EMPLOYMENT TRIBUNALS

Claimant: Mr S Mainali

Respondent: New Godalming Sushi Ltd

Heard at: Watford Employment Tribunal (In Public; In person)

On: **27 and 28 July 2022**

Before: Employment Judge Quill & Mr W Dykes (in the hearing centre)
& Ms B Robinson (by video)

Appearances
For the claimant: In person
For the respondent: Mr H Dhorajiwala (counsel)

RESERVED JUDGMENT

(1) The Claimant did not have a disability within the meaning of section 6 of the Equality Act 2010 at the relevant times.

(2) The complaints of harassment related to disability fail and are dismissed.

(3) The complaints of direct discrimination because of disability fail and are dismissed.

(4) The complaint of breach of contract succeeds.

(5) A remedy hearing has been scheduled for 3 April 2023.

REASONS

The Hearing and The Evidence

1. This was a two day hearing which took place fully in person, save for the fact that one of the panel members attended remotely.

2. We had a bundle of around 311 pages initially, with some extra pages added during the hearing.

3. The Claimant had not prepared a specific statement despite this having been ordered at a hearing before EJ Burje on 12 October 2021. With the Respondent's agreement, the Claimant was sworn in and, is evidence in chief was taken as being his attesting to the accuracy of documents in the bundle, being his impact statement, claim form and (the relevant extracts from) his further and better particulars. He was cross-examined and answered questions from the panel.

4. The Respondent had produced a written statement from Nattida Siriwatworasakul, who did not attend. We have read her statement, but given it little weight.

5. The Respondent also produced written statements from Ionut Tiplea, Yadu Aryal and Sumin Lohani, each of whom gave evidence on oath, and were questioned by the claimant and the panel.

The Claims and Issues

6. One of the things decided at the first preliminary hearing (before EJ Burje) was that a further preliminary hearing was needed. That took place before EJ Reindorf on 22 April 2022, and the full list of the decisions she made at that hearing is in the bundle. Her orders included the list of issues to be decided at this final hearing. They were:

A. Disability

1. Was the Claimant disabled within the meaning of s 6 of the Equality Act ('EqA') 2010 at the relevant times?

2. The Claimant states that he is disabled by reason of:

i. Anxiety;

ii. Insomnia; and

iii. Panic attacks.

3. Did the Respondent have knowledge of the Claimant's alleged disabilities, and if so, from what date?

B. Direct Discrimination (Disability) (s 13 EqA 2010)

1. Did the Respondent treat the treat the Claimant less favourably than a hypothetical comparator?

2. The treatment that the Claimant relies upon is:

i. On 15 and/or 16 January 2020 the Claimant felt bullied because Sumin Lohani told the Claimant he was not liked by members of staff and told him to leave his employment, the inference being that it was because of the Claimant's disability;

ii. On 17 January 2020 the Claimant was called 'mental', 'psycho', and felt bullied. The Claimant was also concerned by the expression of aggression by Sumin Lohani to the extent that the Claimant perceived he was trying to headbutt him; and

iii. On or around the 17 January, Sumin Lohaini told the Claimant that staff were scared of him, the inference being that it was because of the Claimant's disability.

3. Was this treatment because of the Claimant's disability?

C. Harassment (s 26 EqA 2010)

1. Did the Respondent engage in unwanted conduct? The Claimant relies upon the conduct identified at para [B.2] of this Agreed List of Issues.

2. Was the conduct related to the Claimant's disability?

3. If so, did the conduct have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant (the 'prohibited effect')?

4. In deciding whether the alleged conduct had the prohibited effect, account be taken of: the Claimant's perception; the other circumstances of the case; and whether it is reasonable for the conduct to have the effect.

D. Wrongful Dismissal

1. Was the Claimant wrongfully dismissed?

2. If so, was he entitled to 6 months' notice pay?

E. Remedy

1. What remedy, if any, was the Claimant entitled to?

The Facts

7. We had photographs of a printout dated 2 December 2021 of GP notes. That print out was 29 pages. We had pages 1 to 14. We therefore seemed to have a consecutive record of GP visits from September 2013 to September 2021.

GP Notes

8. The Claimant had a head injury in 2013. He was abroad at the time and attend an accident and emergency centre. He attended A&E at West Middlesex Hospital n his return to UK on 3 September 2013 and was discharged on 4 September.

9. He visited his GP around 17 October, and reported symptoms of mood swings and fuzziness. He did not feel safe to drive or to work. He was given signed off work until 26 November 2013.

10. He visited the neurology department at St Marys Hospital in around 25 November 2013. The GP notes record that the diagnosis had been of intracerebral haemorrhage. He saw a GP again on 10 December 2013, but there is no confirmation that either the hospital or the GP extended the fit note which had certified him as unfit to work until 26 November 2013.

11. He visited the surgery again in February 2014, but this does not seem to be related to any head injury.

12. There might have been some communication from St Marys neurology department to the surgery in March 2014, but no details are given.

13. In around June 2014, in an entry described as “new episode”, it was reported that the Claimant had seen endocrinologist and required further tests “post TBI”.

14. The 8 September 2014 entry notes that there was growth hormone deficiency “likely secondary to traumatic brain injury”. It also said “CT confirmed frontal bone fracture”.

15. In May 2015, the Claimant was seen in endocrine clinic, and also took part in a study related to effects of a course of treatment on “traumatic brain injury”.

16. There was a GP visit for a seemingly unrelated matter on 9 October 2015. On 30 December 2015, referring to a letter from neurologist, it was stated that some medication was issued and there were to be Vitamin D and bone tests.

17. On around 31 August 2016, the Claimant visited West Middlesex A&E with his brother in law, who reported that the Claimant had been behaving strangely over the past few days; mood swings between laughing and crying; saying things that did not make sense. The diagnosis was “psychiatric issues”.

18. On 1 September 2016, he attended the GP, accompanied by his wife, and there was a discussion about the previous day’s hospital visit. He was certified as not fit to work for 30 August to 13 September 2016, with diagnosis “stress”.

19. It does not seem that this certificate was extended. However, the Claimant had been given medication when discharged from the hospital, and, on 29 September 2016, was given a further supply. The GP notes recorded (in reference to the late August event) “psychotic episode”.

20. This is probably taken from the document which is at page 225 of the hearing bundle. That shows he was under the care of a specialist from 1 September 2016 to 29 September 2016, but on that date was considered well enough for that care to be ended, and future care/treatment to be via GP. That “discharge summary” stated:

> SUMMARY OF CARE PLAN ON DISCHARGE ENHANCED/STANDARD CPA
>
> Mr Mainali was referred to CATT on 1st September 2016 from liaison psychiatry due to a 10 day history of bizarre behaviour and poor sleep since returning from United States. He reported being able to read clinicians' minds when presenting in A+E, about being able to telepathically have a conversation with a friend in Japan as well as other people and 'points of references’ to him on social media (delusions of reference). This was thought to constitute and acute psychotic episode secondary to sleep deprivation. He was commenced on olanzapine for this and promethazine and diazepam to help with his sleep
>
> His symptoms improved, he remained well and will be discharged back to the care of his GP.

