EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr A El-Mariesh	v	Decision Inc United Kingdom Limited (1) Mr N Bell (2)

Heard at: Reading by CVP **On**: 3, 5 and 6 May 2022

Before: Employment Judge Hawksworth
Ms J Cameron
Mr D Palmer

Appearances
For the Claimant: Mr B Phelps (counsel)
For the Respondent: Ms K Taunton (counsel)

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

1. The claimant's complaint of direct disability discrimination fails and is dismissed.

2. The claimant's complaint of discrimination arising from disability fails and is dismissed.

3. The claimant's complaint of failure to make reasonable adjustments fails and is dismissed.

4. The claimant's complaint of indirect disability discrimination fails and is dismissed.

REASONS

Claim, hearings and evidence

1. The claimant was employed by the first respondent from 15 October 2018 until his dismissal on 27 September 2020. The first respondent is an IT

consultancy business which was previously called Copperman Consulting (UK) Limited. The second respondent is the Group CEO of the holding company of the first respondent. In these reasons we refer to the first respondent as the respondent and the second respondent as Mr Bell.

2. In a claim form presented on 6 July 2020 after a period of Acas early conciliation from 19 May 2020 to 19 June 2020, the claimant made complaints of disability discrimination concerning his dismissal by the respondent and matters leading up to the dismissal. A response was presented on behalf of both respondents on 25 August 2020. Both respondents defended the claim. The respondents did not accept that the claimant was disabled.

3. There was a preliminary hearing before Employment Judge Anstis on 16 April 2021 at which the issues were identified and case management orders were made for the parties to prepare for a preliminary hearing on the issue of disability, and for the final hearing.

4. At the public preliminary hearing on 20 August 2021, Employment Judge Cowen made orders for the parties to obtain evidence from a joint medical expert on the issue of disability. Dr Mehrotra, a consultant psychiatrist, provided a report dated 25 November 2021. The position on disability is set out in the issues section below. Dr Mehrotra did not attend the hearing to give evidence.

5. The final hearing took place by video hearing (CVP). There was an agreed hearing bundle with 710 pages. The tribunal is grateful to the parties' representatives for the carefully prepared bundle. The fact that the paper copy and the pdf copy had the same pages numbers has assisted considerably with page referencing at the hearing and in this judgment.

6. On the first day of the hearing, by consent, 15 additional pages were added to the bundle. The additional pages were a series of WhatsApp messages. An unredacted copy of a document at pages 699 to 710 of the bundle was also provided at the start of the hearing. References to page numbers in these reasons are to the bundle.

7. After preliminary matters had been dealt with, we took the first morning of the hearing for reading. We began hearing witness evidence at 2.00pm. All the witnesses had exchanged witness statements. We heard witness evidence from the claimant on the first and second day of the hearing. On the second day of the hearing, we heard evidence from the witnesses for the respondents:

    7.1 Mr N Bell (the second respondent and Group CEO of the holding company of the first respondent);

    7.2 Mrs T Swemmer (Group Chief of Staff of the holding company of the first respondent).

8. Both Mr Bell and Mrs Swemmer gave evidence by video from South Africa. The respondent had received confirmation from the FCDO's Taking of Evidence Unit that South Africa has no objection to the taking of evidence

by video conferencing by a UK court from a witness in South Africa in a civil or commercial matter, as this is. A copy of the email with this confirmation was provided to the tribunal by the respondents' solicitors.

9. We had the benefit of an opening skeleton argument from Mr Phelps, and written closing comments from both counsel. On the third day of the hearing both counsel made short oral closing comments.

10. Judgment was reserved. The judge apologises to the parties and their representatives for the delay in promulgating the reserved judgment. This is due to the current volume of work in the tribunal.

The Issues

11. The issues for us to decide were set out in an appendix to the case management summary of the first preliminary hearing (bundle page 59). The list of issues is attached as an appendix to these reasons.

12. At the start of the hearing the parties confirmed that, following Dr Mehrotra's report of 26 November 2011 (page 464), the position on disability is:

    12.1 The respondents accept that the claimant was disabled by depression from 13 March 2020;

    12.2 The respondents do not accept that the claimant was disabled prior to 13 March 2020 and this is an issue for the tribunal;

    12.3 The respondents' knowledge of the claimant's disability is in dispute.

13. There are ongoing High Court proceedings between the parties in this case which relate to warranties given at the time of the purchase of the first respondent by Decision Inc Holdings Proprietary Ltd. Both counsel agree that there is no conflict or overlapping issue between the High Court claim and the claim before us. We have decided that it is not necessary for us to decide any facts relating to the warranties which are the subject of the High Court claim. That claim is relevant here only to the background narrative, if at all, and there is therefore no difficulty with us deciding the employment tribunal claim at this time.

Findings of fact

14. We make the following findings of fact based on the evidence we heard and read. We decide facts on the balance of probabilities, that means we decide what we think is most likely to have happened. We have included here those facts which we found most helpful in determining the issues we have to decide.

<u>The acquisition of the respondent</u>

15. The respondent is an IT consulting business based and registered in the UK. It was co-founded in 2005 by the claimant and Stephen Garbett. At that time the respondent's name was Copperman Consulting Limited. The

claimant was a director and one of two majority shareholders of the business.

16. In October 2018, Copperman Consulting Limited was acquired by Decision Inc Holdings Proprietary Ltd, a company registered in South Africa. A share purchase agreement recorded that Decision Inc Holdings Proprietary Ltd ('the holding company') purchased 70% of the shares in the respondent. Mr Bell is the group CEO of the holding company.

17. On the acquisition, the claimant became an employee of the respondent (page 80). His role at that time was Company & Consulting Director. He managed the consulting side of the respondent's business. This was a client relationship role, but the claimant's duties also included preparing the annual budget and business plan, driving growth in revenue and monitoring and managing the financial and non-financial performance of the company (page 96).

18. The claimant's contract with the respondent provided that his primary place of work was the respondent's offices (which were in Windsor) and that his minimum hours of work were 48 hours per week 'plus any other additional hours as may be reasonably required by the company' (page 85).

19. After the acquisition, the claimant reported to Mr Bell. Mr Bell was based in South Africa but regularly came to the UK for meetings. The claimant said, and we accept, that from an early stage after the acquisition, there were significant tensions between Mr Bell on one hand and the claimant and Mr Garbett on the other. These tensions arose in part because of a difference in management style between the claimant and Mr Garbett on the one hand, and Mr Bell on the other, and in part because of the financial performance of the respondent.

