EMPLOYMENT TRIBUNALS

Claimant: **Samuel Cope**

Respondent: **John Lewis Plc**

Heard at: **Reading Employment Tribunal**

On: **6th to 8th June 2022 and 22nd to 24th August 2022**

Before: **Employment Judge Eeley**
Mrs J Smith
Mrs M Thorne

Representation
Claimant: In person
Respondent: Ms A Meredith, counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:

1. The claimant's claim of direct disability discrimination contrary to section 13 of the Equality Act 2010 fails and is dismissed.

2. The claimant's claim of discrimination arising from disability contrary to section 15 of the Equality Act 2010 fails and is dismissed.

3. The claimant's claim of breach of the duty to make reasonable adjustments contrary to sections 20 and 21 of the Equality Act 2010 fails and is dismissed.

4. The claimant's claim of victimisation contrary to section 27 of the Equality Act 2010 fails and is dismissed.

5. The claimant's claim for unpaid annual leave is dismissed upon withdrawal by the claimant.

REASONS

Background

1. By a claim form presented on 3 May 2020 the claimant brought claims of disability discrimination and for unpaid holiday pay.

2. On the first day of the final hearing the claimant withdrew his claim for unpaid holiday and so we have dismissed that claim (upon withdrawal) in our judgment, as confirmed above.

3. The claimant had less than two years' continuous service with the respondent and so the Tribunal had no jurisdiction to hear any freestanding claim of so-called 'ordinary' unfair dismissal. Rather, the alleged constructive dismissal was considered relevant as a detriment forming part of the discrimination claim. The list of issues set out in the Case Management Summary of 14 June 2021 lists constructive dismissal as a detriment in both the section 13 and section 15 discrimination claims. In such circumstances it was necessary to consider whether there was a constructive dismissal of the claimant and also whether the alleged breach of contract which triggered the resignation was discriminatory. This was summarised at paragraph (4)(iv)(a) of the list of issues. The question posed was whether "the respondent's failure to make reasonable adjustments to enable the claimant, who is autistic, to attend the meeting on 7 February 2020 and a meeting scheduled to take place on around 15 April 2020 with Mr Tom Elliott accompanied by someone to provide the claimant with support" was the conduct which breached the trust and confidence term [and entitled him to resign and consider himself constructively dismissed].

4. The claimant brings claims of disability discrimination based upon his disability of autism. The respondent concedes that the claimant was disabled within the meaning of section 6 of the Equality Act 2010 during the relevant period by reason of his autism.

5. The claimant's claims of disability discrimination contrary to sections 13, 15 and 20/21 and victimisation contrary to section 27 of the Equality Act were identified by the Tribunal and recorded in the Case Management Summary of Employment Judge Gumbiti-Zimuto following the preliminary hearing on 14 June 2021. At the outset of the final hearing the Tribunal agreed the issues for determination with the parties in line with the list of issues located at [36] of the Tribunal hearing bundle. The claimant provided some further clarification as to the identity of the individuals that he alleged had subjected him to the detrimental treatment listed at paragraph (vi)(a)-(j). Stuart Lemon was said to be responsible for the matters in paragraphs (a)-(f) whereas Tom Elliott was said to be responsible for the matters at (h) and (i). Furthermore, the matter at (g) was said to be the responsibility of the respondent's Head Office or 'whoever handles grievances and makes decisions on grievances for the respondent.' To the extent that the same factual allegations were

made as part of the section 15 discrimination claim, the same individuals were recorded as having been responsible for the matters complained of.

6. For the purposes of his direct discrimination claim (section 13) the claimant relied upon a hypothetical comparator.

7. The Provision Criterion or Practice ("PCP") for the purposes of the reasonable adjustments claim was clarified with the parties as the respondent having a 'general requirement that employees attend meetings of the sort arranged for 7 February and 11 April 2020 without support.' This was clarified to make it of general application rather than a PCP which, on the face of it, was applied solely to the claimant (as could be suggested by the formulation in the list of issues from the preliminary hearing). The claimant says that the PCP put him at a disadvantage triggering a duty to make reasonable adjustments.

8. The Tribunal had regard to the documents it was referred to within an agreed bundle of 552 pages plus additional pages inserted at [227(a)-(j), 275(a) -(c), 328(a)-(d), 334(a)-(h), 553 and one further page of WhatsApp messages from 12 February between the claimant and his proposed companion for the meeting the following Friday]. We also had the benefit of a chronology and cast list prepared by the respondent.

9. The Tribunal received written witness statements and heard oral evidence from the following witnesses:

    a. The claimant, Samuel Cope
    b. Claire Cope, the claimant's mother.
    c. Tom Elliott, Deputy Branch Manager at Waitrose in Godalming, who was due to conduct the claimant's disciplinary hearing.
    d. Stuart Lemon, Deputy Branch Manager at Waitrose Store Godalming, who investigated the claimant's alleged misconduct.
    e. Jake Lloyd, Deputy Branch Manager, who investigated the claimant's grievance and was interviewed during the grievance appeal.
    f. Tracy McCreadie, the respondent's Appeals Manager, who investigated claimant's appeal against the outcome of his grievance against Kit Arthur.

10. We also received oral closing submissions on behalf of both parties, for which we were grateful.

11. A significant proportion of the factual background to this case relates to complaints which were made about the claimant by one of his female colleagues. Given the nature of the complaints she made, given that she did not attend the hearing to give evidence, and given that her identity is not material for the purposes of this Tribunal's decision, we will not be referring to her by name within these written reasons. This approach was agreed with the parties during the course of the final hearing. The individual concerned will instead be referred to as "X" or "Ms X." In those circumstances there is

no need for the Tribunal to make any form of rule 50 anonymity order in this case as any concerns are adequately addressed by this approach.

12. References to numbers in square brackets in these reasons are references to pages in the Tribunal hearing bundle, unless otherwise indicated.

Findings of fact

13. On 23 June 2018 the claimant commenced employment as a Supermarket Assistant with the respondent at its Waitrose and Partners store in Godalming [64-67].

14. On 27 October 2018 the claimant completed his Earning Membership Period (the equivalent of a probationary period in many other businesses). During his employment up to that point it appears that adjustments had been made for the claimant which were apparently related to his autism following some form of Occupational Health guidance or recommendation. The recommended adjustments included moving the claimant to work in the Ambient Department [94-100].

15. In mid-December 2019 Ms X made a complaint to the respondent that the claimant was behaving inappropriately towards her.

16. On 15 December 2019 Stuart Lemon was appointed to conduct an investigation into the claimant's alleged misconduct. He had an initial meeting with the claimant with a notetaker present. At this initial stage Mr Lemon had not seen the text messages between the claimant and Ms X and he did not know the detail of the allegations. Instead, he had had a more general conversation with Ms X and had asked her what resolution she wanted. She just wanted the behaviour to stop. His meeting with the claimant was therefore an informal first step and not a formal part of the disciplinary process. Mr Lemon went into his meeting with the claimant thinking that it might be a situation which was capable of informal resolution. He thought that he might be able to have a 'quiet word' with the claimant such that, if the claimant did not deny the alleged conduct, Mr Lemon could give some management advice that there should be no repetition of the unwelcome conduct. Mr Lemon thought that, in those circumstances, he might well be able to 'draw a line' under the matter to everyone's satisfaction so that the case would not have to go down the formal disciplinary route.

17. On 15 December Mr Lemon broached the issue with the claimant and said that he needed to have a private word with him later that day and that there would be a notetaker present. The discussion was due to take place in Mr Lemon's office. The Tribunal concludes that there was not much of a delay between Mr Lemon informing the claimant that there would be a meeting and the meeting itself actually taking place. We accept that the claimant was not given formal notice of the meeting and was not told of any right to be accompanied at the meeting and that this was because it was an informal fact finding meeting. The right to a companion was not offered because this

was not required by the respondent's procedures for this type of meeting. It was not anticipated that this would be a necessary step in the circumstances. We also conclude that the claimant was not really told in advance what the meeting would be about. The meeting itself took place at around 3pm on 15 December.

18. The notes of the 15 December meeting were in the Tribunal bundle [107]. In the course of the meeting the claimant denied inappropriate behaviour towards Ms X and said that they were friends. He denied having made contact with her via social media and denied making sexual references to Ms X or anyone else within the branch. When it was put to him that he had been sending messages that were inappropriate he denied it and said that he "does not come to work to chat up staff." When he was told that the partner in question (Ms X) had asked him to stop messaging her he confirmed that he had 'backed off' and maintained that he had not done anything wrong. He denied having made sexual references to Ms X, either inside or outside of work.

19. The Tribunal further notes that during cross examination the claimant accepted that at the time that the meeting on 15 December took place management did not have full details of the allegations. Consequently, Mr Lemon could not inform him of the particular detail of the case against him. It became clear that the claimant was not asserting that Mr Lemon *knowingly withheld* details of the allegations from him during that meeting. He seemed to accept that Mr Lemon was not privy to any more detail than he actually gave to the claimant at the meeting.

20. When the substance of the allegation was put to the claimant he flatly denied it. This took Mr Lemon somewhat by surprise. Once the claimant had said that the conduct in question had not taken place Mr Lemon realised that he would not be able to resolve matters informally. He could not get the claimant's assurance that 'it would not happen again' if the claimant denied that anything untoward had happened in the first place. In those circumstances Mr Lemon had to find out exactly what *had* happened and then decide what next steps would be appropriate, whether that be a disciplinary process or something else.

21. The conversation between the claimant and Mr Lemon moved on to deal with some performance and behaviour issues that had been raised with the claimant. He accepted that his performance had been lacking. He did not know why. When asked whether he was able to follow instructions from a Team Leader he confirmed that yes, he was. He was asked if there was any other reason why his behaviour might be lacking. In response to that question the claimant disclosed his autism and anxiety and that he had also had 'blackouts.' He said that he was drinking too much and that one night he had been in London on a bench wanting to 'end it all.' Mr Lemon asked the claimant whether he had any support and the claimant just confirmed that he had support from friends. He confirmed that his Mum would be "mad at him."

The claimant is recorded as saying that he was drinking too much to black everything out and that he needed help as he was an alcoholic. Mr Lemon obtained the claimant's consent for a health referral and told the claimant about partner support. The claimant confirmed that he was on medication. The notes indicate that he said that he was on medication for his autism but this is unlikely to have been the case given the nature of that condition. The Tribunal understands that there is no medication which can be prescribed for autism itself as it is a diagnosis of neurodiversity which is intrinsic to the individual in question. We note, therefore, that it is perhaps more likely that the medication was prescribed for associated anxiety. The claimant informed Mr Lemon that he had not seen his doctor for about two years and so had not had his medication reviewed. Mr Lemon advised the claimant to get a doctor's appointment first thing in the morning and asked if he (Mr Lemon) could ring his next of kin. The claimant's response was that he could ring his Mum but she would be mad and would not care.