21. It also listed the medication and the blood tests etc that would be done (3 monthly at first, then annually).

22. There were no further GP visits until March 2017, when a large array of tests were given in March 2017. High blood pressure was noted, and he had further tests in April for that.

23. A 1 April 2017 entry appears to suggest that the March 2017 tests were part of "discharge care programme approach review", which is consistent with the recommendations of that report for there to be 3 monthly tests.

24. He also had a 19 April 2017 GP visit for unrelated issues.

25. There are no further potentially relevant entries until the December 2017 meeting with the Community Health Service.

26. The Claimant saw the practice nurse for blood pressure checks in August 2018. That seems to be the only time he attended the surgery in 2018.

27. On 19 January 2019, he had a "mental health review follow up". His answers to questions are noted, but no particular mental health issues or episodes are mentioned.

28. He had an appointment for "review of mental health care plan" on 8 February 2019. A summary of what was discussed is in the GP Notes. We also have the document completed the same day at pages 226 to 228 of the bundle. Our finding is that the GP was not noting that the Claimant had listed all these symptoms/behaviours/signs. Rather, the GP was making sure that the Claimant had information that he might need to take action (contact GP, call 999, go to A&E, etc) if certain things happened.

29. The Claimant had an appointment and various tests on 16 December 2019.

30. His next appointment (4 February 2020) was after the relevant period, and for unrelated reasons.

Impact Statement

31. The Claimant's impact statement was included in the bundle at pages 95 to 97.

32. The Claimant has not been diagnosed with diabetes.

33. It is correct that he has been diagnosed with high blood pressure, and treated for that. However, we find that that has had no noticeable affect on his day to day activities.

34. The main issues for us to make findings about are the Claimant's assertions of insomnia and panic attacks, as well as what he says about difficulties speaking to other people, socialising, remembering and concentrating. We do not doubt that the Claimant was seeking to give honest evidence, but his written statement lacked sufficient detail, and particular examples. He answered questions from the panel and the Respondent's counsel seeking additional detail.

35. In terms of poor memory, the Claimant gave an example of turning up for work on a day on which he was not rostered to work. We accept that did happen.

36. He says that he now socialises, and talks to people outside his immediate family by phone, far less than before his head injury in 2013. That may well be factually accurate, but we were not given any expert evidence of a causal link. The Claimant accepted that he is able to speak to people, in person and by phone, but he prefers not to.

37. The 2016 episode was the only acute psychiatric episode. We accept that the medication continued for a few months afterwards, even though this is not expressly corroborated by the GP notes.

38. We also accept that some of that medication was to help with sleep problems, which had contributed to the 2016 episode, which had occurred (or commenced) during a period of travelling.

39. Apart from that medication, the Claimant has taken ibuprofen, and also prescribed medication for a skin condition.

40. The GP records do not provide corroboration that the Claimant was having difficulties socialising. The care plan says that if the Claimant notices that he has any of the signs of being unwell, as noted by the doctor, then he should (amongst other things) "**continue** to engage with my friends/family" (our emphasis). It seems likely to us that this would have been phrased differently had the Claimant said that he was having problems socialising.

41. The GP records do not provide corroboration that the Claimant was having difficulties remembering.

42. Anxiety and panic attacks are not mentioned.

43. There is some corroboration in relation to insomnia. However, other than in connection with the 2016 incident, specific discussions about that topic are not included in the GP notes.

44. The Claimant asks us to note (and we do) that he is not a medical expert, and that he had a need to continue working to support his family.

45. Our finding is that he did not discuss panic attacks, anxiety or difficulties with socialising or remembering with his GP. Had he discussed such matters, they would be in the notes. Although the Claimant is not a medical expert, he would not have to be. If he described relevant symptoms in layperson's terms, the GP would have noted them.

<u>The parties and the history of the working relationship</u>

46. The Claimant has previously worked as a chef, including as a head chef.

47. The Respondent, New Godalming Sushi Ltd is a company which operated the sushi kiosk in the Godalming branch of Waitrose. The products were freshly prepared on site at the kiosk. The franchise is owned by KellyDeli UK Limited ("KellyDeli"). In other words, it was KellyDeli (rather than Waitrose) which had a direct contract with the Respondent, for the Respondent to perform these

operations. Mr Robin Elson was a Regional Manager for KellyDeli, and the most regular and important point of contact between the Respondent and KellyDeli.

48. One of the directors and shareholders in the Respondent, at the relevant times, was Mr Sumin Lohani ("Mr Lohani").

49. In around 2018, the Claimant and Mr Lohani had discussions about the Respondent company. They had been friends since childhood and came from the same village in Nepal.

50. Mr Lohani suggested to the Claimant that the Claimant would have a role in the business. The suggestion was that they were both to be directors and shareholders and receive a salary.

51. Mr Yadu Aryal ("Mr Aryal") works for Kanti & Co Ltd ("Kanti"). Kanti acted as the Respondent's accountants at the relevant times, and Mr Aryal was the person within Kanti who did the work. The Respondent's accounts for 11 May 2018 to 30 April 2019 (signed off by Kanti on around 13 September 2019) show both the Claimant and Mr Lohani as directors throughout. The report says staffing costs were around £86,000. It says "Average number of employees, including directors, during the year was as follows: 6". These were the accounts for the first year of trading.

52. The franchise agreement between KellyDeli and the Respondent was dated 12 June 2018. The Claimant and Mr Lohani were also parties to the agreement. The Respondent itself is described as "franchisee" and KellyDeli as "Franchisor".

53. The related documentation is in the hearing bundle from page 139 to 224.

    53.1 The main body of the agreement is 139 to 183

    53.2 184 to 197 are annexes 1 to 14, some of which are blank

    53.3 198 to 203 is annex 15, deals with employees, and is mainly focused on TUPE issues

    53.4 Pages 204 to 214, Annex 16, set out extracts from KellyDeli's agreement with its customer (Waitrose, presumably)

    53.5 Annex 18, pages 216 to 218 set out the directors' and shareholders' undertakings, and each of the Claimant and Mr Lohani signed these (the documents assert that it was executed as a deed) on their own accounts.

    53.6 Pages 219 to 220 are the signature pages to the overall agreement, with annexes, and these are signed by each of the Claimant and Mr Lohani.

54. As envisaged in Annex 18, as well as being an annex to the main agreement, the same document (Annex 18) was also printed separately and signed as a separate document. Again this was by each of the Claimant and Mr Lohani on their own accounts. This document contained confidentiality duties and non-compete duties owed directly by the Claimant and Mr Lohani to KellyDeli. This is pages 221 to 224 of the bundle.

55. We are satisfied that the Claimant signed these documents willingly. He knew that, by doing so, he was entering into formal, and legally binding, agreements. We are satisfied that he had the opportunity to read the documents, and consider the contents, before signing and that – subject to financial considerations, of course – he had the opportunity to take legal advice before signing.

56. At the time he signed these documents (in or around June 2018), the Claimant did so because he wanted to be involved in the business venture. Nothing that Mr Lohani did tricked or coerced the Claimant into signing these documents.

