask 'are you alright?' and then carry on.

62.8. At another stage of the meeting the Claimant said he could not look at Ms Skinner and Mr Allinson and so he went and faced a wall in a state of deep distress and spoke to them from that position. The meeting continued nonetheless.
62.9. There were some comfort breaks during which the Claimant was left alone.
62.10. We find that the Claimant was *not* told that the team did not want to work with him. These words were not said.

63. At the end of the meeting the Claimant said that he wanted to address the team and give them an explanation for his behaviour. He proceeded to do so and gave a very personal account to the team of his mental health problems which in turn were met with great sympathy from the team.

64. On 15 May 2018, the Claimant drafted a letter of resignation. He set out a number of complaints. By this time he was in touch with Ms Julia Mazzafiore, a Mental Health First Aider and Ms Irene Robertson of the Diversity and Inclusion team. Ms Robertson persuaded the Claimant to speak to June Lilley, HR, prior to executing his resignation.

65. Ms Lilley telephoned the Claimant. They spoke for an hour and a half and she told the Claimant that the Respondent would not accept his resignation at that time. She asked the Claimant to summarise his concerns in writing. She relayed the content of that conversation to Mr Cornish (a very senior manager) by email. It included the following points:

> "*at some point, his LM did ask him to take part in OH referral, which he refused…. If everything is to be believed, we appear to have handled this very badly, including what appears to be a request for reasonable adjustments to work in a quiet room in the building. This was refused by Mr Smith…There appears to be a lack of knowledge in relation to an Employer responsibilities under the Equality Act…I don't need to tell you, how so much of this links back into culture, Well Being and People Survey results."*

66. On 16 May 2018, the Claimant did as Ms Lilley had asked and put his complaints in writing. This was then, unsurprisingly, treated as a grievance. The Claimant wrote this very lengthy email over the course of six hours in a state of very high emotional distress. That is reflected in the content of the email which is not easy to follow in parts. There is a very long narrative that jumps around. It is difficult in places to identify what is mere background and what is a complaint and in some places what is meant. The email does not in terms use the language of discrimination. The matters raised include the following:

66.1. The Claimant's mental health problems began in 2008. He could not eat or drink by day;
66.2. In 2012 he had 12 weeks off because of work related stress and "mild humiliation" at work.
66.3. At a fraud event Mr Smith had said 50% of staff will suffer from mental health problems over the course of their career and said "*that's those nutters over there*";

66.4. Complaint was made about being moved from a dark cool office to one that did not meet the Claimant's needs very well because it was it was too hot;
66.5. An account was given of, and complaint made about, matters relating to the driving ban.
66.6. Complaint was made about the meeting of 26 April 2018.

67. The email culminated with the following:

> *"So where has that left me; I believe it's left me in a position where there is no going back. I do not think I could ever trust these people again, people who are meant to be in a position of responsibility, in a position of trust and are supposed to have care of duty over there in employees… I have included for your attention a copy of my notice on the basis of constructive dismissal breach of implied trust and confidence….*
>
> *Thank you for your time, your caring words and the efforts that you suggested to try and bring this to a successful resolution. But I really cannot see that it would ever work I'm not sure if I need to forward a copy of the letter to my manager directly I assume I should, otherwise she will be aware that I have been trying to seek assistance behind her back (so to speak) exactly as I was blamed for in approaching PW once again thank you and I'm sorry if I have chosen a cowards way out but I cannot continue the fight anymore."*

68. Although the Claimant alluded to resigning in this message, this was not treated either by him or the Respondent as in fact a resignation. Rather, it was treated as a grievance and Ms Debbie Pollard, Counter Fraud Directorate, was appointed to investigate.

69. On 20 May 2018, the Claimant sent a very lengthy email to Ms Lilley. Among other things the Claimant expressed uncertainty and doubt about ever being able to return to his work and referred extensively to constructive dismissal and potentially leaving prior to the grievance investigation concluding. The Claimant said that he did not want to go off sick as it would complicate matters and require an OHS referral. Ms Lilley explained the benefits of an OHS referral to the Claimant. Ms Lilley also said that: "*The attendance management policy/process has a different nuance from 2012 where LM consider the reason why someone is absent and don't apply policy religiously."*

70. On the 22 May 2018, the Claimant emailed Ms Lilley again raising some questions about what would happen if he took sick leave and asking if he would be exempt from the sickness absence trigger points. Ms Lilley replied stating *"The attendance management policy has been amended in that LM do not slavishly follow trigger points any more".*

Claimant commences sick leave and absence management begins

71. The Claimant was signed off sick 29 May 2018 (p298). All of the sick-leave that followed was certified by the Claimant's GP whose advice at all times was that the Claimant was unfit for any work.

72. The management of the Claimant's sickness absence was passed to Ms Cath Kirkpatrick. She was outside of the Claimant's line management chain and independent of the workplace events the Claimant had complained of.

73. On 5 June 2018, Ms Kirkpatrick had a keeping in touch call with the Claimant.

74. On 6 June 2018, the Claimant had a grievance interview with Ms Debbie Pollard. This was a well conducted meeting: it had good structure and Ms Pollard made good use of open questions to illicit information and steer the discussion to new topics. It was a good effort at exploring the matters of apparent importance in the Claimant's grievance.

75. At the outset of the grievance interview, the Claimant handed over a prepared statement. In the statement the Claimant made some references to discrimination albeit that they were somewhat oblique. He seemed to be saying that others had suggested that he had been discriminated against but that it was not really for him to say: *"I would just like to make it clear from the outset, that what you have said ref bullying and harassment, even discrimination maybe true and that is not a decision for me to make."* The Claimant also referred to having recently spoken to ACAS and said: *"ACAS then directed me to the equality and advisory support service, who believe that things may have been dealt with in a manner that discrimination may exist and also to seek legal advice as to where I stand, which I have."*

76. On 13 June 2018, Mr Allinson, Ms Skinner and Mr Smith, were each interviewed by Ms Pollard. The interviews were conducted with some skill. They were well structured and used appropriate questioning techniques to elicit information. Generally they were a good effort at investigating what appeared to be the important points of the Claimant's grievance.

77. On 15 June 2018, Ms Kirkpatrick invited the Claimant to a 28 day absence review meeting at Ramsgate library. That neutral venue was chosen as a reasonable adjustment. The meeting went ahead on 22 June 2018. At this meeting:

    77.1. The Claimant gave written consent for an OH report.
    77.2. Ms Kirkpatrick told the Claimant that Mr Smith had retired and that Mr Elmore had been appointed to his post;
    77.3. The Claimant said he had had a second session of counselling through the Employee Assistance programme. He told Ms Kirkpatrick that he was doing some therapeutic work and it was helping. The Claimant owned an ice-cream kiosk on the sea-front. At the weekend he would go to the kiosk. He did some work there, however, it was extremely sheltered. There would always be another employee working there. The Claimant did serve some customers but he sometimes simply sat on a stool in the background. If he felt uncomfortable with a particular type or group of customers and he would retreat to his stool.
    77.4. There was a discussion of returning to work, but the Claimant implied it depended on the outcome of the grievance process;
    77.5. There was a discussion of reasonable adjustments and the Claimant again implied that matters depended on the outcome of the grievance process. He noted that he had made an application for part-time work, which was

outstanding, although there was no suggestion that he was fit at that time to work part-time.

77.6. A back to work plan was agreed. In very short summary, the plan involved completing the grievance investigation, following medical advice, taking OHS advice and considering different options for returning to work.

78. On 22 June 2018, the outcome letter from the 28 day absence review meeting recorded that the Claimant's absence continued to be supported by the department.

79. On 4 July 2018, OH produced a report. The advisor was Ms Samantha Jones, BSc, Dip Hyp CS, Dip PC, Ad Dip PC:

79.1. It is plain form the report that the advisor took a history from the Claimant;
79.2. The advisor reported that the Claimant was experiencing severe symptoms of anxiety and depression;
79.3. At that time the advisor was unable to suggest any adjustments that would facilitate the Claimant's return to work or to give a timescale for return.

80. On 23 July 2018, Ms Kirkpatrick conducted a further absence review meeting with the Claimant at Ramsgate library:

80.1. The Claimant reported concerning symptoms of ill-health including, short-term memory loss, paranoia, and hiding away. He no longer felt confident to go shopping on his own.
80.2. He continued however with his therapeutic work that he found helpful;
80.3. He stated that he was concerned about returning to work and whether he would fit back into the team, and concerned that no one from work had made contact with him leaving him feeling isolated.

81. In an outcome letter dated 26 July 2018, Ms Kirkpatrick confirmed that the Claimant's absence continued to be supported.

82. On a date that is not entirely clear, but is likely to be on or around 10 August 2018 the Claimant was sent the outcome of his grievance. It is unclear whether or not there was a grievance outcome letter as such, but what the Claimant was sent was three reports that dealt respectively with Ms Skinner, Mr Allinson and Mr Smith.

83. In summary the investigation:

83.1. Found that Mr Smith did not make the '*nutters'* comment. He denied it, and Ms Skinner and Mr Allinson could not recollect it when interviewed. The conference evaluation form had been searched for but could not be found.
83.2. Found that Mr Smith had not tried to negatively influence the Claimant's end of year appraisal.
83.3. Criticised Mr Smith for moving the Claimant out of his office in Margate and into a less suitable room and found this amounted to a failure to make adjustments;
83.4. Criticised Ms Skinner, Mr Allinson and Mr Smith in relation to the driving ban. The basis of the criticism included, that Ms Skinner had not clarified

the duration of the driving ban; had not based the decision on medical advice; had not put the decision in writing in a clear way; had not given a right of appeal; had been told by HR that the Claimant could not be banned from using his own car but nonetheless banned him; and did not tell the Claimant about the HR advice.

83.5. Criticised Ms Skinner and Mr Allinson in relation to the conduct of the meeting of 26 April 2018. The basis of the criticism included: the meeting had not been on notice; it had been unacceptably long; there had been a failure to respond appropriately to the level of distress the Claimant showed at the meeting; Mr Allinson's role had been misdescribed, he was not a mere notetaker; the meeting had been misdescribed as informal when it was anything but; and altogether these behaviours amounted to bullying.

83.6. Found that the facts of a complaint the Claimant had raised in relation to working from Brighton one day were broadly true but that there was nothing significant in the complaint;

83.7. Found that Mr Smith had not, contrary to the Claimant's allegation, discussed a member of staff's grievance in an open office.

84. In her conclusion, Ms Pollard stated that the driving ban had been well intentioned but poorly managed. She did not consider it to be bullying, harassment or discrimination. She stated that the conduct of the meeting of 26 April 2018 could be considered as an instance of bullying and had been intimidating and humiliating. However, she found that this was a single, misjudged episode and that there was no evidence of ongoing harassment or discrimination.

85. The Claimant was never advised he had a right of appeal against the grievance outcomes.

86. Disciplinary cases were brought against Ms Skinner and Mr Allinson (Mr Smith had retired). Both concluded that there was no case to answer. However, it is unclear why that conclusion was reached or on what basis. Few of the documents relating to those processes are before the tribunal and the Respondent has not otherwise explained the basis of the decisions.

87. On 15 August 2018, Ms Kirkpatrick emailed the Claimant asking for a chat now that he had received the grievance outcome. On 16 August 2018, they met for a discussion at Ramsgate library. At the meeting there was a discussion of return to work options:

87.1. The Claimant stated that he did not consider working at Margate to be viable, he had no confidence in the Higher Executive Officer there;

87.2. The Claimant rejected the suggestion of doing his existing role but from the Ramsgate office.

87.3. The Claimant rejected the suggestion of working in a new Interventions role to do Decision Making from the Ramsgate office. The Claimant said he knew some people in that office and did not want to move there. The Claimant also said he did not want to change his role because he loved the work he did;

87.4. The Claimant rejected a suggestion of working in the same role but in new team at the Folkstone Office. He rejected doing that work either from the Folkstone Office itself or from the Ramsgate office. He said the journey was not good especially in bad weather. Ms Kirkpatrick said he could work from the Ramsgate office.

87.5. The Claimant then referred to constructive dismissal and alluded to being dismissed with 100% compensation.

88. In his oral evidence the Claimant suggested that at this meeting he had raised the possibility of being deployed to an Appeals Officer role. An Appeals Officer, he explained, carries out an internal review of benefit decisions and also attends First Tier Tribunal, Social Security Chamber, hearings as presenting officer. In our view the Claimant is mistaken here. He had *historically* applied to be an Appeals Officer as referred to in his grievance of May 2018 (p278). However, this was prior to his sick-leave and in our finding he did not raise the matter again after his sick-leave had commenced. If he had, we are sure that Ms Kirkpatrick would have recorded the matter in her notes. Indeed she would have been very keen to progress any interest the Claimant showed in any form of alternative employment that might have returned him to work.

89. After the meeting Ms Kirkpatrick spoke to Mr Chenery, Home Counties Area Leader, feeding back the Claimant's thoughts. He suggested that the Claimant be part of the Sittingbourne and Sheerness team with the option of working from Ramsgate. Ms Kirkpatrick put this option to the Claimant by email on 20 August 2018 519.

90. On 24 August 2018, the Claimant had a further absence review meeting with Ms Kirkpatrick at the Ramsgate library.

90.1. At the meeting he handed Ms Kirkpatrick a lengthy letter in which he complained about the outcome of his grievance. He complained both about some of the findings of fact and some of the conclusions. It is a letter of appeal although it does not use the word appeal.

90.2. At the meeting the Claimant said that he did not consider any of the options he had been given to be viable. He said he did not see a future in the department.

90.3. He told Ms Kirkpatrick that his health had declined.

91. On 31 August 2018, the Claimant emailed Ms Kirkpatrick and reported that he had witnessed the immediate aftermath of a man jumping off the cliff top near his ice-cream kiosk. He also reported that he had seen a colleague on the sea front who had blanked him.

92. On 5 September 2018, Ms Kirkpatrick wrote to the Claimant with the outcome of the August 2018 review meeting indicating that his absence continued to be supported.

93. On 6 September 2018, Ms Kirkpatrick emailed that Claimant's de facto letter of appeal against the grievance outcome to Mr Chenery and to an HR officer.

94. On 7 September 2018, Ms Kirkpatrick had a call with OH who advised her to re-refer the Claimant. 538

95. On 18 September 2018, OH (Ms Jones) produced a further report:

95.1. The Claimant had a lack of trust in his department and felt he would have to move out of the directorate to avoid contact with previous management;
95.2. He was experiencing severe depression and anxiety;
95.3. he was not fit for work;
95.4. no modifications could be identified that would expedite his recovery;
95.5. the Claimant had had six counselling sessions and remained under the care of his GP.

96. On 8 October 2018 the Claimant had his 4 month review there was a discussion of return to work options:

96.1. The Claimant ruled out returning to Margate even with a guarantee of a different line manager.
96.2. The Claimant did not accept the suggestion of moving to a different team within Kent, continuing with the work he currently did. He was offered, Folkestone, Sittingbourne and Sheerness. He said that the additional travel would not be acceptable.;
96.3. The Claimant refused the option of working from Ramsgate whether the Margate, Folkestone or Sittingbourne offices on the basis that he would need to pair with colleagues for some interviews. He also declined an offer to move to Interventions in Ramsgate.
96.4. The Claimant was asked what he wanted to do, in the context of getting back to work and he said he did not know. He also said "*sack me and give me my life back*". He said he did not see a way forward unless they "*stand up and admit what they have done*".
96.5. The Claimant was told that he could have a phased return to work. He responded that he felt hated by the team at Margate.

97. At the meeting the Claimant was also given some information about a restructure and who had taken what role.

98. On 16 October 2018, Ms Kirkpatrick sent the Claimant an outcome letter from the meeting of 8 October 2018. It stated that his absence continued to be supported.

99. On 24 October 2018, Ms Kirkpatrick wrote to the Claimant, notifying him that his sick pay would reduce to half pay on 23 November 2018.