22. In relation to the request for consent for an occupational health referral we find that Mr Lemon did not really go into detail with the claimant about the purpose of the referral. We find that the main trigger for making the referral was concern about the claimant's welfare and his apparent dependence on alcohol. It was only after the meeting had concluded and Mr Lemon was filling out the referral document that he realised that it would be more efficient to get an occupational health opinion on whether the claimant would be fit to attend a disciplinary hearing as part of the same referral. Mr Lemon was concerned that if the referral only asked for an opinion on the alcohol issue and the matter then proceeded to a disciplinary process, there would be a further delay whilst occupational health were asked whether the claimant was fit to attend meetings as part of the disciplinary procedure. He considered that such a delay would be in nobody's interests and sought to avoid it by asking for an occupational health opinion on both matters as part of the same referral. The net result was that the claimant gave his consent to an occupational health referral in general terms but had not given specific consent for a referral to determine specifically whether he was fit to attend a disciplinary hearing. He was not told the purposes of the referral in specific terms. However, the Tribunal also notes that the claimant gave consent to occupational health for them to release the report to the respondent without a copy being sent to him for review in advance. We also note that the consent box [128] shows that the general content of report had been conveyed to the claimant. The claimant did not withdraw consent for the report to be sent to the respondent once he knew its contents. The Tribunal therefore concludes that the claimant may have been dismayed by some of the questions which were put to occupational health and this may have alerted him to the fact that a disciplinary procedure might be initiated against him in the future. However, this does not mean that the respondent had actually already decided that it wanted to take the matter to a formal disciplinary hearing in any event. That decision had not been taken by this stage. This was a preliminary enquiry to clear the way for such a procedure if it should become necessary in future and to avoid unnecessary delay. The Tribunal does not accept that the claimant was told that he was subject to disciplinary action at the occupational health appointment. At that stage he was not subject to disciplinary action.

The allegations had not been investigated and no decision had been made about whether the case would go forward to a disciplinary process. We accept that the claimant may have realised during the appointment that his fitness to participate in future hearings was being looked at (albeit as a secondary purpose of the referral). However, this did not mean that the claimant was subject to disciplinary action.

23. The claimant alleges that Stuart Lemon stated on 15 December that 'he did not understand autism'. In cross examination the claimant was prepared to admit that Mr Lemon's version of the wording was likely to be correct. Mr Lemon's position was that he said words to the effect of "help me to understand what life is like for you living with autism." The Tribunal prefers Mr Lemon's evidence as to what he said in this regard. In effect, he was asking for information to help him understand the impact that autism might have on the claimant and the circumstances of his employment and the complaint. He was asking a genuine question in order to understand the situation. The Tribunal finds that he was not being dismissive of the disability or otherwise seeking to undermine the claimant. His comments were made in a spirit of concern.

24. At some point in December the claimant wrote a grievance [123-124]. He presented it to the front desk at the store. It was left for Mr Lemon but was not picked up by him until later. The grievance was about Ms X and also about another colleague called Kit Arthur. The grievance was not submitted to the correct department in line with the respondent's grievance procedure. The Tribunal also noted that the grievance was submitted during the Christmas trading period which is one of the busiest parts of the respondent's year. Staff would be particularly busy during this time and it would be more difficult to allocate appropriate personnel to handle grievances and the like during this time. It is also a part of the year during which the respondent would face increased requests for annual leave.

25. The substance of the grievance about Ms X was a complaint that she had made the allegation of harassment against him. He asserted that he was not guilty of the allegation and that these sorts of allegations can ruin lives. He did not make any substantive counter allegations against X but instead confirmed how damaging her allegations about him were. He asserted that the respondent had a duty of care towards him (the claimant) as well as towards Ms X. He said that this had destroyed his confidence and had made him depressed. He asserted that he should not be in fear of losing his job over this. He went on to say that he felt he was being persecuted for his autism and he felt that the respondent should have more awareness and training around autism. He asserted that he was protected by the Equality Act by reason of his autism.

26. The claimant went on to make a complaint about Kit Arthur's behaviour towards him over a period of months. He asserted that Kit had constantly told the claimant that he was pathetic, a joke to everyone and was attention seeking. Kit allegedly smirked at him on the shop floor and made odd

comments towards him. He went on to allege that Kit picked a fight with him and pushed him into a door on 10th November. The claimant apparently then threw a box at Kit, something which he accepted was wrong. He asserted that he was starting proceedings against Mr Arthur for protection from harassment. (There appears to be a reference to the 1997 Act). In the course of this grievance the claimant asked for a stress risk assessment under regulation 3 of the Management Regulations of 1999.

27. Having reviewed the content of the claimant's grievance the Tribunal finds that the respondent was entitled to split it into two and deal with the two separate elements of the grievance differently. The complaint about Ms X was not a grievance as such but rather was a response to her complaints about him. It was part and parcel of his response to the potential disciplinary allegations against him. In those circumstances the respondent was entitled to deal with it as part of the disciplinary case rather than as a free standing grievance. The claimant would be able to make whatever points he felt relevant in relation to Ms X when he responded to the allegations against him. The comments about Mr Arthur were different in nature and the respondent was entitled to hive them off to deal with as a freestanding grievance. This grievance raised entirely separate factual allegations. The outcome of these complaints was not tied up with the issues surrounding Ms X and could be looked at separately.

28. Nicolette Keough from HR sent an email to Jake Lloyd telling him that he should deal with the grievance about Kit and not the grievance about Ms X [553]. That email was actually shown to the claimant by Mr Lloyd and he received a copy of it. This shows that he knew that the respondent was going to split the grievance into two and how it proposed to deal with the two separate aspects of it. Whether he knew how the complaint about X would be aired as part of the disciplinary case is another matter. The reality is that the case never got as far as a disciplinary hearing (as opposed to an investigation hearing). The Tribunal therefore never got to examine how the respondent would have handled this aspect of the disciplinary issue. It is essentially a matter of speculation as to whether the claimant would have been able to put forward what he considered to be his grievance about Ms X at any disciplinary hearing and, if so, what the respondent would have made of it. Mr Lemon did not really have his role in relation to the grievance relating to Ms X communicated to him by HR (or whoever had made the decision that the disciplinary process should cover the grievance about Ms X) so perhaps he did not proactively talk to the claimant about that aspect of the case. The Tribunal gained the impression that Mr Lemon did not really think that he had a role in looking at the claimant's grievance about Ms X. He felt he was factfinding in relation to the potential disciplinary allegations against the claimant.

29. On 24 December 2019 Mr Lemon made arrangements for the claimant's occupational health referral [120].

30. On 2 January 2020 the claimant's grievance document was sent to the Personnel Service Centre ("PSC") by Mr Lemon [126]. In an initial discussion

Mr Lemon asked the claimant what he wanted to do with his grievance and the claimant confirmed that he wanted it treated as formal grievance so Mr Lemon forwarded it to the correct people (as the claimant had not forwarded it to the correct people pursuant to the applicable procedure).

31. On 8 January 2020 claimant had an appointment with occupational health which resulted in the production of a report [127-130]. In summary, the claimant had declared symptoms of a recently diagnosed mental health condition which he felt had started in October of the previous year (i.e. 2019) with no obvious triggers. He denied that alcohol dependence was the primary issue (as indicated in the respondent's referral) but acknowledged increasing alcohol consumption as a poor coping strategy for his mental health symptoms. He reported that he was accessing treatment from his GP and was due to have an appointment the next week exploring counselling support services. The claimant had reported that he had a long term history of episodes where he disconnects with his surroundings and the duration of these episodes can vary from a few days to two weeks. He denied that these symptoms were associated with any recent substance misuse as he stated that he had had the episodes for years. As far as he could recall these episodes had not resulted in any 'near miss' incidents, accidents or endangering his own safety or the safety of others. As far as he could recall, there was no previous history of him discovering consequences of having done things without complete awareness during such episodes. The report summarises that the claimant has an underlying behavioural condition which he believes affects how he perceives situations, how he may be perceived by others and socially interact with others and that it also impacts on him being able to distinguish right from wrong. In the course of the consultation the claimant had denied the inappropriate behaviour allegations for which he was under investigation. The claimant had denied any ongoing alcohol dependency issues.

32. In the Occupational Health clinician's view the claimant did have an underlying medical condition 'as discussed above' which may impact on his behaviour and he had been proactive in seeking and starting the appropriate support. The report noted the previous referral to occupational health (9/10/18) and the recommendation for completion of a tailored adjustments plan. The suggestion was that this should be reviewed with the claimant in relation to his (then) current health concerns. It was thought that this might help to frame the discussion with the claimant about the effects of his condition, adhering to appropriate partnership behaviours and checking his understanding and agreeing a strategy for correcting any unacceptable behaviour.

33. The clinician concluded that the claimant was fit to proceed with a disciplinary hearing. He had the capacity to understand and follow proceedings, if necessary with extra time and an alternative of written explanations and additional time for breaks. He had the ability to understand the allegations and reason for the meeting, respond to questions and would be able to instruct a friend or representative to represent his interests. It was observed that, due to his condition, any formal work proceedings might be stressful for

the claimant and increase his level of anxiety but delaying the process by a lengthy timeframe was also likely to have a more detrimental effect on his heath the longer the work-related issues remained unresolved. Suggested measures to consider in order to help alleviate distress within the meeting could include allowing the claimant to be accompanied by a suitable person and allowing him comfort breaks to enable him to regain composure, absorb or process content. The clinician did not feel that a review was necessary and was due to close the referral. The claimant had given consent for the details of the outcome of the assessment to be released in confidence to his manager and/or Personnel. He did not want to see a copy of the report before it was disclosed to the respondent.

34. On 24 January PSC were informed that the claimant had not received a response to his grievance letter and responded that the email had not been received. Consequently, it was re-sent to them.

35. On 25 January Ms X was interviewed in order to get more specific details of her allegations. Notes were taken [132]. She alleged that the problem started when they were working on the Fresh Department when the claimant kept asking for her snapchat details which she did not want to give him. He gave her his. She alleged that he was being very flirty, something which she did not want. He wanted to take her out for her 17th birthday. Ms X contended that she had reported it to her team leader at the time. She added him to her snapchat in order to be friendly and contended that she never gave out "a flirty vibe." As the claimant kept making comments she blocked him and her line manager told him to stop too. Someone else also reported him and he stopped talking to Ms X altogether because he thought she had reported him. Some of their male colleagues tried to wind the claimant up by saying that X liked him. After a gap, the messaging re-started (about 8 months before the interview). As the claimant did not have her snapchat he would talk to her through a male colleague and would private message her on Instagram. The claimant would say things like, "Tell X that I think she is a peng ting and got something incredible planned if she sees me on Saturday night." She ignored a message enquiring whether she wanted to do something on his Saturday night off. Ms X maintained that she would only talk to him if it was at work in order to be polite as she felt awkward. She gave an account of circumstances surrounding the claimant's birthday where she had used an excuse not to go on his birthday night out. Ms X received a video message of the claimant saying, "X is so fit, bring her right here I wanna shag her." Ms X ignored this. Further messages were sent begging her to meet him. She told the boys that he was with that it had gone too far and they stopped joking around with him. She then described an incident where she had to talk to the claimant again at work and which led to him saying to another male colleague, "I think I'm going to get back on X again." He was told not to by this male colleague. The claimant followed X out (in order to offer to do her rubbish with her at work) but she discouraged him. She reported the issue to James and he told Stuart and the claimant had not spoken to her since then.