57. A further relevant document appears at page 229 of the bundle. Each of the Claimant and Mr Lohani signed and dated it on or around 26 April 2019. It bears the heading "New Godalming Sushi Ltd Business Partnership Deed". On its face, it does not purport to be a new agreement entered into in April 2019, but rather purports to be a written record of the agreement that they had reached at the outset of creating the company and making it operational (so around April or May 2018).

58. At the time he signed this latter document (on or around 26 April 2019), the Claimant did so because he believed that it accurately recorded what had previously been orally agreed. There are two crossings out (each initialled by both parties); we are satisfied that the Claimant gave the document some thought and consideration before agreeing to sign the final version (that is, including the handwritten amendments).

59. Significantly, and amongst other things, the document included the following extracts:

> This document is proof of the agreement of SUMIN LOHANI and HEMANTA MAINALI becoming business partners for the purpose and time of New Godalming Sushi Ltd being operational, under the following terms:
>
> • HEMANTA MAINALI will own 30% of New Godalming Sushi Ltd, and SUMIN LOHANI will own 70% of New Godalming Sushi Ltd respectively, responsible for either loss or profit during trading.
>
> • HEMANTA MAINALI will be the primary on-site full time Operational Manager of New Godalming Sushi Ltd.
>
> • HEMANTA MAINALI will be given a NET Salary of £1500 per month
>
> • If either party, HEMANTA MAINALI or SUMIN LOHANI, wish to exit from the terms and conditions stated here, as well as their ownership of New Godalming Sushi Ltd, they must give a minimum of Six months' notice and company will be valued on the base of company asset, liabilities, cash flow in bank and stock hold.
>
> By signing below both parties here by agree to the before stated terms and conditions, for the duration of New Godalming Sushi Ltd being operational

60. The Respondent's witness, Mr Lohani, accepted that his interpretation of the document was that this reference to a notice period of six months applied to all parts of the agreement between him and the Claimant, including any parts that dealt with employment by the Respondent.

61. The reference to "net salary" of £1500 per month was a reference to what the Respondent would pay the Claimant, and this was because he had agreed to work as the Respondent's "primary on-site full time Operational Manager". Each of the Claimant and Mr Lohani sometimes worked in the kiosk (and the Respondent also had other employees) but the Claimant worked there more frequently and regularly than Mr Lohani. The agreement was that Mr Lohani would more frequently work off-site and the Claimant was responsible for sourcing and dealing with suppliers, accounting and the monitoring of daily performance of the kiosk.

62. No other contractual documents or written documents were created in relation to the Claimant's employment relationship with the Respondent. This was because neither the Claimant nor Mr Lohani thought it was necessary at the time.

63. As shown by the payslips in the bundle, the Claimant was paid by the Respondent each month from June 2018 to January 2020 inclusive. In the first few months, his pay fluctuated slightly before settling down at a steady £1200 net per month. From April 2019 to January 2020 inclusive, it was exactly £1500 per month. PAYE deductions are shown on each payslip, with the gross being stated as around £1772 per month. Thus, in April 2019, his gross pay increased by around £120 per month.

64. There is not necessarily agreement between the parties about what happened in relation to specific shareholdings and specific capital payments at particular dates. However, there is no dispute that until (at least) January 2020, the Claimant was all of the following:

    64.1 Shareholder of the Respondent

    64.2 Director of the Respondent

    64.3 Employee of the Respondent

65. In November 2019, KellyDeli (Mr Elson) met the Respondent (Mr Lohani and the Claimant). KellyDeli expressed some concerns about the Respondent's performance. There was a further meeting around 20 December 2019, with the same three attendees. KellyDeli was not fully satisfied with the outcomes of two recent audits, and told the Respondent that improvement was required and it would be continuing to monitor the situation. However, it was not so concerned that it served any formal improvement notices, or that it urgently scheduled a further meeting. The plan was that the next meeting would not be until around a month later (22 January 2020).

66. As far as Mr Lohani was concerned, the failings that KellyDeli was highlighting were operational issues for which the Claimant, as "primary on-site full time Operational Manager" was responsible. He also formed the opinion that KellyDeli had doubts about the Claimant's suitability for this role.

67. On 4 January 2020, at about 00:29, Mr Lohani sent out the rota for the following week. He sent it to the employees of the Respondent who would be working at the kiosk that week, including the Claimant. He sent it via WhatsApp. He did not send it to the Claimant only. He did not choose the time of sending to annoy the Claimant or anyone else. He had thought that people would read the message

when convenient to them, and had not expected them to read/respond straight away (and no response was necessarily required, unless there was a problem working the specified shifts).

68. The Claimant's phone made a sound when this message was received. That had not been Mr Lohani's intention; he had simply given no thought to that possibility. The Claimant and his family were asleep, and were disturbed by the phone alert.

69. The Claimant replied two minutes later, at 00:31, to say:

> This is very wrong to post at midnight. Go fuck yourselves

70. Mr Lohani replied immediately, at 00:32, to say:

> Watch your mouth, I didn't ask you to check now

71. There was a brief discussion, at work later in the morning, in which each reiterated their views of the matter (the Claimant objecting to having been awakened, and Mr Lohani objecting to the Claimant's four letter response). As this exchange demonstrates, the Claimant's and Mr Lohani's friendship was under strain and (as we discuss below) there were some further incidents in January. However, as a self-contained incident, it was over after the brief discussion in the morning of 4 January. The Respondent did not commence any (formal or informal) disciplinary action against either of them, and nor did either raise a grievance.

72. We reject the Claimant's factual assertions that, on 15 &/or 16 January 2020, Mr Lohani told the claimant that the claimant needed to leave the business. Mr Lohani denies it, and there is no documentation or corroborating witness. Furthermore, during the tribunal hearing, whenever the claimant was asked about this particular allegation from the list of issues (as he was, several times), he consistently referred instead to his arguments about what happened on and immediately after 17 January.

73. On 17 January 2020, Mr Lohani wished to have a conversation with the claimant. He therefore went to the kiosk while the Claimant was there. Another employee, Ionut Tiplea (one of the witnesses in the hearing), was also present. Mr Tiplea is referred to as "Jon" or "John" in some of the contemporaneous communications between the Claimant and Mr Lohani.

74. Both the Claimant and Mr Lohani accept that the discussion became heated. However, they disagree about the details of what happened. They each suggest that the other was the more aggressive, and that they simply reacted to, and sought to defend themselves against, the other's aggression.

75. We accept Mr Tiplea's evidence that he was paying attention to his work. He was using sharp knives and was seeking to avoid injuring himself and he had to complete his tasks quickly to avoid spoilage. Furthermore, he regarded Mr Lohani and the Claimant as his two bosses, and he was keen to avoid becoming involved in the confrontation. His account – which we accept is truthful – is that he does not know what specific words were used. This means that, on the one hand, he does not provide corroboration for the Claimant's account of what was said to him.

On the other hand, the fact that Mr Tiplea did not hear such words does not, in the circumstances, provide corroboration for Mr Lohani's denials.

76. Mr Lohani's account was that he wished to discuss the hygiene and performance issues which KellyDeli had raised in November and December. This was a Friday. They were due to meet KellyDeli the following Wednesday 22 January. His account is that he started that conversation and the Claimant reacted by becoming very aggressive and trying to punch him. He suggests that the Claimant had a knife in his hand at the time.