20. Sometime after the acquisition, the respondent's name changed to Decision Inc United Kingdom Limited.

<u>The financial position of the respondent</u>

21. The respondent's financial performance by year end 2018 was worse than expected.

22. In March/April 2019, because of the difficult financial position the respondent started a redundancy process and dismissed several members of the consulting team for redundancy. Mr Garbett was put on a performance improvement plan because of his performance as managing director and the poor financial performance of the respondent (page 116). Mr Garbett resigned and left the respondent on 10 April 2019.

23. After Mr Garbett's departure from the business, Mr Bell told the claimant that Henri de Bruine would be coming to the UK from the South African division of the holding company, to help run the respondent. When he arrived in the UK in May 2019, Mr de Bruine was appointed as managing director of the respondent and became the claimant's direct line manager. The claimant was unhappy about this as he felt that Mr de Bruine lacked

experience and had no knowledge of the UK market. The claimant believed that he should have been appointed as managing director (page 125).

The claimant's medical history

24. The claimant was experiencing low mood and anxiety in 2019. The claimant had previously consulted a GP and been treated for depression in 2010 and 2017. In December 2017, the claimant was treated by his GP with an antidepressant, sertraline. He had problems staying asleep. He was in a daze and described anxiety linked with depersonalisation type experiences. There was a social withdrawal and he did not want to see anybody. He did not want to go out and engage in sports such as cycling, go to the cinema, or cook (activities he had enjoyed previously). There was a pervasive unhappiness (page 471).

25. The anti-depressant medication which the claimant was prescribed was effective. He stopped taking it in around March 2018.

26. The respondents were not aware of the claimant's history of depressive episodes.

The claimant's position in 2019

27. Unlike on previous occasions, the claimant did not consult his GP or seek any form of medical assistance for any mental health issues at any time in 2019. He was not signed off work at any time in 2019 and did not take anti-depressant medication during this time.

28. The opinion of the joint medical expert Dr Mehrotra, which we accept, is that the claimant experienced anxiety and low mood from February 2019 to 12 March 2020, but this did not meet the diagnostic criteria for either a depressive episode or generalised anxiety disorder. The effects of the claimant's anxiety and low mood were minor or trivial and did not interfere with the activities of the claimant's daily living on a sustained basis (pages 476 and 479). However, because of the claimant's anxiety and low mood symptoms, he was at a high risk of transition to a psychiatric disorder like major depression (page 480).

29. From February 2019 the claimant had regular sessions with a life coach to help him manage his stress and anxiety (page 448). The life coach was not medically qualified. While these session helped the claimant to cope at a difficult time, Dr Mehrotra's opinion, which we accept, was that the sessions did not in medical terms have an alleviating nature or stop the claimant's psychiatric health from deteriorating (page 480).

30. The claimant was experiencing problems with his performance at work. He was not required to work in the office and would often avoid attending the office. He went into the office about two days a week. He was often late for client or staff meetings or forgot about them altogether. His colleagues often had to call to check if he would be attending meetings and he sometimes asked colleagues to proceed without him. He also found it very difficult to complete work in a timely manner as he needed longer to complete a task or had to summon the motivation to do it.

31. The claimant did not tell his employer that he was experiencing anxiety and low mood; he made excuses that did not invite too many questions such as childcare responsibilities (for example in November 2019, page 153).

32. In August 2019 the focus of the claimant's job role changed from client relationship management to sales. At the claimant's suggestion, the respondent entered into a partnership agreement with OneStream, a corporate performance management company. The claimant drove the respondent's OneStream strategy. OneStream has a business software product which the claimant felt the respondent could offer to its clients. He thought OneStream presented an opportunity for the respondent to develop and grow a new and profitable business service (pages 146 and 148).

33. The claimant found the transition to a sales role very difficult. He had no experience or training in sales. He thought his performance was substantially affected by Brexit and the emerging Covid-19 pandemic. He was under considerable stress and his relationship with Mr Bell was becoming increasingly fractious.

34. The difficulties in the working relationship between Mr Bell and the claimant were contributed to by differences in management style. Mr Bell is very detail oriented and expects to be provided with detailed data to enable him to analyse performance. The claimant found Mr Bell's management style difficult and was unhappy about some of the processes and systems which Mr Bell introduced to the respondent, for example a new 'Exco Process'. This process required the preparation of detailed spreadsheets and performance data in advance of each meeting of the Executive Committee (Exco) of the respondent. Preparing the required information took the claimant a significant amount of time and effort. At the Exco meetings, Mr Bell asked the claimant detailed questions about the data, and the claimant could not always provide an immediate answer. The claimant felt that Mr Bell was not asking the right questions, and wanted the opportunity to communicate relevant information in a productive and balanced way, rather than being asked specific detailed questions. He communicated his difference of opinion about this to Mr Bell. Mr Bell's view was that the claimant was resistant to change.

35. Although it is clear that Mr Bell was making demands of the claimant in terms of performance, we do not find that the claimant was expected to work late into the evenings and weekends or that unreasonable requirements were imposed on him. There was no evidence to support that.

36. The claimant regularly spoke to Mrs Swemmer, then the HR executive for the holding company who had taken over HR responsibilities for the respondent from March 2019. On 18 December 2019 he spoke to her about the difficulties he was experiencing with working with Mr Bell. He felt his suggestions and explanations were not being acknowledged or taken on board. In the conversation, the claimant also said he was going through a difficult divorce, and had found the redundancy process particularly difficult. He said he was frustrated with team members. He said he was struggling to cope. In this and other conversations with Mrs Swemmer, the claimant

deliberately avoided using the word depression because he was worried that Mr Bell might be prejudiced against those with mental health issues.

37. Mrs Swemmer emailed the claimant after the discussion, thanking him for the insight and hoping he would 'refresh and renew [his] energies' over the break for the festive season (page 155). Against the background of the difficult relationship between the claimant and Mr Bell, Mrs Swemmer understood the claimant to be describing work-related stress arising from the difficulties at work and also stress from his divorce. She was unaware that the claimant had any history of mental ill-health.

38. Mrs Swemmer did not retain any notes of her discussions with the claimant. Her practice was to dispose regularly of her handwritten notes.

39. The respondent was in a negative profit position in 11 of 12 months in 2019 (page 618). By the end of 2019, the respondent's financial position was very stark.

