EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4114755/2019 & 4107034/2020

Held in Edinburgh via Cloud Video Platform (CVP) on 9, 10, 11, 12, 16, 17 and 18 May 2022; 28 and 29 November 2022 & Members Meeting 3 and 23 February 2023

Employment Judge R McPherson
Members: L Grime and A Matheson

Mr Grant Timothy	**Claimant** **In Person**
Dell Corporation Ltd	**Respondent** **Represented by:** **Mrs D Reynolds - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that:

1. the claimant's claim in respect s15 of the Equality Act 2010 (discrimination arising) in respect of the event complained of on 22 July 2019 (expectation of agreeing meeting schedule) succeeds and the claimant is awarded £1,000 for injury to feelings in relation to that claim only together with interest in the sum of £295.01; and

2. the claimant's remaining claims in terms of s15 of the EA 2010 (discrimination arising) because of disability, do not succeed and are dismissed; and

3. the claimant's claims in terms of s19 of EA 2010 (indirect discrimination) do not succeed and are dismissed; and

4. the claimant's claims in terms of s20 and 21 EA 2010 (reasonable adjustments do not succeed; and are dismissed; and

5. the claimant's claims in terms of s27 of EA 2010 (victimisation) do not succeed and are dismissed; and

6. the claimant's claim for unfair dismissal does not succeed and is dismissed.

REASONS

Preliminary procedure

1. The claimant presented his **2019** ET1 on **Friday 20 December 2019** following ACAS Early Conciliation (ACAS certificate identifying receipt of EC notification on Thursday 21 November 2019 and issue of the ACAS Certificate on Monday 2 December 2019) against the respondents following certain alleged events which the claimant relies upon which occurred in the course of his employment with the respondent as an Advisory Systems Engineer.

2. The claimant's **2020** ET1 was presented **Wednesday 4 November 2020** following ACAS Early Conciliation (ACAS certificate identifying receipt of EC notification on **Monday 7 September 2020** and issue of the ACAS Certificate on **Wednesday 30 September 2020**) against the respondents following termination of his employment with the respondent as an Advisory Systems Engineer.

3. All claims are resisted. The respondent does not dispute that the claimant had a qualifying disability for the purpose of s6 of the Equality Act 2010 (EA 2010) although they dispute knowledge, further the termination of employment was due to redundancy failing which some of substantial reason by reason of redundancy. The respondent's 2019 ET1 set out that claims which occurred before 21 September 2019 were time-barred.

Preliminary Issues

4. Prior to this Final Hearing there were several Preliminary Hearings in 2020 and 2021. In the Tribunal's Note of PH on 15 September 2020 which at paragraph 15 observed that at that time it was then difficult to ascertain what the key facts were, allowed in part amendment of the claimant's claim introducing new claims of ss 20,21 EA 2010 (reasonable adjustments) and

s27 EA 2010 (Victimisation)) although did not permit the element of the proposed amendment to include a claim of s13 EA 2010 Direct Discrimination.

5. Parties were subsequently ordered to consolidate pleadings with respondent consolidated pleadings being provided Tuesday 16 March 2021. The 2021 Respondent Consolidated Pleadings set out matters by heads of claims asserted rather than dates of events.

6. At case management Preliminary Hearing on Thursday 11 November 2021, it was determined that the claimant's evidence would be provided after the respondent's witnesses, with the potential respondent witnesses were identified as former employee Anjam Akbar together with then-current respondent employees Richard Bowen, Mark Galpin, Lisa Harvey and Norbert Macko and it was determined that primary evidence in chief for all witnesses would be by way of written witness statements.

7. On Tuesday 15 March 2022 the claimant provided revised Claimant Consolidated Pleadings March 2022, which continued to be organised primarily in order of claims (rather than dates) with what the claimant asserted were relevant (dated) events as subheadings those being set out in chronological order. An agreed list of issues was issued.

8. At case management Preliminary Hearing on Tuesday 3 May 2022, it was confirmed that the claimant should give his evidence after that of the respondent witnesses.

9. At the outset of the final hearing on Monday 9 May 2022, the respondent provided a proposed running order of witnesses in which it was identified that Norbert Macko was out with the UK.

10. At the Final Hearing the respondent witnesses were Anjam Akbar, Richard Bowen, Mark Galpin, Daniel Grant, Lisa Harvey and Ms Eleanor Smith together with Norbert Macko.

11. A Joint Agreed Bundle of 1006 pages was provided with a second non-agreed bundle.

12. In the course of this hearing, it was determined that it was appropriate to effectively interpose the claimant as his sole witness prior to consideration of matters of evidence of Norbert Macko, it being determined that the final allocated day would be adjourned for a period of 11 weeks to allow for permission to be obtained administratively (it not being a judicial process) to be obtained from the state where it was indicated Mr Norbert resided, consistent with the decision of the Upper Tribunal (Immigration and Asylum Chamber) in Agbabiaka (Evidence from Abroad, Nare Guidance) [2021] UK UT 286.

13. Following the conclusion of the allocated evidence hearing, a rescheduled final date was allocated for **Friday 22 July 2022** in anticipation of that permission having been obtained.

14. Such permission not having been provided in advance of same the then allocated date of **22 July 2022** was postponed, there being exceptional circumstances and parties' views having been sought; the claimant setting out that he had not been approached by the respondent on an offer to meet Mr Macko's flight costs while the respondent agreed to proposed postponement, on Wednesday 20 July 2022.

15. In **August 2022** parties' comments were sought on how the Tribunal should proceed in respect of the unfinished hearing; the Tribunal having provided both parties with the current available relevant Presidential Guidance issued July 2022.

16. The respondent intimated that it was necessary to call Mr Macko a witness and proposed that a further day be allocated to allow sufficient time for conclusion of the claimant's evidence and the evidence of Mr Macko. The claimant who did not disagree that Mr Norbert's evidence was necessary, expressed concern at delay and intimated he considered that allocation of a further day was unnecessary. The respondent subsequently confirmed that Mr Macko would travel to Scotland to provide his evidence remotely and the respondent sought allocation of a further day, it being noted that cross-examination of the claimant had not concluded.

17. After consideration of the respective parties' position the Tribunal determined in **September 2022** that not granting 1 more day (thus allocating 2 evidential days to be heard together) created a risk to both parties including that the claimant would not be able to fully respond to remaining cross-examination, within the time frame then proposed by the claimant, those further days were allocated as 28 and 29 November 2022

18. Following the conclusion of the evidential hearing on **29 November 2022**, unanimous directions were issued to the parties, permitting the parties to exchange draft written submissions by **4pm Monday 12 January 2023**, addressing all issues relevant to this Final Hearing in relation to the claimant's claims in respect of s15 Equality Act 2010 (EA 2010) (discrimination arising because of disability), s19 of EA 2010 (indirect disability discrimination) and s20&21 of EA 2010 (reasonable adjustments); s27 of EA 2010 (victimisation); "ordinary" unfair dismissal, and including remedy and thereafter provide final written submissions to the Tribunal on Thursday 12 January 2023. Following upon extension, sought by the respondent, being granted parties' final submissions were provided **Monday 23 January 2023** with both parties being permitted the opportunity to provide short summary supplementary submission thereafter by **Monday 30 January 2023**.

19. The Tribunal's private deliberation, initially, took place at the Members' Meeting on **Friday 3 February 2023** this being the earliest mutually available date for the full panel of the Tribunal and following deliberations and reflective of the detailed submission the panel appointed a second final deliberation day **Thursday 23 February 2023**.

Claims relied upon

20. The claimant, whose employment started **Monday 21 June 2010** (with that employment transferring by reason of TUPE on Saturday 2 November 2019 to the respondent) was terminated on **Thursday 31 August 2020** asserts what can be identified as 5 heads of claim:

    a. Unfair Dismissal

b. S15 EA discrimination arising from disability; and

c. S19 EA 2010 Indirect discrimination because of disability: and

d. ss20 & 21 EA 2010 Reasonable adjustments; and

e. S27 EA 2010 Victimisation

21. The respondent resists all claims, their consolidated pleadings (undated) accept that the claimant is disabled but deny that the respondent knew or could reasonably have been expected to know that the claimant was disabled and argue that the claimant's employment terminated on 31 August 2020 by reason of redundancy, or the claimant was dismissed for some other substantial reason.

22. Events (summarised for brevity) pled and insisted upon as claims:

1. Tuesday 5 March 2019

1. Criticism for not attending corporate dinner event by manager Mr Mark Galpin (s19 EA 2010 Indirect Discrimination) and ss20 & 21 EA 2010 (reasonable adjustments.

2. s 15 EA 2010 Discrimination Arising was withdrawn in claimant submissions and is therefore dismissed.

2. Wednesday 6 March 2019

1. Requested by the manager, Mr Galpin to clear the air with Mr Mackie by apologising to Mr Mackie; s15 EA 2010 (Discrimination Arising) and ss20 &21 EA 2010 (Reasonable Adjustment)

2. Not invited to annual territory plan review meeting by sales Manager Mr Dave Mackie; s15 EA 2010 (Discrimination Arising), s19 EA 2010 (Indirect Discrimination) and ss20 & 21 EA 2010 (Reasonable Adjustments)

3. Monday 18 March 2019

1. Meeting with Mr Galpin and his manager Mr Bowen Requesting support from manager and involve HR regarding Mr Mackie but worried about retribution. Mr Bowen replied there shouldn't be, but there would be; s15 EA 2010 (Discrimination Arising), s19 EA 2010 (Indirect Discrimination) and ss 20&21 EA 2010 (Reasonable Adjustments).

4. Friday 26 April 2019

1. Multiple performance criticisms alleged by manager made in an aggressive manner during telephone conversation with Mr Galpin; s 15 EA 2010 (Discrimination Arising), s19 EA 2010 (Indirect Discrimination), and ss20 & 21 EA 2010 (Reasonable Adjustment)

5. **Friday 3 May 2019** (asserted as a relevant protected act) Email to Mr Mark Galpin (direct line manager) raising grievance about how the claimant was being managed in relation to his mental health condition; s27 EA 2010 (Victimisation)

6. Wednesday 8 May 2019

1. If there were indeed performance issues, the respondent should have followed the Global Performance Improvement Policy; s15 EA 2010 (Discrimination Arising).

2. Email from Mr Galpin threatening disciplinary procedure for alleged performance issues upon my return from sick leave; s 15 EA 2010 (Discrimination Arising), s19 EA 2010 (Indirect Discrimination), and ss20 & 21 EA 2010 Reasonable Adjustment.

3. While on sick leave, Mr Galpin informed the claimant that there were holes in his performance, and he would be put on a Performance Improvement Plan (a disciplinary procedure) upon return from sick leave: s27 EA 2010 (Victimisation)- from the (asserted as) protected act on Friday 3 May 2019 email raising grievance about how managed.

7. Monday 13 May 2019

1. Email from Mr Galpin incorrectly informing the claimant that commission payments would be stopped after 4 weeks and requesting to know when the claimant would be returning from sick leave; s19 EA 2010 (Indirect Discrimination); ss20 & 21 EA 2010 (Reasonable Adjustment); and

2. s27 EA 2010 Victimisation- from the (asserted as) protected act on Friday 3 May 2019 email raising grievance about how managed.

8. Wednesday 15 May 2019

1. Email from Mr Bowen (Mr Galpin's manager) confirming performance disciplinary procedure would commence upon the claimant's return from sick leave; s 15 EA 2010 (Discrimination Arising) and s19 EA 2010 (Indirect Discrimination); and

2. Request is made to HR to communicate via post, but they continue to email the claimant; s 15 EA 2010 (Discrimination Arising), s19 EA 2010 (Indirect Discrimination) and s20. 21 EA 2010 (Reasonable Adjustment); and

3. Mr Galpin's manager, Mr Bowen; also confirmed this (s27 EA 2010 Victimisation- from the (asserted as) protected act on Friday 3 May 2019 email raising grievance about how managed.

9. Friday 17 May 2019

1. HR resist investigating a formal grievance by post that the claimant made about his manager, Mr Galpin, and his manager, Mr Bowen, insisting a formal grievance meeting would be required s 15 EA 2010 (Discrimination Arising); s19 EA 2010 (Indirect Discrimination); and ss20. & 21 EA 2010 (Reasonable Adjustment).

10. Wednesday 10 June 2019

1. HR cancel grievance process without investigating and say claimant should re-raise it on my return to work from sick leaves; s 15 EA 2010 (Discrimination Arising), s19 EA 2010 (Indirect Discrimination), and ss20 & 21 EA 2010 (Reasonable Adjustment).

11. Monday 22 July 2019 (p 549 bundle)

1. HR threaten to stop sick pay unless sign consent forms and agree to a meeting schedule with Mr Bowen; s 15 EA 2010 (Discrimination Arising), s19 EA 2010 (Indirect Discrimination), and ss20 & 21 EA 2010 (Reasonable Adjustment)

12. Friday 16 August 2019

1. HR handling of what are asserted as legitimate concerns (since 9 July 2019) about occupational health interfering with the claimant's current medical treatment s 15 EA 2010 (Discrimination Arising); s19 EA 2010 (Indirect Discrimination); and ss20 & 21 EA 2010 (Reasonable Adjustment).

13. Wednesday 18 September 2019

1. HR ended claimant's grievance complaint about Mr Galpin and Mr Bowen finding no evidence of wrongdoing; s19 EA 2010 (Indirect Discrimination) and ss 20 & 21 EA 2010 (Reasonable Adjustment).

14. Saturday 30 November 2019

1. The respondent failed to confirm its position about whether the claimant's sick pay would be extended beyond October 2019; s15 EA 2010 (Discrimination Arising).

2. s19 EA 2010 (Indirect Discrimination) was not insisted upon same in submissions and is therefore withdrawn and dismissed; and

3. ss20 & 21 EA 2010 (Reasonable Adjustment) was withdrawn in course of this hearing and is therefore dismissed.

15. **Sunday 31 January 2020** Sick Pay was stopped, it is asserted even though the claimant had produced evidence on multiple occasions showing why the respondent had exacerbated his condition and prevented him from returning to work; ss20 & 21 EA 2010 (Reasonable Adjustment).

16. **Thursday 6 February 2020**: following Protected Act 30 Jan 2020 presenting (second) ET1, detriment on this date being Ms Smith emailing claimant to inform that sick pay was being stopped.

17. Tuesday 14 July 2020:

1. Prior to claimant's role at risk of redundancy letter dated **Tuesday 14 July 2020**, no group consultation. No skill matrix was presented No criteria or scoring was presented. No opportunity to question to contribute to the criteria or scoring was possible. No clear reason was presented as to why roles were potentially identified as being redundant. No opportunity was therefore afforded to a suggest alternative options to avoid redundancy No option was presented for voluntary redundancy.

2. Role at Risk of Redundancy letter, no option to be accompanied was offered. No option for preferred method of consultation was offered, and no option for a preferred time of meeting was offered, only stipulated. No consultation process took place. Therefore, no matrix, criteria or scores were presented. No discussion or communication took place to avoid redundancy. No other roles were presented as an alternative.

3. Letter received informing claimant he was at risk of redundancy; ss20 & 21 EA 2010 (Reasonable Adjustment);

4. Invitation to attend redundancy Zoom call with only 3 days' notice; ss20 & 21 EA 2010 (Reasonable Adjustment) &

5. Email received offering enhanced redundancy in exchange for dropping all claims and signing an NDA; ss20 21 EA 2010 (Reasonable Adjustment)

18. Wednesday 15 July 2020

1. Email sent to HR requesting visibility on the documents that will be relied upon in order to prepare for the consultations Management practices; ss20 & 21 EA 2010 (Reasonable Adjustment); and

2. Email sent to HR reminding them of (what the claimant asserts are) their key responsibilities in the redundancy process; ss20 & 21 EA 2010 (Reasonable Adjustment)

19. Friday 31 July 2020

1. Email received accusing claimant of declining previous consultation meeting; ss20, 21 EA 2010 (Reasonable Adjustment).

2. Email received asking the claimant to review internal vacancies for jobs the claimant would like to apply for; ss20 & 21 EA 2010 (Reasonable Adjustment)

20. Tuesday 18 August 2020

1. End of consultation process letter and notification of my redundancy. No final consultation/ redundancy dismissal meeting took place.

2. Email was received confirming redundancy; ss20 & 21 EA 2010 (Reasonable Adjustment)

21. **Tuesday 18 August 2020** The s27 EA 2010 Victimisation detriment, being selected for redundancy and employment terminated by Mr Galpin & Mr Bowen, and Ms Harvey due to, what are argued by claimant as (individual or cumulative), protected acts on;

    1. **15 May 2019** Email to HR raising a formal complaint about Mr Galpin's management of the claimant and Mr Richard Bowen (Mr Galpin manager).

2. **23 May 2019** Email to Ethics Committee raising a formal grievance about Mr Galpin's management of me, bullying, the mental health of colleagues.

3. **15 July 2019** Email to Mr Norbert Mackie.

4. **26 July 2019** Email to Ms Eleanor Smith.

5. **14 August 2019** Email to Mr Macko.

6. **5 September 2019** Email to Ms Smith.

7. **23 September** (submission refers to as August) **2019** Email to Mr Macko.

8. **29 November 2019** Email to Ms Barbara Raxter (Global Head of HR-USA based), Ms Smith, Mr Daniel Grant (Head of HR) Ms Fiona McCarthy (Head of HR for Europe).

9. **6 March 2020** Email to Mr Michael McLaughlin (Global Head of Ethics-USA based).

10. **11 March 2020** Email to Mr Adrian McDonald (Dell president of Europe-UK based).

11. **12 March 2020** Email to Mr McDonald, Mr McLaughlin, and Ms Anjam Akbar.

12. **16 March 2020** Email to Mr McDonald.

13. **19 March 2020** Email to Ms Akbar.

14. **15 April 2020** Email to Mr McDonald (Dell President of Europe)

15. **19 May 2020** Email to Mr McDonald was not referred to in submissions and is therefore not insisted upon.

Issues for Tribunal at a Final Hearing

23. Issues for Tribunal may include whether the claimant complaints presented within the time limits set out in Sections 123(1)(a) & (b) of the Equality Act

2010 (EA 2010) / Sections 23(2) to (4), 48(3)(a) & (b) and 111(2)(a) & (b) of the Employment Rights Act 1996 (ERA 1996)?

a. Dealing with this issue may involve consideration of subsidiary issues including whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether it was not reasonably practicable for a complaint to be presented within the primary time limit; whether time should be extended on a "just and equitable" basis; when the treatment complained about occurred; etc.

b. Given the date the **2019 ET1** claim form was presented and the dates of early conciliation, any complaint in respect of the 2019 ET1 about something that happened before **Thursday 22 August 2019** is potentially brought out of time, so that the Tribunal may not have jurisdiction to deal with it.

c. Given the date the **2020 ET1** claim form was presented and the dates of early conciliation, any complaint in respect of the 2019 ET1 about something that happened before **Monday 13 July 2020** is potentially brought out of time, so that the Tribunal may not have jurisdiction to deal with it.

d. That is to say all claims in the present claim have been lodged out with 3 months less one-day time limit (allowing for the operation of ACAS early conciliation). The provisions of section **207B of ERA 1996**, since 2014, provide for an extension to that period where the claimant undergoes early conciliation with ACAS. In effect initiating early conciliation “stops the clock” until the ACAS certificate is issued, and if a claimant has contacted ACAS within time, he will have at least a month from the date of the certificate to present his claim.

Unfair Dismissal

24. In relation to Unfair Dismissal, the issues included:

a. Was the principal reason for the claimant’s dismissal a potentially fair reason in accordance with section 98(1) (b) of the Employment Rights

Act 1996 (ERA 1996)? It was asserted (but disputed by the claimant) by the respondent that it was due to redundancy or some other substantial reason of a kind such as to justify dismissal (SOSR).

b. If so, did the respondent act reasonably in treating that reason as sufficient for dismissing the claimant within the meaning of section 98(4) of ERA 1996?

c. If not, what is the appropriate remedy, including having regard to the claimant's assertion as to the basis of the dismissal, the extent that the Tribunal considers there were any procedural defects in the process followed by the respondent, and the dismissal was procedurally unfair would the claimant have been dismissed in any event?

Discrimination claims

25. Section 6 Equality Act 2010 "Qualifying Disability" asserted as Depression and anxiety, the respondent accepts that the claimant had the qualifying disability at all relevant times, although the respondent's knowledge of same of is disputed.

26. In relation to the issues for the Tribunal in respect of **Section 15 EA 2010 (discrimination arising from disability)** the Tribunal may consider:

a. what unfavourable treatment is alleged to have occurred?

b. what was the reason for that unfavourable treatment?

c. was the reason for the unfavourable treatment because of an effect (or effects) of the disabilities.

d. Has the respondent shown that the unfavourable treatment (*which is alleged and has been found by the Tribunal to have occurred*) was a proportionate means of achieving a legitimate aim?

e. The Tribunal would have regard to the proposition that *"something"* can arise *"in consequence of"* a disability if the disability plays more than a trivial part in causing that *"something"*; and that the disability

need not be the predominant cause of the *"something"* that arises from it.

27. In relation to the issues for the Tribunal in respect of 19 of **EA 2010 (indirect discrimination because of disability)** the claimant consolidated pleadings set out the s 19 EA 2010 events from which the Tribunal may consider:

    a. What is the Provision, Criterion or Practice asserted. A Provision, Criterion or Practice (PCP) is a PCP generally applied or would be generally applied by an employer to its employees.

    b. From that the Tribunal would require to consider whether the respondent had the asserted PCP?

    c. Did the respondent apply the PCP(s) to the claimant at any relevant time?

    d. Did the respondent apply (or would the respondent have applied) the PCP(s) to persons with whom the claimant does not share the characteristic?

    e. Did the PCP(s) put persons with whom the claimant shares the characteristic, at one or more particular disadvantages when compared with persons with whom the claimant does not share the characteristic, e.g., (as this is asserted as indirect disability) "non-disabled" employees, if so, how?

    f. Did the PCP(s) put the claimant at that/those disadvantage(s) at any relevant time?

    g. If so, has the respondent shown the PCP(s) to be a proportionate means of achieving a legitimate aim? What is the legitimate aim the respondent relies upon?

