EMPLOYMENT TRIBUNALS

Claimant: Mr T Duncan

Respondent: Fujitsu Services Limited

Heard at: Watford (in public; partly in person and partly remote)

On: 26, 27, 28, 31 October 2022
1, 3, 4, 7, 8, 10, 11, 14, 15, 21, 22 November 2022
12, 13 December 2022
13 February 2023

In chambers on: 14 to 17 February 2023; 2 and 3 March 2023; 5 and 6 April 2023

Before: Employment Judge Quill (from 31 October 2022; EJ Maxwell prior)
Ms Barratt
Ms Harris

Appearances
For the claimant: Representing himself with assistance of his father
For the respondent: Mr P Michell, counsel

JUDGMENT

1. By a unanimous decision, the complaint of harassment related to disability by failure to conduct stress risk assessment (identified in Row 2 of Scott Schedule) succeeds.

2. By a unanimous decision, the complaints of failure to make reasonable adjustments and indirect discrimination about contact requirements during sickness absence (identified in Row 15) of Scott Schedule succeed.

3. By a majority decision (Ms Barratt and Ms Harris), the complaint of harassment related to disability by supplying information to the Claimant's mother (identified in Row 17 of Scott Schedule) succeeds.

4. By a unanimous decision, the complaint of failure to make reasonable adjustments in relation to requiring oral communication (Row 51 of Scott Schedule) succeeds.

5. By a unanimous decision, the complaint of failure to make reasonable adjustments in relation to information about meetings (Row 61 of Scott Schedule) succeeds.

6. All of the other complaints fail and are dismissed.

REASONS

Introduction

1. The Claimant is a former employee of the Respondent. He presented the following three claim forms.

2. 3322572/2019 ("Claim 1") presented on 18 September 2019, which cited an Early Conciliation Certificate for which the conciliation period had been 18 July 2019 to 18 August 2019.

3. 3312130/2020 ("Claim 2") presented on 1 October 2020, which cited an Early Conciliation Certificate for which the conciliation period had started and finished on 1 September 2020.

4. 2204298/2021 ("Claim 3") presented on 15 July 2021, which cited an Early Conciliation Certificate for which the conciliation period had been 18 June 2021 to 15 July 2021. [The incorrect version of the ET1 form was in the bundle, and the panel accessed the correct version from tribunal records.]

5. As mentioned in paragraph 7 of EJ R Lewis's orders following the preliminary hearing on 2 August 2022, this hearing was to deal with liability, including any reductions in principle because of Polkey/Chagger and/or for contributory conduct. This hearing was not to deal with any other remedy issue. The parties had been told that the witness statements to be exchanged for this hearing did not need to deal with other remedy issues.

6. There have been several preliminary hearings, and the summaries and orders are in the hearing bundle. It is not necessary to itemise all of them. In the summary following the hearing on 2 August 2022, EJ R Lewis included a section "practical management of the hearing" and the panel has sought to adhere to those arrangements, including the comments about reminding ourselves of the relevant parts of the Equal Treatment Bench Book.

The hearing

<u>Days 1 to 3</u>

7. On Days 1 to 3, the panel was EJ Maxwell, Ms Harris and Ms Barratt. It dealt with the following matters.

8. There with a discussion about reasonable adjustments, picking up on the matters which had been discussed and agreed during earlier case management hearings. The panel sought to reassure the Claimant, that no adverse inference would be drawn from his body language. He was informed that, in this and every case, the Tribunal assesses the substance of the evidence and argument rather than the manner of its presentation. The panel also indicated it would endeavour to take the various steps identified by EJ Lewis

9. It had previously been agreed the Claimant would attend at the Tribunal to give his evidence. There was a discussion about the hearing format to be adopted for the remainder of the hearing, when the Respondent's witnesses giving their evidence, bearing in mind the Claimant wished not to see two named individuals.

The possibilities appeared to be having screens in the hearing room, to create a physical barrier between the Claimant and the witnesses when they gave their evidence, or conducting that part of the hearing by video. The Claimant's preference was for video, in particular so as to avoid the stressful effects of a long journey. The Respondent's concern was that video may prove unreliable, as this had been so during preliminary hearings. The Claimant said there had been no apparent difficulty with the video connection as far as he could tell. The panel agreed to proceed on the basis of a hybrid hearing when the Respondent's witnesses were giving their evidence, although it was recognised that if this did not work it may be necessary to revert to a fully in-person hearing. It was further agreed, these two witnesses would observe the Claimant's evidence remotely, with their cameras turned off.

10. The parties agreed the issues arising on the pleaded claims were:

    10.1 with respect to claims one and two, as set out in the Scott Schedule;

    10.2 with respect to claim three, as set out in paragraph 10 of the case management order made by EJ Lewis on 7 July 2022, save that issue 10(c) was no longer relevant because the relevant claim had been struck out for non-payment of a deposit order.

11. The Claimant said he had asked the Respondent whether it was calling Rose Shelton as a witness and this question went unanswered. He said the Respondent should justify not producing her, as he believed she could give relevant evidence. Counsel for the Respondent told the Tribunal that the exchange of witness statements took place on 23 September 2022, pursuant to an order previously made. Ms Shelton was not one of the Respondent's witnesses. The panel explained to the Claimant it was a matter for the parties to decide which witnesses they would rely upon. The Claimant was told that if he wished to apply for a witness order for Ms Shelton it would be necessary for him to first invite her to give evidence on a voluntary basis and if, and only if, that was not agreed, he could then seek an order.

12. The Claimant said Ms Shelton was willing. The panel explained to the Claimant that if he wished to rely upon Ms Shelton as a witness, then it would be necessary for him to obtain a statement from her setting out the evidence she could give and then apply to the Tribunal to call her as a witness. If he did this, the Respondent would have an opportunity to object and the Tribunal would have to decide whether to allow this witness or not.

13. In accordance with the matters agreed when the case was before EJ Lewis, the Respondent had brought a laptop to the hearing for the Claimant's use. The main hearing bundle is more than 6,000 pages and would occupy very many lever arch files, if printed physically. The Claimant has a desktop computer at home and had downloaded the PDF bundle although not yet attempted to open it. He agreed he would check that he could open this when he got home, so as to be sure he would access to the bundle when the hearing reached the stage that he was cross-examining the Respondent's witnesses, by video.

14. The Respondent produced a draft timetable, consistent with the way in which the hearing had been listed, which included "break days" on Wednesdays. The

intention was that, after each two day hearing block, the Claimant would have a chance to rest.

15. The Respondent's proposed timetable anticipated that the Claimant's evidence would start on Day 3 of the hearing, Friday, 28 October 2022. There was, however, a difficulty with this. The Claimant's father, who had driven him to the hearing and was providing support, could not attend on that day because he was visiting a seriously ill friend. Whilst the Claimant did not say it would be impossible for him to use public transport, he raised the prospect that this would be very stressful and the effect on his Autistic Spectrum Disorder may make it difficult for him to participate at the hearing. In light of this, it was agreed the Claimant's evidence would be heard on Monday (31 October 2022), Tuesday (1 November 2022) and Thursday (3 November 2022), in person at the Tribunal.

16. The Respondent confirmed that no dispute arose in connection with disability as to the impairments, material or knowledge.

17. There were two outstanding applications, which could not have been dealt with as preliminary matters without running the risk that the evidence and submissions could not be heard within the listing.

18. Both parties decided (which the panel thought was sensible) that, rather than pursuing these matters as preliminary issues, they would instead address the points in their closing submissions.

    18.1 The Claimant did not pursue his strikeout application. The Claimant's arguments on strikeout would be considered in connection with the merits of his claims and when considering whether to draw inferences from the primary facts

    18.2 The Respondent did not pursue its application to exclude evidence (alleged to be covered by without prejudice privilege, and not to be within any exception) as a preliminary point. If the Tribunal is persuaded by the Respondent that the Claimant's witness statements include without prejudice material, that was to be disregarded.

19. After the preliminary discussions on Day 1 (as set out above), the remainder of Day 1, as well as Days 2 and 3 were to be panel reading time, with the evidence due to start on Day 4 (Monday 31 October 2022). During that phase, a decision was made that EJ Maxwell should be recused from the panel. Acting REJ Bedeau made a decision that EJ Quill would replace EJ Maxwell with effect from Day 4 of the hearing, and the parties were notified (by letter dated 28 October 2022) accordingly. EJ Quill carried out his pre-reading over the weekend so as to catch up with the remainder of the panel.

<u>Applications on Day 4</u>

20. From Day 4 (31 October 2022), EJ Quill was the judge on the panel, and EJ Maxwell played no further part in the matter. From Day 4 onwards, the panel ("we"; "us"; "our") was EJ Quill and (as before) Non-Legal Members Harris and Barratt.

21. The Claimant brought a hard copy witness statement from Ms Shelton. He handed that to the Respondent in the hearing room at the start of Day 4. The

Respondent objected to Ms Shelton's giving evidence. For the reasons that we gave at the time, we agreed that the Claimant could call her as a witness. We ordered that the time for the Respondent to cross-examine her would come from the time which had been allocated in the timetable for cross-examination of the Respondent's witnesses.

22. The Claimant also made an application for an order that Mr Sam Welek attend to give evidence on his behalf. For the reasons that we gave at the time, we agreed that we would order the Respondent to supply the last known address that it held for him and that we would make the requested order. The time for this witness's evidence in chief and the time for the Respondent to cross-examine him would come from the time which had been allocated in the timetable for cross-examination of the Respondent's witnesses.

23. In each case, we stated that we would potentially hear from them on Day 7 (Friday 4 November), after conclusion of the Claimant's evidence, but that hearing from the Respondent's witness, Hannah Boots, would be prioritised on that day, and Ms Shelton and/or Mr Welek might have to attend the following week. We informed the parties that we were content to have Ms Shelton and/or Mr Welek give their evidence by video.

Practicalities

24. As the hearing progressed, we allowed each party to have breaks when they requested them (as well as scheduling breaks of our own accord). This included requests for comfort breaks and, when necessary, breaks because the Claimant was distressed and required time to compose himself.

25. There were also parts of the hearing during which we allowed the Claimant to sit in another hearing room in the building, and participate in the hearing via CVP. Where technically possible (not every room has the same set up) we allowed him to do so with his camera on (those of us in the main hearing room could see him on screen) but his own monitor off (so that he did not have to view certain of the Respondent's witnesses). During those periods that his screen was off, his father remained in the main hearing room so that the Claimant had someone present who could observe events in the main hearing room. On the occasions on which the Claimant's screen in the other room was switched on (ie, when people in that other room could observe, via the screen, the events in the main hearing room) we left it to the Claimant and his father to decide whether his father sat in the main hearing room (with the panel, and the Respondent's representatives) or with the Claimant in the additional room.

26. It was necessary to make several changes to the hearing timetable as the matter progressed. Regrettably, it had been listed for dates which included Thursday and Friday 16 and 17 November 2022, which were dates on which it was impossible for panel to sit. At first, it did not appear that that would necessarily matter because (in accordance with the timetable proposed at a preliminary hearing on 2 November 2021, and adopted by the Respondent at the outset of the final hearing) Thursday and Friday 16 and 17 November 2022 (Days 14 and 15 of the 15 day listing) were proposed to be deliberation days. In other words, evidence and submissions were scheduled to finish by Day 13 (Tuesday 15 November 2022) with a reserved judgment.

27. It became apparent, however, that, for various reasons, the evidence (let alone submissions) would not be concluded by Day 13. We therefore added 21 and 22 November, as Days 14 and 15, to replace 16 and 17 November. When it became apparent that that would not be sufficient, we added 12 December on – what was intended to be – the strict understanding that the evidence would conclude by 1pm, with submissions that same day in the afternoon.

28. On Day 16 (12 December 2022), we acceded to the Claimant's request to have extra time to question the witnesses. We therefore agreed to delay submissions until the following day, 13 December 2022. The evidence finished on Day 16, and we also agreed to the Claimant's request that we would not start the submissions until 2pm. We gave the parties until 12pm to send written submissions.

Oral Evidence

Day	Date	Witnesses	Time
4	31.10.22	Claimant	starting around mid-day
5	01.11.22	Claimant	finishing a few minutes into afternoon session
6	03.11.22	Claimant	starting around 12.30pm
7	04.11.22	Boots	starting around 10.40am
8	07.11.22	Claimant	starting around 10.30am
9	08.11.22	Claimant Sam Welek	finish at 1:25pm start at 2.30pm
10	10.11.22	Tearall	around 10.30 to 10.40am
		Shelton	Following supplementary questions, cross-examination commenced around 12.15pm
		Duncan (Christopher)	finish at 1pm
		Godfrey	start around 2.20pm
11	11.11.22	Godfrey	
12	14.11.22	Lockwood	
13	15.11.22	Lockwood Walton	until lunch start after lunch
14	21.11.22	Marsden Dryden	start at 11.15am start at 3.15pm
15	22.11.22	Dryden	Morning

		Brown	start around 2.30pm
16	12.12.22	Doherty Sabey Moody	

29. Thus the Claimant was the only witness on four of the days, and finished his evidence on a fifth day after 1pm.

30. The Claimant's cross-examination was significantly less than 4.5 days. The morning of Day 4 was taken up with various other matters. We ended Day 5 early. Upon being asked questions about the alleged contents of the "chat logs", the Claimant became unable to continue that day. We resumed the evidence late on Day 6 as a result of a discussion about that, and other matters.

31. We accepted the Claimant's request that he should not have to answer any questions about the contents of the chat logs, because he believed that he would be unable to do so as the memories of what he had written were too traumatic. Both sides therefore had permission to make submissions about the contents as if the Claimant had been cross-examined about them. It was the Respondent's position that they would have liked to cross-examine the Claimant, not just with a view to arguing not just that the dismissal had been reasonable, but also as to showing what the Claimant's contemporaneous thoughts and opinions had been said about various incidents.

32. The Respondent's witnesses were mainly cross-examined by the Claimant, but the Claimant's father asked questions where the Claimant felt unable to do so.

33. We gave various reminders throughout the Claimant's cross-examination of the Respondent's witnesses about the planned finishing time, and the need to budget his time across the 10 witnesses. We mentioned after Ms Boots' evidence that it was surprising that her cross-examination had taken so long, given how few of the relevant issues she had first hand knowledge of. We also gave reminders that we had allowed the evidence of Shelton and Welek on the basis of a decision that the time for their evidence would come out the time that had been timetabled for the Claimant's cross-examination of the Respondent's witnesses. Ultimately, for the reasons we gave at the time, we acceded to the Claimant's requests for extra time and extended the hearing.

<u>Submissions and Deliberations Phases</u>

34. What transpired on 13 December 2022 is dealt with in more detail in our summary and orders from that day. Suffice to say that the hearing was adjourned for submissions to be given on 13 February 2023 (Day 18).

35. Days 16, 17 and 18 were each fully remote by video, with the consent of the panel and both parties.

36. The panel subsequently met in chambers on 14 to 17 February 2023; 2 and 3 March 2023; 5 and 6 April 2023 and reached the decisions set out above, for the reasons set out below.

37. EJ Quill would like to apologise to the parties for the length of time it has taken to finalise this written document.

Documents & Evidence

38. We were provided with:

38.1 a main hearing bundle running to page 6,287;

38.2 a supplemental bundle prepared by the Respondent, including its submissions and other party documents:

38.3 Email from the Claimant to Madelein Lindeque dated 27 October 2020

38.4 Email from Keelin Duddy to the Claimant dated 1 October 2020

38.5 Email from itg.technical.operations@fujitsu.com dated January 2021

39. The witness statement bundle was initially 164 pages. In addition, we received a written statement from Rose Shelton and a supplemental statement from Catherine Doherty. Furthermore, a document "Index of redacted chatlogs disclosed by Claimant" was produced which was introduced to the evidence by way of being a supplement to Mr Dryden's witness evidence.

40. On the Claimant's side, we had written statements from:

40.1 The Claimant

40.2 Christopher Duncan (his father)

40.3 Nathalie Tearall (his partner)

40.4 Rose Shelton

41. On the Respondent's side, we had written statements from:

41.1 Charlie Godfrey

41.2 John Lockwood,

41.3 Hannah Boots

41.4 Robin Dryden

41.5 Maria Sabey

41.6 Helen Brown

41.7 Tim Moody

41.8 Catherine Doherty

41.9 Emma Walton

41.10 Daniel Marsden

42. Each of those witnesses gave evidence on oath and answered questions from the other side, and from the panel.

43. In addition to those, the Claimant requested, and we granted, a witness order for Sam Welek. Mr Welek answered that order by attending via video. He gave evidence, pursuant to the order, without having previously prepared a written statement.

The Claims and The Issues

44. For Claims 1 and 2, the alleged acts and omissions were as follows, numbered from 2 to 84.

	Allegation
1.	Not Used
2.	Failure to conduct Medigold recommended stress risk assessment
3.	Failure to provide plenty of warning and clear instructions in respect of Cafcass/DCLG support. On 14/05/18 the Claimant was asked to cover the support desk without any notice. On 22/06/18 the Claimant was informed on that day (Friday) that he was to cover the support desk on the following Monday. On 02/08/18 the Claimant was asked to cover the support desk that day with no prior notice and to cover the support desk on 06/08/18. On 03/09/18 the Claimant was asked to cover the support desk with no notice. On 03/12/18 the Claimant was asked to cover the support desk with no notice. On each occasion the Respondent failed to provide the Claimant with any or any detailed explanation as to what was to be required of him
4.	Unreasonable delay in investigating department change for C after assurance given on 03 May 2018 that opportunities for department move would be investigated. (There were only 2 two enquiries and these were made 54 and 79 days after the promise.)
5.	Telling C that R could not make the OH report recommended adjustments without explaining in clear and concise terms why the adjustments could not be made. He was simply informed that this was not the way that the Respondent does these things.
6.	C being ostracised by his manager CG including not holding 1:1 meetings during the period May to September 2018 and beyond, including at 3rd appraisal meeting on 3 January 2019

7.	Failure to give notice of change or to give explanations of change by not holding 1:1 management meetings for 4 months and failed to put any other supervision or feedback mechanism in place to replace 1:1 meetings.
8.	Failing to give sufficient notice of the cancellation of planned 1:1 meeting scheduled for 19 September 2018 which was cancelled at 20 minutes notice
9.	Failing to give sufficient notice re meeting scheduled for 19 September 2018 which was cancelled at 20 minutes notice, rescheduled for 20 September 2018 and then converted without warning into an appraisal meeting
10.	Requiring C to adhere strictly to R's timesheet provision policy and threatening Disciplinary / Performance Improvement Plan regarding timesheets, without having provided clear, written instructions on timesheet protocols, notification of project codes etc. Also, failure to provide support for weekly and monthly timesheet completion by deadlines, through provision of clear and concise instructions and clean feedback
11.	Failure to provide sufficient or reasonable notice iro postponement of Skype Graduate Review Meeting from 10 am, eventually to 3 pm without prior warning of change. The impact of the short notice was made worse by the fact that at the time the C had food poisoning which exacerbated a pre-existing bowel condition. The combination of these two factors resulted in significant mental distress
12.	R decided that C had failed to meet a performance requirement in respect of timesheet completion. However, this performance requirement had never been set as an objective for C for the 6 month period in question and so his alleged 'failure' to meet the performance objective entered onto C's formal appraisal documentation was fictitious, as he did not have that objective in the first place. The entry in appraisal document purporting to represent an objective set on 01 April 2018 was also fictitious
13.	Failure to break down tasks / projects into bite sized pieces and/or failed to provide concise and clear written instructions on all projects, but in particular, re Specsavers, Whitbread, Symfoni WE (Integrate SalesForce into ServiceNow) e.g. handover before sick leave 24/10/18 **Specsavers** The work was not broken down into clear and concise tasks. The first meeting was only a brief call on or about 17.05.2018 regarding the Specsavers project and the work to be done on it. No detailed instructions were given as to what was required from C. The instructions were also given verbally and were not provided in writing at any stage. C's removal from the Specsavers project was without reasonable warning and he was then

	onboarded to ReAssure on or about 31.05.2018, also without reasonable notice. **Whitbread** The Claimant was only given a vague indication of possible involvement with support work on the Whitbread account by CG on 22.06.2018. No other information was supplied, leaving C disoriented and uncertain as to what, if anything was required of him. **Symfoni WE** On or about 27.09.2018 C was told by CG that he was being assigned to this project. He had a brief interview with Peter Van Damme and was told only that the work involved integrating SalesForce into ServiceNow. C was never provided with a clear explanation as to what that meant and CG ignored requests for assistance in obtaining clear instructions and wrongly accused C of not seeking **Handover** On or about 24.10.2018 C was asked if he could do a handover of work to Dan Tolgyesi prior to taking a period of sick leave. C asked what that would entail and stated that he could not communicate a handover verbally, but received no response at all until 29.10.18 and even then was not informed as to what he was required to do to achieve a handover.
14.	Remark: "You can just call us, we aren't that scary." Context: re Cs sick leave, where C suffered a low communicative episode. During these episodes, C finds verbal communication more difficult. He also finds comments like this very offensive and lacking in empathy/awareness of his disability and effectively telling him he should get over it. He also felt infantilised by the comment.
15.	Remark: "You need to call us, not e-mail, as that's policy." Context: re Cs sick leave, where C suffered a low communicative episode. During these episodes, C finds verbal communication more difficult. Given R's awareness of C's disability, C found this hostile and offensive
16.	Remark: 'If you think the job is stressful, you should try building your own home. That's stressful.' in response to C raising concern about workplace needs, disability and reasonable adjustments. C found this to be offensive, hostile and belittling and revealed a failure to understand or empathise with his disability.
17.	Disclosure of confidential personal health and work information to C's mother without consent or other lawful excuse. An unmonitored and unauthorised

	tel con took place between CG and C's mother. CG denies sharing of personal data but C's mother made statements to C about his work attendance indicating to him that personal data was shared with her behind his back. Text message screenshots between mother and R exist and were given by CG to R when requested by R. R wiped CG's phone thereafter, removing original messages and R refused to provide partial text messages to C for about 1 year. C reasonably believes that partial text screenshots from CG are because she was hiding remainder of content due to data breach. Data referred to in grievance was deleted by R. Further, when challenged about whether she should have spoken to C's mother CG stated "Not really, but as we are concerned I thought it was best."
18.	Putting C under unreasonable pressure to obtain a Med3 GP certificate (via email and text) whilst on sick leave with low communication episode / social withdrawal
19.	Appraisal (Third) being conducted without informing C and without C's input
20.	Remark: "We all find it hard but non-communication is inexcusable." Context: Witness raised with CG communication issues as part of Cs disability , CG responded with this statement to the witness.
21.	Ostracism by CG including failure to reply to emails and messages, not contacting C and not being aware of C being on/offline for work, specifically: 1. 24 October 2018 re sick leave email. 2. 25 February 2019 to 12 March 2019 re 13 working days unnoticed absence. 3. January 2019 to 02 April 2019. Failing to review and act on CV distribution commitment for around 3 months.
22.	Being unjustifiably put at risk of redundancy and subjected to rumours of such. C became aware 20/04/19
23.	Giving C an "unrated" in the Third Appraisal due to work created absence and lack of opportunity resulting in C not being awarded a pay rise
24.	Being criticised at Third Appraisal meeting for "not communicating enough", lack of project work, failing to deliver SymfoniWE project, for the amount of sick leave taken and failure to provide time sheets. Also the following comments were made at that meeting: "Do you mind if I turn the screen on, or would that be too bright for you?" and "You need to be careful about going over statutory sickness absence limits" The complaint about not communicating enough also amounted to discrimination arising from his disability as his disability caused his perceived communication issues.

25.	R's failure to properly and/or fully address the Claimant's grievances regarding disability discrimination and to provide satisfactory grievance outcome due to unreasonable failure to recognise and uphold allegations of disability discrimination, despite the evidence in support
26.	During C's second appraisal he was provided with a false explanation that the reason that he was mostly being allocated to support work or being placed 'on the bench' was because there was a lack of development work in the business area. In the written appraisal this was described as a lack of opportunity to work on projects from start to finish
27.	Failure to arrange training and personal development plan at 1:1 line manager meetings and explain that this is the forum for making such arrangements.
28.	Unreasonable delay in obtaining details of reasonable adjustments from HR
29.	Criticising C in the grievance outcome for not asking for help in the face of clear evidence to the contrary, in the grievance appeal outcome
30.	Criticising C for not employing reasonable adjustments that he was allegedly aware of and had control of without making any specific reference (no clean feedback), in the grievance appeal outcome
31.	Criticising C's communication efforts, in the grievance appeal outcome
32.	Failure to properly consider evidence provided by C in support of his appeal
33.	Failure to provide details about what future recommendations are to be made in relation to measures to prevent disability discrimination, and when, in the grievance appeal outcome
34.	Failure to uphold C's grievance at appeal that his line manager 'did not recall' C asking for further or additional training in the face of evidence to the contrary
35.	Falsely stating that C wanted to explore "ServiceNow training opportunities", in the grievance appeal outcome
36.	Falsely stating that the "other outcomes were discussed and are incorporated into the specific responses as documented above", in the appeal outcome
37.	Reaching an appeal outcome based on expectations of a neurotypical employee in relation to propensity to accept compromise in a cover-up or to resign

38.	Telling C that it would not be in his best interests to be a mentor to Graduate trainees and apprentices, without providing any basis for the belief or stating that the matter will be properly considered in the grievance appeal outcome
39.	Unsatisfactory grievance appeal outcomes: - Accusations of C failing to engage to change role - Critique of how C manages self - Lack of specific Outcomes - Unreasonable burden of responsibility for Cs adjustments was placed on C - Assumption that C can just do his adjustments himself - Consistent bias toward CGs statements without evidence - No mention of most of Cs outcomes
40.	Failure to provide final appraisal feedback (Second Appraisal) e.g. "All outstanding timesheets must be completed in the next week and for the next period all timesheets must be completed weekly and any issues with project codes flagged, without exception."
41.	C being criticised for failing to comply with policy, process and absence reporting procedure in Third Appraisal feedback notes
42.	Comment: C "must take responsibility for his contributions to the team" (Third Appraisal) / failure to provide clean feedback. CG failed to provide any or any clear explanation as to what C could or should do in order to be perceived as taking responsibility for his contributions to the team
43.	Comment: "Increase understanding of the market by building closer relationships with Fujitsu Sector and offering teams." (Second Appraisal) / failure to discuss and agree objectives etc.
44.	Comment: "It would be good to see more active engagement with other members of the team" (Second Appraisal)
45.	Comment: "Over the next few months I would suggest Tom continues to develop and extend his links with colleagues, delight customers by being more proactive and interact with colleagues in the office." (Second Appraisal) / failure to discuss and agree objectives etc.
46.	Untrue evidence being given by C's line manager about claiming not to have shared confidential and personal health information with C's mother
47.	Remark: 'Take your stress and multiply it by 25 and you get my job.' re C stating he was feeling overwhelmed
48.	Remark: 'We all get like that sometimes.' re C social anxiety, 1:1 meeting CG
49.	Failure to conduct Medigold recommended stress risk Assessment