The Exco meeting in January 2020

40. There was an incident at an Exco meeting which took place on 21 January 2020. Mr Bell attended the meeting in person as he was in the UK. He asked the claimant probing questions about the new OneStream service and pressed him for more detailed information. The claimant felt that Mr Bell was not giving him a proper opportunity to explain the bigger picture. One of the claimant's colleagues who was present at the meeting sent the claimant a text message saying 'breathe', to which the claimant replied, 'he's a dick' (referring to Mr Bell) (page 159). The claimant became agitated, saying that Mr Bell should not ask him questions at that level of detail. The claimant raised his voice and exclaimed, 'I'm not a salesman'.

41. Mrs Swemmer attended the meeting remotely. She was shocked by the claimant's behaviour, which she described as an 'outburst'. She had never seen a senior staff member act in that way before. The incident was understood by Mr Bell and Mrs Swemmer in the context of the difficult relationship between Mr Bell and the claimant which had been ongoing since around the time of the acquisition over a year before.

42. After the meeting Mrs Swemmer had some discussions with the claimant about what had happened, but she did not ask him whether he was experiencing any mental ill-health or whether a referral to occupational health would have been helpful.

43. The claimant emailed Mr Bell on 24 January 2020 (page 164). In his email he said he wanted to 'draw a line under the history and move on', and said he recognised that it would take time and significant effort to rebuild Mr Bell's trust, but he was fully prepared to do that.

44. The claimant did not hear back from Mr Bell immediately. He asked Mrs Swemmer to let him know when she had heard from him. Mrs Swemmer replied to the claimant by email. She said that she had told Mr Bell that she believed that the claimant had 'resisted getting onboard' because he was

'uncertain of how [he fitted] in', but that he had now made a fundamental decision to get onboard (page 162).

45. Mr Bell responded to the claimant on 30 January 2020 (page 166). He said the business was not succeeding and was in deep crisis and that a fundamental shift would be needed in the way the claimant worked, how long he worked, and what he did.

46. On 7 February 2020, Mr Bell spoke to Mr de Bruine. Mr de Bruine told Mr Bell that he believed that the claimant was 'playing' them and that there continued to be no real progress. Mr de Bruine said the claimant was not supportive of his tenure and was undermining him to other staff. Mr Bell emailed Mrs Swemmer about this and asked whether the claimant could be dismissed 'for performance' and what notice period he had (page 230).

The performance improvement plan

47. On 11 February 2020 Mr Bell attended a meeting of the board of the holding company. He made a presentation which included an update on the position of the respondent. One of his slides (page 217) reported that the claimant:

> "has proven to be … untenable and undermining [Mr de Bruine and Mr Bell] at every turn. His unwillingness to change has created a significant issue for the business as he continues to drive a wedge within the management team.
>
> We are to formally notify him of his Performance Management process, similar to as was done with [Mr Garbett]. We no longer can have him in the business and the cost to be rid of him would cost 6 months of notice pay, therefore we have to work towards firing him for non performance.
>
> This has had a greater impact than we anticipated in driving a real wedge in the team and stunting chances to move forward."

48. It is clear from this slide that by this meeting Mr Bell had decided that the relationship with the claimant was no longer tenable. His decision is expressed in final terms ('we no longer can have him in the business'). There is no suggestion that the decision will be reviewed as the performance management process progresses or that it will be changed if there is an improvement in performance. We find that by 11 February 2020 Mr Bell had decided that the claimant could not stay in the business and that he should be dismissed. The reason Mr Bell decided to implement a performance improvement plan rather than dismissing the claimant immediately was not because he wanted to give him a chance to improve, but because he thought a dismissal for failing to meet targets in a performance improvement plan would save the respondent the cost of 6 months' notice pay. The board of the holding company approved Mr Bell's decision.

49. Mrs Swemmer prepared a draft performance improvement plan. She sent this to Mr Bell on 13 February 2020 (page 240). Mr Bell spoke to the claimant on the same day and told him that he was going to put him on a

performance improvement plan. The claimant said he was under a lot of pressure and struggling to cope, especially with the sales side. He did not in this conversation (or at any other stage) tell Mr Bell or anyone else in the respondent that he had depression, that his performance had been affected by a health condition, or that he needed adjustments because of depression.

50. Mrs Swemmer sent Mr Bell an amended version of the performance improvement plan on 27 February 2020 (page 246).

51. On 6 March 2020 Mr Bell and the claimant had a meeting to discuss progress. They discussed the target which had been set by Exco in its 11 February meeting that all of the respondent's staff should find 10 business leads (page 343). The claimant thought this was a demanding but realistic target for OneStream.

52. The final version of the performance improvement plan was sent to the claimant on Friday 13 March 2020 (page 253). We find that there was no expectation on the part of the respondents that the claimant would meet the targets set out in the plan. Rather, the performance improvement plan was a mechanism which the respondents intended to use to dismiss the claimant. We reach this finding because in each consecutive draft, the targets set for the claimant in respect of OneStream business (the most easily quantifiable target) had become more challenging, changing from targets for weekly calls, introductions and qualified prospects only in the first draft, to targets of 7 new potential clients and 3 closed deals in the second draft, and then to targets of 10 new potential clients and 3 closed deals in the final version of the plan. We find that the reason Mr Bell spent time amending and finalising the plan was so that he could dismiss the claimant at the end of it, not because he wanted to see the targets met and the claimant's performance improve.

53. The performance improvement plan required the claimant to be in the office four days a week.

<u>The claimant's sickness absence and dismissal</u>

54. The claimant became unwell on the weekend after the performance improvement plan was sent to him, and he was unfit for work on Monday 16 March 2020.

55. We accept the view of the joint medical expert that from 13 March 2020 the claimant had an impairment (a moderate to severe depressive episode), that this had a substantial adverse effect on his ability to carry out normal day to day activities and that without medication the claimant's illness would have continued to have substantial effects for more than 12 months.

56. The claimant emailed the respondent on 16 March 2020 and said he had become 'quite unwell' and was unable to work (page 259). This was the week before the start of the first national lockdown for Covid-19 and the respondent emailed the claimant referring to coronavirus and asking whether the claimant had any concerns around his condition as they would

need to communicate with staff if he did. In his reply on 18 March 2020, the claimant said he did not seem to have the symptoms of coronavirus. He described his symptoms as feeling sick, dizzy, shaky, having blurry vision, zero energy and being unable to sleep. He said he did not seem to have a fever or sore throat. He said he was concerned and would continue to seek medical help and keep the respondent informed (page 258).