100. On 30 October 2018, the Claimant had a five month review:

100.1. The Claimant was issued with a letter stating his pay would reduce to half.
100.2. The Claimant reported that he had been referred to *The Beacon* and that he was awaiting a case conference with a psychiatrist the following day. He had also been referred for further counselling;
100.3. The Claimant reported paranoia;

100.4. The Claimant was asked what his ideal scenario job would be. He did not really answer that question but said he had lost trust in people. He was asked what would help him get back to work and he referred to medical treatment. He was asked if, hypothetically, Ms Skinner and Mr Allinson were not in Margate, how he would feel about going back there. He said that they would have to be out of the organisation altogether because they influenced others. The return to work options previously discussed were raised again and the Claimant did not want any of them.

100.5. There was a discussion of sick pay, and it reducing to 50%. The Claimant raised the issue of Injury Benefit, and Ms Kirkpatrick said she did not know how to claim it but would look into it.

100.6. The Claimant reported that he could only cook when his wife was home for fear of leaving the cooker on. He said that he would not open the door even to take parcels and that he would not go out on his own.

101. On or around 5 November 2018, the Claimant had an initial assessment with the Community Mental Health Team. The assessment was with a registered mental health nurse. The report records the Claimant's history and symptoms but give no diagnosis or opinion.

102. On 5 November 2018, Ms Kirkpatrick had a call with OH. The advise was that a referral be made to a decision maker.

103. On 6 November 2018, Ms Kirkpatrick wrote to the Claimant with the outcome from the preceding return to work meeting. She enclosed guidance and an application form for Injury Benefit. She also enclosed an application for ill-health retirement stating "*should you decide to apply for it*." She asked the Claimant to let her know and to return the paperwork if he wished to apply for either injury benefit or ill health retirement. She stated that the department would continue to support the sickness absence.

104. On 6 November 2018, Ms Kirkpatrick wrote to the Claimant by email advising him to expect a letter by post and explaining it was nothing to worry about. She offered him the chance to meet Don Elmore for a mid-year review if he wanted and advised that the Claimant was going to be given a '2' which is 'good'.

105. On 9 November 2018, Mrs Foat emailed Ms Kirkpatrick and asked her some questions about ill-health retirement and other matters. She also said "*The other option that has been previously mentioned, is dismissal on absence to which I assume is a terminated contract and it said 18 months full Salary as a settlement. I believe then normal pension as and when*." Ms Kirkpatrick responded that she could not answer those queries but explained that Civil Service Pension Scheme may be able to. She also explained that injury benefit and ill health retirement had to be considered prior to a referral to a decision maker to consider capability dismissal.

106. On 9 November 2018, Ms Kirkpatrick had an email exchange with an HRBP. In it she said:

Ideally both Management and Darron would like the case to go to the Decision Maker, but the guidance says I have to ask whether he has considered Ill-Health

retirement. I have given him until 21 November to inform me of his intentions. If he decides not to pursue this or the Injury Benefit claim, then I will refer to the OM as soon as possible. From conversation, Darron wants this to be complete as soon as possible, but it will only be passed back to me as not asking the questions, so I have to follow this guidance.

107. The Claimant's pay reduced to half-pay on 23 November 2018 (c:76).

108. On or around 29 November 2018, the Claimant completed the injury benefit form and passed it to Ms Kirkpatrick.

109. Also on 29 November 2018, Ms Kirkpatrick said in an email to an HR officer, that she had the Claimant's 6 month review meeting coming up and that she would not support the absence further. However, the matter could not be referred to a decision maker until the claim for Injury Benefit was decided.

110. On 26 November 2018, Ms Kirkpatrick invited the Claimant to a 6 month absence review meeting to take place on 4 December 2018. The meeting took place on 4 December 2018. In summary:

110.1. The Claimant was distraught at this meeting and explained that his medications had been adjusted;
110.2. There was a discussion of Injury Benefit and Ms Kirkpatrick advised that she needed a personal statement from the Claimant describing the reasons for the injury. The Claimant said he would use his grievance letter;
110.3. There was a discussion of ill-health retirement. It culminated in Ms Kirkpatrick advising the Claimant that if he wanted an estimate he would need to obtain it from the pension scheme provider.

111. On 7 December 2018, Ms Kirkpatrick wrote to the Claimant with the outcome letter. She gave the Claimant further information on how to obtain and an ill-health retirement pension estimate. On 7 December 2018, the Injury Benefit claim was made.

112. On 20 December 2018, Ms Kirkpatrick invited the Claimant to a 7 month absence meeting on 4 January 2019.

113. On 21 December 2018, Ms Kirkpatrick had a further call with OH. The advisor said that as the Claimant remained unfit for work for the foreseeable future, if the Respondent could not accommodate his sickness absence she would recommend consideration for ill-health retirement.

114. Over the course of December 2018, Ms Kirkpatrick worked with Mrs Foat to try and get an ill-health retirement pension calculation. However, there were complications in getting the calculation.

115. On 21 December 2018, Mrs Foat wrote to Ms Kirkpatrick. Among other things:

115.1. She said: "*I do not think he will ever be able to return to the role he loved or anything similar to what was his life and his health is still in decline, as I mentioned he broke down at the doctors yesterday."*
115.2. She noted that loss of post compensation, which she had previously understood to be 18 months pay, would in fact by more like 59 weeks.
115.3. She referred to a discussions with ACAS and potential breaches of the Disability Discrimination Act.

116. On 27 December 2018, Civil Service Pensions wrote to the Claimant and indicated that further information was needed in support of his application for Injury Benefit.

117. On 4 January 2019, the Claimant had a further absence review meeting with Ms Kirkpatrick:

117.1. There was discussion of the Claimant's medications and the fact he was continuing to receive counselling.
117.2. The Claimant said he felt unsupported save by Ms Kirkpatrick.
117.3. The Claimant was reminded of the return to work options previously discussed but it was acknowledged that his health precluded them and that OH supported ill-health retirement.
117.4. The Claimant said that if he was dismissed he would go to the employment tribunal.
117.5. The Claimant said he was considering writing to Mr Cornish with an offer to put an end to all this.
117.6. The Claimant explained that he cried all the time and that his medication had been increased.
117.7. The Claimant also referred to having looked up Civil Service Pension Scheme payments in the event of death, with the implication that he was considering killing himself. Ms Kirkpatrick advised the Claimant to speak to his GP and again to the Employee Assistance programme.

118. On 7 January 2019, Ms Kirkpatrick re-submitted the application for Injury Benefit providing the additional information requested.

119. On 9 January 2019, Ms Kirkpatrick sent the Claimant the outcome of the absence management meeting. She stated that the absence continued to be supported.

120. Ms Kirkpatrick was concerned by the implied reference to suicide at the meeting of 4 January 2019 and took some HR advice about it for reassurance she was doing the right thing. She spoke to Margaret Fuller, Senior Operations Manager, about how demanding the Claimant's case had become. Ms Fuller then wrote to Ms Julie Wiggins, Home Counties Senior Operational Leader, asking for the management of the Claimant's case to be taken back into his usual reporting line.

121. On 4 February 2019, Ms Kirkpatrick handed the management of the Claimant absence over to Ms Beaddie.

122. In anticipation of the handover, Ms Beaddie telephoned the Claimant towards the end of January 2019 for an introductory call. The call did not go well at all. The Claimant was extremely emotional and in tears. Ms Beaddie thought that he kept going off track and there was a discussion of ill-health retirement. Ms Beaddie told the Claimant that there would be a formal absence review meeting which she would conduct over the telephone with a notetaker.

123. On 8 February 2019, Ms Beaddie telephoned the Claimant for the absence review meeting. There is a transcript of the meeting in the bundle and it shows that the call was not well managed;

123.1. There was a lack of a proper introduction to the call.
123.2. It became clear that the Claimant had somebody with him, and it was a friend of his.
123.3. The friend was angry. She wanted to read out a statement and said that she wanted to do so without slowing for a notetaker. She also asked for permission to record the meeting but Ms Beaddie declined. The friend said that she was going terminate the call, although she in fact continued speaking.
123.4. The friend referred to a letter from solicitors to the Respondent that apparently had alleged breaches of the Equality Act 2010. Ms Beaddie tried to respond but was interrupted by the friend.
123.5. The call ended in acrimony.

124. On 18 February 2019, Ms Beaddie wrote to the Claimant with the outcome of the meeting. She stated that the Respondent continued to support the Claimant's sickness absence (p772).

125. Also on 18 February 2019, Ms Beaddie wrote another letter to the Claimant. In it she:

125.1. required him to make a decision on whether he wished to pursue ill-health retirement or not within two weeks;
125.2. noted that further medical information was required from OH to support the injury benefit application;
125.3. indicated that a further OH referral would be made to provide advice in relation to returning to work;
125.4. advised that at some stage the Claimant's case may be passed to a decision maker to decide if his employment should terminated and if so whether to pay compensation.

126. Ms Beaddie told the Claimant they needed to have a further absence review meeting. She told him she was not prepared to meet in Ramsgate library and offered to meet in the Ramsgate, Ashford or Stevenage offices.

127. The Claimant asked for the meeting to be held in the Romford office and to be accompanied by a colleague. This is where the meeting then took place on 26 March 2019 starting at 11 am. The Claimant was accompanied by Ms Evleigh:

127.1. The Claimant was extremely unwell. He complained that the timing of the meeting at 11am had made matters very difficult with his medication. However, he had specifically asked for the meeting to be late morning or early afternoon and we agree with Ms Beaddie that 11am is indeed late morning.

127.2. The Claimant explained that the application for injury benefit was still under consideration and that it had been sent for further medical advice.

127.3. Ms Beaddie went through the return to work plan and in that context asked about the ice-cream kiosk. The Claimant had not worked there since the preceding August 2018. He explained that "*most of the time I would sit in the chair and Sophie the girl who was employed did 90% of the work and she just sort of pacified me*."

127.4. The Claimant reported that today was the first day he had been out of the house for 13 days and that everything scared him. He felt everyone was out to hurt him. The Claimant said his health was declining;

127.5. The Claimant spoke at considerable length, at times off-topic;

127.6. Ms Beaddie did not want to go into the detail of the matters that been the subject of the Claimant's grievance;

127.7. Ms Beaddie invited a discussion of the back to work plan and asked if the Claimant wanted to add anything to it. He said: *"I would like to know when the solicitor's department are going to make a decision as to whether or not they want to bring this process which is making me ill to bring this process to an end in a nice discrete gentlemanly way as oppose to what appears to be me being pushed out for me being the innocent party."*

127.8. The Claimant said that matters were out of his hands and the subject of litigation.

127.9. Ms Beaddie referred to the fact that the Claimant had been given a variety of return to work options. She indicated that based on the discussion she did not think it was worth going through them. The Claimant initially said he wanted to, but then agreed with Ms Beaddie that it was not necessary. The context of this passage of conversation is that the Claimant had made it very clear already that returning to work with the Respondent was not viable or of interest.

127.10. Ms Beaddie told the Claimant that people could return to work part-time on medical grounds.

127.11. Ms Beaddie asked an open question as to whether there was anything that could be done to support the Claimant and assist with a return to work. She stated that she hoped OH might make some suggestions. The Claimant responded that he did not think he would be wanted back at work. Ms Beaddie asked the Claimant if he was contemplating a return to work at any time in the future and he said he was not well enough to make a sound judgment. Ms Beaddie said there was no point going over the various locations that the Claimant might work from because he was saying he was too poorly to return to work. We agree that was a broadly fair analysis of what he was saying.

127.12. Ms Eveleigh asked whether there would be compensation in the event of termination of the Claimant's contract. Ms Beaddie said that she could not say and did not want to raise hopes although it was in principle possible.

127.13. The Claimant referred to wanting to know 'when to litigate'.

127.14. At the meeting the Claimant spoke at great length at times. He was somewhat combative. He also discussed just how unwell he was and had been. He gave an example that over Christmas the chip pan had caught fire and instead of dealing with it, he sat there and filmed it until the smoke alarms went off and his wife came downstairs.

128. On 7 April 2019, a further OH advice was obtained (Chis Valentine, Medical doctor);

128.1. In the introductory paragraph the advisor gave a summary of the Claimant's role. Ms Mallick was critical of this because it omitted to describe administrative work. However, as above, in our view the Claimant's role was not primarily an administrative role and the summary of the role is acceptable and broadly accurate. That we find reflects the fact that the Claimant described the role to the advisor.

128.2. The Claimant described being too scared to leave the house most days. He did not answer the phone unless he knew who was calling.

128.3. The OH advisor recorded that the Claimant was on an "*impressive panoply of medication for anxiety and depression*".

128.4. The Claimant told the OH advisor that he was upset that Ms Beaddie had revoked the practice of meeting at a neutral venue;

128.5. The Claimant said he had been offered re-deployment within the DWP but felt this would not be acceptable as it would involve working with colleagues with whom he had been in dispute. He would not be prepared to commute further if relocated. He told the OH advisor that he did not feel safe to return to work and that he was scared of everybody and everything. He said he had no plans to return to work and could not suggest what his employers could do to facilitate and support a return to work.

128.6. The OH advisor said that the Claimant's strength of feeling and antipathy toward work was a clearly a major barrier to his return and that he was not sure how effective a rapprochement would be.

128.7. There was possible scope for improvement in the Claimant's symptoms but it might be limited and inhibited by the degree of resentment directed to the employer.

128.8. The advisor went on:

> *This employee's views have become profoundly entrenched and there is a degree of embitterment which are acting as barriers to his returning to work. Management may like to consider how they could facilitate a rapprochement and restoration of good relationships between the parties which may ease the employee's return to the workplace. Unless these hostilities and misunderstandings can be resolved the prospects for a successful and sustained return to the workplace are not good.*
>
> *Given the strength of feeling displayed and the apparent distance between the parties I am extremely doubtful this divide can be crossed and I suspect the prospects for a successful and sustained return to work are limited.*
>
> *He described a fraught relationship with his new manager whom he perceives as not being sympathetic. Whereas his previous managers had*

agreed to his meeting on neutral territory, he maintains this accommodation was withdrawn and that he has been pressurised into meetings he has found intimidating and that these have not taken his disabilities into consideration.

[The Respondent] "may further wish to make accommodations regarding meeting with him to ease his anxiety. He has expressed a desire that this be on a neutral site. Whether they are able to facilitate this is for them to determine."

129. On 12 April 2019, Ms Beaddie wrote to the Claimant and indicated that he was due an 11 month review at the end of April, but because of her leave she could not accommodate that. She therefore said she would arrange a meeting towards the end of May 2019. The Claimant responded, asking for the meeting to be in the week commencing 28 May 2019.

130. On 25 April 2019, the Respondent wrote to the Claimant notifying him that his sick pay would reduce to nil from 25 May 2019.

131. On 2 May 2019, Ms Beaddie wrote to Claimant and invited him to a meeting on 23 May 2019 at the Ramsgate Job Centre. The letter contained a standard paragraph that stated: *"If you need me to make any special arrangements or if you have any special accommodation needs to enable you to attend the meeting, please let me know as soon as possible".*

132. As regards the location of the meeting, we do not accept that this was anything other than mere wording. Ms Beaddie had already made clear to the Claimant that the meeting would have to take place in the Respondent's offices. She maintained that view, notwithstanding the OH advice that the Claimant would find it helpful for the meeting to be at a neutral venue. Ms Beaddie also indicated in her witness statement that it had been internally decided that the meeting would be in one of the Respondent's offices.

133. In her oral evidence, Ms Beaddie she said that she was not prepared to meet the Claimant at a neutral venue because of her experience with the Claimant's friend at the telephone meeting in February 2019. She had looked the friend up online and found that she had some profile in consumer rights. Ms Beaddie was concerned that the Claimant might invite the press and that there might be cameras if she met him at a neutral venue. She was also concerned about her safety.

134. While we accept that these were Ms Beaddie thoughts and feelings, we do not accept that they were objectively reasonable:

134.1. Nothing the friend had done at the meeting of February 2019 had given any basis for a concern about personal safety;

134.2. There was no reason to think that that the Claimant would invite press or that there would be cameras. It is not something that, so far as the evidence we have been taken to shows, the Claimant ever threatened or implied.

135. In around late April or early May 2019, but before the Claimant resigned, he received the outcome of his application for injury benefit. The outcome letter is not before us. However, doing our best, it appears, and we find, that the application was rejected on the basis that the Claimant had a pre-existing condition. The detail of the decision is not before us and it is not clear what pre-existing condition is in issue or whether that was a sound basis for refusing the application.