50.	Instructing C to attend the 'tech hack' ('just show up and see how it goes') on 07 April 2020 having been informed by C that he was probably not well enough to do so
51.	Requiring C to communicate primarily verbally, to 'avoid miscommunication'
52.	Criticising C for sometimes "barbed" and "rude" written communications
53.	Asking C for a “big change in normal behaviour”
54.	Stating that C “sees things in black and white, while [JL] sees things in shades of grey”
55.	JL stating that while something seems like a “small shade change” in [JL's] world, he sees that C might see it as changing the “entire rail he runs on”
56.	JL stating “A lot of issues that I know in your mind are real are a misunderstanding of what’s going on”
57.	JL stating the only person who had come back directly with a problem was C, whereas C knew that several of C's colleagues had raised concerns (e.g. about problems with working conditions, lack of work and organisation, Outsystems) to R
58.	JL stating that C needed to recognise his behavioural traits – the black and white thinking
59.	JL stating that C needed to see that “things can be done gradually”, implying C could not envisage incremental processes
60.	JL stating that C had a “very academic view of the world”, which wasn’t necessarily aligned with what R wanted to do as a pragmatic approach
61.	Failure to consider or adopt email templates to encourage reasonably adjusted team behaviours providing concise written instructions, tangible agendas and goals for meetings
62.	To Rose Shelton (RS): JL says [KKJ] is “concerned about [Rose] from a work perspective”. The Claimant believes that comment was made because JL wanted to make life difficult for the Claimant and to frustrate the Claimant's agile working framework project
63.	To RS: JL says “some of the difficulties processing what’s being said to [C] might rub off on [Rose]”, insinuating that C's autism might exacerbate autistic traits displayed by RS which he regarded as undesirable.
64.	To RS: JL asks RS whether she consciously knows that the battle [C] is fighting, C thinks he's fighting for RS. His purpose in asking this of RS was

	intended to drive a wedge between the Claimant and RS and to persuade her to withdraw her support for the issues that the Claimant was raising.
65.	To RS: JL indicated that he thought the framework was a misguided attempt at creating a panacea which reflected his lack of belief in the Claimant's idea which in turn stemmed from his stereotypical views of the Claimant's autism
66.	To RS: JL stated that he wanted C to “fit in as best as he can”, which insinuates that C would not be able to fit in properly or fully due to his neurodiversity and expecting C to change rather than be accepted for who he was
67.	To C: JL stated he was “in awe” of the Claimant’s predictions, and that he saw C’s disability as “a superpower”, because C “can see things [he] can't, and explain them to [him]”. In the context of his other comments the Claimant perceived these comments as insincere and stereoptypical
68.	To C: JL stated he didn’t think C is the bad guy, and wasn’t aware of anyone else saying bad things about him.
69.	To C: JL stated he acknowledged C's perception is his reality
70.	C being excluded from a mentorship meeting
71.	To C: JL stated that he/R was not sure C wanted to be involved in mentorship, despite C's written confirmation that he did want to be
72.	To C: R is doing its best to meet C's reasonable adjustments when it wasn't telling him how it was making reasonable adjustments and it was not true that they were being made, which meant it was not clean feedback
73.	To C: JL stated C's perspective was becoming his reality
74.	Unreasonable delay in addressing grievances raised on 08 July 2020 (and thereafter) regarding disability discrimination
75.	Unreasonable deprivation of opportunity to pursue software development proposals, as diverted to others
76.	To C: You’re an entrepreneur, you’re not a good fit for this company”; “You’d probably be better off in Sweden or Japan than the UK, the UK isn’t for you”; [with reference to disability] “We all have problems in and out of work”; “Are you still on your apprenticeship or are you fresh off it?”; “Oh you have an answer to everything don’t you?
77.	Unreasonable delay in processing C's 'Disability Passport'

78.	Cancellation of 1:1 meeting at short notice
79.	Subjecting C to a greater level of scrutiny in relation to Personal Development Plan detail by requiring the Claimant to colour code his PDP to provide greater detail
80.	C being ostracised generally and after C raised his concerns about reasonable adjustments and disability discrimination with R, in the following ways: KKJ ceased speaking to C generally. JL and KKJ ignored emails from C. KKJ and JL, HR team and R generally paid little attention or interest in C's opinion generally and including about C's disability and working arrangements. KKJ and JL and R generally kept information from C relating to instructions relating to work matters and decisions. KKJ and JL, Doug Johnson and Hannah Boots excluding C from mentorship and similar interface with Graduates. JL and KKJ began directing communications through RS.
81.	C being repeatedly refused opportunity to develop projects during 2020, including: C's proposal re development standards in January 2020; ePortfolio for new joiners in Aprill/May 2020; Project database from February to June 2020; Agile Working Framework Project proposal during various meetings and communications as raised by C on 12 May 2020
82.	C being victimised for having raised his grievance on 06.07.20, specifically: Fabricated complaints from a group of employees, including alleged interruptions by C in a meeting on 11 August 2020; alleged refusal to cease copying a colleague on emails (August/September 2020); JL stating that C had offended colleagues without providing details or any right of reply (as reported to Robin Dryden)
83.	C being victimised for having raised his grievance on 06.07.20, specifically: Unfounded allegations of unauthorised absence from work in August 2020
84.	C being victimised for having raised his grievance on 06.07.20, specifically: Feedback from the leadership team that they had received false and misleading feedback about C, including being overly sensitive, unreasonable and that people can't say things without offending C

45. The following rows were said to be allegations of harassment.

    1, 4, 6, 10, 14, 15, 16, 17, 19, 20, 21, 22, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38. 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 69, 70, 71, 72, 73, 74, 76, 77, 79, 80

46. The following rows were said to be allegations of direct discrimination. Where the same allegation is alleged to be both harassment and direct discrimination, we only consider the direct discrimination allegation where the harassment allegation has been unsuccessful. The allegations highlighted in bold were the only ones which were pleaded as direct discrimination only (ie not as an alternative to harassment).

    1, 4, 6, 17, 19, 21, 22, 25, 26, 28, 37, **39**, 42, 46, 49, 50, 64, 65, 66, 67, 70, 71, 74, **75**, 77, **81**.

47. The following rows were said to be allegations of indirect discrimination.

    10, 15

48. The following rows were said to be allegations of failure to make reasonable adjustments

    3, 5, 7, 8, 9, 10, 11, 12, 13, 15, 18, 19, 23, 27, 40, 41, 42, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 67, 68, 69, 72, 73, 74, 78

49. The following row was said to be discrimination within the meaning of section 15 the Equality Act 2010 (discrimination arising from disability)

    24

50. The following rows were said to be allegations of victimisation

    74, 76, 79, 80, 82, 83, 84

51. For Claim 3, as per the discussion on Day 1 of this hearing, paragraph 10 of EJ Lewis's orders lists them (omitting item (c)) as follows:

    (a) Unfair dismissal;

    (b) Direct disability discrimination - the dismissal;

    (d) Discrimination contrary to s.15 Equality Act ('something arising'). The unfavourable treatment being the dismissal. The 'something' is the conduct which led to dismissal, ie the language of the Slack traffic;

    (e) Failure to make reasonable adjustment ie failure to delay the disciplinary process until the claimant was well enough and / or had concluded therapy;

(f) Failure to make reasonable adjustment ie failure to arrange advocacy.

Victimisation / Protected Act

52. The protected act is ill-defined in the Scott Schedule. The Respondent has said that it assumes that the protected act is the grievance submitted on 8 July 2020.

53. In fact, Claim 1, at paragraph 9, referred to victimisation. It was drafted by solicitors, but did not expressly say "the protected act is …". It did, however, at paragraph 16, mention Grievance 1, and the disability discrimination allegations set out therein. It also referred to the 1 May 2019 meeting about Grievance 1, and stated (accurately) that he made discrimination allegations in that meeting. Claim 1 did not identify any specific incident as being victimisation. In response, the Respondent did not deny that there had been a protected act, but sought clarification. EJ Bedeau ordered further information by 23 October 2020 for Claim 1. The Claimant's solicitors filed the document slightly late on 12 November 2020. The document did not identify any allegations of victimisation or refer to any specific protected act.

54. Claim 2 was presented on 1 October 2020. It replicated some of the introductory wording from Claim 1 including mentioning "Victimisation" in paragraph 8. It did not use the express phrase "protected act". At paragraphs 56 and 61 it used the plural form of "complaints/grievances" when referring to "victimisation for having raised his disability discrimination complaints/grievances".

55. On 15 February 2021, EJ Daniel ordered further information for both of Claims 1 and 2, and that was supplied by the Claimant's representative on 12 June 2021 (by way of two Scott Schedules). These provided further confirmation that there were no victimisation complaints as part of Claim 1.

56. The earliest events alleged (as part of the claims) to be victimisation are around May 2020. They predate the 8 July 2020 grievance. By implication, the acts alleged to have caused that alleged victimisation are the complaints (about failure to make adjustments and/or other forms of disability-related contraventions of EQA) with Mr Lockwood following Mr Welek's departure.

57. There could be no sensible argument that Grievance 1 not a protected act. We will take that into account when considering each of the victimisation complaints. However, having had solicitors at the times that Claims 1 and 2 were presented, and were the subject of preliminary hearings, and the further information orders, the Claimant failed to set out any express reliance on Grievance 1.

58. Similarly, there could be no sensible argument that the 2020 grievance was not a protected act. The Respondent accepts that it is.

59. In relation to the discussions with Mr Kjelstrup-Johnson and Mr Lockwood during 2020, there are some email exchanges and also some notes of meetings. We do not need to examine each item one by one. It is sufficient to note that, in Mr Lockwood's witness statement (paragraph 24 and 25) he states:

> Tom sent me a message on 14 April 2020 asking if to have a quick chat regarding some concerns that he was having (page [2043]). We spoke at 12:30 and this is when Tom started to complain that Kris was not complying with the reasonable adjustments that Tom required. As part of this discussion Tom shared with me a copy of his Occupational Health ('OH') report from February 2018. …
>
> Tom's primary concern was that Kris was not giving him 5 days' notice of meetings which Tom said that he required as a reasonable adjustment for his conditions. …

60. These discussions on 14 April 2020 were a protected act. Both sides agree that these were not the only occasions in which the Claimant raised these points either with Mr Lockwood or directly with Mr Kjelstrup-Johnson (for example, the 16 June exchange with Mr Kjelstrup-Johnson about insufficient notice of ACT meeting). We will take those matters into account when considering each of the victimisation complaints. They are implicitly referred to in the Scott Schedule.

61. There would be no proper basis for us to take Claims 1 or 2 as protected acts for the victimisation complaints. It is self-evident that they were protected acts, but the Particulars of Complaint for Claim 2 (and the further information and the Scott Schedule) did not, expressly or implicitly, rely on Claim 1. Claim 3 did not allege victimisation (based on Claim 2 or any other alleged protected act).

Decisions about "without prejudice" and "strike out"

62. On 19 and 23 May 2022, the Claimant had made a written application for strike out. [Supplementary Bundle 56 to 96].

63. In part, it was an application that the responses be struck out because there was no reasonable prospect of the defence(s) set out there being successful. The panel decided to hear the evidence, and allow the Respondent to participate fully in the hearing. Having heard all the evidence, it is not our opinion that the defence to any of the claims had no reasonable prospect of success.

64. In part, it was an application that there had been unreasonable conduct of the litigation by the Respondent and/or its solicitors. The application listed various matters. While denying any unreasonable conduct, for some of the alleged examples, the Respondent also asserted that the Claimant was breaching the rules in relation to without prejudice communications.

65. Evidence which is covered by "without prejudice privilege" is not admissible in employment tribunal proceedings: Independent Research Services Ltd v Catterall 1993 ICR 1, EAT

66. Additionally, evidence about any communications between a party and an ACAS conciliator is not admissible without that party's consent: S.18(7) Employment Tribunals Act 1996.

67. In this case, the Respondent has not waived privilege (if any) and so we have to decide whether the "without prejudice privilege" applies.

67.1 It cannot apply unless, at the time of the communication in question, a dispute between the parties had arisen, and the parties were conscious of at least the potential for litigation, even if neither side intended it as an outcome.

67.2 Where there is a dispute, communications between the parties as part of settlement negotiations (including attempts to commence settlement negotiations) are covered by "without prejudice privilege" unless an exception applies.

67.3 The Court of Appeal listed various exceptions in Unilever plc v Procter and Gamble Co 2000 1 WLR 2436. That was not employment tribunal litigation, but is relevant nonetheless. The exceptions include where exclusion of the evidence would otherwise act as a cloak for perjury, blackmail or other "unambiguous impropriety".

68. From no later than April 2019, when the Claimant lodged Grievance 1, there was a dispute between the parties that had the potential to result in employment tribunal litigation.

69. One example of alleged unreasonableness is that (according to the Claimant) the Respondent failed to agree to internal mediation. To the extent that he is referring to alleged conduct prior to April 2019, then that would potentially fall outside the scope of the without prejudice privilege. However, by the same token, could not be unreasonable conduct of the litigation, and would not be grounds for strike out.

70. Other examples of alleged unreasonableness include refusal to participate in the Claimant's preferred form of mediation. Our decision is that that is not an example of unambiguous impropriety, and is an example of communication about potential settlement. It is covered by without prejudice privilege. Similarly, the Claimant also asserts a willingness on his part to engage in any reasonable form of alternative dispute resolution. To the extent, if at all, that this differs from the allegation mentioned earlier in this paragraph, the answer is the same. The (alleged) refusal is covered by without prejudice privilege.

71. It is not the Claimant's argument that there was no attempt to settle at all. In his correspondence to the Tribunal, he has asserted what he was told by the Respondent was the maximum that it would agree to. We have not been given specific evidence of exactly what was said/written and by whom, and in which circumstances. However, to the extent that the Claimant argues that any "threat" that he might end up having to pay costs was mentioned in the settlement discussions, and/or that any statement was made that the offer matched or exceeded what he might obtain if successful, we are not persuaded, that, in the circumstances, the Claimant has shown there was unambiguous impropriety. This applies even more so to the suggestion that the Respondent's offers were not high enough. Our decision is that the content of the settlement discussions, including via written correspondence and/or orally, is not admissible evidence, either in relation to the strike out application, or for the substantive hearing. We have put what we have been told about those things out of our minds.

72. In the application, the Claimant quotes extensively from correspondence sent to him during the litigation. In short, the quotes do not demonstrate unreasonable conduct on the part of the Respondent's solicitors.

73. The Claimant also alleges failure to disclose relevant documents. We have treated the dispute about disclosure as being part of our decision making on the substantive issues. To the extent – if at all – that we decide the Respondent possessed relevant documents which it failed to disclose, then that might potentially adversely affect the credibility of a particular witness, and/or we might draw an adverse inference against the Respondent in relation to what the document might have said.

74. During the course of the hearing, there were some generalised assertions that the Respondent either had, or might have, altered some documents from the versions which the Claimant had previously seen. We are not satisfied that happened. The Claimant raised these suggestions early in the hearing, and said he could not be sure. He was told that he could raise the matter later in the hearing once he had compared the contents of the bundle to documents in his own possession. He did not come to us with any specific examples.

75. During the course of the hearing, the Claimant made allegations of "hacking". He suggested that he had been preparing cross-examination material and that the Respondent had hacked into his gmail account to access it. He suggested that a mobile phone had been tethered to his account, and it was not his phone. He inferred it was either the Respondent or the Respondent's solicitors (Pinsent Masons) who had done this. It was suggested to us by the Claimant's father that the police had told him that the police would investigate if and only if the employment tribunal ordered them to do so. We informed the parties that that was not our understanding of how the police dealt with reports of crimes, and that the Claimant would need to pursue the matter further directly with the police if he wanted a police investigation, because we would not be writing to the police, or purporting to order them to investigate. We said that if the Claimant wished to allege that there had been unreasonable conduct of the litigation by the Respondent, (specifically to gain improper access to his privileged material, or otherwise) then we would hear the application for strike out. We pointed out that we would be only likely to decide it in the Claimant's favour if there was some specific evidence put before us.

76. We also asked the Respondent to provide, via its legal advisers, an assurance that they had not done what the Claimant alleged. We did, in due course, get something along those lines from the Respondent, though it was caveated in various ways. The Respondent also stated that it was unclear what, specifically, the Claimant was alleging had been done.

77. The Claimant, while not withdrawing the allegations, did not make a new specific strike out application based on these allegations.

78. Overall, we are not persuaded that the responses (or any part of them) should be struck out.

The Findings of Fact

Overview

79. The Claimant was employed by the Respondent between September 2017 and April 2021. His employment ended when the Respondent dismissed him. The Respondent alleges that the dismissal reason was gross misconduct.

80. Claim 1 and Claim 2 were presented during employment. Claim 3 was presented after termination.

81. When the Claimant first joined the Respondent, his line manager was Dan Tolgyesi.

82. Between around May 2018 and around April 2019, his line manager was Charlie Godfrey Training Lead - SaaS Practice, Business & Application Services

83. From then until (after) the last day performing duties, his line manager was John Lockwood, Head of Transformation Services

84. The Claimant's last day performing duties was in October 2020. After that, he commenced a period of sick leave, which continued until he was placed on disciplinary suspension on 8 January 2021. That suspension continued until his dismissal on 16 April 2021.

85. The Claimant brought the following grievances during his employment

    85.1 Around the time of the change in line manager from Ms Godfrey to Mr Lockwood, the Claimant brought what we will call "Grievance 1".

    85.2 Grievance 1 was dealt with by Robin Dryden, Service Lead for Defence and National Security (D&NS), who sent an outcome letter dated 30 May 2019.

    85.3 The Claimant appealed against the outcome of Grievance 1. The appeal for Grievance 1 was dealt with by Maria Sabey, Head of Property for UK and Ireland, who sent an outcome letter dated 29 July 2019.

    85.4 In 2020 (so a year later than Grievance 1), there was correspondence to the Respondent from Ms Shelton and from the Claimant. The Respondent decided that this correspondence should be treated as (i) an individual grievance from the Claimant; (ii) an individual grievance from Ms Shelton; (iii) a joint grievance. The Claimant does not necessarily agree that the correspondence should have been treated in this manner. However, for ease of exposition, we will refer to what the Respondent what the Respondent treated as a joint grievance as "Grievance 2" and what the Respondent treated as an individual grievance from the Claimant as "Grievance 3".

    85.5 Grievance 2 was dealt with by Mr Dryden. The outcome letter was dated 13 August 2020.

85.6 The Claimant appealed against the outcome of Grievance 2. The appeal for Grievance 2 was dealt with by Neil Futers, Head of Operations D&NS. Mr Futers was not a witness.

85.7 Grievance 3 was dealt with by Mr Dryden. Mr Dryden delegated Madeline Lindeque, HR Consultant to carry out parts of the investigation into Grievance 3. Ms Lindeque was not a witness. Mr Dryden's outcome letter was dated 8 January 2021.

85.8 There was no appeal against the outcome of Grievance 3. The Claimant's email dated 8 January 2021 made clear that the lack of appeal was not because he was in agreement with the contents of the outcome letter.

86. Many of the matters raised in the grievances formed part of the complaints to the Tribunal, and will be discussed in more detail below.

87. The Respondent's case is that, because of the contents of certain material which was disclosed to Dryden/Lindeque (around October 2020) in connection with Grievance 3, the Respondent decided to take certain steps, which ultimately led to the Claimant's being suspended (on 8 January 2021) and to a disciplinary investigation. The chronology will be discussed in more detail below.

88. On 15 January 2021, the Claimant was informed that there was a case to answer and that Stuart Middleton would conduct a disciplinary hearing on 20 January 2021. (Mr Middleton was not a witness).

89. That hearing did not go ahead. In due course, a different employee was appointed to deal with the disciplinary hearing. That was Emma Walton, Programme Manager. Ms Walton took the decision to dismiss the Claimant, on behalf of the Respondent. Her letter dismissing the Claimant with immediate effect was sent to the Claimant on 16 April 2021 by email.

90. The Claimant appealed against dismissal. The appeal was heard by Daniel Marsden, Global Delivery Manager, Hybrid IT Managed Services. The letter rejecting the appeal was dated 18 June 2021 and sent by email.

91. The Respondent's other witnesses, not already mentioned in this overview, were:

91.1 Helen Brown, HR consultant, who provided HR advise in connection with each of Grievance 1, 2 and 3, and the appeals for Grievances 1 and 2.

91.2 Catherine Doherty, HR Business Partner, who was involved with discussions with the Claimant about disability passport and also had some contact with the Claimant during his suspension.

91.3 Hannah Boots, HR Business Partner, who was asked to facilitate some feedback to the Claimant (discussed in more detail below) following the outcome of Grievance 2.

91.4 Tim Moody, Head of Strategy for Hybrid Information Technology Services, who had some communications with the Claimant on 29 July 2020 and 9 September 2020 which are discussed in more detail below.

Disability

92. The Respondent concedes that the Claimant is disabled within the meaning of section 6 of the Equality Act 2010 at all relevant times. The Respondent accepts that the Claimant's conditions of Attention Deficit Hyperactivity Disorder ("ADHD") and Autistic Spectrum Disorder ("ASD") constitute a physical or mental impairment and that that impairment of the Claimant has a substantial and long-term adverse effect on the Claimant's ability to carry out normal day to day activities.

93. He has related health issues being severe depression and anxiety, severe headaches and migraines and dermatophagia.

94. The Respondent accepts that it had knowledge of the Claimant's disability from the start of employment.

Start of Employment and Training Requests

95. The Respondent is a global information technology company offering products, and services to its clients. It employs over 8,000 people in the UK and Ireland

96. The Claimant was appointed as Graduate Trainee, commencing September 2017, in a full-time role (around 37 hours per week). His job title was Software and Solutions Developer.

97. A colleague who started at a similar time was Jonathan Swannick. Their line manager was Mr Tolgyesi. During this time, they would be allocated to projects from time to time to do work for the Respondent's customers. They often were allocated work which required familiarity with the Respondent's Service Now and Run My Process systems.

98. Ms Godfrey is a training lead. In January 2018, Mr Swannick emailed Mr Tolgyesi and Ms Godfrey and others stating that he and the Claimant had each been put on various projects and would like some training, and suggested some specific course. [Bundle 407].

99. Sam Welek was already working for the Respondent before the Claimant joined. Mr Welek and the Claimant became friends. They often sent written messages to each other, and Mr Welek sometimes offered advice on workplace issues, including how the Claimant could/should raise things with managers.

100. In February 2018, the Claimant passed an examination which Mr Swannick failed. In writing to them both about this [Bundle 435], Mr Tolgyesi mentioned to both of them that the Respondent was not approving all of the training that they had each requested, and invited them to (i) focus on ServiceNow certifications (ii) do free Java Script courses on-line and (iii) do a free "Agile Foundation" course via the Respondent's booking system.

101. The Claimant and Mr Welek exchanged messages about this. [Bundle 438,437]. The Claimant believed that the Respondent's reasons for the rejections were cost-based, including that he, the Claimant, was seeking training which he was ready for immediately, but the rest of his colleagues were not. He believed he would have to wait until all of his colleagues were ready so that the Respondent would train them all simultaneously, a cheaper option. He did not believe at the time that he was being rejected because of his disability.

102. The decisions to reject the training were not made by Ms Godfrey.

103. The Claimant wrote to Mr Tolgyesi to see if it was worth putting in a further request, specifically to obtain some coding qualifications.

February 2018 OH Advice

104. In around February 2018, Mr Tolgyesi obtained occupational advice relating to the Claimant. The referral [Bundle 412] was made by an HR Advisor. It did not state that there were any problems with the Claimant's attendance or performance, but described the main reason for referral as being:

> It has come to our attention that Tom has recently been diagnosed with Asperger's and gets sensory overload and he feels it is better for him to work from home at times. We want to understand more specific details about his condition and how we can help support him in the workplace and if there is any recommendations or adjustments which we should consider. We have offered for him to book a meeting room when he feels he needs quiet time so he can continue with his work.

105. The advice was dated 22 February 2018 [Bundle 416]. It included the history of the Claimant's diagnosis while at university and outlined treatment the Claimant had had in the past, and his current medication. As part of the background, the report included the following information which had been supplied by the Claimant:

> Mr Duncan tells me he feels he has settled well into the workplace and is able to wear headphones while working if he wishes to block out some of the background noise in the office. He reports he has had a few occasions when he has telephoned into work and requested to work at home; he tells me this has been requested when he feels that he is overloaded and feels overwhelmed by the amount of activity going on around him. He can feel that the amount of activity in the office is too much and he needs to be in a quiet environment and distance himself from people around him in order to concentrate and focus. He tells me he can do this at home and is able to email, rather than have verbal contact with people, which he finds affects his concentration and focus. It can also make him feel irritable and he is aware he has a low tolerance of people around him when he feels like this.

106. The report made the following recommendations (and emphasised it was for the employer to make the decision(s)).

> Given Mr Duncan's diagnosis you may wish to consider the following adjustments that may support him within the workplace. I would recommend you consider allowing him access to a quiet area away from other colleagues to allow him to work without being disturbed or interrupted. Mr Duncan tells me he does not require this adjustment all of

the time but is unable to predict when this might be necessary. If this is not available, you may wish to consider allowing him to work at home on occasions.

I would also recommend he would benefit from the following;

- explaining unspoken office rules,
- keeping instructions clear and concise,
- writing instructions down if they are detailed,
- breaking down projects into bite sized pieces, which he tells me he does do,
- ensuring he works six hours rather than variable shifts,
- giving plenty of warning of change and explaining why it is happening,
- reduce sensory specific stimuli, which he tells me he uses headphones for while he is working,
- assign a personal workstation rather than sharing or hot desking,
- using clean feedback with information that is given to him.

Mr Duncan would also benefit from having a relaxed space with calm colours, low lighting and quiet when possible. It would also be beneficial to complete a Stress Risk Assessment to try and identify any issues and concerns he may have. Templates for Stress Risk Assessments can be found on the following website; www.hse.gov.stress/standards/downloads.htmand I recommend regular meetings with his line Manage in order to monitor his progress and update the Stress Risk Assessment if required. You may also wish to consider allocation of a Mentor for further support.

107. A copy of the full report was sent to the Claimant and to the HR advisor. It stated that there were no plans to see the Claimant again, but a fresh referral could be made

108. Although he has not given evidence, we are satisfied that Mr Tolgyesi also received a copy of the report on or shortly after 22 February 2018. Furthermore, we are satisfied that it was stored in the Respondent's HR records, and could be retrieved later on. (At the least, a copy could easily be obtained from Medigold).

109. Mr Tolgyesi and the Claimant discussed the report and agreed that the Claimant could work from home 2 days a week, and use a meeting room on the premises for quiet time on other days. [Bundle 861].

Transfer to Ms Godfrey's team

110. In March 2018, the Claimant began having discussions with Mr Tolgyesi about a team move. He sought to brush up his CV at this time. On 6 April 2018, he wrote to Nick White stating that he was "no longer being challenged" in his current role and would like to switch to another business area. He made similar comments in an email to Mr Tolgyesi on 30 April 2018 [Bundle 527].

111. In exchanges with Mr Welek, the Claimant made clear that his contemporaneous opinions were that his skills were being under-utilised and undervalued. He was assured that the Respondent would look for more "back end" work for him. He was told he could put forward specific training proposals that were based on the Respondent's requirements for his role. [Bundle 538, 537]

112. Ms Godfrey was covering two roles at this time. She was doing her main role, training delivery for clients and also temporarily covering resource management for the practice area.

113. The move to Ms Godfrey's line management was approved, and took effect in around May 2018. Ms Godfrey was informed by Mr Tolgyesi that the Claimant had a disability and required some adjustments. She also discussed it with HR.

114. We are satisfied that she was made aware that an occupational health report existed. Neither Mr Tolgyesi nor HR provided her with a copy, and nor did the Claimant. The Claimant was left with the impression that she had actually read the report.

115. Ms Godfrey had an email exchange with Catherine Doherty. HR adviser, in January 2019. [Bundle 1170 to 1168]. By the time of that email exchange, Ms Godfrey had not asked Mr Tolgyesi for a copy of the OH report. (She suspected that he might not have it, because he had changed his laptop since). From the wording of the email, it is clear that she had not previously contacted HR to ask for a copy of the OH report. Ms Doherty replied that she could not locate the item.