57. Mr Bell emailed the claimant on the morning of 19 March 2020 to schedule a meeting for the following week to progress the activities set out in the performance improvement plan (page 260).

58. The claimant was certified by his GP as unfit to work from 19 March 2020 until 2 April 2020. The fit note said that the reason for the absence was stress at work (page 262). The GP added that the claimant had 'relapse of low mood and increased anxiety'.

59. The claimant sent his fit note to Mrs Swemmer on the evening of 19 March 2020, and she forwarded it to Mr Bell on 20 March 2020 (page 263). On receipt of the fit note, Mr Bell emailed Mrs Swemmer asking, 'How do you get off for 2 weeks for a low mood and anxiety?', and adding, 'Sure this should force an escalation'. We find that by escalation Mr Bell meant a speeding up of the dismissal process, because the claimant's absence would mean a delay in the performance improvement process (and therefore the claimant's dismissal).

60. Mr Bell and Mrs Swemmer both thought the claimant's sickness absence was a tactic on the claimant's part to avoid having to engage with the performance improvement plan. For this reason, the respondents did not take any steps to request GP records or obtain a medical report under the respondent's sickness absence policy and procedure (page 73).

61. On 23 March 2020 the claimant emailed the respondent and said that he was 'not feeling great at all both physically and mentally'. He gave no other details (page 265).

62. Between 20 March and 27 March 2020, Mr Bell spoke to the claimant's colleagues including Mr de Bruine and the respondent's sales director. They were both critical of the claimant and felt that the OneStream business was failing, despite the claimant's assurances to the contrary. Mr Bell decided that the respondent should dismiss the claimant with immediate effect rather than waiting for the (expected) failure to meet the targets in the performance improvement plan which was likely to be delayed by the claimant's sickness absence. Mr Bell spoke to board members of the holding company in South Africa and they approved his decision. Mr Bell kept no records of any of the discussions during this time.

63. Mr Bell tried to call the claimant on 27 March 2020 to notify him of his dismissal, but he was unable to reach him. The claimant was notified of his dismissal in a letter sent by email on 27 March 2020. He had a six month notice period which he spent on garden leave (page 268). The letter said that the respondents had reviewed the decision to put the claimant on a performance improvement plan and decided that the breakdown in trust

between the claimant and the respondent was such that his position had become untenable.

64. Mr Bell spoke to the respondent's key staff about the decision to dismiss the claimant (pages 353 and 354). He said that the claimant had been dismissed because of the breakdown of trust which arose from his constant undermining of the leadership and its efforts.

65. The claimant replied to Mr Bell by email on 29 March 2020 (page 272). He said the letter was a shock and he was still trying to digest it. He asked about practical issues such as the company laptop and mobile phone. He did not mention any health issues.

The Law

Disability

66. Disability is a protected characteristic under section 4 of the Equality Act 2010.

67. The definition of disability is in section 6 of the Equality Act:

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

68. Schedule 1 to the Equality Act sets out additional detail concerning the determination of disability. In relation to long-term effects, paragraph 2 of schedule 1 provides:

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

69. When considering whether an effect is long-term, the relevant time point is the date that the alleged discriminatory acts occurred. The question is whether, at that date, there had been 12 months of adverse effect or an adverse effect which was at that time likely to last for at least 12 months (or the rest of the person's life).

70. Paragraph 5 of schedule 1 deals with the effect of medical treatment. It says:

> *"(1) An impairment is to be treated as having a substantial effect on the ability of the person concerned to carry out normal day-to-day activities if –*
>
> *a) measures are being taken to correct it, and,*
>
> *b) but for that, it would be likely to have that effect.*
>
> *(2) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid."*

71. This requires the tribunal to consider what the effect on the claimant's ability to carry out day-to-day activities would have been but for the medical treatment or other measures.

Direct disability discrimination

72. Section 13(1) of the Equality Act 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."*

73. Section 23 provides:

> *"(1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.*
>
> *(2) The circumstances relating to a case include a person's abilities if - (a) on a comparison for the purposes of section 13, the protected characteristic is disability."*

74. The claimant relies on a hypothetical comparator.

75. When considering an employer's knowledge of disability for the purposes of a complaint of direct discrimination under section 13, the focus of the ET's enquiry should be on 'the underlying facts which amount to the disability and the effects of it, not on the condition itself'. That means looking at the effects of the impairment, not the cause. (Urso v Department for Work and Pensions UKEAT/0045/16/DA).

76. In the Urso case, the EAT accepted that the evidence that the respondent had at the material time suggested that the claimant exhibited the symptoms of a psychiatric condition which went well beyond mere stress and anxiety. The claimant was absent from work because of psychiatric problems and the employer was aware of a history of psychiatric problems. It was plain from the evidence that the employer had that the claimant's mental health problems were continuing and required investigation.

Discrimination arising from disability

77. Section 15(1) of the Equality Act 2010 provides that a person (A) discriminates against a disabled person (B) if:

> *"(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."*

78. Section 15(2) provides that:

> *"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."*

79. Paragraph 5.15 of the EHRC Employment Code of Practice says:

> *"An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."*

80. There is an example in paragraph 5.15 which describes a disabled man who has a good attendance and performance record but who becomes emotional and upset at work for no apparent reason, has been repeatedly late for work and has made some mistakes. The code suggests that:

> *"The sudden deterioration in the worker's time-keeping and performance and the change in his behaviour at work should have alerted the employer to the possibility that that these were connected to a disability."*

<u>Indirect discrimination</u>

81. Section 19 of the Equality Act 2010 provides:

> *"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
>
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
>
> *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
>
> *(c) it puts, or would put, B at that disadvantage, and*

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

Failure to make reasonable adjustments

82. The Equality Act imposes a duty on employers to make reasonable adjustments. The duty comprises three requirements, in this case, the first requirement is relevant. This is set out in sub-section 20(3). In relation to an employer, A:

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

83. Paragraph 20 of schedule 8 of the Equality Act says that an employer, A, is not subject to a duty to make reasonable adjustments:

> *"if A does not know, and could not reasonably be expected to know –*
>
> *…*
>
> *(b) … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."*

Burden of proof in complaints under the Equality Act 2010

84. Sections 136(2) and (3) provide for a shifting burden of proof:

> *"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) This does not apply if A shows that A did not contravene the provision."*

85. This means that if there are facts from which the tribunal could properly and fairly conclude that there has been unlawful discrimination, the burden of proof shifts to the respondent.