77. The Claimant's account is that nothing about hygiene or KellyDeli's concerns were raised. Rather he says that Mr Lohani came over and said (words to the effect of) "what are you still doing here?" That is, on the Claimant's case, Mr Lohani had previously been trying to persuade him to resign and was continuing that campaign on this day. The Claimant denies that he was using a knife, and says he was grating vegetables. He claims that Mr Lohani became aggressive and tried to headbutt him. He says that he simply put up his hands to defend himself. He says he tried to get away, but Mr Lohani blocked his escape route.

78. After the incident, Mr Lohani spoke to Waitrose security staff. He wanted to know what, if any, CCTV existed. He was told, we infer, that if there was a request from the police, then Waitrose security would be willing to share what CCTV footage (if any) existed.

79. At about 5pm, Mr Lohani wrote to the Claimant:

> This afternoon 17th Jan around 2.30-2.40pm your violence & aggressive behaviour is totally unacceptable, not only that, you raised your punch towards to me which is physical assault completely disgusting!! I have spoken to Waitrose management and security guy who is going to look in to CCTV footage during those time frame which will be pass on to police as physical assault complaint!! Jon is a witness as you crossed the line today, such a shame that I would not trust your presence in my kiosk anymore as all of my staffs are scared with your funny behaviour!!!! I need you to think how are you going to exit from my company before I start disciplinary action your behaviour!!

80. He did not, in fact, contact the police himself, or make any further enquiries with Waitrose security as to whether they took any action at all.

81. The Claimant replied to say:

> You have threatened me in the training room twice before. Which has be verbally reported to robin in the last meeting. You have made forged paper to sack me against the kellydaily policy. Today you started verbal abuse, hate speech, swear words and threatened me again. When I ask for clarification of why you started all this you came to attack me close to John, while he was cutting fish so I ask you to go out for safety of all. Anyway I feel much safer and it all on open sapne and recorded in Waitrose. There might be recording of training room incident as well. I did nothing wrong. I was doing my job you started verbal and physical abuse while at work.

82. Mr Lohani's response was:

> You live in dreaming with your fake story, I disagree with your fake accusations!! You proved that what level of your language you use and your abusive language which has

> been recorded in our company WhatsApp group, all my staff agree with me that they don't feel safe and comfortable working with you, remember I gave you certain percentage, it's my company and I take the right step and decision for the better for company and staff. Anyway , rest of the process will be handled by police as you cross the line with witnesses of Jon and CCTV footage!!

83. The Claimant answered by saying, “I welcome fair and just process.”

84. Our findings are that each of the Claimant and Mr Lohani have exaggerated slightly both in terms of (a) how aggressive the other person was and (b) how calm and restrained they themselves were. We take into account that this was an incident which took place in a supermarket during opening hours. At the start of the incident, Mr Lohani was on the customer side of the counter. We have been provided with no evidence that the incident was so heated that (i) any customer complained (to the Respondent or to KellyDeli or to Waitrose); (ii) that any member of Waitrose staff or Waitrose’s security became involved; (iii) that anyone (including Mr Lohani and the Claimant) actually got the police involved. We accept that Mr Tiplea was motivated to avoid becoming involved but, even so, if there had been as much aggression as each of Mr Lohani and the Claimant accused the other of, then he would have seen it.

85. The Claimant alleges that Mr Lohani sought to head-butt him and we find that that did not happen. Mr Lohani's says that the claimant tried to punch him while holding a knife and we find that that did not happen. Our finding is that the oral argument escalated to some pushing and shoving. However, between the two of them before matters became too overheated, there was a realisation that having a very aggressive interaction in Waitrose during opening hours was not sensible for themselves as individuals, or for their business venture.

86. On balance, we prefer Mr Lohani’s account of what started the argument. His account that he wanted to speak to the Claimant about the upcoming meeting with KellyDeli and wanted to be sure that the Claimant was going to be able to give satisfactory answers at the meeting about what improvements had been made is consistent with the chronology. Furthermore, it is more inherently plausible than the Claimant’s account. If Mr Lohani had wanted to provoke the Claimant (physically or orally) into a fight or a resignation, then he had every opportunity to do it away from Waitrose. Doing so on Waitrose premises, during opening hours, would run the risk of damaging the Respondent’s business significantly.

87. We are not persuaded that Mr Lohani used the words “psycho” or “mental”. We are sure that he did not do so at the outset, to either insult or provoke the Claimant. If, contrary to our finding, he used them during the altercation as a response to what he perceived as the Claimant’s inappropriate response to the questions about hygiene matters, not because he thought the Claimant had a mental impairment.

88. We do not think Mr Lohani made the threats of police involvement in bad faith. Our finding is that his perception on the day of the incident was that he had been assaulted (though he is probably mistaken that the Claimant was holding a knife at the time). However, on calmer reflection, he came to decide that the matter was not serious enough to involve the police, and/or that he lacked sufficient evidence.

89. We are satisfied that Mr Lohani had no specific discussions with the other employees about whether they were (or were not) happy to work with the Claimant, or about whether they felt comfortable working with him. He was expressing his own opinion that he did not think staff were comfortable, and his own opinion that they would (therefore) agree with him if he asked them.

90. Based – in particular – on the contents of the emails, we are satisfied that Mr Lohani gave some thought to whether it was necessary for the Claimant to leave the business. As well as the fact that his perception was that the Claimant was responsible for the fact that the 17 January 2020 discussion had become physical, he had also not received satisfactory answers to the matters he had wanted to discuss; that is, what assurances the Claimant was going to be able to give to KellyDeli on 22 January 2020.

91. On the balance of probabilities, we accept that Mr Lohani's recollection is correct and the claimant did come to work the following day, Saturday 18 January. We accept that there was some discussion about whether they could put things behind them. The reason that we think that the claimant must have come into work on at least one of the days between the 18 and 21 January is that we do accept that they both were going to the preplanned meeting on 22 January at KellyDeli, head office and there must have been some discussions about that trip after the email trail on 17 January finished.

92. On 22 January, the claimant, Robin Elson and Mr Lohani met in Mr Elson's office. The exact details of what happened are in dispute.

    92.1 Mr Lohani's account is that there was no particular discussion about the events of 17 January or any other disagreements between the claimant and him, because as far as he was concerned, they had put all that behind them. He says he had accepted the claimant's apology (on or around 18 January) because of their long-standing friendship.

    92.2 On the claimant's account, Mr Lohani had manipulated the situation and Mr Lohani had sought to persuade KellyDeli that there had been a breach of KellyDeli's rules. According to the Claimant, Mr Lohani persuaded Mr Elson purely to listen to Mr Lohani's version of events of 17 January without giving any consideration to the Claimant's version. Furthermore, the Claimant suggests that he was presented with a document in the meeting, which Mr Elson said the claimant had to sign and said that he, the claimant was not allowed to go back to the kiosk at all.

93. The document mentioned by the Claimant is at page 257 of the bundle. It has handwritten signatures from each of the Claimant and Mr Lohani. It reads:

> Dear Robin,
>
> Hemanta Mainali wishes to resign from New Godalming Sushi Ltd as soon as possible. We will send through an application to replace Hementa no later than 27th January 2020.
>
> We both would like to request you to consider this application please.