28. In relation to the issues for the Tribunal in respect of **sections 20 & 21 EA 2010 (reasonable adjustment)** the claimant has set out in consolidated pleadings the events relied upon from which the Tribunal may consider:

a. As above what is the PCP relied upon, a "PCP" is a *"provision, criterion or practice"* applied by an employer to its workforce (in broad terms) generally.

b. It is disputed that the respondent knew, or could it reasonably have been expected to know the claimant was a person with a disability? Subject to this, the issues would include:

c. Did the respondent have / or apply the specific PCP(s) which the claimant gives notice he relies upon?

d. Did the PCP for which notice is given/relied upon, put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, and in what way?

e. If so, did the respondent know, or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

f. If so, were there steps that were not taken that could have been taken by the respondent to avoid the disadvantage? The burden of proof in this question does not lie on the claimant, although it is helpful to know what steps the claimant alleges should have been taken.

g. If so, would it have been reasonable for the respondent to take those steps at any relevant time?

29. In relation to s27 EA 2010: victimisation, the issues were:

a. Did the claimant do one or more *"protected acts"*, and/or: did the respondent believe that the claimant had done or might do a protected act. The claimant relied upon the above listed as protected acts.

b. Did the respondent subject the claimant to detriments being cessation of Company Sick Pay and selection for redundancy and termination of employment.

c. If so, was this because the claimant did a protected act and/or because the respondent believed the claimant had done or might do a protected act?

30. **Remedy** If any of the claims succeed:

a. How much compensation for financial loss should be awarded to the claimant?

b. Has the claimant taken reasonable steps to minimise his loss?

c. Should the claimant be awarded compensation for injury to feelings? If so, how much should be awarded?

Findings in Fact

31. The respondents are a multi-national computer business involved in both sale and provision of technical computer support.

32. The claimant commenced employment with his then-employer EMC on **Monday 21 June 2010** based in Scotland as one of several Advisory Systems Engineers (commonly referred to as SE's) with the respondent Pre-Sales Team, his work location was described as home-based mobile and may be required to work at other locations within the UK as directed by his employer. The claimant was the sole member of the team based in Scotland. He was managed from the respondent's office in London. The claimant had a salaried role and received commission on sales secured together with car allowance and health insurance.

33. The claimant has had 3 separate line managers; from around December 2016 Mr Colin West, from March 2019 Richard Bowen, and from around April 2019 Mr Mark Galpin who had been promoted to that role having been a colleague of the claimant. Mr West reported to Richard Bowen the Team Director and part of the respondent's leadership team. The respondent Team Lead holds weekly Team call meetings and a weekly one-to-one meeting with each Team member. Mr Galpin held such calls and meetings on a Friday.

34. The claimant has suffered from episodes of depression a of mild to moderate severity since around 2014 diagnosed in 2019 as mixed depression and anxiety disorder ICD10 Code 6A73 with symptoms manifesting in 2019 as sporadic periods of high anxiety and panic and has been prescribed anti-depressant medication since around 2014. The claimant was absent from work from **Thursday 29 April 2019** because of an effect (or effects) of his disabilities.

35. On **Saturday 2 November 2019**, the claimant's continuous employment was transferred by virtue of TUPE to the respondent. The claimant's employment ceased **Saturday 31 August 2020** he received full statutory redundancy payment of £8,070 reflecting his age 51 and length of service together with outstanding leave and pay in lieu of notice. The claimant elected to cash in shares received as an employee in August 2020.

36. The claimant was latterly employed as one of 11 Advisory System Engineers in the UK providing presales support to field sales teams during the respondent sales process. The claimant and his colleagues worked within an effective division of the respondent company providing technology solutions to both public and private enterprises.

37. On **Tuesday 10 June 2014** the claimant attended a meeting with Richard Bowen and another employee following which the claimant issued an email **Wednesday 11 June 2014** at 1.28 pm to a Mr Colin Ingall and **Richard Bowen**, in which the claimant set out that *"I want to provide a summary of what we discussed – if I have missed something then please add to it. If you feel something is not accurate then I'm happy to change it. This summary won't be in any particular order. Purpose of meeting as to discuss issues at work and the impact on my health. We discussed historical issues… the agreed action actions from that and what had not been done .. impact of that ..." and "We discussed my doctors opinion".* The claimant described what was said to be his unhappiness at events on Tuesday 27 May 2014 and handling *"We discussed my health and the resulting medication (Please keep this private, both you and HR should be the only people that have access to that information").* It did not contain a direction that HR should be notified. It was

not understood by Mr Bowen as being a direction that he should take steps which the claimant had not done so and notify HR of what the claimant described at this time, to Mr Bowen, as being his doctor's opinion. It was not such a direction. Mr Bowen around this time raised issues of what was perceived as the claimant's lack of visibility with colleagues including arising from working from home on some days. Mr Bowen respected the claimant's direction and did not disclose the information provided to others within the respondent company. The trigger for attendance in 2014 with a doctor was subsequently recorded as being *"some indirect criticism from work colleagues".*

38. The Tribunal was taken to annual appraisals issued to the claimant including 2010 to 2016 while elements of those historical documents overall recorded that the claimant was broadly competent and successfully met each of those year's expectations and was provided with areas to focus on. The Tribunal was not provided with annual appraisals issued to the claimant in 2017 and 2018 as they were created offline and are no longer available.

39. On **Thursday 28 March 2018** the claimant sent an email to his then-line Manager Colin West headed Formal Complaint. It referred to the claimant having reflected on what he described as events of Tuesday 20 March and requested that Mr West contact HR. It did not specify what was being complained of, although it identified a named manager in the heading Mr Davie Mackie and described that *"the stress levels coming to this decision have been significant enough for me to contact my doctor and on his advice I will be signing myself off for the remainder of the week"* and described that the claimant was *"disappointed that this has been allowed to go on so long undressed and that it has been left to me to challenge this behaviour".* The claimant withdrew that request after speaking to his then-line manager Mr West.

40. The Tribunal was not provided with what the contemporaneous GP's medical records for that period set out, nor any other medical records created around in the early months of 2018.

41. In July 2018 over a period of around few minutes the claimant and his colleagues offered, via a private WhatsApp group flippant views of the cause of Mr West's then condition. They did so without any clinical expertise or relevant clinical knowledge and did so without intending that the comments would be relied upon in any way.

42. In **late 2018** and while Mr West, the claimant's manager and Sales Team Lead was experiencing health issues, Mr Galpin who was a colleague of the claimant and an Advisory Sales Engineer (SE) covering a geographic area known as Finance London City, was asked by Mr Bowen to inspect and monitor the training records of the Sales Team, of which he was part.

43. From **January 2019** Mr Galpin was asked by Mr Bowen to report on the daily activities of the Sales Teams including customer calls and the likelihood of new sales, although he implied there were areas of challenge Richard Bowen did not give any details. It became increasingly clear that Mr Galpin would be offered the role of Team Lead, although he was not offered the role until 18 March 2019 following discussions with Mr Bowen. In or around February 2019 Mr Galpin sought advice from HR regarding the claimant falling short of expectations and was advised to deal with informally initially through providing support and guidance.

44. In early 2019 Mr Bowen advised Mr Galpin that Dell was considering a Workforce Reduction and asked him not to share this information at that time.

45. By March 2019 news of Mr Galpin's effective appointment as Team Lead was common knowledge within the team.

46. **Monday 4 March 2019** was day one of the respondent's FY20 H1 Kick-Off Event (a two-day event) at Ricoh Arena Coventry commencing 10 am to just before midnight on Monday, and 8 am to 5 pm on Tuesday. Invite issued to the claimant and others described that attendance was mandatory – with an *"evening reception to recognise and celebrate our individual and team successes"* and that if unable to attend either day or evening *"please submit a reason as to why copying in your manager".* The claimant did not attend the dinner and did not give notice to either Mr Galpin or Mr Bowen of his non-

attendance. The claimant in reply to a colleague on a WhatsApp Group message issued at 8.08pm asking where he was, replied at 8.12pm that *"forgive me chaps but I've missed my goddaughters 21st to be at this event. I'm the only member of my family that's not there so not exactly feeling like going for dinner and shooting breeze. Have a wine for me"* . The colleague on the WhatsApp group asked where he was and the claimant responded, *"in my hotel room".*

47. On **Tuesday 5 March 2019** at a meeting requested by the claimant, the claimant engaged in what was initially a one-way conversation, the claimant effectively setting out his stall to Mr Galpin setting out what he considered he did and how the claimant expected things to continue. This resulted in a wider discussion on performance with the claimant being advised he should overcommunicate with Mr Galpin, so Mr Galpin had an understanding of what the claimant was actually doing, reflective of the claimant's geographical location and Mr Galpin described in broad context that nobody's job is safe although Mr Galpin was unable, in the context of the direction issued by Mr Bowen, to tell him about the WFR. Mr Galpin criticised the claimant for not attending the corporate dinner evening the preceding evening in the context that a corporate instruction had been issued that attendance was required. Mr Galpin was not aggressive in setting out his criticism. In response, the claimant told Galpin that it was not his cup of tea and further described in broad terms that he had anxiety and depression. The claimant did not describe how anxiety impacted him, beyond broadly suggesting that there were some areas where he felt uncomfortable. The claimant did not describe any medication. Prior to and as of this date, Mr Galpin had been unaware of any mental health issues affecting the claimant. The claimant is mistaken in his recollection that Mr Galpin described that he was aware of any mental health issue. Mr Bowen, in accordance with the direction issued by the claimant in June 2014, had not shared with Mr Galpin, the description the claimant had offered in June 2014. The claimant's reason for not attending the evening dinner was as set out in his WhatsApp message, he felt aggrieved at missing his goddaughter's 21st party. The claimant elected not to provide that reason copying his manager in advance. The claimant was dissatisfied

that Mr Galpin a former colleague had been promoted to the role of manager. Mr Galpin also had discussions around performance issues with the claimant's colleagues around this time also asking colleagues to improve in areas where he considered they were falling short.

48. On **Wednesday 6 March 2019**, due to an administrative oversight arising from variable individuals being invited to such meetings, the claimant was not included, in an email issued by the respondent's Sales Manager Mr Mackie, inviting several employees to that quarter's Territory Plan Review meeting planned for **Wednesday 20 March 2019**. Another Systems Engineer was invited in the claimant's place through administrative oversight. Mr Galpin had not been the claimant's Manager in the preceding year when the claimant had challenged Mr Mackie about the way in which Mr Mackie had spoken to a colleague. Mr Galpin was aware in 2018 of criticism of colleagues of Mr Mackie around that instance. Mr Mackie had not at that time, nor in March 2019 been made aware of what the claimant described as his mental health issue.

49. Subsequently on Wednesday 6 March 2019, the claimant raised the absence of the invitation with Mr Galpin. Mr Galpin confirmed he would raise the matter with Mackie, he did not suggest that the claimant clear the air with Mr Mackie. Mr Galpin raised the absence of invite, with Mr Mackie who apologised for the oversight and confirmed he would send the invite to the claimant.

50. On **Friday 8 March 2019**, following the claimant raising the matter of his omission from the invite to the Territory Plan Review with Mr Galpin, and Mr Galpin having addressed that oversight, the claimant confirmed in his detailed email to Mr Galpin issued at **9.51 am** that he had that morning received the invite to that Territory Plan Review planned for Wednesday 20 March 2019 from Mr Mackie (the claimant's detailed 8 March 2019 email). The claimant described that *"People in my condition have a tendency to overthink and it is generally in the negative. Upon hearing that I had not been invited to the territory plan and having witnessed situations within Dell EMC of known that people will be losing their jobs before they do, my mind goes into a massive overdrive where it is almost impossible to focus on anything else , even simple*

tasks The anxiety level become so great that it starts to manifest itself physically> In my case this is continual nausea and vomiting and diarrhea. This results in a huge loss of appetite and therefore energy and of course there is lack sleep" (p446) and described suffering from depression and illness and described that "I will be feeling this for weeks and it could have been avoided if Dave Mackie had invited me to the meeting as and when you asked rather than waiting over 48 hours". The claimant in his detailed email, set out that it had been his intention to go to his doctor *to "ask for his meds to be increased and get something for the vomiting but your words offered some comfort to me ".* The claimant's detailed email concluded *"I don't want my mental health (or physical health) to get any worse. I can only describe these last few days as being tortious. I can fully understand that this may all seem very strange and overblown to someone who has no experience of this but I can assure you, it is very real. Thank you for taking the time to read this. See at boot camp."* It did not describe that Mr Galpin had suggested he clear the air with Mr Mackie, as Mr Galpin had not done so. It did not offer any criticism of the way Mr Galpin expressed his views to the claimant on 5 March 2019, it did not suggest that that the claimant considered that Mr Galpin had acted in a bullying manner. Mr Galpin in response to the claimant's detailed email described that there were *"some very concerning comments in this email on how your health and well being is being effected by work"* and described that he thought it best if they meet face to face to discuss this in more detail and come up with a plan to resolve matters so they have less impact on the claimant's health and as he was new to management at the respondent; he would need to have Mr Bowen at the meeting to *"leverage his experience and support to improve things for you".* Mr Galpin proposed Monday 18 March 2019 in Brentford, and the claimant agreed to those arrangements. On this date Mr Galpin advised Mr Bowen that the claimant had not attended the evening FY20 H1 Kick-Off event at the Rico Arena event.

51. Subsequently on **8 March 2019** the claimant sent an acknowledgement of the invite to Mr Mackie which had by then been issued by Mr Mackie (following Mr Galpin highlighting the earlier oversight) for the Territory Plan Review meeting planned for Wednesday 20 March 2019 setting out *"Thank you for*

the invite. I am sorry that things worked out the way they did at our last meeting. I hope we can put this behind us. It has certainly been water under the bridge for me for a long time. I am looking forward to a positive and productive meeting." The claimant forwarded that response to Mr Galpin at 9.56 am that day, in a short email which read *"Hi Mark. Hope this seems reasonable".*

52. On **Monday 18 March 2019** Richard Bowen formalised the appointment of Mark Galpin Team as Lead Role.

53. Also, on **18 March 2019**, the claimant attended the meeting with Mr Galpin and Mr Bowen. It was scheduled for around an hour but last around two and a half hours. Mr Galpin and Mr Bowen took time to discuss the claimant's detailed 8 March 2019 email. The claimant indicated that he requested support in relation to what he considered to be unwarranted actions by Mr Mackie, the claimant was advised he could involve HR and could make a formal complaint against Mr Mackie. In the context of the claimant raising the possibility of any responsive action from Mr Mackie, Mr Bowen described that there shouldn't be, but seeking to be pragmatic set-out, in fact, there could be, in the sense that Mr Mackie could in response raise a grievance against the claimant for what was suggested (though denied by the claimant) as the language used by the claimant in engaging with Mr Mackie around a year earlier. The claimant did not subsequently raise a grievance regarding Mr Mackie. The claimant described to Mr Galpin and Mr Bowen that he didn't want any special treatment in the context of what the claimant had described as his medical condition in the detailed email of 8 March 2019. Both Mr Galpin and Mr Bowen believed that the discussion had been helpful to the claimant and resolved issues.

54. On **Friday 20 March 2019** the respondent's quarterly Territorial meeting took place with the claimant in attendance.

55. On **Sunday 22 March 2019** the claimant thanked Mark Galpin and Richard Bowen setting out *"Hi Gents. I wanted to thank you for taking the time to listen on Monday. I found the meeting very helpful. Credit where it is due, I could*

not fault Dave Mackie at the territorial review. As well as being professional, his demeanour was friendly supportive and jovial. His advice was useful and constructive. We both came away from the meeting feeling it was a very different experience to the last. Had I met that Dave Mackie a year ago I would have been his biggest fan. Have a good weekend".

56. By **Thursday 1 April 2019** news of Mark Galpin's appointment as Team Lead was circulated (although it was common knowledge by March 2019).

57. On **Friday 26 April 2019** the claimant missed a scheduled 30 minute telephone one2one at 11am with Mr Galpin, who followed up with an email at 11.36am and separately in a telephone call, in which Mr Galpin asked about a number of issues including why when the claimant had travelled to London for a meeting on 25 April (the previous day) which was cancelled, the claimant had not come into the office to work. The claimant had not given notice to Mr Galpin that he would not be attending the one2one nor offered any explanation by email for not doing so. In Mr Galpin's email he described that it was a shame that the claimant had missed the one2one as it had been a while since they last caught up and set out areas he was going to cover being

    a. Training: describing both modules not started and a few unfinished badges.

    b. Inspire: where he noted that there had been no check in for personal reflection and he had therefore been unable to set FY 20 goals.

    c. SFDC: looking at the next quarter the claimant had 21 opportunities almost without exception the claimant has updated the same narrative as no change from SE perspective, indicating that the claimant should be talking to/visiting the customers on a regular basis, if not how would he convert the opportunity to win?

58. Mr Galpin's email further set out that Mr Galpin himself was being asked to report on the activity of each team member, indicating that he had limited ways to do so, describing that he used Skype to see if people have their laptops on, he checked all the above areas for updates, he speaks to Core

SE Managers on a weekly basis along with other ways, and described *"Using these checks it concerns me that your activity appears low. Additionally, you've not responded to the invite for the mandatory training next month and also not joined the Slack group I set up to test. What have you been up to this week?".* In the context of the claimant having failed to attend the scheduled One2One Mr Galpin in his role as Team Leader during that telephone call described a number of effective managerial criticisms of the claimant, they were not expressed in an aggressive manner. Mr Galpin's raising at such One-to-one meetings of performance issues with team members, on the information available to him, in areas where he considered performance could be improved to meet expectations, was in accordance with the respondent's policies.

59. Thereafter at 5.22pm Mr Galpin followed up the telephone call and his earlier email, with an email to the claimant setting out that Mr Galpin had *"spent some time trying to work out what you've completed. The system is showing me the below. After manually completing each module, it would appear you have some work to do on 3 remaining badges. You don't seem to have any, meetings booked for Monday and Tuesday, so I hope you find time to finish this. Along with that QAT. Thanks."* Mr Galpin's concerns around the claimant's performance which Mr Galpin had wished the opportunity of raising at the One2One and which were reflected in the emails issued that day and in his telephone call with the claimant were both genuine and reasonably held by him.

60. Mr Galpin on this date was seeking to support the claimant by identifying areas where he considered both communication with Mr Galpin and the claimant's performance could be improved in order to meet the respondent's expectations.

61. On **Thursday 29 April 2019**, the claimant emailed Mr Galpin at 8.27am stating that he was *"off sick today Trying to get an appointment from my doctor".*

62. On **Friday 30 April 2019**, the claimant contacted his GP who recorded in the GP notes the position as described by the claimant to the GP *"Problem (FIRST) Stress at work and recorded what the claimant stated was the position "new boss ruling by fear – getting anxious again – asking for referral to psy for follow up re meds – reassures we can make changes as needed – will be getting counselling – agree to"* Fit Note. The claimant's inaccurate description of Mr Galpin to his GP was not reported to the respondent, the claimant's description reflected his objection to any effective managerial criticism of the claimant by Mr Galpin.

63. On **Wednesday 1 May 2019** the claimant provided via his GP Fit Note from 30 April to 13 May 2019, in covering email issued to Mr Galpin and within that email the claimant described that his doctor had increased medication. Mr Galpin was made aware only of the description in the Fit Note *"Stress at work"* and that the claimant was signed off work for the period of the Fit Note and that the claimant described in an email that his *"Doctor has increased medication".*

64. On **Friday 3 May 2019** at 5.25pm the claimant issued an email to Mr Galpin only headed sick leave from his work email, not copied to Mr Bowen nor the respondent HR with a detailed attachment (**the claimant's detailed letter of 3 May 2019**) which opened *"I feel it only decent to explain my absence from work and raise some very real concerns. I thought it would have been fairly clear to you about how debilitating anxiety and depression can be after our conversation with Richard Bowen on Monday 18 March 2019"* The claimant set out that he felt deflated that Mr Galpin had chosen to manage the claimant *"in a way that is entirely detrimental to my condition"* asserting inaccurately that Mr Galpin had *"chosen to manage"* the claimant *"by adopting aggressive, accusatory and overall disrespectful approach"* and set out what the claimant asserted were examples, asserting that Mr Galpin predecessors had an entirely different management style which was one of support, compassion and understanding, including:

    a. Mr Galpin asking to speak to him (inaccurately accusing Mr Galpin of being upset) because *"I did not attend an evening event. You seemed*

to feel that I should have been there and reminded me that I was part of the team. During that conversation you kept reiterating that nobody's job was safe and that people are under scrutiny. I am not sure how you expect your staff to feel or perform when you encourage such a feeling of insecurity." The claimant asserted that he explained about his condition and why he *"did not want to attend the social event that evening"* and *that "Regardless of my condition, if on occasion I do not feel up to a social engagement I should be allowed to return to the hotel without fear of criticism"* comparing himself without specification to others on the team who the claimant was critical of for their presence at unspecified team and social events being far worse than his.

b. *"You told me during that meeting that need to over communicate because of I live in Scotland. You are yet to articulate how you would like that to be done but yet you continually criticise me for not doing it. I should not be discriminated because I live in Scotland. I should be able to communicate in exactly the same way as everyone else. I have been allowed to do so for all the years I have worked with Dell EMC, until the point you became my Manager."*

c. On Friday 26 April you had a go at me for several things, inaccurately accusing Mr Galpin as being *"really quite aggressive about not being able to dial in for our one-to-one"* describing that every day people are late for conference call, days can be fluid and while not right it was not a unique event to him and accusing Mr Galpin as being unnecessary in his response to the claimant's failure to take part in a scheduled one-to-one.

d. The claimant repeated his criticism for Mr Galpin request that he overcommunicate describing that Mr Galpin has not set out how the claimant should (in effect) increase communication with Mr Galpin.

e. The claimant described that Mr Galpin had described that he was aware what everyone else was doing apart from the claimant wrongly accusing Mr Galpin as being particularly aggressive on this point and

set out that Mr Galpin had based his view on that fact that he would bump into people in down south in the office and gather anecdotal information. The claimant set out again that he lives in Scotland and had done so since working with the respondent. The claimant described those previous managers worked differently in that they *"would take the time to call me, have a chat and that problem was solved very quickly"*. The claimant described that he had taken the step of opening up his work calendar to make it visible to Mr Galpin, *"but would really expect one of two things to happen. Either I put it back to limited view or you instruct all SE's to open their calendar up too. I should not be single out and treated differently from my other SE colleagues just because I live in Scotland."*

f. The claimant set out further criticism which he objected to including:

   i. It was said that Mr Galpin had said the claimant should not go for lunch with colleagues in Glasgow as he was expected to work through lunch

   ii. Mr Galpin criticising the claimant for not bringing the company work laptop to some team meetings in London which he suggested Mr Galpin had described as lazy, the claimant asserting that he uses his smart phone allowing him to work with shortest breaks and should not be penalised for this.

   iii. Mr Galpin criticising the claimant records on what was referred to as SFDC describing, in the claimant view that it was not difficult to for any manager to view the report below, see the last comment of the account manager and work out that nothing has changed, describing to complete the information would not, in the claimant's view be an efficient use of his time.

   iv. Criticising the claimant for not signing into Skype setting out that this would be micromanagement describing what was indicated as being a stealth tool to monitor staff setting out *"I think I am*

entitled to ask whether all managers have been instructed to monitor their staff in the same way".

v. Criticism for the claimant not starting his quarterly training event though he had been on holiday for the previous two weeks. *"Either way, if I am to be criticised for this then we should have visibility of the QAT for each SE to see overall progress and make sure no -one is being singled out unfairly".*

vi. Criticising the claimant for not going into the office on the morning of 25 April when the claimant described that an account planning meeting was cancelled.

g. The claimant set out that since he had started nearly 9 years ago all such members of staff have been allowed to manage their time describing that the claimant not being allowed to operate the same as everyone else was victimisation and he would expect to see a directive sent to all colleagues that if in London (on work) they should come into the office even if they had no customer meetings and described that this should be true for all those travelling to Scotland or Ireland.

h. The claimant described that since Mr Galpin has become his manager, he had done nothing but criticise the claimant and singled him out.

i. The claimant set out that he expected a proper conversation with his manager who should have an open mind describing Mr Galpin's approach as being a throwback to the former approach of management which was, he said, in direct conflict with the respondent Code of Conduct.

j. The claimant described that an email he had sent on 8 March about Mr Mackie and what the claimant described as bullying behaviour was not limited to Mr Mackie but included all managers including Mr Galpin and that he had been clear in that email and in meeting with Mr Bowen *"about how such behaviour affects"* describing that it appeared Mr

Galpin had not paid any attention to which had consequently led to his absence from work.

k. The claimant described that he had engaged AXA Healthcare on 29 April to start psychiatric treatment and he would know when it would start in about 5 to 10 days and described that *"My GP stated on 30th April that my anxiety and depression have been aggravated through stress at work. She has increased my anti- depressant medication… Even though I've had this condition for about 5 years, I have never been signed off because of it and never had this problem with any of my other managers".*

l. The claimant described that he would at that stage be looking into what the respondent can do for him regarding his *"mental health as it is work related. This means I will be pursuing three individual tracks of help which should indicate how serious I am about this. However, this will only be a sticking plaster if things don't change at your end."*

m. The claimant described that he was committed to getting back to work as soon as possible but would like *"a formal plan to be put in place to get me back to work in a controlled manner. "*

n. The claimant set out that details should be sent to his personal Gmail email *"as I will not be checking my work email while on sick leave".* The claimant did not set out a request that the respondent should communicate only by post.