86. If the burden shifts to the respondent, the respondent must then provide an "adequate" explanation, which proves on the balance of probabilities that the respondent did not fail to make reasonable adjustments.

87. The respondent would normally be expected to produce "cogent evidence" to discharge the burden of proof. If there is a prima facie case and the explanation for that treatment is unsatisfactory or inadequate, then it is mandatory for the tribunal to make a finding of discrimination.

Conclusions

88. We have applied the legal principles to our findings of fact to reach our conclusions in respect of the issues we had to decide.

Disability

89. In light of Dr Mehrotra's report, the parties agree that the claimant was disabled from 13 March 2020.

90. The respondents do not accept that the claimant was disabled prior to that date.

91. We have accepted Dr Mehrotra's view that prior to 13 March 2020 the claimant's anxiety and low mood did not meet the diagnostic criteria for either a depressive episode or generalised anxiety disorder, and that the effects of the claimant's anxiety and low mood were minor or trivial and did not interfere with the activities of the claimant's daily living on a sustained basis. We have also accepted Dr Mehrotra's view that the claimant's sessions with a life coach did not in medical terms have an alleviating nature or stop the claimant's psychiatric health from deteriorating. It was therefore not a measure without which there would have been a substantial adverse effect on the claimant's ability to carry out normal day to day activies.

92. We have found, based on Dr Mehrotra's report, that in December 2017 the claimant had an episode of depression which affected his ability to engage in social and leisure activities and his ability to cook. His sleep was also affected. This was a substantial adverse effect on the claimant's ability to carry out normal day to day activities.

93. We have also found, again based on Dr Mehrotra's report, that because of his anxiety and low mood, the claimant was at high risk of a recurrence of depression. We find therefore that the substantial adverse effect on the ability to carry out normal day to day activities which the claimant experienced in December 2017 was likely to recur (in the sense that recurrence of that effect could well happen). The claimant's recurrent depressive condition is therefore treated as continuing to have a substantial adverse effect by virtue of paragraph 2(2) of schedule 1 of the Equality Act. This likelihood of recurrence and the deemed continuing effect lasted throughout the period February 2019 to 12 March 2020 when the claimant had anxiety and low mood. This period was longer than 12 months and was therefore long-term.

94. We conclude that the claimant was disabled for the purpose of the Equality Act during the period February 2019 to 12 March 2020, because of the risk of recurrence of an earlier depressive condition which had a substantial adverse effect on his day to day activities.

95. The respondents' knowledge of the claimant's disability is in dispute. The issue of knowledge has a different impact in relation to the different forms of prohibited conduct. We have therefore considered knowledge in respect of each of the claimant's complaints.

Direct disability discrimination

96. The claimant complains that his dismissal amounted to direct disability discrimination. He was dismissed with notice on 27 March 2020 and his employment terminated on 27 September 2020.

97. We have found that the decision to dismiss the claimant was made by Mr Bell. He made the decision in two stages. His decision that the claimant should be dismissed was first made on 11 February 2020, and then, between 20 and 27 March 2020, Mr Bell decided to bring the dismissal forward, rather than waiting for the end of the performance improvement plan.

98. We have considered carefully the reason why Mr Bell made these decisions, including Mr Bell's knowledge of the facts surrounding the claimant's disability at the time of those decisions.

99. We have found that the reason why Mr Bell made the decision of 11 February 2020 to dismiss the claimant was that Mr Bell considered the claimant's behaviour to have been undermining of the respondent's new leadership team, and he felt the situation had become untenable. He based this on the claimant's behaviour, including the outburst at the Exco meeting on 21 January 2020, and on what he had been told about the claimant by Mr de Bruine.

100. At the time this decision was made, Mr Bell had no knowledge of the fact that the claimant was disabled. At this time, the claimant's disability arose from the likelihood of recurrence of depression. Mr Bell was not aware of the claimant's history of depression; the claimant had not told him or anyone else in the respondent about this. The claimant had not had any time off work. We have found that the claimant was experiencing anxiety and low mood from February 2019, but he had not told Mr Bell about this. The effects of the anxiety and low mood were minor or trivial, and did not interfere with his day to day life on a sustained basis. The effects were not apparent to Mr Bell. The claimant's anxiety and low mood did not play any part in Mr Bell's decision to dismiss.

101. Mr Bell was present during the incident at the Exco meeting and was aware that the claimant was under stress. An outburst of that nature from a senior member of staff was unusual, but we accept that in the context of the difficult relationship between Mr Bell and the claimant, which had been ongoing since shortly after the acquisition over a year previously, the claimant's behaviour would not in itself have communicated to Mr Bell that the claimant had a history of depression or that he was at risk of a depressive episode.

102. We have concluded that at the time he made the decision to dismiss the claimant which was approved by the board on 11 February 2020, Mr Bell was not aware that the claimant had depression, or that he was at risk of developing a recurrence of depression. He did not consider the claimant to have any mental health issues over and above work-related stress.

Therefore, Mr Bell was not aware of the claimant's disability or of any underlying facts about the claimant's disability or its effects.

103. The second stage of the decision to dismiss the claimant was the decision by Mr Bell to bring the dismissal forward. This second stage decision was made between 20 and 27 March 2020. We have found that Mr Bell decided not to wait for the outcome of the performance improvement plan because he thought the claimant's sickness absence was a tactic, and in light of the further information he had received from Mr de Bruine, he thought that it was clear that the respondents' relationship with the claimant had broken down. He decided that there should be no further delay, and that the claimant should be dismissed immediately.

104. At the time of this second stage of the dismissal decision, the claimant was disabled by virtue of the effects of a depressive episode. However, the claimant had not told Mr Bell (or anyone else in the respondent) that he was experiencing a depressive episode. We have considered the information which Mr Bell had between 18 and 27 March 2020 about the claimant's health. We have decided that this information did not make Mr Bell aware of the claimant's disability or the underlying facts which amounted to it, for the following reasons.