Many thanks

Hemanta Mainali

Sumin Lohani

94. The correct spelling of the Claimant's name is "Hemanta", as per the first and third appearances in the document just cited. The middle appearance, "Hementa", is therefore spelt incorrectly.

95. Mr Lohani's account of the production of this document is that the claimant decided that he would type something up on Mr Elson's laptop, and that he borrowed Mr Elson's laptop and produced this document of his own accord. Mr Lohani repeatedly said, when asked, that the wording was all of the claimant's own creation without any input from either Mr Lohani or Mr Elson.

96. Our findings are that what actually happened is somewhere in between these two extremes, but in important respects is closer to the claimant's version of events.

    96.1 We do not accept that, by 22 January, Mr Lohani had put the events of 17 January as fully behind him as he professed, in the tribunal hearing, to have done.

    96.2 We accept (based on Mr Lohani's evidence, which is to some extent consistent with the claimant's evidence on this point) that during the meeting Mr Elson expressed some concern about the claimant's performance. [He may well have also expressed concerns about other aspects of the respondent's performance, including things that were the responsibility of Mr Lohani; but he did particularly refer to the onsite issues at the kiosk and query whether the Claimant was on top of things.]

    96.3 During the course of the meeting, Mr Lohani formed the definite view that the Claimant should leave the business and do so promptly. He had been thinking about the Claimant's departure already (as the emails on 17 January demonstrate). It is possible that he had already decided, before the meeting, that he definitely wanted the Claimant to leave straight away. However, we think it more likely that he was more focused on getting the meeting with KellyDeli out of the way first, and to have further discussions with the Claimant about the business's future after that. However, on hearing what Mr Elson said about on-going concerns about the kiosk, Mr Lohani decided to ask what Kelly Deli's attitude would be to claimant's leaving and KellyDeli said that this would have to be in writing.

    96.4 We are not persuaded that Mr Elson would have loaned his laptop to the claimant to produce the document. It seems unlikely (thought not impossible) that the Claimant would have mistyped his own name. However, in any event, regardless of who actually did the typing of the document, we are satisfied that the wording was chosen by Mr Lohani and/or Mr Elson, and not by the claimant. There would, for example, have been no reason for the claimant to write in this document "*We will send through an application to replace Hementa no later than 27th January 2020*" if he was simply writing his own unprompted document. Similarly, the whole of the document – as well as the

signatures – made clear that it was a joint letter, and not a letter from the Claimant alone. We think it implausible that the Claimant would have typed this without input from any body else, and we find that he did not do so.

97. We are also satisfied that Mr Lohani was acting on the behalf of the Respondent (the limited company, New Godaiming Sushi Ltd) during the meeting on 22 January. He was the 70% shareholder and had referred to it as "my" company when writing to the Claimant. We are satisfied that Mr Lohani was aware that the claimant did not wish to sign this letter (257) to KellyDeli. We are satisfied it was not the claimant who suggested that the Claimant would resign (as an employee, or as a director, or as a shareholder). We are satisfied that, as of 22 January, the claimant wanted to stay in the business.

98. The Claimant signed the documents because he was told that Mr Lohani (who was acting on behalf of the Respondent) was not giving him the choice and that the business was going to carry on without the claimant.

99. After the document had been signed during the meeting, at 15:15 on 22 January, Mr Lohani wrote to the Claimant saying:

> As we discussed earlier, please work till next week Friday and I will organise Yadu to visit next week Friday in our kiosk to reconciliation of our P&L till this month, you may wish to bring your accountant if you feel needed, otherwise our company accountant Yadu will finalise our accountants.
>
> Can you please bring all company documents which you took those few months ago, thanks
>
> Sumin

100. "Yadu" refers to Mr Aryal of Kanti & Co Ltd, the Respondent's accountants. "Next week Friday" was the last day of the month, 31 January 2020.

101. The Claimant replied half an hour later, saying:

> As discussed earlier, it was said I may damage kiosk/ reputation so though I wanted to help. I have emailed robin saying conversation ended me being on leave. Though I could help it doesn't seem right to be there without KellyDeli permission. And I have other priorities. Thanks Hemanta

102. What the Claimant says in that email was his genuine understanding of the situation. That is, as far as he was concerned, he had been told in the meeting that he was leaving the business almost immediately, as a result of what happened during the meeting, and he had been told that he would be on some form of leave (whether holiday or garden leave) with immediate effect.

103. Our finding is that Mr Lohani acknowledged as much in his reply 17 minutes later, which said:

> Ok, understood , then please come to the kiosk on Friday 31st Jan for final account. Please bring your uniform, locker keys and company documents on Friday 31st. Thanks

104. Our finding is that the fact that Mr Lohani said he wanted the claimant spend a few more days working at the kiosk is not inconsistent with the Claimant's assertion that it was Mr Lohani's decision that he leave the business. Rather, having gone ahead and ended things during the meeting (with some input from KellyDeli), after the meeting Mr Lohani realised that he needed somebody urgently to cover some shifts. Furthermore, he was keen (not unreasonably) to recover the company paperwork which the Claimant had previously taken home (with permission).

105. Regardless of the Claimant's status between 22 January and 31 January (that is, regardless of whether he was on annual leave, or some other sort of absence), Mr Lohani's emails at 15:15 and 16:02 made clear that the Claimant's last day as an employee was to be 31 January. He was being told to hand in his uniform and the keys because he would no longer need them (or have the right to use them) after that date.

106. On Sunday 26 January, there was a further exchange of emails in which the arrangements for the forthcoming Friday 31 January were discussed. This correspondence (like all the rest at around this time) makes clear that both sides knew that the Claimant would not be an employee after 31 January.

107. We take account of the item of late disclosure, which is "Deed of Adherence". The Claimant (as well as Mr Lohani, and some others) signed this document. The effect (or at least the intention) was to replace the Claimant "as both a shareholder and director" with Mr Lohani's wife. She also replaced the Claimant in the contractual agreements between the Respondent and its directors and KellyDeli. This item is dated 28 February 2020 and cross-refers to the letter of 22 January cited above. The Respondent alleges that this shows that the Claimant was content with, and still agreed with, the contents of that letter.

The Law

Burden of Proof under Equality Act 2012 "EQA"

108. Section 136 of the Equality Act deals with burden of proof and is applicable to all the Equality Act claims in this action. Section 136 of EA 2010 states (in part):

> (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.

109. Section 136 requires a two stage approach:

109.1 At the first stage, the tribunal considers whether there are proven facts from which the tribunal could conclude, in the absence of an adequate explanation from the respondent, that the contravention has occurred. At this stage it would not be sufficient for the Claimant to simply prove that what she alleges happened did, in fact, happen. There has to be some evidential basis upon which the tribunal could reasonably infer that the proven facts did amount to a

contravention. That being said, the tribunal can look at all the relevant facts and circumstances and make reasonable inferences where appropriate.

109.2 If the Claimant succeeds at that first stage, then that means that the burden of proof has shifted to the respondent and that the claim must be upheld unless the respondent proves that the contravention did not occur.