65. The claimant was setting out as he had done before that it was for the claimant to decide how he would be managed; the claimant's position was unrelated to any disability.

66. On **Wednesday 8 May 2019** Mr Galpin issued an email to the claimant, copied to the claimant's personal Gmail email, thanking the claimant for his informative letter and set out *"We need to discuss in more detail your current thoughts like we did a few weeks ago when you raised similar concerns which we thought we had addressed and closed. We first however want you to*

recover and return to work as soon you feel fit enough. You mentioned in your last paragraph about a clear plan to help you, this was our intention anyway. It has been obvious for many months that we need to plug some holes with your performance. On your return from sick leave" Mr Bowen "and I will take time to discuss with you the expected requirements of Pre-Sales employee within Dell. Our aim is to help you perform the role of a Dell DPS Pre Sales SE better with help and coaching from the leadership team. Please continue to keep me advised of your current plans to return to work".

67. Mr Galpin's email of 8 May 2019, did not described the implementation of any Performance Improvement Plan (known as a PIP) and would not reasonably be read as a threat to implement a PIP upon return from sick leave. Mr Galpin's email of 8 May 2019 did not arise in consequence of the claimant's disability. Mr Galpin's email of 8 May 2019 was not in contravention of the respondent's policies including the respondent's Global Improvement Plan.

68. On **Monday 13 May 2019** at 10.20 am Mr Galpin sent an email reply to the claimant's email of Friday 10 May 2019 at 6.01 pm headed *"sick leave"* setting out *"Thank you for advising me of your continued sick leave I have recorded this on the system. As per company policy, commission payments are suspended during sick leave which total 4 weeks of more. Please advise me in due course when you are fit to return."* In doing so and through a misunderstanding arising due to the complexity of process, Mr Galpin on that date erroneously advised the claimant that commission payments would be stopped after 4 weeks sick leave. In setting out his misunderstanding, Mr Galpin and the respondent did not treat the claimant unfavourably because of a disability.

69. On **Tuesday 14 May 2019** the claimant (via his personal email) replied to Mr Galpin's email of 13 May 2019 stating that he had made it clear in his previous correspondence that *"the reason I am off work is because of your victimisation and bullying behaviour towards me. You have responded to that email by attacking me <u>once again</u> with claims of holes in my performance for many months which I deny. You then went on to threaten me with a 'Performance Improvement Plan' when it was help from people with experience in mental*

health that I asked for. This treatment has further exacerbated my condition and I have no faith that you are interested in my wellbeing. I find you behaviour towards me absolutely disgraceful." Mr Galpin had not threatened nor proposed a PIP.

70. On **Wednesday 15 May 2019** at 4.20pm Mr Bowen (as Mr Galpin's manager) sent an email to the claimant copied as directed to the claimant's personal email and copying in Mr Galpin setting out *"I would like to state on record that i do not believe that Mark has been bullying you since he took on the role of Enterprise Pre Sales Manager in the UK. He has been conducting 121 sessions with all the team to be able to build new relationships with all team members since taking on the management responsibilities, He has not treated you any different to any other team member. I have also been directly involved and Mark has been seeking my advice as a Senior Leader… There are issues with your performance we need to address which have been highlighted to Mark and myself. When you return to work we will work through a performance plan to help you improve in the areas where we both have concerns. Please refrain from sending such emails you have sent below" a reference to the claimant email of Friday 3 May 2019 "Your well being is key and we do want you to return to work when you feel fit to do so. So we do not want add any additional stress with email communication going back and forth lets get you back to work. You have my commitment and Human resources available to work through the understanding matters you would like to address when fit to do so. This commitment was clearly demonstrated when we took time to sit and go through and resolve the concerns your raised a few months ago. I understand you are signed off for an additional 4 weeks please keep us posted on your recovery and how we can help you in any way. "*

71. Mr Bowen in his email did not describe that disciplinary performance procedure would commence upon the claimant's return from sick leave. Mr Bowen was referring to coaching of the claimant not the implementation of a PIP. Mr Bowen email was not in breach of the respondent policies.

72. On **Wednesday 15 May 2019** Ms Raffaella Di Ciccio the respondent's HR Generalist Advisor, wrote to the claimant describing that in accordance with

the respondent Company Sickness Policy he was entitled to 26 weeks of full pay at 100% of basic salary providing the Sickness Absence Policy and setting out that entitlement to full contractual company sick pay (CSP) would run out on **29 October 2019**, she further described that their PHI insurers Generali offered a Rehabilitation Service where the absence is greater than 4 weeks. Ms Di Ciccio further described that if the claimant was absent for more than 26 weeks, he might be eligible for insurance-based income protection (PHI), describing the claimant would require to provide consent to the GP to share information with the PHI provider and PHI provider would take 13 weeks to process a claim so the respondent would look to start the process if the absence reaches 10 weeks.

73. On **Wednesday 15 May 2019** at 9.41pm the claimant, from his personal Gmail email not copied to his manager, an email reply headed *"Re Sick Leave Update 15.05/19"* to Ms Di-Ciccio describing that he wished to raise a formal grievance against his manager Mr Galpin and his manager Mr Bowen. The claimant described that he had been off work since 29 April 2019 with work related stress anxiety and subsequent depression caused by a situation with his direct line manager Mr Galpin, that he felt had had been victimised and bullied by Mr Galpin since Mr Galpin had taken on the role. The claimant set out that he had written to Mr Galpin on 3 May initially explaining why he was off ill and described that since then and while on sick leave with work related mental health problems and Mr Galpin emailed him on 8 May 2019 accusing the claimant of poor performance and *"told me would be placed on a performance plan on my return. This is the first I have ever heard of any performance issues or performance plan."* The claimant set out that Mr Galpin emailed saying that commission payments would be stopped if he was off work for more than 4 weeks. The claimant continued *"Today I received an email from Richard Bowen confirming that he has been given advice to Galpin and again claiming there have been issues with my performance and confirming that will placed on a PIP an on his return.*" The claimant described that the emails were particularly cruel describing that Mr Bowen had known for some *time "that I have been suffering with mental health issues"* and Mr Galpin was made aware when he took on the role. The claimant set out that

"they were both aware that I am due to start psychiatric treatment for my work related anxiety and depression before sending these emails." The claimant described that he had 9 years of exemplary service with the company and had never been presented with any performance issues until now. The claimant concluded *"please can you communicate via post as the additional stress of not knowing when I will get a similar email is too much at this moment in time. I will respond when I feel well enough to do so."* The claimant did not set out the detail he had previously set out in his lengthy email to Mr Galpin Friday 3 May 2019, beyond describing.

a. that Mr Galpin had emailed him on 8 May stating that the claimant would be placed on performance plan on his return; and

b. that he had received an email on the 13 May 2019 saying that commission payments would be stopped where he was off for 4 weeks; and

c. that he had received an email that day (15 May 2019) from Mr Bowen confirming that there were issues with the claimant's performance and that the claimant would be placed on a performance plan on his return.

74. The claimant did not provide further detail of what he described as victimisation bullying by Mr Galpin since Mr Galpin had taken on the role, an allegation which Mr Bowen had responded to in the letter **Wednesday 15 May 2019**. The claimant did not provide **the claimant's detailed letter of 3 May 2019** or other evidence on which he wished to rely.

75. On **Friday 17 May 2019** Ms Di Ciccio replied to the claimant's email of Wednesday 15 May 2019 in a brief email at 1.53pm to the claimant to his personal email *"Please note that if you wish to raise a formal grievance you must do it raising a MYHR case. As you are currently unwell, I can do it on your behalf if you wish. At that point another member of my team will pick it up and will get in touch with you. I cannot be involved as I'm managing your sick leave. Please remember that you will need to provide grounds of your grievance. I will be waiting to hear back from you if you wish to take advantage of the Generali Service and if you wish to raise a formal grievance."*

76. Ms Di Ciccio followed up her 1.53pm email at 2.18 pm *"Thanks Grant. I meant to say you will need to provide evidence of the grounds. It would be very difficult to manage a grievance communicating to you via post as my colleagues will need to invite you to a formal grievance and will need to follow up with further communications. Are you able to provide us of another email address we can use to reach out to you so that you don't need to access this one and get further stressed."* The respondent's proposal that the claimant provide a separate email was both reasonable and proportionate.

77. The claimant responded at 3.16pm in short email *"Yes please raise this on my behalf. The grounds have been set out in the last email I sent you. As requested before, please can you communicate via post for the reasons I mentioned in the same email."* The claimant as above had not provided the detail he had previously set out in his lengthy email to Mr Galpin Friday 3 May 2019.

78. The respondent did not resist investigating a grievance issued by the claimant at this time. The respondent, specifically Ms Di Ciccio, upon noting the claimant's wish to progress a grievance set out the respondent process expressly set out that she could submit it on behalf of the claimant although to do so detail of the substance would be required, in her reference to evidence of the grounds. That statement was against the background of the limited information provided by the claimant on Wednesday 15 May 2019 in the context that the claimant had asserted a wider position that he had been victimised and bullied by Mr Galpin since Mr Galpin had taken on the role. It was an attempt to seek clarity of what information the claimant wished to rely on. Ms Di Ciccio factually described that managing such a process via post would be very difficult.

79. On **Friday 17 May 2019** Ms DiCiccio logged a Grievance on the respondent MYHR (the **May 2019 Grievance**) for the claimant which was allocated to Mr Norbert Macko UKI Advisor and HR Generalist. It was a copy of his email of 15 May 2019.

80. On **Thursday 23 May 2019** the claimant emailed the respondent's Global Ethics & Compliance Team setting out that he was *"reporting a violation of ethics as set out in the Dell Technologies Code of Conduct; specifically that there should be no retaliation for whistleblowing, or raising genuine concerns that people should "never bully, threaten, intimidate or hard another person"* the **May 2019 Ethics Complaint**) describing that he had been off work since 29 April with work-related stress, anxiety and subsequent depression caused by a situation with Mr Galpin and Mr Bowne describing he felt that he had been victimised and bullied by Mr Galpin since he took on the role of as the claimant manager. The claimant set out that he wrote to Mr Galpin on 3 May providing examples of the bullying and victimisation, describing that Mr Galpin (in his view) retaliated via email on 8 May accusing the claimant of poor performance over many months and told him he would be placed on a performance plan; on 13 May Mr Galpin emailed him that commission payment would stopped if off work from than 4 weeks, on 15 May Mr Bowen emailed informed him Mr Bowen had been advising Mr Galpin throughout the process, claiming that there had been issues with the claimant's performance, and *"confirming that I will indeed be placed on a performance plan on my return".* The claimant further made reference to Mr Mackie referencing an event which he suggested took place on 13 February 2018 and described that fear of reporting Mr Mackie was discussed with Mr Bowen and Mr Mackie on 18 March 2019 where he set out that Mr Bowen *"openly admitted that reprisal may be a possibility if"* he choose to report Mr Mackie and described that Mr Mackie had *"deliberately not invited him to an important territory review meeting"* and further described that at a meeting of 18 March 2019 there had been no mention of performance issues. The claimant set out what he believed was the health condition of Mr West and referencing what he suggested was a lack of support from Mr Bowen. The claimant set out that people did not require to be trained in mental health not to send the emails he complained of and concluded noting that in the UK the main cause of death for men under 50 is suicide. The claimant, unlike in his communication with Ms Di Ciccio, expressly referred to **the claimant's detailed letter of 3 May 2019.**

81. On **Thursday 23 May 2019** Mr Norbert Macko the respondent's UKI Advisor and HR Generalist acknowledged to the claimant by letter receipt of the May 2019 Grievance (which was submitted separately and without reference to the claimant's complaint to the respondent's Global Ethics & Compliance Team on 23 May) raised via Ms Di Ciccio on 15 May 2019 (that was reference to the claimant's email of 15 May 2019). Mr Macko described that he was now seeking to arrange a meeting *"which may enable us to resolve the issues you have raised against your manager Mark Galpin and his manager Richard Bowen based on the Grievance (Problem Solving) Policy, specifically on the base that you feel that you have been victimised and bullied by Mark Galpin since he took on the role."* It was described that the grievance would be heard by an independent and impartial manager of appropriate seniority and offered a meeting with Mr McGowan who was described as an Independent Manager and Mr Norbert on Monday 3 June 2019, via Skype. Mr Norbert noted that the claimant had requested communicating by post *"May I please suggest that, in the interest of solving your grievance promptly and without unnecessary delay, we communicate for the purpose of your grievance via email… Many thank for confirming your availability to attend the meeting before 12 noon on Friday 21 May 2019."* There was no reference to the claimant's detailed letter of 3 May 2019.

82. On **27 May 2019** the respondent's Global Ethics Team acknowledged the **May 2019 Ethics Complaint** saying that they had opened an investigation and would let the clamant know if they had any questions, they described *that "please note that during the course of the investigation, the Ethics Team may work with colleagues from HR, Security and other groups, so various steps in the investigation may be handles by employees from one or more of those teams. If you have any more information you would like to share with us or have any questions"* he should submit via link provide.

83. On **Thursday 30 May 2019** the claimant attended his private psychiatrist who provided a report to AXA-PPP copied to the claimant's GP and recommended that GP sign him off work till June 2019 and further recommended that 20 to 40 sessions of psychological therapy were provided (the May 2019 Report).

84. The May 2019 Report did not describe that the author had been asked to review the claimant's GP records or other documentation nor that the author had reviewed same. It described that the author had met with the claimant on 22 and 30 May 2019 to complete a psychiatric and psychotherapeutic assessment, over 90 and 60-minute appointments.

85. On Treatment History the May 2019 report described that the author was *"slightly unclear in time scales, but understand a diagnosis of Depression and Anxiety was made in the last 2- 3 years, with Citalopram 20mg prescribed since. This has been increased by his GP to 30mg in response to the recent episode of persistent low mood and high anxiety and sick leave from work again with some benefit".*

86. The May 2019 report did not describe that the author had any reviewed any emails or documented discussions with the respondent. The May 2019 report reflected the claimant's description of matters to the psychiatrist.

87. No comment in the May 2019 report was provided regarding proposed remote attendance by the claimant on Monday 9 June 2019 with the Independent Manager Mr McGowan.

88. On **Friday 31 May 2019** at 6.52 pm the claimant sent a short email to Mr Macko *"Hi Norbert Please be advised I am still on sick leave"* in response to Mr Macko's email of Thursday 23 May 2019. The claimant did not respond to the request on his availability to attend a remote (skype) meeting on Monday 3 June 2019. The claimant did not set out that he was unable to attend the remote meeting. He did not refer to it at all. The claimant did not provide a report from his physician.

89. In around June 2019 the respondent's then consideration of a WFR to lose one SE from around November 2018 did not proceed further at that time.

90. On **Monday 3 June 2019** the claimant elected not attend what had been a proposed remote meeting with the Independent Manager Mr McGowan.

91. On **Monday 3 June 2019** Mr Macko, emailed the claimant in brief terms *"Hi Grant, Thank you for advising. We'll wait for you to return to proceed with the*

grievance investigation". That was a response to the absence of the claimant's confirmation of the claimant's availability to attend remote (skype) meeting on Monday 3 June 2019 before 12 Noon on Friday 21 May 2019 accordingly, there was no remote meeting with the Independent Manager Mr McGowan on Monday 3 June 2021. The information available for the purpose of the May 2021 Grievance remained as summarised by Ms DiCiccio for the claimant on Friday 17 May 2019 as provided by the claimant to Ms DiCiccio. The respondent did not end the May 2019 Grievance at that time, rather they expressly set out that they would wait for the claimant to return to proceed with same.

92. On **Thursday 6 June 2019** the claimant emailed Ms DiCiccio provided a further Fit Note which extended his absence to 10 July, setting out that he had *"looked over the Generali information and feel that I am getting the proper care from my current doctors so I won't be proceeding with that".* The claimant set out that it was his decision and did not describe that it was on clinical advice.

93. On **Thursday 6 June 2019**, Ms Di Ciccio acknowledged further fit note provided by the claimant via email and set out *"please note that you can change your mind and engage with Generali in a later moment".*

94. On **Monday 10 June 2019**, Mr Macko provided a further brief email the claimant setting out *"Further to email"* being his email of 3 June *"below I understand your sick leave has now been extended for a further month until 10.07.19. Since, due to your absence, we have not been able to progress your grievance and our internal systems and process requires us to close such grievance with cases within the 30 day period, I will have to close you MyHR case (HRC0571184). You will be required to submit a new case upon your return to work at which point we will pick it up again. If you have any questions or require assistance with this when you return, please feel free to contact me directly."*

95. The respondents had not been able to progress the grievance through their processes, reflecting the claimant's decision not to respond to the request to

confirm his availability to attend the remote meeting with the Independent Manager Mr McGowan on Monday 3 June 2019. The respondent's process requiring closing such grievances following 30 days of inactivity was a practice which would be generally applied to the respondent employees. The claimant was in June 2019 capable of confirming his position on attending a remote meeting. The claimant was able to attend the remote meeting offered with the independent manager Mr McGowan. The inactivity did not arise from the claimant's disability, it arose from the claimant's decision not to respond.

96. On **Wednesday 19 June 2019**, Ms Eleanor Smith respondent HR Advisor issued letter via post to the claimant, introducing herself as the point of contact during the claimant's sickness absence, taking over from Ms DiCiccio who was based in Italy. Ms Smith described that she understood from Ms DiCiccio that he understood that the claimant's preferred method of communication during his leave was post and confirmed the postal address of the office at which she was based. She asked *"I wanted to confirm with you whether you would be comfortable in me sharing your postal address with Mr Bowen. This would be in order for him to maintain contact with you regarding your wellbeing and whether there is any further support which we can offer. Please let me know if you would be happy for this information to be shared with him for this purpose."* Ms Smith set out that she understood that the claimant did not wish to engage with the rehabilitation service offered through Generali and *"just want to confirm that this provision is still available should you want to proceed with it. It can offer personalised rehabilitation as well as, once suitable, a return work plan to meet your needs. Please do not hesitate to contact me should you need any further information."* Ms Smith's understanding of the claimant's position at that date was correct.

97. On **Friday 21 June 2019,** the claimant emailed Mr Norbert expressing disappointment that Mr Norbert *"not been able to progress the grievance, because I am sick leave"*, describing that the reason that he was on sick leave was, the claimant argued, was as a direct result of the behaviour of the two individuals reported in the grievance. *"It appears that my case has not been investigated at all even though I pointed out in both emails to your colleague"*

Ms DiCiccio *"on 17/05/2019 that you have all the information you need to substantiate the claim".* He did not describe that he had been unable to attend a remote meeting with the independent manager due to a disability. The claimant was incorrect in asserting that he had provided all the relevant information, he had not provided the detail to Ms Di Ciccio as part of the grievance as he had been requested, which he had set out in his lengthy email to Mr Galpin Friday 3 May 2019. The, then current position, further reflected the claimant's decision not to attend what had been proposed as a remote meeting with the independent manager Mr McGowan.