116. Regardless of the reasons for Ms Doherty's comments In January 2019, HR were able to find the report and provide it to Ms Godfrey promptly during the March 2019 absence [Bundle 834], and able to find information about what adjustments were implemented by Mr Tolgyesi promptly after the Claimant's 15 April 2019 grievance. [Bundle 823; 826]. Thus it seems certain that, provided the Claimant consented, Ms Godfrey could have obtained a copy of the report in May 2018 had she chosen to request it then.

117. Based on her discussions with Mr Tolgyesi and HR, Ms Godfrey believed that the required adjustments were that:

    117.1 The Claimant needed an environment which reduced sensory stimuli. She believed that this requirement was satisfied by ensuring a room in the Respondent's premises (in Bracknell) was available, so that the Claimant could use that space as and when required, away from his desk in the open plan office.

    117.2 The Claimant needed to be able to work from home when working on support services. This was to be away from distractions.

118. She provided these (and only these) adjustments at the start of the Claimant's time on her team. Her belief was that if other adjustments were required, the Claimant would raise that with her.

119. Ms Godfrey did not arrange for the Claimant to have a stress risk assessment.

Work on Ms Godfrey's team

120. The Claimant's role when reporting to Ms Godfrey continued, as it had when reporting to Mr Tolgyesi team, to include work on the ServiceNow support desk. When employees were not on time that was allocated to a specific project, they could potentially be asked to assist with the support desk, which entailed providing technical support to customers via a telephone helpline and trying to answer queries and resolve technical issues.

121. The Claimant was familiar with what type of work and type of queries could come to him if and when he was on the support desk. He had received training. He was sometimes scheduled to be assisting the support desk by being given several days notice. Other times, when Ms Godfrey believed that she required to assign someone urgently, and believed the Claimant was available, he was assigned at short notice. For example:

121.1 On Monday 14 May 2018, the Claimant was asked to be able to supply Cafcass/DCLG support on the following Wednesday for a few hours at around lunchtime. He was asked to do this in addition to his work on Whitbread. He replied to Ms Godfrey to say "sure, no probs". [Bundle 540].

121.2 Around Friday 22 June 2018, the Claimant was on training and was contacted by Ms Godfrey about the following Monday. He was told that a colleague (Nicky) was on leave and so he should provide support for Cafcass/DCLG. He was also told that support for Whitbread might also be needed, but Ms Godfrey would not know until Monday. He replied to say that was OK, and was told it would be between 9am and 6pm and replied "yep, fine by me". [Bundle 549].

122. The Claimant continued to pursue a move to a completely different business area. He wrote again to Nick White on 6 July 2018 [Bundle 557] and also raised it with Ms Godfrey (for example, on 28 June 2018 [Bundle 554]). Ms Godfrey suggested to the Claimant that he should update his CV and she would potentially use his updated CV to help find out if managers in other business areas might be interested in taking him on. He did not do this immediately, and she reminded him about her suggestion on 1 August 2018 [Bundle 562].

123. In the same email, sent on a Wednesday, she asked the Claimant to cover for a colleague (Nicky) the following Monday 6 August 2018.

124. The Claimant replied the next day (Thursday) to say that he was working on the CV and would pass it to Ms Godfrey when ready. He also agreed that he would provide cover on DCLG "today". On Monday 6 August 2018, Ms Godfrey emailed him to confirm that it was that day for which cover was required.

125. On Monday 3 September 2018 [Bundle 591], Ms Godfrey wrote to the Claimant to say that he would not be required on the Specsavers project that week. He was

asked to cover for Nicky, in her absence that week, on DCLG. The Claimant replied to say "no worries".

126. On Monday 3 December 2018 [Bundle 696], the Claimant was asked by the Claimant to "keep an eye on the DCLG incident queue today" because a colleague was off sick. The Claimant replied to say "sure thing".

Take your stress and multiply it

127. On Thursday 16 August 2018, the Claimant was feeling stressed because of family issues. He mentioned this to Mr Welek.

128. Shortly afterwards, he had an instant message exchange with Mr Welek which reported that he was frustrated with work issues and feeling overwhelmed. Part of the frustration was that the client who was supposed to attend a virtual meeting had not attended. [Bundle 587].

129. Later the same day, he had a discussion with Ms Godfrey. He mentioned to her that he was feeling overwhelmed by the number of different things he had to juggle. Ms Godfrey replied by saying "oh yes, multiply that by about 25 and then that's my job". The Claimant reported this remark to Mr Welek while it was fresh in his mind. [Bundle 584].

130. In the same conversation with Ms Godfrey, the Claimant had also told her that if there was a big crowd, he might have to step away. Ms Godfrey had replied "Ah yes, we all get like that sometimes". Again, the Claimant reported this remark to Mr Welek while it was fresh in his mind. [Bundle 585].

131. The Claimant knew that Ms Godfrey had been told about his disability by Mr Tolgyesi. The Claimant's opinion was that she had also seen the OH report itself. As of August 2018, his recollection was that he had specifically asked her, and she had said that she had seen it. [Bundle 589].

132. The Claimant saved the conversations Mr Welek with a time stamp of Monday 20 August 2018. By comparison with similar documents in the bundle, that does not necessarily demonstrate that the discussion (all) took place on Monday 20 August 2018. [For example, the comparison with Bundle 603 shows that the conversations shown on Bundle 651 did not all take place on 28 September 2018.] Ms Godfrey's emails sent just before this time included in the signature "Advance notice of leave: 20-28 August." Therefore, it seems likely that the conversations between her and the Claimant, and the Claimant's instant message reports of them to Mr Welek, occurred late the previous week.

Assignment to Projects; Timesheets and Time Codes

133. The Claimant and his colleagues would spend their time either assigned to projects, or else "on the bench".

133.1 Being “on the bench”, meant that they were potentially available to be assigned to projects, and might spend their time either on training or on doing ad hoc work such as covering the support desk, for example.

133.2 Being on project work would mean that they would be working on a particular piece of work, for a particular client, usually as part of a team. The Respondent would generally charge the clients be reference to the amount of time spent by each of its employees on that project. Each employee was required to record the time spent on a project by completing an electronic time sheet, and recording the time spent against a specific project/client code. These time sheets were to be submitted each week.

133.3 Being on project work would include liaising with the client and/or liaising with colleagues working on the same project, in order to assess the client’s needs, report on progress, seek feedback, etc.

134. The Claimant was aware of these requirements.

135. The Claimant frequently failed to complete his timesheets. On 4 September 2018 [Bundle 592], Ms Godfrey sent him a reminder. She supplied him with some specific codes, and a link from which he could access others.

136. She gave him an oral reminder around Friday 14 September 2018. The Claimant mentioned this to Mr Welek and was amused that she had appeared annoyed. [Bundle 598].

137. The following Monday, 17 September 2018, she asked him if he had met the 10am deadline that day. She said that she had received a notification to say he had not done it, and she wanted to check if that was because the report had been run too early. The Claimant replied to say “I haven't yet, I'll get on it asap**”.** She reminded him that the deadline was 10am each Monday, or else month end, if earlier. She used a smiley face punctuation; the Claimant replied to say “ok”. [Bundle 603].

138. The following day, Tuesday 18 September, the Claimant asked about the time code for the work he was doing that week (Symfoni WE Salesforce project). Ms Godfrey did not know and said she would look into it. [Bundle 605]. By the Friday, the time code was still not resolved, and so Ms Godfrey advised the Claimant to enter this as an “exception” on his weekly timesheet. [Bundle 631].

139. The Claimant attempted to act on Ms Godfrey’s instructions to complete his outstanding timesheets for the preceding weeks/months. He informed her that the code he was trying to use for Specsavers did not appear to work for periods earlier than August. She suggested he go back to the person who supplied the code and ask them what the code had been prior to August. Later, Ms Godfrey checked if he had now done it; he said he was still waiting for his colleague to reply. So Ms Godfrey supplied some codes that she thought might work. They did not, so she advised him again to contact the colleagues in charge of that project. The Claimant confirmed that he had completed his timesheets up to end of September, with the

exception of the work done on Specsavers prior to August, and the work in September on Symfoni WE Salesforce. [Bundle 652-653].

140. On Monday 3 December 2018, Ms Godfrey reminded the Claimant that he was passed the month end deadline for November, and he should complete his timesheet by 4pm that day. The Claimant replied to say "will do". [Bundle 696]

141. On 3 January 2019, the Claimant sent Ms Godfrey his draft action plan for 2019. He included "do time sheets" as one of his planned items.

142. The Claimant has given various reasons for not supplying timesheets on time. To the extent that he alleges that Ms Godfrey failed to explain the process to him, that is not true. To the extent that he alleges that she failed to supply codes to him, our finding is that she provided the codes to him where she knew them, and when she did not know them, she attempted to find them for him. When she was not able to find them, she ensured that he knew who to ask in order to obtain the code.

Specsavers project

143. The Claimant worked briefly on this project around May 2018. The specific details of the instructions that the Claimant was given about it have not been proven to us by either party. However, the contemporaneous documents do not record the Claimant expressing any lack of understanding about what was required of him.

144. Ms Godfrey suggests that the most likely reason that the Claimant came off this project in around May 2018 was simply that the other employees working on the project had sufficient capacity. There is no evidence to contradict that. In particular, there is no evidence that the reason the Claimant ceased to be on the project was because of his disability. The Claimant did not complain to Ms Godfrey at the time about ceasing to be on this project. He has not produced evidence that he complained to anyone else (such as Mr Welek) at the time.

Whitbread project

145. The Claimant was not assigned to this project. As mentioned above, on Friday 22 June 2018, he was told that he might potentially be assigned to it the following week. However, that did not happen. The reason was that the Respondent had sufficient resources to allocate to the project without needing to call upon the Claimant to work on it too.

146. There is no evidence that the reason the Claimant ceased to be on the project was because of his disability. The Claimant did not complain to Ms Godfrey at the time about ceasing to be on this project. He has not produced evidence that he complained to anyone else (such as Mr Welek) at the time.

Symfoni WE Salesforce project

147. The Claimant was assigned to this project in September 2018.

148. This was an internal project to develop an interface between ServiceNow and Salesforce. The Claimant was required to work with the Respondent's employees in the UK and Belgium. Ms Godfrey put the Claimant in touch with Peter van Damme, Product Manager. She joined the initial call in which the Claimant was given information about the project and what specifically needed to be done. It was Mr Van Damme, and not Ms Godfrey, who had the technical knowledge and ability to answer the Claimant's questions.

149. On around Friday 14 September 2018, Ms Godfrey informed the Claimant that the Respondent had Salesforce experience in the UK to assist if needed. [Bundle 601]. The Claimant followed up by asking Ms Godfrey:

> would you be able to setup some sort of call/introduction with that SalesForce contact? I have a lot of questions re: SalesForce and the integration with WE

150. On around Tuesday 18 September 2018, the Claimant asked Ms Godfrey again for the introduction. Ms Godfrey replied the same day to supply the name of the contact (Nupoor Pandey) and to say that she, Ms Godfrey, would contact her.

151. On 21 September, Ms Godfrey contacted Ms Pandey [Bundle 627-628]. Ms Pandey replied promptly, and Ms Godfrey forwarded the email trail to the Claimant, inviting him to contact Ms Pandey to set up a time for a discussion. This message was sent around 10am that day. The Claimant did not contact Ms Pandy that day.

152. On Sunday 23 September, the Claimant informed Ms Godfrey that he might not be in the following week because of illness.

153. Following his return from sick leave, Ms Pandey contacted the Claimant around 27 September 2018. She said she would be free for a meeting the following week, to which the Claimant agreed. A discussion did take place, but the Claimant regarded it as unproductive.

154. As the Claimant was aware, Mr Tolgyesi also had some relevant knowledge of the systems. The Claimant did not seek to contact him about this specific project.

155. On Thursday 5 October 2018 (at 8.41am), the Claimant informed Ms Godfrey about a phone call with Mr Van Damme the previous day. In full, he wrote:

> Just a quick update regarding a call yesterday with Peter.
>
> - I'm currently struggling with several personal problems outside of work and this is being exacerbated by my Asperger's. Sadly, this has resulted in me being prone to some severe bouts of anxiety.
>
> This lead to a call, with Peter, in which I had a bit of a breakdown and found myself a bit incapable of constructing coherent sentences.
>
> I've been doing the work for Peter, but I've made a couple of misjudgements regarding time required to complete the task and I feel that the above has impacted my ability to communicate this effectively.

Apologies if I've caused any inconvenience.

156. Ms Godfrey emailed back the same day. She asked if there was anything she could do to assist. She said that she would be in the Bracknell office (the Claimant's workplace) the following week and they could discuss further. [Bundle 656]. The same day, the Claimant had also emailed Mr Van Damme (at 8.33am). [Bundle 663]. His email demonstrated that he did understand what work was required of him on the project. He supplied an update of where he was with that work.

157. In due course, Ms Godfrey received feedback from Mr Van Damme. Mr Van Damme's opinion was that the Claimant had not delivered work of sufficient quality or within the required time frame. The Claimant's involvement with the project ceased.

121s; Appraisal and Review

158. When Ms Godfrey first became the Claimant's line manager in May 2018, she did not formally set up a schedule for regular one to one meetings ("121s"), or other catch up or supervision meetings. Ms Godfrey works on several of the Respondent's sites, and so was not always present at the Bracknell site at which the Claimant was based. Their main methods of communication were instant message and email, though they did also have face to face meetings and telephone conversations, as well as video meetings.

159. Ms Godfrey's other direct report was Jonathan Swanwick. She had the same arrangements in relation to 121s, and other contacts, with Jonathan Swanwick as with the Claimant.

160. When the Claimant and Ms Godfrey met, this was generally done on an informal basis, without an agenda (being circulated in advance, or at all) and without minutes or written action points being produced afterwards.

161. As mentioned above, the Claimant alleges that some comments were made to him by Ms Godfrey on 20 August 2018. ["Take your stress and multiply it by 25 and you get my job" and "We all get like that sometimes"]. As mentioned above, we cannot be sure from the contemporaneous documents that the remarks were actually made on Monday 20 August (as opposed to late the previous week), but we are satisfied that they were made. In her witness statement (paragraphs 39 to 41), Ms Godfrey claims that there was a 121 at around this time, and suggests that the conversation that the Claimant is referring to took place in that 121. No contemporaneous records of such a meeting (or the dates of it) have been supplied to us. We are not satisfied that this was a formally scheduled meeting (though it did take place).

162. In the Claimant's and Mr Welek's instant message exchange about these remarks, Mr Welek encouraged the Claimant (i) to make sure that Ms Godfrey was aware that he was making a connection between his feelings of being overwhelmed and

his disability and (ii) to seek to insist on regular 121s so that there could be discussion about what the Claimant required from her.

163. Mr Welek helped the Claimant to draft an email to Ms Godfrey, which he sent on 7 September 2018 [Bundle 596] requesting schedules 121s once every two weeks. He also asked that they schedule a time to discuss his appraisal.

164. On 19 September 2018, the Claimant sent Ms Godfrey a meeting invite for later the same day. He said this was because the deadline for appraisals was near. He told her to "feel free to move it if there is a more suitable time" for her. She replied to suggest moving it to the following day, as she would be in Bracknell and it could, therefore, be face to face. She sent this reply at around 1.30pm, ahead of the proposed 2pm start time.

165. The meeting was arranged for the following day, Thursday 20 September, at 11.30am. Ms Godfrey went through the list of goals which had been suggested for all team members and sought to adapt them to the Claimant's role.

166. Following the meeting, Ms Godfrey sent an email to the Claimant and Mr Swanwick [Bundle 614]. She attached the draft of the team goals and invited any comments or re-wording. She said that they could each also make suggestions to her for individual goals. She said that the following Tuesday she would meet each of them and aim to complete half year reviews. She asked them to bring material to that meeting (such as feedback from customers) for discussion. She invited any questions. The draft included, amongst other things, goals for engaging with customers and for completing time sheets on time, and minimising bench time.

167. The Claimant was absent (due to what he believes was food poisoning) on the Monday. On the Tuesday, Ms Godfrey proposed going ahead with the meeting, as there was a deadline for inputting the half year reviews to the Respondent's ZinZai system. The Claimant replied to say that the half year review meeting could take place at 4pm, but he would have to do it from his bed as he was still not well. Ms Godfrey proposed doing it the following day via Skype "if you're still not well".

168. She proposed the meeting for 10am. The Claimant was able to attend the Bracknell office in person, though was still not feeling well. Ms Godfrey was also due to attend another meeting that day, with a senior colleague, and she had no choice other than to attend it. That meeting was moved, which in turn led Ms Godfrey to push back the meeting with the Claimant until the afternoon.

169. The meeting took place. Ms Godfrey gave the Claimant some oral feedback on the time to date that she had been his line manager. She referred to the time sheet issue as an area which required improvement.

170. Although the timing of its completion is unclear (for example, it refers to manager as being John Lockwood), the half year review document with Ms Godfrey's comments is Bundle 1418 to 1430. The overall rating was "achieves".

171. For goals:

171.1 For being a "trusted partner" to customers, the comments were favourable.

171.2 For "global strength" and "customer satisfaction", there was no criticism. It was stated – accurately – that the projects on which the Claimant had worked had not yet completed, and so there were no results for this goal yet.

171.3 For "build a customer dedicated culture", it was stated, amongst other things: "*For the next period it would be good to see more active engagement with other members of the team and feedback from the new graduates who are buddied with Tom*".

171.4 For time sheets, it was stated that "*after chasing Tom has finally completed some of his timesheets to end of June*". This comment was factually accurate. It said that "*for the next period all timesheets must be complete weekly and any issues with project codes flagged, without exception*".

171.5 For "grow the business", the comments were favourable.

171.6 For "improve our propositions", the comments were favourable.

172. For competencies, the comments were all favourable:

172.1 For "delivering customer value", after praising the Claimant for work to date, the additional comment was: "*Over the next few months I would suggest Tom continues to develop and extend his links with colleagues, delight customers by being more proactive and interact with colleagues in the office*."

172.2 For inspiring leadership, it was noted that the Claimant had recently been assigned a new graduate buddy, and the Claimant was looking forward to supporting that person.

172.3 His integrity and passion for results were praised, and it was noted that he often suggested improvements.

<u>October 2018 sickness absence and request for hand over</u>

173. In October 2018, the Claimant had discussions with Mr Welek that he was feeling overwhelmed. Amongst other things, they discussed the graduate buddy programme. On 23 October 2018, In relation to difficulties discussing a work issue, Mr Welek suggested to the Claimant that the Claimant should say that he did not know what he was supposed to be doing. The Claimant replied that he did know. Mr Welek said that he should point out that he was struggling with mental health. The Claimant believed that this was truthful, but was reluctant to say it to Ms Godfrey. Mr Welek encouraged him to do so, and to take it further (with HR) if Ms Godfrey did not respond appropriately.

174. The following day, Thursday 24 October 2018, the Claimant emailed Ms Godfrey [Bundle 682] to say:

> *Sorry I haven't been in touch sooner. I can't seem to connect to the VPN today, so I don't have access to my email. I'll try and resolve that ASAP.*
>
> *As I previously mentioned, I've been struggling with my mental health as a by-product of my disabilities, and I think it's reached critical mass. Is it possible that I can request some short-term leave, just to recuperate and reset my schedule? Unfortunately, I won't be able to take a voicecall at the moment - as that will exacerbate the issue. Let me know what you think here.*

175. He informed Mr Welek that he had done this, and Mr Welek advised him to obtain a GP note for his return. [Bundle 679].

176. Ms Godfrey messaged to ask if the Claimant would be able to do a hand over to Mr Tolgyesi in the short term. The Claimant replied that he might be able to, so long as it did not have to be done by speaking to anyone. Ms Godfrey replied that she would check with Mr Tolgyesi. She did not follow this up further with the Claimant and he was not asked to do anything by way of handover.

177. Ms Godfrey emailed the Claimant on Monday 29 October [Bundle 685] to apologise for not having contacted him again the previous week. She told him that sick leave up to 5 days was self-certificated, and then he would need a doctor's note. She added

> I really want to help reduce any anxiety and I was wondering if it would be valuable for you to talk with a member of our occupational health team who can provide additional assistance.
>
> Please let me know if you'd like me to refer you to the Occ. Health team for further support.
>
> Looking forward to hearing back from you soon

178. Following the end of the self-certification period, the Claimant obtained a fit note. On 8 November, he emailed it to Ms Godfrey. On Monday 19 November, not having heard from the Claimant, Ms Godfrey emailed him and asked for an update, pointing out that the fit note had expired the previous Thursday. She repeated the offer of a referral to Occupational Health. [Bundle 689].

179. On 26 November, the Claimant replied to her 19 November email. By this time, Ms Godfrey was on leave herself. He said that he assumed she was aware by now that he had returned from sick leave with effect from 19 November, and had being having some technical issues, and was also working his way through emails which had been received while off sick. He said he would discuss the offer of extra help with her on her return. [Bundle 694].

<u>CV and request for transfer</u>

180. The Claimant and Ms Godfrey had a 121 on 3 January 2019. At the Claimant's request, following the meeting, she emailed him a template to use when updating his CV. After the meeting, the Claimant sent her a list of the action points arising

from the meeting. This included that he would create a CV which was relevant and highlighted his skills. [Bundle 703].

181. On 7 January 2019, he sent her his draft of the CV and asked if she had any advice about it. [Bundle 706]. It was a two page document. [Bundle 707-708].

182. On 14 January, Ms Godfrey sent a general email to the team asking them to update their CVs. This prompted the Claimant to ask about his. She acknowledged that she had received it, but not yet reviewed it.

183. After she had reviewed it, she did circulate it in March 2019.

184. On 2 April 2019, (the day after the Claimant returned from a sickness absence starting 25 February), Ms Godfrey emailed the Claimant with some minor revisions. [Bundle 803].

Comments made on 3 January 2019

185. Although Ms Godfrey does not recall the specific words that she used, we are satisfied, on balance of probabilities, her words were approximately those recalled by the Claimant, namely "You can just call us, we aren't that scary" and "You need to call us, not e-mail, as that's policy".

186. Her reason for doing so was because she wanted to be sure that the Claimant did know the policy, because he had not fully complied with it for the 24 October to 19 November absence. She was not proposing disciplinary action, and she made clear to the Claimant that she was not proposing that.

187. We are also satisfied that she said something along the lines of "If you think the job is stressful, you should try building your own home."

Absence notification policy

188. In fact, the actual policy wording is:

> NOTIFICATION OF ABSENCE
>
> Any local variation to the notification procedures for any period of absence will be provided by the employee's manager. However in general the following procedure should be followed where possible.
>
> If an employee is unable to attend work, they should inform their manager, or arrange for a friend or relative to do so on their behalf, within one hour of their normal start time on their first day of absence. If there are extenuating circumstances that prevent the employee from doing this they will be taken into account. Fujitsu recognises that sometimes it is not possible for an employee to call their manager before their normal start time due to the nature of their illness or injuries. Similarly the employee's manager may not yet be at work. If the employee's manager is unavailable the employee must leave a full message confirming the reason for their absence (i.e. sickness), likely duration and provide a number where they can be contacted to discuss further. This will help to

minimise disruption and enable contingency to be established. It is not acceptable for the employee to phone and leave a message simply stating that they are absent due to illness.

If an employee does not have their managers telephone number they should contact the switchboard on XXXXX and ask to be transferred.

If the employee is absent for more than one working day they should maintain regular contact with their manager, informing them of their status. The employee should agree the frequency of contact with their manager. Where a period of absence is prolonged it is recommended that the employee should maintain a minimum of weekly contact where possible with their manager in order to discuss progress. If the employee is unable to make the call themselves, they must ensure that someone keeps the manager informed on a regular basis if the absence persists.

Without prior management agreement, e-mails and text messages are unacceptable as the sole method of notifying absence unless in extreme circumstances, but may be used to record or draw attention to attempts to notify the Company. If the manager is unavailable, and there is no voicemail facility, the employee or their nominee must notify the manager's nominated deputy.

If no nominated deputy is available another member of the team who can relay a message should be contacted. In this event, the team member should take a message confirming a time when the employee will call back to speak to the manager.

Employees who leave work during working hours due to sickness must make sure their manager or the manager's nominated deputy or some other responsible person is informed before leaving work.

Failure to comply with the sickness notification process could result in the absence being classed as "unauthorised absence" and may result in Sick Pay being withheld. Sick pay will not be unreasonably withheld.

Managers are required to respect the privacy of employees' information and to adopt a pragmatic and professional approach regarding conversations in relation to an employees' absence and/or the disclosure of the reason for the period of absence.

Please refer to the Sick Pay Guidelines and Unauthorised Absence from Work Guidelines.

UNAUTHORISED ABSENCE FROM WORK

When employees are absent from work and have not contacted their manager, every practicable and reasonable attempt should be made to contact the person as soon as possible to establish the reason for absence. If an employee cannot be contacted please refer to the Unauthorised Absence from Work Guidelines for the process to follow in these circumstances.

MEDICAL CERTIFICATION

A Statement of Fitness for Work ("fit note") from the employee's doctor is required for any absence which extends beyond seven calendar days. Fit notes are issued for a stated period of time, and further fit notes must be submitted where necessary to cover the total period of absence. Delays in submitting fit notes may invalidate any Sick Pay payment due to the employee.

189. In other words, the emphasis Ms Godfrey placed on the importance of phone calls is matched by the policy wording. However, Ms Godfrey appears to have mentioned only that the Claimant must personally make the phone call, and not highlighted that the policy also allowed the employees to "arrange for a friend or relative to do so on their behalf".

Replacing Mr Swanwick on a course

190. On Monday 25 February 2019, Mr Swanwick had been due to undertake a training course. He was unable to do it. Ms Godfrey found out the previous Friday, and asked Mr Swanick to find out if the Claimant was interested. At 8.17am on the Monday, Ms Godfrey sent a text message to the Claimant to ask him if he could do it. It was due to start at 9am (so 43 minutes later). [Bundle 725].

191. The Claimant did join the course. He left part way through. He did not contact Ms Godfrey to say that he had done this, or to say why. He commenced a period of sickness absence, but did not contact the Respondent to let it know.

Start of Sickness absence – February/March 2019

192. Around 12 March 2019, Ms Godfrey realised that she had not heard from the Claimant for a while. He had been on-line on 26 February, but not since. She texted him to ask if he was OK. [Bundle 725]. A reply to her text was sent the following day (at 4:13pm), and it stated that the Claimant was finding it difficult to communicate, and said that his partner had replied to HR's email.

193. That was a reference to the email sent on 13 March 2019 at 1.17pm [Bundle 733]. That email was from HR advisor, Helena Robinson, and referred to Ms Godfrey's text, and a phone call made by Ms Robinson. It concluded: "*As we have had no contact from you, I will send you a letter to which you must respond*."

194. The Claimant's partner sent an email signed "Nathalie Tearall (on behalf of Tom Duncan)" in reply at 3.57pm. It referred to the Claimant's disability and personal issues, and workplace issues. This email was sent before the Claimant or Ms Tearall had seen any letter. It stated that asking the Claimant to go on the course at very short notice on 25 February 2019 had tipped the Claimant over the edge. It referred to the Claimant having communication issues at this time, and that Ms Tearall would respond to the letter (if any) on his behalf.

195. Ms Robinson replied to say:

> Hello Natalie
>
> I am sorry to hear Tom is unwell; we need him to communicate with his manager and to provide fit notes if he is unwell as per the company policy.
>
> Please let me know if there is anything we can do to help Tom.
>
> If Tom wishes you to liaise on his behalf he will need to sign a letter to that effect and send to me.

196. Ms Godfrey also sent a text at 16:16 to the Claimant which said: “Please can your get your doctor to do a sick note and share it with me & HR.” [Bundle 743]

197. The same day, the Claimant sent an email, timed at 16:46, with the subject line “SEED - Diversity & Inclusion”. This was a fairly lengthy email [Bundle 741-742] which spoke about various issues, including pay, lack of career development, lack of 121s, lack of response regarding CV. It stated that the issues had “had an extremely negative impact on my mental health and my daily life” and he wanted to know what could be done to help in the future.