36. In addition to the interview the respondent was provided with copies of relevant social media messages between the claimant and Ms X. They

spanned the period 18 August 2018 to 30 May 2019. They then started again in September 2019 and the last dated message is from October 2019. The early messages are from the claimant trying to get a response from Ms X. She rarely responds to him. In response to some of his messages X responds: "I've got a boyfriend," evidently trying to put him off and his response is: "And that's going to stop me?." He asks her out on his Saturday night off and she turns him down. In May she sends a message "Please leave me alone." There is also a series of messages around the claimant's birthday night out where she says she is already going out with the girls. She indicates that she won't be coming on his night out. He still tries to contact her during the night.

37. A review of the available messages shows that Ms X tried to discourage the claimant but he did not get the message. He kept trying to pursue contact with her despite her saying that she did not want it.

38. On 29 and 30 January 2020 PSC wrote to the claimant confirming receipt of his grievance and advising him of the next steps [148-149]. Jake Lloyd was appointed as a grievance investigator on 30 January. On 6 February 2020 the PSC wrote to the claimant informing him that a hearing manager had been allocated for his grievance [147] and that he would be hearing from said manager direct.

39. On 7 February 2020 the claimant attended a further informal investigation meeting with Mr Lemon in relation to the allegations made against him. Once again, a notetaker was present [156-164]. Mr Lemon asked the relevant questions to address the details of the complaint made by X and to get the claimant's response. This was a difficult exercise but also a necessary one. The salient points from the notes are that the claimant was asked how he was getting on with his health problems. He confirmed that he was still on medication and going to the doctors. He noted that therapy and counselling had been recommended for his depression but that he had declined this as he felt it did not work when he tried it as a teenager. The claimant felt that he was not alcohol dependent and that this issue had been taken out of context. He maintained that he did not have a problem with alcohol. He said that the drinking was more to do with the depression which he did not recognise as depression at the time.

40. Turning to the issues under investigation, the claimant was asked whether he had ever made contact with Ms X outside of work. He said he had not and denied making contact. Mr Lemon then showed the claimant a copy of the social media pictures and exchanges between him and X and he asked the question again. The claimant admitted making contact with her in the past. He maintained that he had not said so before because it was in the past and last year and so not relevant to today. It was put to him that X had asked him to stop contacting her but he had continued. He denied this. He maintained that the last contact he had had was on his birthday in September of the previous year. It was put to him that X had said that a snapchat had been sent saying that the claimant wanted to 'shag her.' The claimant definitely denied this and commented that he did not have X on snapchat.

41. When the claimant was asked why X had brought this issue up the claimant attributed it to attention seeking on X's part. His view was that X wanted to be seen as vulnerable and was trying to get the claimant into trouble. He also explained that his references to 'peng' meant 'cute' and three red chillies meant 'spicy.' It was put to the claimant that X had told him that she had a boyfriend. The claimant said that yes, that was inappropriate but it wasn't to do with work. He maintained that this issue was unrelated to work and that he had not said anything at work. The claimant maintained that his conduct with her in work was appropriate but his conduct outside of work was not appropriate. The claimant denied following X around the branch.

42. On 7 February Mr Lloyd invited the claimant to a grievance meeting and informed him of his right to be accompanied [154-155].

43. On 9 February Mr Lemon conducted interviews with Josh McIntyre [173] and Karen Durrant [170]. The gist of Josh's evidence was that the claimant had been a bit inappropriate towards Ms X and was persistent when she tried to put him off. X had told Josh that it made her uncomfortable and that she did not like it. The claimant had told Josh that he was "fully dropping it now." Karen's evidence was to the effect that X had found the claimant's conduct "a bit much" and had approached Karen about it. Karen reported it to Dave so that he could have a word with the claimant. She noted that the claimant was asking X out and when she said no he turned quite nasty, although she could not remember specifically what was said. She commented that X must have felt really uncomfortable about all of this to have said it to her in the first place. She noted that after Dave had a word with the claimant it stopped and then it had started again since. She commented that the claimant was harassing X, she was trying to be polite but he kept going. Karen went to Dave about it and asked him to support X and Karen by having a conversation with the claimant. Although she knew about the social media contact, Karen was unaware of any inappropriateness going on in the workplace.

44. On 12 February 2020 Mr Lemon concluded his investigation and determined that there was a disciplinary 'case to answer' [116, 187].

45. The investigation was then referred to Tom Elliott to conduct the disciplinary hearing. Mr Lemon provided a summary of the position to Mr Elliott [186]. He indicated that in addition to speaking to Josh and Karen he had spoken to Dave Carroll. Dave had confirmed that he had spoken to the claimant and made expectations surrounding his behaviour clear and that the claimant should stop messaging Ms X as per her request. He was reminded that his behaviour needed to be professional in line with the Partnership policy.

46. On 14 February 2020 there was a grievance meeting in relation to the claimant's grievance about Mr Arthur. This was chaired by Mr Lloyd [175-183]. The salient points recorded were that the claimant was offered a companion and the claimant's response was that he did ask but wasn't allowed. He was asked if he was happy to continue with the meeting and he confirmed that he was. The first part of the claimant's grievance concerned

Ms X and Jake Lloyd said that he could not hear it due to ongoing issues. He showed the claimant the email from PPA [553] to confirm this so that he would understand the procedural position. The claimant took a photo of the email, which has since been produced to the Tribunal. The claimant said that he was more concerned about the issues surrounding Ms X than the grievance about Mr Arthur but had been instructed to write against both.

47. The claimant said that a lot had changed since two months previously but at the time Mr Arthur kept making "silly comments on weight." This was in November/December time. He confirmed that they had fallen out outside of work and the claimant wanted to leave it but Kit would not and it got out of hand. The claimant refused to expand on what the arguments outside of work were about. He asserted that on 10 November Mr Arthur started a fight on the respondent's premises. The claimant was waiting for him to finish with rubbish and Mr Arthur whispered 'pathetic' as the claimant walked past. Mr Arthur then pushed the claimant and they had an argument. The claimant threw a box at Kit. The claimant said that there were no witnesses to the push but two people saw them arguing: James Wallis and Liam Clarke. They intervened to calm the claimant down. The claimant confirmed that the box he had thrown did not hit Mr Arthur. After this the claimant left the warehouse and the manager Dave had a word with him. Dave also took the others into the office to speak to them together. The outcome was that the matter was not going to be taken any further. It was an informal resolution. The claimant confirmed that he had not spoken to Kit since and that what happened with Kit was not linked to what happened with Ms X. He and Mr Arthur had agreed to 'forgive and forget' and there had been no further interactions with Mr Arthur. The claimant said he felt like the issue with Mr Arthur had not really affected him and was resolved when it happened. The lawyers had told him to write it up to get it written and logged. The claimant also confirmed that he was diagnosed with depression at the end of December but that was due to the other situation with Ms X. There were no further incidents with Mr Arthur. When asked, the claimant could not say what outcome he wanted regarding the grievance about Mr Arthur. He did not know. He indicated at one stage that he would drop it, although the notes did not make particularly clear what he meant by this.

48. During the course of the Tribunal hearing the claimant indicated that he felt he had not been allowed to bring a companion to that meeting. The respondent gave evidence about needing to have advance notice of a companion in case it needed to release someone from their duties on the shop floor to facilitate their attendance at the meeting. The witnesses indicated that as far as they knew, one of the reasons why the claimant was not allowed to bring a companion might have been that he had only given the respondent about five minutes advance notice of his request so that the colleague could not be released in time to attend. It was in response to this evidence that the claimant disclosed (in the course of the hearing) some text messages between him and a colleague 'Emily' from 12 February which seemed to indicate that the claimant had asked her to accompany him to the meeting and got some form of agreement from her that she would attend. What the Tribunal does not know is why Emily did not actually attend the

meeting. There was no evidence from her to show what she had said to the respondent about this and whether she had confirmed her willingness to attend the meeting to them. There was no evidence from the respondent to show whether they spoke to Emily about it at all. There was a gap in the evidence available to the Tribunal. All the Tribunal can say is that the claimant tried to get a companion for the meeting who, on the face of it, consented but then did not actually attend the meeting. We also know that the claimant said at the meeting that he was refused a companion [176]. In those circumstances the Tribunal has to accept the claimant's evidence on this issue but we still do not know why his request was refused. There may have been a good reason for the refusal but we do not know what it was.

49. The claimant was signed off work on sick leave between 18 February 2020 and 6 March 2020.

50. On 25 February Mr Lemon interviewed Dave Carroll and X's brother [189 and 196]. The substance of Dave Carroll's evidence was that Karen Durrant had approached him in September 2019 and asked him to have a word with the claimant. Karen told him that the claimant had been sending inappropriate messages to Ms X. He spoke to Ms X and asked if it was OK for him to speak to her brother. She was happy for him to do this. Mr Carroll confirmed that at the time he assumed it to be no more than teenage chat but told the claimant that it had to stop as Ms X felt very uncomfortable about it. The claimant assured him that he would stop messaging young females from that point on and promised to not message any fellow partners inappropriately. Dave Carroll confirmed that he had to speak to the claimant again a few weeks subsequently as he was led to believe that he had messaged a young female in the café. He reminded the claimant of their earlier conversation and the claimant assured him that they would not have to have that conversation again. X's brother confirmed that he had told the claimant that it wasn't right him messaging his sister a while ago. He could not recall exactly what the claimant said but he appeared uncomfortable and changed the conversation. X's brother confirmed that he had not spoken to her properly but that she had made him aware that that he had been messaging her inappropriately. She had mentioned that his behaviour was weird and that he followed her and had been messaging her. X's brother told her that if she wanted something doing about it she would have to report it to management. He had heard that he was intoxicated one night and sent the claimant an explicit message making sexual advances towards her inviting her to a hotel. X's brother felt uncomfortable about this. He did not feel threatened by the claimant or that he was a risk but he would just like it to be dealt with and the behaviour changed.

51. On 26 February 2020 Mr Lemon arranged for copies of policies that had been requested to be sent to the claimant [193-194].

52. On 4 March Mr Elliott invited the claimant to a disciplinary meeting [215-220]. It was due to take place on 6 March at 9am.

53. On 5 March 2020 the claimant's solicitors sent their first letter to the respondent [229-230]. In that letter they pointed out that the claimant is disabled and that he raised a grievance on 20 December 2019 against Kit regarding disability related harassment and that it had taken a month for the respondent to acknowledge the grievance. They also alleged that the element of the grievance relating to Ms X had not been dealt with at all. The solicitors alleged that there had been a breach of confidentiality regarding the grievance investigation. They remarked upon the adverse impact that there had been on the claimant's mental health as a result of the allegations against him and the breach of confidentiality. They alleged that the delay to the procedure had detrimentally affected the claimant's mental health. They further alleged that it was only via occupational health that the claimant had been informed of the disciplinary allegation. They commented that the communications from occupational health indicated that the claimant was under disciplinary investigation, the implication being that Ms X's grievance had been upheld. They alleged that this was contradicted by Mr Lemon who indicated that the investigation was still ongoing and that there was no evidence of any wrongdoing that had taken place in the workplace. They alleged that the decision to begin disciplinary proceedings had been taken before the investigation into Ms X's grievance had been completed. They suggested that the hearing on 6 March be delayed pending a proper grievance investigation into the claimant's grievance. They concluded the letter by alleging that the respondent had fallen short of its duty to protect the claimant from discrimination and harassment.