98. On **Thursday 27 June 2019** at 8.33 am, Mr Macko on a return from leave, in response to the claimant's email of 21 June, responded by email providing clarity as to the terms of his brief email of **10 June**, describing that the claimant had been sent the grievance invitation letter by post on 24 May 2019 *"where we sought to arrange a call with you to enable us to fully hear your grievance and obtain the necessary evidence to investigate the allegation you had made in your email of 15/05/2019. You replied after the deadline stating you were still on sick leave. I confirmed we would wait for your return to proceed with the grievance investigation as you did not indicate you wish for the grievance to be held in your absence or supplied any evidence. Despite the fact that we had requested that you provide the evidence you refer to in your grievance, to date you have not provided any emails/ communications to us. As per the attached grievance policy…, a copy of which was also enclosed with the grievance invitation letter, team member is required to cooperate with investigation by responding to all requests for documentation etc. It is imperative that the evidence supporting allegations is provided by you, to avoid any misunderstanding as to which emails you refer to, and also to make sure all the evidence you wish to be submitted is part of the grievance investigation. If you wish for your grievance to be heard in your absence, please provide any emails/ communications you refer to in your grievance and any additional evidence /statement you wish to be part of your grievance (In addition to the original grievance). If you wish for your grievance to be heard on your return from sick leave please advise. I look forward to hearing from you at the earliest convenience, confirming how you wish to proceed. If you*

have any questions in relation to your grievance, please do not hesitate to contact me."

99. On **27 June 2019** at 12.24 pm**,** the claimant issued a short email to Ms Smith thanking her for her letter of **19 June** and describes *"I am fine communicating with you via email and if you have read all emails between Ms DiCiccio and myself you will understand why. This leads me to be being a little confused as to why you would think I would want to hear from Mr Bowen if you indeed have read all those emails. I absolutely do NOT want to hear from Mr Bowen or Mr Galpin "until all internal investigations have been completed".* The claimant was responding to the suggestion that his home address be provided to Mr Bowen for contact purposes. The claimant did not offer to expressly identify what he emails he was referring to, nor provide same. He did not identify that he had separately submitted the May 2019 Ethics complaint. The reasonable reading of the claimant's email of 27 June 2019 was simply that he did not wish to engage with either Mr Galpin or Mr Bowen, as he had complained about both.

100. On **27 June 2019** at 5.12 pm Ms Smith responded by email to the claimant's email that day thanking him for reaching out and thanked also *"for confirming that you do not wish to be contacted by Mr Bowen in the interim. I acknowledge your feedback. My colleague Mr Macko has been the point of contact for your May 2019 Grievance and he will be able to discuss this with you in more detail should you wish. I will be working with him to ensure we are aligned on your guidance/ wishes. I'm pleased you're happy to communicate via e-mail it should be a more reliable method for us both. I am always concerned about letters not making it to their desired destination. Going forward, please do reach out to me with any changes in your situation, or if you receive a further doctor's certificate. I would like us to keep in contact during this period and then I can follow up on your well-being and see if there is any further support available. I am aware you have previously received details on the rehabilitation service offered through our permanent health insurance provider, Generali, and also details on the Employee Assistance Programme. I just wanted to reconfirm their availability should you want to*

meet use of them as tools to support your recovery. The employee assistance programme is available 24/7 and is totally confidential it can offer telephone and face to face counselling as well as advice and guidance articles it can be a valuable supplementary tool for recovery." A web link was provided to both the Employee Assistance programme and to what was referred to as the EMEA specific portal. Ms Smith further set out that *"The rehabilitation service on the other hand provides a review of your situation in order to offer a personalised guidance advice and return to work plan when suitable this would also advise whether there are any adjustments which may help your situation please let me know if you need any further guidance or information in the meantime".* While acknowledging that the claimant did not wish to be contacted by Mr Bowen, this was in the context that Ms Smith had proposed providing Mr Bowen with the claimant's home address for contact which the claimant had declined referring to both Mr Galpin and Mr Bowen. The claimant had not identified to Ms Smith that he had issued the May 2019 Ethics Complaint.

101. On **Tuesday 2 July 2019**, Ms Smith in email to the claimant identified to the claimant that he was reaching the end of the 10-week period for full company sick pay (CSP enhanced from SSP) and described that by completing accompany forms and reviewing attached letter she would be able to submit a Permanent Health Insurance claim. The letter described that 10-week absence would be reached on 9 July 2019 *"which is the point we need to commence the process of submitting a claim under"* the PHI insurance scheme provided by Generali *"the purpose of this scheme is to provide team members with a regular income if they are unable to work due to long terms illness of injury... team members are not required to contribute to towards the cost."* It described that if unable to work for more than 26 weeks the claimant may be eligible for income protection and if a claim was made and accepted after 26 weeks it would pay at 67% of basic annual salary over the previous 12 months pus amount for fluctuating emoluments in the previous 3 years include bonus sales commission, overtime, shift pay, but excluding car and long term allowance. It requested that the Employee claim form be completed

along with Declaration and Consent form and returned as soon as possible. It also set out detail of the Employee Assistance Programme.

102. On **Tuesday 9 July 2019** at 10.43 am, Ms Smith, as follow up to her email of 2 July, emailed the claimant noting that the then current Fit Note was due to expire the following day 10 July 2019 and commented *"Have you received another certificate from your doctor at this stage or will you be meeting tomorrow? Alternatively, should you doctor not sign you off again, please let me know of any updated to your situation to allow us to support your return?"*

103. The claimant responded that day *"My Doctor is intending to sign me off again and I will forward the fit for work certificate to you as before. As for the generali, both you and Ms DiCiccio have been very keen to sign me up to this . I have given this a lot of consideration and whilst I understand it's merits for a lot of situations I don't think it is applicable to my scenario. The main reason is that I am currently under the care of a very experienced and well respected psychiatrist. His treatment follows a very specific and tailed programme. I don't believe the generali programme offers the same level of care but I would be obligated none the less to follow it which I think would do more damage than good for my situation. Additionally, I would have to agree to Dell having full access to my medical records and I am not comfortable with that intrusion of my privacy. The main thing is that I am getting the best medical care available which I hope Dell will be happy with and supportive of."* The claimant's email was misleading in that he did not consider that the support offered would adversely impact on his condition, he had not been advised that it would, he simply did not wish to engage with the respondent's offer of support.

104. Ms Smith responded at 4.29pm that day to the claimant, thanking the claimant describing that she completely understood that he was happy with the support he was receiving from the health care professionals he was working with and set out *"We are just trying to provide you with all the support available to team members who are facing medical issues. I also want to take the opportunity to provide some further detail on the forms you have received as the Generali details which have been shared comprise 2 elements. The initial*

documentation shared was relating to the rehabilitation offered through our Generali permanent health insurance. This service aims to offer detailed advice, rehabilitation guidance and a personalised return to work plan. As we are now approaching the 10 weeks absence mark, I provided some additional information and forms for you this is to begin the process of submitting your claim to Generali directly for the income protection insurance. Income protection/long term disability payments would begin after 26 weeks of absence, subject to the member satisfying the provider's definition of incapacity. This would offer continuation of income for team members once company sick pay is no longer payable and towards the end of statutory sick pay. The claims process can take up to 13 weeks so the forms are sent now to avoid any delays in your case. I hope this provides more clarity on the forms which have been provided please let me know if anything is unclear and I am happy to provide any further guidance." Ms Smith set out in clear terms two distinct processes:

a. the first related to rehabilitation including a personalised return to work; and

b. the second related to the possible provision of income protection which would begin after 26 weeks of absence, subject to meeting the insurance providers definition of incapacity.

105. The claimant did not wish to engage with either, he did not wish to seek rehabilitation for a return to work, nor did he wish to engage with a process of income protection.

106. On **Monday 15 July 2019** at 8.51 am the claimant emailed Ms Smith describing that he had an appointment with *"my doctor at 3.40 today. I will forward the paperwork after that"* Ms Smith responded briefly thanking the claimant for letting her know and described that she hoped the *"appointment goes smoothly".*

107. At 9.22 am the claimant emailed Ms Smith describing that he had come back from leave and set out that he *"wanted to thank you for the offer of Generali. As stated before, I have taken third party help and consider myself in the best*

of care. If you feel I am not getting the best of care then I beleive you should state clearly your reasons why. As for income protection we're a long way off that and it is not something I'm thinking about. That said if I'm reading the documentation correctly the 26 week limit is not mandatory but more of a guidance guideline at the discretion of Dell. Therefore, given my particular circumstances and the reasons as to why I am ill and off work it would seem particularly harsh for that to be implemented: but that is of course up to Dell. I am happy to converse by email but please may I remind you as to the reasons why I'm off. Therefore, if communications get to a point where I feel it interferes with my mental health treatment then I will ask for it to be paused I hope you understand." The claimant's response of 15 July to Ms Smith reflected his position that did not wish to engage with or seek rehabilitation for a return to work, and nor did he wish to engage with a process of income protection which identified it was subject to a provider's definition of incapacity. The claimant's position did not reflect any medical advice he was receiving.

108. On **Monday 15 July 2019** at 10.11 am, the claimant replied, by email to Mr Macko's email of 27 June 2020, apologising for his delay in doing as he had been on leave. The claimant set out criticism including that *"it is clear that you have not read in detail all previous correspondence"* without specifying same. The claimant continued that *"I think I will leave this until I feel well enough to re-open the grievance before my return to work as per your rules. However I would like to highlight some points in response to your email,"* setting out 6 bullet points:

    a. there had a recurring theme of no consideration as to the claimant's assertion that that was on sick leave due to mental problems as a direct result of the two individuals he had raised a grievance about.

    b. Mr Macko letter of 23 May indicated that Mr Macko had not realised that he was still on sick leave.

    c. There was no deadline, the letter of 23 May 2019 merely asked the claimant to confirm his availability *"which I did later that day. I received*

the letter on Wednesday 29th around mid-day. That gave me a day and half to decide if I was capable of such a meeting as to whether I should attend and collate any information I thought I would need to refer to. Given the reason I am off work. I would have thought the considerate thin to do would have been to first check if I felt up for such a meeting and then allowing me to choose a date rather than placing me under such time pressure.

d. *In the same letter you did not ask for copies of the emails in advance of the meeting.*

e. *I have read the grievance policy and whilst I did not physically provide you with emails there was no ambiguity in my email to"* Ms DiCiccio *"It states exactly the emails that should be referred to.*

f. *Additionally, the grievance policy makes no reference of how things should be handled when a member of staff is off sick. It also makes no mention of how the procedure applies to staff with mental health problems or what provisions should be made if any."*

109. The claimant concluded *"I will reiterate as I did to your colleague"* Ms Smith. *"I am happy to converse via email but if I feel it interferes with my mental health communication then I will look to pause communication."*

110. On **Monday 15 July 2019** at 3.38 pm, Mr Macko issued reply by email which said *"thank you for your email and confirming that you will advise us when you feel well enough to proceed with your grievance. Your grievance and the points raised below will be addressed when we reconvene the grievance process".*

111. Mr Macko on 15 July expressly set out that the claimant's grievance would be addressed when *"we reconvene"* the grievance process. At that stage Mr Macko did not know that the claimant would subsequently on 14 August 2019, impose as a condition of continuing with the claimant's May 2019 Grievance that Mr Macko express his view on the merits and in particular whether Macko

saw *"any wrong doing"* in the emails referred to in the claimant's May 2019 Grievance.

112. On **Tuesday 16 July 2019**, Ms Smith again emailed the claimant thanking him for coming back to her and set out that she *"completed understand that you need to do what's best for your mental health and I'm pleased to hear you trust the support you are receiving. The provision of the Generali documents is to ensure you are aware of and have access to all the tools and resource Dell EMC make available for team members who are currently unable to work due to sickness. These are then available should you wish to utilise them at any point and they have been very valuable tools previously. The purpose of the long term disability insurance is to provide team members with a regular income if they are incapable of undertaking work because of long term illness or injury. General, the insurance provider would cover the ongoing provision of salary once the 26 week limit for Company Sick Pay (CSP) has been reached. The reasons the forms are sent early is that claims can take up to 13 weeks to be approved. This enables us to take to ensure any necessary transition between the CSP and the Long Term Disability Insurance is as smooth as possible for team members. The intention is not to send large numbers of forms for completion. Once we receive the doctor's certificate we can review our communication schedule to not interfere with your recovery. In addition to receiving certificates, I just want to check in now and again on your welfare and see her see if there are any changes to your situation. This will enable us to support you in the most effective way possible I hope this clarifies."* Ms Smith again identified two distinct processes:

    a. the first related to rehabilitation, previously identified on 2 July 2019 which included a personalised return to work; and

    b. the second related to the possible provision of income protection which would begin after 26 weeks of absence, subject to meeting the insurance providers definition of incapacity.

113. The claimant did not wish to engage with either, he did not wish to seek rehabilitation for a return to work, nor did he wish to engage with a process of

income protection which identified it was subject to a provider's definition of incapacity.

114. On **Tuesday 16 July 2019**, the claimant in response, provided GP Fit Note to Ms Smith for the respondent, apologising that he had tried to send this the previous day but had only (then) realised that none of his sent emails had got through to anyone. The claimant offered no criticism of the two processes identified by Ms Smith nor indeed Ms Smith's actions in relation to same.

115. On **Monday 22 July 2019**, Ms Smith, further to her email of 2 and 16 July 2019 set out in letter form clarification of the respondent's Sickness Absence Policy and the respondent expectations of team members, she described that the respondent offered a range of support mechanisms through third party providers and set out that *"Under the Sickness Absence Policy, team members are expected to avail themselves of all support offered to assist with their own recovery".* She again described:

a. the Rehabilitation, Service identified on 2 July 2019 which included a personalised return to work *"to allow a connection between you and the Company to be maintained… This service is offered to team members following 4 weeks sickness absence and is intended to compliment support team members are already receiving";* and

b. the process, after 10 weeks of sickness absence where team members are provided with documents to enable them to begin the process of submitting a claim under the PHI scheme and reminded the claimant that the respondent offers up to 26 weeks of company sick pay additional to statutory sick pay, with the purpose of this process *"is to provide continuing salary payments for reasonable period of time for those who are genuinely unable to work because of sickness/injury. Payment under the scheme are made at the Company's discretion. DELL EMC reserves the right to withdraw payment should a team member fail to engage with the support provided-including by third parties"*

116. In her letter of 22 July, she further described that *"Under the sickness absence policy the company requires regular communication to be maintained between the team member and their leader. The company acknowledges that you do not wish to communicate with your leader at this stage. It is vital, however, that reasonable communication exists between you and your leadership team, this is to enable them to check in on your welfare, understand your progress and best support your return to work. Therefore, a communication schedule should be agreed between yourself and Richard Bowen, Director, Systems Engineering. These calls should take place every two weeks. They should be pre-arranged to ensure both parties are able to attend. It is imperative for the company to hold welfare discussions and to enable them to best meet your support needs. In order to continue benefiting from CSP from 1st August 2019 please complete and return your rehabilitation service consent form and review the assessment brochure in advance of 31st July 2019. These documents were issued to you 15th May 2019. It is expected that by 31st July 2019 a communication schedule will be agreed between yourself and Richard Bowen. You should also complete a complete the Permanent Health Insurance Employee Claim form and the Declaration and Consent form to enable us to support to submit a claim on your behalf. These forms were sent to you on 2nd July 2019. This will allow you to avail all the tools the Company makes available to support a team member's recovery during the period of sickness absence. I have enclosed a copy of the sickness absence policy for ease of reference. Please do not hesitate to contact me should you need any further information, or you would like me to resend any of the aforementioned forms."*

117. In Ms Smith's 22 July 2019 letter, she did not threaten to stop sick pay unless the claimant signed consent forms and agree to a meeting schedule with Mr Bowen. Ms Smith fairly described that contractual company sick pay, paid over and above SSP would come to an end. Ms Smith did not threaten the claimant with a sanction. She fairly described the process which would operate. The claimant did not refuse to sign consent forms due to outstanding questions. The claimant had failed to engage with the reasonable offer of a meeting with independent manager Mr McGowan. The claimant was not

genuinely and reasonably fearful that the occupational health process would interfere with his then-current medical treatment. She set out that there was an expectation that by 31 July that a communication schedule be agreed between the claimant and Mr Bowen and set that a requirement, until the claimant responded on 26 July on same following upon which the expectation was withdrawn on 31 July 2009.

118. On **Wednesday 24 July 2019,** the claimant emailed Ms Smith, in response *"I received your letter I'm confused why you choose to write rather e-mail as you've been urging me to do; I will assume you just use e-mail going forward. That aside, I would like you to answer a question for me before I respond to the content of the letter. The tone of your correspondence has dramatically changed it has gone from supportive to adversarial. My question is this. Is this change in tone entirely your doing or you or are you being guided by someone else, your boss for example? If the latter, then please hand this over to that person alone let them introduce themselves and like to know who it is I'm dealing with."*

119. On **Thursday 25 July 2019**, Ms Smith responded at 1.25pm professionally *"Thanks for confirming receipt of the letter. I sent this letter to provide clarification on the sickness absence policy and the expected engagement with all aspects of it I continue to be your HR point of contact for topics during your period of sickness please let me know if you require any further information on any of the support provisions which have been provided alternatively as mentioned in the letter please let me know if you need any of the forms again".*

120. The claimant issued his response at 2.40pm that day *"Thank you for the carefully worded e-mail which fails to address any of the points in my last correspondence. The other concerns that remain to be addressed (re-stating policy does NOT address concerns) are detailed on emails dated:*

27th June 12:23

9th July 12:16

15th July 9:22.

Once you've addressed those these concerns we can move forward and why you've resorted to threatening me with removal of CSP (letter 22nd July)"

121. Ms Smith had responded to the claimant's email of 27 June on that day, to the claimant's email of 9 July on that day and to the claimant's email of 15 July on 16 July. The claimant did not identify what points he considered remained outstanding. The claimant did not consider there were any outstanding points.

122. On **Friday 26 July 2019**, and while Ms Smith had responded to the claimant's email of 27 June that day, to the claimant's email of 9 July that day and to the claimant's email of 15 July on 16 July, she again sought clarity as to what concerns he was suggesting he had, at 4.18pm *"Please let me know what concerns you still have regarding the next steps. The letter outlines the support provisions made available for individuals during a period of sickness under the Sickness Absence Policy. It offers clarification regarding the expectations of team members during sickness absence. Team members are expected to engage with all support in order to assist their own recovery. The company reserves the right to withhold Company Sick pay should team members fail to engage with the support provided. Engagement with the services offered is actively encouraged in order to support in order to help support and guide team members during the sickness absence and assist with sustainable return to work programme, when appropriate."* Ms Smith factually and consistently set out the respondent's expectation of engagement to seek to assist employee recovery. Ms Smith described the respondent's requirements. Ms Smith did not threaten to withdraw sick pay to which the claimant was otherwise entitled.

123. The claimant set out in response at 6.11pm *"I think I may have to take a break here as your communication makes no sense and rather than help with my recovery it is not only impeding it but setting it back. You keep changing the language and the messaging. it is not consistent. For someone with my condition that causes huge amounts of stress. My concerns are clearly stated*

in my previous email and I even gave the specific emails to reference. Forgive me for saying this as it sounds harsh, but a person trained in HR should be able to recognise those concerns and address them accordingly. You haven't. What you choose to do instead was threatened my ability to provide for my family if I didn't comply to your demands by 31st of this month. How did you expect that would affect me? How do you expect me to speak intelligently to you if you refuse to address my valid concerns but threaten me instead? Now you've gone from deadlines to saying the 31st of this month the language of it is actively encouraged which is it? As for Richard Bowen, I am going to ask questions that I will expect an answer to… if you were off sick and held a manager partially responsible for that illness where there was an outstanding grievance complaint against that manager for the same reason, would you want to be forced to communicate with him every two weeks? I'm happy to talk to you personally every two weeks. I'm also happy to talk to Generali to understand exactly what they offer and how that may complement my current treatment but not interfere with my current structured healthcare but both options have never been presented are these really unreasonable requests ….my psychiatrist is on holiday and I'm due to see him on 13th August. Please let me talk to him and get guidance on how I should communicate. I'll be in touch on 14th of August. Please do not send any more emails until then all of this is extremely distressing for me. I thought you wanted to help... ".

124. On **Wednesday 31 July 2019**, Ms Smith emailed the claimant in reasonable terms *"I really appreciate you coming back to me during this. It is incredibly valuable to help me understand your situation and enable the company to help you in the best way possible. I acknowledge your request to suspend further communication communications to allow you to speak to your psychiatrist. Also, to confirm. I take onboard your concerns about being contacted by anyone in your direct leadership team. I am happy to remain your point of contact during your sickness absence. I just want to clarify a couple of points with you first, to help you to help provide more clarity in the background. The reason I reiterate the support provisions is that I want to ensure that you are aware of and have every opportunity to avail of all the support Dell offers to team members during sickness absence. Should you be*

unable to return to work during sickness absence after 26 weeks, the income protection insurance (provided by Generali) is intended to provide team members with a continued income. I don't want you to miss out on having this option. The income protection though, is time dependent and claims cannot be submitted retrospectively with great success. Additionally, it takes a number of weeks for these claims to be reviewed. I want to ensure you have access to all the support available to you under the Sickness Absence Policy. These support mechanisms also help me support you most effectively. I completely understand there's a lot of documentation connected to both rehabilitation services and the income protection. If this is too much at this stage, please let me know if you'd like me to work with a family member to help have these forms completed. Alternatively, you may want a family member to make enquiries with HCML (the rehabilitation provider) directly to understand the support they offer. This may provide further clarity import the provision includes. I await your update on 14th August. I look forward to hearing from you and I would hope by this stage you will be intending to avail with all the support provisions offered by Dell in order to support your recovery. I am keen to ensure you receive all the support available." Ms Smith accepted expressly that there was no requirement to have contact with either Mr Bowen or Mr Galpin.

125. On **Wednesday 14 August 2019**, the claimant emailed Ms Smith describing that he had his appointment with his psychiatrist and *"we spoke about my situation. He too is concerned that I will be effectively handing over my care in the middle of over very structured programme where I MUST comply to all requests as stated in the terms and conditions and yet have no knowledge about what that would involve. You have not answered any of my questions and concerns regarding this, so on this basis I will not be signing the Generali forms. I would however like further clarification on HCML. I seem only to have an overview document for them. Are they affiliated or work in combination with Generali in anyway? All that aside I'm still extremely concerned about your letter dated 22nd July where you threatened me. I don't even know if I will receive any salary this month but have to assume that based on this letter I won't. You're refusing to answer direct questions but continue to use evasive*

language instead. To date you've done far more damage than good and this begs another question which is this: is DellEMC's HR department truly independent for ALL employees as the documentation suggests it is, or is it simply their to fundamentally protect the interests of the company? I would like an answer to that one too please. As agreed if you want to agree a schedule I would be happy to talk over the phone." The clamant was not advised at or about this time that there was any clinical concern regarding any respondent processes. Ms Smith's letter of 22 July did not threaten the claimant and could not be reasonably read as doing so, it set out the respondent company sick pay arrangements. Ms Smith had not been evasive in her communications with the claimant, she had sought to provide relevant information to the claimant. The claimant did not propose dates for or otherwise agree a communication schedule with Ms Smith.