136. The Claimant resigned on notice on 3 May 2019 to take effect on 2 June 2019. His resignation letter was lengthy and very detailed.

137. Ms Lilley responded to the Claimant's resignation attempting a rebuttal of the points he had raised. In parts her response was, based on the evidence we have, factually inaccurate:

137.1. She said that the Claimant had been given the option to mediate the allegations of bullying and discrimination but had declined. He had not been given that option;
137.2. She told the Claimant that he had been notified of his right to appeal and the identity of the appeal manager. That is wrong on both counts and when the Claimant gave Ms Kirkpatrick a letter challenging the grievance outcome, it was not progressed as an appeal or seemingly at all.

Fraud surveillance

138. The Claimant made a variety of FOI and DSARs on dates that are not in evidence. One of the responses revealed that over the course of July 2018, the Claimant had been seen by colleagues working in the ice-cream kiosk. This was reported and for a time was dealt with as a potential fraud issue on the basis that the Claimant was working at the kiosk whilst on sick-leave and sick-pay. The log of events shows that the matter was rapidly escalated and once it became clear that the Claimant had permission to carry out this 'work' for therapeutic reasons no further action was taken.

Law

Direct discrimination

139. Section 13 EqA provides: *"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."*

140. Section 23 EqA provides:

(1) On a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to each case.
(2) The circumstances relating to a case include each person's abilities if – on a comparison for the purposes of section 13, the protected characteristic is disability…

141. In ***Nagarajan v London Regional Transport*** [1999] IRLR 572, the House of Lords held that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case is, '*why the complainant received less favourable treatment…Was it on the grounds of [the protected characteristic]? Or was it for some other reason..?*'.

142. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] ICR 337 at [11-12], Lord Nicholls:

> *'[…] employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.*
>
> *The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant […]'*

143. Since ***Shamoon***, the appellate courts have broadly encouraged Tribunals to address both stages of the statutory test by considering the single 'reason why' question: was it on the proscribed ground, or was it for some other reason? Underhill J summarised this line of authority in ***Martin v Devonshire's Solicitors*** [2011] ICR 352 at [30]:

> *'Elias J (President) in Islington London Borough Council v Ladele (Liberty intervening) [2009] ICR 387 developed this point, describing the purpose of considering the hypothetical or actual treatment of comparators as essentially evidential, and indeed doubting the value of the exercise for that purpose in most cases-see at paras 35–37. Other cases in this Tribunal have repeated these messages- see, e.g., D'Silva v NATFHE [2008] IRLR 412, para 30 and City of Edinburgh v Dickson (unreported), 2 December 2009 , para 37; though there seems so far to have been little impact on the hold that "the hypothetical comparator" appears to have on the imaginations of practitioners and Tribunals.'*

144. Where an employer makes inaccurate assumptions about mental illness that are not based on up to date medical evidence, but for instance upon stereotypes about mental illness, that is a matter that may infer directly discriminatory treatment: ***Aylott v Stockton on Tees*** **[2010] IRLR 994.**

145. In ***Owen v Amec Foster Wheeler Energy Ltd*** **[2019] ICR 1593** the Court of Appeal gave important guidance on direct discrimination in the particular context

of disability. Mr Owen had multiple health issues and was denied an overseas posting because medical concerns were raised in an occupational health assessment. Mr Owen argued that the reason the employer did not allow him to be posted overseas was the outcome of his medical assessment and that this was indissociable from his disabilities. He argued that, regardless of any benign motive that Amec may have had, there was a necessary and inherent link between the reason Amec made the decision and his disabilities. The Court of Appeal rejected this argument – the hypothetical comparator was a person who was not disabled but who was also deemed to be a high medical risk. That person would have been treated in exactly the same way.

146. The appeal considered the concept of indissociably and the case-law jurisprudence around that in the context of direct discrimination. That culminated with the following conclusion:

> *78. I would also accept the submission made by Ms Sen Gupta that, unlike racial or sex discrimination, the concept of disability is not a simple binary one. It is also not the case that a person's health is always entirely irrelevant to their ability to do a job. For those reasons the concept of indissociability, which forms the foundation of much of Ms Genn's submissions, cannot readily be translated to the context of disability discrimination.*

Reasonable adjustments

147. Section 20(3) EQA 2010 provides:

> *"…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, [there is a requirement] to take such steps as it is reasonable to have to take to avoid the disadvantage."*

148. "*Substantial*" is defined at section 212(1) EQA 2010 to mean "*more than minor or trivial*".

149. An employer is not under a duty to make reasonable adjustments unless it knows or ought to know the employee has a disability and is likely to be placed at the substantial disadvantage in question (per paragraph 20(1) Schedule 8, EA 2010).

150. The *Code of Practice on Employment* gives useful guidance on knowledge particularly at paragraph 5.15 and 6.19 which emphases that employers must do all they can reasonably be expected to do to find out.

151. The relevant case law was summarised by HHJ Eady QC (as she then was) in *A Ltd v Z* [2020] ICR 199 EAT at [23]. Although this guidance was given in the context of s15 EQA, it can be read across to the s20 context:

152. General guidance as to the overall approach to reasonable adjustments was given in ***Environment Agency v Rowan*** [2008] ICR 218:

152.1. The PCP must be identified;

152.2. The identity of the non-disabled comparators must be identified (where appropriate);
152.3. The nature and extent of the substantial disadvantage suffered by C must be identified;
152.4. The reasonableness of the adjustment claimed must be analysed.

153. In ***Ishola v Transport for London*** **[2020] IRLR 368** the Court of Appeal gave guidance on 'PCPs' as follows:

35 The words 'provision, criterion or practice' are not terms of art, but are ordinary English words. I accept that they are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application. I also bear in mind the statement in the Statutory Code of Practice that the phrase PCP should be construed widely. However, it is significant that Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words 'act' or 'decision' in addition or instead. As a matter of ordinary language, I find it difficult to see what the word 'practice' adds to the words if all one-off decisions and acts necessarily qualify as PCPs, as Mr Jones submits. Mr Jones' response that practice just means 'done in practice' begs the question and provides no satisfactory answer. If something is simply done once without more, it is difficult to see on what basis it can be said to be 'done in practice'. It is just done; and the words 'in practice' add nothing.

36 The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. The PCP serves a similar function in the context of indirect discrimination, where particular disadvantage is suffered by some and not others because of an employer's PCP. In both cases, the act of discrimination that must be justified is not the disadvantage which a Claimant suffers (or adopting Mr Jones' approach, the effect or impact) but the practice, process, rule (or other PCP) under, by or in consequence of which the disadvantageous act is done. To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. I accept of course (as Mr Jones submits) that the comparator can be a hypothetical comparator to whom the alleged PCP could or would apply.

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

38 In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that 'practice' here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one.

39 In that sense, the one-off decision treated as a PCP in Starmer *is readily understandable as a decision that would have been applied in future to similarly situated employees. However, in the case of a one-off decision in an individual case where there is nothing to indicate that the decision would apply in future, it seems to me the position is different. It is in that sense that Langstaff J referred to 'practice' as having something of the element of repetition about it. In the* Nottingham *case in contrast to* Starmer*, the PCP relied on was the application of the employer's disciplinary process as applied and (no doubt wrongly) understood by a particular individual; and in particular his failure to address issues that might have exonerated the employee or give credence to mitigating factors. There was nothing to suggest the employer made a practice of holding disciplinary hearings in that unfair way. This was a one-off application of the disciplinary process to an individual's case and by inference, there was nothing to indicate that a hypothetical comparator would (in future) be treated in the same wrong and unfair way.*

154. The reasonableness of an adjustment falls to be assessed objectively by the Tribunal (***Morse v Wiltshire County Council*** [1998] IRLR 352).

155. There is no requirement for there to be a good or a real prospect of an adjustment removing or mitigating the substantial disadvantage before it can be held to be one that the Respondent ought reasonably to have made. An adjustment may be a reasonable one to make even if there is merely *a prospect* of it removing or mitigating the substantial disadvantage (***Leeds Teaching Hospital NHS Trust v Foster***, unreported EAT UKEAT/0552/10/JOJ).

156. In ***O'Hanlon v Revenue and Customs Comrs*** [2007] ICR 1359 the Court of Appeal essentially endorsed the decision of the EAT in that litigation including the following paragraphs from the EAT's decision:

64.It was suggested that the Claimant would suffer hardship as a result of the reduction in pay, but it was not alleged that she was in any essentially different position to others who were absent because of disability related sickness … it seems to us that it would be wholly invidious for an employer to have to determine whether to increase sick payments by assessing the financial hardship suffered by the employee, or the stress resulting from lack of money-stress which no doubt would be equally felt by a non-disabled person absent for a similar period….

67. In our view, it will be a very rare case indeed where the adjustment said to be applicable here, that is merely giving higher sick pay than would be payable to a non-disabled person who in general does not suffer the same disability related absences, would be considered necessary as a reasonable adjustment. We do not believe that the legislation has perceived this as an appropriate adjustment, although we do not rule out the possibility that it could be in exceptional circumstances. We say this for two reasons in particular.

68. First, the implications of this argument are that tribunals would have to usurp the management function of the employer, deciding whether employers were financially able to meet the costs of modifying their policies by making these enhanced payments. Of course we recognise that tribunals will often have to have regard to financial factors and the financial standing of the employer, and indeed section 18B(1) requires that they should. But there is a very significant difference between doing that with regard to a single claim, turning on its own facts, where the cost is perforce relatively limited, and a claim which if successful will inevitably apply to many others and will have very significant financial as well as policy implications for the employer. On what basis can the tribunal decide whether the claims of the disabled to receive more generous sick pay should override other demands on the business which are difficult to compare and which perforce the tribunal will know precious little about? The tribunals would be entering into a form of wage fixing for the disabled sick.

69. Second, as the tribunal pointed out, the purpose of this legislation is to assist the disabled to obtain employment and to integrate them into the workforce. All the examples given in section 18B(3) are of this nature. True, they are stated to be examples of reasonable adjustments only and are not to be taken as exhaustive of what might be reasonable in any particular case, but none of them suggests that it will ever be necessary simply to put more money into the wage packet of the disabled. The Act is designed to recognise the dignity of the disabled and to require modifications which will enable them to play a full part in the world of work, important and laudable aims. It is not to treat them as objects of charity which, as the tribunal pointed out, may in fact sometimes and for some people tend to act as a positive disincentive to return to work.

157. ***O'Hanlon****,* on any view, is a significant case. One of the reasons for its significance is it's consideration of the prior case of ***Meikle v Nottinghamshire County Council*** [2004] IRLR 703. The EAT in O'Hanlon discussed *Meikle* at paragraphs 70 – 75. The essence of it's reasoning is captured at paragraph 74:

74. It is important to note, however, that the Court [in Meikle] did not find that the payment of full pay was a reasonable adjustment independently of the other specific adjustments which ought to have been made and would have resulted in the employee returning to work without having to take such lengthy absences. It was never suggested that the adjustment lay simply in granting full pay. Liability arose because of the failure to make reasonable adjustments to accommodate her back into the classroom. This had the knock-on effect of rendering the failure to give her full pay unjustified. Admittedly there was no express finding that the case could not have been put in that way, but it was not even suggested that this might have been a more straightforward route.

158. We remind ourselves that the statutory provisions that govern disability discrimination law have changed since ***Meikle*** and ***O'Hanlon*** were decided. However, in our view the principles decided in those cases remain good law.

159. In ***Tarbuck v Sainsbury's Supermarkets*** [2006] IRLR 664**,** the EAT held that the duty to make adjustments does not extend to matters such as consultations or assessments and declined to follow ***Mid-Staffordshire General Hospital NHS Trust v Cambridge*** [2003] IRLR 566. The only question is whether the employer has *substantively* complied with its obligations or not. ***Tarbuck*** has been repeatedly followed since and correctly states the law.

Discrimination arising from disability

160. Section 15 EQA 2010 provides as follows:

(1) A person (A) discriminates against a disabled person (B) if –
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

161. In ***Pnaiser v NHS England*** [2016] IRLR 170 the EAT gave the following guidance:

(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her skeleton).
(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where

the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in Land Registry v Houghton UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

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

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in s.15(2) so that there must be, as she put it, "discriminatory motivation" and the alleged discriminator must know that the "something" that causes the treatment arises in consequence of disability. She relied on paragraphs 26–34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the "because of" stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the "something arising in consequence" stage involving consideration of whether (as a matter of fact rather than belief) the "something" was a consequence of the disability.

(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the "something" leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

162. As to what is unfavourable treatment, see the Equality and Human Rights Commission Code of Practice gives the following guidance: *"For discrimination arising from disability to occur, a disabled person must have been treated 'unfavourably'. This means that he or she must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably."*

163. The Code does not replace the statutory words but gives helpful guidance and an indication of the relatively low threshold sufficient to trigger the requirement for

justification: ***Trustees of Swansea Assurance Scheme v Williams*** [2019] ICR 230 (per Lord Carnwath at para 27).

164. As to the requirement for knowledge of disability on the part of the employer, there need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment: ***City of York Council v Grosset*** [2018] IRLR 746, Court of Appeal.

165. In ***MacCulloch v ICI*** [2008] IRLR 846, Elias J (as he then was) set out four legal principles with regard to justification, which have since been approved by the Court of Appeal in ***Lockwood v DWP*** [2014] ICR 1257:

> *(1) The burden of proof is on the respondent to establish justification….*
> *(2) The classic test was set out in **Bilka-Kaufhaus GmbH v Weber Von Hartz** (case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (paragraph 36). This involves the application of the proportionality principle, which is the language used in reg. 3 itself. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see Rainey v Greater Glasgow Health Board (HL) [1987] IRLR 26 per Lord Keith of Kinkel at pp.30–31.*
> *(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardys & Hansons plc v Lax [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60].*
> *(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no "range of reasonable response" test in this context: Hardys & Hansons plc v Lax [2005] IRLR 726, CA."*

166. Concrete evidence is not always required to prove justification (***Lumsdon v Legal Services Board*** [2015] UKSC 41).

167. When assessing proportionality, the tribunal must reach its own judgment, but it must be based on a fair and detailed analysis of the working practices and business considerations involved, having regard to the business needs of the employer (***Hensman v Ministry of Defence*** *UKEAT/0067/14/DM*, *[2014] EqLR 670;* ***City of York Council v Grosset*** (*[2018] EWCA Civ 1105*, *[2018] IRLR 746*).

168. In a s.15 case, it is the particular unfavourable treatment of the Claimant that must be justified rather than the general policy (such as a sick pay policy) which the employer applies (***Buchanan v Commissioner of Police of the Metropoli****s [2016] IRLR 918).*

169. In ***Browne v Commissioner of Police of the Metropolis***, UKEAT/0278/17, Simler P, agreed that the reduction of the Claimant's sick pay in accordance with a sick pay policy was justified because the policy itself allowed consideration of individual circumstances and had an appropriate mechanism to enable individual circumstances to be considered.

Harassment related to disability

170. 22. Section 26 EQA 2010 provides:

(1) A *person (A) harasses another (B) if –*
(a) A engages in unwanted conduct related to a relevant 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 [for short we will refer to this as a "proscribed environment"].
…
(4) In deciding whether conduct has the purpose or 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."

171. In ***Weeks v Newham College of Further Education*** UKEAT/0630/11/ZT, Langstaff J said this at [21]:

"An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staff-room concerned. We cannot say that the frequency of use of such words is irrelevant."

172. In ***Richmond Pharmacology v Dhaliwal*** [2009] IRLR 336 (at ¶15), Underhill J (as he was) said:

15…*A Respondent 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. That…creates an objective standard….Whether it was reasonable for a Claimant to have felt her dignity to be violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt."*

22…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…"

173. A finding that it is not objectively reasonable to regard the conduct as harassing is fatal to a complaint of harassment. That point may not be crystal clear on the face of s.26 Equality Act 2010 but see the *obita dicta* of Underhill LJ in ***Pemberton v Inwood*** [2018] IRLR 557 at [88] and the ratio of ***Ahmed v The Cardinal Hume Academies***, unreported EAT Appeal No. UKEAT/0196/18/RN in which Choudhury J held that ***Pemberton*** indeed correctly stated the law [39].