54. On 6 March 2020 the claimant returned to work but was then issued with a suspension letter [233]. On considering the available evidence we have concluded that the decision to suspend the claimant was not linked to receipt of his solicitor's letter. The reasons for the suspension were that the issue had been looked at again, this time by a different manager (Mr Elliott) who had access to more and different information and who was looking at the case in different circumstances. Mr Elliott had access to more details about the allegations facing the claimant. As the claimant had been off work on sick leave up until this point Mr Elliott had not had to risk assess the situation before this point in time. At this point in time the evidence had developed and he was entitled to look at it when making his risk assessment. The Tribunal concludes that this explains why two different managers looking at the case at two different stages could come to two different conclusions about suspension and still be acting reasonably in so doing. The relevant factors to be considered by the manager were the claimant's imminent return to work after a period of sickness absence, the risk to the claimant of further allegations being made against him once back in work, the risk to other colleagues that the claimant might take action against them or that further incidents of misconduct might take place. The respondent's manager also had to consider whether there was a need to complete the claimant's grievance before carrying out the disciplinary. Even if the claimant's solicitor's letter had not been sent at all, those factors would still have applied and would have arisen for consideration. Even if the solicitor's letter had not made an allegation of discrimination, those factors would still have applied.

55. The Tribunal's conclusion is that the claimant would still have been suspended by Mr Elliott at this point upon his return from sick leave even if the claimant's solicitor had sent *no* letter or a letter which did *not* make an allegation of discrimination. In reaching this conclusion we understand why the claimant has made a connection between the two events. The chronology is unfortunate but a coincidence of timing does not demonstrate a causal link between the solicitor's letter and the suspension. It does not show that the former caused the latter. We also question whether it was actually detrimental to the claimant to suspend him at this point. It was arguably in his best interests to keep him out of the workplace pending resolution of this issue. It insulated him from further allegations. We also note that suspension pending disciplinary investigation is always said to be a neutral act which does not prejudge guilt or innocence of the charges. It is not a disciplinary sanction.

56. On 8 March Mr Lloyd interviewed Ms X's brother and Liam Clarke regarding the claimant's grievance [245 and 250].

57. On 10 March 2020 the claimant's solicitors sent their second letter to the respondent [256]. In that letter they set out that the claimant was due to return to work on 6 March and he had agreed that he would do so. They alleged that he was told by Mr Elliott that he could return to work if he felt comfortable but that people would be gossiping about him. They queried why there had been a change of position on the suspension issue in less than 24 hours. They alleged that the suspension letter was deficient and no reasons were given why there was reasonable and proper cause for the claimant to be suspended. They queried why the claimant's colleagues would be gossiping about him when the grievance and disciplinary processes should be confidential. They cast doubt on whether a fair investigation could take place if potential witnesses had been discussing the allegations between themselves. They alleged that this was part of the "ongoing discrimination" that the respondent had subjected the claimant to as a result of its "obvious intention to treat him less favourably and dismiss him because of his disability." The solicitors also queried why the suspension was taking place now given that the events which formed the allegations took place some time ago in 2019. They also queried why only the claimant had been suspended and not the others who were involved in the relevant events. They alleged that the respondent had breached the implied term of mutual trust and confidence. They concluded by asserting that the suspension was an act of victimisation following their earlier letter to the respondent on the claimant's behalf.

58. On 11 March the respondent responded to the first letter from the claimant's solicitor [262-3]. It was a short letter which stated: *"Thank you for your letter dated 5 March 2020 which has been passed to the Personnel Policy and Advice team as the appropriate department to respond. Please treat this letter as confirmation that we are unable to comment on the details raised in your*

letter as our employment relationship is with the Partner and are being dealt with in line with our internal procedures."

59. On 12 March 2020 Mr Lloyd completed his investigation into the claimant's grievance against Mr Arthur. He informed the claimant that the grievance was not upheld. The reasons for his decision were that the conduct the claimant referred to in his grievance had been brought on by an isolated incident which had happened outside of work. This had led to both parties' conduct in question within work since then. Before this they both considered each other as friends. Second, he noted that there was no eyewitness evidence that Mr Arthur started the altercation on 10 November, other than each other's contradictory statements. The only third party eyewitness accounts were that the claimant showed aggressive behaviour towards Mr Arthur before the incident was broken up by two other partners. He noted that the incident had been dealt with by Dave Carroll on the day and there was an informal outcome with no further action or issues raised at the meeting. Finally, he noted that the claimant had only raised the grievance against Mr Arthur due to advice given by his legal representatives. He was actually more concerned to pursue his grievance against Ms X. Mr Lloyd concluded by recommending a mediation between the claimant and Mr Arthur. The claimant was told that he had a right of appeal against the decision [264].

60. On 16 March 2020 the claimant appealed the grievance outcome in relation to his grievance about Kit Arthur [267]. The Tribunal queries how much of this was based on the claimant's own views and how much was based on his lawyers' advice, given the claimant's lack of any real desired outcome from the grievance when he was interviewed by the respondent about it.

61. On 27 March 2020 the respondent responded to the second letter from the claimant's solicitors by essentially reiterating and relying upon their response to the first solicitors' letter [271].

62. On 1 April 2020 the claimant was invited to the adjourned disciplinary hearing [279]. This was due to take place on 3 April. The claimant said that he would not attend the disciplinary meeting [115].

63. The claimant commenced ACAS Early Conciliation on 2 April 2020.

64. On 2 April the respondent invited the claimant to a grievance appeal hearing to take place on 7 April and asked the claimant if he wished to bring a companion [300].

65. On 8 April the claimant was invited to attend a disciplinary hearing on 11 April. His right to be accompanied was confirmed [305].

66. On 9 April the claimant called PSC and advised them that he was unable to find a trade union representative to attend in time for his disciplinary hearing. He also questioned the fact that the grievance appeal had not been heard and asserted that that should happen before the disciplinary hearing. He raised a number of queries about the process. PSC advised the claimant to

speak to his trade union representative and establish when they could be available for the hearings. He was told that if he wanted the branch to postpone the hearing they could not do that indefinitely so he should go back to them with a suggested date that he *could* do. He was also advised that it was open to him to ask about any adjustments to be implemented given the Covid lockdown, for example, to hold the meeting 'virtually' to enable the trade union representative to attend [333].

67. On 9 April, at around 2.49pm, the claimant apparently sent the letter at [329] which was addressed to Mr Elliott. He reiterated that he would not be able to attend the hearing on 11 April as it was not a suitable time. He pointed out that it was Easter and virtually impossible to get a trade union representative to attend with him. He also asserted that ACAS had agreed that it should be postponed for a suitable amount of time to resolve the situation. He said that he would like to "extend the date of the disciplinary hearing in two weeks" so that his grievance appeal could be heard first. He also asked for more advance notice of the hearing than 2 or 3 days.

68. From the email chain around [330] the Tribunal can see that the claimant's correspondence was passed to Mr Elliott. The HR advice given was that further time would have to be given to enable the claimant to get his trade union representative for the hearing. However, HR maintained the position that there did not need to be a delay to the disciplinary hearing in order to hear the grievance appeal first. Mr Elliott was told to ask the claimant when he could get a trade union representative to attend the hearing.

69. The Tribunal can see from the contemporaneous documents that Mr Elliott always intended to grant the postponement which the claimant had asked for regarding the disciplinary hearing on 11 April. We heard evidence from Mr Elliott that this was the Easter weekend and that he was not due to be at work on 9 and 10 April. He intended to grant the postponement but did not communicate this decision to the claimant. His evidence to the Tribunal was that he does not deal with such correspondence outside of his working days. He was next due to be back in work on 11 April, the day of the hearing. The first thing that he had to attend to on 11 April was an accident which had occurred in the loading bay at the respondent's premises. It was also extra busy in store as it was Easter Saturday. We accept his evidence that he was intending to postpone the hearing and would have told the claimant this but that the claimant's resignation was handed in before he had the chance to confirm the postponement.

70. Meanwhile the claimant was wondering what was going to happen on 11 April. As far as he knew the hearing would still go ahead unless he was advised to the contrary. He decided that if he had heard nothing further from the respondent in response to his adjournment request by a certain time than he would resign. This is what happened. He pre-prepared the resignation letter and dispatched his mother to deliver it to the store at about 2.30pm. The hearing was scheduled to take place at 3pm.

71. The claimant's letter of resignation confirmed that he would serve his two week notice period [334]. He thanked some of his colleagues for taking him under their wing at the start of his employment. He went on to assert that his position had become untenable since the allegation was made on 15 December. He asserted that he had followed the legal channels but the respondent had blocked his right to have any say. His side of the story had not been heard, his reasonable adjustments had not been made and the attendance of a trade union representative had not been facilitated. He alleged that the failure to deal with his grievance against Ms X showed that nobody wanted to hear his side of the argument. He alleged that it is the law to listen to people with disabilities and the failure to respond to emails and letters was a clear breach that the company was unwilling to cooperate. He alleged that none of the guidelines of the Equality Act had been met and that the respondent had acted illegally. He also maintained that giving him two days' notice to attend a hearing when it was Easter and lockdown was wrong. He concluded his letter by thanking the respondent for taking him on and giving him a chance when nobody else would. He asserts that "It seems this is most appropriate thing to be doing considering that I was going to be forced out. I would like ACAS first to help resolve this issue before I consider taking this to a tribunal or to the press."

72. On 21 April the claimant's grievance appeal hearing took place via telephone with Tracy McCreadie. Notes were taken which set out what was discussed at the hearing [341]. It was indicated at the end of the hearing that a review would take place and that an outcome would be expected in 4 weeks.

73. On 25 April the claimant's notice expired. This was the effective date of termination of his employment.

74. On 28 April Ms McCreadie spoke to Mr Lloyd and John Bailey about the claimant's grievance appeal [346, 347].

75. Ms McCreadie issued the grievance appeal outcome on 14 May [361]. She set out the background to the appeal and the claimant's desired outcome. He had wanted disciplinary action to be taken against Mr Arthur. She explained that any disciplinary action taken as a result of the grievance would be confidential. She then set out the appeal process.

76. Ms McCreadie noted that John Bailey had said that the claimant had not raised any concerns with him regarding Mr Arthur's behaviour towards the claimant. Mr Bailey had never witnessed Mr Arthur behaving inappropriately towards the claimant. Having reviewed the incident on 10 November Ms McCreadie was satisfied that there were no witnesses to Kit pushing the claimant and making derogatory comments towards him during the incident. Mr Arthur's recollection of the incident was very different to the claimant's. Ms McCreadie summarised the evidence that she had collated on this point. She concluded that there were no grounds on which she could reasonably intervene in the decision reached by Mr Lloyd to not uphold the claimant's grievance and she found no reason to recommend that any action be taken against Mr Arthur. She did not consider that the essential facts were in doubt

or that any relevant circumstances had not been taken into account. She believed that the respondent's procedures had been properly followed and that the claimant was not being treated unfairly or any differently from other partners in closely similar circumstances. The appeal was not upheld.