110. Where we do not find, on the balance of probabilities (taking into account the evidence from both sides and drawing inferences where appropriate), that a particular alleged incident did happen then complaints based on that alleged incident fail. Section 136 does not require the Respondent to prove that alleged incidents did not happen.

Harassment

111. Section 26 of the Equality Act defines harassment. It states (in part):

> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> …
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect.

112. Disability is a relevant characteristic for the purposes of section 26. The facts needs to establish - on the balance of probabilities - that the Claimant has been subjected to "unwanted conduct" which has the "the prohibited effect". To succeed, in a claim of harassment, it is not sufficient for a claimant to prove that the conduct was unwanted or that it has the purpose or effect described in Section 26(1)(b) Equality Act 2010. The conduct also has to be related to the particular protected characteristic (in this case disability). However, because of section 136, the claimant does not necessarily need to prove - on the balance of probabilities - that the conduct was related to the protected characteristic. To shift the burden of proof, we would need to find facts from which we can infer that the conduct could be so related.

113. In HM Land Registry v Grant 2011 ICR 1390, the court of appeal stated that – when considering the effect of the conduct, and taking into account section 26(4) – it was important not to "cheapen" the words used in section 26(1). It said.

> *Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The claimant was no doubt upset … but that is far from attracting the epithets required to constitute harassment. … to describe this incident as the Tribunal did as subjecting the claimant to a "humiliating environment" when he heard of it some months later is a distortion of language which brings discrimination law into disrepute.*

114. When assessing the effects of any one incident which is one of several incidents, it is not sufficient to consider each incident by itself in isolation. The impact of separate incidents can accumulate and the effect on the work environment may exceed the sum of the individual episodes. In Qureshi v Victoria University of Manchester, the EAT warned against taking too piecemeal an approach to the analysis of a set of incidents which were each said to amount to harassment or discrimination. Taking the allegations as a whole (as well as considering each individually) is necessary not just when assessing the effect of the Respondent's conduct on the claimant, but also when deciding whether to draw inferences that the unwanted conduct (or any of it) was related to race.

115. When deciding whether particular unwanted conduct was related to disability or not, then the alleged harasser's knowledge about the Claimant's (alleged) impairments will be relevant, but not decisive. For example, a response to something which the Claimant did because the Claimant was disabled, might be "related to" the disability.

Direct Discrimination

116. Direct discrimination is defined in s.13 of EQA.

> (1) 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.

117. It has two elements; firstly whether the Respondent has treated the Claimant less favourably than it has treated others ("the less favourable treatment question") and secondly whether the Respondent has done so because of the protected characteristic ("the reason why question"). So for the less favourable treatment question the comparison between the treatment of the claimant and the treatment of others can potentially require decisions to be made about the characteristics of a hypothetical comparator. That being said, the two questions are intertwined and sometimes an approach can be taken that the Tribunal deals with "the reason why question" first. If the Tribunal decides that the protected characteristic was not the reason even in part for the treatment complained of it will necessarily follow that the person whose circumstances are not materially different would have been treated the same. That might mean that in those circumstances there is no need to construct the hypothetical comparator.

118. When considering the reason for the claimant's treatment we must consider whether it was because of the protected characteristic or not. We must analyse both the conscious and sub-conscious mental processes and motivations for actions and decisions and s.136 applies. In other words, if there are proven facts from which the Tribunal could infer that there had been unlawful discrimination then the burden of proof shifts to the respondent and the claim must be upheld

unless the respondent proves that the treatment was in no sense whatsoever because of a protected characteristic.

119. In approaching the evidence in a case and considering the burden of proof provisions the Tribunal can have regard to the guidance given by the Court of Appeal in, for example, Igen v Wong [2005] ICR 931 and Madarassy v Nomura [2007] ICR 867. The burden of proof does not shift simply because the claimant proves a difference in sex or race and a difference in treatment. That only indicates the possibility of discrimination, and that is not sufficient. Something more is needed. In In Deman v Commission for Equality and Human Rights 2010 EWCA Civ 1279, the Court of Appeal suggested that "something more" does not need to be a great deal more. For example - depending on the facts of the case - a non-response from a respondent, or an evasive or untruthful answer from a respondent or an important witness, could be the "something more" that is required. Against other factual circumstances, it may simply be the context of the act itself. In SRA v Mitchell, the EAT upheld a tribunal's decision that the burden of proof shifted based on a finding that the employer had given a false explanation of the less favourable treatment. That being said, it is important for us to remind ourselves that the mere fact alone that a Tribunal rejects the employer's explanation for some particular act or omission does not mean that the burden of proof necessarily shifts, see for example Raj v Capita Business Services.

120. As per Essex County Council v Jarrett EAT 0045/15, when there are multiple allegations, the Tribunal has to consider each allegation separately when determining whether the burden of proof has shifted in relation to each one. It should not take a broad-brush approach in respect of all the allegations.

121. When a comparator is used the actual or hypothetical comparator's circumstances must be the same as the claimant's other than the protected characteristic in question. In relation to comparators for allegations of direct disability discrimination, the Equality and Human Rights Commission's Code of Practice on Employment gives useful guidance

> 3.29 The comparator for direct disability discrimination is the same as for other types of direct discrimination. However, for disability, the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different. An appropriate comparator will be a person who does not have the disabled person's impairment but who has the same abilities or skills as the disabled person (regardless of whether those abilities or skills arise from the disability itself).
>
> 3.30 It is important to focus on those circumstances which are, in fact, relevant to the less favourable treatment. Although in some cases, certain abilities may be the result of the disability itself, these may not be relevant circumstances for comparison purposes.
>
> Example: A disabled man with arthritis who can type at 30 words per minute applies for an administrative job which includes typing, but is rejected on the grounds that his typing is too slow. The correct comparator in a claim for direct discrimination would be a person without arthritis who has the same typing speed with the same accuracy rate

Definition of Disability

122. The statutory provisions are to be found in the Equality Act 2010 ("EqA"). Section 6 provides the statutory definition of disability. In part, it states:

(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.

(2) A reference to a disabled person is a reference to a person who has a disability.

123. Schedule 1 contains supplementary provisions relating to the determination of disability. Sub-paragraphs 2(1) and 2(2) of the Schedule provide:

(1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c)it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

124. In SCA Packaging Ltd v Boyle [2019] UKHL 37; [2009] ICR 1056, the House of Lords made clear that the word “likely” in this context means something that could well occur, as opposed to something that is more likely than not to happen.

125. Sub-paragraphs 5(1) and 5(2) of Schedule 1 provide:

(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

(a) measures are being taken to treat or 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.

126. In summary, there are 4 matters which the tribunal must consider:

126.1 Whether the Claimant has a physical or mental impairment;

126.2 Whether the impairment affects the person's ability to carry out normal day-to-day activities.

126.3 The effect on such activities must be 'substantial' which means more than trivial

126.4 The effects must be 'long term'

127. The third and fourth of these matters - long-term and substantial – can be analysed separately but it is also important to bear in mind that they are inter-connected. The substantial effects must also be long-term.