198. Ms Godfrey had been copied into Ms Robinson’s email to Ms Tearall. She emailed Ms Robinson to let her know about the text message from the Claimant, but without mentioning that the Claimant’s text message had said that Ms Tearall would be responding to Ms Robinson on his behalf. [Bundle 744].

199. On 14 March 2019, Ms Robinson provided advice to Ms Godfrey. She suggested that the Claimant be reminded of the employee assistance programme and the opportunity to be referred to HR. She advised that Ms Godfrey would need to speak to the Claimant. She suggested that the Claimant’s fit note would need to cover the period from leaving the training course, and asked to be kept informed. Subsequently, the Claimant obtained a fit note [Bundle 748] which was dated 20 March 2019, and covered the period 25 February to 30 March; however, that was not sent to the Respondent on 20 March 2019.

200. By 28 March, the Respondent had not heard further from the Claimant (or from Ms Tearall). With Ms Godfrey’s approval, Ms Robinson drafted a letter in Ms Godfrey’s name and emailed it and posted it to the Claimant. The letter was headed “absence without leave”. The file name (for the attachment to the email) was “AWOL ltr - TD 28 03 2019”. The Respondent’s unauthorised absence from work guidelines were also attached. The letter commenced by suggesting that Ms Godfrey had not heard from the Claimant since 7 January. That was wrong, because she had had a text message on 13 March 2019 (in addition to the email from his partner, sent from the Claimant’s email account, which was mentioned in the letter). The letter accurately stated that the Claimant had not yet supplied a fit note and that Ms Godfrey had sought to contact him by phone several times. The letter included:

> I must remind you that under the terms of your employment it is your responsibility to notify your manager as soon as practical, of the reason for your absence and likely duration.
>
> Please would you either attend work, or if this is not possible contact me on [phone number] as a matter of urgency so that we may understand your current situation and when you are likely to return to work. If we do not hear from you within 5 days from the date of this letter further action may need to be taken.

201. The covering email from Ms Robinson mentioned that the Claimant’s pay might be stopped if he did not contact the Respondent and arrange for fit notes to be provided. [Bundle 750]

Discussions between Ms Godfrey and the Claimant's mother

202. Ms Godfrey's 28 March 2019 letter refers to a "letter" having been sent to the Claimant on 13 March 2019. The hearing bundle does not include a copy of such a "letter" or covering email for such a letter. [We have Ms Godfrey's texts and Ms Robinson's emails of 13 March, but not a "letter".]

203. It is the Claimant's recollection that there was a letter around 13 March, as well as the email. It is the Claimant's opinion that he received a hard copy letter dated (on or around) 13 March 2019 and he opened it and placed it somewhere in his residence. At the time, he was living with his mother. It is the Claimant's belief that his mother came across the letter, and from it (i) firstly learned that the Respondent believed he was on unauthorised absence and (ii) secondly obtained Ms Godfrey's contact details.

204. What is not in dispute is that the Claimant's mother contacted the Respondent on around 18 March 2019, by sending a text [Bundle 5679] to Ms Godfrey. Given that the Claimant had not asked her to do this, or told her about his work situation, on the balance of probabilities, our finding is that the Claimant's inference about how his mother became aware of the situation is correct. The text message stated that the sender was the Claimant's mother, and that she did not want the Claimant to know about the contact and that the Claimant would be upset if he knew that his mother had contacted his employer. The text made clear that the Claimant's mother had had some discussion with the Claimant about his absence/health (stating that the Claimant had told her he had contacted GP). It invited Ms Godfrey to come to visit the Claimant at home. It suggested, in the alternative, a meeting on the Respondent's premises, but added that the Claimant would need "disability team" member or a family member to facilitate such a meeting. The text included a link to information about managing employees with ADHD.

205. Having read the text (and noticed that she had a missed call from the same number), Ms Godfrey texted back to say that she would phone later. During the course of Monday and Tuesday 18 and 19 March 2019, there was at least one phone call and various text messages. [Bundle 5329-5332]. An arrangement was made to meet that week (on 20 March) at the Respondent's Bracknell premises but the arrangement was cancelled on 19 March 2019.

206. The Claimant has not called his mother as a witness, or sought a witness order for her to attend and/or produce her phone records.

207. The Claimant invites us to infer that there is something suspicious about the fact that the Respondent has not produced documentary evidence about the duration of the phone call(s) between his mother and Ms Godfrey. Our finding is that this is not suspicious, and that neither the Respondent nor Ms Godfrey has deliberately destroyed the phone records to make sure the data was not available to the Claimant and/or the tribunal. Ms Godfrey's work phone was changed for routine business reasons.

208. Our finding is that Ms Godfrey has not been deliberately dishonest in her account of what she said to the Claimant's mother during the phone call. However, it seems likely to us, from looking at the available contemporaneous documents, that when Ms Godfrey made the arrangement to meet the Claimant's mother, she was doing so unconditionally, and that it was only later, after liaising with HR, that she got back in touch with the Claimant's mother to say that the meeting could only go ahead with the Claimant's consent. (Ms Lindeque's account [Bundle 985] as part of the Grievance 1 investigation is likely to be correct.)

209. After being given this information, the Claimant's mother did speak to him, and texted Ms Godfrey to say that the discussion with the Claimant had not gone well. The Claimant had refused permission for either of his parents to attend a meeting with Ms Godfrey and had declined the opportunity of a meeting at his home. Based on information given to her by the Claimant (or, in any event, not on information given to her by Ms Godfrey or the Respondent), the Claimant's mother stated that it was her understanding that the Respondent's occupational health advice was that the Claimant required a week's notice of meetings; on that basis, the Claimant's mother suggested that the Respondent invite the Claimant formally to a meeting in a week's time. It was as a result of this text message that the proposed meeting for the following day was cancelled.

210. We are not persuaded that Ms Godfrey supplied information to the Claimant's mother about the Claimant's health or absence that she did not already have from (i) reading the 13 March letter (which the panel has not seen) and (ii) speaking to the Claimant about his contact with his GP (information which Ms Godfrey received from the Claimant's mother, having not yet received such information from the Claimant). The Claimant's mother was already aware that the Claimant had still not contacted the Respondent, and that was, we infer, one of her motivations for seeking to get in touch with the Respondent. It seems clear to us from the documents that the Claimant's mother was hoping to persuade the Respondent to be understanding, and to refute any suspicion that the Claimant was absent for any reason other than a genuine medical condition.

211. We accept Ms Godfrey's account that the majority of the duration of the conversation was the Claimant's mother talking about the Claimant and his disability and what were (in the Claimant's mother's opinion, an opinion not necessarily shared by the Claimant) his needs.

212. We are, however, satisfied that Ms Godfrey did not simply state that she could have no discussion whatsoever in the absence of the Claimant's consent. The precise duration of the phone call is not crucial, but it was not simply a brief call to say "obtain Tom's consent and we can talk further". (Ms Godfrey's own estimate was 17 minutes in July 2019, based on her call history when she still had that handset). The Claimant's mother was already aware that the Claimant was hoping for a change of department (and had been for some time). On her own admission, Ms Godfrey had some discussion about the potential availability of jobs in other sections. We infer that the change of department was an important issue for the Claimant at this time (as highlighted, amongst other places, in his email of 13

March 2019 re "SEED - Diversity & Inclusion" which had not been sent to Godfrey) and that the Claimant's mother had obtained this information from the Claimant, not Ms Godfrey, which led her to enquire about the likelihood of the Claimant successfully securing a transfer.

213. We are satisfied that Ms Godfrey's reason for being willing to talk to the Claimant's mother by phone (and potentially meet face to face) was that she required information about the Claimant's absence, which the Claimant had not supplied. She was aware (based on the advice from Ms Robinson) that a failure by the Claimant to comply with absence policies might have consequences for the Claimant, including cessation of pay and/or disciplinary action. It was not Ms Godfrey's intention to undermine the Claimant (by supplying confidential information to his mother, or at all) or to seek to obtain information to use against the Claimant.

214. The Claimant regards the conversation between him and his mother on the evening of 19 March 2019 as being one in which his mother criticised him. If that is true, she was not doing it on behalf of Ms Godfrey, who had only invited the Claimant's mother to obtain consent from the Claimant, not to criticise him if he was not willing to give it. Similarly, to the extent that the Claimant's mother suggested that he should leave the Respondent (by taking voluntary redundancy or otherwise), this was not a suggestion made by Ms Godfrey (and Ms Godfrey did not state that the Claimant was at risk of redundancy).

215. Once it became clear that the proposed meeting on 20 March would not take place, the Claimant's mother suggested that Ms Godfrey might liaise with Mr Welek, who might have more success in persuading the Claimant to attend a meeting, or to contact the Respondent. Ms Godfrey replied to say that she would talk to Mr Welek "as needed".

216. Around 1 April 2019, the Claimant's mother chased this up [Bundle 1349-1350] and asked if it was possible for the Respondent to contact the Claimant's GP directly. Ms Godfrey replied to say that she had not yet spoken to Mr Welek but would do so. The Claimant's mother sent a further text around 2 April to say that the Claimant had switched on his work laptop. Ms Godfrey replied by text to the Claimant's mother to say that the Claimant had resumed work. The Claimant's mother asked Ms Godfrey to try to arrange a meeting with Mr Welek and the Claimant.

<u>1 April 2019</u>

217. At about 1pm on Monday 1 April 2019 (following prompting from the Claimant's mother), Ms Godfrey messaged Mr Welek about the Claimant. [Bundle 788]. She told Mr Welek that the Respondent had not received a doctor's note, and asked Mr Welek to mention this to the Claimant if they spoke.

218. There was an exchange of text messages between the Claimant and Mr Welek. We infer that it was after 1pm and before 1.20pm. The full exchange (and precise time stamps) are not in the bundle. Bundle Pages 800 to 802 seem to be part of

same text conversation. From the context, we infer it was on 1 April 2019, but cannot be sure the pages are in the right order. On the balance of probabilities, the messages immediately prior to page 801 are not included in the bundle and are Mr Welek informing the Claimant of Ms Godfrey's message. The Claimant replied to say that he was already back at work. Mr Welek was surprised. In the text conversation on 1 April 2019, Mr Welek said that he and Ms Godfrey had discussed the communications between Ms Godfrey and the Claimant's mother, and the lack of contact from the Claimant. At the time, Mr Welek said:

> Also she said "we all have to follow the process" and I said how difficult it would be if your illness meant that communication was the main issue
>
> And she replied with "oh yes. we all find it hard but no communication is inexcusable"

219. This part of the conversation, on page 800, may have been later than the exchanges shown on 801 and 802. In any event, we have no direct reply from the Claimant about it.

220. During oral evidence, Mr Welek was not able to say whether those were direct and exact quotes from Ms Godfrey. He did not recall her exact words. The Claimant invites us to infer that they were her exact words, taking account of the use of quotation marks, and the fact that they were written soon after the discussion between Mr Welek and Ms Godfrey. We cannot be sure those were her exact words, taking into account that texts are an informal medium, and that Mr Welek was not seeking to convey the information with the accuracy that might be expected in (for example) sworn evidence in court. We do accept (and Ms Godfrey does not deny) that the gist of what she said was that the policy required the Claimant to keep the Respondent informed about a sickness absence, and that the Claimant had not done that, and that her stance was that he needed to do so.

221. About 1.20pm, the Claimant sent, by email, the fit note mentioned above (dated 20 March 2019, and covering the period 25 February 2019 to Saturday 30 March 2019). Ms Godfrey replied to point out that if the Claimant was still on sickness absence, he would need a further note, and asking if he was back at work. At 2pm, the Claimant emailed back that he was doing various things that day (such as applying updates to his laptop and catching up with emails), and would be ready for normal work by the following day. In other words, he was informing that his sickness absence was at an end with effect from 1 April.

222. Ms Godfrey had previously forwarded the Claimant's CV to Nick White, who was in charge of the Respondent's graduate scheme, and who was someone that the Claimant had previously contacted directly about a potential transfer to a new business area.

223. She had done this shortly before 9pm on 19 March 2019 (so after having heard from the Claimant's mother). At 9.36am on 1 April 2019, Mr White forwarded it to John Lockwood. Mr White's email included the comment that the Claimant "works in the Service Now Practice – but again, has suggested he would rather be in a developer role". He also mentioned, "He's autistic", and said he would speak to

Mr Lockwood. Mr Lockwood replied within a minute to say "I know Tom and am aware of his autism. I am also happy to have a chat with him."

224. The Claimant's 13 March email (SEED - Diversity & Inclusion) to Nick Forshaw had been acknowledged on the same day by Mr Forshaw who had replied:

> I am very sorry about your experience to date. With your permission I would like to involve Karen Thomson who is our HR D&I lead in the UK and also Nick White who is in charge of the graduate scheme so that we can look at how best to help you and address the issues highlighted. I would also like to put you in contact with Paul Crayson who is our Autism champion as he may be able to give you some additional support. Please let me know if this is OK.

225. The Claimant replied to that email at 1.07pm on 1 April 2019, saying that Nick White was already aware of his situation, and that he welcomed any assistance.

April 2019 transfer

226. Mr Welek worked on Mr Lockwood's team. Mr Lockwood and Mr Welek were keen for the Claimant to join Mr Lockwood team, where he would be supervised by Mr Welek. Mr Lockwood explored this possibility with his line manager on 2 April [Bundle 805], expressing the opinion that the Claimant had the potential to become a software developer, but had not had sufficient support towards that goal so far during his 18 months of employment.

227. The move was approved and the Claimant started working on the Welek/Lockwood team around 8 April 2019. Though Ms Godfrey still had some formalities to complete, such as the Claimant's end of year review, and the "official" transfer date, for budget and accounting purposes, was around 1 May 2019.

228. The move was to work which the Claimant found more enjoyable (more regular coding work) and gave him the opportunity to work with Mr Welek. He was happy with the move for both these reasons.

229. Prior to requesting that the Claimant join his team, Mr Lockwood was already aware, from Nick White, that the Claimant had expressed concerns about Ms Godfrey's leadership.

230. Prior to 8 April, Mr Lockwood had a discussion with the Claimant about potential adjustments. No formal record was kept at the time, but it was Mr Lockwood's opinion that all the adjustments could be accommodated.

End of Year review

231. On 10 April 2019, the Claimant wrote to Ms Godfrey about his appraisal. This had been due by 20 March 2019, though that date fell within the Claimant's sickness absence. The Claimant chased this by instant message on 15 April 2019, and Ms Godfrey replied to suggest 24 April 2019, taking account of when she would be due in Bracknell. The Claimant agreed. [Bundle 821]. The Claimant had already

started work on Mr Lockwood's team, and informed Ms Godfrey that he was enjoying it so far.

232. The appraisal meeting went on 24 April 2019. Ms Godfrey stated that she had had limited feedback from the projects that he had worked on over the year. She said that she had discussed with Nick White and they believed that the best option was for the appraisal to be marked as "unrated". This had already been input to the Respondent's systems, and was not changed after the meeting.

233. It was Ms Godfrey's genuine opinion that "unrated" was a fair outcome. It did not imply that the Claimant had failed to meet his objectives, just that there was insufficient evidence to decide if he had met them or failed to meet them. She had received some negative feedback (from Mr Van Damme) but thought that the Claimant had had insufficient opportunity to demonstrate his qualities. She believed that an "unrated" outcome allowed the appraisal to be positive and forward-looking, and it was more important to focus on the new work he could do on a new team. She included her genuine opinions and suggestions on the form. [Bundle 1431 to 1439].

234. In the meeting room they were using, there was a large screen. Ms Godfrey asked in if it was OK for her to documents on the screen because she was conscious of the need to reduce sensory stimuli. The Claimant agreed.

235. Ms Godfrey commented on the time sheet issue. She also referred to his sickness absence and that he needed to do his best to communicate with his manager in those circumstances. The comments that she made about these issues were factually accurate. She was not suggesting that there would be any disciplinary action (or stoppage of pay) for what had happened to date; however, she was advising the Claimant about what the Respondent would potentially expect from him in the future. In context, given that both she and the Claimant knew that she was not going to be his manager for the forthcoming year, she was not implying that she personally would be taking any disciplinary action if the Claimant did not comply with the requirements that she was outlining.

236. Under the "Competencies" heading "Integrity" [Bundle 1438], she wrote:

> Tom needs to take responsibility for his contributions to the team and adhere to standard company processes for notifications of absence. This was reinforced during his last review meeting and he has not yet provided a fit note for his current absence (now 2 weeks).
>
> Tom is now back at work and will be transferring to John Lockwood's team so he has an opportunity to develop further in his career.

237. Seemingly the second sentence was written in March, in anticipation of the review taking place around 20 March. The second paragraph implies that it was written some time between 1 and 7 April 2019. In other words, these were both out of date by 24 April 2019 (and by end of May, when the document was uploaded).

238. In relation to the "goal" "Be a trusted partner to our customers", one of the success criteria was "Increase understanding of the market by building closer relationships with Fujitsu Sector and offering teams." Ms Godfrey made a remark which was similar to several of those for the other goals, namely: "Not had an opportunity to work with the sales team in this period to complete this goal." This was her honest assessment of the evidence she had obtained from her own research and from what the Claimant had supplied to her.

Grievance 1 – 15 April 2019

239. About a week after joining Mr Lockwood team (but about a week before the review meeting with Ms Godfrey), the Claimant raised a grievance about events on Ms Godfrey's team. He did so by making a submission via the HR portal on 15 April 2019 [Bundle 819-820].

240. In some ways, the contents were similar to what he had emailed to Mr Forshaw on 13 March 2019

240.1 He expressed dissatisfaction with failure to move him to a different business area, despite having been submitting transfer requests from the time he reported to Mr Tolgyesi and having continued to do so while reporting to Ms Godfrey

240.2 He mentioned specific alleged comments made by Ms Godfrey.

241. In other ways, the contents were different. He referred to the recent discussions with his mother, which he regarded as data protection breaches.

242. He alleged that there was a failure to make reasonable adjustments, and that there was disability discrimination. Amongst other things, he complained that his appraisal was overdue.

243. He referred to having had a disability passport, and alleged that this had been lost. He also referred to the recommendations made by OH in February 2018, and suggested that these had not been implemented. These are two distinct propositions and to some extent, the Claimant's grievance appeared to conflate the two. The Claimant had not had, and therefore had not lost, a disability passport.

Disability passport

244. The Respondent's policy is [Bundle 374 to 384]. A disabled employee has a choice about whether to use a "disability passport" or not. The disability passport" policy does not replace any obligations that the Respondent has, in accordance with of the Equality Act 2010, to make reasonable adjustments. Put another way, if an employee declines to have a disability passport, then that does not mean that the Respondent has no obligation to make reasonable adjustments; correspondingly, if the Respondent fails issue a passport, that does not – in itself – show there was a failure to make reasonable adjustments.

245. In brief, the purpose of the passport is that if an employee and the Respondent agree to particular adjustments in one job, then those can be recorded on the passport. Then, with the employee's consent, if the employee moves jobs internally, the new manager can view what adjustments have been made previously, with the intention being that that makes it easier to ensure that the adjustments follow the employee around, without the need to start from scratch each time.

246. We have not been satisfied, on the evidence, that the Claimant was issued with a "disability passport" in accordance with the Respondent's policies.

247. On the evidence, the Claimant and Mr Tolgyesi agreed some adjustments shortly after the February 2018 report, and shortly before the change in line management to Ms Godfrey. For whatever reason, Ms Godfrey did not actually receive a copy of the February 2018 OH report when the Claimant joined her team. This is something that is consistent with the Respondent's policies, and is part of the reason for having the disability passport policy; that is, new line managers do not automatically get to see OH reports prepared when the employee was on another team.

248. At around the time of the change in line management, the Claimant was left with the impression that Ms Godfrey had actually read the report. By the time of his 1 May 2019 grievance interview, the Claimant was aware that Ms Godfrey had only recently received the OH report. [Bundle 900]

249. When the Claimant joined Mr Lockwood's team, it was Mr Lockwood's initial opinion that no disability passport needed to be produced by him. He was aware (or, at least, it was his understanding) that there was no pre-existing passport.

<u>The Claimant and Mr Dryden Meeting for Grievance 1 – 1 May 2019</u>

250. Helen Brown forwarded the Claimant's grievance to Robin Dryden around 25 April 2019, and liaised with the Claimant, Mr Welek and Mr Dryden to arrange a meeting for 30 April 2019. Mr Dryden's invitation letter [Bundle 849] gave details of right to be accompanied, and included copy of grievance policy.

251. On Friday 26 April, the Claimant suggested new time, and Mr Dryden suggested another time, and the parties all eventually agreed to push it back one day to Tuesday 1 May 2019. The attendees were Ms Brown, Mr Dryden, Mr Welek and the Claimant.

252. For the meeting, the Claimant produced a "timeline" document [Bundle 879-882], which Mr Dryden read and took into account. It alleged discrimination, victimisation, harassment, and mentioned potential constructive dismissal, as well as GDPR breach. It referred to several outcomes sought, including "reasonable compensation".

253. Mr Welek's notes of the meeting are [Bundle 890-891]. The Respondent's are [Bundle 894-910].

254. The Claimant discussed his early months with the Respondent:

> TD - I know my title was SYE Developer. I have done about 2 months of Dev work, and was on Service Desk, 6 months into that. I had the CAFCAS contract, don't think we have it anymore, also RBS and people would log instances on site and you would resolve them. Only problem was no-one would submit anything and you would be staring at a screen all day and waiting for something to happen.
>
> RD - When you did get into this, what was the work required to resolve, was it user errors?
>
> TD - It was if someone needed you to amend a table somewhere, things like that or just minor amendments, desk side support stuff.
>
> RD - So you were on that about 12 months?
>
> TD - Yes

255. The Claimant suggested that he had not had problems with his first two managers, but did have problems with the next one, Ms Godfrey. In continuing to discuss matters prior to Ms Godfrey:

> RD - You are in the Service role and a lot of the time you didn't have much to do.
>
> TD - Yes, under my previous manager I didn't have my reasonable adjustments. At the start I didn't think I needed anything and felt confident that I had a good time with HR and can see where my career was doing and I didn't think that I needed any additional help. They said if I did need additional help then to speak to my Line Manager. …..

256. The Claimant discussed the working from home arrangements, and that, before the February 2018 OH report, he had worked from home regularly, which was technically against the rules for those on the graduate scheme, but with Mr Tolgyesi's acquiescence. Part of the reason for obtaining the OH report was that Mr Tolgyesi's line manager (not Ms Godfrey) had questioned the arrangement. [After the OH report, it was approved as an adjustment.]

257. The Claimant explained that he had got along well with Mr Tolgyesi and had no complaints generally about him, but the request for a change in management came after his review for 17/18 proposed a grading of "successful" which the Claimant believed failed to take account of the evidence of achievements which he had supplied.

258. The Claimant reported that he was initially glad that Ms Godfrey had become his manager. However, he still wanted to move to a new business area (hoping to do more software developer work) and believed that Ms Godfrey was not doing enough to push this. He was aware of Ms Godfrey's request for an updated CV, but thought that this was pointless as he had not gained significant experience since producing the previous CV. He mentioned that Nick White had arranged for him to meet the Head of Talent.

259. In terms of timesheets, he said:

TD - … given than I have no work, my timesheets had become sporadic, and I had to book to the bench for everything. I stopped doing it weekly and just did it at the end of the month.

RD - You probably shouldn't have done that.

TD – I know.

260. During the Tribunal hearing (as well on 1 May 2019 – [Bundle 904]), the Claimant suggested that he stopped submitting time sheets as a method of gaining Ms Godfrey's attention because she would not speak to him otherwise. He also said that he could not complete them because Ms Godfrey failed to give him the correct codes. Of the various explanations given, the one cited above, that he did not see the point, is probably closest to the truth.

261. In terms of adjustments:

RD - At this point had you discussed with Charlie your reasonable adjustments?

TD – I have had several meetings with her about my reasonable adjustments.

TD - Even though she hadn't seen a copy of it, it was discussed

RD - Did she ask you for a copy of this?

TD - Yes, I was asked to send her a copy but I couldn't find one.

262. He mentioned that Ms Godfrey had failed to make reasonable adjustments, including failing to assist him with understanding what Mr Van Damme's requirements were.

263. During the meeting, the Claimant showed Mr Dryden that his end of year appraisal form was showing as blank on the relevant system (called ZinZai). Mr Dryden told the Claimant that his inference was that the review must not yet be "final".

264. Towards the end of the meeting, Mr Dryden took the Claimant back over the grievance document, heading by heading, checking that everything had been covered. The Claimant stated that the discussion about reasonable compensation should take place at a later date, and mentioned some of the points that he thought should be taken into account when assessing it. [Bundle 909].

<u>Grievance 1 Investigation and Outcome</u>

265. Mr Dryden did not know during the meeting whether the Claimant being "unrated" would affect the entitlement to SIS bonus payment. Ms Brown investigated and let him know that it would not. [Bundle 929].

266. He (accompanied by Ms Brown) met Ms Godfrey on 9 May 2019. [Bundle 930-936].

266.1 Our finding is that Mr Dryden asked reasonable questions of her based on the points raised by the Claimant.

266.2 There was some lack of clarity from her about precisely when she asked HR for a copy of the February 2018 OH report and why (if she made that request not long after the Claimant joined the team) she did not chase it up, especially upon being told by Mr Tolgyesi that he no longer had a copy.

266.3 She claimed to have continued the same reasonable adjustments (quiet room available on site plus working from home).

266.4 She claimed to have informed Mr Van Damme of the Claimant's requirements for clarity.

266.5 She claimed that she had allocated project work to the Claimant when it had been available, but that recently there had been nothing suitable for him.

266.6 In relation to the 25 February message to the Claimant suggesting that he could do the training later that morning (starting at 9am), she claimed that there had been prior discussions, and the Claimant had asked about the possibility of doing the course, before she knew about the last minute vacancy. She claimed that she had asked for him to be notified on the Friday.

266.7 She stated that there were other graduates who had also had little work experience during the course of the year, and that they also would not be given "achieved" as an appraisal outcome.

266.8 Mr Dryden told her that the Claimant had seen any written comments from her on the September 2018 half year review as yet. Ms Godfrey disputed the Claimant's assertion that she had set new goals at that meeting, stating that, as far as she was concerned, she had simply carried over the goals that had already been set. Ms Godfrey made an adjustment to the ZinZai system in the course of the 9 May meeting with Mr Dryden so that the Claimant could see what she had written.

266.9 Ms Godfrey stated that when she had first asked HR for the OH report, she had been told that HR would need to obtain a new copy of the report directly from the provider.

267. Mr Dryden (accompanied by Ms Brown) met Mr Tolgyesi on 9 May 2019. [Bundle 937-940]. He confirmed that he had given Ms Godfrey information about the Claimant's reasonable adjustments, but could not recall if he supplied the OH report.

268. Mr Dryden (accompanied by Ms Brown) met Ms Robinson on 9 May 2019. [Bundle 941-936].

268.1 She said that she had taken the initiative of supplying Ms Godfrey (on 25 March 2019) with the February 2018 OH report, because Ms Godfrey had said she was unaware of the Claimant's medical issues.

268.2 She said she had not sought the Claimant's consent, as she believed it could be shared with his current manager (that is, Ms Godfrey). She was not aware

of Ms Godfrey having been told that the Respondent needed to go back to the provider for the OH report. As far as she was aware, it had been available within HR's systems.

268.3 She said she had been aware in October 2018 that a further OH report had been discussed. As far as she knew, this had not gone ahead because Ms Godfrey did not progress it. [In fact, in the Tribunal hearing, the Claimant confirmed that he had been aware of Ms Godfrey's suggestion of a fresh referral to OH, but had not considered it necessary; his opinion was that the February 2018 advice remained current and that the Respondent should be following it.]