174. In considering whether a remark that is said to amount to harassment is conduct related to the protected characteristic, the Tribunal has to ask itself whether, objectively, the remark relates to the protected characteristic. The knowledge or perception by the person said to have made the remark of the alleged victim's protected characteristics is relevant to the question of whether the conduct relates to the protected characteristic but is not in any way conclusive. The Tribunal should look at the evidence in the round (per HHJ Richardson in ***Hartley v Foreign and Commonwealth Office Services*** UKEAT/0033/15/LA at [24-2].)

175. In considering whether the conduct is related to the protected characteristic, the Tribunal must focus on the conduct of the individuals concerned and ask whether their conduct is related to the protected characteristic (***Unite the Union v Nailard*** [2018] IRLR 730 at [80]).

176. In ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam*** [2020] IRLR 495 HHJ Auerbach gave further guidance:

[21] Thirdly, although in many cases, the characteristic relied upon will be possessed by the complainant, this is not a necessary ingredient. The conduct must merely be found (properly) to relate to the characteristic itself. The most obvious example would be a case in which explicit language is used, which is intrinsically and overtly related to the characteristic relied upon. Fourthly, whether or not the conduct is related to the characteristic in question, is a matter for the appreciation of the Tribunal, making a finding of fact drawing on all the evidence before it and its other findings of fact. The fact, if fact it be, in the given case that the complainant considers that the conduct related to that characteristic is not determinative.

[24] However, as the passages in Nailard that we have cited make clear, the broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. Ms Millns confirmed in the course of oral argument that that proposition of law was not in dispute.

[25] Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be.

177. Constructive dismissal can amount to an act of harassment: ***Driscoll v V&P Global Ltd*** **[2021] IRLR 891**.

<u>The burden of proof</u>

178. The burden of proof provisions are contained in s.136(1)-(3) EqA:

(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.

179. The effect of these provisions was summarised by Underhill LJ in ***Base Childrenswear Ltd v Otshudi*** [2019] EWCA Civ 1648 at [18]:

'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in Madarassy.[1] He explained the two stages of the process required by the statute as follows:
(1) At the first stage the Claimant must prove "a prima facie case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):
"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.
57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"
(2) If the Claimant proves a prima facie case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:

[1] *Madarassy v Nomura International plc* [2007] ICR 867, CA

"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."
He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'

180. In ***Deman v Commission for Equality and Human Rights*** [2010] EWCA Civ 1279, Sedley LJ observed at [19]: *'the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by a non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.'*

181. The Court of Appeal in ***Anya v University of Oxford*** [2001] ICR 847 at [2, 9 and 11] held that, in a discrimination case, the employee is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of the causative link between the protected characteristics on which he relies and the discriminatory acts of which he complains. The Tribunal must avoid adopting a 'fragmentary approach' and must consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts.

182. In a complaint of failure to make reasonable adjustments the Claimant has the burden of proving that the PCP, physical feature or failure to provide auxiliary aid, would put him at a substantial disadvantage compared to others who are not disabled. The burden does not shift unless there is evidence of some apparently reasonable adjustment which could have been made. This does not necessarily mean providing the detailed adjustment but at the least requires the broad nature of the adjustment to be clear enough for the Respondent to understand and engage with it. See ***Project Management Institute v Latif*** [2007] IRLR 579.

183. In ***Hewage v Grampian Health Board*** [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

Time limits

184. S.123(1)(a) EqA provides that:

(1) [Subject to [sections 140A and 140B],] 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.

185. The three-month time limit is paused during ACAS early conciliation: the period starting with the day after conciliation is initiated, and ending with the day of the ACAS certificate, does not count (s.140B(3) EqA). If the ordinary time limit would expire during the period beginning with the date on which the employee contacts ACAS, and ending one month after the day of the ACAS certificate, then the time limit is extended, so that it expires one month after the day of the ACAS certificate (s.140B(4) EqA).

186. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. In ***Hendricks v Commissioner of Police of the Metropolis*** [2003] ICR 530, the Court of Appeal held that Tribunals should not take too literal an approach: the focus should be on the substance of the complaint that the employer was responsible for an ongoing situation or a continuing state of affairs, in which an employee was treated in a discriminatory manner.

187. The law in respect of continuing conduct is in the context of reasonable adjustments has additional complexity. The authorities do not speak with one voice in the following cases: ***Matuszowicz v Kingston Upon Hull City Council*** [2009] ICR 1170, ***Secretary of State for Work and Pensions (Jobcentre Plus) v Jamil*** UKEAT/0097/13/BA and ***Abertawe University Local Health Board v Morgan*** [2018] ICR 1194.

188. In ***Matuszowicz*** the CA held that s.3 of Sch.3 of the DDA 1995 provided that a deliberate omission was deemed to occur when it was decided upon and that a person can be taken to have decided upon that omission either (a) when he does an act inconsistent with the doing of the omitted act or (b) after that period of time within which a reasonable person would have acted. Lord Justice Lloyd held that the effect of para 3(4) was to treat an inadvertent omission by the employer as an act that was done deliberately either when the employer had performed an act inconsistent with the omitted act or after that period of time within which a reasonable person would have acted. His Lordship also stated that since the allegation in Matuszowicz, concerned a continuing omission, the time limit was governed by paragraph 3 of Schedule 3. Lord Justice Sedley agreed with the judgment of Lord Justice Lloyd and stated that it was worth stressing that the effect of paragraph 3 of Schedule 3 “is to eliminate continuing omissions from the computation of time by deeming them to be acts committed at a notional moment.” Their Lordships therefore agreed that even where an act is a continuing omission the time limits were governed by paragraph 3.”

189. In ***Jamil*** the EAT held that the duty to make adjustments once established runs from day to day and a continuing failure to comply with the duty is continuing conduct.

190. In ***Abertawe*** the Court of Appeal essentially built upon the jurisprudence of ***Matuszowicz.*** It held as follows (this is extracted from the headnote, which in our view accurately captures the principles):

section 123(4) of the Equality Act 2010 dealt only with the question of when time began to run for the purpose of calculating the time limit for bringing proceedings in relation to acts or omissions which extended over a period; that, in the case of omissions, the approach taken in section 123(4) was to establish a default rule that time began to run at the end of the period in which the employer might reasonably have been expected to comply with the relevant duty; that ascertaining when the employer might reasonably have been expected to comply with its duty was not the same as ascertaining when the duty to comply began; that pursuant to section 20(3) of the Act, the duty to comply with the relevant 2010 requirement began as soon as the employer was able to take steps which it was reasonable for it to have to take to avoid the relevant disadvantage; that, in contrast, the period in which the employer might reasonably have been expected to comply with its duty ought in principle to be assessed from the Claimant's point of view, having regard to the facts known or which ought reasonably to have been known by the Claimant at the relevant time; and that, accordingly, there was no inconsistency between the tribunal's finding that time did not begin to run for bringing the reasonable adjustments claim until August and its conclusion that the claim 1 2011 was well founded.

191. In our view the law is as stated in ***Matuszowicz*** and developed in ***Abertawe***. ***Jamil*** is not consistent with that approach. We are confident that it is the former strand of authorities we must follow. Firstly, ***Matuszowicz*** and ***Abertawe*** are Court of Appeal decisions. Secondly, although ***Jamil*** is more recent than ***Matuszowicz*** it appears to have been decided *per incuriam*. So far as can be seen from the transcript of the EAT's decision, the EAT was not referred either to ***Matuszowicz*** or to the fact that the Equality Act 2010 deals with acts and missions differently when it comes to limitation (see s.123(3) – (4) above).

192. S.123(1)(b) EqA provides that the Tribunal may extend the three-month limitation period, where it considers it just and equitable to do so. That is a very broad discretion. In exercising it, the Tribunal should have regard to all the relevant circumstances, which may include factors such as: the reason for the delay; whether the Claimant was aware of his right to claim and/or of the time limits; whether he acted promptly when he became aware of his rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (***Abertawe***).

Constructive dismissal

193. The essential elements of constructive dismissal were identified in ***Western Excavating v Sharp*** [1978] IRLR 27 as follows:

"There must be a breach of contract by the employer. The breach must be sufficiently important to justify the employee resigning. The employee must resign in response to the breach. The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach in terms to vary the contract".

194. It is an implied term of the contract of employment that: *"The employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee"* (***Malik v BCCI*** [1997] IRLR 462).

195. It is for the tribunal to decide whether or not a breach of contract is sufficiently serious to amount to a repudiatory breach. However, a breach of the implied term of trust and confidence is inevitably a repudiatory breach of contract. Whether conduct is sufficiently serious to amount to a breach of the implied term is a matter for the employment tribunal to determine having heard all the evidence and considered all the circumstances: ***Morrow v Safeway Stores*** [2002] IRLR 9.

196. The core issue to determine when considering a constructive dismissal claim was summarised by the Court of Appeal in ***Tullett Prebon Plc v BGC Brokers LP*** [2013] IRLR 420 as follows:

19. … The question whether or not there has been a repudiatory breach of the duty of trust and confidence is "a question of fact for the tribunal of fact": Woods v WM Car Services (Peterborough) Limited, [1982] ICR 693 , at page 698F, per Lord Denning MR, who added: "The circumstances … are so infinitely various that there can be, and is, no rule of law saying what circumstances justify and what do not" (ibid).

20. In other words, it is a highly context-specific question. It also falls to be analysed by reference to a legal matrix which, as I shall shortly demonstrate, is less rigid than the one for which Mr Hochhauser contends. At this stage, I simply refer to the words of Etherton LJ in the recent case of Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168 (at paragraph 61): "…the legal test is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."

197. The implied term can be breached by a single act by the employer or by the combination of two or more acts: ***Lewis v Motorworld Garages Ltd*** [1985] IRLR 465.

198. Breach of the implied term must be judged objectively not subjectively. The question is not whether, from either party's subjective point of view, trust and confidence has been destroyed or seriously undermined, but whether objectively it has been. See e.g. ***Leeds Dental Team v Rose*** [2014] IRLR [25] and the authorities cited therein.

199. In ***Amnesty International v Ahmed*** [2009] IRLR 884, Underhill J gave importance guidance on the relationship between discrimination and constructive dismissal:

> *…The provisions of the various anti-discrimination statutes and regulations constitute self-contained regimes, and in our view it is wrong in principle to treat the question whether an employer has acted in breach of those provisions as determinative of the different question of whether he has committed a repudiatory breach of contract. Of course in many if not most cases conduct which is proscribed under the anti-discrimination legislation will be of such a character that it will also give rise to a breach of the trust and confidence term; but it will not automatically be so. The question which the tribunal must assess in each case is whether the actual conduct in question, irrespective of whether it constitutes unlawful discrimination, is a breach of the term defined in* Malik*. Our view on this point is consistent with that expressed in two recent decisions of this tribunal which consider whether an employee is entitled to claim constructive dismissal in response to breaches by the employer of his duty under the Disability Discrimination Act 1995: see* Chief Constable of Avon & Somerset Constabulary v Dolan *(UKEAT/0522/07) [2008] All ER (D) 309 (Apr), per Judge Clark at paragraph 41, and* Shaw v CCL Ltd *[2008] IRLR 284, per Judge McMullen QC at paragraph 18.*

200. The employee must resign in response to the breach. Where there are multiple reasons for the resignation the breach must play a part in the resignation. It is not necessary for it to be 'the effective cause' or the predominant cause or similar. See e.g. ***Wright v North Ayrshire Council*** [2014] ICR 77 [18].

201. In ***LB Waltham Forest v Omilaju*** [2005] IRLR 35, the CA guided that, the final straw, viewed in isolation, need not be unreasonable or blameworthy conduct. The mere fact that the alleged final straw is reasonable conduct does not necessarily mean that it is not capable of being a final straw, although it will be an unusual case where conduct which has been judged objectively to be reasonable and justifiable satisfies the final straw test. Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective.

202. In ***Kaur and Leeds Teaching Hospitals NHS Trust*** [2018] EWCA Civ 978 [2019] ICR 1 the Court of Appeal suggested the following approach:

    202.1. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
    202.2. Has he or she affirmed the contract since that act?
    202.3. If not, was that act (or omission) by itself a repudiatory breach of contract?
    202.4. If not, was it nevertheless a part…of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term?
    202.5. Did the employee resign in response (or partly in response) to that breach?

203. **In *Mari v Reuters Ltd (UKEAT/0539/13),*** HHJ Richardson said this in relation to sick pay and affirmation:

49. … The significance to be afforded to the acceptance of sick pay will depend on the circumstances, which may vary infinitely. At one extreme an employee may be so seriously ill that it would be unjust and unrealistic to hold that acceptance of sick pay amounted to or contributed to affirmation of the contract. At the other extreme an employee may continue to claim and accept sick pay when better or virtually better and when seeking to exercise other contractual rights. What can safely be said is that an innocent employee faced with a repudiatory breach is not to be taken to have affirmed the contract merely by continuing to draw sick pay for a limited period while protesting about the position: this follows from Cox Toner, which I have already quoted, for a sick employee can hardly be in any worse position than an employee who continues to work for a limited period."

204. In ***Chindove v William Morrisons Supermarket PLC*** UKEAT/0043/14/BA, Langstaff P said this in relation to affirmation:

24. Had there been a considered approach to the law, it would have begun, no doubt, with setting out either the principles or the name of Western Excavating Ltd v Sharp [1978] 1 QB 761 CA. At page 769 C-D Lord Denning MR, having explained the nature of constructive dismissal, set out the significance of delay in words which we will quote in a moment. But first must recognise are set out within a context. The context is this. There are two parties to an employment contract. If one, in this case the employer, behaves in a way which shows that it "altogether abandons and refuses to perform the contract", using the most modern formulation of the test, in other words that it will no longer observe its side of the bargain, the employee is left with a choice. He may accept that because the employer is not going to stick to his side of the bargain he, the employee, does not have to do so to his side. If he chooses not to do so, then he will leave employment by resignation, exercising his right to treat himself as discharged. But he may choose instead to go on and to hold his employer to the contract notwithstanding that the employer has indicated he means to break it. The employer remains contractually bound, but in this second scenario, so also does the employee. In that context, Lord Denning MR said this: "Moreover, he [the employee] must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."
25. This may have been interpreted as meaning that the passage of time in itself is sufficient for the employee to lose any right to resign. If so, the question might arise what length of time is sufficient? The lay members tell me that there may be an idea in circulation that four weeks is the watershed date. We wish to emphasise that the matter is not one of time in isolation. The principle is whether the employee has demonstrated that he has made the choice. He will do so by conduct; generally by continuing to work in the job from which he need not, if he accepted the employer's repudiation as discharging him from his obligations, have had to do.
26. He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time. The reference to time is because if, in the usual case, the employee is at work, then by continuing to work for a time longer than the time within which he might reasonably be expected to exercise his right, he is demonstrating by his conduct that he does not

wish to do so. But there is no automatic time; all depends upon the context. Part of that context is the employee's position. As Jacob LJ observed in the case of Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121 , deciding to resign is for many, if not most, employees a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to him in his community. His mortgage, his regular expenses, may depend upon it and his economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test.
27. An important part of the context is whether the employee was actually at work, so that it could be concluded that he was honouring his contract and continuing to do so in a way which was inconsistent with his deciding to go. Where an employee is sick and not working, that observation has nothing like the same force.

Unfair dismissal

205. By s.94 Employment Rights Act 1996 there is a right not to be unfairly dismissed. That includes a right not be unfairly constructively dismissed (s. 95(1)(c) ERA).

206. There is a limited range of fair reasons for dismissal (s.98 ERA). In a constructive dismissal case, the reason for dismissal is the reason that the employer did whatever it did that repudiated the contract and entitled the employee to resign. See ***Beriman v Delabole*** [1985] IRLR 305 [12 – 13].

207. In ***Buckland***, the Court of Appeal gave guidance as to the stages of the analysis in a constructive dismissal claim: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished *Malik* test applies; (ii) if acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) it is open to the employer to show that such dismissal was for a potentially fair reason; and (iv) if he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally, fell within the range of reasonable responses and was fair.