105. In the claimant's email of 18 March 2020, the claimant set out his symptoms. He did not mention depression. The symptoms he described could have been symptoms of depression, such as having zero energy and being unable to sleep. But they could also have been symptoms of many other conditions, including Covid-19, which was what prompted the email exchange. The claimant did not say definitively that he did not have Covid-19, only that he did not 'seem to have the symptoms of coronavirus'. This email was not sent to Mr Bell but in any event, we accept that he would not have understood from it that the claimant may be experiencing depression or a health condition with substantial adverse effects which was long term. Further, at this time, Mr Bell did not anticipate the claimant being off work for long, because he sent an email to the claimant to arrange a meeting for the following week. He did not know that the condition was a long-term condition.

106. More information about the claimant's health was sent to the respondent in the fit note of 19 March 2020. It said that the claimant would be unfit for two weeks. The fit note did not refer to depression; it said the reason for the absence was stress at work. There was a reference to relapse of low mood and anxiety, from which Mr Bell understood that this was something that the claimant had had before. It did not say that the claimant had a history of depression. It was not evident from the fit note that the claimant's absence was because of an impairment that would substantially affect his day to day activities, or one that would be long-term, as opposed to being a reaction to stress at work. The reference to low mood and anxiety did not suggest to Mr Bell that the claimant had an underlying impairment, because he was surprised the claimant had been certified unfit for work for two weeks because of it. In circumstances where the fit note said the reason for the absence was stress at work and the claimant's absence had started on the working day after a performance improvement plan had been sent to him,

Mr Bell's assumption was that the cause of the claimant's absence was stress at work.

107. Mr Bell's email of 20 March 2020 was dismissive of sickness absence for 'low mood and anxiety'. This was not because he did not take mental health issues seriously or because he was unhappy that the claimant had to take time off for these reasons. This comment was prompted by Mr Bell's perception that, because of its timing, the claimant's sickness absence was a tactic to avoid engaging with the performance improvement plan. This comment was made without knowledge of the claimant's disability or the facts underlying it.

108. The claimant provided more information in his email of 23 March 2020. He said he was 'not feeling great at all both physically and mentally'. This was entirely unspecific. It could have been referring to any illness, mental or physical, or to stress. It did not make Mr Bell aware of the claimant's disability or the underlying facts which amounted to the claimant's disability.

109. We have found therefore that when he decided to bring the claimant's dismissal forward, Mr Bell was not aware of the claimant's disability or of the underlying facts which amounted to it. He was not aware that the claimant had depression, that he was experiencing a recurrence of a depressive condition, that the depression had substantial adverse effects on the claimant or that the effects were likely to be long term.

110. We have concluded that the reason for the claimant's dismissal was Mr Bell's perception that the claimant was not performing in his role, that he was undermining the senior managers of the respondent and that he was holding up the respondent's progress. The relationship had broken down. The decision to bring the dismissal forward was because Mr Bell decided there should not be any further delay, and he thought that completing the performance improvement plan in circumstances where the claimant had two weeks' sickness absence would lead to delay.

111. Although the claimant's sickness absence was the context in which Mr Bell's decided to bring the date of dismissal forward, the claimant's disability did not play a part in the decision, because Mr Bell was not aware of his disability, or of the underlying facts amounting to it.

112. For these reasons, we have concluded that the dismissal of the claimant by Mr Bell was not because of the claimant's disability. The reason why the claimant was dismissed was not his disability.

113. As we have been able to make a finding about the reason why the claimant was dismissed, we do not need to consider the shifting burden of proof. If we had done, and if we had found that the burden shifted to the respondent, we would have accepted that the decision to dismiss the claimant was in no sense whatsoever because of the claimant's disability, in particular because Mr Bell, who made the two decisions which led to the dismissal of the claimant on 27 March 2020, did not know that the claimant was disabled and did not know the underlying facts which amounted to the claimant's disability.

114. The complaint of direct disability discrimination fails for these reasons.

Discrimination arising from disability

115. The claimant's allegations of discrimination arising from disability can only succeed if one or both of the respondents knew, or could reasonably have been expected to know, that the claimant had a disability at the material times (section 15(2)) of the Equality Act). We have considered this issue first.

116. The material times in relation to the claimant's allegations of discrimination arising from disability are January to 27 March 2020.

117. We have first considered the actual knowledge of the respondents in the period January to 27 March 2020. We have found, as explained above, that Mr Bell did not know that the claimant had a disability at any time prior to the dismissal of the claimant on 27 March 2020.

118. We also have to consider whether the first respondent actually knew that the claimant had a disability, through Mrs Swemmer. We have therefore considered whether she knew about the claimant's disability.

119. In the period prior to 13 March 2020, Mrs Swemmer had several conversations with the claimant about how he was feeling. In particular, they had a conversation on 18 December 2019 in which the claimant said he was struggling to cope. However, in this and his other conversations with Mrs Swemmer, the claimant deliberately avoided using the word depression. He said he was under stress because of his divorce and the problems at work. We do not find that Mrs Swemmer knew from these conversations that the claimant had a disability or that he had previously had depression and was at risk of recurrence. She did not know the underlying facts which formed the basis for the claimant's disability at that time.

120. For the same reasons we have set out above in relation to Mr Bell, we do not find that Mrs Swemmer knew from the interactions between the claimant and the respondent between 13 March 2020 and 27 March 2020 that the claimant was disabled. The claimant did not provide the respondents with sufficient information about his ill-health for them to know that he had a disability.

121. We have gone on to consider whether either of the respondents could reasonably have been expected to know that the claimant had a disability at the material times. This is sometimes called 'constructive knowledge'. We bear in mind the guidance in the EHRC code which says that, "An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment." We need to consider whether the information the respondents had about the claimant and his health was such that it ought to have considered whether the claimant had a disability, even though he had not formally disclosed one.

122. The situation here was not like the example in the EHRC code of a sudden deterioration in performance or time-keeping and a change of behaviour. We have found that the claimant had difficulties with his working relationship with the respondents from shortly after the time of the acquisition. He was often late for meetings and found it difficult to complete work in a timely manner. He made excuses for his behaviour which were not related to his health. In that context, the respondents would not have been alerted that the claimant's performance issues were anything to do with his health.

123. The claimant's behaviour at the Exco meeting was unusual. Mrs Swemmer said she had not seen anything like it from a senior member of staff. In those circumstances, we would have expected an experienced HR professional like Mrs Swemmer to have explored with the claimant after the meeting whether he was well, whether there was anything the respondents needed to know about or could do to assist him. Although she did speak to the claimant, Mrs Swemmer did not go as far as asking him directly whether he was well or whether a referral to a doctor could assist. We would have expected Mrs Swemmer to have done so. We would have also expected her to have kept a note of the incident and of her discussion with the claimant about it.