269. On 13 May 2019, Mr Dryden emailed the Claimant with a copy of the 1 May notes, and said he aimed to supply the outcome by 24 May.

270. On 14 May, he sent a reminder to Ms Godfrey to supply documents and information that he had requested when they met. [Bundle 981]. Amongst other things sent in reply, she told him that she would complete the documentation for the Claimant's full year appraisal by the end of May.

271. On 24 May 2019, Mr Dryden informed the Claimant that he would send the outcome shortly. The outcome [Bundle 1127-1135] was sent by email on 31 May 2019. [Bundle 1181].

272. It was a detailed letter which accurately summarised the content of the Claimant's grievance, as raised in writing and during the 1 May meeting. It contained Mr Dryden's genuine opinions. He reached those opinions after carefully considering the information that he had received as a result of his careful attempts to look into the points that the Claimant had raised.

272.1 He decided that Ms Godfrey had not seen the February 2018 report until (it was sent to her by Ms Robinson in) March 2019. He accepted Ms Godfrey's account that she had requested this from HR in January 2019.

272.2 He decided that Ms Godfrey's failure to share her comments on the half year review was due to a mistake by her (not understanding how the ZinZai system worked, after she had entered her comments on that system).

272.3 He noted that she had not yet shared the full year appraisal document with the Claimant.

272.4 He did not uphold the Claimant's argument that Ms Godfrey, or the Respondent, had blocked a transfer to another business area. He found that there was evidence that Ms Godfrey had contacted several people about potential transfer during 2018, and had forwarded the CV to White and Lockwood in 2019.

272.5 In terms of discriminatory remarks, he said it was one person's word against another, and he did not find it proven that the remarks were made. [The notes

of the 9 May meeting with Ms Godfrey do not record specific questions and answers about the specific alleged words uttered by her.]

272.6 He did not think that it was wrong of Ms Godfrey to chase the Claimant for timesheets.

272.7 He thought it was "unacceptable" that Ms Godfrey had not noticed until mid-March that he was not working after 25 February 2019. He regarded this as a breach of duty of care.

272.8 He decided that there had not been "disability discrimination" in relation to events headed as such by the Claimant in his grievance.

272.9 He decided that there *had* been a failure to make reasonable adjustments.

272.9.1 There had been occasions when he had not been given notice of in advance of changes to his routine, including on 25 February 2019.

272.9.2 He had been pressed to communicate orally, including in relation to absence, rather than by written methods only.

272.9.3 Ms Godfrey had failed to understand (and had failed to ask for a copy) the adjustments recommended in February 2018.

272.10 He found that assistance in technical matters had been available, including from Ms Pandey and Mr Tolgyesi.

272.11 He did not uphold the GDPR breach aspect of the grievance, deciding that Ms Godfrey had cancelled the meeting with his mother when the Claimant had refused consent. He also decided that the request made to Mr Welek to ask the Claimant to provide a fit note was acceptable. He decided that Ms Godfrey had appropriately sought and followed HR advice.

272.12 He upheld the grievance in relation to Ms Godfrey's handling of the appraisal process. He accepted the Claimant's account that (some of) the goals were not set until September (when it should have been done by June). He accepted that some 121s had been cancelled. He decided that Ms Godfrey's actions had not been up to the "standard expected" by the Respondent.

273. The letter mentioned that Mr Dryden could not personally guarantee that there would be no similar incidents in the future. Our finding is that this was a reasonable thing to say in the context. He was not suggesting that the Respondent would not make efforts to ensure that the Claimant was treated correctly by it in the future.

274. The letter stated that Mr Dryden was not at liberty to say what action, if any, would be taken against Ms Godfrey. He made the following recommendations:

o You have a new OH referral which is shared with John to ensure revised reasonable adjustments are put in place. These should be entered into a disability passport that moves around with the employee.

o You agree regular 1:1 meetings with John.

o You are provided with a mentor with whom you can discuss technical challenges in your role.

o You create and agree a personal development plan with John to address your training and development needs in line with business requirements.

o For further training, I would suggest that you are allocated a Pluralsight licence which provides access to a considerable range of training courses. These are allocated to Fujitsu DNS graduates on joining the company.

o With regard to your bonus, I can confirm the unrated grade does not affect your eligibility for the Sharing in Success bonus scheme.

o John has offered that your salary review be based on your current performance in his team.

o I note that you have been in contact with SEED and put in touch with their Autistic champion. I hope you have enjoyed some benefit from this and remind you that they will help you find other people to offer support if you need it.

275. He also wrote:

> As a Mental Health Champion in Fujitsu Services Defence & National Security, I am very sympathetic to the challenges you have faced. If you consider it appropriate, I would like to offer my support in terms of being a Mentor to you as someone outside your business area who can offer independent support and advice.

276. Our finding is that this was a genuine offer. On 13 June, the Claimant emailed Mr Dryden to thank him for the outcome letter. Mr Dryden replied the same day to repeat the offer of mentoring. On 26 June, the Claimant emailed to say that he was interested. Mr Dryden invited him to suggest a time to meet up, and offered to be flexible. [Bundle 1268].

Appeal for Grievance 1

277. The letter informed the Claimant of his right to appeal, and he did appeal on 10 June 2019. [Bundle 1191; 1194 to 1216]. Amongst other things, the appeal referred to specific sections of the of Equality Act 2010, including 13, 15, 19, 20, 21, 109 and 136.

278. Maria Sabey, Head of Property UK&I was appointed to deal with it. Ms Brown notified the Claimant of that on 13 June [Bundle 1242] and suggested a meeting date of 21 June. There was no immediate response, and so it was re-scheduled for 4 July, which the Claimant accepted. [Bundle 1251]. The invitation letter [Bundle 1667] (as well Ms Brown's email exchange with the Claimant) confirmed the right to be accompanied.

279. Mr Welek could not attend, and the Claimant decided to attend alone. As well as a note taker, Ms Sabey and Ms Brown attended.

280. The Claimant's notes are Bundle 1276 to 1278. The Respondent's are 1279 to 1286.

280.1 The Claimant stated that the points he wished to make were covered in his appeal document.

280.2 In relation to the "AWOL" letters sent to his home address, the Claimant said those were "fine".

280.3 He mentioned that he thought the work he had been doing under Ms Godfrey's and Mr Tolgyesi's management was not what he had expected and that he was concerned that other graduate recruits in the future might also be misled about the nature of the work they would be doing. He wanted a career in software, and had been expecting that when he joined the Respondent but (prior to the move to Mr Lockwood) did not believe that the Respondent had been accommodating that.

280.4 He said that he would like to be a buddy or a mentor for new graduate entry employees in Ms Godfrey's business area.

280.5 Ms Sabey replied by saying "*Do you think that will have a detrimental effect on you? I don't think it would be in your best interests. You are now happy in your new area*". This was her genuine opinion, and she said it based on the contents of the documents submitted for the grievance and as part of the appeal. She was not seeking to undermine the Claimant, or be critical of his abilities. However, based on his own account, he had found working with Ms Godfrey stressful, and had been glad of the move to a new team.

281. Ms Sabey, accompanied by Ms Brown, interviewed Ms Godfrey on 11 July 2019. [Bundle 1322 to 1325].

282. On 15 July 2019, Ms Sabey wrote to the Claimant to say she was still investigating and was aiming to have the outcome by end of July. The Claimant replied to acknowledge and to say he would be commencing early conciliation. [Bundle 1332].

283. The appeal outcome was sent by email on 29 July 2019. [Bundle 1384; 1387 to 1391].

283.1 The appeal was not upheld in relation to blocking change of department. Ms Sabey acknowledged that the role had not been what the Claimant had been expecting, and said she would be making some recommendations to the Respondent.

283.2 The appeal was not upheld in relation to remarks allegedly made by Ms Godfrey. Ms Sabey noted that Ms Godfrey had not kept notes of meetings with the Claimant.

283.3 In relation to training, Ms Sabey accepted that training was tailored to needs. Mr Swanwick had been offered the 25 February course, because that

seemed appropriate at the time. Ms Sabey was satisfied that the Claimant would have been offered it in due course in any event had Mr Swanwick not dropped out.

283.4 She accepted Ms Godfrey's account that Mr Swanwick had dropped out at short notice. (On the Friday, is what Ms Godfrey told both Mr Dryden and Ms Sabey, and also stated that she had asked for the Claimant to be given the joining details on the Friday.)

283.5 Ms Sabey found that the Claimant had not been deliberately underutilised.

283.6 Ms Sabey found that Ms Godfrey should have obtained the OH report when the Claimant first came under her management. She accepted that Ms Godfrey had eventually requested the report from HR and that it was not sent to her straight away because of error by HR.

283.7 Ms Sabey found that Ms Godfrey should have made a fresh referral in any event when the Claimant was off sick.

283.8 Ms Sabey's decision was that the following adjustments had been made, based on the February 2018 report.

- Breaking down projects into bite sized pieces.
- Ensuring [work of] six hours rather than variable shifts.
- Reduce sensory specific stimuli, i.e. headphones.
- Assign a personal workstation rather than sharing or hot desking.
- Ability to work from home, with management agreement
- Use of a quiet room ..

283.9 She believed that "writing instructions down if they are detailed" and "Explaining unspoken office rules" had not necessarily happened, but believed that the Respondent had a reasonable excuse for that.

283.10 She believed that there had been occasions when the Respondent had failed, without reasonable excuse, to "[give] plenty of warning of change and [explain] why it is happening".

283.11 As requested by the Claimant, Ms Sabey attempted to give full details of what had been said to, and written to, the Claimant's mother. She stated her genuine beliefs based on the information received.

283.12 The allegation of GDPR breach was rejected. Ms Sabey found that (i) Ms Godfrey should have ended the call much sooner (effectively doing no more than saying that the Claimant's consent was required for any discussion at all) and (ii) there should have been no offer of a meeting unless and until the Claimant's formal consent was obtained. Her decision, for the reasons that

she explained in the letter, was that none of the Claimant's personal data had been disclosed.

283.13 She offered to work with the Claimant in relation to help him learn tools for breaking down his workload, and to understand unspoken office rules. She offered a series of half hour sessions. The Claimant did not follow up on this offer.

284. Ms Sabey's letter was thorough and addressed the points which the Claimant had raised. She based her decisions on the investigation, and had made a genuine and reasonable attempt to obtain evidence from both the Claimant and Ms Godfrey.

285. The letter contained Ms Sabey's genuine opinions. Ms Brown assisted with the drafting [Bundle 1342]. Susan Thomas, Head of Legal, also made suggestions [Bundle 1376 & 1379] in relation to the GDPR allegations.

Claim 1 is presented.

286. As the Claimant had informed Ms Brown and Ms Sabey, he commenced early conciliation. He did this on 18 July 2019. It ended on 18 August 2019, and the claim was presented on 18 September 2019. Thus, in relation to complaints made within Claim 1, acts and omissions occurring on or after 19 April 2019 are in time. (For events earlier than that, further analysis is required, as discussed below in more detail.) Mr Lockwood was aware of the claim by no later than 4 October 2019. [Bundle 1492]

Change in Byte Team Lead

287. Around January 2020, the Claimant's previous fixed term contract was replaced with a permanent one. There was also a pay rise.

288. Mr Lockwood managed the Byte team. Mr Welek was Team Lead from the time the Claimant joined, until the end of January 2020. Mr Welek moved internally to another job within the Respondent, but based in Manchester rather than Bracknell.

289. Mr Lockwood covered the role briefly, until, with effect from around 18 February 2020, Kris Kjelstrup-Johnson was appointed to take over. Mr Kjelstrup-Johnson is not to be confused with the Claimant's colleague, Kelsey Jones (who is sometimes referred to as "Kels" in the contemporaneous documents.)

Hackathon

290. The pandemic arrived in March 2020. The Respondent already had various facilities for remote meetings and working from home.

291. In April 2020, it was decided that the Byte team would take part in what they termed a "hackathon". This was to be an event where the whole team worked solidly on one particular business issue for a period of time.

292. A discussion meeting was held on 3 April 2020. [Bundle 2023]. It took place place between 11:30 and 12:00 via Skype and was organised by Mr Kjelstrup-Johnson. He listed some topics that would be discussed. It was decided that the hackathon would be the following week Tuesday to Thursday 7 to 9 April 2020.

293. Later in the day, Mr Kjelstrup-Johnson messaged the Claimant to ask for his thoughts. The Claimant replied:

> Ehhhh. To be frank, I'm a bit perplexed. I don't work well with non-absolutes and vagueness my chief concerns are still along the lines that we're not doing this kind of project with the right intent or the right knowledge

294. Calendar appointments for the Skype meetings that would take place during the hackathon were issued and an itinerary supplied. [Bundle 2028-2035]

295. The Claimant had expressed some anxiousness about attending this but Mr Kjelstrup-Johnson encouraged him attend. The Claimant took part in some, but not all, of the event. He felt unwell and departed. He did not inform Mr Kjelstrup-Johnson or Mr Lockwood at the time that he was doing so.

296. Subsequently, around 14 April 2020 [Bundle 2012], Mr Kjelstrup-Johnson removed the Claimant from the Slack channel for the hackathon. Mr Welek told him that he should go to HR as it could be seen as "exclusion" and the Claimant's initial reaction was "good point".

<u>Meeting with Mr Lockwood in April, and requirement of sufficient notice</u>

297. On 14 April, the Claimant had a discussion with Mr Lockwood. For the first time, Mr Lockwood saw the February 2018 OH report. The Claimant instigated this discussion because he wanted to inform Mr Lockwood that he believed that Mr Kjelstrup-Johnson was not complying with the adjustments recommended in the report, whereas Mr Welek had done so.

298. The Claimant stated that he needed a specific amount of advance notice of change. The witnesses disagree about whether the stated period was 5 days, or 7 days, and whether it was working days or not. On the balance of probabilities, the Claimant was stating that he required a week's notice (which would, of course, usually be 5 working days).

299. The February 2018 report does not specify a specific period of time. It refers to "giving plenty of warning of change and explaining why it is happening", and Grievance 1 was upheld in relation to that not having been done. However, one weeks' notice was not specified there. The Claimant's mother apparently told Ms Godfrey that that was her understanding – gleaned from the Claimant presumably – of what the OH had recommended, but that is not what was written.

300. Ms Godfrey had not been giving the Claimant a week's notice. Mr Lockwood advised the Claimant that he did not think it would always be possible to give the Claimant a week's notice of particular events. (The report referred to "change"

rather than meetings, or appointments, or – for example – one off events like the hackathon).

301. On around 10 June 2020, when discussing the notice requirement with Nicola Richards, Byte Lead North, the Claimant said that the requirement was for 7 days notice "for things" [Bundle 1690]. The discussion continued:

> **Tom Duncan 4:44 PM BST**
>
> it's hard to believe when I literally gave John my adjustments, he said he'd pass to Kris and in the meeting, I asked him if he had read them and he said "yeah absolutely, I read them"
>
> but now, ofc, he says he hasnt got them
>
> SO WHICH IS IT
>
> **Nicola Richards 4:45 PM BST**
>
> i have a question about your 7 days notice, is this for every meeting? how does this affect things like daily scrums?
>
> you don't have to answer that if it's personal was just curious
>
> **Tom Duncan 4:45 PM BST**
>
> it's not for everything
>
> if it's routine, it's fine
>
> ie: tell me im gonna be on a project at least 7days before hand
>
> **Nicola Richards 4:45 PM BST**
>
> also on that last note that's very confusing... and hard to bring up without sounding accusatory
>
> oooh okay and then all the meetings that come alongside that project count as 'routine'
>
> getcha
>
> **Tom Duncan 4:46 PM BST**
>
> yeah
>
> unless they're oneoffs
>
> ie: customer meets
>
> it's why rose and I have a daily standup at 11 every day, to keep the routine up

302. It was the Claimant's genuine opinion that he would require 7 days notice before starting a project, and 7 days notice before an out of the ordinary meeting, such

as meeting a customer. Furthermore, it was his genuine opinion that the OH advice supported that stance.

303. It was not his opinion that he required 7 days notice of all and any meetings. In particular, at the time, he believed that in the course of a project, as matters came up which required discussion between those of the Respondent's employees who were working on it, then he was able to participate in such discussions without 7 days' notice.

304. In the April meeting, Mr Lockwood informed the Claimant that a week (or 5 working days) notice would not always be possible. He said that the Respondent would attempt to provide that notice where possible.

305. At the Claimant's request, and with the Claimant's agreement, Mr Lockwood spoke to Mr Kjelstrup-Johnson and shared the report with him. He told the Claimant he had done this, and suggested that Mr Kjelstrup-Johnson and the Claimant meet to discuss directly. [Bundle 2072-2073].

306. The meeting took place around 23 April 2020. Amongst other things, Mr Kjelstrup-Johnson asked that if (like on the hackathon) the Claimant would have to take time away at short notice, he could send an instant message, or similar, to Mr Kjelstrup-Johnson. The Claimant did not believe that Mr Kjelstrup-Johnson was willing to comply with reasonable adjustments. For the next few weeks, the Claimant was excused from scrum team duties; Mr Kjelstrup-Johnson sought to have him resume them, but the Claimant believed that Mr Kjelstrup-Johnson was pushing him to move too fast.

2020 Appraisal

307. The Claimant was given "exceeds" for his end of year appraisal in May 2020. It was Mr Lockwood's genuine opinion that the Claimant had demonstrated a lot of progress and promise and that this outcome was deserved.

Ms Shelton

308. Ms Shelton's employment with the Respondent commenced in September 2018.

309. She was taken on as an apprentice (on a fixed term contract for 4 years) while doing her degree.

310. She came to work closely with the Claimant during his time on Mr Lockwood's team. The Claimant and Ms Shelton were working on a project together: "Automation Project".

May 2020 Exchange with Mr Kjelstrup-Johnson

311. On 12 May 2020, the Claimant wrote to Mr Kjelstrup-Johnson and cc'ed Ms Shelton. [Bundle 2226]. Amongst other things, he suggested that Mr Kjelstrup-Johnson was frustrated with the Claimant for going "AWOL" (in the Claimant's

words) during the hackathon. He commented on various matters, including the Automation Project, and requested that Mr Kjelstrup-Johnson reply.

312. Mr Kjelstrup-Johnson replied around 26 May [Bundle 2216] and in the format the Claimant requested (making clear which parts of his response were to which parts of the query).

313. In summary, there seemed to be a difference of opinion about the project, in that Mr Kjelstrup-Johnson believed he was asking reasonable questions of the Claimant, and the Claimant believed that they were questions that had already been answered and/or which misunderstood the nature of the product which the Claimant and Ms Shelton were seeking to produce.

314. After receiving the Claimant's email, but before replying, Mr Kjelstrup-Johnson arranged for Patrick Hynes, Senior Cloud Native Technologist, to attend a meeting with him, the Claimant, Ms Shelton and another colleague.

315. Following prompting from Mr Kjelstrup-Johnson, on 27 May [Bundle 2247], Mr Hynes put his opinion in writing. He said, amongst other things, that he thought the Claimant's proposal for Automation within Byte was interesting and worthy of exploration, but he thought the scope was not clearly defined, and he believed some of the Claimant's (and/or Ms Shelton's) assumptions were technically dubious. He made some suggestions, including that the project be split into a Phase 1 (which he defined) which he thought might be achievable and a Phase 2 (which he also defined) which he thought would be a lower priority, and could be a research project that might not lead to a successful outcome.

<u>3 June 2020 meeting</u>

316. On 3 June 2020, a meeting took place attended by Ms Shelton, the Claimant, Mr Lockwood and Mr Kjelstrup-Johnson. Ms Shelton emailed her notes the same day. [Bundle 2265.]

317. Mr Lockwood requested that the Claimant communicate verbally more, and then email afterwards to consolidate. He said this was to avoid miscommunication. He acknowledged that the Claimant's preference was for written communication only as much as possible, and that this would potentially be a big change.

318. Mr Lockwood and the Claimant both agreed that the Claimant tended to see things in black and white, and Mr Lockwood tended to see things as shades of grey.

319. Mr Lockwood said that he acknowledged that something he saw as fairly minor change (from one shade of grey to another) might be regarded by the Claimant as "changing the entire rail you run on".

320. They discussed the Automation Project. Mr Kjelstrup-Johnson and Mr Lockwood had had further discussions with Patrick Hynes to try to better understand the project. The Claimant said that he, the Claimant, had divided the project into chunks, and asked why other people did not think that was clear enough. Mr

Lockwood suggested that the Claimant had a very academic view of the world, and that a pragmatic approach might be required.

321. The Claimant argued that he had already divided the project in a way that matched Patrick Hynes Phase 1, and expressed frustration that other people could not see that. The Claimant and Ms Shelton were invited to consider the matter and come up with a time estimate for completion.

10 June 2020

322. The Claimant made a suggestion to Mr Lockwood around 10 June 2020 that standard templates be adopted for emails. For example, there could be one template for an email sent around in advance of a meeting with and agenda; another template for an email sent afterwards with action points, or minutes, etc. Mr Lockwood decided against seeking to implement that for the whole team.

323. Around 16 June, Mr Kjelstrup-Johnson sent a message to the Claimant to (i) ask if was OK to send questions via message, or if there had to be a schedule for doing so and (ii) asking if it was possible to talk. The Claimant replied to say (i) no need to stick to a schedule for sending instant messages but (ii) " I do, however, need 7 days (6 at a push) notice before any meetings, calls or other large out-of-routine events to avoid causing undue ASD-related stress/meltdowns Hope that helps"

324. Mr Kjelstrup-Johnson let him know that there was a meeting the following day, and the Claimant was welcome to attend, but if he could not come, then Mr Kjelstrup-Johnson would have it recorded. The Claimant opted for the latter. In the on-going discussion Mr Kjelstrup-Johnson said that he would be trying to arrange future meetings with 7 days notice, but that had not been possible on this one, as he had only been given the date the day before.

Disability Passport discussions (June to October 2020)

325. Around 8 June, Mr Lockwood made a health and safety enquiry relating to the Claimant. He reported that the Claimant has health issues including ASD and ADHD and was working from home which was causing increased levels of stress. He asked if it was possible to have an independent review to determine if more can be done to support the Claimant. This was referred on to HR. [Bundle 2422].

326. This matter was passed to Catherine Doherty to deal with. A meeting with the Claimant was arranged. It took place (remotely) on 17 June 2020. The main purpose was to discuss the content of the Homeworking Assessment (HWA). There was approval for noise cancelling headphones to be purchased.

327. The Claimant raised some more general concerns about reasonable adjustments. He referred to the recommendations contained in the February 2018 OH report. He said that there was for the OH report to be shared with Ms Doherty, Mr Lockwood and Mr Kjelstrup-Johnson.

328. It was also discussed that the Claimant was interested in creating a 'disability passport'. This was to be completed by him and Mr Lockwood. Ms Doherty's hope

was that it could to help to facilitate an open discussion about the Claimant's medical conditions and to record agreed adjustments.

329. It would also mean that whenever the Claimant's line manager changed in the future, he would do not have to explain his requirements again.

330. The Respondent's policy is that the passport is reviewed at agreed intervals to check that the adjustments remain appropriate and they can be adjusted if the employee's needs or their role has changed.

331. Mr Lockwood sent an email after the meeting to summarise next steps [Bundle 2587-2588]. The Claimant sent an email afterwards to Ms Doherty and Mr Lockwood. [Bundle 2585].

332. Ms Doherty informed the Claimant that it was for him to complete an initial draft of the passport. There were questions to answer in the template, and there was space to set out his proposed adjustments. Once he had submitted it on-line, that would prompt his manager to arrange a review and discussion. On 2 July 2020 Ms Doherty supplied him with a link to the document and associated guidance.

333. Ms Doherty, Mr Lockwood and the Claimant had a meeting on 24 July to discuss. Ms Doherty's opinion was that the draft was not yet fit for purpose; she thought it read more like a grievance, than a factual recitation of disadvantages and proposed adjustments. Ms Doherty had several further meetings with the Claimant to try to refine the draft passport document. The purpose of the document was that it would record adjustments that the Respondent was agreeing to make. As a matter of logic, it might contain agreed adjustments which went further than EQA required; or it might not contain all the minimum adjustments that EQA might require (meaning, potentially, that the employee might need to take action in the Tribunal to pursue further). Alternatively, there might be adjustments which the Respondent was content to make but which were not contained in a disability passport (whether because the employee did not want a passport or for some other reason). However, the disability passport would not contain adjustments which the Respondent was not willing to make. Put another way, if an employee requested adjustments, and the Respondent was not willing to include them in the passport, then the employee would either have to elect to accept the passport with just the agreed adjustments only (but without renouncing the right to continue to push for further adjustments) or else could decide not to have the disability passport. The Respondent's scheme did not allow the employee the unilateral right to decide on the contents of the passport.

334. Ms Doherty made significant efforts to give the Claimant plain English explanations of the policy and its requirements. For example, there was a detailed exchange of emails in August 2020 [Bundle 3613 to 3610]. She assured him that by submitting a draft passport document which focussed on the required adjustments going forward, he would not be abandoning the right to complain about historic issues (in particular, alleged historic failures to meet the adjustments that had been recommended in 2018).

335. In addition to offering assistance with the passport, she also made other suggestions. She wrote:

> I am sorry to hear that you are not happy with others responses. I am not involved in these conversations but would encourage you to speak to those that are and seek clarification for anything that is unclear. In regards to your mental state, we did discuss the option of counselling (you did advise about your reluctance to undertake this as well as seeking information to help yourself) but I want to ask to you consider the services we discussed EAP and Generali (I can send on the information again if you wish). Also as discussed access to work also have a mental health section that you may want to explore before making a decision to engage. Let me know if I can be of further assistance.
>
> If it would help you can give those you are referring to my name and they can speak to me.

336. She met the Claimant and Mr Lockwood again in September, and provided written feedback [Bundle 4066]. She itemised particular adjustments that would be included in the passport as they were agreed: for example on 8 September [Bundle 4238].

337. Within the discussions, the Claimant suggested that the Respondent should agree that the passport contain an adjustment that the Claimant would have around 5 days' notice of meetings. The Respondent was not willing to include that and told him why. It was also not willing to agree to a similar period of advance notice for changes of project and told him why.

338. The latest remote meeting between Ms Doherty and the Claimant about the passport was 13 October 2020. Several points had been agreed, but some remained outstanding.

339. Ultimately, the Claimant and the Respondent did not have a meeting of minds and did not agree the full contents of a final version of the passport by the time the Claimant commenced sickness absence in October 2020.

<u>22 June 2020</u>

340. Ms Shelton and Mr Lockwood had a catchup meeting around 22 June.

341. In the meeting, Mr Lockwood discussed that his perception was that she had gone from being a strong performer to a weak one, in terms of quality and quantity of work. He asked because he wanted to know if he could help, not for any reason related to the Claimant or the Claimant's disability.

342. Ms Shelton made contemporaneous notes [Bundle 2609] and noted that Mr Lockwood asked her if she was aware of the Claimant believing that he was fighting battles for her.

<u>24 June 2020</u>

343. On 24 June, Mr Lockwood had a meeting with the Claimant. In the meeting, he used the word "superpowers" when referring to the Claimant. He was not doing so in a mocking way. His intention was to praise the Claimant's intellectual

abilities. He was also seeking to boost the Claimant's confidence in his own abilities.

344. Although Mr Lockwood does not specifically recall, the Claimant recalls that Mr Lockwood also said that the Claimant was able to see things that Mr Lockwood could not see, and explain them to Mr Lockwood. Mr Lockwood does not deny this, and on balance of probabilities, we accept that something along those lines was said.

345. Mr Lockwood also probably said in this meeting that "your perception is your reality", as Mr Lockwood uses that phrase from time to time.