208. It is for the employer to show the reason for the dismissal and that the reason was a potentially fair one. Conduct is a potentially fair reason. The test of fairness is at s.98(4), in relation to which the burden of proof is neutral:

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

209. The range of reasonable responses test applies when considering the s.98(4) test.

Discussion and conclusions

Disability status

210. The Respondent concedes that the claimant had a disability for the purposes of the Equality Act 2010, namely, anxiety and depression, at all relevant times.

Direct discrimination and harassment related to disability

211. We consider each allegation at schedule 1 of the List of Issue from the perspective of direct discrimination and the perspective of harassment related to disability.

- *Maria Skinner seeking to actively undermine the Claimant between February and April 2018 by in February 2018 forbidding the Claimant to drive his car for the purposes of work, causing him difficulties in carrying out his job role*

212. We do not accept that Ms Skinner was trying to undermine the Claimant. We are satisfied that she banned the Claimant from driving for work purposes out of a concern for health and safety, both his and others'.

213. The basis of Ms Skinner's view was that the Claimant had fainted in the workplace, that he was taking diazepam which can cause drowsiness and that there were reports of him falling asleep in the workplace. We think the contemporaneous documents are candid and make this clear. It was not because the Claimant had depression/anxiety. That is something Ms Skinner had a long-standing awareness of and it was not until the three specific factors identified at the outset of this paragraph emerged and coalesced that she banned the Claimant from driving. It was also not because of any sort of stereotyping of people with mental health problems generally or depression/anxiety particularly. Again, it was because of the three specific factors we have identified.

214. A hypothetical comparator who was in materially the same circumstances as the Claimant (had an unexplained fainting episode, was on a drug that was known to potentially cause drowsiness and had two episodes of falling asleep at work) would have been treated in exactly the same way.

215. The complaint of direct discrimination fails.

216. There can be no doubt that banning the Claimant from driving was unwanted conduct. The Claimant very much wanted the freedom to drive in the course of his work. It was what he usually did and it was what others did. He found it very

distressing and inconvenient that he was banned from driving.

217. The conduct undoubtedly related to disability. A major part of the reason for the conduct was that the Claimant was on diazepam and this could cause drowsiness. The Claimant was on diazepam, as Ms Skinner knew, as a treatment for his disability. That is enough for the conduct to relate to disability. The Claimant's sleepiness in the work-place was also probably a symptom of his disability. That is certainly his evidence and we consider it plausible given the nature of his disability. That is a further reason why the conduct related to disability. However it is not an essential ingredient of our finding that the conduct related to disability.

218. We do not accept that the purpose of the conduct was to create a proscribed environment or to violate the Claimant's dignity. It was to protect the Claimant's and other's health and safety from a perceived risk of him falling asleep at the wheel.

219. However, the conduct did have the effect of creating a proscribed environment having regard to the Claimant's perception, all the circumstances of the case and what is objectively reasonable:

a. The Claimant's perception was that the driving ban was humiliating. It meant that he often had to be dropped off and collected by colleagues if he was working outside of Margate. He felt that it made him a burden on his team-mates who had to give him lifts and that it made him unpopular. If he took public transport this often took a lot longer than driving and took more organisation. The decision had a significant effect on his work/life balance. It also meant that he had to incur the initial cost of public transport / taxis and then go to the trouble of claiming reimbursement.
b. Generally, it restricted his liberty to go about his work in the way he wanted to and was accustomed to. This was a significant imposition on his freedom as a grown adult with a car and a driving license. That is so, particularly given the nature of his job which involved attending quite a number of locations around a large geographical area.
c. On the other hand, the concern about his fitness to drive was not entirely baseless. The Claimant had fainted, he was on diazepam which can cause drowsiness and there were reports of him falling asleep at work. However, it is a question of degree and the reality is the basis for the concern was small. He had never fallen asleep when driving and he had driven thousands of miles for work without issue.
d. A major factor is that the decision to ban the Claimant from driving was not based upon any medical evidence. Regard must of course be had to the extent to which efforts were made by the Respondent and the Claimant to obtain medical evidence. In our view the Respondent's efforts were wholly inadequate. Ms Skinner did suggest that the Claimant see OH in October 2017 and the Claimant did decline. However, at that point there was not a strong indication to see OH and moreover, no issue of a driving ban had arisen and did not arise until the following year. The possibility of an OH referral was not revisited at the time that a driving ban was imposed in February 2018.
e. The Claimant was asked to obtain evidence from his GP as to his fitness to drive. He did make that request of his GP but his GP did not answer it. The Claimant then made the cogent suggestion that the Respondent write to the GP on headed

paper, perhaps through HR, asking for the GP's advice. That was an immensely sensible suggestion given that it was the Respondent that wanted the GP's advice. If a request had been presented in that way, there is plainly a good chance the GP would have produced a report, perhaps for a fee. The Respondent failed to do that despite the Claimant explicitly suggesting it. There is no explanation as to why not.

f. The Claimant also set out cogently and in detail his answer to Ms Skinner's apparent concerns about him driving. She did not give this communication the thought it deserved and just responded repeating her position.
g. When HR advice was sought it was against Ms Skinner's position but she and Mr Allinson decided to plough on nonetheless and indeed not to tell the Claimant that this is what HR's advice had been.
h. It appears that some unspecified person in the health and safety team told Mr Allinson that the driving ban was acceptable but this aspect of the evidence is totally lacking in detail and transparency. It is unclear who said this to Mr Allinson, what their expertise/qualifications were, what their precise advice was, whether there were any nuances/caveats to it, how long it was intended to apply for, and what information it was based upon. We therefore do not consider this to be a weighty factor.
i. Finally, the manner in which the driving ban was imposed was very casual. There was no formality to the procedure and the ban was not formally explained in a letter detailing its basis and duration. This was a significant shortcoming given that the Claimant was being deprived of his freedom to drive in the course of his work.

220. All in all, in our view it is reasonable to consider that the driving ban created a hostile and offensive environment for the Claimant.

221. The harassment complaint is well-founded.

Maria Skinner on 26 April 2018 requiring the Claimant to attend a 3-4 hour meeting, when informed of poor mental health, and being aware of his medication, and despite the Claimant's objection.

222. The reason for the meeting and the reason for continuing with it was to tackle the Claimant in relation to concerns that Ms Skinner and the Claimant's team-mates had about the Claimant's conduct in the workplace and to talk through those concerns. These were genuinely held concerns.

223. The reason for the meeting was not the Claimant's disability or any stereotype in relation to it. It was the Claimant, rather than Ms Skinner, who linked the concerns about the Claimant's behaviour to disability. There were no preconceptions or stereotypes at work regarding how people with mental health problems generally or depression/anxiety particularly conducted themselves nor in relation to the Claimant's conduct.

224. A hypothetical comparator, someone who had behaved in materially the same way as the Claimant had in the workplace, would have been treated in the same way. The complaint of direct discrimination fails.

225. The meeting and its continuation in the circumstances were unwanted conduct. The Claimant did not want this meeting and at the outset he objected to it, not least because he had not been given any notice and had no representative. He did then acquiesce in the meeting continuing but that does not mean he wanted it to: he did not. He also had no real of way of knowing what would come up in the meeting or what turns it would take. Ultimately the meeting was deeply upsetting for the Claimant. Undoubtedly, Ms Skinner's and Mr Allinson's conduct in initiating and continuing with the meeting in the way that they did was unwanted conduct.

226. The conduct did relate to disability. During the meeting the Claimant entered an acute state of deep distress that was totally outside the normal range. It was extreme. He said in terms that he was feeling suicidal. At one stage he got up and faced the wall to speak to Ms Skinner and Mr Allinson because he was so distressed. He spoke to them facing the wall. They knew that he was suffering from anxiety and depression and they knew that the terrible state that he was in, in front of them, was a manifestation of this disability - that must have been very obvious. This was anything but an ordinary case of an employee becoming upset/crying at a meeting. They must have evaluated whether or not it was right to continue with the meeting in the knowledge of, and in light of, those facts. They decided to continue with the meeting, impugning the Claimant's conduct, in circumstances in which he was to their knowledge having an acute, extreme, mental health episode. Having regard to the broad, fact sensitive test we have set out in our legal directions, this conduct related to disability.

227. The conduct did not have the purpose of violating dignity or creating a proscribed environment. As above, it was to tackle the Claimant on some conduct issues. However, the conduct did have the effect of creating a proscribed environment and violating the Claimant's dignity, having regard to the Claimant's perception, all the circumstances of the case and what is objectively reasonable:

    227.1. The Claimant found the meeting intimidating, degrading and humiliating.
    227.2. Objectively speaking, it was and it was completely unreasonable to continue with the meeting once the Claimant entered a heightened state of extreme distress. Telling his manager that he was feeling suicidal was a red flag that should have immediately prompted a switch to a welfare mode in which the priority was obtaining some assistance for the Claimant to make sure he was safe. This could have taken any number of forms but might have been, for instance, calling his wife.
    227.3. We are very familiar with the fact that employees often become upset in difficult meetings and that it is often appropriate to continue nonetheless. However, this case is completely outside the usual range. We are talking about suicidal ideation and extreme distress. Further, there was no particular urgency about the matters that the manager wanted to talk to the Claimant about, so that cannot explain the continuation of the meeting.
    227.4. All of the above was aggravated by the overall set up in which the meeting was without notice, was an ambush, was with two seniors manager, one of whom was misdescribed as a notetaker but then in fact questioned the Claimant in detail.

228. The complaint of harassment succeeds.

On 25 April 2018, Maria Skinner and Steven Allinson informed the Claimant that his team members did not want to work with him.

229. This allegation fails on its facts. The Claimant was not told that his team members did not want to work with him. This is not something that either Ms Skinner or Mr Allinson said.

230. We note that in her closing submission Ms Mallick says that *"There is no dispute by R that C was told that his colleagues did not want to work with him*". That is not right; there was a dispute about this and it is a dispute that was ventilated in cross-examination of the Claimant. In cross-examination he broadly accepted that nobody had said that his team members did not want to work with him at this meeting.

The Respondent made findings in respect of some but not all of the Claimant's grievances against Maria Skinner, Steven Allinson and Mr Smith.

231. The primary document that sets out the Claimant's grievance is the email he sent on 16 May 2018 to June Lilley. That email is some 10 pages of dense, small, typed text. It is very long. The document itself is hard to follow. It is really hard to tell what is background/story-telling and what is an actual complaint for grievance investigation.

232. What is clear is that Ms Pollard made a real and determined effort to deal with the Claimant's grievance. She was unafraid to be critical of the Claimant's managers and her approach was detailed. Broadly speaking we thought that the way she dealt with the grievance was impressive.

233. There is a document (p343) which identifies a few headings drawn from the grievance. Ms Mallick submits that not all of the points set out there were dealt with. That is probably true. However, we do not think the document at p343 is very helpful in understanding what the key points about the Claimant's grievance were. What is clear to us, is that Ms Pollard did her best (and it was a good effort) to identify and deal with the key points of the grievance and that she did this by considering the grievance with care and then actually speaking to the Claimant about what seemed to be the main points in interview with him.

234. Ms Mallick submits that, in effect, Ms Pollard deliberately shied away from investigating everything and making findings on them, in order to avoid concluding that the Claimant had been discriminated against. We do not think that is a fair assessment. Ms Pollard was far more critical of the Respondent's managers than is typical in internal grievance proceedings and the documentation we have seen, which includes three outcome reports, demonstrates a fair minded approach. Indeed, it is notable that as a result of her investigation, disciplinary proceedings were commenced against Mr Allinson and Ms Skinner. The disciplinary proceedings did not ultimately result in disciplinary action but that was beyond Ms Pollard's remit and is another matter.

235. There is no remotely cogent reason to think that the reason why Ms Skinner did not deal with every point in the grievance/omitted to deal with certain points was the

Claimant's disability. The reason not every point was dealt with, was because it was perfectly adequate to deal with what were understood to be the key points in circumstances in which the grievance was so long and in parts difficult to follow that it would not have been proportionate or feasible to deal with every point.

236. A hypothetical comparator, someone who was not disabled or had a different disability, presented a similarly lengthy, narrative form grievance with the same difficulty in discern background from complaint, would have been treated in just the same way. The complaint of direct discrimination fails.

237. The complaint of harassment must also fail:

237.1. Although the subject matter of the Claimant's grievances related to disability, we do not think Ms Pollard's approach and in particular the fact that she did not deal with every single point, related to disability. Disability was simply background. She was evidently concerned to try and grapple with what appeared to be the main issues and to reach reasoned conclusions in relation to them.

237.2. Further, the purpose of Ms Pollard's conduct was to produce a grievance outcome that reflected her assessment of the grievance dealing with the main points. It was not to violate dignity or create a proscribed environment.

237.3. Although the Claimant regarded the grievance outcome in an extremely negative way, we do not think it would be objectively reasonable to conclude it violated his dignity or created a proscribed environment. In this regard we repeat our analysis of the grievance process and outcome set out above.

In mid-August 2018, Debbie Pollard and/or HR did not offer the Claimant workplace mediation with Maria Skinner, Steven Allinson and Mr Smith.

238. It is true that mediation was not offered at this time. However, we do not accept that was because of the Claimant's disability. The possibility of workplace mediation simply did not arise *at this time*. The Claimant did not suggest it at or around this time. Occupational health did not suggest it.

239. We do not accept that the Claimant's disability was any part of the reason why mediation was not suggested or offered at this time. A hypothetical comparator, someone without a disability or with a different disability with like complaints against those managers and who was unable to work in their primary job would have been treated in the same way.

240. We do not accept that the treatment complained of was related to disability. Certainly some of the underlying issues between the Claimant and the managers related to disability but the actual conduct of Ms Pollard/HR – not offering mediation – did not. The Claimant raised serious complaints which were dealt with formally and seriously in a grievance process. The possibility of mediation did not arise at this time. It was not suggested at this point by the Claimant or by OH and in the absence of that, there was little to prompt management/HR to suggest it because there was no real indication that it had much of a prospect of success at this stage or that it was something the Claimant wanted. The conduct was unrelated to disability.

241. We do not accept that the conduct was unwanted because we do not accept that the Claimant had any active desire to mediate with those individuals at or around mid-August 2018. If he had, we think he would have expressed that desire (as he had much earlier in the chronology - prior to the grievance process commencing). The conduct did not have the purpose of violating dignity/creating a proscribed environment, nor did it have such an effect. The Claimant's complaints against these managers was taken very seriously in a formal grievance process – it is not as if they were simply ignored. The issue of mediation was simply not raised at all at this time and there was no real indication the Claimant wanted it. In our view the effect on the environment and the Claimant's dignity was neutral.

242. These complaints must fail.

Sickness absence contact being provided on a monthly rather than weekly basis.

243. The amount of sickness absence contact did vary but it is true that for the most part it was more like monthly than weekly.

244. However, we do not think that the reason why the contact was more monthly than weekly was anything at all to do with the Claimant's disability. It was essentially set by the Attendance Management Policy. The intervals for contact in the policy in turn were essentially set by reference to the length of absence. We note, however, that the policy was not slavishly adhered to, and variations arose through circumstances. At times there was frequent contact between the Respondent and the Claimant and/or his with Mrs Foat. In addition to the contacts set out in the findings of fact above, we accept that there was yet further contact as set out in the contact log at p782.

245. Disability was no part of the reason why the contact was more monthly than weekly. Further, a hypothetical comparator, someone on long-term absence with no/a different disability would have been treated in just the same way.

246. We do not accept that this was harassment.

247. We do not accept that the Claimant wanted weekly rather than monthly conduct. There was never anything cogent to indicate either that it is what he wanted or that it would be helpful. On the contrary, beyond the very early stage of the sickness absence, it would have been repetitive and unnecessary to have routine weekly contact.

248. We also do not accept that the intervals at which the contact happened were related to disability. Of course the contact itself related to disability since that is one of the things routinely discussed. However, the intervals at which the meetings happened were fixed by the policy rather than through any consideration of the particular health problem that underlay the long-term sickness absence.

249. We do not accept that the purpose of meeting monthly rather than weekly was to violate the Claimant's dignity or create a proscribed environment. There is not the slightest basis for such a finding.