128. In Walker v Sita Information Networking Computing Ltd [2013] the EAT, emphasised that when considering whether or not an individual is disabled the ET must concentrate on the question whether he or she has a physical or mental impairment; the *cause* of the impairment, or absence of apparent cause, is not of zero significance, but its significance is evidential rather than legal. In other words, a cause identified by a medical expert might corroborate that the impairment exists, and the lack of such a proven cause might lead the tribunal o conclude that the Claimant does not genuinely suffer from the impairment. However, if satisfied of the genuineness of the symptoms then lack of a specific diagnosis of the cause does not mean that the Claimant had failed to prove "impairment".

129. In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Activities which are not performed by the majority of the population might still be day to day activities, and activities which are usually performed only in connection with work – such as attending an interview, or maintaining a shift pattern – can potentially be considered day to day activities.

130. Guidance has been issued "On matters to be taken into account in determining questions relating to the definition of disability". In that Guidance, it is suggested: "An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect."

131. Furthermore, at paragraph B7 of the Guidance, it is suggested that the ability of a person to modify their behaviour to cope with an impairment may be of relevance in deciding whether it is substantial.

132. Paragraph B9, advises that an impairment may exist even though there is some ability to carry out tasks. Deciding how substantial an adverse effect is requires analysis of what someone cannot do rather than what they can.

133. The time at which the question of disability is to be determined, that is as at the date of the alleged discriminatory act or omission: Cruickshank v VAW Motorcast Ltd [2002] IRLR 24, EAT.

134. That means, amongst other things, that where it is necessary to decide whether an impairment was "likely to recur" (as per paragraph 5(2) of Schedule 1 EQA), the Tribunal must base that decision on whether the evidence shows that, as of the relevant on which the alleged discrimination occurred, it was "likely to recur" . Evidence that the impairment did actually recur later does not necessarily establish that it had been "likely to recur" as of the relevant date. McDougall v Richmond Adult Community College [2008] ICR 431; [2008] IRLR 227.

135. In Sullivan v Bury Street Capital Ltd [2021] EWCA Civ 1694, the following list was approved as questions for the Tribunal to address when determining whether or not a claimant is disabled for the purposes of EQA.

135.1 Was there an impairment?

135.2 What were its adverse effects?

135.3 Were they more than minor or trivial?

135.4 Was there a real possibility that they would continue for more than 12 months or that they would recur?

136. These are questions for the Tribunal. Medical evidence may be of great assistance, but the Tribunal, it is not bound by any expert opinion on the disability question. Furthermore, a lack of medical evidence (either generally, or on a particular point) does not prevent the Tribunal accepting the Claimant's evidence and other evidence to demonstrate that the Claimant had the impairment at particular times, or the effects of treatment, etc.

137. It is, however, for the Claimant to prove that they meet the definition, not for the Respondent to prove that they do not.

Breach of Contract

138. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 allows the Tribunal to deal with breach of contract claims, and award up to £25,000 in damages. The requirements included that the Claimant was an employee of the Respondent. This is subject to the requirements in Article 3:

> Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if-
>
> (a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;
>
> (b) the claim is not one to which article 5 applies; and
>
> (c) the claim arises or is outstanding on the termination of the employee's employment.

139. The exclusions defined by Article 5 are:

> This article applies to a claim for breach of a contractual term of any of the following descriptions-
>
> (a) a term requiring the employer to provide living accommodation for the employee;
>
> (b) a term imposing an obligation on the employer or the employee in connection with the provision of living accommodation;
>
> (c) a term relating to intellectual property;
>
> (d) a term imposing an obligation of confidence;
>
> (e) a term which is a covenant in restraint of trade.

In this article, "intellectual property" includes copyright, rights in performances, moral rights, design right, registered designs, patents and trade marks.

Analysis and conclusions

140. As per the list of issues, the first set of matters to determine are:

A. Disability

1. Was the Claimant disabled within the meaning of s 6 of the Equality Act ('EqA') 2010 at the relevant times?

2. The Claimant states that he is disabled by reason of:

i. Anxiety;

ii. Insomnia; and

iii. Panic attacks.

3. Did the Respondent have knowledge of the Claimant's alleged disabilities, and if so, from what date?

141. Our decision is that claimant is not disabled within the meaning of the Equality Act 2010 ("EQA") by reason of those alleged impairments.

142. He has not proven to our satisfaction, the relevant elements of the definition were met as of the relevant dates.

143. In the findings of fact, we went through the medical notes in some detail. We noted the 2013 injury. We noted the September 2014 items referring back to the injury about growth hormone. We noted the 2016 episode between 31 August and 29 September. We noted the hospital discharge form on page 225. We noted the entries for March 2017, which refers to "discharge care programme approach review".

144. We also noted the February 2019 "Stay well plan" and that, on the claimant's own account, it was he who was invited by the surgery to come in.

145. The sections on the form (also replicated in the GP notes; so pages 227 and 126 of bundle) were things, according to our findings, that the GP was telling the claimant to look out for. He was being told that he were to have these symptoms he should contact the surgery, but he was not been diagnosed as having these symptoms. He was not recorded as informing the GP that he had these symptoms; on the contrary, the GP believed that the Claimant did not have those symptoms at the time.

146. We also noted, in our findings of that, that in relation to the hospital discharge plan, there was a discussion that the claimant had been having severe sleep deprivation immediately prior to the August/September 2016 episode. Seemingly that was the cause of the episode we described in the findings. At the time, he was prescribed some medication, by the hospital, and we accepted the claimant's evidence that he continued to take them for longer than the 28 days initial supply.

Although his GP records do not explicitly confirm, the duration, on his own account, he finished taking that medication within a few months of 29 September 2016. The March 2017 discharge review section in the GP notes does not mention that he is taking the medication by then, and we infer that he had stopped a significant period of time prior to that review.

147. There is no indication in the notes that the claimant was regularly suffering, insomnia after the 2016 episode or, other than in the 10 days or so in immediate run up to it, before that 2016 episode either.

148. There is no indication in the notes that the claimant was regularly suffering or that he had anxiety or panic attacks.

149. Although it is not conclusive that he was not prescribed medication for any of these alleged impairments, he was, in fact, prescribed no medication, other than, as just discussed, the medication given to him by the hospital in September 2016, which he took for a few months, ceasing a significant amount of time prior to March 2017. That medication did include medication to help with sleep. However, it was also to deal with the psychotic episode. We are not persuaded that it was for anxiety or panic attacks.

150. We discussed what the notes said about hospital attendance for the head injury which happened in 2013. As far as is potentially relevant to the impairments, insomnia, anxiety or panic attacks, other than for the 2016 episode, he does not seem to have been referred to a hospital for any form of non-medication treatments whether it be counselling or something else. He did have a stay well plan, and that advised him on usual healthy options such as diet and reducing alcohol and so on, as well as “continue to engage with my friends / family, spend time with family …”

151. The claimant has said that he believes he socialises much less frequently then he used to do so prior to his head injury in 2013. It is not one of the three things that are specifically alleged as impairments, but rather the Claimant would like us to consider it as an effect of anxiety. This includes speaking less on the telephone. While this may be true, that does not demonstrate causation to our satisfaction, and there is nothing in the medical notes to indicate that he discussed with his GP that he was socialising less frequently since 2013.