The Law

Section 13: Direct discrimination

77. Section 13 Equality Act 2010 states:

> (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.*

78. Section 23 of the Equality Act 2010 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…*

79. In some cases it may be appropriate to postpone consideration of whether there has been less favourable treatment than of a comparator and decide the reason for the treatment first. Was it because of the protected characteristic? (*Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL; Stockton on Tees Borough Council v Aylott)*

80. The claimant must show that they received the less favourable treatment 'because of' the protected characteristic. In *Nagarajan v London Regional Transport 1999 ICR 877, HL* Lord Nicholls stated: *"a variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds… had a significant influence on the outcome, discrimination is made out'."*

81. The judgment in R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors [2010] IRLR 136, SC summarised the principles that apply in cases of direct discrimination and gave guidance on how to determine the reason for the claimant's treatment. Lord Phillips emphasised that in deciding what were the 'grounds' for discrimination, a court or tribunal is simply required to identify the factual criteria applied by the respondent as the basis for the alleged discrimination. Depending on the form of discrimination at issue, there are two different routes by which to arrive at

an answer to this factual inquiry. In some cases, there is no dispute at all about the factual criterion applied by the respondent. It will be obvious why the complainant received the less favourable treatment. If the criterion, or reason, is based on a prohibited ground, direct discrimination will be made out. The decision in such a case is taken on a ground which is inherently discriminatory. The second type of case is one where the reason for the decision or act is not immediately apparent and the act complained of is not inherently discriminatory. The reason for the decision/act may be subjectively discriminatory. In such cases it is necessary to explore the mental processes, conscious or subconscious, of the alleged discriminator to discover what facts operated on his or her mind.

Section 15: Discrimination arising from disability

82. Section 15 Equality Act 2010 states:

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

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

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

83. Four elements must be made out in order for the claimant to succeed in a section 15 claim:

(i) There must be unfavourable treatment. No comparison is required.
(ii) There must be something that arises 'in consequence of the claimant's disability.' The consequences of a disability are infinitely varied depending on the particular facts and circumstances of an individual's case and the disability in question. They may include anything that is the result, effect or outcome of a disabled person's disability. Some consequences may be obvious and others less so. It is question of fact for the tribunal to determine whether something does in fact arise in consequence of a claimant's disability.
(iii) The unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability. This involves a consideration of the thought processes of the putative discriminator in order to determine whether the something arising in consequence of the disability operated on the mind of the alleged discriminator, whether consciously or subconsciously, at least to a significant extent.
(iv) The alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

See Secretary of State for Justice and another v Dunn EAT 0234/16.

84. Treatment cannot be 'unfavourable' merely because it is thought that it could have been more advantageous or is insufficiently advantageous (The Trustees of Swansea University Pension & Assurances Scheme and anor v Williams [2015] IRLR 885; [2017] IRLR 882 and [2019] IRLR 306.)

85. The consequences of a disability 'include anything which is the result, effect or outcome of a disabled person's disability.' Some may be obvious, others may not be obvious (paragraph 5.9 EHRC Employment Code 2011).

86. Following the guidance given in Pnaiser v NHS England [2016] IRLR 170 at paragraph 31 the correct approach to a section 15 claim is:

> (a) A tribunal must first identify whether there was unfavourable treatment and by whom. No question of comparison arises.
> (b) The tribunal must determine what caused that unfavourable treatment. What was the reason for it? An examination of the conscious or unconscious thought processes of A is likely to be required. There may be more than one reason or cause for impugned treatment. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
> (c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is irrelevant
> (d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability.' That expression 'arising in consequence of' could describe a range of causal links. The causal link between the something that causes unfavourable treatment and the disability may include more than one link. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
> (g) The knowledge that is required is knowledge of the disability only. There is no requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. (See also City of York Council v Grosset [2018] ICR 1492).
> (i) It does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's disability.' Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

87. The first limb of the analysis at section 15(1)(a) is to determine whether the respondent treated the claimant unfavourably "because of something arising in consequence of the claimant's disability". This analysis requires the tribunal to focus on two separate stages: firstly, the "something" and, secondly, the fact that the "something" must be "something arising in consequence of B's disability," which constitutes a second causative (consequential) link. It does not matter in which order the tribunal takes the relevant steps (Basildon & Thurrock NHS Foundation Trust v Weerasinghe

[2016] ICR 305 at paras 26-27) also City of York Council v Grosset [2018] IRLR 746 paragraph 36).

88. When considering an employer's defence pursuant to section 15(1)(b) the 'legitimate aim' must be identified. The aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration. The objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. (Bilka-Kaufhaus GmBH v Weber von Hartz [1986] IRLR 317.)

89. The question as to whether an aim is "legitimate" is a question of fact for the tribunal. The categories are not closed, although cost saving on its own cannot amount to a legitimate aim (Woodcock v Cumbria Primary Care Trust 2012 ICR 1126.)

90. Once the legitimate aim has been identified and established it is for the respondent to show that the means used to achieve it were proportionate. Treatment is proportionate if it is an 'appropriate and necessary' means of achieving a legitimate aim. A three- stage test is applicable to determine whether criteria are proportionate to the aim to be achieved. First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective? (R(Elias) v Secretary of State for Defence [2006] IRLR 934).

91. Determining proportionality involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the treatment as against the employer's reasons for acting in this way, taking account of all relevant factors (EHRC Code paragraph 4.30). The measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see EHRC Code (para 4.31). It will be relevant for the tribunal to consider whether or not any lesser measure might have served the aim.

92. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business but it has to make its own judgment, based upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary (Hardy & Hansons Plc v Lax [2005] IRLR 726 and Hensman v Ministry of Defence UKEAT/0067/14/DM). It is not the same test as the 'band of reasonable responses' test in an unfair dismissal claim. However, in Birtenshaw v Oldfield [2019] IRLR 946 (para 38) the EAT highlighted that in considering the objective question of the employer's justification, the employment tribunal should give a substantial degree of respect to the judgment of the decision maker as to what is reasonably necessary to achieve the legitimate aim provided it has acted rationally and responsibly. However, it does not follow that the tribunal has to be satisfied that any suggested lesser measure would or might have been acceptable to the decision-maker or would otherwise have caused him to take a different

course. That approach would be at odds with the objective question which the tribunal has to determine; and would give primacy to the evidence and position of the respondent's decision-maker.

93. It is necessary to weigh the need against the seriousness of the detriment to the disadvantaged person. It is not sufficient that the respondent could reasonably consider the means chosen as suitable for achieving the aim. To be proportionate a measure has to be *both* an appropriate means of achieving the legitimate aim *and* (reasonably) necessary in order to do so (Homer v Chief constable of West Yorkshire Police Authority [2012] IRLR 601.)

Section 20/21: reasonable adjustments.

94. Section 20 (so far as relevant) states:

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(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.
(4) The second requirement is a requirement, where a physical feature 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.
(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

…

95. Section 21 states:

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
(3) …

96. The correct approach to a claim of unlawful discrimination by way of a failure to make reasonable adjustments remains as set out in Environment Agency v Rowan 2008 ICR 218 and is as follows:

(a) Identify the PCP applied by or on behalf of the employer,
(b) Identify comparators (if necessary),
(c) Identify the nature and extent of the substantial disadvantage suffered by the claimant.

97. The identification of the applicable PCP is the first step that the claimant is required to take. If the PCP relates to a procedure, it must apply to others than the claimant. Otherwise, there can be no comparative disadvantage.

98. A 'substantial disadvantage' is one which is 'more than minor or trivial.'

99. Only once the employment tribunal has gone through the steps in Rowan will it be in a position to assess whether any adjustment is reasonable in the circumstances of the case, applying the criteria in the EHRC Code of Practice. The test of reasonableness is an objective one. The effectiveness of the proposed adjustments is of crucial importance. Reasonable adjustments are limited to those that prevent the PCP from placing a disabled person at a substantial disadvantage in comparison with persons who are not disabled. Thus, if the adjustment does not alleviate the disabled person's substantial disadvantage, it is not a reasonable adjustment. (Salford NHS Primary Care Trust v Smith [2011] EqLR 1119) However, the threshold that is required is that the adjustment has 'a prospect' of alleviating the substantial disadvantage. There is no higher requirement. The adjustment does not have to be a complete solution to the disadvantage. There does not have to be a certainty or even a 'good' or 'real' prospect of an adjustment removing a disadvantage in order for that adjustment to be regarded as a reasonable one. Rather it is sufficient that a tribunal concludes on the evidence that there would have been a prospect of the disadvantage being alleviated. (Leeds Teaching Hospital NHS Trust v Foster [2011] EqLR 1075.

100. Where the disability in question means that an employee is unable to work as productively as other colleagues, adjustments to enable him to be more efficient would indeed relate to the substantial disadvantage he would otherwise suffer (Rakova v London Northwest healthcare NHS trust [2020] IRLR 503. It cannot be assumed that a desire to achieve greater efficiency does not reflect the suffering of a substantial disadvantage. The fundamental question is what steps it was reasonable for the respondent to have to take in order to avoid the particular disadvantage not what ought 'reasonably have been offered.'

101. An employer has a defence to a claim for breach of the duty to make reasonable adjustments if it does not know and could not be reasonably be expected to know that the disabled person is disabled and is likely to be placed at a substantial disadvantage by the PCP etc. The question is what objectively the employer could reasonably have known following reasonable enquiry.

Victimisation

102. Section 27 Equality Act 2010, so far as relevant, provides that:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act…

…

(2) Each of the following is a protected act –

…

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

…

102. A protected act requires that an allegation is raised which, if proved, would amount to a contravention of the Equality Act 2010. No protected act arises merely by making reference to a criticism, grievance or complaint without suggesting that it was in some sense an allegation of discrimination or otherwise a contravention of the Equality Act 2010: Beneviste v Kingston University UKEAT/0393/05/DA [29].

103. The test for detriment has both subjective and objective elements. The situation must be looked at from the claimant's point of view but his perception must be 'reasonable' in the circumstances.

104. The employee must be subjected to the detriment 'because of' the protected act. The same principles apply in considering causation in a victimisation claim as apply in consideration of direct discrimination (see above). The protected act need not be the sole cause of the detriment as long as it has a significant influence in a Nagarajan sense. It need not even have to be the primary cause of the detriment so long as it is a significant factor. Detriment cannot be because of a protected act in circumstances where there is no evidence that the person who allegedly inflicted the detriment knew about the protected act. In the absence of clear circumstances from which such knowledge can be inferred, the claim for victimisation will fail Essex County Council v Jarrett EAT 0045/15.

Burden of Proof

105. Section 136 of the Equality Act 2010 provides that, once there are facts from which an employment tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof "shifts" to the respondent to prove any non-discriminatory explanation. The two-stage shifting burden of proof applies to all forms of discrimination under the Equality Act.

106. The wording of section 136 of the Act should remain the touchstone.

107. The relevant principles to be considered have been established in the key cases: Igen Ltd v Wong 2005 ICR 931; Laing v Manchester City Council and another ICR 1519; Madarassy v Nomura International Plc 2007 ICR 867; and Hewage v Grampian Health Board 2012 ICR 1054.

108. The correct approach requires a two-stage analysis. At the first stage the claimant must prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out on the balance of probabilities is the second stage engaged, whereby the burden then "shifts" to the respondent to prove (on the balance of probabilities) that the treatment in question was "in no sense whatsoever" on the protected ground.

109. The approved guidance in Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205 (as adjusted) can be summarised as:

    a) It is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail.
    b) In deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. In many cases the discrimination will not be intentional.
    c) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination, it merely has to decide what inferences could be drawn.
    d) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts. These inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information. Inferences may also be drawn from any failure to comply with the relevant Code of Practice.
    e) When there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent. It is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground.
    f) Not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment. Since the respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden.