250. We also do not accept that the Claimant perceived that having monthly rather than weekly contact violated his dignity or created a proscribed environment. He did feel that members of his *team* should have kept in touch with him (which they did not do at all), but that is another matter altogether that has nothing to do with the intervals at which he had sickness absence contact.

251. In any event, it would not be objectively reasonable to regard having monthly rather than weekly contact as a violation of dignity nor as creating a proscribed environment. A monthly interval for routine contact was perfectly appropriate. It would have been repetitive and unnecessary to meet weekly. Many employees, probably including the Claimant, would have found routine weekly contact during very long-term sickness absence an undue burden. Moreover, in this case where more frequent contact was needed for particular reasons it happened.

In not providing, workplace updates during May 2018 – January 2019 and holding sickness absence contact meetings to obtain information on the Claimant's fitness to work.

252. It is true that the Claimant was given little by way of workplace update between May 2018 and January 2019.

253. The Claimant was updated on two matters of importance: that Mr Smith was retiring and he was told the details of a restructuring that had happened. There is no evidence he was given other updates although there is also no evidence of any other significant workplace events that the Claimant was not updated about. The Claimant was not given routine day to day team news.

254. There is no indication that this was because of disability and we do not accept that it was in any part. The Claimant was on sick leave with no indication of when or if he would return. Further, he was aggrieved with his team (who had complained about him) and his managers and it was far from clear that hearing routine news about them would be in any way helpful. Thus the focus in communications with the Claimant was on his health, his ability to return to work and alternatives to that (such as retirement).

255. A hypothetical comparator, someone off work who was aggrieved in the same way as the Claimant and to the same extent as the Claimant, but with no disability or a different disability, would have been treated in the same way.

256. We accept that on balance that this was unwanted conduct. The Claimant's evidence to the tribunal, which we accept, is that he would have liked more by way of work place updates.

257. There is no remotely cogent basis to consider that the purpose of the conduct was to violate the Claimant's dignity or create a proscribed environment. It would not be reasonable, in all the circumstances, and taking into account the Claimant's perception, to consider that this conduct violated dignity or created a proscribed environment:

257.1. The bottom line is that it was objectively reasonable to focus the discussion on health, wellbeing and broad principles of returning to work (what job, what

office, what management).

257.2. The Claimant was extremely sensitive and was aggrieved essentially with his whole team and his managers. It was far from clear that hearing about them routinely would be helpful.

257.3. The Claimant made his position clear, time and again that he would not feel comfortable being around the people he had complained about and at times even suggested that he would not be comfortable working in the same organization as them even in a different place.

257.4. The Claimant was told when there were significant events (the two events identified above).

Not informing/ providing the Claimant with information as to contents of the Occupational Health referral form before each OH appointment in July 2018, September 2018 and April 2019, so that the Claimant could have input

258. It is true that the Claimant was not shown the forms. However this was nothing to do with disability. It was simply the general practice for the manager to get the employee's consent generally to an OH referral and then to make the referral without running the detail of the referral past the employee.

259. A hypothetical comparator, a non-disabled, or differently disabled, employee being referred to OH, would have been treated in exactly the same way.

260. We do not accept that the conduct complained of was unwanted. The Claimant never gave any indication that he wanted to see the referral documents and we do not accept that he did regard the referral being made without his input as unwanted.

261. We also do not accept that the impugned conduct related to disability. The referral itself related to disability but the practice (which was applied to the Claimant) of not consulting the employee in relation to the detail of the referral did not. Neither the Claimant's disability nor any factor related to it had any bearing on the practice. It was a practice of general application.

262. There is no cogent basis to suggest that the purpose of making the referral without the Claimant's input was to create a proscribed environment or violate dignity. We also do not accept it had that effect:

262.1. We do not accept that even the Claimant perceived the conduct as violating his dignity or creating a proscribed environment. If he had, we think he would have said something at that time (he was forthcoming when he was unhappy about something).

262.2. It is clear from the content of the OH reports that the practitioners are dealing with the relevant issues. In broad terms they were: what the health position was in relation to the Claimant, what the prognosis was, his fitness for work and whether any adjustments could be made that would assist him, particularly with regard to a return to work.

262.3. The Claimant had an opportunity to speak to the OH advisor and say what he wanted to say each time he had an appointment. It is clear from the reports that he tended to speak at length. He thus always had a chance to have his say.

The 18 September 2018 Occupational Health Report not giving or omitted any consideration to possible reasonable adjustments such as carrying out administrative functions through remote home-working facilities, with an alternative line manager to Maria Skinner and Steven Allinson.

263. The Claimant was very unwell when he saw the OH advisor on 18 September 2018 - to the point that the advisor contacted the Claimant's GP out of concern for his mental health.

264. It is plain that the Claimant was simply unfit for any work with the Respondent at this time, and there was no indication that he was fit for work from home. Notably, the Claimant's GP's advice was also that the Claimant was unfit for any work.

265. There is really no basis for the suggestion that if only someone had suggested or considered working from home that this would have been something the Claimant could have managed. On the contrary, the indications were very clearly the reverse to the point that there was no reason to specifically consider working from home at all - whoever the line manager would be.

266. We do not accept that the reason why working from home/other adjustments were not considered was because the Claimant had depression and anxiety. On the contrary it was because he was entirely unfit for work and that is undoubtedly a distinct ground for the treatment. Many people with depression and anxiety are fit for work; but at this time the Claimant was, sadly, not one of them.

267. A hypothetical comparator, someone with no disability or a different disability, who was unfit for any work, would have been treated in exactly the same way.

268. We do not accept that this conduct was unwanted. The suggestion of working from home is one that is made after the event in the course of the litigation. It is not something that we believe the Claimant would have welcomed contemporaneously. If it is something he would have been interested in at the time, we think he would have suggested it at the time.

269. The conduct did relate to disability. The Claimant's inability to work was a consequence of the severity of his disability. It was the inability to return to work in any capacity that informed the OH advice.

    269.1. The OH advice obviously did not have the purpose of violating the Claimant's dignity or creating a proscribed environment. We also do not accept that it had that effect having regard to what is reasonable, all the circumstances of the case including the Claimant's perception.
    269.2. We do not accept that the Claimant did want to work from home at this time. He therefore did not perceive the lack of a reference to that possibility as creating a proscribed environment or violating his dignity.
    269.3. However, even if he had perceived this, it would not be objectively reasonable. There was simply no indication that he was fit to carry out any form of work for the Respondent from home. On contrary all the indications were that he was unfit for any work. That was both OH's view and his GP's

view.

269.4. At one stage Ms Mallick suggested that the Claimant's GP would have advised that the Claimant was fit to work from home if the possibility of that had been raised. However, there is simply no evidence of that. In any event, the GP's advice was simply that the Claimant was unfit for work (rather than that he may be fit with adjustments). If the GP thought the Claimant could manage some of some kind from some location, the GP could and presumably would have said so.

270. All in all these complaints must fail.

In August 2018 Cath Kirkpatrick failed to offer the Claimant a suitable alternative role. Cath Kirkpatrick should have thought about an alternative role of her own volition as an Appeals Officer, or alternative redeployment roles within the organisation under a different line manager, or home working with a different line manager.

271. Putting aside the Appeals Officer role for a moment, Ms Kirkpatrick did offer the Claimant redeployment to numerous roles within the organization, at numerous locations, with numerous line management options. These were in principle suitable options to offer for the Claimant's consideration. It was a matter for the Claimant to decide whether or not to express an interest in one of the options. Undoubtedly Ms Kirkpatrick acted appropriately in giving the Claimant those options. Thus the generalised part of this complaint – that Ms Kirkpatrick should have offered suitable alternative roles in the organisation fails.

272. Homeworking has already been dealt with above and we repeat our analysis.

273. This leaves the Appeals Officer role. In August 2018, the Claimant was unfit for any work and it was unclear whether or when he would be fit for any work. There was no reason at all to think he would be fit to do the Appeals Officer role. There was also no reason at all to think he would be open to such a role at that time (though we accept he had historically been prior to sick-leave). We say that because when it was suggested that the Claimant may wish to consider an alternative role in intervention, his response was '*why should I be penalised'* (we find, consistently with the notes, he said this at the meeting of 16 August 2018). In other words why should he be the one to change role rather than Ms Skinner/Mr Allinson. He gave the impression that he was not willing at this time to consider an alternative role.

274. There is no cogent reason at all to think that the reason why Ms Kirkpatrick did not offer the Claimant the Appeals Officer role was because of disability. It was not. Rather, it is not a role that occurred to Ms Kirkpatrick in circumstances in which she was offering the Claimant a wide range of return to work options each of which he summarily declined. Moreover, he seemed hostile to the idea of changing role.

275. A hypothetical comparator, someone on long-term leave, unable to do their primary job, but with no disability or a different disability, would have been treated in just the same way.

276. We do not accept that there was unwanted conduct here. In our view, the Claimant had no intention at this time of accepting a change of career of path, as evidenced by

his reaction to the suggestion he move to intervention ('*why should I be penalised?*'). It is also *evidenced* by the fact that he did not suggest the Appeals Officer role which we think he would have, had it been something that interested him at that point in the chronology.

277. Ms Kirkpatrick did not offer the Claimant the Appeals Officer role but that had nothing to do with disability at all. It is a role that simply did not come up. It was not the case, for instance, that some feature of the Claimant's disability or any other disability related factor made Ms Kirkpatrick think the Claimant was unsuited to the role. There is simply no evidence of that.

278. Ms Kirkpatrick's conduct did not have the purpose of violating the Claimant's dignity nor of creating a proscribed environment. It did not have that effect either, in all the circumstances of the case, including the Claimant's perception and what is objectively reasonable:

278.1. We do not accept that the Claimant perceived the omission to offer him the Appeals Officer role as a violation of his dignity or as creating a proscribed environment. If he had any strong feelings about it, indeed any feelings about it, he would have said so to Ms Kirkpatrick.
278.2. It would not be objectively reasonable in any event for it to have that effect. The impression the Claimant gave was that he did not want to change role.
278.3. The wider context is that the Claimant was offered a significant number of return to work options. None of them appeared to have any appeal at all and the Claimant did not want to explore any of them.
278.4. The wider context is also that the Claimant was unfit for a return to work in any capacity at that the time.

In October / November 2018 Cath Kirkpatrick threatened the Claimant with capability processes if the Claimant did not apply for ill health retirement.

279. This allegation fails on its facts. Ms Kirkpatrick did not threaten the Claimant with capability processes. Ms Kirkpatrick pointed out the link between the capability processes and ill-health retirement, which was that dismissal could not be considered unless and until ill-health retirement had been. She needed to know what the Claimant's position was in relation to applying ill-health retirement so that she could manage his sickness absence (including by deciding whether or not the time had come to refer the case to a decision maker) accordingly. None of this can reasonably be regarded as in any way a threat.

280. The reason for this treatment was not, even in part, the Claimant's disability. It was simply that Ms Kirkpatrick needed to know whether or not the Claimant wanted to be considered for ill-health retirement so that she knew how to further progress and manage the Claimant's ongoing sickness absence.

281. The allegation of harassment must also fail. The conduct alleged – threatening the Claimant – simply did not occur.

282. The conduct that did occur (pointing out the link between the capability process and ill-health retirement and asking the Claimant to consider and state his position in

relation to ill-health retirement), could not possibly amount to a violation of the dignity or the creation of a proscribed environment:

282.1. The conduct was wholly benign.
282.2. There was no pressure on the Claimant to apply for ill-health retirement;
282.3. Ms Kirkpatrick simply wanted to know if the Claimant was interested in applying for it or not. She had proper cause for this because the Claimant's position on ill-health retirement was of significant relevance to the further management of his sickness absence;
282.4. Ms Kirkpatrick did her best to help the Claimant find out the details of what it would look like;
282.5. The bottom line is that the Claimant was being pointed to an option to consider, there was no threat, there was no pressure to take ill-health retirement and it was nothing more than an option and it was eminently sensible for him to consider.

In January 2019 Cath Kirkpatrick made an assessment of the Claimant's health.

283. We struggle to understand what this allegation means. It remains difficult to understand even having read the further particulars which, despite being lengthy, do not with respect make it clear what this allegation means. The allegation was not formally withdrawn but nor was it, so far as we could discern, pursued by counsel.

284. Ms Kirkpatrick's job was to assess whether, in light of the medical advice from OH and Claimant's GP, and in light of what the Claimant said, he was fit to return to work in some capacity. To that extent Ms Kirkpatrick had to and did make an assessment of the Claimant's fitness for work.

285. This was not because of disability, but because the Claimant had a job which he was not doing and had not done for a long time, and an assessment needed to be made of whether he could come back to it or another job and if so when.

286. It was not harassment either. It was objectively reasonable for Ms Kirkpatrick to assess the Claimant's fitness for work. It is something that any manager managing an employee with long term sickness absence would need to do.

On 2 May 2019 Wendy Beaddie insisting the Claimant attend a twelve-month review meeting on the 23 May 2019 at the Ramsgate office.

287. Ms Beaddie did indeed insist upon this. She did this because she had been rattled and upset by the telephone call with the Claimant's friend at a preceding meeting. Ms Beaddie's imagination ran away with her and she was concerned that there was a risk to her health and safety if she met the Claimant in a public place. She was also concerned there may be reporters and cameras there ready to scrutinize her. Odd and unwarranted as those thoughts were, we accept that they are what was in Ms Beaddie's mind.

288. The reason for the treatment was not the because of the Claimant's disability or any stereotypical assumptions about people with mental health problems or depression/anxiety in particular. It was, in short, the heated conversation with the

Claimant's friend which had spooked her. She would have treated a hypothetical comparator, someone whom she had had a very difficult prior sickness absence review meeting with, but with no disability or a different disability, in just the same way.

289. The conduct was undoubtedly unwanted on the Claimant's part. He had been accustomed to meeting at a neutral venue with Ms Kirkpatrick. That had worked very well and he did not want to go to the Respondent's offices.

290. The conduct did relate to disability. The meeting was about the Claimant's disability related ill-health and his ability to work in light of it. Moreover, Ms Beaddie was well aware that Ms Kirkpatrick had habitually met with the Claimant at a neutral venue as a reasonable adjustment. The Claimant was a vulnerable person by reason of his disability and accordingly found it very difficult and uncomfortable to attend the Respondent's offices. Ms Turner decided that the meeting would take place at the Respondent's premises knowing that in so doing she would be removing a reasonable adjustment that had historically been put in place to facilitate such meetings.

291. Further, the preceding meeting which had been in the Romford office had not gone well. The OH advice subsequently, in the report of 7 April 2019, made plain that the Claimant had been upset by changing the process so that the meeting had not been in a neutral venue. It said *"He described a fraught relationship with his new manager whom he perceives as not being sympathetic. Whereas his previous managers had agreed to his meeting on neutral territory, he maintains this accommodation was withdrawn and that he has been pressurised into meetings he has found intimidating and that these have not taken his disabilities into consideration."* OH advised that the Respondent may wish to accommodate further meetings at a neural venue to help ease the Claimant's anxiety.

292. Ms Beaddie nonetheless insisted on meeting the Claimant in the Ramsgate office, no doubt having evaluated the Claimant's needs and weighed them against her own concerns. It is right to conclude applying the broad test that her conduct related to disability.

293. It was not the purpose of the conduct to intimidate the Claimant or create an offensive environment but that is how he perceived it. In our view, having regard to all the circumstances of the case including what is reasonable, the conduct did create an intimidating environment:

293.1. The Claimant was a very vulnerable individual. He had a well-documented and long history of work-related mental health problems. Those problems were intertwined with the workplace and it was clear that attending the Respondent's offices was a major issue for him.

293.2. Although Ms Beaddie had the concerns we have identified above they, objectively speaking, were fanciful and not based in reality. There was no proper basis to be concerned about her health and safety. Nothing the Claimant's friend had said in the prior telephone call could have reasonably implied any such risk. There was no reason at all to think that the press would attend there, but even if they had been, Ms Beaddie could simply

have declined to continue with the meeting in their presence.

293.3. It is not difficult to find a neutral venue for a meeting. Ramsgate library had worked well. But common sense tells us that there must have been alternatives. All manner of venues have meeting rooms/spaces.