346. Although Mr Lockwood does not specifically recall, the Claimant recalls that Mr Lockwood also said something along the lines that he, Mr Lockwood, did not think the Claimant was a bad guy, and was not aware of anyone else saying bad things about him. Mr Lockwood does not deny this, and on balance of probabilities, we accept that something along those lines was said.

29 June 2020

347. Mr Lockwood met the Claimant and Ms Shelton on around 29 June. Mr Lockwood mentioned that HR was going to seek out some specific autistic training, and Mr Kjelstrup-Johnson would follow that up with HR.

348. Mr Lockwood also mentioned the Employee Assistance Programme to the Claimant.

349. There was a further discussion about mentoring. It had been discussed on 3 June (following up on the Claimant's email to Mr Kjelstrup-Johnson of 27 May 2020 and the follow-up exchange with Dan Mason [Bundle 2255 to 2252].) Mr Lockwood said that Mr Kjelstrup-Johnson had said he has unsure whether the Claimant was still interested in doing it, and had asked Mr Lockwood whether to forward more information to the Claimant about it. The Claimant was critical of Mr Kjelstrup-Johnson's query and suggested that Mr Kjelstrup-Johnson was playing the victim. The Claimant added that Mr Kjelstrup-Johnson needed to talk to him and use active listening skills. From the Claimant's perspective, it should already have been clear to Mr Kjelstrup-Johnson (and the Respondent) that he was still interested in acting as a mentor.

350. During the meeting, Mr Lockwood mentioned that people's perspectives become their realities. He was not specifically referring to the Claimant (only) but was making a more general comment.

"Low Code"/Outsystems and Team Feedback

351. The Respondent had proposed that the Byte team would be using different working methods and software packages going forward. The Claimant believed (and believed that others shared his view) that (a) this would not provide an increase on the quality of the Byte teams work and (b) could lead to software developers becoming deskilled. The Claimant believed that Nicola Richards (Mr Kjelstrup-

Johnson's counterpart in Manchester) shared some of his concerns. [Bundle 3091-3092]

352. The Claimant and others commented on the matter at a team meeting on 1 July 2020 at which Mr Lockwood discussed the feedback he had received (from Nicola Richards and others). Mr Lockwood said that some of the feedback was emotional and rude. He was challenged to say which bits.

353. On 2 July, Mr Lockwood circulated a document containing the anonymised comments together with his remarks (which, as requested, said which bits he thought were influenced by "emotion and bias". [Bundle 2755; 2734-2747]

Grievance on 3 July 2020

354. The Claimant sent an email to Mr Lockwood headed formal complaint on 3 July 2020. [Bundle 2754]. It stated that he was escalating matters to HR, and had contacted ACAS.

355. It was acknowledged as a grievance on 6 July 2020 by Ms Brown. [Bundle 2757]

356. Ms Shelton also filed a grievance around the same time. The Claimant knew this, and her intention to do so – and a draft – had been flagged up to Mr Welek and the Claimant. [Bundle 2561-2563]

357. On 7 July, Ms Brown emailed the Claimant suggesting a meeting on 8 July. The Claimant agreed to the meeting and the Claimant accepted, stating that Ms Shelton would be attending to support him, and making reference to her grievance. [Bundle 2818-2817]. The Claimant scheduled the Teams meeting for 1pm.

358. Following the meeting, Ms Brown sent an email summarising what had been discussed. [Bundle 2834]. There were:

    358.1 What she termed "workplace issues" which were things that were common to both Ms Shelton's and the Claimant's respective grievance (including issues about Outsystems, and other "low code" packages, being introduced). It had been agreed that these would be dealt with – initially – by an attempt at mediation.

    358.2 What she termed "disability discrimination" which were things raised by the Claimant specifically. The Claimant was going to speak to his solicitor about whether this would go straight to a formal grievance (without mediation or other alternative dispute resolution) but, if if did go to formal grievance, he was content for Mr Dryden to be appointed as decision-maker.

359. The Claimant replied the same day (9 July). He supplied some clarifications and additional information but did not dispute the substance of what Ms Brown said had been agreed. He said he had not yet spoken to his solicitor.

360. Ms Brown proposed that the mediation meeting (with Mr Lockwood) was arranged for 14 July. [Bundle 2832] as that was a date acceptable to the Respondent. The

date was later agreed as 21 July. At 2.55pm, on 14 July, Ms Brown sent written information about the process. The Claimant replied at 3.15pm to say that there was something else to add to the agenda, being that an element of his project had been ”stolen” by Mr Kjelstrup-Johnson.

Grievance 2 becomes “formal”

361. The Claimant sent an email to Mr Kjelstrup-Johnson and Mr Lockwood on 14 July 2020 at 3.59pm. It was copied to Ms Brown. In the email, the Claimant accused Mr Kjelstrup-Johnson of (to paraphrase) stealing the Claimant’s idea (the Framework Automation Project) and claiming it for his own. He alleged this was done to force him out of the team. He said it was “*high-time we addressed how rude, exclusionary and disrespectful you’re both being towards myself and my disabilities and relying on my autism and my own self-doubt to get away with it*” and he said he was “*now insisting that Kris attend our mediation meeting because I am not accepting this level of Machiavellian piece-moving at the expense of my career, health and sanity*.”

362. As a result, the Respondent decided that it would not attempt mediation for the “workplace issues”. It decided instead that there would be a formal route for this. We will term this, therefore, “Grievance 2” and it was brought by both the Claimant and Ms Shelton, as summarised in the 9 July email exchange. Ms Brown spoke to the Claimant to tell him that, and on 20 July supplied written confirmation, with the suggestion that - since Mr Dryden was acceptable to the Claimant for the “disability discrimination” aspect of his grievance - Mr Dryden could deal with Grievance 2 as well. A meeting on 23 July was proposed, but the Claimant was given the option of choosing a later date. [Bundle 2936]. The Claimant accepted both the meeting date and Mr Dryden’s appointment.

363. Mr Dryden also emailed the Claimant directly the same day (20 July). He called it “First Stage Collective Grievance Meeting”. He mentioned that he had the Claimant’s written grievance and asked if there was anything else. The Claimant replied: “No problem, I will share the evidence in the meeting”. Prior to the meeting, Ms Shelton forwarded Mr Lockwood’s 2 July email and attachment.

364. The meeting went ahead (remotely) on 23 July 2020. As well as a note-taker, the attendees were the Claimant, Ms Shelton, Ms Brown and Mr Dryden. The notes are [Bundle 2983].

365. After the meeting. Ms Shelton and the Claimant submitted additional evidence and comments on 24 July. [Bundle 3037]

366. The Claimant became concerned that he might have to take some absence as a result of how (understandably) upset he was that a close relative was hospitalised. On 24 July, he emailed Mr Dryden to express concerns that, despite the grievance, the Respondent seemed to be going ahead with the introduction of Outsystems. [Bundle 3099-3101]

367. On 7 August, Mr Dryden wrote to say the outcome should be ready by 14 August. [Bundle 3356]

368. The Grievance 2 outcome letter was sent by email on 13 August. [Bundle 3409]

369. The 11 page letter [Bundle 3431] demonstrated that Mr Dryden had investigated carefully and taken time and effort to explain his reasons carefully. He addressed the way in which the Respondent was dealing with apprentices, alleged dissatisfaction from the apprentices, the low code systems, including who introduced them and why, training decisions, and the efforts made by managers to engage with the apprentices and other employees.

370. Mr Dryden did not uphold the grievance.

371. In the letter, he said:

> Tom, as part of my investigation and after reviewing the evidence presented to me, I have been made aware that certain communications sent by you to managers and other Fujitsu colleagues have been viewed as inappropriate, have caused offence and as a result have had a negative impact.
>
> You have mentioned that you feel there has been a significant breakdown in your workplace relationships and in my view I feel that to some extent your email communication to colleagues and managers may have contributed to this. I appreciate that your disability is a factor here and means that you do not always fully understand the impact that your communications may have on others. As such I recommend a discussion is held separately with you to enable a conversation to take place to address this and for you to work with John Lockwood, Line Manager and Hannah Boots HR Business Partner for Application and Multi-Cloud Services. The aim of the session will be to work together to discuss guidelines and parameters around appropriate communication going forward. They will provide you with the required notice to attend this meeting and share with you the details of what they would like to discuss.

372. He also said that, while his letter concluded Grievance 2, the Claimant would be contacted separately about the disability discrimination aspects of his 3 July email (what we are calling Grievance 3).

373. On 24 August, the Claimant asked for an extension of time to submit appeal documents and that was granted until 2 September. By 9 September, Ms Brown had not received the documents, and asked the Claimant to supply them by 18 September. On 16 September, an invitation to an appeal hearing on 7 October was sent. The meeting took place on 7 October, and the Claimant sent emails with further documents to the appeal decision maker (Neil Futers) in the days that followed.

374. On 22 October, [Bundle 4563], Mr Futers told the Claimant the appeal outcome should be ready by 6 November. The Claimant replied to say that he was on sick leave and “I am trying to compile my evidence still, but given my poor health at this juncture it’s proving difficult”.

375. The outcome was supplied 6 November 2020. The appeal was not upheld. [Bundle 4791].

24 July 2020

376. On around 24 July 2020, Steve Robinson noticed some comments the Claimant had made on Slack. They piqued his interest so he replied, and suggested a voice call, which took place. Mr Robinson did not know the Claimant prior to the call.

377. Mr Robinson has not given evidence. We only have his answers to questions put to him by Ms Lindeque as part of Grievance 3. He was asked many months later, and did not claim to have a perfect recollection.

378. During the call the Claimant discussed his ideas (the Automation Framework project ideas) and said they were good ideas but the Respondent was not interested in them. The Claimant mentioned that he had a disability and that he believed that the Respondent was discriminating against him.

379. Mr Robinson had no recollection of suggesting that the Claimant try another country, but said he might have commented on the possibility (given that he had done that himself). He said that in general terms, he had suggested that being an employee sometimes meant having to fit in with the manager's plans if you could not persuade the manager to change the plans, and being an employee was not the same as being an entrepreneur who was free to develop their own ideas.

380. He denied to Lindeque that he knew anything about the Claimant's adjustments, and anything about the Claimant's disability (or complaints to the Respondent about discrimination) other than what the Claimant told him during the call.

29 July 2020

381. On Monday 27 July, at 4.23pm, Mr Lockwood sent an email to the Claimant to say that on the Wednesday, the Claimant was due to meet him at 11.30am and Mr Kjelstrup-Johnson at 1.30pm. He proposed cancelling the first meeting, and all three of them attending the second instead. [Bundle 3114]. He asked the Claimant if that was OK. He had not heard by the following day, and so, at 3.49pm, he sent an email to confirm that he was proceeding with his suggestion, and cancelled the 11.30am meeting.

382. The Claimant logged on on the Wednesday, and saw the emails from Monday and Tuesday and that was how he found out the 11.30am meeting was cancelled. He emailed Mr Dryden to tell him.

383. The 1.30pm video meeting did go ahead. Ms Shelton was visiting the Claimant's home and listened in (with the knowledge of the others) and took notes. [Bundle 3133]. The Claimant did not complain in the meeting about this being a joint meeting, or that the 11.30am slot had been cancelled. In the meeting, there was a discussion about training and about the Claimant's personal development plan. Mr Lockwood invited the Claimant to produce a colour coded version to show (a) what training had been done; (b) what had been authorised but not yet completed;

(c) what requests cost money if approved. Mr Lockwood also asked for details of how much time the Claimant was spending on the training.

384. The Claimant asked if other people were having to colour code their PDP in the same way. Mr Lockwood stated that other people tended to use the Respondent's SABA system for keeping records of training, and the Claimant had produced something different, and that was why he was asking for it to be colour coded.

Feedback from Hannah Boots in August/September 2020

385. As per the Grievance 2 outcome, Hannah Boots, HR Business Partner spoke to Mr Lockwood and sought to contact the Claimant. On 17 August 2020, she sent an email to introduce herself and state that she was going to set up a meeting with her, the Claimant and Mr Lockwood. [Bundle 3503].

386. She noticed on the system that Tom was showing as "offline for 3 days". She checked whether the Claimant was on leave and was told that he was not. She asked Amanda Donaghy (HR Case Management Lead) to try to make contact with the Claimant to check he was OK. Ms Donaghy emailed the Claimant to say that she had been advised that the Claimant not attended work, and asked him to contact either Ms Boots or her to ensure that everything was OK.

387. The Claimant responded promptly to say that he was at work but had had some internet trouble around lunchtime. Ms Donaghy asked Tom to speak to his line manager as he had been showing as offline, and the Claimant responded to say that he had been attending meetings and sending emails during this period, and had been online.

388. Ms Boots let him know that the concern had been raised by her, and gave her reasons. [Bundle 3506-3508].

389. The Claimant was willing to meet Ms Boots, as per the Grievance 2 outcome, but wanted examples of the type of communication that had caused concern in advance of a meeting. Therefore, on 19 August, Ms Boots 2020 sent him an email setting out a some examples for discussion at the meeting. These included that the Claimant had made comments during a presentation that had been perceived as saying that those involved in the project in question had not taken accessibility into account and were not taking accessibility seriously. The Claimant was informed that some colleagues felt upset and publicly belittled. The second example was someone had said that he did not want to be copied in on an email chain anymore, but the Claimant was alleged to continued to do so in any event. It was said that there had been occasions on group calls when the Claimant had raised an issue and the person leading the call had suggested that the issue could be spoken about separately on a 1-to-1 basis, and the Claimant's response had been to suggest that he was being shut down. Another example was the email that he had sent to Mr Kjelstrup-Johnson) and Mr Lockwood on 14 July 2020 (page [2831]). It was said the email contained very strong and emotive language, some of which was very accusatory and also directly questioned their competence. Both Mr Lockwood and Mr Kjelstrup-Johnson were said to have been very insulted and hurt by the email and the accusations contained within.

390. The meeting took place on 1 September 2020. It took place virtually attended by Ms Boots, Mr Lockwood the Claimant and Ms Shelton (whom the Claimant had brought to accompany him) attended. They went through the examples in more detail, It was Ms Boots intention to try and give the Claimant the feedback in the way that he had requested. She tried to approach this meeting as a coaching session. We went through the

391. Ms Boots conclusion, based on emails the Claimant sent to her in advance of the meeting, and the comments made during the meeting was that things had not gone well, or at least had not achieved the objective that Mr Dryden had mentioned in the Grievance 2 outcome letter; her opinion was that the Claimant had not been receptive to the feedback, and believed that the criticism was misplaced and/or in bad faith. She and the Claimant had a lengthy exchange of emails in which the Claimant highlighted his opinion that other people had behaved in a similar way to him and that he thought he was being unfairly singled out. Mr Lockwood agreed to issue instructions to the whole team to be careful when interrupting others during presentations and team meetings. [Bundle 4134 to 4124]. Amongst other things, he copied/pasted messages from Nicola Richards in which she told the Claimant that she thought Ms Jones should not have made a complaint about the Claimant, but expressed the view that she thought Ms Jones had done similar things to others in the past. Further the Claimant had had an exchange with Dan Mason which stated that Dan Mason had not thought that the Claimant in particular ought to have been singled out in relation to the Byte team's (as a whole) comments during his presentation.

392. On 18 September, Mr Lockwood wrote to the Claimant to explain what he was intending to do in terms of having a written "team etiquette" document, and offered to discuss with the Claimant if there were questions. The Claimant replied "yep, that's great thanks". [Bundle 4196]

<u>Discussion with Tim Moody</u>

393. Tim Moody is of Head of Strategy for Hybrid Information Technology Services.

394. He ran what he called "culture club". The aim was bringing forward thoughts and experiences from various colleagues which might be used to determine how the Respondent could develop the business moving forwards. The culture club was open for anyone to attend.

395. At one of the meetings (in July), Mr Moody decided that the Claimant talking about things which went well beyond what they were talking about as a group. Rather than discussing the points with on a call with 20 or so other people, he suggested it was best to talk about the topics on a 1-2-1 basis. He was not seeking to silence the Claimant or criticise him, but was intending to be helpful and to offer some of his time. The meeting went ahead on 9 September.

396. The Claimant made a recording of the discussion without Mr Moody's knowledge or consent. A transcript which the Respondent says is accurate is 5619 to 5632. The Claimant does not concede the accuracy, but has not highlighted specific points of disagreement.

Discussions about possible work assignments

397. Based on comments made by the Claimant to Ms Doherty, the Respondent came to the view that the Claimant regarded his working relationship with Mr Lockwood as having broken down. Ms Boots therefore arranged a meeting between her, the Claimant and Mr Lockwood's manager, Doug Johnston (Head of Delivery, AMCS). She emailed the Claimant on 28 September. [Bundle 4296]

398. They had an initial meeting on 6 October 2020. [Bundle 4372-4374]. It was agreed that Mr Johnston would share more information about the potential alternative work that had been discussed in the meeting. They had a further (remote) meeting on 13 October to discuss further details and next steps. [Bundle 4496-4500]. It was agreed that Ms Boots would introduce the Claimant to Mark Ascott (Test Manager) with a view to progressing allocation to the assignment. The Claimant sent an email with some questions, on 8 October, and Ms Boots provided answers on 12 October. [Bundle 4482 to 4477]. The Claimant was told that the reason that mediation with Mr Lockwood was not occurring in October 2020 was that it seemed Mr Lockwood's and the Claimant's relationship was broken down. It was confirmed that the Claimant was not being redeployed (or suspended) but was being offered a work assignment that appeared to be available and suitable to his skill set. The Claimant said he was grateful that Ms Boots' response was detailed and alleviated some of his stress.

399. The Claimant subsequently, on 13 October, sent an email raising objections to the proposed new role on the basis, amongst other things, that he was not a tester and it was not aligned with his career aspirations. He said at the end of the email that he was going on sick leave [Bundle 4506- 4508].

400. On 27 October 2020, the Claimant submitted a sick note for work related stress which covered him for 2 months. [Bundle 4607-4609]. For that reason, nothing progressed in the remainder of 2020 about potential move to new line management and/or new job role. The Respondent decided that it was not appropriate to seek to push the discussions forward in the circumstances.

Absence approval around 13 October

401. On around 13 October, the Claimant made an entry into the Respondent's computer systems to say that he would be absent on sick leave from 15 November 2020 to 21 November 2020. He also made an entry to say that he would be absent on sick leave from 14 October 2020 to 30 October 2020. These came to Mr Lockwood for approval.

402. Mr Lockwood declined to approve these "absent request approval" forms because they were not what was required by the sickness absence policy. Unlike (say) holiday or special leave, the requirements for sickness absence are those mentioned above. In brief, contacting the manager during the absence, and supplying fit notes from GP where appropriate.

403. The Claimant had also written to Ms Boots, not copying in Mr Lockwood, to say he would obtain a sick note. [Bundle 4502].

Grievance 3

404. In September 2020, Ms Brown reminded the Claimant that the parts of his 3 July grievance which she had termed the "disability discrimination" part in her email of 9 July (and which we are going to call "Grievance 3") had not yet been addressed and that the Claimant had been intending to speak to the solicitors who were dealing with Claim 1, and let the Respondent know whether Grievance 3 should go straight down the formal route. The Claimant said that that was his preference, and Mr Dryden promptly confirmed to the Claimant (on 10 September) that that would happen.. [Bundle 4107]. Mr Dryden suggested a meeting on 24 September and asked for evidence by 18 September. The Claimant replied to agree to the meeting date, but to request (slightly) longer for provision of evidence.

405. On 17 September, the Claimant and Ms Brown exchanged emails. The Claimant was told it was fine for Ms Shelton to accompany him to his grievance meeting and that she was not being invited as someone who was bringing a grievance. He was directed to the role of companion in the Grievance Policy and invitation letter. [Bundle 4190 to 4187]

406. On around 22 September 2020, Ms Shelton also submitted a second grievance. The documents around that were not in the bundle, and it was not directly relevant to the Claimant's complaints. Ms Doherty submitted a supplementary statement to address it part way through the oral evidence, following questions put to Mr Dryden about it. Ms Shelton's individual grievance was dealt with by Mr Dryden and the outcome sent 6 November 2020.

407. On 23 September, the Claimant suggested a longer meeting or else additional meetings with Mr Dryden. Mr Dryden said that it would be better to have a single meeting, and was happy to lengthen it. [Bundle 4259]. The meeting went ahead and notes are Bundle 4276 to 4290. Prior to the meeting, Mr Dryden received a 34 page submission from the Claimant [Bundle 3688-3722].

408. The Claimant was told that the Respondent might wish to appoint an investigator, and the details were proposed in an email to him the following day Friday 25 September. The Claimant agreed on Monday 28 September [Bundle 4297]. It was also discussed that the Claimant would have extra time to collate evidence. On 1 October, Mr Dryden invited the Claimant to send this to him so that he could instruct the investigator. The Claimant replied to say that there was a lot of evidence to compile. [Bundle 4313 to 4312]. On 12 October, he emailed to say that there would be a delay, and would submit the evidence asap. [Bundle 4476]. Ms Brown wrote to say that Maddie Lindeque, HR Consultant had been appointed as the independent investigator for the grievance and wished to meet the Claimant on 29 October. Ms Lindeque wanted the evidence by 23 October to have time to review it before the meeting.

409. The Claimant replied to say: "*Just a quick thank you for the lenience and kindness you're both showing with regards to deadlines & extensions. It's much appreciated on top of everything else I'm facing*." [Bundle 4554]. Ms Brown said that the

invitation letters would be sent out, and that the Claimant could ask Ms Lindeque if he needed a further extension.

410. The Claimant sent an email to Ms Lindeque (copied to Mr Dryden, Ms Brown and Mr Futers) on 27 October 2020 at 1.17pm. It included a link to access his evidence, which he said was "comprehensive" but "not everything". After this email, he sent several further emails which he said contained further information and evidence. For example, he sent more than one email on 12 November 2020. Ms Brown invited him to refrain from further emails so that Ms Lindeque could focus on the investigation. [Bundle 4810]. She made similar comments on 19 November at 8.01am after further emails from the Claimant. [Bundle 4832].

411. As well as interviewing the Claimant (on 29 October and 5 November), and considering his evidence, Ms Lindeque interviewed Tim Moody, Mr Lockwood, Mr Kjelstrup-Johnson, Ms Boots, Kelsey Jones, Nicola Richards, Steve Robinson, Amanda Donaghy, Ms Doherty, Mr Welek between 23 November and 16 December. She produced a lengthy and detailed report: [Bundle 5553 to 5567]. The respective interview notes are also in the bundle, and we have taken the answers given into account when assessing the evidence as a whole.

412. Mr Dryden received the reports and considered the contents and supporting documentation carefully. He was the decision maker on the grievance. While he was relying on Ms Lindeque's investigation and Ms Brown's HR advice, the decision was his and his alone. He spent around 120 hours preparing his outcome decision which was sent to the Claimant on 8 January 2021. [Bundle 4955 to 4965]. It was a careful and detailed letter. It represents his genuine opinions as to the facts, and to the recommendations.

412.1 Having taken into account Mr Welek's evidence about what adjustments he believed were made by him, he did not accept that there had been a significant change in *those* adjustments following Mr Welek's replacement by Mr Kjelstrup-Johnson. He did not find that OH had recommended a week's notice of meetings, or that Mr Welek had been implementing that adjustment.

412.2 He found that OH had suggested a 6 hour day, as an adjustment, and that the Claimant had not wanted that.

412.3 He found that Ms Boots had provided (or attempted to provide) clean feedback.

412.4 He found that Mr Lockwood had helped obtain equipment to assist with home working.

412.5 He said that the Respondent had sought to implement measures to help give him information about unwritten rules.

412.6 He said that since he had been working from home since the start of the pandemic, some of the adjustments suggested by the February 2018 report

(and/or the disadvantages which led to the suggested adjustment) were no longer relevant.

412.7 He rejected the complaint of failure to make reasonable adjustments, but said that it was important that new OH advice was taken into account and that a disability passport be finalised.

412.8 He rejected that there had been discrimination by the Respondent in providing the feedback from certain colleagues (the exercise undertaken by Boots in August 2020) or by the colleagues in making their views known.

412.9 Mr Dryden expressed the view that he did think the Claimant's email of 14 July was inappropriate.

412.10 He was satisfied there was nothing untoward about Ms Donaghy's contact with the Claimant on 17 August 2020, and that it was a wellbeing check, not an accusation of AWOL.

412.11 He did not think there was sufficient evidence about "black and white thinking" being said, or in what context.

412.12 He did not think Mr Robinson's remarks (based on Mr Robinson's recollection of them) were inappropriate.

412.13 He did not find that there was wrongdoing by Doug Johnston (or Ms Boots) in relation to the suggestions of possible work assignments, or at all. His decision was that it was not proposed as a permanent redeployment outside of Byte, but a temporary assignment outside of Byte.

412.14 He explained why some evidence was, in his opinion, related to Grievance 2, and he was not going to comment on it.

413. He did not uphold any elements of the grievance (but did make some suggestions to the Claimant about progressing PDP and disability passort). He informed the Claimant of the right to appeal. (The Claimant did not agree with the outcome, but decided not to appeal).

414. The outcome included the following:

> Firstly, with regards to the evidence you submitted in relation to chat logs with various work colleagues, I am disappointed and shocked at the repeatedly derogatory and wholly inappropriate language used directed at management and other colleagues. This is openly offensive, at times abusive, and shows contempt towards other Fujitsu employees. It is my recommendation this part of your evidence is reviewed by an independent manager within the business for consideration on possible next steps due to the seriously inappropriate nature of the content. I would also request you refrain from sending such messages going forward, they are unprofessional, rude and insulting. Given the comments regarding John and Kris it is my recommendation an alternative manager is aligned to you upon your return to work.

Sickness absence

415. As mentioned above, the Claimant had informed Ms Boots that he would commence a period of sickness absence starting on 14 October 2020. Following discussions with Ms Doherty, around 26 October, he set his email auto reply for the period 17 October to 20 November 2020 to say he was "currently off work".

416. The Claimant obtained a fit note to say that from 27 October 2020 he was unfit for work for "two months" but might be able to work with altered hours. [Bundle 4608]. He emailed it to Mr Lockwood the same day.

417. The Claimant made entries on the Respondent's systems about return to work, and Mr Lockwood asked Ms Doherty to discuss those with the Claimant. Ms Doherty continued to have remote meetings with the Claimant during his sickness absence in November. Amongst other things, she assisted him to make sure that the annual leave he had booked for this period was added back to his entitlement (since he was on sick leave instead). The Claimant agreed and was happy with this.

Disciplinary and Dismissal

418. Although it was only in the Grievance 3 outcome letter (dated 8 January 2021) that the Claimant was informed of Mr Dryden's decision to refer the matter of the Claimant's communications for potential disciplinary action, the referral had actually been prior to the Christmas break.

419. One thing that the Claimant alleges is that, on receipt of the link he sent on 27 October 2020, the Respondent EITHER hacked his cloud-based account to access other items which he had not disclosed OR ELSE he accidentally gave access to documents that he did not intend to disclose (and, in the latter case, the Respondent should have realised that there was a mistake and not looked at those items).

420. During the course of the hearing, we asked for a detailed index of which documents in the bundle were (part of) what the Claimant himself disclosed on 27 October (according to the Respondent, at least). In particular, where we had the same document in both redacted form and unredacted form, we wanted to know if both items, or only one, was disclosed by the Claimant.

421. Ultimately, the Claimant did not put forward any specific challenge to the Respondent's 47 item "Index Of Redacted Chatlogs Disclosed By Claimant" that was introduced by way of being Mr Dryden's supplementary statement. He did not necessarily accept the accuracy of it, but found the subject very upsetting. We accept the document as being truthful and accurate to the best of Mr Dryden's knowledge and belief.