110. The shifting burden of proof rule only applies to the discriminatory element of any claim. The burden remains on the claimant to prove that the alleged discriminatory treatment actually happened and that the respondent was responsible. The statutory burden of proof provisions only play a role where there is room for doubt as to the facts necessary to establish discrimination. In a case where the tribunal is in a position to make positive findings on the

evidence one way or another as to whether the claimant was discriminated against on the alleged protected ground, they have no relevance (Hewage). If a tribunal cannot make a positive finding of fact as to whether or not discrimination has taken place it must apply the shifting burden of proof.

111. Where it is alleged that the treatment is inherently discriminatory, an employment tribunal is simply required to identify the factual criterion applied by the respondent and there is no need to inquire into the employer's mental processes. If the reason is clear or the tribunal is able to identify the criteria or reason on the evidence before it, there will be no question of inferring discrimination and thus no need to apply the burden of proof rule. Where the act complained of is not in itself discriminatory and the reason for the less favourable treatment is not immediately apparent, it is necessary to explore the employer's mental processes (conscious or unconscious) to discover the ground or reason behind the act. In this type of case, the tribunal may well need to have recourse to the shifting burden of proof rules to establish an employer's motivation

112. The claimant bears the initial burden of proving a prima facie case of discrimination on the balance of probabilities. The requirement on the claimant is to prove on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination. The employer's explanation (if any) for the alleged discriminatory treatment should be left out of the equation at the first stage. The tribunal must assume that there is no adequate explanation. The tribunal is required to make an assumption at the first stage which may in fact be contrary to reality. In certain circumstances evidence that is material to the question whether or not a prima facie case has been established may also be relevant to the question whether or not the employer has rebutted that prima facie case.

113. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination (see Madarassy).

114. If the claimant establishes a prima facie case of discrimination the second stage of the burden of proof is reached and the burden of proof shifts onto the respondent. The respondent must at this stage prove, on balance of probabilities that its treatment of the claimant was in no sense whatsoever based on the protected characteristic.

115. In some instances, it may be appropriate to dispense with the first stage altogether and proceed straight to the second stage (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.) The employment tribunal should examine whether or not the issue of less favourable treatment is inextricably linked with the reason why such treatment has been meted out to the claimant. If such a link is apparent, the tribunal might first consider whether or not it can make a positive finding as to the reason, in which case it will not need to apply the shifting burden of proof rule. If the tribunal is unable to make a positive finding and finds itself in the situation of being unable to decide the issue of less favourable treatment without examining the reason, it must examine the reason (i.e. conduct the

two stage inquiry) and it should be for the employer to prove that the reason is not discriminatory, failing which the claimant must succeed in the claim.

Conclusions

116. The Tribunal has addressed each claim made by the claimant in line with the agreed list of issues in the Tribunal bundle. We set out our conclusions in relation to each claim and cause of action in the paragraphs below.

Direct discrimination: section 13 Equality Act 2010

117. The alleged detrimental treatment relied upon by the claimant was set out at paragraph (vi) (a) to (j) of the agreed list of issues. We deal with each factual assertion below.

118. At paragraph (a) the claimant asserted that on 15 December 2019 Mr Lemon informed him that an allegation of sexual harassment had been made against him without informing him of the details of the allegations. The Tribunal has concluded that on 15 December Mr Lemon gave the claimant as much detail as he was able to in relation to the allegations given that he had not obtained a more detailed account from Ms X at that stage. As set out above, he was having an initial conversation with the claimant to get his initial response to the allegations. Upon discovering whether the claimant actually denied the factual allegations or not he would be able to determine what the appropriate next steps were and whether the matter could be resolved informally or would need to go to a more formal disciplinary investigation. To the extent that Mr Lemon gave the claimant all the information that he could, this was not detrimental treatment, save to the extent that informing an employee of a disciplinary allegation against him would always constitute unwelcome conduct towards the recipient.

119. The Tribunal has considered how the relevant hypothetical comparator would have been treated in the same circumstances and whether it could be said that the claimant was treated less favourably because of his disability. The correct hypothetical comparator would not have autism but would be facing the same complaints and allegations. The respondent would have had the same level of detail and information in relation to the allegations against the comparator as in relation to the claimant. The conversation with the comparator would have been held at the same stage of the process as it was with the claimant.

120. Given our findings of fact we have to conclude that the appropriate non-disabled comparator would have been treated in exactly the same way as the claimant. Put another way, the respondent did not withhold the extra information because the claimant happened to be disabled. They gave as much information as they had, consistent with the fact that this was an initial conversation to get the claimant's initial response. They would have had no more information to provide to the comparator and so would have treated the

comparator in the same way. It was not a formal disciplinary hearing where full details of the allegations would have to be given to the employee in advance, together with the opportunity to prepare for the hearing. Any employee facing the same allegations based on the same evidence would have been treated in the same way in the circumstances. There was no less favourable treatment of the claimant than of the comparator. The treatment of the claimant was not because of his disability. The required elements of direct discrimination are not made out and this allegation of direct discrimination must be dismissed.

121. At paragraph (b) the claimant alleges that Stuart Lemon stated on 15 December that 'he did not understand autism'. As set out above, the Tribunal finds that Mr Lemon's version of events was correct. He said words to the effect of "help me to understand what life is like for you living with autism." In effect, he was asking for information to help him understand the impact that autism might have on the claimant and the circumstances of his employment and the complaint. He was asking a genuine question in order to understand the situation. He was not being dismissive of the disability or otherwise seeking to undermine the claimant. Even if he had stated that he did not understand autism rather than asking for further information to help him understand, we cannot conclude that this was detrimental treatment of the claimant by Mr Lemon. It was an explanation of the state of Mr Lemon's knowledge and understanding of the topic in the context of finding out from the claimant how he wanted or needed to be treated. It was said in a spirit of concern. If Mr Lemon were to be prohibited from asking genuine questions like this it is difficult to see how the respondent could meaningfully engage with the claimant's disability or make the appropriate adjustments. Employers cannot just assume that all employees with autism have the same experiences of the condition and will need the same kind of assistance. Mr Lemon needed to be able to be able to ask questions to deal appropriately with the claimant. In the same way, further questions might be raised of a non-disabled comparator in relation to other personal matters and circumstances in order to be able to understand the context of the allegations against the employee. Such questions do not constitute a detriment.

122. Mr Lemon's comments did not subject the claimant to a detriment within the meaning of section 39 Equality Act 2010. In light of the absence of detrimental treatment, this cannot constitute less favourable treatment because of disability within the meaning of section 13. Further questions might well have been asked of the appropriate comparator in order understand the context of the complaint against him. In such circumstances there would be no less favourable treatment of the claimant than the comparator. Furthermore, the reason behind the questions was to obtain context and clarification. The elements of a claim of direct discrimination are not made out and this complaint of direct discrimination fails and must be dismissed.

123. At paragraph (c) the claimant alleged that Mr Lemon had made a referral of the claimant to occupational health without explaining to the claimant the purpose of the referral. The Tribunal heard the evidence in relation to the circumstances surrounding the occupational health referral. As set out above, we find that the referral was made primarily because of the distress and alcohol problems expressed by the claimant and the indication that he had been suicidal. It was triggered by welfare considerations to make sure that

he got the support that he needed. The referral was made in the context of a conversation where the claimant had divulged worrying information and was a direct response to that. The referral was because of the claimant's distress and suicidal thoughts together with his dependence on alcohol. This was the trigger for the referral and it was explained to the claimant. An appropriately constructed hypothetical comparator would have had the same issues and would have been given a similar explanation as to why the referral was thought necessary. The manager would not have gone into any greater detail about the referral with the comparator either. Both the claimant and the comparator would have received a similar level of explanation. There was no less favourable treatment because of disability.

124. The issue of fitness to attend further disciplinary hearings would have been as relevant in relation to the comparator as in relation to the claimant and Mr Lemon would have had the same reasons for including it in the referral for the comparator as he did for the claimant. Just as for the claimant, it is likely that Mr Lemon would not expressly have referred to this reason for the referral when discussing it with the comparator. The issue would have arisen when Mr Lemon was completing the referral form (see above) and would have been included at that point.

125. In light of the above the Tribunal concludes that there was no less favourable treatment of the claimant than of a hypothetical comparator in this regard. Consequently, this allegation of direct discrimination must fail.

126. At paragraph (d) the claimant alleged that he found out for the first time during the occupational health consultation that he was subjected to disciplinary action and that the referral to occupational health had been made in order for the claimant to be assessed to determine whether he was fit to attend disciplinary proceedings.

127. The Tribunal does not accept that the claimant was told that he was subject to disciplinary action at the occupational health appointment. At that stage he was not subject to disciplinary action. The allegations had not been investigated and no decision had been made about whether the case would go forward to a disciplinary process. We accept that the claimant realised during the appointment that his fitness to participate in future hearings was being looked at (albeit as a secondary part of the referral and report). However, he has gone from this realisation of an assessment of fitness to participate, to asserting that he was already subjected to disciplinary action. This is not accurate and is not reflected in the evidence. Furthermore, we set out the reasons for the referral above. Fitness to attend disciplinary proceedings was not the main reason for the referral.

128. In any event, we do not accept that any of this has anything to do with the claimant's autism. Similar questions would probably have been asked of a non-disabled comparator who had been referred in circumstances of distress and reliance on alcohol. The employer would want to know whether they were fit to participate in future meetings too. They would have been asked the same questions and might have drawn similar conclusions. There was therefore no less favourable treatment of the claimant than of a non-disabled comparator because of disability.

129. We heard that the claimant was given general information about the referral but was not told the specific questions which would be put to the clinician. This is not at all unusual. The referral form is often completed by the manager sitting alone and not in consultation with the employee. There is no general requirement that employees are told the details of the referral form before they can give proper consent to the referral. Rather it is general practice to provide an indication of the subject matter of the referral (i.e. why is it thought necessary) and get consent from the employee on that basis. That is basically what happened in the claimant's case. The detailed questions on the referral form were thought of later when the manager completed the necessary paperwork.

130. We have heard no evidence to indicate that a non-disabled comparator in the same circumstances would have been dealt with any differently. The non-disabled person would have been referred to occupational health out of welfare concern too. Likewise, the circumstances of the comparator and of the claimant would both have triggered the question in the mind of Mr Lemon as to whether, if disciplinary proceedings were required, the claimant/comparator would be fit to attend any disciplinary hearing. We heard from Mr Lemon that he had previous experience of the delays which can be caused when managers had to go back to occupational health to get answers to subsequent questions. His intention was to avoid any unnecessary delays as they would not have benefited anyone, certainly not the claimant. It did not occur to him that he needed to tell the claimant that he was going to ask the question about fitness to participate in hearings before he actually asked it. He would not have thought it necessary to forewarn the comparator either.

131. The Tribunal doubts whether it is really detrimental treatment. It was asking a subsidiary question and the consent provided by the claimant had not been limited as to what the occupational health clinician could report on. Furthermore, there were additional opportunities for the claimant to amend or withdraw consent. During an occupational health consultation it is for the clinician to ensure that he has appropriate consent from the employee. Furthermore, the employee is entitled to request a copy of the report before it is released to the employer. The claimant did not withdraw his consent at any of these stages.