124. However, if Mrs Swemmer had had a conversation like this with the claimant after the Exco meeting, it is very likely that the claimant would not have told her that he had a depressive condition. The meeting was in January 2020. In November 2019 the claimant had given an excuse about childcare rather than explaining the real reasons why he did not want to attend an event. In December 2019 the claimant deliberately decided avoid saying he had depression in conversations with Mrs Swemmer. We have concluded that it is very likely that the claimant would have taken the same approach had Mrs Swemmer asked him about his health in more detail in January 2020 after the Exco meeting. Therefore, even if Mrs Swemmer had spoken to the claimant about his health after the Exco meeting, the respondents could not reasonably have been expected to know that the claimant had a disability.

125. Overall, the information which the claimant provided to the respondent about his health in March 2020 was very limited. He had not told the respondent about his history of depression. None of his emails to the respondent or his fit note mentioned depression. He gave very unspecific information about his symptoms. The fit note gave the reason for absence as stress at work, and the timing of the claimant's sickness absence suggested that it was related to stress at work. The first time the claimant took sick leave was on a Monday (16 March 2020) after he was sent a performance improvement plan on the previous Friday.

126. In these circumstances, it was objectively reasonable for the respondent to think that the sickness absence was a stress response to the performance improvement plan. As the respondent had no knowledge of the claimant's history of mental ill-health, and given that the claimant had only been signed unfit for work for two weeks for stress at work, it was objectively reasonable for the respondent not to think it was necessary to ask the claimant to provide his GP records or to obtain a medical report.

127. We have decided that the respondents did not know and could not reasonably have been expected to know that the claimant had a disability at the time of the treatment which the claimant says was discrimination arising from disability. For this reason, the claimant's complaints of discrimination arising from disability cannot succeed.

Failure to make reasonable adjustments

128. While not withdrawn by the claimant, the complaints of failure to make reasonable adjustments were not the focus of the claimant's claim. No closing submissions were made on behalf of the claimant on the reasonable adjustments complaints.

129. Knowledge of disability is relevant to complaints of failure to make reasonable adjustments. Paragraph 20 of Schedule 8 of the Equality Act provides that an employer is not subject to the duty to make adjustments if they do not know and could not reasonably be expected to know that the employee has a disability (and is likely to be placed at a disadvantage).

130. We have found that the respondents did not know, and could not reasonably have been expected to know, that the claimant was disabled. This means that under paragraph 20 of schedule 8, the respondents were not subject to the duty to make reasonable adjustments for the claimant. The complaint of failure to make reasonable adjustments therefore fails.

Indirect disability discrimination (section 19 Equality Act 2010)

131. As with the complaints of failure to make reasonable adjustments, while not withdrawn by the claimant, the complaints of indirect discrimination were not the focus of the claimant's claim. No closing submissions were made on behalf of the claimant on indirect discrimination.

132. The claimant's complaint of indirect disability discrimination is based on three provisions, criteria or practices:

    132.1 The requirement to work beyond contractual hours including late into the evenings and weekends (applied from summer 2019 until dismissal).
    132.2 The requirement to generate at least 10 business leads (applied from February 2020 until dismissal).
    132.3 The requirement for non-field consultants to work entirely in the office (applied from February 2019 until dismissal).

133. We have considered each of the complaints of indirect discrimination in turn.

134. Requirement to work beyond contractual hours: There was a requirement in the claimant's contract to work 'any other additional hours as may be reasonably required by the company'. We have not found that the claimant was expected to work late into the evenings and weekends or that unreasonable requirements were imposed on the claimant.

135. There was no evidence before us that a contractual requirement to work additional hours as reasonably required was applied to other staff who did not have depression. Although this is a term which is often included in the contracts of senior staff, there was no evidence before us about whether this contractual term was included in the contracts of other staff of the respondent. There was also no evidence to enable us to conclude that a requirement of this nature would put people with depression at a particular disadvantage when compared to other people.

136. If we had found the requirement to work beyond contractual hours to have been indirectly discriminatory, we would have accepted that it was justified. The need to improve the performance of the respondent's business is a legitimate aim, and a contractual term providing for a senior member of staff to work additional hours as reasonably required is a proportionate means of achieving that legitimate aim.

137. Requirement to generate at least 10 business leads from February 2020: We have found that a target was set at the Exco meeting on 11 February for all staff to find 10 business leads. It was discussed by Mr Bell and the claimant on 6 March 2020.

138. There was no evidence before us that this target would put people with depression at a particular disadvantage when compared to other people. Further, we have not found that the claimant was put at that disadvantage by this target. The claimant accepted that the target was realistic for his part of the business (OneStream). He found the target challenging because of his lack of experience and training in sales, and because of Brexit and the start of the pandemic. He felt that he needed more support because of his lack of experience in sales. This was not related to his depressive condition.

139. If we had found the business leads target to have been indirectly discriminatory, we would have accepted that it was justified. We accept that the need to improve the performance of the respondent's business is a legitimate aim, and that setting a realistic target for finding business leads is a proportionate means of achieving that legitimate aim.

140. Requirement to work entirely in the office from February 2019 until dismissal: We have not found that there was a requirement to work entirely in the office from February 2019 until the claimant's dismissal. We have found that before 13 March 2020 there was no requirement for the claimant to work in the office and that he went into the office about two days a week. From 13 March 2020 the claimant was required to work in the office four days a week.

141. There was no evidence before us that a requirement to work in the office was applied by the respondent to other staff who did not have depression. There was no evidence that a requirement to work in the office would put people with depression at a particular disadvantage when compared to other people. We have not found that the claimant was put at that disadvantage by this requirement. Prior to the requirement being imposed, the claimant worked in the office about two days a week. He was on sick

leave after 13 March 2020 until his dismissal and so he was not required to work in the office at all during that time.

142. If we had found any requirement to work in the office to have been indirectly discriminatory, we would have accepted that it was justified. The need to improve the performance of the respondent's business is a legitimate aim, and a requirement for a senior member of staff to work in the office for a set part of the week is a proportionate means of achieving that legitimate aim, especially when the claimant accepted that he avoided attending the office and that he was failing to attend work meetings or forgetting about them altogether.