293.4. There was specific advice from OH which made plain the Claimant's feelings and made plain that a neutral venue would be helpful.

293.5. In short, there were good and very weighty reasons related to the Claimant's wellbeing to hold the meeting in a neutral venue. There were thin and fanciful reasons to insist on holding the meeting in the Respondent's office.

Constructive dismissal

294. We return to this below.

EQA, section 15: discrimination arising from disability

295. The respondent accepts that the Claimant's sickness absence between May 2018 and January 2019 arose in consequence of the Claimant's disability. The Respondent also accepts that it knew of the Claimant's disability.

Did the respondent treat the Claimant unfavourably as follows between May 2018 and January 2019? And if so was that because of something arising in consequence of disability?

296. The sickness absence is the 'something' arising from disability that the Claimant relies upon.

- *No weekly contact days.*

297. It is true that the contact was not routinely weekly and was more often approximately monthly (see findings of fact). However, we do not accept this was unfavourable treatment.

298. There is no cogent evidence that it would have been helpful or beneficial to routinely have weekly contact days and we do not accept that it would have been. The Claimant had an entrenched mental health problem in which changes and progress happened quite slowly. It would have been repetitive and unnecessary to have routine weekly contact. Things were generally not changing on a week by week basis. Where contact between the Claimant was required or useful more frequently than monthly, it happened (see our findings of fact and the contact log at p782). There was nothing unfavourable about the contact not routinely being weekly.

299. For the avoidance of doubt, we do not accept that the Respondent ever conceded that this treatment was unfavourable although we accept that the drafting of the original list of issues is ambiguous. After the initial list of issues was produced, the Respondent was given permission to file amended grounds of resistance and did so. In those grounds it made clear that it did not accept this was unfavourable treatment. The dispute as to whether it was or not has been well ventilated in the proceedings.

- *No home working*

300. It is true that no home working was offered. However, we do not think this was unfavourable treatment because there was never a relevant time (i.e. after C's sickness absence commenced) during which he was fit or anywhere near becoming fit to work from home. The indications, both from medical evidence and his own contemporaneous account, was always that that he was suffering from really serious mental health problems that precluded him from carrying out any work for the Respondent at all.

301. In any event, the fact that the Claimant was not offered home working was nothing to do with sickness absence. He did not work from home prior to his sickness and the evidence before us is that the Respondent did not have a culture of home working at all until the pandemic (which post-dates the events in this case). The Claimant's sickness absence was no part of the reason why he was not offered home working.

302. For the avoidance of doubt, we do not accept that the Respondent ever conceded that this treatment was unfavourable although we accept that the drafting of the original list of issues is ambiguous. After the initial list of issues was produced, the Respondent was given permission to file amended grounds of resistance and did so. In those grounds it made clear that it did not accept this was unfavourable treatment. The dispute as to whether it was or not has been well ventilated in the proceedings.

- *A reduction in pay*

303. The Claimant's pay was reduced to half pay after six months of sick leave. This was obviously unfavourable treatment amounting as it did to a significant economic loss compared to full pay.

304. There can be no doubt that that this arose as a result of his sickness absence and therefore that it arose in consequence of disability. The very reason why his pay reduced was because he had been on sick-leave for 6 months and did not then return to work, because he continued to be on sick-leave.

305. However, in our view the reduction in pay was a proportionate means of achieving a legitimate aim.

306. We accept that the aim of the treatment was to ensure a sustainable and fair workplace. It is obvious that no public sector organization, particularly not one that is a large employer like this one, could have unlimited sick pay: that could not be sustainable and could create disincentives to returning to work.

307. We also accept on balance that the treatment was proportionate:

    307.1. The treatment did have a considerable impact on the Claimant – it meant that his pay reduced to half after six months and would reduce to nil thereafter. This was significant in his case because the nature of his disability meant that he was unable to return to work at the time his sick

pay reduced. There was an ongoing need, in other words, for sick pay.

307.2. However, the primary allowance of 6 months full pay and 6 months half pay is in our experience a substantial sick pay allowance at the upper end of what is in the normal range (reflecting of course standard civil service terms).

307.3. The reasonable needs of the employer must be taken into account. Again, it is obvious that no public sector organization, particularly not one that is a large employer like this one, could have unlimited sick pay: that would not be sustainable and could create disincentives to returning to work.

307.4. The sick pay policy includes a number of ways in which employee's particular circumstances can be taken into account. The sick pay policy was tailored to some degree to individual cases:

307.4.1. In the event of an assault on duty sick pay continues indefinitely;

307.4.2. In the event of employee returning to work sick pay could be continued in certain respects in the event of further absence;

307.4.3. In the event of the absence being caused by a work-place injury there was provision for industrial injury benefit. That involved making a claim to civil service pensions, a third party, who decide the outcome of the application. We are of course aware that the Claimant's application for industrial injury benefit was not successful. However, there is no complaint about that before the tribunal and, although as part of the general background factual matrix we have heard about the application, the case has proceeded on that basis.

307.4.4. There was provision for ill-health retirement where the criteria for that were met.

308. Overall we take the view that the unfavourable treatment of the Claimant went no further than was reasonably necessary to achieve the legitimate aim.

Reasonable adjustments: EQA, sections 20 & 21

Did the Respondent apply the following PCPs?

- *PCP 1. The respondent's grievance policy.*

309. The Respondent admits it applied this PCP and we so find.

- *PCP 2. In October 2018 applying the respondent's capability policy. The Claimant says that the invitation to apply for ill health retirement was a truncated capability process or that is how the sickness management policy was applied.*

310. With respect the formulation is convoluted. We have not seen a separate 'capability policy' but the Attendance Management procedure contain detailed provisions that deal with both ill-health retirement and managing ill-health capability through to dismissal. In other words it contains a capability policy.

311. Doing our best to understand the PCP (by reading the wording together with Ms Mallick's closing submissions and trying to attribute a fair meaning to it) the best sense we can make of it is that it is alleged that the Respondent was trying to get the Claimant

to take ill health retirement in order for his employment to come to an end quickly. That stands in contrast to following a capability process which would have taken longer.

312. We do not think that is a fair interpretation of the facts. Ill-heath retirement was part and parcel of the capability process. In fact, by asking the Claimant to consider ill health retirement rather than simply discounting it, the process was prolonged. It was not possible to move to the formal stages of the capability process (where dismissal was considered) whilst ill health retirement remained a possibility.

313. Thus we agree that a capability policy was applied (as contained in the Attendance Management procedure), but we do not agree that the remainder of the PCP existed nor was it applied to the Claimant.

- *PCP 3. Applying the respondent's sickness absence management policy.*

314. This is admitted by the Respondent and we agree it was a PCP and one that was applied.

- PCP 4. Returning the Claimant to work after sickness absence

315. There was certainly a policy and practice of trying to return employees (including the Claimant) who were on sick leave to work.

Did any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time? If so was the Respondent aware or it to have been aware of the substantial disadvantage?

PCP 1. Grievance policy: the respondent had not considered whether the Claimant had suffered discrimination, Claimant's depression made it more difficult for him to move on, in comparison to someone who did not suffer from depression and workplace mediation had not been arranged.

316. The formulation here is, with respect, convoluted and difficult to follow.

317. There was nothing in the grievance policy that meant the Respondent should not consider whether the Claimant had been discriminated against and indeed part of the purpose of the policy is to consider complaints of discrimination. It also clear that when actually applying the grievance policy Ms Pollard did consider whether or not the Claimant had been discriminated against. That is clear from the very terms in which she expressed the outcome in her three reports.

318. The Claimant did find it difficult to move on from the grievance. It is our experience that even employees who are not disabled frequently find it difficult to move on from grievances. This gives us pause for thought as to whether it was substantially different in the Claimant's case. On balance we think it was. He ruminated upon, and displayed a level of preoccupation with the grievance and its outcome to the extent that it was very distressing for him. This was plainly linked with and/or was an aspect of his disability. It is a question of degree and we find the Claimant's level of distress in relation to the grievance outcome is substantially beyond the normal range that employees who are not disabled experience. We therefore think that compared to

other employees who are not disabled, the application of the grievance policy, which included an outcome the Claimant was far from satisfied with, put him at substantial disadvantage compared to others who are not disabled.

319. In our view the Respondent knew or ought reasonably to have known of this substantial disadvantage. It was obvious from the Claimant's reaction to the grievance outcome, from the continual references back to the subject matter of the grievance, his level of distress in describing them and more than anything from his attitude to returning to work. This included expressing feelings such as that he could not return to work unless those who aggrieved him left the organisation. The OH advice also made clear how entrenched and stuck the Claimant's feelings were.

PCP 2. Capability policy: the Claimant was placed at a substantial disadvantage as he was given the choice to retire on a small pension. This would not have been suggested to someone without a disability.

320. This was not a substantial (or any) disadvantage – the Claimant was simply given the *option* of considering ill-health retirement. There was no pressure on him to apply for it or to take it in the event of applying and being offered it. Although in almost all circumstances an employee would need to be disabled to qualify for ill-health retirement and thus non-disabled employees probably would not be invited to consider it, being asked to consider it was simply appropriate. It was not a disadvantage never mind a substantial one.

PCP 3. Sickness absence management: the Claimant was at a disadvantage when the respondent had not paid the Claimant instead applied sickness absence triggers for pay reduction and did not maintain regular contact.

321. The Claimant was at a substantial disadvantage compared to other employee who are not disabled in relation to his pay reducing to half after six months of sick leave. In that respect he was in materially the same position as Ms O'Hanlon in ***O'Hanlon***.

322. The Respondent was plainly aware that the Claimant was put at the said substantial disadvantage compared to other employees who are not disabled. It knew that the Claimant was disabled, it knew his absence was disability-related, it knew that his absence was very long-term, there was never a time he was fit to return to work and all the while the evidence showed that the absence would continue to protract.

323. The Respondent did maintain regular contact with the Claimant while he was on sick-leave – see our findings of fact and the contact log at p782. This aspect of the disadvantage fails on the facts.

PCP 4. Returning the Claimant to work (after sickness absence): the Claimant was at a disadvantage, the respondent had not taken suitable steps to facilitate return by (i) seeking appropriate advice from OH in sept 2018/ April 2019 (ii) offering homeworking; (iii) workplace mediation (iv) graduated hours.

324. Respectfully, this formulation is confused and convoluted. It is not very clear what the disadvantage is said to be. The wording repeats the PCP and then what appear to be allegations of failure to make adjustments.

325. The best sense we can make of this is that it is alleged that the Claimant was placed at a disadvantage by the general requirement to return work. The consequences of not doing so was of course ultimately a risk of dismissal. Other employees who are not disabled are generally able to attend work so do not face this risk for this reason. Thus we accept that the PCP put him at a substantial disadvantage.

326. The Respondent must have been aware and if not should have been aware of this substantial disadvantage. It was obvious that an employee unable to return to work on a long-term basis risked dismissal. It was obvious this was more likely to occur in the case of disabled employees. It was obvious that the Claimant in particular was having grave difficulty in returning to work and that in due course that there was a real risk of his employment being terminated because he was unable to return to work.

327. We now deal with the specific points at (i), (ii), (iii) and (iv). None of them really seem to belong at the 'substantial disadvantage' stage of the analysis. Certainly (ii), (iii) and (iv) seem to be descriptions of possible adjustments.

328. We do not accept the premise of (i). The Respondent *did* seek appropriate advice from OH in September 2018 and April 2019 so this aspect of the disadvantage fails on the facts. Ms Mallick submits that the OH advisors were not "qualified in psychiatry" so were not appropriate advisors. We do not accept that it was necessary or that it would be reasonable to expect the OH advisors to be qualified in psychiatry. On a general note, Occupational Health is a discipline of its own and advisors can seek opinions from the GP or specialists where they consider that is indicated. In this case, the nature of the Claimant's mental health problems were inevitably ones that were very familiar to occupational health. Depression and anxiety are among the typical presenting conditions in employees who are seen by Occupational Health. Certainly, the Claimant had a severe case but that did not mean the OH advisors were unable to advise in relation to him. Further, we note that the absence management process was at a relatively early stage. The absence was still being supported and dismissal was not actually under consideration. The case had not even been passed to a decision maker. OH were not therefore being asked for a final opinion and that is another reason why it would not be reasonable to expect the OH advisor to be qualified in psychiatry. It was still routine (but nonetheless important) advice that was being sought.

329. Ms Mallick also criticises OH because "*There is no specific assessment by reference to the psychiatric tool for the assessment of disorders."* We do not accept this criticism. OH are not treating clinicians. The Claimant already had a mental health diagnosis which he told the OH advisors all about. It was not necessary to conduct an assessment of the Claimant (in the way that a psychiatrist would to make a primary diagnosis of mental illness) in order to give a meaningful opinion on the Claimant's fitness for work and the adjustments that may assist him to return to work.

330. More generally, it is clear from the reports that the OH advisors were asked for and understood themselves to have a broad remit to explain: the general nature of the Claimant's health; whether the Claimant was fit to return to work and if so when; whether that could be facilitated by any adjustments. Appropriate advice was sought

and appropriate advice was obtained.

331. We have already dealt with (ii) homeworking extensively above. We repeat our analysis. There was no indication for it and it was entirely reasonable not to offer it. This contributed nothing to any substantial disadvantage.

332. In terms of (iii) graduated hours, the Claimant simply was not at any relevant time fit for work at all. The issue of what his hours he would work upon his initial return was irrelevant because he was not fit to return to work at all and a return was not even on the horizon. Certainly there was never the slightest suggestion that he would not be allowed a phased return. This matter contributed nothing to any substantial disadvantage.

333. Since (iv) workplace mediation is identified as a reasonable adjustment we deal with it below and not here.

Did the Respondent fail to take any step it ought reasonably to have taken to avoid any of the disadvantages?

- *Offer workplace mediation*

334. In our view offering workplace mediation was a step the Respondent ought reasonably to have taken – at a particular point in time - in order to attempt to remove or reduce the substantial disadvantage caused by the application of PCP 1 (the grievance policy) and/or the PCP 4 (of returning to work after sickness absence).

335. The starting point is that it was clear was that the Claimant's inability to move on from the outcome of the grievance was a barrier to returning to work and clear that if he failed to return to work his employment would ultimately be at risk.

336. In April 2019, the OH advice was that the Claimant was unlikely to be able to return to work at all in the absence of some form of reconciliation or reproachment following a grievance outcome he was dissatisfied with. The report was not optimistic about the prospects of their being a successful outcome but it did make clear what was at stake. Barring a successful reproachment (and mediation would be the most obvious means to that) that would be it: the chances were, the Claimant would never return to work. The report did not rule out the possibility of their being a reproachment. It would be fair to say that it implied there was *a prospect* of there being one. That was in our own view is a correct analysis.

337. By this stage in the chronology (unlike in August 2018) it was plain that the passage of time would not lead to a return to work and that a prerequisite for the same was some form of reproachment.

338. Given the length of the Claimant's absence, his dissatisfaction with the grievance process, his length and quality of service, the likelihood of termination and potentially litigation in the event of their being no reproachment, it was clearly sensible to give mediation a try, starting by offering it to the Claimant, despite the less than optimistic prospects of success.

339. Ms Beaddie was asked in cross examination why she did not take the

suggestion of reproachment any further. She was unable to give any explanation at all. She simply said she did not know. There is no other cogent evidence either that there was any weighty reason not to offer the Claimant some workplace mediation.

340. Ms Gordon-Walker submitted that the time for considering the same was following absence management meeting in May 2019, but that the Claimant had resigned in advance of it.

341. We do not accept that. First of all as an aside, based on Ms Beaddie's evidence we do not accept it is something that was on the agenda for that meeting. It was not in her mind to raise it at the meeting or at all.

342. More importantly, the question of whether to proceed with workplace mediation was something that the Claimant would need to think about carefully. It would make little sense to raise it with him for the first time at the absence management meeting. It would make much more sense to make the offer to him in advance of the meeting so he could process the offer and then talk about it at the meeting. That would have been the reasonable thing to do – but it did not happen.

343. In our view had the Respondent been acting reasonably it would have notified the Claimant of the option of workplace mediation by around mid to late April 2019. That timeframe would have allowed the Respondent a couple of weeks to make the offer to the Claimant having received the OH report of 7 April 2019 and allowed the Claimant a few weeks to think about it prior to the next absence review meeting.