126. On **Wednesday 14 August 2019**, the claimant emailed Mr Macko in a short email which read *"Hi Norbert, I would like to reopen the grievance as discussed in the email of 15 July 2019. However, while I do not feel up to interviews I would like to ask in the interests of expediency and preparation if you could review my email to "*Ms DiCiccio *"and read the emails referred to and one answer one question before we move forward. Do you see any wrong doing in this emails? A simple yes or no will be fine and will determine if I move forward with the complaint."*

127. While the claimant referred to *"my email to"* Ms DiCiccio, he did not set out which email he was referring to, nor did specify which emails Mr Macko should understood as being referred to. The claimant elected not to refer to his more comprehensive May 2019 Ethics Complaint. The claimant was referring to his email of Wednesday **15 May 2019** to Ms DiCiccio which referred to 3 emails. The claimant's email set out a direction to that Mr Macko should confirm his view before the claimant would decide on whether to re-open and continue with his May 2019 Grievance. The claimant set out, not that he was seeking to continue with the May 2019 Grievance but rather, before he made a decision on same, he wanted Mr Macko's opinion.

128. On **Thursday 15 August 2019**, Mr Macko, in reasonable terms, set out that he would re-open the grievance *"and investigate the concerns outlined in your email"* to Ms DiCiccio*. "I will, however, hold back on forming a view either way until I have had a chance to interview those involved and full reviewed the emails referred to in your grievance. I appreciate that you do not want to be interviewed and accept this, however this will mean we will form a view based on the limited information available. Please allow me some time to collate the information and I will respond to you in due course. If you have any questions in the meantime, please do not hesitate to contact me."*

129. Mr Macko's email of **15 August 2019**, was a reasonable response to the direction set out in the claimant's email of 14 August 2019. Mr Macko reasonably set out that, while the claimant wanted Mr Macko's view before the claimant would decide on whether to re-open and continue with the May 2019 Grievance, Mr Macko would hold back at that stage from expressing any view; describing that Mr Macko would interview those involved the claimant's email of **15 May 2019**. Mr Macko, as requested by the claimant, did not interview the claimant and restricted his interviews accordingly to Mr Bowen and Galpin on the May 2019 Grievance having read the emails which were referenced therein and reported to the claimant on his finding on Wednesday 18 September 2019 on the matters within the May 2019 Grievance. As the claimant had declined to be interviewed there were no other reasonable steps for the respondent to have taken. There was no obligation on Mr Macko to identify the content or substance of the separate May 2019 Ethics Complaint which the claimant had consistently failed to identify to Mr Macko.

130. On **Thursday 15 August 2019**, the claimant emailed Ms Smith stating *"I would like to try to get this past one more time. I am not against Generali or signing up. I just need to better understand it. Someone had told me that insurance companies such as Generali will very rarely do anything else than expect you to adhere to the treatment being proposed by your own doctors. Is this the case? If so, then I am happy to sign up. Help me understand what's involved. I am frightened they intervene, insist on a new psychiatrist, put me on new medication etc. These are all very real fears for me. I don't know what*

else to say?". The claimant did not hold and had not held as a genuine or reasonable belief the position he set out.

131. On **Friday 16 August 2019**, Ms Smith responded after a short delay due to IT problems apologising for that delay and confirming that she was happy to arrange for the claimant to *"speak to one of the team at HCML, the rehabilitation service. It will be a conversation with someone from the Clinical team. The rehabilitation service aims to work in partnership with the care you are receiving from your doctor's. They will not override the advice and treatment you are already receiving. They cannot override your existing plan as any information they provide, will always be advice. For example they will often advise additional resource which may be helpful for individuals recovery or where to find additional support. While HCML's rehabilitation services are provided through our relationship with Generali as this was not provision they could offer in house. They therefore had to engage with an external advisor".*

132. Later that day the claimant responded *"This makes much more sense to me. I would be happy to speak to someone from HCML and ask some questions. If what you state below is the case I see no reason to avoid signing the forms. Let me know when is suitable for a chat please."*

133. On **Friday 16 August 2019,** Ms Smith thanked the claimant for coming back so quickly identified that she had contacted HCML and hoped to hear back early on the Tuesday (20 August) and asked *"Would you be happy for me to share your personal email with her to enable her to reach out if necessary" to which the claimant responded at 9.13 pm "Of course".* Ms Smith made contact with (p577) HCML and described her understanding of the claimant's expressed concern was that *"the service will try to override feedback from his doctor psychiatrist and may force him to change medication or points of contact. I have reassured him that this is not the case and that your service aims to supplement the care he is already receiving".*

134. On **Monday 20 August 2019**, Ms Smith confirmed to the claimant that she had shared his email with HCML. An Occupational Therapist at HCML at 9.54am emailed the claimant indicating that Ms Smith had given his email as

he had a couple of queries with regard to HCML and *"how we can support you", a direct number was provided indicating "please feel free to call me at any point before 2pm today and we can discuss our process/service.. Look forward to speaking with you soon".* The claimant did not call until after 2.15pm and emailed at 3.08pm indicating that he tried calling but got her voice mail and he had *"just noticed the small print about your working day ending at 2.15. Apologies for that. Please feel free to call when it is convenient for you".*

135. On **Thursday 22 August 2019**, the claimant emailed Ms Smith advising that he had spoken with HCML who he indicated would send him additional information. HMCL on that day, having made contact with the claimant, (p560) provided the claimant with a brochure which included an example of face to face rehabilitation (p564) report they provide, the example report concludes with a general statement that HCML's services are provided on a without prejudice basis, they are intended for treatment purposes only with a focused outcome to assist with recovery and return to work, their services are not provided or intended for medico legal purposes.

136. On **Friday 30 August 2019,** Ms Smith emailed the claiamnt setting out that *"under the sickness absence policy team members are offered a certain number of Sales Commission Payments (SCP) during their initial period of absence. These are offered on a sliding scale during the first, second and third months of absence. Upon following up with the Payroll team, they advised they had not processed any payments for Sales Commission during your absence. This had been due to the way the EMC SCP team calculates and shares owed commission with the Payroll teams for processing. I had asked the teams to review the figures and, in August payroll, the SCP for this period is due to have been paid to use an additional lump sum. Apologies for the delay in this payment and please let me know if you have any query questions. HR does not have access to the payslip so I may need to seek confirmation from the Payroll team."*

137. The claimant responded that day that he didn't know if he *"was getting paid at all this month based on previous correspondence. It sounds as though I may and the commission would be most welcome well spotted."*

138. On **Tuesday 3 September 2019,** Ms Smith emailed the claimant *"I'm pleased to hear that your and"* HMCL representative *"spoke about the service HMCL offer. I understand she sent through some further information regarding the support that HCML provide to team members who are out due to sickness. Please let me know if you require the form for HCML engagement resend or whether you still have access to the forms previously sent."*

139. On **Wednesday 4 September 2019**, the claimant replied requesting that Ms Smith resend the form to make sure he had the most up to date ones. Ms Smith responded that day as requested with the forms required to commence engaging with HCML's early intervention service provided through Generali.

140. On **Thursday 5 September 2019** at 11.33 the claimant emailed Ms Smith *"Please see attached form. Does this invoke income protection or is that a different set of forms?".*

141. Ms Smith responded at 2.01pm *"Thank you for returning this form. Are you able to confirm the best telephone number for HCML to contact you on? I will share this with them and also share your e-mail address. There is a separate set of forms for the income protection application. The rehabilitation/ early intervention service does not trigger any claim actions for income protection. I've attached the forms that to commence this process here for ease. These forms will enable us to support a claim on your behalf. Please also provide a copy of your ID for the claim application too. Generali require this with the claim submission. once again thanks for sending this through."*

142. At 2.39pm the claimant emailed Ms Smith complaining about handling of occupational and employee insurance process, he opens with his mobile telephone number *"As for the whole Generali thing. The whole issue has been extraordinarily stressful and detrimental for me and it needed have been had you or your extended HR team simply addressed my concerns when I brought them up weeks ago. I told you numerous occasions how this was affecting me*

and yet you did not address those concerns which has it turns out was very easy to do. Another point would be your letter dated 22nd July threatening me you and your staff have allowed me to suffer unnecessarily, whilst on sick leave for mental health problems, by allowing me to believe for a period of 40 days that I would not be paid anything. What reasonable person does that?? As stated, before my whole experience with each other has made matters much worse for me and you should know that. I will fill out the other forms and send them over." The claimant did not set out what concerns he had. The claimant had no reasonable and genuine concerns that engagement with the respondent provided would have any adverse impact on treatment he was already receiving. The claimant was aware that CSP was due to expire in October. The claimant's understanding of the expiry in October of CSP was the reason for the claimant's change of approach on engagement.

143. On **Thursday 5 September 2019**, the claimant signed both Generali forms Group Income Protection (PHI) and Early Intervention (HCML) forms – consenting to medical report being supplied to Generali that consent set out that medical records may be used for the purpose of occupational health and rehabilitation.

144. On **Friday 6 September 2019**, Ms Smith set out response to the claimant *"Thank you for coming back to me so quickly. I have shared your phone number with each HCML. They should make contact soon but please make let me know if you do not hear from them in the coming days and I will follow up. It would be great to be able to get you set up with that support as soon as possible. I'm sorry you that you felt your concerns were not addressed regarding Generali/HCML. We had regular communications in which I tried to outline their role in the process and the support they provide. As a result of the concerns you expressed, I then requested a specific discussion between you and HCML team directly to help you feel help you better understand the process. This is not something which is has previously been offered by HCML but I felt it would be valuable. I'm pleased you found it a productive discussion. Regarding the letter on 22nd July this was sent to outline sickness absence policy and expectations for team members under it. The more support a team*

can engage with, the better their support for their recovery. It was therefore a priority for the Company to get you engaged with HCML as soon as possible to provide you with that assistance and since this letter it has been our effort to have you engage with them. It was not sent to threaten you I appreciate you confirming that you will send through the additional forms." Ms Smith reference to claimant concerns, were those concerns expressed, but not reasonably and genuinely held by the claimant, that engagement with the respondent processes would impact adversely on treatment he was already receiving.

145. On **Monday 9 September 2019,** the claimant attended his GP who recorded at that time *"work issues causing anxiety and depression, didn't divulge what work issues were but ongoing and everything in hands of solicitor. Expecting everything to 'kick off' end Oct. and things to get worse for him."* The claimant was on Citalopram 30mg which allowed him to cope day to day but not *"big hits".* The reference to end of October was a reference to when company sick pay was due to expire.

146. On **Friday 11 September 2019** the claimant liaised via telephone with HCML.

147. On **Wednesday 18 September 2019**, Mr Macko set out further to the email of 15 and 14 August *2019 "I have now had the opportunity to both speak with"* Mr Galpin and Mr Bowen *"and fully review the emails referred to in your grievance. Based on the information available I find no evidence to support your view that you've been treated unfairly victimised or bullied or discriminated against. Whilst I appreciate that, given the circumstances you might have found emails from"* Mr Galpin and Mr Bowen *"you refer to in your grievance direct, I don't find the emails unreasonable or malicious in anyway. On the contrary, the emails clearly show that management wanted you to return to work as soon as you were fit enough and offered you a meeting to discuss your thoughts and concerns whilst supporting you in achieving a required level of performance in line with the company policy and processes. As per your request in the e-mail of 14th August 2019 I provided my views on the findings and information available. I'll await further instructions from you as to whether you wish to move forward with the complaint as stated in your*

e-mail. Please do not hesitate to contact me if you have any questions or require any assistance."

148. Mr Macko, as he described in his email, set out his honest and reasonable view. Mr Macko had been requested by the claimant to set out Mr Macko's view, the claimant having intimated that the claimant would, thereafter, decide whether to proceed by re-opening his grievance. Mr Macko did not end the claimant's grievance. What Mr Macko set out was not a concluded grievance, he set out what he had been requested to do by the claimant. What Mr Macko set out was his view. Mr Macko had been requested to respond with his view on the claimant's **May 2019 Grievance**. Mr Macko did not have the content of the claimant's **May 2019 Ethics complaint** nor the claimant's email of 3 May 2019 neither of which the claimant had provided or identified to Mr Macko.

149. The claimant asserts in his claim that the grievance had been outstanding since 15 May 2019. It was outstanding for a period of almost 3 months, it had been outstanding during that period as the claimant had declined, without reason the offered meeting with the independent manager Mr McGowan and had declined to be interviewed. Mr Macko's email was his findings. There was no requirement to provide any separate document or report, the claimant had in any event had not requested same at the time.

150. On **Monday 23 September 2019**, the claimant responded to Mr Macko setting out that he was not satisfied with the respondent's finding regarding the grievance and described that *"I do not believe that it would be possible for me to get a fair hearing if I move forward with the complaint. Therefore, I see no point in proceeding. …I believe it would be prudent for me to have this independently verified. Feel free to close the complaint".* That is to say, the claimant was exercising this choice he had identified he would take in his email of 14 August 2019. The grievance was not re-opened **from its non-active position**, it was withdrawn by the claimant. The claimant chose to withdraw on the basis that he had set a task for Mr Macko of confirming whether he saw any wrongdoing in (only) the emails identified in the May 2019

Grievance. The respondent did not fail to uphold the claimant's grievance, nor did they end the May 2019 Grievance. The claimant ended his own grievance.

151. On **Friday 27 September 2019**, the respondent wrote to the claimant confirming that his employment would transfer from EMC Compute Systems (UK) Ltd by reason of TUPE to Dell Corporation Ltd on 2 November 2019.

152. On **Tuesday 10 October 2019**, the claimant's private psychiatrist provided a report at the request of Generali, which report was copied to claimant's GP (the October 2019 report). The October 2019 Report did not describe that the author had been asked to review the claimant's GP records or other documentation nor that the author had reviewed same.

153. The October 2019 Report reflecting the information provided by the claimant and described that the claimant's the current symptoms were that he continued to *"have sporadic episodes of high anxiety and panic largely associated with ruminative worry about his future security for his family and engaging with his employers. His mood, sleep, eating, anhedonia, anergia and general levels of anxiety have improved*" confirming a diagnosis of ICD 11 code 6A73 and 6A71.C could also be considered appropriate describing that *"Both episodes appear to be triggered by an unsupported interpersonal work culture in which Mr Timothy felt criticised and unfairly treated particularly by his manager"* and continued that the claimant had *"used 12 sessions of therapy well, making significant changes. He has also been compliant with anti-depressant medication. Although the prognosis for full recovery appears good based on response to medication and psychological treatment whilst on sick leave at home prognosis is also dependent on environmental triggers that may cause re occurrence in my view the prognosis would be less good should Mr Timothy returned to an interpersonal work environment in which he does not have sufficient trust that he would be treated fairly and reasonably."*

154. The October 2019 Report, under heading Ability to Undertake Normal Daily Activities described that the claimant *"is now able to return to most normal daily activities however he needs not to be burdened with too much*

responsibility until he has made further progress and rebuild his self-confidence".

155. The October 2019 Report, on what was preventing the claimant from engaging in phased return to work with reasonable adaptations described the author's *"understanding is that interpersonal culture in his workplace is a central trigger for the two episodes of depression"* the claimant had *"experienced. In psychological terms, the reasonable adaptations that are required amount to ensuring" the claimant "has trust that he will be treated fairly and with consideration for his emotional needs as a person recovering from a mental health condition. His employers do not have appear do not appear to have earned his trust in the manner in which they have engaged with him since he left work on sick leave. Despite his improvement I can therefore not recommend that his return to work unless that trust is established, otherwise I believe it is likely to be detrimental and may cause deterioration".*

156. The October 2019 Report did not describe that the author had any reviewed any emails or documented discussions with the respondent. The October 2019 does not describe that the GP records have been reviewed. The October 2019 Report reflected the claimant's description of matters to the author. It described that the claimant would benefit from continued anti-depressant from a further 6 – 12 months and described that the claimant had at the date of the report responded very well to the three key aspects of treatment being sick leave from work, anti-depressant medication and psychological therapy and anticipated that the claimant would benefit from around 10 to 20 sessions of therapy to consolidate the progress and strengthen psychological treatment. The October 2019 Report did not suggest that the claimant was unable to take steps to keep his technical skills up to date by reason of disability. While it described that the claimant at that stage needed not to be burdened with too much responsibility until he had made further progress and rebuilt his self-confidence it did not set out that the claimant would be unable to work after the 6 to 12 month period of recommended anti-depressant medication in any capacity other than in a self-employed capacity.

157. On **Tuesday 29 October 2019,** the claimant's entitlement to full company sick pay as advised above was due to run out.

158. On **Friday 1 November 2019,** the PHI application made for the claimant was refused by Generali.

159. On **Saturday 2 November 2019,** the claimant's employment transferred by virtue of TUPE to the respondent.

160. On **Tuesday 5 November 2019,** the respondent elected to extend Company Sick Pay.

161. On **Friday 8 November 2019,** the respondent was provided with further GP Fit Note *"anxiety with depression – work-related"* for 10 weeks (i.e., to Friday 3 January 2020).

162. On **Monday 11 November 2019,** Generali wrote to the respondent setting out that it had made the decision to decline liability. It set out that it had concluded that the claimant did *"not have a medical condition of such severity that it should prevented him from performing the functional duties of the material and substantial duties of his own occupation throughout the material time of the claim. As such the claimant does not meet the definition of incapacity hence our decision to decline liability for the claim."*

163. On **Friday 29 November 2019,** the claimant emailed Ms Raxter the respondent's Global HR Services – senior Vice President, copied to Ms Smith and Mr Dan Grant Respondent UK & Ireland Head of HR and Ms McCarthy Respondent Head of HR for Europe, in which (under exclusion of reference to negotiations between the claimant solicitor and the respondent) he set out that he *"I would like an explanation as to why your HR team continue to be consistently cruel towards me. Is it not enough that whilst on sick leave for mental health condition (because of their actions)"* Mr Galpin and Mr Bowen *"attacked me for by threatening a disciplinary procedure upon my return. Is it not enough that on 22nd July, while <u>still</u> on sick leave, your own HR department, under Dan Grant, went on to also attack me by threatening to stop my salary if I didn't sign a rehabilitation consent form. Is the damage*

you've done to my mental health and family really still not enough? It would appear not as you never even had the decency to inform me if I would receive a salary this month or not.... Is it really that difficult to understand what that kind of uncertainty stress and anxiety does to somebody with a mental health condition. How high do I have to go in this organisation to find somebody that will treat me with the care and respect that I'm entitled to?" Mr Galpin and Mr Bowen *"initiated this situation. In my opinion the proper course of action would have been to immediately terminate the employment of"* Mr Galpin and Mr Bowen *"for gross misconduct. This would have been on the basis that there is no justifiable reason whatsoever to attack a man with a known mental health condition, with threats, while being on sick leave for the very same condition. Had you taken this correct approach apologised and offered any assistance required to eat in my recovery we would not be in this situation right now. That approach would have been defendable from any perspective. Instead, I'm being forced to go down a path I really shouldn't have to. I'm still an employee of Dell and I such would like an explanation for this latest act of cruelty".* The claimant set out in his email to the respondent's Global HR Services – senior Vice President, the claimant's position that the respondent should dismiss both Mr Galpin and Mr Bowen for gross misconduct for what the claimant inaccurately describes as attacks on himself as a person with a disability. That email was not issued in good faith, the claimant was aware that CSP had been due to expire and was aware that it had been extended as it had been paid on 28 November. The email was issued with the intention of bringing about the termination of employment of both Mr Galpin and Mr Bowen and not raising an allegation of contravention of the Equality Act 2010.

164. On, or about **Saturday 30 November 2019**, the claimant was informed by his then representative that in the course of negotiations with the respondent the issue of CSP was raised. CSP had been due to expire in October, however the claimant was aware on this date that company sick pay had been extended as it had been paid on 28 November 2019. The claimant was advised 19 December 2019 that he would remain on pay in January 2020.

165. On **Tuesday 21 January 2020**, the claimant was issued with a GP Fit Note from Friday 17 Jan 2020 *"anxiety with depression"* to Monday 16 March 2020, a period of around 9 weeks.

166. On **Thursday 30 January 2020**, the claimant presented his 2020 ET1 to the Tribunal.

167. On **Sunday 31 January 2020**, the extended period of CSP ceased. The extension was a one-off act. It was not a practice generally applied to the respondent employees.

168. On **Thursday 6 February 2020**, Ms Smith emailed the claimant setting out that *"I am just reaching out to provide you with additional clarity on the next steps regarding your compensation. As confirmed at the start of January the company had approved an exemption for full Company Sick Pay to be paid for the month. As you are, aware your entitlement to Company Sick Pay under the policy expired in November 2019. Unfortunately, the company will not be extending the Company Sick Pay in further and therefore no Company Sick Pay will be paid in February Payroll. I want I also want to confirm that as previously detailed Generali are unable to approve your Permanent Health Insurance claim based on the information available to them. In the mean time we continue to work towards your recovery and resolution suitable for all parties. I'm pleased you were able to have a face to face meeting with … HCML. They are a valuable resource and I'm pleased you are in agreement to continue with their support. Please let me know if you would like to discuss any of their feedback".*

169. On **Monday 10 February 2020,** the claimant replied. *"I would like to know who made that decision and why."*

170. On **Thursday 13 February 2020,** Ms Smith in reply set out that entitlement to company sick pay exhausted in November 2019 *"Since that point, as a gesture of goodwill, we have kept you on the Payroll for 3 months from November"* 2019 to January 2020, *"however, we're not in a position to continue this any further. The current entitlement under the Sickness Absence Policy extended to 5th November. After that date, the only remaining*

entitlement would be statutory sick pay as Generali declined the claim. Our continued focus remains on supporting your recovery and working towards a resolution". The respondent accurately described that they had, as a gesture of good will, extended to the Company Sick Pay, that is the enhancement over and above Statutory Sick Pay, from November 2020 to January 2020. The respondent's decision to do so was a one-off act having extended the period of company sick pay. It was not a practice generally applied to its employees. Ms Smith accurately described that Generali had declined the claim.