422. Based on the content of the redacted versions of the "chat logs" (largely Slack messages exchanged between the Claimant and Mr Welek and Ms Shelton), Mr Dryden recommended that disciplinary investigation be considered. He was not

closely involved in the exact steps which followed. Nor was Emma Walton, but as a result of the panel's observation that we probably needed some information about it, Ms Walton made some enquiries and gave evidence about what she was told. According to what Ms Walton was told, following Mr Dryden's recommendation, the Respondent considered whether it could lawfully access the Slack chat between Mr Welek, the Claimant and Ms Shelton to see the unredacted versions. Susan Thomas, Head of Legal, believed that she had the lawful right to do this without breaching GDPR. Ms Thomas was given access by the people with the appropriate administrator access to do so and she went through the chat with a view to extracting parts that were potentially relevant to a disciplinary investigation, and ensuring that parts which did not need to be seen by an investigator were not. Prior to Ms Walton's involvement files of these potentially relevant chats were created and referred for investigation.

423. The Claimant argues that this explanation cannot be true (on the grounds that the Respondent's administrators would not have been able to grant access to the Slack chat in that way) and/or it was unlawful as the chat "belonged" to the three of them (or Ms Shelton as administrator) rather than the Respondent. Our finding is that Slack was one method which the Respondent's employees used to communicate with each other (for example the Claimant's exchanges with Nicola Richards) and they did so using a licence purchased by the Respondent. The Respondent's senior technical people did have the ability to control and grant access to particular conversations. We accept that the account relayed by Ms Walton (albeit hearsay based on questions she asked two years after the event) is plausible and the most likely explanation. We reject the Claimant's alternative theory that either his cloud-based account, or his laptop, was hacked. Further, although Slack had ceased to be a communication tool that the Respondent "officially" recommended for its employees, that did not mean that they had therefore abandoned their licence, or their right to control what it was used for by its employees. We note that a lot of the Slack chat includes things copied and pasted from the Respondent's other applications, and infer that Mr Welek, Ms Shelton and the Claimant were logged into those other applications at the same time as they were in Slack. Similarly, there are examples of real-time discussions about what colleagues were saying in work meetings being held via a different platform. In other words, the Slack conversations (or some of them at least) occurred in work time, and (all) were using the employer's systems.

424. On the same day as his grievance outcome (8 January 2021) and while still off sick, the Claimant was notified of suspension. [Bundle 4966]. The letter was from Doug Johnston. He was told the terms of his suspension, including that any contact with the Respondent should be via Nicky Paintin (HR). The letter said:

- we are investigating a serious allegation of misconduct against you;
- the chat logs we have reviewed document threatening language about co-workers. We have had particular regard to the following comment in making our decision to suspend you: "I am gonna fucking string them up by their ankles all of them, every last one of them."

- given the tone and content of the chat logs we consider there to be a real risk of harm to our business and/or our employees if you are not suspended during the investigation.

425. On 15 January 2021, a letter was sent to the Claimant [Bundle 4987] inviting him to a disciplinary hearing on 20 January. The letter said:

> The hearing will consider the following allegations of gross misconduct against you:
>
> 1. You have repeatedly used extreme foul, abusive, objectionable or insulting language about managers, colleagues, and the company, in chats with other colleagues; and
>
> 2. You have repeatedly used threatening language about your managers and colleagues, in chats with other colleagues.
>
> The use of this language is considered to fall seriously below the standards of behaviour which Fujitsu expects of its employees, and the following sections of our company policies:

426. The letter attached a 5 page summary of comments said to potentially fall within the above description [Bundle 4990 to 4994]. It also said that the Claimant would be sent a link from which he could download files labelled "TD01 to TD16". Our finding is that those were the files produced by Ms Thomas. Furthermore, she did send the links to the Claimant with zip files. Ms Tomas received a notification that the Claimant had attempted to access (at least one of) the links at 13:45 on 15 January 2021. The notification does not necessarily confirm that the Claimant was able to successfully download the entire file(s). However, we are satisfied that the Claimant was told the information was available, and told that the Respondent was giving him access.

427. The letter was sent by Stuart Middleton. It included Conduct Policy and Global Business Standards document. It advised the Claimant of right to be accompanied, and to reply to confirm whether he would be attending or not.

428. Mr Middleton held a disciplinary hearing regarding Mr Welek and dismissed him without notice in January. [Bundle 6279]. Mr Middleton held a disciplinary hearing regarding Ms Shelton and gave her a final written warning in February. [Bundle 6283]. Each of them unsuccessfully appealed the respective outcomes.

429. At the Claimant's request, the disciplinary meeting was proposed. Mr Middleton sent an invitation for 27 January. The letter replicated the first one barring the change of meeting date/time. The meeting, like the first, was to be by Skype. [Bundle 5019].

430. The Claimant informed the Respondent he could not attend due to sickness, and Ms Paintin acknowledged that. [Bundle 5027]. He was told that he would be going onto SSP from 1 February. He was told that he could continue to liaise with Ms Doherty about his sickness absence (and with Ms Paintin about everything else). He exchanged further emails with Ms Paintin about the suspension, and sick pay. Amongst other things, it was confirmed on 11 February that he still had permission

to speak to Mr Welek and Ms Shelton (and Rob Loseby, head of Seed). [Bundle 5029 to 5022]. The request had first been approved on 8 January [Bundle 5119].

431. The Claimant's sickness absence came to an end with effect from 22 February. He remained away from duties because of the suspension. [Bundle 5160]

432. Mr Middleton became unable to remain as hearing officer because of pressures of work. Ms Walton was appointed to replace him and wrote to the Claimant on 23 February 2021 to say so and to propose 1 March as rearranged hearing date. The letter invited the Claimant to give the name of any companion, and to contact Ms Walton to discuss further if he could not attend.

433. The following day, 24 February, the Claimant said he was not well enough to attend, but implied the hearing should go ahead in his absence. He referred to documents he thought were relevant. He did not mention the name of any companion. He said: "Considerations as above for the hearing would be of great benefit in enabling my fitness and return to work". Our finding is that this was not a postponement request, and that the email as a whole acknowledged the hearing would occur on 1 March. His email attached a GP letter. [Bundle 5138-5139].

434. The Claimant sent some detailed information on 24 February 2021. [Bundle 5197 to 5208] including 17 headings in the category "my mitigating circumstances are as follows". The lengthy document was not copied to any representative and nor did it invite Ms Walton to contact any representative. It finished by stating: "If you have any further questions, feel free to contact **me** …" (our emphasis).

435. At 11.21am on 1 March, she emailed the Claimant to acknowledge that he was not attending and that she would take into account the documents he had mentioned and the points in his 24 February email, and the OH report. She invited him to supply any further information by 5 March 2021.

436. Ms Walton conducted the meeting in the Claimant's absence. Notes are [Bundle 5162-5167]. She took into account the documents which the Claimant asked her to consider, as well as the 5 page summary of comments.

437. At 3.07pm, the Claimant replied to Ms Walton's email. He made no mention of any representative. He said he wanted the matter to be over, and had no other documents to add.

438. The invitation letter had included a link to join the remote meeting by Teams, or to call in by audio only. When she started the meeting, at 1pm, Ms Walton diverted her phone to voicemail. Ms Walton is unaware of any attempt to join the Teams meeting, by video or voice. The day after the meeting, she picked up a voice mail from Ray Field. The message said that Mr Field was trying to contact Ms Walton about the disciplinary hearing. She emailed him to say the hearing had taken place in the Claimant's absence [Bundle 5191] and there was no reply to that email.

439. At 8.23am on 3 March 2021, Ms Walton sent 12 questions to the Claimant. [Bundle 5193 to 5195]. He replied the same day, following her numbering and adding "I would appreciate no further questions on my disabilities".

440. On 10 March, Ms Walton repeated the request to be able to speak to the occupational psychologist who was assigned to assist the Claimant. The Claimant agreed. The reply, on 17 March, was that it was not considered appropriate to speak to Ms Walton, but that the Claimant could share a copy of the report already issued to him. [Bundle 5226].

441. Ms Walton wrote to the Claimant on 1 April 2021 to say that she was ready to send her outcome, but the Respondent had decided to defer sending it for the reasons stated in the email. [Bundle 5244]

442. The outcome was sent by email on 16 April at 12:43 [Bundle 5247].

443. The outcome letter is pages 5250 to 5257. The Claimant was dismissed with effect from 16 April.

444. The letter refers to the allegations mentioned in the hearing invitation letters and says those same allegations have been found proven. It says

> The specific exchanges that I reference are contained within the following chat logs:
>
> TD01, page 8: The log shows an exchange between 1:46PM BST and 1:47PM BST confirming a 3 minute delay on email
>
> TD09, page 4: The log shows an email at 2:22PM BST
>
> TD10, page 6: The log shows an email at 2:30PM BS

445. The letter acknowledged the Claimant's argument that this was a discussion with his closest friends. It comments, amongst other things, point by point on the Claimant's 17 mitigation points.

446. It stated:

> I have taken account of your statements that there is a link between your disabilities and the offensive behaviour. I had hoped to explore this particular point in more detail with your occupational psychologist, but she was not willing to discuss this with me. Given this issue and the wider context (including the fact that you disclosed the chat logs in connection with your own grievance) I considered whether a different sanction, such as a final written warning, may be appropriate. However, on balance I consider that the online chat content shows deliberate repeated hateful verbal abuse directed at colleagues, and dismissal is appropriate in the circumstances.

447. Our finding is that Ms Walton did dismiss the Claimant because she decided that he had done the things referred to in the letter (and that she had in mind the comments referred to in paragraph 19 of her witness statement). Further, she genuinely did take into account a lesser sanction, and the mitigation points the

Claimant raised before she reached the conclusion that, in her honest opinion, dismissal was the appropriate sanction.

Appeal

448. The Claimant appealed, but informed the Respondent he would not meet the appeal officer.

449. Daniel Marsden was appointed to deal with the appeal. He contacted the Claimant via email on 17 May 2021 with a view to setting up a meeting [Bundle pages 5302-5303]. The Claimant replied to say that he had spoken to his union who had confirmed that they would not be providing representation in his absence. He said he had spoken to various healthcare professionals and been advised to disengage with the process and to focus on his mental health.

450. On that basis, Mr Marsden proceeded in the Claimant's absence. He rejected the appeal, and our finding is that he did so after considering all the material presented to him, and his reasons are genuinely as set forth in the letter dated 18 June 2021 [Bundle 5323 to 5326] following the hearing on 26 May 2021.

The Law

Burden of Proof for the Equality Act complaints

451. The burden of proof provisions are codified in s.136 EQA and s.136 is applicable to all of the contraventions of the Equality Act which are alleged in these proceedings.

> **136 Burden of proof**
>
> (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.

452. It is a two stage approach.

452.1 At the first stage, the Tribunal considers whether the Tribunal has found facts - having assessed the totality of the evidence presented by either side and drawn any appropriate factual inferences from that evidence - from which the Tribunal could potentially conclude - in the absence of an adequate explanation - that a contravention has occurred.

452.2 At this first stage it is not sufficient for the claimant to simply prove that the alleged treatment did occur. There has to be some evidential basis from which the Tribunal could reasonably infer that there was a contravention of

the act. The Tribunal can and should look at all the relevant facts and circumstances when considering this part of the burden of proof test.

453. If the claimant succeeds at the first stage then that means the burden of proof is shifted to the respondent and the claim is to be upheld unless the respondent proves the contravention did not occur.

454. In Efobi v Royal Mail Neutral citation: [2021] UKSC 33, the Supreme Court made clear that the changes to the wording of the burden of proof provision in EQA compared to the wording in earlier legislation do not represent a change in the law. Thus when assessing the evidence in a case and considering the burden of proof provisions, the Tribunal can have regard to the guidance given by the Court of Appeal in, for example, Igen v Wong Neutral citation: [2005] EWCA Civ 142 and Madarassy v Nomura International Neutral citation: [2007] EWCA Civ 33.

455. The burden of proof does not shift simply because, for example, the claimant proves that they have a disability and/or that there was unwanted conduct and/or that they did a protected act and/or that there was difference in treatment between her and somebody who did not have the disability. Those things only indicate the possibility of discrimination or victimisation or harassment. They are not sufficient in themselves to shift the burden of proof, something more is needed.

456. It does not necessarily have to be a great deal more and it could in an appropriate case be a non-response from a respondent or an evasive or untruthful answer from an important witness.

457. In terms of assessing the burden of proof provisions as per Essex County Council v Jarrett [2015] UKEAT 0045/15/0411, where there are multiple allegations, the Tribunal has to consider each allegation separately when determining whether the burden of proof is shifted in relation to each one. That does not mean that we must ignore the rest of the evidence when considering one particular allegation. It just means that we assess separately, for each allegation, whether the burden of proof shifts or not, taking into account all of the facts which we have found.

Time Limits

458. In the Equality Act 2010 ("EQA"), time limits are covered in s.123, which states (in part):

> (1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.

459. In applying Section 123(3)(a) of EA 2010, the tribunal must have regard to the guidance in Commissioner of Police of the Metropolis v Hendricks ([2002] EWCA Civ 1686; [2003] ICR 530); Lyfar v Brighton and Hove University Hospitals Trust [2006] EWCA Civ 1548. Applying that guidance, the Court of Appeal has noted that in considering whether separate incidents form part of an act extending over a period, one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents: Aziz v FDA 2010 EWCA Civ 304. The tribunal must consider all relevant circumstances and decide whether there was an act extending over a period or else there was a succession of unconnected or isolated specific acts. If it is the latter, time runs from the date when each specific act was committed.

460. A crucial distinction is between – on the one hand – an invariable rule which will inevitably result in a discriminatory outcome each time and – on the other hand – a discretionary decision made under a policy, in which the discretionary decision may sometimes result in an employee getting the desired outcome, and sometimes not. In the latter case, the discretionary decision causes the time to run, regardless of arguments about whether the policy itself is discriminatory.

461. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. That being said, time limits are there for a reason and the default position is to enforce them unless there is a good reason to extend. That does not meant that the lack of a good reason for presenting the claim in time is fatal. On the contrary, the lack of a good reason for presenting the claim in time is just one of the factors which a tribunal can take into account, and it might possibly be outweighed by other factors.

462. The Tribunal has a broad discretion to extend time when there is a good reason for so doing. Parliament has chosen to give the Employment Tribunal the widest possible discretion. Unlike, say, the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it is wrong to interpret it as if it contains such a list. A tribunal can consider the list of factors specified in s 33(3) of the Limitation Act 1980, but if it does so, should only treat those as a guide, and not as something which restricts its discretion.

463. The factors that may helpfully be considered include, but are not limited to:
    463.1 the length of, and the reasons for, the delay on the part of the claimant;
    463.2 the extent to which, because of the delay, the evidence is likely to be less cogent than if the action had been brought within the time limit specified in Section 123;
    463.3 the conduct of the respondent after the cause of action arose, including the extent (if any) to which it responded to requests for information or documents

Indirect discrimination

464. Section 19 EQA states, in part:

> **19 Indirect discrimination**

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

465. Disability is one of the protected characteristics listed in section 19(3).

466. The phrase "provision, criterion or practice" is commonly abbreviated to "PCP". It is not separately defined in the Equality Act 2010. Tribunals must interpret it in accordance with guidance in the EHRC Code and in appellate court decisions.

467. In Nottingham City Transport Ltd v Harvey UKEAT/0032/12, the EAT held that the word practice has something of the element of repetition about it, and if related to a procedure, should be applicable to others as well as the complainant.

468. In Onu v Akwiwu; Taiwo v Olaigbe [2016] UKSC 31, the Supreme Court pointed out that a PCP must apply to all employees and that a practice of mistreating workers specifically because of a protected characteristic, or something closely connected to the protective characteristic, would not fall within the definition of PCP because it would necessarily not be applied to individuals who were not so vulnerable.

469. The PCP does not have to be a complete barrier preventing the claimant from performing their job for section 19 to be triggered. Furthermore, a PCP might be "applied" even if the employee is not necessarily disciplined or dismissed if they fail to meet the requirement. In Carreras v United First Partners Research, the EAT concluded that an expectation or assumption that an employee would work late into the evening could constitute a PCP, even if the employee was not "forced" to do so.

470. There are two aspects to the "particular disadvantage" limb of the test for indirect discrimination.

470.1 that the PCP puts (or would put) persons who share the claimant's protected characteristic at a particular disadvantage when compared with persons who do not share it. So a female claimant needs to show that the PCP puts women at a particular disadvantage when compared with men. This is sometimes referred to as "group disadvantage".

470.2 that the claimant must personally be placed at that disadvantage.

471. The word "disadvantage" is not specifically defined in the Equality Act 2010. The Code of Practice suggests that disadvantage can include denial of an opportunity or choice, deterrence, rejection or exclusion. A person might be able to show a

particular disadvantage even if they have complied with the PCP in order, for example, to avoid losing their job. It is sufficient that the PCP caused the claimant "great difficulty" in meeting her obligations.

472. If the PCP is shown to exist and to place persons with the relevant protected characteristic, and the claimant herself, at a particular disadvantage, the burden of proof switches to the respondent to show that the PCP is nevertheless a proportionate means of achieving a legitimate aim.

473. The "legitimate aim" of the PCP should not be discriminatory in itself, and must represent a real, objective consideration. The health, welfare and safety of individuals may qualify as legitimate aims provided that risks are clearly specified and supported by evidence.

474. Reasonable business needs and economic efficiency may be legitimate aims. However, a discriminatory rule or practice will not necessarily be justified simply by showing that the less discriminatory alternatives cost more.

475. Once a legitimate aim has been established, the tribunal must consider whether the discriminatory PCP is a proportionate means of achieving that aim.

476. Tribunals considering whether a PCP is a proportionate means of achieving a legitimate aim must undertake a comparison of the impact of the PCP on the affected group as against the importance of the aim to the employer.

477. The tribunal must consider whether there are less discriminatory alternative means of achieving the aim relied upon. However, the existence of a possible alternative non-discriminatory means of achieving the aim of a measure or policy does not, in itself, make it impossible for the respondent to succeed in justifying a discriminatory PCP. The existence of an alternative is only one factor to be taken into account when assessing proportionality.

478. The tribunal must make an objective determination and not (for example) apply a range of reasonable employers test.

479. The defence to a section 19 claim can, in principle, rely on a legitimate aim which was not in fact the reason for imposing the PCP at the relevant time.

<u>Direct Discrimination</u>

480. Direct discrimination is defined in s.13 EQA.

> **13 Direct discrimination**
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

481. There are two questions: whether the respondent has treated the claimant less favourably than it treated others ("the less favourable treatment question") and whether the respondent has done so because of the protected characteristic ("the reason why question").

482. For the less favourable treatment question, the comparison between the treatment of the claimant and the treatment of others can potentially require decisions to be made about whether another person is an actual comparator and/or the circumstances and attributes of a hypothetical comparator. However, the less favourable treatment question and the reason why question are intertwined. Sometimes an approach can be taken where the Tribunal deals with the reason why question first. If the Tribunal decides that the protected characteristic was not the reason, even if part, for the treatment complained of then it will necessarily follow that person whose circumstances are not materially different would have been treated the same and that might mean that in those circumstances there is no need to construct the hypothetical comparator.

483. When considering the "reason why question" for the treatment we have found to have occurred, we must analyse both the conscious and sub-conscious mental processes and motivations of the decision makers which led to the respondent's various acts, omissions and decisions.

484. For comparators for direct disability discrimination allegations the EHRC Code gives useful guidance at paragraphs 3.29 and 3.30 in particular with the example quoted therein.

485. If we find that the reason for particular treatment of the claimant was - for example - the claimant's absence from work, then the relevant comparator (for the direct discrimination allegations) would have to be someone who was also absent from work for a similar amount of time, and so on.

Victimisation

486. Victimisation definition is in s.27 EQA.

> **27 Victimisation**
>
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act—
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.
>
> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

487. There is an infringement if a claimant is subjected to a detriment and the claimant was subjected to that detriment because of a protected act.

488. The alleged victimiser's improper motivation could be conscious or it could be unconscious.

489. A person subjected to a detriment if they are placed at a disadvantage and there is no need for either claimant to prove that their treatment was less favourable than a comparator's treatment.

490. For the Claimant to succeed in a claim of victimisation, we must be satisfied (having taken into account the burden of proof provisions) that the claimant was subjected to the detriment because she did a protected act or because the employer believed that she had done or might do a protected act.

491. Where there is a detriment and a protected act, then those two things alone are not sufficient for the claimant to succeed. The Tribunal has to consider the reason for the treatment and decide what consciously or otherwise motivated the respondent. That requires identification of which decision makers made the relevant decisions as well as consideration of their mental processes.

492. The claimant does not have to demonstrate that the protected act was the only reason for the detriment. Furthermore, if the employer has more than one reason for subjecting the Claimant to the detriment, then the claimant does not have to establish that the protected act was the principal reason. The victimisation complaint can succeed provided the protected act has a significant influence on the decision making. An influence can be significant even if it was not of huge importance to the decision maker. A significant influence is one which is more than trivial.

493. A victimisation complaint might fail where the reason for the detriment was not a protected act itself but something else which (while being in some way connected to the protected act) could properly be treated as separate. See Martin v Devonshires Solicitors [2010] UKEAT 0086/10.

494. S.136 applies and so the initial burden is on the claimant to demonstrate that there are facts from which the Tribunal might conclude that the detriment was because of the protected act.

Discrimination arising from disability

495. Discrimination arising from disability is defined in s.15 of the Act.

> **15 Discrimination arising from disability**
>
> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

496. The elements that must be made out in order for the claimant to succeed are that: there must be unfavourable treatment; there must be something that arises in consequence of the claimant's disability; the unfavourable treatment must be because of, in other words caused by, the something that arises in consequence of the disability. Furthermore, the alleged discriminator must also be unable to show either that the unfavourable treatment was a proportionate means of achieving a legitimate aim or, alternatively, that it did not know and could not reasonably have been expected to know that the claimant had the disability.

497. The word "unfavourably" in s.15 is not separately defined in the legislation but should be interpreted consistently with case law and the EHRC Code of Practice. Dismissal, for example, can amount to unfavourable treatment but so can treatment which is much less disadvantageous to an employee than dismissal.

498. In *Risby v London Borough of Waltham Forest EAT 0318/15* the EAT made clear that an indirect connection between the claimant's unfavourable treatment and the "something" that arises in consequence of the disability can be sufficient. The EAT decided that the employment tribunal had been wrong to reject the section 15 claim on the basis that an incident in which the employee lost his temper was unrelated to his disability. On the facts, an effective cause of the loss of temper had been the employer's decision to hold an event at a venue that was inaccessible to him because of his disability, that loss of temper led to his dismissal, and there was therefore a sufficient connection between the unfavourable treatment (his dismissal) and his disability for the purposes of section 15

499. When considering what the respondent knew or could have reasonably been expected to know, the relevant time is the time at which the alleged unfavourable treatment occurred. Thus, where there are different allegations, then the respondent's knowledge has to be assessed at the time of each alleged act or omission. For that reason, for example, what the Respondent knew (or could have been expected to know) at the time of a dismissal might be different than what it knew (or could have been expected to know) at the time of an appeal hearing.

500. The complaint will not succeed if the respondent is able to show that the unfavourable treatment was a proportionate means of achieving a legitimate aim. The aim relied upon should be legal, should not be discriminatory in itself, and must represent a real objective consideration. Business needs and economic efficiency may be legitimate aims, but simply demonstrating that one course of action was less costly than another is not likely to be sufficient.

501. In relation to proportionality, the respondent is not obliged to go as far as proving that the discriminatory course of action was the only possible way of achieving the legitimate aim. However, if there are less discriminatory measures which could

have been taken to achieve the same objective then that might imply that the treatment was not proportionate.

502. It is necessary for there to be a balancing exercise which takes into account the importance of the respondent achieving its legitimate aim in comparison weighed against to the discriminatory effect of the treatment. Regardless of whether the respondent carried out that balancing exercise at the time (and it is not necessary for the Respondent to prove that it did), the tribunal carries out its own balancing exercise - based on the evidence presented at the hearing – in order to decide if the section 15(1)(b) defence succeeds.

503. If a respondent has failed to make reasonable adjustments which could have prevented or minimised the unfavourable treatment, then it is going to be very difficult for the respondent to show that the treatment was a proportionate means of achieving a legitimate aim.

504. Section136 EQA applies to alleged contraventions of section 15 EQA.

Harassment

505. Harassment is defined in s.26 of the Act.

> **26 Harassment**
>
> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect.

506. It needs to be established on the balance of probabilities that the claimant has been subjected to unwanted conduct which had the prohibited purpose or effect. However, to succeed in a claim of harassment, it is not sufficient for a claimant to prove that the conduct was unwanted or that it had the purpose or effect described in s.26(1)(b). The conduct also has to be related to the particular characteristic.

507. Section 136 EQA applies and so the claimant does not necessarily need to prove on the balance of probabilities that the conduct was related to the protected

characteristic. If the tribunal finds facts from which we can infer that the conduct could be so related then the burden of proof shifts.

508. In Land Registry v Grant Neutral citation [2011] EWCA Civ 769, the Court of Appel said that when considering the effect of the unwanted conduct, and when analysing s.26(4), it is important not to cheapen the words used in s.26(1).

> Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The claimant was no doubt upset that he could not release the information in his own way, but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the Tribunal did as subjecting the claimant to a "humiliating environment" when he heard of it some months later is a distortion of language which brings discrimination law into disrepute. When assessing the affects of any one incident of serval alleged harassments then it is not sufficient really to consider each instant by itself. We obviously must consider each incident by itself but in addition, we must stand back and look at the impact of the alleged incidents as a whole.

Failure to make reasonable adjustments,

509. Section.20 defines the duty. S.21 and schedule 8 also apply.

> **20 Duty to make adjustments**
>
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.
>
> (6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.
>
> (7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Schedule 8, Part 3, paragraph 20: Lack of knowledge of disability, etc.

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

510. The expression "provision, criterion or practice" [usually shortened to "PCP"] is not expressly defined in the legislation. We have regard to the guidance given by EHRC to the effect that the expression should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, pre-requisites, qualifications or provisions.

511. The claimant must clearly identify the alleged PCPs to which the adjustments should have been made. The tribunal must only consider those PCPs as identified. See Secretary of State for Justice v Prospere [2015] UKEAT 0412/14/3004.

512. When considering whether there has been a breach of s.21 we must precisely identify the nature and extent of each disadvantage to which the claimant was allegedly subjected. Furthermore, we must consider whether there is a substantial disadvantage when the relevant alleged PCP is applied to the claimant in comparison to when the same PCP is applied to persons who are not disabled.

513. The claimant has the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred that the duty may have been breached. If she does then we need to identify the step or steps (if any) which the respondent could have taken to prevent the claimant suffering the disadvantage in question, or to reduce that disadvantage. If there appear to be such steps, then the burden is on the respondent to show that the disadvantage could not have been eliminated or reduced by such potential adjustments or, alternatively, that the adjustment was not a reasonable one for it to have had to make.

514. There is no breach of s.21 if the employer did not know and could not reasonably have been expected to know, that the claimant had the disability.

515. Furthermore, in relation to a particular disadvantage, there is no breach of s.21 if the employer did not know and could not reasonably have been expected to know, that the PCP would place the claimant at that disadvantage.

Unfair Dismissal

516. Section 98 of the Employment Rights Act 1996 ("ERA") deals with fairness.

> **98.— General.**
>
> (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.
>
> (3) In subsection (2)(a)—
>
> (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
>
> (b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.
>
> (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.

517. The respondent has the burden of proving, on the balance of probabilities, that the claimant was dismissed for the reason relied upon. The reason in this sense is the set of facts known to the person taking the decision on behalf of the employer (or

the set of beliefs held by that person) which cause the employer to dismiss the employee. See the court of appeal decision in Abernethy v Mott [1974] I.C.R. 323.