152. He also refers to lack of concentration and forgetfulness. Again, these are not impairments in their own right, but the alleged effects of the anxiety and insomnia. He gives an example of having turned up for work on a day when he was not on the rota. However, we are not satisfied that he has shown that that particular incident was in some way linked to any impairment. It is the type of error that people sometimes make. Having an impaired memory is not something for which the Claimant and his GP appear to have discussed any treatment for. Such an incident of making a mistake which the claimant puts down to forgetfulness.

153. Thus, for the anxiety and panic attacks, we are not persuaded that the Claimant had these impairments.

154. For insomnia, at most, he has shown that he had sleep deprivation for a period of time in 2016. On the assumption that the sleep deprivation was caused by

insomnia, he has shown that it had a significant affect on his day to day activities. His ability to communicate was affected, as was his ability to reason, as was his perception of reality. He did recover after a fairly short period of time (episode began no more than about 2 weeks before 31 August 2016, and finished no later than 29 September 2016). We must ignore the effects of treatment, but he was not having medication for more than a few months.

154.1 On the evidence, the impairment of insomnia did not last for close to 12 months, and nor was it likely (as of January 2020) to recur.

154.2 In the alternative, if the insomnia was on-going any later than the period August 2016 to (at the latest) March 2017, the effects on day to day activities were no more than trivial. There is no medication or other treatment to ignore after this period. The more than trivial effects were not likely to recur.

155. Furthermore, we are not persuaded that Mr Lohani perceived the Claimant as being disabled, or as having a mental impairment.

156. In relation to the harassment allegations, the Claimant has failed to prove that the alleged unwanted conduct in item 2i of the list of issues occurred (on the alleged dates of 15 or 16 January). He has also failed to prove (as per item 2ii of the list of issues) that (a) he was called “mental” or “psycho” or (b) that Mr Lohani tried to headbutt him.

157. For item 2iii, Mr Lohani did use the words, “all my staff agree with me that they don't feel safe and comfortable working with you”. This was unwanted conduct, but was not related to any (actual or) perceived disability. It was because the Claimant and Mr Lohani had had an argument earlier that day.

158. The harassment allegations all fail.

159. The Claimant’s complaints of direct discrimination fail. He has not been treated less favourably because of (actual or perceived) disability.

Breach of Contract

160. It is not one of the specific issues, but, as per the findings of fact, the claimant did not persuade us that he was improperly forced to sign the April 2019 document (page 229). Furthermore, and in any event, this is the document on which the claimant places reliance when asserting entitlement to 6 months’ notice, and so it would be inconsistent with his case for him to argue that this was void and/or did not represent the actual contractual agreement that he is claiming existed between the Respondent and him. In fact, it is our finding that the document does accurately reflect an agreement reached between Mr Lohani and the Claimant. Strictly speaking, it was not a written agreement between the Respondent and the Claimant.

161. However, the respondent's witness, Mr Lohani accepted that this document did – in his opinion – say that there was a 6 month notice period applicable to employment relationship (as well as to other parts of the agreement). We are satisfied that there was a meeting of minds between the Claimant and the Respondent. Both the Claimant and the Respondent intentionally and validly

agreed that either of them would be required to give the other 6 months' notice in order to unilaterally terminate the employment contract. It does not particularly matter whether that was an agreement which the Claimant and the Respondent first made at the start of the Claimant's employment, or whether April 2019 was the first time that this particular clause was agreed. Either way, it was agreed no later than April 2019.

162. Although not a specific item in the list of issues claimant suggested that the WhatsApp message of 4 January at 266 was deliberate attempt to disturb him, and perhaps encourage him to leave. We find that that is not the case. Even if the claimant is right in his belief that it was sent to his own contact address, not just to the group contact address, that does not indicate that he was being targeted or deliberately disturbed at night. As a co-owner of the respondent and somebody also responsible for drawing up rotas, there is nothing suspicious about the item being sent to him directly (if that was in fact the case).

163. On the claimant's account, and genuine belief, Mr Lohani manipulated events so that, at the meeting on 22 January 2020, KellyDeli came to the view that there had been a breach of KellyDeli's rules or agreements. The Claimant thinks that KellyDeli made the decision that he, the Claimant, had to leave (albeit, according to the Claimant, they were tricked into doing so by Mr Lohani).

164. As per the findings of fact, our finding was that it was Mr Lohani who decided the Claimant should leave the business and who, acting on behalf of the Respondent, decided that that would include ceasing to be an employee. The Claimant was presented with a document in the meeting, which he was told he had to sign. During the meeting, it was made clear to the Claimant that he would not be going back to work at the kiosk at all (as the emails later on 22 January make clear and confirm). The fact that his last day as an employee would be 31 January was made clear to him on 22 January (including in the emails).

165. The Claimant did not wish to cease to be director or shareholder or employee. It was Mr Lohani's decision, not his. In the case of the Claimant's employment, Mr Lohani, the 70% shareholder was acting (and was intending to act) with the Respondent's authority, and the Claimant knew this.

166. As per the findings of fact, it was not the claimant who suggested resignation. It is not true that the Claimant typed up the 22 January letter. The Claimant signed that document only because he was told that Mr Lohani was not giving him the choice.

167. The 22 January document did not state that the Claimant was waiving his entitlement to notice as an employee. In the findings of fact, we quoted the exchange of emails sent later that day. It is our decision that, by telling Mr Lohani that he would not work up to 31 January, the Claimant was not breaching any term of his employment contract. Rather, he was simply repeating in writing what he had been told earlier that day by Mr Lohani (and/or Mr Elson) that he would be on leave, not working at the kiosk, with immediate effect. Mr Lohani did not seek to contradict what the Claimant had written (because what the Claimant had written was true) and did not suggest that if the Claimant did not come to work he might be subject to disciplinary action, or deemed to be in breach of contract. It is likely

that, had it wanted to do so, the Respondent could simply have informed the Claimant that his leave (whether holiday leave or garden leave) was cancelled, and the Claimant would have to work after all. However, the point is academic, because the Respondent did not purport to do so, having received the Claimant's email of 1545 on 22 January.

168. We note that the claimant did not promptly raise allegations that what occurred on 22 January 2020, was a dismissal. We also note that the Claimant did not promptly assert an entitlement to payment in lieu of 6 months notice, or damages for failure to give notice.

169. However, our decision is that:

    169.1 As conceded by Mr Lohani, the 26 April 2019 document confirmed that the Claimant was entitled to 6 months notice if the Respondent wished to terminate the Claimant's employment contract

    169.2 The Claimant did not waive that entitlement

    169.3 The Claimant had not committed any breach of contract such that the Respondent was entitled to terminate without notice

    169.4 The Respondent's actions on 22 January 2020 did amount to termination, with effect from 31 January 2020.

170. The Claimant is therefore entitled to damages for the failure to give notice of a termination which could (if notice had been lawfully given) taken effect no earlier than 21 July 2020.

171. The Claimant's entitlement to salary was to £1500 net per month. Therefore, the parties may well be able to agree the appropriate sum themselves. However, if not, the panel will decide the amount at a remedy hearing.

Employment Judge Quill

Date: 25 October 2022

RESERVED JUDGMENT &
REASONS SENT TO THE PARTIES
ON 26 October 2022

FOR EMPLOYMENT TRIBUNALS