- *Allowing the Claimant to return to the Margate office*

344. It is hard to understand this complaint. It was always open to the Claimant to return to the Margate office. It did not happen because he did not want to return there and was not well enough to.

- *Providing provide a home-working option*

345. The Respondent did not offer home-working. However we do not think that offering home working was a step the Respondent ought reasonably to have taken. As we have set out above, there was never a relevant time at which the Claimant was fit for any work, whether at home or otherwise. Nor was fitness for a return to work even on the horizon. That was the fact of the matter and also the appearance of the matter at the time based both upon the Claimant's evidence, that of his GP and that of occupational health.

346. This is a convenient moment for us to state that the Claimant's therapeutic work in the ice-cream kiosk (which in any event ended in the summer of 2018), is not an indication that he was fit for some work with the Respondent. The Claimant's description of that work shows that it was so sheltered and yet so hard for him to manage that it does not indicate any wider fitness to work. It was much more about getting out and about and talking to some people than about the economic activity of work.

- *offering offer reduced hours*

347. The analysis is the same as in relation to graduated hours. There was no indication of fitness for any work and offering reduced hours would not have assisted. It would have been pointless to offer reduced hours when the Claimant's position and the medical evidence was that he was unfit for any work. There was no failure here.

- *having have weekly contact with the Claimant*

348. This was not a step the Respondent ought reasonably to have taken. There was no indication for it. We repeat our analysis of this matter. In summary, routine weekly contact would have been repetitive and unnecessary. It would not have assisted with anything in a case in which the Claimant's condition changed if, at all, slowly. As set out in our findings of fact and in the contact log at p782, there was regular contact.

- *maintaining the Claimant's full pay*

349. For essentially the same reasons why it was not a step that the employer ought reasonably to have taken in Ms O'Hanlon's case, it was not such a step in this case. We think the reasoning of the EAT as endorsed by the CA in *O'Hanlon* applies here, particularly paragraphs 64 – 69 extracted above.

350. We do not accept that this is a case that is comparable to *Meikle,* i.e., one in which a failure to make reasonable adjustments clearly preventing the employee from returning to work and to full pay. We have indeed identified one adjustment that the Respondent failed to make (offering mediation). However, this came very late in the chronology. Moreover, the appearance was that it was an adjustment which, if made, harboured no more than a prospect of the Claimant returning to work at some unknown point in some unknown capacity in the future. That is a very different case to *Meikle*.

351. We also take into account that the sick pay allocation here was at the upper end of the normal range and that there was provision for alternative potential sources of income, in the form of injury benefit and ill-health retirement (albeit of course that the Claimant's application for the former failed and he did not apply for the latter).

- *Not applying to the Claimant the capability process*

352. In our view it was reasonable to apply the capability process, as we understand that process (i.e., as it is set out in the Attendance Management policy). It is a very flexible process. The trigger points are flexible. It builds in provisions for reasonable adjustments to be made.

353. The Claimant's sickness absence was supported for the duration of his employment until his resignation. As such he was never moved to the later stages of the capability process. All the while efforts were made to try and get him back to work, whether in his existing job or a different one, with different line management and in a range of different offices.

354. It would not have been reasonable to simply abandon the capability process. It was an appropriate way of managing absence.

Constructive dismissal

355. We have found that three of the incidents that the Claimant relies upon to found his complaint of constructive dismissal are well founded:

355.1. The driving ban;
355.2. The meeting of 26 April 2019;
355.3. The insistence that the meeting of 5 May 2019 take place at the Ramsgate office.

356. We remind ourselves that not all acts of discrimination/harassment amount to a repudiation of the contract of employment (*Ahmed).*

357. However, in our view in combination those three matters undoubtedly seriously damaged and undermined the relationship of trust and confidence between the Claimant and the Respondent (assessed objectively). Each of those matters was very serious in its own right; in combination we have no doubt that the threshold of repudiation is crossed.

358. We are also satisfied that there was no reasonable and proper cause for any of the three matters. In that regard we repeat the factors that led us to the view that they amounted to harassment.

359. We have no doubt at all, that each of these matters contributed significantly to the Claimant's decision to resign. He was seriously aggrieved by all of them.

360. The last of the three acts was the final straw. It was also apt in law to be a final straw (in the sense of that term in *Omilaju*). It was a serious matter in its own right that contributed to the breach. It was very far from being wholly innocuous (indeed it was not innocuous at all).

361. The Claimant's letter of resignation was very proximate in time to the final straw: it was the following day. During that short period of time he remained on sick leave and did nothing to affirm the contract.

362. The Claimant was entitled to and did treat himself as dismissed.

363. Given our findings in relation to the repudiatory acts, the constructive dismissal was a further act of harassment related to disability.

364. The Respondent accepts that if the Claimant was dismissed that the dismissal was not for a potentially fair reason. We agree. It follows that the dismissal was unfair.

Unpaid annual leave – Working Time Regulations and under the contract of employment

When the Claimant's employment came to an end, was he paid all of the compensation he was entitled to under regulation 14 of the Working Time Regulations 1998 and/or his contract?

365. As presented to us, this dispute comes down to whether the applicable provisions are found in the Claimant's contract of employment or in the Annual Leave Policy.

366. In our view paragraph 19 of the Annual Leave Policy is significantly different to the terms of the Claimant's contract. Under the terms of the contract there is nothing to suggest that any form of annual leave only accrues during sick leave/is only payable if the Claimant returns to work after that leave. On the contrary, on a construction of the terms of the contract returning to work following sick leave is immaterial to the accrual of leave or the payment of leave on termination.

367. There is no evidence that the Annual Leave Policy was incorporated into or otherwise varied the Claimant's contractual terms. There is no evidence that it was brought to his attention during his employment. There is in fact no evidence at all as to the relationship between the Annual Leave policy and the contract. There is no evidence that the Claimant agreed to vary his entitlement to annual leave whether expressly or impliedly in accordance with the Annual Leave policy.

368. The contract is stated to be subject to collective agreements, but the Annual Leave policy is not a collective agreement. There is no evidence that it reflects a collective agreement and there is no collective agreement before us.

369. We would not accept that the reference in the contract to "*You can find information about leave on the Employee Policy page of The Department and You Intranet site"* assists the respondent. There is no evidence that the Annual Leave Policy was on the Employee Policy page of the Department or on the You Intranet site. In any event, we would not accept that the reference in the contract means that the express terms stated in the contract are varied by what is stated on the Employee Policy page of The Department or on the You Intranet site. That is not what the contract says and one would expect clear wording to that effect if it were the intention. In the absence of such wording we think the parties' intention was that matters such as the mechanics of taking leave (how, when, on what notice etc) would be described on the Employee Policy Page and the Department and You intranet site.

370. In short, the terms of the Claimant's contract say what they say and support his case. We are not persuaded on the very, very limited evidence that has been presented on this issue (and no doubt the Respondent could have presented more) that the terms of the contract were varied or otherwise disturbed by the Annual Leave policy.

Limitation

371. The Respondent accepts that the following complaints were presented in time:

371.1. The complaint about the location of the meeting of 5 May 2019;
371.2. Constructive dismissal;
371.3. Holiday pay.

372. We agree those matters are in time. The Respondent's position was that acts of

discrimination occurring on or after 25 December 2018 were in time. The Claimant did not demur. We adopt that position. It follow that the reasonable adjustments complaint that there was a failure to offer mediation was also in time.

373. The two other complaints of harassment are out of time occurring as they did in early to mid 2018. We do not think they formed part of an act extending over a period with later events. Neither Ms Skinner nor Mr Allinson had any further relevant involvement with the Claimant. They were not responsible for the 5 May 2019 meeting issue which was of a different character. There was a lengthy gap between the meeting of 26 April 2018 and the next unlawful act. No one factor is determinative but looking at the matter in the round we do not think there was continuing conduct.

374. However, we do think it is just and equitable to extend time.

375. Fundamentally, we do not think the delay in presenting the complaints has caused the Respondent any significant material prejudice. The self-same matters were litigated as components of the constructive dismissal claim. In a constructive dismissal claim time runs from the termination of the contract not the date of the repudiation (*Miekle*). Thus the constructive dismissal claim is in time and the events that repudiated the contract are properly before the tribunal for that purpose.

376. The only prejudice that arises as a result of extending time to consider those additionally as freestanding complaints is that the Respondent has a liability for them. That is not, however, forensic prejudice and simply flows from the fact that the claims are well-founded. No additional work is needed to defend the claims as freestanding complaints, no additional witnesses and no additional disclosure.

377. If we did not extend time then the Claimant would be deprived of a remedy for those matters as freestanding complaints. That is significant prejudice.

378. We take into account the length of the delay. It is relatively long. However, that is a less weighty factor in this case than it sometimes is because the issues are before the tribunal anyway (as part of the constructive dismissal claim).

379. We also take into account the explanation for the delay, or more precisely, the fact that there is lack of a clear one. This is not a matter that the Claimant has addressed. However, there is a large body of evidence from which the explanation is readily inferred. The Claimant was essentially trying to achieve a resolution to the issues without litigation. He did this through his internal grievance and then through various allusions to resignation and litigation. He had legal advice at a relatively early stage. However, he was not ultimately successful in leveraging an outcome he was happy with, without litigation, so he presented a claim. We regard that as far from a compelling explanation for the delay.

380. However, standing back, weighing up the various competing factors and looking at them in the round it is just and equitable to extend time - the balance of prejudice being the key thing that tips the scales in the Claimant’s favour.

Conclusion

381. A remedy hearing will be listed to determine the Claimant's remedy in relation to those claims that have succeeded.

_____

Employment Judge Dyal

_____

Date 22.04.2022

SENT TO THE PARTIES ON

FOR EMPLOYMENT TRIBUNALS

Annex: Agreed Final List of Issues

Time limits / limitation issues

1. Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA")? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether timeshould be extended on a "*just and equitable*" basis; when the treatment complained about occurred; etc.

Unfair dismissal

2. Was the claimant dismissed, i.e.

    a. Was there a fundamental breach of the contract of employment, and/or did the respondent breach the so-called 'trust and confidence term', i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant by perpetrating the alleged acts and omissions as set out in section 1 of the Schedule to this order?

    b. if so, did the claimant affirm the contract of employment before resigning by

    delay?

    c. if not, did the claimant resign in response to the respondent'sconduct (to put it another way, was it a reason for the claimant's resignation – it need not be the reason for the resignation)?

3. If the claimant was dismissed, the respondent does not assert that there was a

    potentially fair reason for dismissal.

Disability

4. The respondent concedes that the claimant had a disability for the purposes of the Equality Act 2010 of anxiety and depression at the relevant time (25 Oct 2017 until termination of employment).

EQA, section 13: direct discrimination because of disability

5. Did the respondent subject the claimant to the treatment set out in Section 1 of

Schedule 1 below?

6. Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on hypothetical comparators.

7. If so, was this because of the claimant's disability and/or because of the protected

characteristic of disability more generally?

EQA, section 15: discrimination arising from disability

8. The respondent accepts that the claimant's sickness absence between May

2018 and January 2019 arose in consequence of the claimant's disability.

9. Did the respondent treat the claimant unfavourably as follows between May 2018

and January 2019?

a. No weekly contact days. The respondent accepts this.

b. No home working. The respondent accepts this.

c. A reduction in pay. The respondent accepts this.

10. The respondent does not accept that this was detrimental / unfavourable treatment. The claimant says that this was not in the original list of issues. The respondent says that it is just making its admissions at paragraph 9 clear.

11. Did the respondent subject the claimant to the alleged unfavourable treatment

because of his sickness absence?

12. If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The respondent

relies on the following as its legitimate aim(s): running a fair and sustainable workplace.

13. The respondent concedes that it knew of the claimant's disability (anxiety and

depression).

Reasonable adjustments: EQA, sections 20 & 21

14. A "PCP" is a provision, criterion or practice. Did the respondent have the following

PCP(s):

a. Applying the respondent's grievance policy. This is admitted by the respondent
b. In October 2018 applying the respondent's capability policy. The claimant says that the invitation to apply for ill health retirement was a truncated capability process or that is how the sickness management policy was applied.
c. applying the respondent's sickness absence management policy. This is admitted by the respondent
d. returning the claimant to work after sickness absence.

15. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time? The claimant says that he was substantially disadvantaged because:

a. Grievance policy: the respondent had not considered whether the claimant had suffered discrimination, claimant's depression made it more difficult for him to move on, in comparison to someone who did not suffer from depression and workplace mediation had not been arranged;

b. Capability policy: the claimant was placed at a substantial disadvantage as he was given the choice to retire on a small pension. This would not have been suggested to someone without a disability;

c. Sickness absence management: the claimant was at a disadvantage when the respondent had not paid the claimant instead applied sickness absence triggers for pay reduction and did not maintain regular contact;

d. Returning the claimant to work (after sickness absence): the claimant was at a disadvantage, the respondent had not taken suitable steps

to facilitate return by (i) seeking appropriate advice from OH in sept 2018/ April 2019 (ii)offering homeworking; (iii) workplace mediation (iv) graduated hours.

16. If so, did the respondent know or could it reasonably have been expected to know

the claimant was likely to be placed at any such disadvantage?

17. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

a. offer workplace mediation

b. allowing allow the claimant to return to the Margate office c. providing provide a home-working option

d. offering offer reduced hours

e. having have weekly contact with the claimant

f. maintaining maintain the claimant's full pay

g. not applying to the claimant the capability process

18. If so, would it have been reasonable for the respondent to have to take those steps

at any relevant time?

EQA, section 26: harassment related to disability

19. Did the respondent engage in conduct in Section 1 of Schedule 1 below?

20. If so was that conduct unwanted?

21. If so, did it relate to the protected characteristic of disability?

22. Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Unpaid annual leave – Working Time Regulations and under the contract of employment

23. When the claimant's employment came to an end, was he paid all of the compensation he was entitled to under regulation 14 of the Working Time Regulations 1998 and/or his contract? The claimant relies on pp31-39 of the bundle. The respondent relies on pp.767§64-65 of the bundle.

Schedule 1, section 1

a. Maria Skinner seeking to actively undermine the claimant between February and April

2018 by:

i. In February 2018 forbidding the claimant to drive his car for the purposes of

work, causing him difficulties in carrying out his job role; and

ii. On 25 April 2018 requiring the claimant to attend a 3-4 hour meeting, when

informed of poor mental health, and being aware of his medication, and

despite the claimant's objection.

b. On 25 April 2018, Maria Skinner and Steven Allinson informed the claimant that his

team members did not want to work with him.

c. The respondent made findings in respect of some but not all of the claimant's

grievances against Maria Skinner, Steven Allinson and Graham Smith.

d. In mid-August 2018, Debbie Pollard and/or HR did not offer the claimant workplace

mediation with Maria Skinner, Steven Allinson and Graham Smith.

e. Sickness absence contact being provided on a monthly rather than weekly basis.

f. In not providing, workplace updates during May 2018 – January 2019 and holding sickness absence contact meetings to obtain information on the claimant's fitness to work.

g. Not informing/ providing the claimant with information as to contents of the Occupational Health referral form before each OH appointment

in July 2018, September 2018 and April 2019, so that the Claimant could have input;

h. The 18 September 2018 Occupational Health Report not giving or omitted any consideration to possible reasonable adjustments such as carrying out administrative functions through remote home-working facilities, with an alternative line manager to Maria Skinner and Steven Allinson.

i. In August 2018 Cath Kirkpatrick failed to offer the Claimant a suitable alternative role. Cath Kirkpatrick should have thought about an alternative role of her own volition as an Appeals Officer, or alternative redeployment roles within the organisation under a different line manager, or home working with a different line manager.

j. In October / November 2018 Cath Kirkpatrick threatened the claimant with capability

processes if the claimant did not apply for ill health retirement.

k. In January 2019 Cath Kirkpatrick made an assessment of the claimant's health.

l. On 2 May 2019 Wendy Beaddie insisting the claimant attend a twelve-month review

meeting on the 23 May 2019 at the Ramsgate office.

m. (Constructively) dismissing the claimant.