132. In light of the above the Tribunal does not consider that the claimant was subjected to detrimental treatment. Nor do we accept that a properly constructed hypothetical comparator would have been treated any differently or more favourably than the claimant. Nor was the treatment because of the claimant's disability. This allegation of direct discrimination fails and must be dismissed.

133. At paragraph (e) the claimant asserts that the respondent failed to respond to the claimant's written grievance (which was submitted on 20 December) until 29 January 2020. We accept that the delay was not ideal in all the circumstances but there is nothing to show that it is differential treatment. There is nothing to show that a non-disabled employee's grievance would have been dealt with more speedily. The reasons for the delay which can be gleaned from the evidence are that there was a delay in the grievance being received by PSC because the claimant did not submit it to the right place and

Mr Lemon had to forward it to the correct department. Then there was the Christmas break. This is one of the busiest periods of the year for the respondent's business, added to which, various members of staff would be taking annual leave during this time. All of these factors would inevitably lead to some element of delay in acknowledging a grievance submitted at this time of year. It would also mean that it would take a little longer to organise an appropriate manager to investigate the grievance. This would be as true for a non-disabled comparator as for the claimant. The Tribunal accepts the delay was not ideal but finds that it was understandable in the circumstances. We do not accept that it was direct discrimination. There was no less favourable treatment of the claimant than of a non-disabled comparator. The treatment was not 'because of' the disability.

134. The claimant alleges at paragraph (f) that the conduct of Mr Lemon at the meeting of 7 February was 'passive aggressive.' This included the failure to allow the claimant to be accompanied at the meeting.

135. We accept that the claimant was not *offered* a companion at the meeting. This was because there was no requirement to offer a companion at an informal meeting. The respondent was acting in line with its own internal policies and procedures (which were provided to the Tribunal, see e.g. [467]). The occupational health report did not mandate it either. The same would have been true in relation to a non-disabled comparator being asked to the same kind of meeting. Of course, Mr Lemon could have offered this as an additional support measure based on the problems that had been encountered at the meeting on 15 December but the complaint made to the Tribunal is one of direct discrimination. We have to consider whether there was less favourable treatment of the claimant than of a non-disabled comparator, because of disability. Furthermore, it is relevant to note that the claimant did not ask for a companion at this meeting. Had he asked for a companion the respondent's witness indicated that he would have allowed this. However, he would be reacting to a request from the claimant rather than initiating this step himself. There was no less favourable treatment of the claimant than of a non-disabled comparator in this regard (i.e. the absence of a companion.) Both would have been in the same position. Further, the treatment was not because of disability.

136. We have also reviewed the evidence relating to the way the meeting was conducted and we are unable to conclude that Mr Lemon acted in a 'passive aggressive' manner during the meeting. No doubt it was a difficult conversation for both participants but that is because Mr Lemon was having to confront the claimant with the evidence that he had unearthed which contradicted the account previously given by the claimant. There was evidence to directly undermine the claimant's previous denials. That is a difficult conversation and will not have been a pleasant experience for either side but it is far short of the Mr Lemon behaving in a 'passive aggressive' way. We do not accept that the claimant was actually subjected to a detriment in this way, as alleged. Nor do we accept that he was treated less favourably than a non-disabled comparator would have been or that this was because of disability. This allegation of direct discrimination is not substantiated and must be dismissed.

137. At paragraph (g) the claimant contends that he was discriminated against in the way that his grievance was considered by the respondent. He refers to the fact that his grievance against Ms X was separated out from his grievance about Mr Arthur. He effectively alleges that nobody explained how his grievance about Ms X would be handled if it was not to be considered alongside the grievance relating to Mr Arthur.

138. The Tribunal has found on the evidence that there were good and understandable reasons for treating the two parts of the grievance differently. The claimant's complaint about Mr Arthur could properly be characterised as a grievance whereas the complaint about Ms X was effectively his defence or response to the disciplinary allegations raised by Ms X. It was natural and appropriate to treat them accordingly so that the 'Ms X issue' could be dealt with as part and parcel of the disciplinary investigation. Consequently, we find that the respondent would have treated a non-disabled hypothetical comparator in the same way. There was no less favourable treatment and the respondent's approach was not because of disability but was instead due to the different nature of the two parts to the grievance when viewed in the context of X's prior complaint. This allegation of direct discrimination is not made out and must be dismissed.

139. At paragraph (h) the claimant complains that the respondent failed to engage with the claimant by replying substantively to letters from the claimant's solicitor. The Tribunal finds that the letters sent out in response to the solicitors' letters were standard letters in line with the respondent's standard procedures in such circumstances. Effectively, they were saying that it is their policy to deal directly with the employee and not with a legal representative during internal HR procedures involving an ongoing employment relationship. They were not going to engage with the solicitors whilst the internal procedures were still ongoing. There is nothing in the evidence before us to suggest that the respondent's response to solicitors' letters on behalf of a non-disabled employee would have been any different. The claimant has not satisfied us that he was treated differently or less favourably than an appropriate comparator. There is nothing to suggest that the reason for the respondent's approach to this issue was the claimant's disability. For those reasons this allegation of direct discrimination must be dismissed.

140. At paragraph (i) the claimant alleges that the suspension was an act of direct discrimination. We do not agree. We have set out above the factors which were taken into account when deciding to suspend the claimant. There is nothing to suggest that a non-disabled comparator in the same circumstances would have been dealt with any differently. The surrounding circumstances, as assessed by the relevant decisionmaker at the relevant time meant that suspension was deemed appropriate. This would have been equally true of a non-disabled comparator in such circumstances. The comparator would not have been treated more favourably than the claimant. Furthermore, the manager who decided to suspend the claimant set out his reasons for doing so, which the Tribunal accepted. Those reasons had nothing whatsoever to do with the claimant's disability. The elements of a claim of direct discrimination are not made out and this allegation must be dismissed.

141. At paragraph (j) the claimant alleges that the 'constructive dismissal' was an act of direct discrimination. In order for this allegation of direct discrimination to succeed the claimant must show that there was a constructive dismissal (i.e. a repudiatory breach of contract which caused the claimant to resign). The claimant must also show that the constructive dismissal was discriminatory.

142. This part of the claim is based upon the allegation that there was a failure to make reasonable adjustments in relation to the meetings of 7 February and 11 April (paragraph iv at [37].) The core trigger for the resignation is said to be the respondent's approach to the meeting on 11 April and the failure to make arrangements for the claimant to attend the meeting with support.

143. The Tribunal is not satisfied that the respondent committed a breach of the implied term of mutual trust and confidence in relation to these meetings so as to entitle the claimant to resign and claim that he was constructively dismissed. As we have stated, the respondent would have allowed the claimant to bring a companion on 7 February if he had asked for one. It was not apparent to the respondent that the claimant needed to be accompanied at this meeting and it was not standard practice to offer a right to be accompanied to meetings at this stage of the procedure. In relation to the 11 April meeting it was clear that the respondent *would* allow the claimant the right to be accompanied by a trade union representative. The only difficulty was a practical one. Suitable dates of availability for the union representative were required in order to rearrange the meeting so that the representative could attend.

144. In light of our findings of fact there was no fundamental breach of contract entitling the claimant to resign and so the constructive dismissal itself has not been established. Furthermore, even if a repudiatory breach of contract had been established the Tribunal would have to consider whether the claimant resigned in response to the breach. The Tribunal concludes that the claimant resigned because the respondent had obtained evidence of the claimant's misconduct which clearly contradicted his earlier denials. He would have to rebut that evidence at any disciplinary hearing. He would clearly have been worried that he was at significant risk of a disciplinary sanction, and possibly dismissal. In such circumstances it was preferable for him to resign and avoid dismissal or an adverse disciplinary record. Had it been necessary to make a finding the Tribunal would have concluded that the claimant resigned because he thought the disciplinary process would go against him rather than because he genuinely thought the hearing would go ahead on 11 April and he would have to attend it without a representative.

145. Furthermore, for the reasons which we set out below in relation to the reasonable adjustments claim, we do not accept that the respondent was in breach of a duty to make reasonable adjustments in relation to these meetings. In such circumstances any constructive dismissal founded on the respondent's conduct in relation to these meetings would not be discriminatory as a breach of the duty to make reasonable adjustments.

146. The matters relied upon by the claimant as constituting the constructive dismissal were most centrally the alleged failure to allow the claimant to have

a trade union representative at the 11 April meeting and the failure to respond to his request for a postponement of that meeting in a timely manner. In line with our findings of fact above, it is true to say that the respondent *did* allow the claimant to bring a companion to the meeting. As a matter of principle that was not a problem. The difficulty arose in that the claimant would need to provide dates of availability for his union representative to attend any rearranged meeting. He had been advised to suggest an alternative date as the respondent could not postpone indefinitely. He did not provide those alternative dates of availability for the respondent to consider and then did not force the respondent to choose whether to go ahead in the absence of a representative or postpone. The respondent's evidence was that it intended to grant the claimant's request for a postponement but was not able to communicate this to him before he took the decision to resign. Essentially, the claimant jumped the gun and resigned without testing whether the respondent would accede to his requests and make the adjustments.

147. Furthermore, there is nothing to suggest that a non-disabled comparator would have been treated any differently in the same circumstances in relation to the meetings in question. The less favourable treatment because of disability is absent. The required elements of section 13 are not established in this case and this allegation must be dismissed.

<u>Discrimination arising from disability - section 15.</u>

148. Paragraph (ix) of the list of issues sets out the matters which were said to be "matters arising in consequence of disability" and therefore the foundation of the section 15 claim:
    a. The claimant suffering from anxiety and inability to deal with stressful situations.
    b. The claimant's difficulty in communication with people in stressful situations resulting in the claimant needing support.

149. The Tribunal approached the section 15 claim by deciding the reason for the unfavourable treatment (if proven) first. The first question was: is the unfavourable treatment 'because of' the pleaded 'something' which arises from disability (as at paragraph 148(a) and(b)?) Only if the Tribunal were satisfied that the treatment was because of the alleged 'something arising,' would the Tribunal need to go on and decide whether the 'something arising' at paragraph 148(a) or (b) actually was 'something arising in consequence of disability' as required by section 15 (i.e. had the necessary link to disability). We therefore considered the reason for the alleged unfavourable treatment first before then examining whether the reason for the treatment was, in fact, something which arose in consequence of disability.

150. The claimant relied upon the same acts of unfavourable treatment (a) to (j) for the section 15 claim as he did in the direct discrimination claim (as acts of less favourable treatment). We addressed each allegation in turn.

151. We repeat and rely on our conclusions on the facts in relation to paragraph (a) as set out above. The respondent gave the claimant the information that it had at this stage. The respondent acted as it did because it needed to ask the claimant about the allegations. They did not do this because the claimant

suffered from "anxiety and inability to deal with stressful situations." Nor did they act as they did because of the claimant's difficulties "in communication with people in stressful situations resulting in the claimant needing support." The alleged unfavourable treatment was not because of the alleged 'something arising' from disability. This allegation of section 15 discrimination therefore fails.

152. In relation to paragraph (b) we do not accept that the words actually uttered by Mr Lemon constituted 'unfavourable treatment' for the reasons set out above. His questions need to be viewed in their proper context. Furthermore Mr Lemon did not speak as he did because of the claimant's anxiety/inability to deal with stressful situations or because of his difficulties in communication with people in stressful situations resulting in the claimant needing support. Rather, he asked this because the claimant had disclosed that he had autism and is disabled. Mr Lemon needed to understand the situation (and the claimant's condition) properly before proceeding with the investigation. This allegation of section 15 discrimination therefore fails.