143. In summary on the complaint of indirect discrimination, the required elements of the claim are not met, and the complaint cannot succeed.

_____

Employment Judge Hawksworth

Date: 19 July 2022

Judgment and Reasons sent to the parties
On: 25 July 2022

.....
For the Tribunal Office

Public access to employment tribunal decisions:
All judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Appendix – List of Issues

A. Disability (section 6 Equality Act 2010)

1. At the time of the alleged discriminatory conduct set out in this List of Issues, was the Claimant disabled within the meaning of section 6 of the Equality Act 2010? The Claimant contends that his disability was depression.

    1.1. Did the Claimant have depression at the material times?
    1.2. If so, was the Claimant disabled by reason of that condition? In particular, did the condition have a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities?

B. Direct disability discrimination (section 13 Equality Act 2010)

2. It is agreed that the Claimant was dismissed with notice on 27 March 2020 and that his employment terminated on 27 September 2020.

3. Was the dismissal less favourable treatment? The Claimant will rely on a hypothetical comparator.

4. If so, did the Respondents subject the Claimant to that less favourable treatment because he was disabled?

C. Discrimination arising from disability (section 15 Equality Act 2010)

5. Allegation 1:

    5.1. Was the Claimant's absence from work from 16 March 2020 something which arose in consequence of his disability?

    5.2. If so, was that 'something' the reason for the Claimant's dismissal on 27 March 2020?

6. Allegation 2:

    6.1. Did the following things arise in consequence of the Claimant's disability:

        6.1.1. the Claimant's failure to demonstrate leadership, focus, and urgency in the performance of his work
        6.1.2. the Claimant's failure to spend time in the office
        6.1.3. the Claimant's negative attitude in the performance of his work?

    6.2. If so, were those 'somethings' (or any of them) the reason for the following unfavourable treatment:

        6.2.1. the implementation of the Performance Improvement Plan on 13 March 2020; and/or
        6.2.2. the Claimant's dismissal on 27 March 2020?

    6.3. If so, did the treatment have a legitimate aim? To the extent that it is necessary for the Respondents to rely on a legitimate aim, they rely on

the need to address inadequate performance in the context of the Claimant's business critical role.

6.4. If so, was it a proportionate means of achieving that aim?

7. Allegation 3:

7.1. Did the following things arise in consequence of the Claimant's disability:

7.1.1. the Claimant's lack of energy, low mood and morale, and lack of motivation
7.1.2. the Claimant taking longer than usual to complete tasks
7.1.3. the Claimant forgetting work meetings?

7.2. Did the Respondents subject the Claimant to unfavourable treatment in that the Second Respondent on behalf of the First Respondent was aggressive and hostile towards the Claimant in the period January to March 2020? The Claimant relies on the examples, non-exclusively and without limitation, given in paragraph 10 of the Grounds of Complaint and paragraphs 8, 9 and 11 of the response to the request for further and better particulars.

7.3. If so, was the reason for that unfavourable treatment one of the 'somethings' set out at paragraph 7.1?

7.4. If so, did the treatment have a legitimate aim? To the extent that it is necessary for the Respondents to rely on a legitimate aim, they rely on the need to address inadequate performance in the context of the Claimant's business critical role.

7.5. If so, was it a proportionate means of achieving that aim?

8. In respect of each of the allegations set out at paragraphs 5 to 7 above, did the Respondents know, or could they reasonably have been expected to know, that the Claimant had a disability at the material times?

D. Failure to make reasonable adjustments (section 21 Equality Act 2010)

9. Did the Respondents apply the following provisions, criteria or practices (PCPs):

9.1. The requirement to work beyond contractual hours including late into the evenings and weekends applied from summer 2019 until dismissal.
9.2. The requirement to generate at least 10 business leads applied from February 2020 until dismissal.
9.3. The requirement for non-field consultants to work entirely in the office applied from February 2019 until dismissal. The Respondents contend that 9.3 is not sufficiently pleaded in the Grounds of Complaint to be pursued without amendment.

10. Did the Respondents apply those PCPs to the Claimant?

11. Did those PCPs put the Claimant at a substantial disadvantage as compared to people without his disability? The Claimant contends that he was substantially disadvantaged in that his disability:

    11.1. caused him to experience an absence of energy, low mood and morale
    11.2. caused him to forget about meetings
    11.3. made him more vulnerable to stress and anxiety.

12. If so, did the Respondents know, or could they reasonably have been expected to know, that the Claimant was disabled and that he was likely to be placed at that substantial disadvantage as a result of the PCP(s)?

13. If so, could the Respondents reasonably have been expected to take the following steps to avoid that disadvantage:

    13.1. Alleviating the Claimant's workload
    13.2. Allowing more time to accomplish tasks
    13.3. Allowing the Claimant to work from home
    13.4. Reducing work targets to realistic levels
    13.5. Providing more direct support on tasks

14. Did the Respondent fail to take those steps?

<u>E. Indirect disability discrimination (section 19 Equality Act 2010)</u>

15. Did the Respondents apply the PCP(s) set out at paragraph 9 above, including to people who do not share the Claimant's disability?

16. Did or would the PCP(s) put people with depression at a particular disadvantage when compared to other people?

17. Did the PCP(s) put the Claimant at that particular disadvantage?

18. Did the PCP(s) have a legitimate aim? To the extent that it is necessary for the Respondents to rely on a legitimate aim, they rely on the need to improve the performance of the First Respondent's business.

19. Was or were the PCP(s) a proportionate means of achieving that legitimate aim?

<u>F. Time limits</u>

20. In respect of alleged discrimination set out in sections C, D and E of this List of Issues, were the complaints of discrimination made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

    20.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
    20.2. If not, was there conduct extending over a period?
    20.3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

20.4. If not, were the claims made within a further period that the Tribunal thinks just and equitable? The Tribunal will decide:
  20.4.1. Why were the complaints not made to the Tribunal in time?
  20.4.2. In any event, is it just and equitable in all the circumstances to extend time?

G. Remedy

21. If the Claimant suffered the discrimination alleged, what compensation is he entitled to:

  21.1. What financial losses has the discrimination caused the Claimant?

  21.2. Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

  21.3. If not, for what period of loss should the Claimant be compensated?

  21.4. What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

  21.5. Is there a chance that the Claimant's employment would have ended in any event? Should his compensation be reduced as a result?