171. On **Friday 14 February 2020,** the claimant set out what while he considered continuing to pay sick pay after a skiing accident would be a goodwill gesture but that *"when you are responsible for an injury to a person… and continue to pay"* company sick pay *"that is not called a goodwill gesture"* and that Ms Smith had not answered his question on *"who had made the decision to stop my pay and why".*

172. On **Wednesday 19 February 2020,** Ms Smith responded that it was *"not a matter of who made the decision. It is based on the Sickness Absence Policy. The entitlement to Company Sick Pay ended on 5th November 2019. Since then, the company extended as a goodwill gesture for November, December and January. We are unable to continue this any further."* She further described that the respondent was still working to support the claimant's recovery although the respondent did not accept that it was responsible for the injury, she understood the claimant had a review with HCML earlier that week and the respondent would review to engage any support or feedback and concluded *"Please let me know if there is anything else you would like to flag from your discussion with them".* The claimant did not respond with any feedback.

173. On **Friday 6 March 2020,** the claimant issued an email setting out what he considered was an Ethics Violation which he asserted was perpetrated by the respondent's Ethics Committee, which email he sent to the respondent's US based Global Head of Ethics Mr McLaughlin. Neither Mr Galpin nor Mr Bowen were copied in, and neither were made aware of same.

174. On **Wednesday 11 March 2020,** the claimant set out by email a complaint to the respondent's European President, requesting that he investigate the conduct of the respondent Ethics Committee headed by the respondent's Global Head of Ethics, regarding what the claimant regarded as a lack of response by the respondent's Global Head of Ethics to an email the claimant described as having issued 3 March 2020. The claimant concluded with a request that Mr McDonald respond to the claimant's personal email address as he was *"still on sick leave and have only logged in to ensure you get this message".*

175. On **Thursday 12 March 2020,** Ms Akbar respondent's Legal Director Ethics and Compliance, EMEA offered her apology for the delay in writing to the claimant to close off the matter he raised with the Ethics Team, describing that when Mr Macko wrote in **September 2019** that was letting the claimant know the outcome of what was described as joint HR and Ethics investigation and that the May 2019 Ethics complaint was closed in September 2019 after thorough investigation.

176. On **Thursday 12 March 2020,** the claimant set out in email to Ms Akbar copied to Mr McDonald and Mr McLaughlin that there were two separate complaints and processes. He expected the matters to be fully investigated and set out that he would like to see copy of *"the report that came out of this "thorough" investigation"* by close of business that day.

177. On **Monday 16 March 2020,** the claimant provided further GP Fit Note for a period of 2 months (the March 2020 Fit Note) to 16 May 2020 which would expire 16 May 2020.

178. On that day the claimant also set out an email to the respondent's European President Mr MacDonald, the claimant's concern regarding the lack of response to his email of **11 March 2020** and made what is described as a Subject Access Request in relation to a complaint to the respondent's Ethics Committee 29 March 2019. The claimant concluded with a request that Mr McDonald respond to the claimant's personal email address as he was *"still on sick leave and have only logged in to ensure you get this message".*

179. On **Tuesday 17 March 2020,** Ms Akbar responded to the claimant and described that *her "role is to assess the investigation into the grievance conducted by HR and to satisfy myself that there is no additional evidence of unethical conduct arising from that case. I followed and reviewed the case conducted by"* Mr Macko *"and I'm satisfied there is no evidence of unethical conduct. If you have any further queries on the above or any matter related to employment then for your convenience I recommend you maintain one point of contact Dell going forward I suggest you contact Dan Grant in HR as needed. Thank you.".*

180. On **Wednesday 18 March 2020**, the claimant emailed Ms Akbar, copying in Mr McDonald in which the claimant raised a number of matters regarding the May 2019 Ethics complaint. The claimant did not set out an allegation that the respondent had contravened the Equality Act 2010.

181. On **Thursday 19 March 2020** Ms Akbar responded in a short email *"Hi Grant, as mentioned in my earlier e-mail please address any queries related to your employment to your single point of contact at Dell,"* Mr Grant.

182. On that day the claimant responded in short email stating *"No. I made the reasons clear my previous e-mail and you should not be asking me to do that"*. The claimant did not provide any specification as to which emails he was referring to.

183. On **Wednesday 15 April 2020,** the claimant sent a short email to Mr McDonald the respondent European President *"You have yet to reply or even acknowledge me or my legitimate complaints. I would like an explanation please".*

184. On **Wednesday 13 May 2020,** HMCL provided update Ms Smith describing that they had called the claimant without success on 6 April and emailing the claimant on 16 April without response and calling him again on 30 April and 12 May without answer.

185. On **Saturday 16 May 2020,** then current existing fit note was due to expire, a further Fit Note was issued confirming the claims was not fit to attend work extending to 27 July 2020.

186. On **Tuesday 19 May 2020,** HMCL called the claimant who couldn't speak as it was his son's birthday, a review call was arranged for 10.30 on Wednesday 20 May.

187. On **Tuesday 19 May 2020,** the claimant sent a further short email to Mr McDonald *"When will you reply to my complaint? Why are you not answering my emails?".*

188. On **Friday 22 May 2020,** the claimant met with his doctor.

189. On **Monday 8 June 2020,** Ms Smith in response to the claimant's request provided a copy of his wage rise information, describing in response to request that appraisals for 2013 to 2016 were completed by the claimant leader and explaining that in relation to appraisals in 2017 and 2018, the respondent was undertaking a search for same.

190. On **Wednesday 10 June 2020,** the claimant described as implausible a suggestion that appraisals could not be located as they were dealt with electronically.

191. On **Wednesday 1 July 2020,** Ms Smith confirmed that appraisals issued to the claimant for the years 2017 and 2018 could not be located as they were *"done offline when HR transitioned its tools".*

192. In early **July 2020** Dell was considering a WFR reducing the team from 11 to 10 with a consultation period to **17 August 2020**.

193. On **Monday 13 July 2020,** Mr Galpin, guided by Mr Bowen and respondent HR set out assessment for the selection pool ratings, weightings and points, in respect of the claimant no period of absence or sickness absence had been taken into account.

194. The claimant scores were the lowest at 240 points whilst the next lowest score within the selection pool above the claimant was 330 points.

195. As of this date the claimant did not have an active grievance, the claimant having withdrawn his May 2019 Grievance on 23 September 2019 and Ms Akbar having set out on 17 March 2020 that she was satisfied that there was no evidence of unethical conduct in response to the claimant's May 2019 Ethics Complaint.

196. On **Tuesday 14 July 2020** Ms Harvey respondent HR Generalist emailed the claimant with a letter headed Role at Risk of Redundancy and described that she was writing regarding a business updated which impacted on the claimant's *role "Following a significant change in the business, we need to consider a change in the workforce. Dell Technologies is currently going through a reorganisation over account and district alignments in the one Dell Technologies organisation. This has results in a reduced Opex, resulting in reduced staff levels to support the new alignment plan. Your role is potentially affected by this proposal and your role is at risk of redundancy. I would like to meet with you virtually (Zoom call) to consult with you regarding the potential redundancy of your role. The meeting is scheduled for Friday 17th July 2020 at 10:30 am".* Attendees were listed as the claimant, Ms Harvey and Mr Bowen described as Director Systems Engineering. *"The consultation process will give us the opportunity to explore ways to avoid redundancy and discuss other options, such as other suitable alternative employment in the company. It is also an opportunity for you to make suggestions or proposals as to how the redundancy could be avoided, as well as raising any other concerns or questions. Additionally, consultation is an important way for the Company to offer any support or assistance you may require. Please be assured the company that the Company will continue to explore the possibilities of avoiding your redundancy and you are encouraged to look for suitable alternative employment the Company. However, should your redundancy be confirmed and we are unable to offer a suitable alternative position then your employment will be terminated by recent redundancy and 31st of August 2020 in that situation you will be eligible to receive a statutory redundancy payment totalling £8,070 plus payment of £21,686 for pay in lieu of your notice. I would like to take this opportunity to stress at the stage you have not been dismissed, nor have you been given notice of termination of*

your employment. No decision as to whether or not you rule is redundant will be made until the end of the consultation process. In the meantime, should you any concerns or queries please do not hesitate contact me." The claimant was not placed at a substantial disadvantage as compared with non-disabled employees, the claimant was able at all relevant times to engage with the redundancy process.

197. On **Wednesday 15 July 2020**, in response to the notice of the Zoom consultation date, and in advance of same, the claimant sent an email to Ms Harvey *"As you are aware, I am currently on sick leave"* and inaccurately described that he was *"therefore unable to attend the Zoom call".* The claimant provided no contemporaneous evidence that he had received any relevant medical advice that he was unable to take part in a remote video discussion of any nature. The claimant was able but elected not to attend to Zoom call on Friday 17 July 2020 at 10.30 am. The clamant in his email of 15 July 2020 set out what he considered were the relevant matters for the respondent being 6 questions to which he sought response from the respondent.

    a. The reasons for the proposals (he accepted that reasons had been provided but indicated that he wished to have more detail although did not give notice of what detail of reasons he considered he required); and

    b. The numbers and descriptions of employees proposed to be dismissed; and

    c. *"The total number of such employees at the establishment";* and

    d. The proposed method of selection; and

    e. The proposed method of carrying out the dismissals; and

    f. The proposed method of calculating any non-statutory redundancy calculation; and

    described that the 6 questions were not an exhaustive list, but gave not notice of what, if other questions he wished responses to. The

claimant concluded *"there should be no reason why you cannot sent that to me to study and any other documents you intend to rely upon during the Zoom call. You will already have this to hand so please send this to me by 5.30pm on 16 July".*

198. The claimant while setting out what he considered were the respondent obligations in law in his email of 15 July 2019 including *"proposed selection criteria"* did not set out that he wished to see the selection criteria. Many employees do not ask for same. The claimant elected not to request sight of the selection criteria during the process. The claimant elected not to seek sight of his scores. The claimant did not make suggestions or proposals as to how the redundancy could be avoided nor did the claimant raise any other concerns or questions, the claimant did not object to Mr Bowen's identified role.

199. The claimant was able to engage in the consultation process at all time.

200. **Friday 17 July 2020** (at 10.30 am) was the date of the Zoom consultation meeting which had been offered on **Tuesday 14 July 2020.**

201. The claimant did not attend but also on that date at 1.45pm (following the claimant's nonattendance at that Zoom consultation earlier that day at which Ms Harvey would have provided responses to the 6 questions posed), Ms Harvey emailed the claimant setting out that objective selection criteria applied. In particular Ms Harvey on Friday 17 July at 1.45 responded to each of the 6 questions identified by the claimant in his email of 15 July 2020:

    a. This has been provided to you in the at risk letter. Dell Technologies is currently going through a reorganisation of our account and district alignments in the one Dell Technologies organisations. This has resulted in a reduced operation expenditure, resulting in a requirement to reduce staff levels to support the new alignment plan.

    b. We have a pool of 11 Advisory Systems Engineers within the UK DPS presales organisation, with a proposal to reduce this by 1.

c. As per the above, there is a pool of 11 Advisory Systems Engineers with the UK DPS presales organisation.

d. Objective selection criteria have been applied based on critical skills, performance and future contribution to the business.

e. Through a redundancy process which we have started with you.

f. This is subject to someone entering into a settlement agreement.

202. On **Friday 31 July 2020** at 12.45 pm Ms Harvie emailed the claimant by email *"I am writing to you in relation to the continuing consultation process. During the process I would encourage you to check the internal vacancies"* providing a link and set out that the respondent *"would like to offer you support through a company called Right management"* providing their details describing that this was 3 months support programme *"to help you find your next role should the role you are currently in become redundant. They will provide support with your CV, interview skills and coaching and applying for jobs. The consultation process will end on 17th August therefore please do let me know if you would like me to arrange a consultation meeting as I note you have declined the previous consultation meeting arranged for 17th July"*

203. The claimant replied that day at 1.23pm *"Thank you for the update. I am sick leave and not well enough to apply for any role. For the purpose of clarity, I never declined the consultation process, only the zoom call. The consultation process can continue over email or letter as previously stated. You can consult with me anytime in this format."*

204. While the claimant had provided fit notes which identified that his GP had confirmed that he was unfit to attend work, the claimant had at all relevant times capacity to consider which if any internal vacancies would be suitable if his current role became redundant. The claimant at all relevant times had capacity to engage with the redundancy process which he accepted could continue via email. The claimant had capacity to, but elected not to, respond offering any comments on the redundancy situation, how it could be avoided, alternatives to redundancy or other engagement with the process. The

claimant did not set out any criticism of the respondent's handling of the consultancy process, nor raise any possible challenge around the selection process. The claimant did not give notice that he wished to consider alternatives seeking to avoid redundancy during the entire process.

205. On **Tuesday 18 August 2020** Ms Harvey issued email confirming the end of the consultation period and next steps and included a letter dated 18 August 2020 which set *out "I'm writing to you following from my previous correspondence in relation to redundancy consultation I confirmed redundancy consultation period ended on 17th August. Unfortunately, there have been no change to the business decision and we've not been able to identify any suitable alternative work for you. As a consequence, the businesses now confirming your redundancy. Your employment will terminate on **31st August** you will not be required to work your notice and the organisation will make a payment in lieu of notice of £21,686. Due to your length of service, you are entitled to statutory redundancy payment of £8,070 which will be paid to you with your final pay instalment. You've accrued 19 days annual leave for 2020 which will be added to your final pay. You can appeal against the company decision to select you for redundancy. You should do so in writing, setting out the reasons for your appeal within 7 days from receipt of this letter to myself … you will then be invited to an appeal meeting so the basis of your appeal can be discussed and considered. If you've any further questions, please do not hesitate contact me. I know this may be an upsetting worrying time for you. I would encourage you to use support services available including the employee assistance programme and right management both of which I have attached the details of please accept my best wishes for your future".*

206. The claimant did not appeal.

207. On **Monday 31 August 2020** the claimant's employment was terminated by reason for redundancy.

208. **Monday 7 September 2020** claimant initiated ACAS Early Conciliation (EC) following the redudundancy.

209. **Wednesday 30 September 2020** second EC concluded.

210. On **Wednesday 4 November 2020** the claimant presented his 2020 ET1.

211. On **Wednesday 6 January 2021** Job Centre Plus/DWP wrote to GP noting that the claimant had been claiming Employment Support Allowance (EAS) they had had recently assessed the claimant's ability to work using Work Capability Assessment, describing that those with potential capability for work enter the *"Work Related Activity group whilst those who have limited or no capability for work-related activity. This patient meets or is treated as meeting the eligibility criteria for Employment Support Allowance [Work related activity group/Support group]. You no longer need to issue an NHS medical certificate for this person's claim to benefits… Proof of illness or disability nay still be required for… employers or insurance companies… If your patient makes another claim for benefits in the future, we will require medical certificates from the date of illness or disability".*

212. As at **Wednesday 6 January 2021** the DWP considered that the claimant would be capable of work at some time in the future, and considered the claimant was capable of taking steps at that stage towards moving into work, although the DWP did not at that time require the claimant to apply for a job or undertake work.

213. On **Tuesday 19 January 2021**, the claimant attended his GP who noted the claimant stating to his GP that he was *"No longer needing"* Fit Not *"cant go back to work for someone else"* and that wants to understand why he feels like this, GP also recorded that claimant describing that he *"previously felt he could take his own life because of work stress" "too dangerous for him"* and they discussing waiting times for referral to psychology support.

214. There is an active job market for employees including employees operating remotely with technical skills comparable to the claimant including in data protection and other areas of IT.

215. Notwithstanding the October 2019 report and intimating of a recommendation of further period of 6 to 12 of anti-depressant medication the claimant made

no subsequent efforts following the date of termination to find alternative employment have electing to spend the time post termination considering whether there was an opportunity to establish operate a self-employed business, in respect of which he had bought domains names on and subsequently created web sites with client examples but did not otherwise establish and or progress by the date of the conclusion of the final hearing.

216. Subsequent to the termination of the claimant's employment other employees including around 4 Systems Engineers have left employment through either redundancy or for other reasons.

Conclusions on witness evidence

217. The Tribunal heard evidence from the claimant.

218. In addition, the Tribunal heard evidence from witnesses called by the respondent.

219. The Tribunal heard evidence from Ms Akbar former Legal Director with the respondent who honestly spoke to documents provided including those of which she was author and accepted that she was unable to recall matters of specific detail to this claim substantially beyond those documents due to the passage of time.

220. The Tribunal heard evidence from Mr Bowen currently the respondent's Senior Director Pre Sales EMEA DPS and who has 8 leaders as direct reports that support the respondent across Europe, Middle East African Region, and whose evidence so far as relevant was straightforward and credible. While Mr Bowen's recollection of the precise reasons for departures of employees who left employment subsequent to the process which culminated in the redundancy of the claimant was limited that did not undermine his honest and accurate recollection of matters specific to the claimant.

221. The Tribunal accepted the evidence of Mr Galpin respondent Enterprise Pre-Sales Manager UKI Enterprise as being wholly straightforward and honest. The Tribunal accepted the evidence of Mr Grant respondent Regional HR Director UK and Ireland as being wholly straightforward and honest. The

Tribunal accepted the evidence of Ms Harvey respondent HR Generalist as being honest and straightforward. The Tribunal accepted the evidence of Mr Macko former respondent HR Generalist as being wholly credible and straightforward and honest. The Tribunal accepted the evidence of Ms Smith respondent Advisor HR Generalist as wholly credible straightforward and honest.

222. Where the claimant's evidence was contradicted by other witnesses the Tribunal does not accept the claimant's evidence. Further where the claimant's evidence was inconsistent with contemporaneous documentation, or otherwise unsupported by a contemporaneous record, the Tribunal does not accept the claimant's evidence. The Tribunal would not wish these reasons to be misunderstood as implying a finding that he lied. The position is simply that, having heard the evidence of those witnesses the Tribunal did not accept the accuracy of the claimant's honest, but it considers inaccurate, recall which the Tribunal considers has been impacted by claimant's view of the respondent when compared to those who gave contradictory accounts.

Submissions

223. Neither party in their written submissions adopted the agreed list of issues. The claimant followed the model he had adopted in his consolidated pleadings of utilising heads of claims with subheadings of (dated) events. The respondent broadly followed the claimant approach of heads of claims although did not identify the dates of the event when it suggested the head of claim had occurred.

224. It is considered unnecessary to set out the claimant submission in full. It is comprehensive extending to some 100 pages, set out in 14 sections over 321 paragraphs and addresses the relevant events relied upon by identify the date of the events complained of broadly in chronological order. In summary the claimant asserts that the claims pled and insisted upon in his submission should be upheld and he should be compensated for consequential loss.

225. It is considered unnecessary to set out the respondent submission in full. It is lengthy extending to some 114 pages set out with headings including

Introduction, Observations on Evidence, (proposed) Facts with subheadings, Relevant law and further set out their response on numbered events utilising the labelling system (although without dates) employed by the claimant in his consolidated pleadings. In summary the respondent argues as its primary position that each of the claims should be dismissed and that the claimant has no consequential losses in all the circumstances.

Dismissal

Relevant Law

Statutory Framework

226. Section 94(1) of the Employment Rights Act 1996 (ERA 1996) provides:

"An employee has the right not to be unfairly dismissed by his employer."

227. Section 98 ERA 1996 states:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

……

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

228. Section 139 ERA 1996 (Redundancy) provides:

"(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to-

(a) the fact that his employer had ceased or intends to cease –

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in a place where the employee was employed by the

employer have ceased or diminished or are expected to cease or diminish.

229. In terms of the s1881(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 where an employer is proposing to dismiss at least 20 employees at an establishment within a period of 90 days or less, the employer must consult about the proposed dismissals, conversely where the proposal is to dismiss less than 20 employees there is no such statutory requirement.

Dismissal

Relevant Case Law

230. In **Polkey v AE Dayton Service Ltd** [1988] ICR 142 (Polkey) at 162 *"… in the case of redundancy, the employer will not normally act reasonably unless he warns and consults any employees affected or the representatives, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation… It is quite a different matter if the tribunal is able to conclude that the employer himself at the time of dismissal acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile could not have altered the decision to dismiss and therefore could be dispensed with."*

231. There is no ACAS statutory Code of Practice for redundancy equivalent to the ACAS Code of Practice on Disciplinary and Grievances which does not apply to redundancy dismissals.

232. The term *"redundancy"* has a technical, legal definition whilst the term "reorganisation" simply means a change in working structures and has no legal meaning. In **Corus and Regal Hotels plc v Wilkinson** [2004] UKEAT 0102/03 the EAT said *"each case involving consideration of the question whether a business reorganisation has resulted in a redundancy situation must be decided on its own particular facts. The mere fact of reorganisation is not in itself conclusive of redundancy or, conversely, of an absence of*

redundancy". It was recognised by the EAT in **Barot v London Borough of Brent** [2013] UKEAT/0539/11 (**Barot**) that what is crucial is whether the restructuring essentially entails a reduction in the number of employees doing work of a particular kind as opposed to a mere repatterning or redistribution of the same work among different employees whose numbers nonetheless remain the same.

233. The EAT in **Safeway Stores plc v Burrell** [1997] ICR 523 (**Burrell**) described a three-stage approach for the Tribunal in assessing whether there was a redundancy:

1. was the employee dismissed? if so,

2. had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish? if so,

3. was the dismissal of the employee caused wholly or mainly by the cessation or diminution.

234. The EAT described that *"There may be a number of underlying causes leading to a true redundancy situation; our stage 2. There may be a need for economies; a reorganisation in the interests of efficiency; a reduction in production requirements; unilateral changes in the employees' terms and conditions of employment. None of these factors are themselves determinative of the stage 2 question. The only question to be asked is: was there a diminution/cessation in the employer's requirement for employees to carry out work of a particular kind, or an expectation of such cessation/diminution in the future [redundancy]?"*

235. The test set out in Burrell was endorsed by the House of Lords in the case of **Murray v Foyle Meats Ltd** [1999] ICR 827 (**Murray**).

236. The EAT in **Davies v Farnborough College of Technology** [2008] IRLR 14 (**Davies**) set out that an employee should be given sufficient information so they may understand the dismissal and be placed in a position to challenge the accuracy of their markings if they wish to do, correct them, and provide

supplemental information, however this may be something short of disclosing actual marking to the employee. What the employer must disclose in order to have acted within the range of reasonable responses will turn on the facts of the case with factors of particular relevance being what the employee asked for and whether the employee challenged the scores awarded to them **Camelot Group plc v Hogg** [2011] UKEAT/0019/10 (**Hogg**).