153. In relation to paragraph (c) we do not accept that the purpose of the referral was not explained (see our findings above). It is more a question of the level of detail which was required in the circumstances. In the circumstances we are not satisfied that it was unfavourable treatment within the meaning of section 15. The respondent gave an adequate explanation to the claimant as to why it wanted to make the referral when his consent to the referral was obtained. They did not withhold any relevant explanation from him.

154. In any event, the respondent's actions in terms of the explanation were not 'because of' the claimant's anxiety/inability to deal with stressful situations or because of his difficulties in communication with people in stressful situations resulting in the claimant needing support. The respondent gave the explanation for the referral that was applicable at the time. The referral was not because of the autism it was because of the alcohol dependency or depression, which was a separate matter. The extra question in the referral relating to fitness to attend hearings would have been added in any case irrespective of the claimant's autism or anything arising in consequence of the autism relied upon by the claimant. This allegation of section 15 discrimination therefore fails.

155. In relation to paragraph (d) we repeat and rely upon our conclusions above. The claimant's factual allegation has not been proven as alleged. Nor is the way the referral was handled 'unfavourable treatment.' The respondent made a referral for genuine and legitimate reasons which could protect the claimant's own interests by ensuring that he was not called to meetings in which he was not fit to participate. The respondent took a responsible approach in this regard. Further, the respondent did not act as it did because of the claimant's "anxiety and inability to deal with stressful situations" or because of his "difficulties in communication with people in stressful situations resulting in the claimant needing support." The referral related to the specific welfare issues raised in relation to alcohol as well as his fitness to attend meetings. This allegation of section 15 discrimination therefore fails.

156. In relation to paragraph (e) we do not accept that the necessary causation is made out. We repeat and rely on our earlier findings as to why there was a

delay until 29 January. The respondent did not act in this way because of the claimant's "anxiety and inability to deal with stressful situations" or because of his "difficulties in communication with people in stressful situations resulting in the claimant needing support." There were other, business related reasons for the delay. This allegation of section 15 discrimination therefore fails.

157. In relation to paragraph (f), as set out above, the Tribunal does not accept that Mr Elliott acted in a passive aggressive manner and so this element of the factual allegation is not made out. We also do not accept that there was a failure to allow a companion at the meeting. There was a failure to *offer* it to the claimant. That is different. The claimant did not ask for a companion and there was no refusal of the request. There is nothing to show that a companion was not 'allowed' or permitted. The respondent's evidence (which the Tribunal accepts) is that this would have been facilitated if requested by the claimant. The unfavourable treatment is not established.

158. The respondent did not act as alleged because of the claimant's "anxiety and inability to deal with stressful situations" or because of his "difficulties in communication with people in stressful situations resulting in the claimant needing support" so the necessary causation is not established. The reasons for the respondent's approach are set out above. The Tribunal has to determine the claims as pleaded and should not redraft them for the claimant. We note that following the parties' experience on 15 December it might have been anticipated that the respondent would approach the second informal meeting having reflected upon what happened on the last occasion. The respondent had also felt the need to commission occupational health to write a report and it might have been *more prudent* to make the offer of a companion to the claimant in order to avoid further difficulties without waiting for him to request it. However, this legal claim does not ask us to consider prudent management techniques per se but whether the respondent has fallen foul of the requirements of section 15. We cannot conclude that the respondent is in breach of its legal obligations in this way. There is no unfavourable treatment because of the something arising in consequence of disability as alleged by the claimant. This allegation of section 15 discrimination therefore fails.

159. In relation to allegation (g) and the separation of the grievance into two sections we have already set out our findings as to why this happened. We are satisfied that the necessary causation is not made out under section 15. The respondent did not act in this way because of the claimant's "anxiety and inability to deal with stressful situations" or because of his "difficulties in communication with people in stressful situations resulting in the claimant needing support." It separated the two parts of the grievance because one was a true grievance and the other was, in reality, the claimant's defence to a disciplinary allegation. This allegation of section 15 discrimination therefore fails.

160. In relation to allegation (h) we have set out our findings above as to why the respondent acted as it did. We are not satisfied that the necessary causation is made out under section 15. The respondent did not act in this way because of the claimant's "anxiety and inability to deal with stressful situations" or because of his "difficulties in communication with people in stressful

situations resulting in the claimant needing support." It acted in accordance with standard practice during internal employment processes and continued to deal with the claimant direct rather than with an external legal representative.

161. In relation to allegation (i) we have set out our findings above as to why the respondent acted as it did. We are not satisfied that the necessary causation is made out under section 15. The respondent did not act in this way because of the claimant's "anxiety and inability to deal with stressful situations" or because of his "difficulties in communication with people in stressful situations resulting in the claimant needing support." The respondent has established the reasons for the decision to suspend, as set out above. This allegation of section 15 discrimination therefore fails.

162. In relation to allegation (j) we refer again to our findings above. We are not satisfied that there was a constructive dismissal and we are not satisfied that the necessary causation is made out for the purposes of section 15. The respondent did not act in the way that it did because of the claimant's "anxiety and inability to deal with stressful situations" or because of his "difficulties in communication with people in stressful situations resulting in the claimant needing support." We are satisfied that there was no breach of the implied term of mutual trust and confidence given that the claimant was invited to bring a companion on 11 April. He did not resign because he thought he would have to attend alone (see above.) He did not have any evidence to suggest that the respondent would go ahead with the hearing in his absence or without him having his representative present. There was no constructive dismissal and no causal link to the 'something arising' relied on by the claimant. This allegation of section 15 discrimination therefore fails.

163. In light of the foregoing it is apparent that all the allegations of section 15 discrimination would fail either because the relevant unfavourable treatment was not established or because the necessary causation was absent. In any event the Tribunal has considered whether the claimant had established that the matters relied on were 'something arising in consequence of disability." Taking the totality of the occupational health evidence together with the way the claimant presented himself before us in the hearing and taking into account what we as a Tribunal know about the frequently encountered features of autism we might have been reluctant to accept the respondent's submissions on this point. It is quite conceivable that the claimant's communication difficulties with people in stressful situations arose in consequence of the autism (b). It is in the very nature of autism that it impacts upon the individual's ability to read emotional or social cues during interpersonal communication. It is likely, in our view, that the claimant would need support in communication in stressful situations and this was linked to his disability.

164. The respondent seeks to link this problem (or 'something arising') to the non-disability condition referred to in the occupational health report as a "recently diagnosed mental health condition which he feels started in October last year" [128] as opposed to the autism. It requires some effort to read the occupational health report in this way (particularly given what is said about his underlying behaviour condition affecting his perceptions, others' perception of him and the way he interacts with others [129] and also his

ability to instruct a representative and the impact of formal proceedings on the claimant [130]). Taking a common sense reading of the occupational health evidence as a whole we think that it does support a link between the 'something arising' relied on and the claimant's autism rather than the more recent episode of depression (which was the recently diagnosed mental health condition referred to in the report). Taking the occupational health evidence together with the other evidence in the case we would have taken the view that there was a sufficient link between the autism and the communication difficulties. We think the same is true of (ix)(a) in that the anxiety referred to there is something different to the depression/mental health condition which had arisen during 2019. We think that (a) and (b) are somewhat interlinked. The communication difficulties arising from the autism are likely to have increased the claimant's anxiety levels. It was something of a vicious circle. We would have accepted that the pleaded 'something arising' had the necessary link to the disability, particularly as the case law indicates that there can be more than one link in the chain between the disability, the 'something arising' and the unfavourable treatment. We accept that there may well have been more than one factor at play but the disability did not have to be the sole reason for the 'something arising.' There could be more than one factor at play.

165. As to the other elements of the section 15 claim we note that the respondent accepted that it had the necessary knowledge of the claimant's disability. Given our other findings above it has not been necessary or appropriate to deal with the respondent's defence of a 'proportionate means of achieving a legitimate aim."

Reasonable adjustments: section 20/21

166. The PCP relied upon was set out at paragraph (xv) of the list of issues as: "Requiring the claimant to attend the meeting on the 7 February 2020 and around 11 April 2020 without support." This was later clarified as the respondent having a 'general requirement that employees attend meetings of the sort arranged for 7 February and 11 April 2020 without support.' This was clarified to make it of general application rather than a PCP which, on the face of it, was applied solely to the claimant. Nevertheless, the PCP relied upon referred to the respondent's *requirement.* The Tribunal cannot redraft the PCP to strengthen the claimant's case after the event but must adjudicate the case as pleaded by the claimant and defended by the respondent. We have found on the facts that there was no *requirement* to attend those meetings without support. Put another way, support was not refused by the respondent. Standard practice was not to offer a companion for the sort of fact finding interview which took place on 7 February. This was not tested. The claimant did not ask for support in relation to the 7 February meeting so it was not tested. We do not know for a fact if he would have been asked to take part alone if he had indicated a desire to be accompanied. That said, as we have already stated, the respondent's witnesses indicated that if he had asked then a companion would have been considered and they would have accommodated this. In those circumstances the PCP was certainly not applied regarding the 7th February meeting.

167. In relation to 11 April, in principle the claimant *was* allowed to attend with support but was just asked to provide alternative dates of trade union

availability before the hearing was rescheduled. As the claimant resigned before the hearing on 11 April he cannot say that he would have been required to attend that meeting without a representative. We have already accepted the respondent's evidence that it was not going to force the issue. The intention was to postpone the hearing and rearrange it so that the representative could attend, although it would have been incumbent on the claimant to come up with the dates which would facilitate his representation by the union at the hearing. The alleged PCP was not applied regarding the 11th April meeting either.

168. In those circumstances, in the absence of the necessary relevant PCP the duty to make reasonable adjustments does not arise. The Tribunal cannot just ignore the word 'requirement' in the PCP. It has to be judged as drafted and that makes a difference on the facts of this case.

169. In any event, the evidence we heard was that the respondent would have allowed the claimant to attend on 7 February with support if the issue had arisen for consideration. Likewise, the respondent was not going to go ahead on 11 April without the presence of the trade union representative. The adjustments would have been made had it 'come to the crunch.' This was, unfortunately, not tested given the way the events unfolded.

170. The claim for breach of the duty to make reasonable adjustments must therefore fail for these reasons.

Victimisation: section 27

171. The Tribunal accepts that the letter dated 5th March 2020 from the claimant's solicitor was a protected act within the meaning of section 27. It clearly asserted a breach of the Equality Act on the part of the respondent. The alleged victimisation detriment was the suspension of the claimant. Unfortunately, for the reasons explored above, we do not accept that the decision to suspend was made because of the protected act. The respondent had good reasons for choosing to suspend the claimant when it did and these had nothing whatsoever to do with the solicitor's letter. They would have suspended the claimant irrespective of the letter and irrespective of any allegation of a breach of the Equality Act which it contained. In the absence of the necessary causation the victimisation claim must also fail.

Annual leave

172. The claim for annual leave pay has been dismissed upon withdrawal by the claimant.

Employment Judge Eeley

Date signed: 19 October 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.....

.....

FOR EMPLOYMENT TRIBUNALS