EA 2010 Time Issue

Statutory provisions and case law

237. In terms of s123 of the EA 2010, where allegations of discrimination stretch over a period, only part of which falls within the primary limitation period the Tribunal requires to assess whether individual allegations together constitute an *"act extending over a period"* or else are to be treated as a series of discrete or isolated specific actions each with its own time limit.

238. As set out above, any complaint about something that happened before **Thursday 22 August 2019** was potentially brought out of time, so the Tribunal may not have jurisdiction to deal with it.

239. Factors that are almost always relevant to an exercise of the discretion are the length of and the reasons for the delay, and whether the delay has prejudiced the respondent **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] ICR 1194 (**Abertawe**) at paragraph 19. However: *"There is no … requirement that the Tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the Tribunal ought to have regard (Abertawe at para 25)",* indeed a Tribunal doesn't require to operate to a checklist of factors given the terms of Section 123 of the Equality Act 2010, so long as it does not leave a significant factor out of account.

240. If the claim has been brought outside the primary limitation period, the Tribunal has jurisdiction to consider the claim if it was brought within such other period as the Tribunal considers "just and equitable."

241. In **Robertson v Bexley Community Centre t/a Leisure Link** [2003] IRLR 434 (**Robertson**), the Court of Appeal identified that for Tribunals considering the exercise of this discretion, *"there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time, so the exercise of discretion is the exception rather than the rule."*

242. More recently, the Court of Appeal in **Adedeji v University Hospital Birmingham NHS Foundation Trust** [2021] ICR D5 (**Adedeji**) reviewed case law around the extension of time in the context of s33 of the Limitation Act 1980. In that case, a surgeon resigned after a lengthy capability and conduct investigation. Having taken legal advice and been advised twice of the time limit, he presented his claim 3 days late. The Tribunal dismissed his claims as out of time. The EAT and Court of Appeal rejected his appeals. The Court reviewed several recent cases involving the list of Limitation Act factors cited in British Coal v Keeble, commenting: "*The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) [Equality Act] is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular, "the length of, and the reasons for, the delay." If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking."*

243. The Tribunal has a broad discretion under the Equality Act 2010 to consider whether to allow a claim out of time.

244. Having regard to whether the acts complained of were acts extending over a period, the Court of Appeal set out in **Hendricks v Metropolitan Police Commissioner** [2002] ICR 530 CA (**Hendricks**) that the Tribunal should look

at whether there is an ongoing situation or a continuing state of affairs in contrast to a succession of unconnected or isolated acts.

245. Having regard to whether it is just and equitable to extend time the EAT in **Robinson v Post Office** [2000] IRLR 804 (**Robinson**) (confirmed in the Court of Appeal **Apelogun-Gabriels v Lambeth LBC** [2002] ICR 713 (**Apelogun**)) identified that delay pending the resolution of internal grievance procedures may not justify a delay.

Burden of Proof Discrimination Claims

Relevant Law

246. **s136 (1) to (3) of EA 2010 (the burden of proof provisions)** set out:

> *"(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision."*

247. In **Madarassy v Nomura International plc** [2007] IRLR (**Madarassy**) Mummery LJ held at [57] that *'could conclude'* [The EA 2010 uses the words *'could decide',* but the meaning is the same] meant: '[…] that *"a reasonable Tribunal could properly conclude" from all the evidence before it.'*

248. However, a simple difference of treatment is not enough to shift the burden of proof, something more is required: **Madarassy** per Mummery LJ at para 56: *'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.'*

PCP

Relevant case law

249. In **Ishola v Transport for London** [2020] IRLR 368 **(Ishola**) the Court of Appeal considered an appeal in relation to termination on grounds of medical incapacity. The former employee appealed, arguing that too narrow and technical an approach had been taken to the reasonable adjustments claim, in that the tribunals below should properly have found that the employer had a PCP of requiring the claimant to return to work without concluding a proper and fair investigation into grievances raised by him, which he said were not properly and fairly investigated prior to his dismissal. The Tribunal had held there was no PCP operated by the former employer because the alleged requirement was a one-off act in the course of dealings with one individual. The EAT upheld that conclusion. The claimant contended that an ongoing requirement or expectation that a person should behave in a certain manner (here, return to work despite the outstanding grievances) was a *'practice'* within the meaning of s 20(3). At the Court of Appeal Simler LJ set out that:

> *"37 In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.*
>
> *38 In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that*

'practice' here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one.

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

EHRC Code of Practice

The Statutory provisions

250. s15 (4) of Equality Act 2006 provides that, the EHRC 2011 Statutory Code of Practice of, shall be taken into account, wherever it appears relevant to the Tribunal to do so. The Tribunal has taken into the account the EHRC 2011 Code of Practice where it appears relevant to do so.

251. The Tribunal notes that the content of the former s.18B DDA1995 is now largely replicated by paragraph 6.23 onwards of EHRC Code of Practice:

- Extent to which taking the step would prevent the effect in relation to which the duty is imposed
- Extent to which it is practicable for the employer to take the step
- The financial and other costs which would be incurred by the employer in taking the step and the extent to which it would disrupt any of his activities
- The extent of the employer's financial and other resources
- The availability to the employer of financial or other assistance with respect to taking the step
- The nature of the employer's activities and the size of his undertaking.

Time Bar

Discussion and decision

252. The Tribunal concludes that aspects of the events complained of from 5 March 2019 to 22 August 2019 were not discrete and were instances constituting acts extending over the period, in that they reflected an ongoing situation or continuing state of affairs in that they related to the claimant's engagement with his managers in March 2019 and his perception that those managers were acting in a discriminatory matter having regard to the claimant's disability and which was followed by the claimant's disability related absence.

253. To the extent that aspects of the events complained of from 5 March 2019 to 22 August 2019 did not fall within an ongoing situation or continuing state of affairs, the Tribunal concludes having considered all the relevant evidence that the delay in presenting discrimination claims in the 2019 ET1, presented on 20 December 2019 arose in the first instance out of the claimant having initiated the May 2019 Grievance, which the claimant subsequently withdrew

on 23 September 2019 and further then then ongoing May 2019 Ethics Complaint, the terms of which the respondent set out was not accepted in 17 March 2020.

254. The claimant was employed by the respondent at the material time and had presented a Grievance and an Ethics Complaint which was more extensive than the May 2019 Grievance. The Tribunal does not consider that the claimant would have been entitled to exhaust both the Grievance and Ethics complaint process by awaiting the outcome of both, however the claimant did not await the outcome of the May 2019 Ethics complaint before presenting the December 2019 claim.

255. In considering matters the Tribunal has considered the balance of prejudice including having regard to the more extensive nature of the May 2019 Ethics complaint. Further the Tribunal does not conclude that it was not possible to have a fair hearing in relation to the events complaints of occurring prior to **22 August 2019** (being the earliest date an event could be in time) specifically the events from 5 March 2019 to 22 August 2019 in all the circumstances, including having regard to the documentation available.

256. In conclusion the Tribunal concludes that it has jurisdiction to consider the events complained of including on 5 March 2019.

Disability Discrimination Claims

Discussion and Decision

257. The Tribunal has considered each of the separate heads of claim in chronological order in relation to alleged disability discrimination:

258. In relation to the event on **5 March 2019**, so far as relevant to the **s19 EA 2010** (Indirect discrimination) claim. There was no relevant provision, criterion or practice which was generally applied or would be generally applied by the respondent and which put the claimant at one of more particular disadvantages when compared with a non-disabled employee. The claimant's

reason for not attending the dinner was not disability related. The claimant's reason for not attending the evening dinner was as set out in his WhatsApp message, he felt aggrieved at missing his goddaughter's 21st party. The claimant elected not to provide that reason copying his manager in advance. The claimant was dissatisfied that Mr Galpin a former colleague had been promoted to the role of manager. This claim is dismissed.

259. In relation to the event on **5 March 2019**, so far as relevant to as relevant to the pled **s 20 & 21 EA 2010**, (reasonable adjustments claim). There was no relevant provision, criterion or practice which was generally applied or would be generally applied by the respondent, and which put the claimant at a substantial disadvantage when compared with a non-disabled employee. In circumstance where the claimant had elected to advise Mr Bowen only of his disability and directed that he should not share this information, which direction Mr Bowen followed, Mr Galpin could not reasonably have known that the claimant was disabled. This claim is dismissed.

260. In relation to the event on **6 March 2019**, so far as relevant to the **s15 EA 2010** (discrimination arising) claim, the respondent's treatment of the claimant was an oversight and did not arise in consequence of the claimant's disability. This claim is dismissed.

261. In relation to the event on **6 March 2019**, so far as relevant to the **s19 EA 2010** (Indirect discrimination) claim. There was no relevant provision, criterion or practice which was generally applied or would be generally applied by the respondent, and which put the claimant at one of more particular disadvantages when compared with a non-disabled employee. The claimant was not invited due to oversight which was rectified when identified. This claim is dismissed.

262. In relation to the event on **6 March 2019**, so far as relevant to as relevant to the pled **s 20 & 21 EA 2010**, (reasonable adjustments claim). The respondent could not reasonably be expected to know that the claimant was a person with a disability at the relevant time given that the claimant had elected to advise Mr Bowen only of his disability and directed that he should not share this

information. There was no relevant provision, criterion or practice which was generally applied or would be generally applied by the respondent and which put the claimant at a substantial disadvantage when compared with a non-disabled employee. The claimant was not invited due to oversight, which was rectified when identified. In circumstance where the claimant had elected to advise Mr Bowen only of his disability and directed that he should not share this information. In any event he respondent could not have reasonably be expected to know that the claimant was likely to be placed at any disadvantage. This claim is dismissed.

263. In relation to the event on **18 March 2019**, so far as relevant to the **s15 EA 2010** (discrimination arising) claim, the respondent's treatment of the claimant, specifically in the context of the claimant raising the possibility of any responsive action from Mr Mackie Mr Bowen description that there shouldn't be, but seeking to be pragmatic set-out, in fact, there could be, in the sense that Mr Mackie could in response raise a grievance against the claimant for what was suggested (though denied by the claimant) as the language used by the claimant in engaging with Mr Mackie around a year earlier, did not arise in consequence of the claimant's disability. This claim is dismissed.

264. In relation to the event on **18 March 2019**, so far as relevant to the **s19 EA 2010** (Indirect discrimination) claim. There was no relevant provision, criterion or practice which was generally applied or would be generally applied by the respondent, and which put the claimant at one of more particular disadvantages when compared with a non-disabled employee. This claim is dismissed.

265. In relation to the event on **18 March 2019**, so far as relevant to as relevant to the pled **s 20 & 21 EA 2010**, (reasonable adjustments claim). The claimant set out in terms of his detailed email of **8 March 2019** information from which Mr Galpin and the respondents generally could by the date of issue, though not before, be reasonably be expected to know that the claimant was a person with a disability. There, however, was no relevant provision, criterion or practice which was generally applied or would be generally applied by the

respondent and which put the claimant at a substantial disadvantage when compared with a non-disabled employee, in relation to Mr Bowen's comment. It was a one-off event. This claim is dismissed.

266. In relation to the event on **29 April 2019**, so far as relevant to the **s15 EA 2010** (discrimination arising) claim, the respondent's treatment of the claimant, specifically Mr Galpin raising areas of performance which he did not do in an aggressive manner, did not arise in consequence of the claimant's disability. This claim is dismissed.

267. In relation to the event on **26 April 2019**, and so far, as relevant to the pled **s19 EA 2010** (Indirect Discrimination) claim, the Tribunal does not accept that what was pled as PCP (Performance Management Practices- Not abiding by the ethics Policy and Anti Mental Health Discrimination Initiatives /policy. Exacerbation of mental health condition) amounts to a PCP generally applied by the respondent to its employees. The respondent concedes that its policy raising performance issues is a Provision Criterion or Practice, that is it was generally applied by the respondent to its employees. The respondent did so by Mr Galpin identifying to team members, on the information available to him, areas where he considered performance could be improved to meet expectations. The respondent applied that PCP to the claimant as of 26 April 2019. It applied that PCP to non-disabled team members. On the evidence before the Tribunal that PCP did not put other disabled persons at one or more particular disadvantages when compared with non-disabled employees and thus did not put the claimant at disadvantage. This claim is dismissed.

268. In relation to the event on **26 April 2019**, and so far, as relevant to the pled **s 20 & 21 EA 2010**, reasonable adjustments claim, the respondent's policy of raising performance issues is a PCP, it was generally applied by the respondent to its employees. The respondent did so by Mr Galpin identifying to team members, on the information available to him, areas where he considered performance could be improved to meet expectations. That PCP did not put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons were not disabled at any relevant time. This claim is dismissed.

269. In relation to the event on **8 May 2019**, and so far, as relevant to the **s19 EA 2010** (Indirect discrimination) claim Mr Galpin's email of 8 May 2019, did not described the implementation of a Performance Improvement Plan (known as a PIP) and would not reasonably be read as a threat to implement a PIP upon return from sick leave. Mr Galpin's email of 8 May 2019 was not in contravention of the respondent's policies including the respondent's Global Improvement Plan. Mr Galpin's email of 8 May 2019 did not arise in consequence of a disability. It set out genuine and reasonable expectations of the claimant's manager unrelated to the claimant's disability. This claim is dismissed.

270. In relation to the claimant's email of **15 May 2019**, so far as relevant to the pled **s27 EA 2010** Victimisation complaint, issued to the respondent's HR asserting that he would like to raise a formal grievance does not constitute the bringing of proceedings. While the claimant set in broad terms that he was victimised and bullied he does not set out an allegation that it was because of a disability. While he describes that he would be placed on a performance plan which the claimant argues was intended to be understood to be a (formal) Performance Improvement Plan, he did not describe it as such; he does not set out that any alleged performance issue arose out disability, he describes that he would be placed on same on his return to work and not while on any disability related absence, not because of disability. It was not a protected act.

271. What was an inaccurate description in the email **15 May 2019** that commission payment to the claimant would stop if the claimant was off for more than 4 weeks amounted to a protected act within the meaning of s27(2) of EA 2010 in that it was an allegation that commission would stop ***because*** of a disability related absence. The respondent did not, however, subject the claimant to any detriment because of this protected act. The respondent did not terminate company sick pay nor select the claimant for redundancy and terminate his employment because of that protected act. Company sick pay had due to expire and while the respondent elected to extend sick pay for a limited period that extension came to an end, that ending was not because of the claimant's disability nor because of the disability related absence.

272. In relation to the claimant's email of **23 May 2019 (the May 2019 Ethics Complaint)**, so far as relevant to the pled **s27 EA 2010** Victimisation complaint and while the claimant deployed the term whistleblowing, victimisation and bullying, he did not set out an allegation that the respondent had contravened the Equality Act 2010. It was not a protected act.

273. Both the claimant's inaccurate allegations, that Mr Galpin retaliated against the claimant's detailed complaint of 3 May and that commission payment to the claimant would stop if the claimant was off for more than 4 weeks amounted to a protected act within the meaning of s27(2) of EA 2010 in that they were allegations both occurred ***because*** of a disability related absence.

274. The respondent did not, however, subject the claimant to any detriment as alleged because of this protected act. The respondent did not terminate CSP nor select the claimant for redundancy and terminate his employment because of that protected act.

275. In relation to the event on **10 June 2019**, and so far, as relevant to the **s15 EA 2010** (Indirect discrimination) claim, the respondent's communication did not arise in consequence of the claimant's disability. It arose in circumstances where claimant was able, but elected not to, attend the remote meeting offered with the respondent independent manager Mr McGowan. The respondent communication of 10 June 2019, in any event, amounted to a proportionate means of allowing the claimant's the claimant participation in relation to issues he raised within the May 2019 Grievance. This claim is dismissed.

276. In relation to the event on **10 June 2019**, and so far, as relevant to the **ss 20 & 21 EA 2010** (reasonable adjustment) claim, the respondent's communication arose as the respondents had not been able to progress the grievance through their processes, reflecting the claimant's decision not to respond to the request to confirm his availability to attend the remote meeting with the Independent Manager Mr McGowan on Monday 3 June 2019. It did not reflect the claimant's disability. The claimant was in June 2019 capable of confirming his position on attending a remote meeting. There was no evidence

that the claimant was unable to attend such a remote meeting, the Tribunal is satisfied that the claimant could have attended a remote with the independent manager Mr McGowan. The respondent process required to close within 30 days of inactivity was a PCP, was practice which would be generally applied to the respondent employees. The respondent applied that PCP to the claimant the material time. That PCP did not however place the claimant at a particular disadvantage in that he was able to attend the meeting with the independent manager. The respondent communication of 10 June 2019, in any event, amounted to a proportionate means of allowing the claimant's the claimant participation in relation to issues he raised within the May 2019 Grievance. This claim is dismissed.

277. In relation to the claimant's email of **15 July 2019** to Mr Norbert Mackie HR Advisor regarding his handling of the May 2019 Grievance, so far as relevant to the pled **s27 EA 2010** Victimisation complaint while the claimant asserted that he was on sick leave due to mental problems as a result of the two individuals he had raised a grievance about and criticised the respondent for their handling of his grievance, he did not set out an allegation that the respondent had contravened the Equality Act 2010. The claimant's **email of 15 July 2019** was not a protected act within the meaning of s27(2) of EA 2010.

278. In relation to Ms Smith's letter of **22 July 2019** and so far, as relevant to the **s15 EA 2010** (discrimination arising) claim, the respondent's treatment of the claimant reflected the claimant having elected not to accept the offer of remote meeting with the independent manager Mr McGowan. The claimant elected not to provide the full detail of his complaint (that is as he described in the May 2019 Ethics complaint), despite having been requested to. The claimant's absence arose in consequence of the claimant's disability. The unfavourable treatment complained of was set out as.

    a. threat to stop sick pay unless the claimant sign consent forms. The Tribunal concludes however that the respondent to complete forms was a proportionate means of achieving a legitimate aim, namely continuation of company sick pay and insurance thereafter. This element of this claim is dismissed.

b. Setting an expectation that the claimant agrees a meeting schedule with Mr Bowen. The Tribunal concludes that the respondent, for a period of 10 days treated the claimant unfavourably in setting an expectation that the claimant agrees a meeting schedule with Mr Bowen because of claimant's disability related absence. That request was not, in the circumstances of the claimant having raised a Grievance including against Mr Bowen, a proportionate means of achieving a legitimate aim. This element of this claim succeeds.

279. In relation to Ms Smith's letter of **22 July 2019** and so far, as relevant to the **s19 EA 2010** (indirect disability discrimination) claim, the Tribunal does not accept the claimant's description of a PCP. The PCP was applying the respondent's sick pay management practices. The process set out by Ms Smith was a PCP applied by the respondent to its workforce generally. It was applied to the claimant. The PCP of requiring the claimant to agree a communication schedule with Mr Bowen did not put the claimant and other disabled employees at one of more particular disadvantages when compared with non-disabled employees. The PCP of engaging with the respondent sick pay management practice was a proportionate means of achieving a legitimate aim of rehabilitating employees into work and potentially extending beyond the period covered by Company Sick Pay. This claim is dismissed.

280. In relation to Ms Smith's letter of **22 July 2019** and so far, as relevant to the **ss 20 & 21 EA 2010** (reasonable adjustment) claim, Ms Smith was aware that the claimant was a person with a disability. The process set out by Ms Smith was a PCP applied by the respondent to its workforce generally. They did not put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled at any relevant time, in seeking to support rehabilitation of employees and their return to work. This claim is dismissed.

281. In relation to the claimant's email of **26 July 2019** to Ms Smith in which the claimant pleads he objected to the threat made to withdraw Company Sick Pay, so far as relevant to the pled **s27 EA 2010** Victimisation complaint, the claimant did not set out an allegation that the respondent had contravened

the Equality Act 2010. While the email referred to a grievance, fairly read it did not set out that conduct on the part of Mr Bowen was discriminatory within terms of the Equality Act 2010. Beyond describing that he did not want to communicate with Mr Bowen because he held Mr Bowen partially responsible for "the illness", the claimant did not otherwise describe, in this email, what the nature of the criticism in any complaint against Mr Bowen was or provide further clarity on same. The claimant's email was unclear. The claimant opened by suggesting, inaccurately, that there had been change in the language adopted by Ms Smith. While the claimant did not set out, in this email, in what previous emails he had set out his concerns, those were as listed in his email at 2.40pm the preceding day, each of which had been addressed by Ms Smith. The claimant did not identify what, he considered was outstanding from the responses already provided by Ms Smith. He did not do so as Ms Smith had in fact already provided responses to them and he did not wish to accept them. The claimant described an effect of cessation of Company Sick Pay threatened his ability to provide for his family, he did not set out an allegation that the respondent had contravened the Equality Act 2010. The claimant's email on **26 July 2019** was not a protected act within the meaning of s27(2) of EA 2010.

282. In relation to the claimant's email of **14 August 2019** to Mr Macko so far as relevant to the pled **s27 EA 2010** Victimisation complaint, the claimant did not set out an allegation that the respondent had contravened the Equality Act 2010. The claimant's email set out a direction to that Mr Macko should confirm his view before the claimant would decide on whether to re-open and continue with his May 2019 Grievance. The claimant's email on **14 August 2019** was not a protected act within the meaning of s27(2) of EA 2010.

283. In relation to the complaint on **16 August 2019** and so far, as relevant to the **s15 EA 2010** (discrimination arising) claim, the claimant pleads, as unfavourable treatment that HR handling failed to address timeously legitimate concerns about occupational health interfering with his then current medical concerns (since 9 July). No relevant medical report was provided setting out that the claimant had any reasonable or genuine concern nor that

any such concern was held by a treating physician. The respondent did not fail to address timeously any legitimate concerns around Occupational Health interfering with the claimant's medical treatment at that time. The claimant did not have a genuine and reasonable belief that Occupational Health would interfere with the claimant's treatment. The respondent responded in reasonable terms to the matters raised by the claimant. The Tribunal concludes that the claimant did not have such a genuine and reasonable fear. There was no unfavourable treatment. This claim is dismissed.

284. In relation to the complaint on **16 August 2019** and so far, as relevant to the **s19 EA 2010** (indirect discrimination) claim, the claimant pleads that HR handling failed to address timeously legitimate concerns about occupational health interfering with his then current medical concerns (since 9 July). The Tribunal concludes that the claimant did not have genuine and reasonable concerns. The PCP pled - grievance management practices- not abiding by the Ethics Policy and Anti Mental Health Discrimination initiatives/policy was not a provision, criterion or practice which was generally applied or would be generally applied by the respondent to it employees. No such PCP was applied to the claimant the relevant time. The PCP relied upon did not put the claimant at a particular disadvantage when compared with non-disabled employees at the relevant time. This claim is dismissed.

285. In relation to the complaint on **16 August 2019** and so far, as relevant to the **ss20 &21 EA 2010** (reasonable adjustments) claim, the claimant pleads that HR handling failed to address timeously legitimate concerns about occupational health interfering with his then current medical concerns (since 9 July). The Tribunal concludes that the claimant did not have genuine and reasonable concerns. The PCP pled - grievance management practices- not abiding by the Ethics Policy and Anti Mental Health Discrimination initiatives/policy was not a provision, criterion or practice which was generally applied or would be generally applied by the respondent to it employees. No such PCP was applied to the claimant the relevant time. The PCP relied upon did not put the claimant at a substantial disadvantage in relation to a relevant

matter in comparison with non-disabled employees at the relevant time. This claim is dismissed.

286. In relation to the claimant's email of **5 September 2019** to Ms Smith so far as relevant to the pled s27 EA 2010 Victimisation complaint, which the claimant describes as complaining about the handling of the occupational health and the employee income protection insurance process and how that affected his mental health, the claimant did not set out an allegation that the respondent had contravened the Equality Act 2010. The claimant's email on **5 September 2019** was not a protected act within the meaning of s27(2) of EA 2010.

287. In relation to the complaint on **18 September 2019** and so far, as relevant to the **s19 EA 2010** (Indirect Discrimination) claim, the claimant pleads that HR ended his (May 2019) Grievance. The claimant asserts that the grievance had been outstanding since 15 May 2019. It was outstanding for a period of almost 3 months, it had been outstanding during that period as the claimant had declined, without reason the offered meeting with the independent manager Mr McGowan and had declined to be interviewed. Mr Macko's email was his assessment. The claimant had tasked him to set out his assessment. There was no requirement to provide any separate document or report, the claimant had in any event not requested same at the time. Mr Macko and HR did not conclude the grievance. The claimant concluded his own grievance by withdrawing it on 23 September 2019. There was no PCP which the claimant at a particular disadvantage when compared with non-disabled employees at the relevant time. There was no relevant PCP. This claim is dismissed.

288. In relation to the complaint on **18 September 2019** and so far, as relevant to the **ss20 &21 EA 2010** (reasonable adjustments) claim the claimant pleads that HR ended his (May 2019) Grievance. HR did not end the claimant's grievance. The claimant concluded his own grievance by withdrawing it on 23 September 2019. There was no PCP which put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with non-disabled employees at the relevant time. There was no relevant PCP. This claim is dismissed.

289. In relation to the claimant's email of **23 September 2019** to Ms Smith so far as relevant to the pled **s27 EA 2010** Victimisation complaint, which the claimant describes as objecting to the result of his alleged investigation finding no wrongdoing and his intention to have the situation independently verified. The claimant did not set out an allegation that the respondent had contravened the Equality Act 2010. The claimant's **email of 23 September 2019** was not a protected act within the meaning of s27(2) of EA 2010. This claim is dismissed.

290. In relation to the claimant's email of **29 November 2019** to Ms Raxter, and others including Ms Smith so far as relevant to the pled **s27 EA 2010** Victimisation complaint, which the claimant describes as objecting to the overall 'cruel' treatment and the impact on my mental health detriment was not issued in good faith, while the claimant referenced CSP, which was due to expire in October he was aware that it had been paid for November on 28 November. The claimant set out in his that the respondent should dismiss both Mr Galpin and Mr Bowen for gross misconduct for what the claimant inaccurately describes as attacks on himself as a person with a disability. That email was not issued in good faith, the claimant was aware that CSP had been due to expire although the claimant was aware that it had been extended as it had been paid on 28 October, it was issued with the intention of bringing about the termination of employment of both Mr Galpin and Mr Bowen rather than setting out an allegation that the respondent had contravened the Equality Act 2010. It was not a protected act within the meaning of s27(2) of EA 2010.

291. The claimant's **email of 29 November 2019** was not a protected act within the meaning of s27(2) of EA 2010.

292. In relation to the complaint on **30 November 2019** and so far, as relevant to the **s15 EA 2010** (discrimination arising) claim, the claimant pleads, as unfavourable treatment requests were made via his solicitor to understand if he would be paid in November 2019 and beyond. The claimant was aware that CSP had been extended as it had been paid on 28 November 2019. The claimant was advised 19 December 2019 that he would remain on pay in

January 2020. On the available information the Tribunal conclude that any communication between the respondent and the claimant solicitor at or about this time which culminated in the claimant being advised that by his solicitor that requests were made via his solicitor to understand if he would be paid in November 2019 and beyond, related to negotiation, are inadmissible and cannot be founded upon a complaint. This claim is dismissed.

293. In relation to the presentation of the claimant's **2020 ET1** on **30 January 2020** so far as relevant to the pled **s27 EA 2010** Victimisation complaint, in accordance with s27(2)a of EA 2010 the 2020 was the bringing of proceedings under the EA 2010. The presentation of the 2020 ET1 was a protected act.

294. The respondent did not, however, subject the claimant to any detriment as alleged because of this protected act. The respondent did not terminate CSP nor select the claimant for redundancy and terminate his employment because of that protected act. The CSP which had been extended at the instance of the respondent as a one-off act.

295. In relation to the complaint on **31 January 2020** and so far, as relevant to the **ss20 & 21 EA 2010** (reasonable adjustments) claim the claimant pleads that Sick Pay was stopped even though he had produced evidence on multiple occasions showing why the respondent had exacerbated my condition and prevented him from returning to work. The PCP which applied was that CSP would expire in October, after 26 weeks absence. The company had extended the CSP, that was a one-off event and its expiry was also a one off event and was not a PCP. The was no relevant PCP. The claimant's claim in terms of s20 & 21 EA 2010 in respect of event of 31 January 2020 does not succeed. This claim is dismissed.

296. In relation to the claimant's email of **6 March 2020** to Mr McLaughlin so far as relevant to the pled **s27 EA 2010** Victimisation complaint, which the claimant describes as reporting a further ethics violation in the form of the Ethics committee not investigating the original complain and a formal request was made to investigate, the claimant did not set out an allegation that the respondent had contravened the Equality Act 2010. The claimant's **email of**

6 March 2020 was not a protected act within the meaning of s27(2) of EA 2010.

297. In relation to the claimant's email of **11 March 2020** to Mr McDonald so far as relevant to the pled **s27 EA 2010** Victimisation complaint, which the claimant describes as complaining of no response from Mr McLaughlin and to formally investigate the conduct of the Ethics committee, the claimant did not set out an allegation that the respondent had contravened the Equality Act 2010. The claimant's **email of 11 March 2020** was not a protected act within the meaning of s27(2) of EA 2010.

298. In relation to the claimant's email of **12 March 2020** to Ms Akbar, copied to Mr McDonald and Mr McLaughlin so far as relevant to the pled **s27 EA 2010** Victimisation complaint, which the claimant describes as objecting to Ms Akbar's investigation explanation and in which a request was made to see a copy of the findings. The claimant did not set out an allegation that the respondent had contravened the Equality Act 2010. The claimant's email of **12 March 2020** was not a protected act within the meaning of s27(2) of EA 2010.

299. In relation to the claimant's email of **16 March 2020** to Mr McDonald so far as relevant to the pled **s27 EA 2010** Victimisation complaint, which the claimant describes as a formal complaint and a request that he investigate the conduct of the respondent's Ethics Committee, the claimant did not set out an allegation that the respondent had contravened the Equality Act 2010. The claimant's email of **16 March 2020** was not a protected act within the meaning of s27(2) of EA 2010.

300. In relation to the claimant's email of **19 March 2020** to Ms Akbar so far as relevant to the pled **s27 EA 2010** Victimisation complaint, which the claimant describes as pointing out that Ms Akbar should not be asking me to direct my complaints to Mr Grant and which referred to previous (unspecified) emails where it, the claiamnt argues, it was made clear HR were part of the May 2019 Ethics complaint, the claimant did not set out an allegation in his email of 18 March nor 19 March 2019 that the respondent had contravened the Equality

Act 2010. The claimant's email of **19 March 2020** was not a protected act within the meaning of s27(2) of EA 2010.

301. In relation to the claimant's email of **15 April 2020** to Mr McDonald so far as relevant to the pled **s27 EA 2010** Victimisation complaint, which the claimant describes as requesting an explanation as to why he had not responded to a legitimate complaint, the claimant did not set out an allegation that the respondent had contravened the Equality Act 2010. The claimant's email of **15 April 2020** was not a protected act within the meaning of s27(2) of EA 2010.

302. In relation to the claimant's email of **19 May 2020** to Mr McDonald so far as relevant to the pled **s27 EA 2010** Victimisation complaint, which the claimant describes as asking why he had not responded to my complaint and as to when he would, the claimant did not set out an allegation that the respondent had contravened the Equality Act 2010. The claimant's email of **19 May** (pled as April but corrected in the hearing) **2020** was not a protected act within the meaning of s27(2) of EA 2010.

303. In relation to the complaint on **14 July 2020** and so far, as relevant to the **ss20 & 21 EA 2010** (reasonable adjustments) claim the claimant pleads that he was informed that he was at risk of redundancy. The PCP which applied was the practice of notifying at risk employees including the provision of a zoom consultation meeting. That PCP did not put the claimant at a disadvantage in relation to a relevant matter in comparison with persons who were not disabled. The claimant was able to attend the Zoom consultation and participate in the consultation process. The claimant's claim in terms of s20 & 21 EA 2010 in respect of event of 14 July 2020 does not succeed. This claim is dismissed.

304. In relation to the complaint on **14 July 2020** and so far, as relevant to the **ss20 & 21 EA 2010** (reasonable adjustments) claim the claimant pleads that he was only offered 3 days' notice of the zoom meeting. The PCP which applied was the practice of offering 3 days' notice of a zoom consultation meeting in that process. That PCP did not put the claimant at a disadvantage in relation

to a relevant matter in comparison with persons who were not disabled. The claimant was able to attend the Zoom consultation and participate in the consultation process. The claimant's claim in terms of s20 & 21 EA 2010 in respect of event of 14 July 2020 does not succeed. This claim is dismissed.

305. In relation to the complaint on **15 July 2020** and so far, as relevant to the **ss20 & 21 EA 2010** (reasonable adjustments) claim the claimant pleads that he sent an email requesting visibility of the documents that will be relied upon in order to prepare for the consultation. The claimants request was a one off act, however the respondent replied in full to the questions set by the claimant. The PCP which operated was the practice of providing information which was requested by at risk employees. The respondent provided the information requested. The claimant did not request his scores had he done so the respondent would have provided sufficient information as to permit him to challenge the scores. The operative PCP of providing responses to questions put to the respondent did not put the claimant at a disadvantage in relation to a relevant matter in comparison with persons who were not disabled. The claimant's claim in terms of s20 & 21 EA 2010 in respect of event of 15 July 2020 does not succeed. This claim is dismissed.

306. In relation to the complaint on **15 July 2020** and so far, as relevant to the **ss20 & 21 EA 2010** (reasonable adjustments) claim the claimant pleads that he sent an email setting out what he asserted were the respondents' responsibilities. The claimants request was a one off act, however the respondent replied in full to the questions set by the claimant. The PCP which operated was the practice of providing information which was requested by at risk employees. The respondent provided responses to the matters identified. The claimant did not request his scores had he done so the respondent would have provided sufficient information as to permit him to challenge the scores. The operative PCP of providing responses to questions put to the respondent did not put the claimant at a disadvantage in relation matter to a relevant in comparison with persons who were not disabled. The claimant's claim in terms of s20 & 21 EA 2010 in respect of event of 15 July 2020 does not succeed. This claim is dismissed.

307. In relation to the complaint on **31 July 2020** and so far, as relevant to the **ss20 & 21 EA 2010** (reasonable adjustments) claim the claimant pleads that the respondent asked him to review internal vacancies for jobs that he would like to apply for. The PCP which operated was the practice of providing information to the employees to enable them to identify jobs that they would wish to apply for. The claimant was capable of doing so, although absent from work his disability did not impede him from review internal vacancies for jobs that he would like to apply for. The operative PCP did not put the claimant at a disadvantage in relation to a relevant matter in comparison with persons who were not disabled. The claimant's claim in terms of s20 & 21 EA 2010 in respect of event of 15 July 2020 does not succeed. This claim is dismissed.

308. In relation to the complaint on **31 July 2020** and so far, as relevant to the **ss20 & 21 EA 2010** (reasonable adjustments) claim the claimant pleads that the respondent issued an email accusing the claimant of declining previous consultation meeting. The respondent's email of 31 July factually set out that the claiamnt had declined the previous consultation meeting arranged for 17 July, that email was a one-off act. There was no operative PCP. The claimant was able to attend the previous zoom consultation notwithstanding his disability related absence from work. There was no operative PCP which put the claimant at a disadvantage in relation to a relevant matter in comparison with persons who were not disabled. The claimant's claim in terms of s20 & 21 EA 2010 in respect of event of 31 July 2020 does not succeed. This claim is dismissed.

309. In relation to the complaint on **18 August 2020** and so far, as relevant to the **ss20 & 21 EA 2010** (reasonable adjustments) claim the claimant pleads that the respondent issued email confirming redundancy. The respondent's email of 18 August 2020 factually set out that the consultation period had concluded and that the respondent was confirming the claimant's redundancy. The respondent did so in the context that the claimant had not substantially engaged, he had not, despite being invited in the respondent letter of 14 July set out any suggestions or proposals as to how the redundancy could be avoided. While the claimant was absent from work his disability did not

prevent him for effectively engaging in the redundancy process. The PCP was the practice of notifying employees who had been selected for redundancy that they had been so selected. The operative PCP did not put the claimant at a disadvantage in relation to a relevant matter in comparison with persons who were not disabled. The claimant's claim in terms of s20 & 21 EA 2010 in respect of event of 18 July 2020 does not succeed. This claim is dismissed.

Unfair Dismissal

Discussion and decision.

310. The respondent accepted it had dismissed the claimant and asserted the reason for the dismissal was redundancy (that is within s139 of ERA 1996) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held, in terms of section 98(1)(b) ERA 1996.

311. The *"substantial reason"* was the workforce reduction which had taken place. The respondent warned and consulted the employees affected. There was not requirement for group consultation. The respondent in assessing the claimant excluding his period of disability related absence in its assessment of the matrix, adopted a fair basis on which to select for redundancy.

312. The respondent took such steps as were reasonable to avoid or minimise redundancy by providing at risk letter 14 July 2020, inviting the claimant to engage and inviting the claimant's suggestions and proposals on how redundancy could be avoided, inviting the claimant to a remote meeting on 17 July 2020 and further inviting the claimant to check for internal vacancies providing a link for same.

313. The claimant was provided with sufficient information to understand the dismissal including setting that there was a significant change in the business, a requirement to consider change in the workforce, resulting in reduced staff levels in the respondent letter of 14 July 2020 and further in the respondent email of 17 July 2020 there was a reduced operation expenditure resulting in a requirement to reduce staff levels.

314. The claimant was given sufficient information to understand the dismissal and while he was not provided with scores this was because the claimant elected not to request same. The claimant elected not to take part on the offered zoom meeting (p625), however he engaged in the process to the extent he wished to do so by setting out on 15 July 2020 (p630) what he described as the respondents' legal responsibilities and to which the respondent responded on 17 July 2020. The claimant did not suggest during the process that he wished sight of his scores or otherwise information which would allow him to challenge the accuracy of the scoring attributed to him by the respondent.

315. The respondent set out that in its response of 17 July 2020 that objective criteria had been applied based on the critical skills, performance, and future contribution to the business. While the claimant issued a short email on 31 July in which he described that he was on sick leave, not well enough to apply for any role within the respondent business and described that consultation could take place over email or letter he set out no request for information and provide no suggestions nor offered any proposals as to how redundancy could be avoided.

316. Following the respondent's email of 17 July 2020 the claimant took no action in the following period of around 1 month prior to the end of the consultation period on 17 August 2020 and his receipt of the respondent's letter of 18 August 2020 confirming his employment would be terminated by reason of redundancy, to raise any request for his scores or otherwise seeking to suggest that he considered that the respondent was incorrect in its approach in any way. The claimant did not raise any issue of scoring by appeal; indeed, the claimant did not appeal at all.

317. While the claimant's 15 July 2020 setting out what the claimant described as the respondent legal responsibilities included the phrase *"and any other documents you intend to rely upon during the Zoom call",* that statement would not be reasonably read to intimate that the claimant wished to challenge accuracy of scorings. He did not set out that he did so at that stage or in appeal that he wished to do so. Had the claimant intimated that he wished to challenge the accuracy of scoring he would have been placed in a position to

challenge the accuracy of the markings, although that may not have required the respondent to disclose the actual markings to him.

318. As set out in their letter of 18 August 2020 the respondent explored the possibility of avoiding the redundancy but had not been able to identify any suitable alternative work for him.

319. The claimant was not selected for redundancy nor was his employment terminated for any of the events /act which were found to be protected acts.

320. The respondent embarked on what it described as a workforce reduction process, that was a restructuring essentially entailing a reduction in the number of employees doing work of a particular kind as opposed to a mere repatterning or redistribution of the same work among different employees whose numbers nonetheless remain the same.

321. The respondent took steps to exclude the claimant's period of disability related absence from its assessment in the scoring system. By the date of the selection criteria being applied the claimant had withdrawn his May 2019 Grievance and the respondent had ended the May 2019 Ethics Complaint. The Tribunal accepts that Mr Galpin and Mr Bowen applied a fair assessment to the claimant's scores.

322. The respondent genuinely applied its mind to the pool for selection as set out in the respondent email of 17 July 2020. The pool of 11 advisory systems engineers, including the claimant, adopted by the employers was one which a reasonable employer could have adopted. There was a diminution in the respondent's requirement for advisory sales engineers to carry out work.

323. The respondent acted reasonably in treating the redundancy as a sufficient reason for dismissal, in accordance with equity and the substantial merits of the case and the circumstances including the size and administrative resources of the employer's undertaking, having regard to the claimant's lack of engagement in the redundancy process including the absence of any suggestions or proposals as to how the redundancy could have been avoided.

324. The claimant's employment was terminated due to a fair redundancy process taking the redundancy process overall, the respondent's reason was substantial and justified dismissal.

325. The Tribunal does not accept that the claimant was selected for redundancy because of either what were argued a protected act, nor was the claimant selected for redundancy for any disability related reason.

326. The departure of other respondent employees including Systems Engineers, subsequent to the redundancy process which culminated in the termination of the claimant's employment does not impact on the fairness at the time of the process applied to the claimant.

327. Had there been no redundancy the claimant would, in any event, not have returned to work until the respondent took the step outlined in his email of 29 November 2019 specifically dismiss both Mr Bowen and Mr Galpin for gross misconduct. Such a demand was unreasonable. The claimant would not have returned to work unless the respondent acceded to his unreasonable demand and his employment which was by then unpaid would have been fairly terminated for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held within terms of s98 (1)(b) of ERA 1996, effective imposition of an unreasonable barrier by the employee to his return to work.

328. It was a matter accepted between the parties that the claimant was paid his statutory redundancy payment of £8,070. There are all the circumstances no further sums due by reason of the termination of employment.

329. The claimant's claim for unfair dismissal does not succeed and is dismissed.

330. By 12 months after the October 2019 report, that is by around October 2020 the Tribunal is not satisfied that the claimant was unable to apply for any role using his IT skills. The Tribunal accepts that there is an active job market for employees including employees operating remotely with technical skills including in data protection and other areas of IT.

331. However, and subsequent to the termination of employment the Tribunal accepts that it would have been reasonable, for the claimant to have sought to minimise his loss by establishing a self-employed business either utilising his many years of experience within IT offering a form of computer advice service via remote or otherwise in alternate self-employed endeavour.

332. However, and following the termination of his employment beyond setting up a website the claimant took no steps to operate a business beyond informally exploring, over a period of in excess of 2 years to the date of the final hearing, the possibility of establishing such a self-employment business without actually operating any such business.

333. The Tribunal does not accept that the claimant took reasonable steps to minimise his loss and had the Tribunal concluded that there had been a unfair dismissal any compensation which would have followed would have been reduced accordingly. In the circumstances the Tribunal does not require to make such an assessment, having concluded, as it has, that the claimant's employment terminated due to a redundancy situation within the meaning of s139 of ERA 1996, the reason for dismissal was redundancy and the respondent acted fairly in consulting with the claimant.

Remedy

334. The claimant's claim in terms of s15 EA 2010 in relation to the respondent's letter of **22 July 2019** succeeds insofar as it set an expectation that the claimant agrees a meeting schedule with Mr Bowen. The Tribunal concludes that the respondent, for a period of 10 days treated the claimant unfavourably in setting an expectation that the claimant agrees a meeting schedule with Mr Bowen because of claimant's disability related absence.

335. Having regard to s124(5)EA 2010 and s119(4) EA 2010 the Tribunal considers that the respondent's treatment of the claimant for the 10 day period was on the facts in this case an isolated event and the Tribunal concludes gave rise to an transient injury to feeling in the context that the claimant was absent from work, was not otherwise required to work with Mr Bowen and had solely be directed to agree an undefined meeting schedule with Mr Bowen. In

all the circumstances, including having regard to the respondent withdrawing the direction following upon on the claimant setting out his objection in response on 26 July 2019 and having regard to the distress caused to the claimant for the 10-day period when the direction was operative, the Tribunal concludes that an award within the lower Vento Band of £1,000 is appropriate.

336. The Tribunal has considered interest in terms of Reg 6(1) (a) of the Industrial Tribunals (Interest on Awards in Discrimination Cases) regulations 1996 which provides that period over which interest accrues begins with the date of discrimination being 22 July 2019 and ends on the date the Tribunal calculates compensation with interest @ 8% as follows: Number of days from 22 July 2019 to 28 March 2023 = 1,333 days; Interest = 1,346 x 0.08 x 1/365 x £1,000 = £295.01.

Employment Judge: Rory McPherson
Date of Judgment: 28 March 2023
Entered in register: 29 March 2023
and copied to parties