518. Furthermore, the employer must also satisfy us that this reason falls within one of the definitions in either section 98(2) or section 98(1)(b).

519. In this case, the Respondent alleges that the reason was "conduct" as defined by section 98(2)(a) ERA.

520. Provided the respondent does persuade us of these things, then the dismissal is potentially fair. That means it is then necessary to consider section 98(4) ERA. In doing so, we take into account the respondent's size and administrative resources and we decide whether the respondent acted reasonably or unreasonably in treating capability as a sufficient reason for dismissal.

521. In considering the question of reasonableness we must analyse whether the respondent had a reasonable basis to believe that the claimant did do the acts that the Respondent's decision maker has found them to have done.

522. We also consider whether or not the respondent carried out a reasonable process prior to making its decisions.

523. Any arguments that an employer has acted unlawfully in the course of its investigation can be taken into account when assessing fairness. As can any argument that any evidence that was obtained unlawfully should be disregarded by the disciplinary hearing officer.

524. In terms of sanction of dismissal itself we must consider whether this particular respondent's decision to dismiss this particular claimant fell within the band of reasonable responses in all the circumstances. The band of reasonable responses test applies not only to the decision to dismiss but also to the procedure by which that decision was reached.

525. Any argument that what the employee did was not work-related, and/or was done in the expectation that their actions were in private and would not come to the attention of the employer can be considered when determining if the dismissal was within the band of reasonable responses.

526. It is not the role of the tribunal to assess the evidence and to decide whether the claimant should or should not have been dismissed. It is not our role to substitute our decisions for the decisions made by the respondent.

Dismissal contravening Equality Act vs Unfair Dismissal

527. In considering unfair dismissal arguments, we must take care not to conflate tests for whether a dismissal was a breach of the Equality Act with tests for whether the dismissal was unfair contrary to the Employment Rights Act.

528. For example, when considering, as we must, in accordance with s15 EQA, whether a dismissal was proportionate, we must perform our own balancing exercise. But

when considering whether the dismissal was unfair we must instead look at the employer's rationale. A dismissal which is discriminatory is not always a dismissal which is unfair.

Analysis and Conclusions

529. We propose to go through the alleged acts and omissions in the order set out in the Scott Schedule, and deal with each complaint for that act. In setting out the analysis for each, we have done our best to avoid compartmentalisation, and to take into account the evidence as a whole.

530. We set out above the full text of the first column for each row of the Scott Schedule. For space reasons, we will not repeat the full text each time below, but have, in each case, considered the full text. Furthermore, we have also taken into account the text in each of the other columns for each row.

Row 2. Failure to conduct Medigold recommended stress risk assessment

531. The February 2018 report recommended:

> It would also be beneficial to complete a Stress Risk Assessment to try and identify any issues and concerns he may have. Templates for Stress Risk Assessments can be found on the following website; www.hse.gov.stress/standards/downloads.htm and I recommend regular meetings with his line Manage in orderto monitor his progress and update the Stress Risk Assessment if required.

532. Mr Tolgyesi had seen the report upon receipt, and discussed it with the Claimant. He had not carried out stress risk assessment by the time the Claimant transferred to Ms Godfrey's line management a few weeks later. The Claimant was content with the way in which Mr Tolgyesi dealt with the report and its recommendations.

533. Ms Godfrey first saw this report in March 2019 very shortly before the Claimant left her team. (He was only back at work on 1 April 2019 and started work on Mr Lockwood's team from 8 April 2019).

534. Mr Lockwood first saw it around 14 March 2020. So just less than a year after the Claimant joined the team. The recommendation in the Grievance 1 outcome (that there be a new OH referral, and that Mr Lockwood see the contents) was not adopted. We accept Mr Lockwood's account that he had not been made aware of this recommendation in 2019 by the Claimant, or Mr Dryden or anyone else.

535. This is argued to be harassment.

536. It was unwanted conduct that the Respondent failed to carry out the assessment. The Claimant repeatedly stated that he was feeling stressed as a result of treatment at work (or his perception of that treatment). In particular, he regularly referred to the need for around a week's notice of (certain) meetings and (certain) changes to routine. He repeatedly stated that his opinion was that the recommendations in the February report were not being adhered to.

537. The Claimant did not specifically request a stress risk assessment. However, based on what he did specifically request and the contents of the February 2018 report, our unanimous decision is that it would have been obvious to a reasonable employer that a stress risk assessment was required.

538. It is our unanimous decision that it was not the Respondent's purpose to violate the Claimant's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

539. The Claimant has perceived that there has been stress and that that stress has caused an intimidating, hostile and offensive environment for the Claimant.

540. It is also the Claimant's perception that that unwanted conduct (failure to arrange risk assessment) has had that effect on him. It is a manifestation, in his opinion, of a lack of willingness to give him sufficient (as he sees it) notice of meetings, but, more importantly, it is a manifestation, in his opinion, of a lack of willingness to even engage on the issue.

541. It is our decision that it was reasonable for the conduct to have that effect.

    541.1 The failure to conduct a risk assessment was flying in the face of the clear advice from OH.

    541.2 There has been no explanation from the Respondent about why it was not done, other than oversight and/or they did not think it was necessary because of other measures.

    541.3 However, it is clear that the Claimant was stressed and also clear that the Respondent knew this, taking into account the October/November 2018 absence, the February / March 2019 absence and the April 2020 departure from the hackathon, as well as the Claimant's express comments about stress. The other measures, if any, had not been working.

    541.4 The onus is not on the Claimant to request a risk assessment in any circumstances, and especially not when the employer has received an OH recommendation. We do not ignore that the Claimant agreed with Mr Tolgyesi what action would be taken, and did not, at the time, seek that Mr Tolgyesi carry out the assessment. We take into account that, for that reason, Mr Tolgyesi did not think it was a piece of work which required doing when he handed over to Ms Godfrey and did not highlight the recommendation to her.

    541.5 However, the Claimant did mention his stress to Ms Godfrey and, rather than arrange an assessment, she brushed it off by saying that she too was stressed.

    541.6 It is reasonable for an employee to believe that an intimidating, etc environment has been created in circumstances in which the employer seems to have no willingness to make formal efforts identify, and attempt to reduce stress, despite their own OH advice.

542. We think that it would have been obvious to the Claimant by no later than around August 2018 that the Respondent was not going to carry out a stress risk assessment based on the February 2018 recommendation. Thus, in terms of a specific argument that there was a failure to carry out the recommendation, time would start to run from then, and a 3 month time period would expire by no later than 30 November 2018.

543. Furthermore, there was no stress risk assessment done during or immediately after the October/November 2018 absence or during or immediately after the absence which ended on 1 April 2019.

544. This was an allegation included in Claim 1 (paragraph 14 of the Particulars of Complaint). It seems to us that it is outside the time limit in section 123(1)(a) EQA, but that we should extend time under section 123(1)(b). We take into account that extensions are the exception rather than the rule, and it is for the Claimant to demonstrate that it would be just and equitable. However, we are satisfied that those criteria are met. The Respondent was aware throughout the period on Ms Godfrey's team that the Claimant was (a) alleging that he was stressed and (b) alleging that OH's recommendations had not been adhered to. The Respondent has had no reason to dispose of any relevant documents or information, and we do not think witnesses have become unavailable. We accept that, had the claim been brought sooner, then events might have been fresher in Ms Godfrey's mind, and she might have created a formal witness statement sooner. However, against that, she was interviewed twice as part of Grievance 1 when the events were much fresher in her memory, and from October 2018 onwards, the Respondent had plenty of opportunities to advise Ms Godfrey to make contemporaneous records of her reasons for not doing a stress risk assessment. The prejudice to the Respondent of granting the extension is significantly less than the prejudice to the Claimant of refusing it.

545. Thus this complaint of harassment related to disability is upheld. The Respondent has contravened section 40(1)(a) EQA.

546. The corresponding complaint of direct discrimination is therefore not ell-founded and is dismissed. (Section 212(1) EQA).

<u>Row 3. Failure to provide plenty of warning and clear instructions in respect of …</u>

547. The alleged PCP is "R had a practice of giving little notice and instructions that were not sufficiently clear"

548. In the findings of fact, we have identified the notifications that the Claimant says failed to provide him with sufficient notice.

549. We are not persuaded that the Respondent did have a PCP of not giving clear instructions. It gave instructions that it intended to be clear. In terms of the times when the Claimant was not doing projects, and was sometimes asked to cover for an absent colleague, we are not satisfied that the Claimant did not know what was expected of him on those occasions. For one thing, his contemporaneous replies

to Ms Godfrey implied that he knew what he was being asked to do (and believed himself capable of doing it). For another, his complaints at the time (eg when discussing with Mr Welek) was not that he did not understand the instructions, it was that it was not project work, and/or was not satisfying work, and/or was not what he had been expecting to be doing when he took the job.

550. In terms of arranging (for example) meetings with very little notice, the Respondent did have this PCP. We agree that the word "practice" is apt. Mr Lockwood and Ms Godfrey, in their evidence, do not deny having the practice, but, on the contrary, refer to its importance.

551. Similarly, the Respondent also had a PCP of allocating a staff member to a project at short notice.

552. The Claimant was placed at a substantial disadvantage by the PCP in that he was less able to cope with the stress of short notice for out of the ordinary meetings and allocation to projects than someone without his disability. We are not persuaded that he was placed at a substantial disadvantage by the fact that he was sometimes asked to cover for an absent colleague. We are not persuaded that he was placed at a substantial disadvantage by the fact that some meetings during the course of a project took place at short notice.

553. Our decision is that there was not a failure to make reasonable adjustments in relation to the matters set out in Row 3. There was no change to the practice that it would have been reasonable for the Respondent to have had to make. The Claimant was given information about why the cover was needed, and he did not ask for more information about what he was supposed to be doing, or why.

554. Furthermore, the last occasion referred to in Row 3 was 3 December 2018. No claim had been presented by 2 March 2019. This complaint is therefore out of time, and we do not extend time for it.

555. This allegation fails.

<u>Row 4. Unreasonable delay in investigating department change …</u>

556. This is alleged to be harassment related to disability, or else direct discrimination.

557. We are not persuaded that the Respondent actually did act unreasonably. The Claimant wanted a move to a different business area for career development reasons. It did not happen as quickly as he wanted (the move happened in April 2019, but he had begun to seek it before his line management transferred from Mr Tolgyesi to Ms Godfrey a year earlier) and therefore the failure to transfer him earlier was unwanted conduct. However, Ms Godfrey and Nick White did take some steps to help facilitate the request.

558. In any event, regardless of whether any other elements of the definition of harassment are met, we are entirely satisfied that any delays on the Respondent's part, or Ms Godfrey's part, had nothing to do with the Claimant's disability.

559. The harassment allegation fails because the conduct was not related to disability. The direct discrimination allegation also because the conduct was not (consciously or unconsciously) because of disability.

560. As per the Scott Schedule, the Claimant specifies the time frame for this allegation to be up until July 2018. On the basis of that time frame, the allegation would be out of time. Indeed, even if the act continued until 7 April 2018 (last day before starting work in Mr Lockwood's team) it would also be out of time. Since it fails on the merits, we do not extend time.

Row 5. Telling C that R could not make the OH report recommended adjustments without explaining in clear and concise terms why the adjustments could not be made.

561. To the extent that the allegations is that Ms Godfrey literally said "we cannot make the OH recommended adjustments", that is factually incorrect. She did not utter those words.

562. Ms Godfrey did not have the OH report at this time. That was not good practice. She did not do enough to obtain the report by pursuing with the Claimant or HR. She first requested it from HR in January 2019, and had not requested it from Mr Tolgyesi prior to then.

563. It seems that she either did not request the report from the Claimant at all, or else did so in terms that were not clear to the Claimant. He thought she had received it and read it [Bundle 589].

564. She did say to the Claimant that she could not guarantee a week's notice of meetings. A week's notice of meetings was not a specific recommendation in the report (though she would not have known that) and was not something which Mr Tolgyesi had told her had been agreed between him and the Claimant.

565. We are satisfied that, from her point of view, she did give an explanation of why she believed that the amount of notice she was giving of changes to work schedule, for cover arrangements, and allocation to projects.

566. It was unreasonable to fail to make greater efforts to see the OH report and to fail to take its contents into account when deciding whether the explanation she was giving was sufficiently clear and detailed.

567. The alleged PCP is: "not providing a detailed explanation of its reasons for acting as it did." We do not accept that the Respondent did have such a PCP. The Claimant (and other employees) might not always have agreed that the explanations were good enough justifications for the actions taken, but the Respondent did communicate with its employees about what it was intending to do and why.

568. Furthermore, as a result of the October/November 2018 absence, Ms Godfrey offered to obtain OH advice. Even if she had previously said she was not willing to follow OH advice (contrary to our decision mentioned above) in August, by November, she was willing. The Claimant did not take her up on that offer

(because he believed the February 2018 report was sufficient) and did not send a copy to her (because he believed that she already had it). However, in our view, any alleged failure to explain her actions (in relation to following OH advice) came to an end in November 2018, and the complaint would therefore be out of time.

569. This allegation fails.

Row 6. C being ostracised by his manager

570. The Oxford English Dictionary definition of 'ostracise' is "To banish; to exclude from favour, or from a society or group; to refuse to speak to or acknowledge."

571. Ms Godfrey did not do things that fell within that definition.

572. Further, Ms Godfrey did not refuse to speak/meet with the Claimant with the intention of punishing him, or making his life difficult.

573. We do accept her evidence about how busy she was, covering too jobs. We are not saying that would necessarily be a legitimate excuse for failing to support an employee with a disability. However, we are saying that it is the truthful explanation for why she did not have as many meetings with the Claimant as the Claimant would have liked.

574. Her only other direct report was Mr Swanwick, and he is a fairly close comparator, having started at a similar time to the Claimant and in a similar role. Ms Godfrey did not meet and speak to Mr Swanwick more often than she did with the Claimant.

575. Ms Godfrey's account is that she had more meetings with the Claimant than she did with others (not just Mr Swanwick, the Claimant's contemporary, but other direct reports she had had at other times). That is not something which has been proved by any documentary evidence because the meetings were not formally documented: no advance agenda; no action points or minutes afterwards.

576. However, Ms Godfrey and the Claimant did have discussions via online messaging systems, and did have face to face discussions when Ms Godfrey was in Bracknell.

577. We do not think that it was good managerial practice that the Respondent failed to give the Claimant more regular meetings. That is true regardless of whether Ms Godfrey should take the "blame" for not arranging it, or whether the employer should take the "blame" for failing to ensure that Ms Godfrey's workload was not too high to allow her to attend to personnel issues. However, there are no facts which cause the burden of proof to shift.

578. The harassment allegation fails because the conduct was not related to disability. The direct discrimination allegation also because the conduct was not (consciously or unconsciously) because of disability.

Row 7. Failure to give notice of change or to give explanations of change by not holding 1:1 management meetings for 4 months …

579. This is alleged to be failure to make reasonable adjustments.

580. The PCP is said to be: "R had a practice of not holding 1:1 management meetings and not giving sufficient notice of change and did not sufficiently explain the reason"

581. In relation to the first part of this, Ms Godfrey did have a PCP, which she applied to all her direct reports at the time (the Claimant and Mr Swanwick) of not holding regular formal 121 meetings. She did have ad hoc meetings and discussions with each of them, but with no advance agenda, and no action points or minutes afterwards.

582. We do not accept that she applied a PCP of "not giving sufficient notice of change" because, in her opinion, she did give sufficient notice. The Claimant's opinion of "sufficient" and Ms Godfrey's are significantly different. If the PCP had been phrased instead "not giving 7 days notice of changes in meeting times", for example, then we would have decided that the Respondent did have such a PCP. However, it is not open to us to re-write the PCP. Amongst other things, if we were to re-rewrite it, it is not self-evident that it should be re-written to say "7 days" rather than "28 days" or "2 days", etc. The choice of the PCP would significantly affect our reasoning about whether a reasonable adjustment was (i) potentially possible and (ii) lawfully required.

583. We do not accept that the Respondent had a PCP of failing to (sufficiently) explain the reasons for changing meeting times. Meeting times were changed and sometimes as late as the day of the meeting. However, explanations were given (for example, Ms Godfrey explained when she had a diary clash; Mr Lockwood explained when he decided to have a joint meeting with the Claimant and Mr Kjelstrup-Johnson, rather than the Claimant meet each of them separately).

584. The Claimant was placed at a disadvantage by the PCP of not holding regular formal meetings. In comparison to an employee without his disability, he was more discomforted by the lack of a routine. He needed to know in advance when he was going to be able to meet Ms Godfrey (and to know how long the meeting was scheduled for) so he could plan out what questions he had for her.

585. The Scott Schedule sets the time frame as being May 2018 (joining the Claimant's team) to September 2018 (presumably the half year review meeting). The allegation is out of time. The Claimant had a further 121 with Ms Godfrey on 3 January 2019. During his absence, in February to March 2019, she did try to contact him. There was no failure on her part to arrange meetings in the February and March periods given that the Claimant was off work. The Claimant started work on Mr Lockwood team within a few days of returning to work from sickness absence, and there was no failure to make an adjustment in that time (that is, it would not have been reasonable for her to have had to arrange a meeting in that 1 to 7 April 2019 period).

586. We do not extend time for this allegation. By the time that the Claimant presented Claim 1, not only was it around 12 months after the Ms Godfrey had held his half

year review meeting, it was also several months after he had ceased being on her team. The delay prejudices the Respondent. The Claimant has not convinced us that there is a good enough reason to extend time in relation to this allegation.

587. This allegation is out of time and therefore outside the Tribunal's jurisdiction.

Row 8. Failing to give sufficient notice of the cancellation of planned 1:1 meeting scheduled for 19 September 2018 which was cancelled at 20 minutes notice

Row 9. Failing to give sufficient notice re meeting scheduled for 19 September 2018 which was cancelled at 20 minutes notice, rescheduled for 20 September 2018 and then converted without warning into an appraisal meeting

588. Each of these are alleged failures to make reasonable adjustments.

589. The PCP for each is the same one just discussed for Row 7 ("R had a practice of not giving sufficient notice of change and did not sufficiently explain the reasons for change. It also had a practice of cancelling planned 1:1 meetings at short notice") and we do not need to repeat our decision about the application of the alleged PCP.

590. As set out in the findings of fact, the Claimant proposed a meeting on 19 September, to take place later the same day. He told Ms Godfrey to pick a more suitable time if she preferred, and that is what she did. She chose the following day.

591. In his 19 September meeting invite, the Claimant had also notified Ms Godfrey that he wanted to discuss his appraisal and that he was aware of the Respondent's forthcoming deadline for inputting half year details. When they met on 20 September, she did discuss those things with him.

592. It would have been better practice for Ms Godfrey to have proactively arranged the meeting, rather than the Claimant having to do it. Nonetheless, the Claimant did arrange it, Ms Godfrey explained the reason for the change, and the meeting went ahead. It went ahead later than the Claimant had suggested, not earlier, and it was not unreasonable to use that meeting to discuss the appraisal. Ms Godfrey had not yet had a similar meeting for Mr Swanwick either (hence her email to the two of them after the meeting with the Claimant).

593. There was no failure to make reasonable adjustments in relation to the allegations at Rows 8 and 9 of the Scott Schedule.

594. These allegations are also out of time, and we do not extend time.

595. These allegations fail.

Row 10. Requiring C to adhere strictly to R's timesheet provision policy ... Also, failure to provide support for weekly and monthly timesheet completion …

596. This is alleged as indirect discrimination, failure to make adjustments and harassment.

597. The alleged PCP is "The Respondent applied a policy/practice of requiring strict adherence to timesheet completion and sought to enforce it through disciplinary or PIP but did not provide clear written instructions on timesheet protocols or matter such as notification of project codes or support or clean feedback"

598. Part of this PCP is correct. For all relevant employees, the Respondent did insist on time sheet completion, and did potentially enforce compliance by disciplinary or PIP.

599. The requirement to complete time sheets did not place the Claimant at a disadvantage because of his disability. The Claimant did understand that (a) he was obliged to submit weekly timesheets (or sometimes sooner for month end) and (b) how to do that. He was made aware by Ms Godfrey of how to obtain the codes. She responded to his queries about problems locating the correct code. The Claimant's reason for not completing the time sheets regularly were mainly, in our opinion, that he did not see the point of doing so. We reject his assertion that it was a method of trying to obtain Ms Godfrey's attention. We rejection his assertion that when he was late, it was because the process had not been explained clearly and/or that he did not know how to get the correct code for a particular entry.

600. The Claimant was not disadvantaged by the Respondent's PCP that it would potentially put employees on PIP or take disciplinary action for failing to adhere to timesheet requirements. Ms Godfrey reminded him of the requirement, and it was one of the goals set out in his appraisal, but she did not take any formal disciplinary or performance action against him. Had she done so, then there may or may not have been a need for reasonable adjustments to that formal process and procedure. However, she did not do so.

601. Since the PCP placed the Claimant at no substantial disadvantage because of his disability the reasonable adjustments complaint fails. Since the PCP placed the Claimant at no particular disadvantage when compared with others who do not share his disability, the indirect discrimination complaint fails.

602. The Respondent's time sheet requirements, and Ms Godfrey's reminders to complete them were unwanted conduct.

603. The purpose of the timesheet requirement was so that the Respondent could charge customers for the Respondent's employees' time. The purpose of requiring the Claimant to adhere to it was the same. The purpose of potentially using PIP or disciplinary action against employees who failed to do timesheets was to make sure that all employees did do the timesheets, unless they had been able to give their manager a reasonable excuse. No such action was taken against the Claimant.

604. We are not persuaded that either (i) the timesheet requirement or (ii) the fact that employees could be disciplined for not meeting the requirement had the effect on the Claimant as set out in section 26(1)(b) EQA. We are not satisfied that he was particularly upset by the requirement, or by having to do the timesheets. What he calls the "threat" of disciplinary action did not stop him (according to what he told Mr Dryden) from deliberately not doing them, and did not stop him (according to what the Tribunal thinks is more likely) from not bothering to do them because he did not see the point.

605. Furthermore, even if (contrary to our decision) the unwanted conduct had had the relevant effect (and even if we had decided that was reasonable), the unwanted conduct was not related to the Claimant's disability.

606. The harassment complaint also fails.

<u>Row 11. Failure to provide sufficient or reasonable notice iro postponement of Skype Graduate Review Meeting from 10 am, eventually to 3 pm</u>

607. This is alleged to be failure to make reasonable adjustments.

608. The alleged PCP is "a practice of giving little or no notice of cancellation/postponement of meetings"

609. It is true that the Respondent sometimes cancelled, or changed the times of, meetings at short notice.

610. It is true that the cancellations or changes of start times, at short notice, placed the Claimant at a disadvantage in comparison to people without his disability.

611. On this particular occasion, it would not have been reasonable for Ms Godfrey to have had to make the adjustment of adhering to the particular start time arranged with the Claimant. The matter was out of her hands; a more senior employee required her to attend a meeting with him, and so she had to push back the meeting with the Claimant.

612. If the Claimant was too unwell to attend work (or to stay at work) because of food poisoning, then it would have been entirely reasonable for him to remain home (or to leave and go home) on sickness absence. It would have been unreasonable for an employer to purport to insist on a meeting with an employee who was off sick. However, on 28 September, the Claimant was not signed off as sick. Any disadvantage to him that day by the fact that he felt unwell because of food poisoning was not caused by his disability. (His own account being that several people had been affected by something in the staff canteen.)

613. The meeting was pushed back, not brought forward, and so the Claimant had more time, not less time, to prepare. (We are making this point for completeness. We understand that the Claimant's complaint is about the short notice of change, rather than short notice for the meeting).

614. The reasonable adjustments complaint fails.

Row 12. R decided that C had failed to meet a performance requirement in respect of timesheet completion. However, this performance requirement had never been set as an objective for C for the 6 month period in question

615. This is alleged to be failure to make reasonable adjustments.

616. The PCP is alleged to be: setting performance objectives retrospectively

617. On the facts, we do accept that the specific goal about time sheet completion was only introduced at the half year stage. However, that is not the same as introducing the requirement retrospectively. At the time it was introduced, September, it became a goal which would be assessed in (around) 6 months time, that is in the future. Furthermore, before it became a specific appraisal goal, the Claimant was already aware of the requirement. Ms Godfrey had sent several reminders. What Ms Godfrey wrote in September (that the Claimant, after chasing, had completed timesheets up to end of June, and was on track – and was required - to be up to date by early October) made clear that what would be assessed at year end was whether, from October onwards, he had completed them each week on time. (It was the Claimant, not the Respondent, who wrote the comment in the half year review that the goal had not been achieved.)

618. He was criticised orally at the September half year meeting (as he had been earlier) but did not see Ms Godfrey's written comments until May 2019 (when she published them during the meeting with Mr Dryden when he pointed out to her that she had not correctly processed the half year review yet). That was because of an error by Ms Godfrey, not because of any PCP which the Respondent had.

619. We reject this complaint because the Respondent did not have the specific PCP in question.

620. We have already commented, in response to other complaints, that the time sheet requirement did not disadvantage the Claimant because of his disability. He was not disadvantaged – because of his disability – by being told at the half year stage that the end of year assessment would take into account his success or otherwise with time sheet completion.

621. For completeness, this allegation is specified to be 26 September 2018, and so, on the face of it is out of time. Given the timing of when the Claimant saw Ms Godfrey's written half year comments, we might have been willing to extend time had the complaint otherwise had merit.

Row 13. Failure to break down tasks / projects into bite sized pieces and/or failed to provide concise and clear written instructions on all projects, but in particular, re Specsavers, Whitbread, Symfoni WE (Integrate SalesForce into ServiceNow) e.g. handover before sick leave 24/10/18

622. This is failure to make reasonable adjustments.

623. The alleged PCP is: a practice of not breaking down task or projects into sections

624. It is true that when employees were allocated to a project (i) they did not always get instructions in writing and (ii) did not always receive a step by step break down of what was required of them.

625. Ms Godfrey did not control the work within a project. She did have a role in helping to decide which projects the Claimant would be allocated to.

626. We commented on particular projects in the findings of fact.

626.1 In relation to the Salesforce Symfoni WE, Ms Godfrey did make reasonable efforts to introduce the Claimant to the project lead (Mr Van Damme) and to a source of additional information and support (Ms Pandey).

626.2 More generally, at the time, the Claimant's complaint in relation to project work was not that he did not understand the requirements of any given project. Rather (a) he thought he had too much bench time and not enough project time and (b) he wanted to move to a different business area in any event, with more challenging/interesting wor.

626.3 His own comments at the half year review, included:

> Worked closely with various points of contact to ensure what I was building was what they wanted. - Whitbread, Specsavers, Highways, DCLG

And

> - Always complete tasks set on Specsavers, Highways, DCLG, RBS, Cafcass and ReAssure
>
> - Once, I made a mistake on Specsavers and immediately owned up and worked with Eko & co to rectify the mistake
>
> - When I see errors or mistakes in other people's code, I tend to fix it or point it out

And

> - Very results driven
>
> - Prioritise work based on time frame and importance, always putting the customer first

627. Thus, in relation to Salesforce Symfoni WE, the complaint fails because there was no further adjustment that it would have been reasonable for Ms Godfrey to have had to make. She had done her best to help the Claimant know what was required. Further, in discussions at the time with Mr Welek, the Claimant suggested that he did know what was required.

628. In relation to all the other projects, the complaint fails because the PCP did not put the Claimant at a disadvantage because of his disability. For the other projects, he was satisfied that he had understood the customers' requirements and had achieved them.

629. In terms of the handover request, it was a brief suggestion which the Respondent did not insist upon, and it did not happen. There was no failure to make a reasonable adjustment.

Row 14. Remark: "You can just call us, we aren't that scary."

630. We satisfied that this remark (in those or similar words) was made on 3 January 2019. We are satisfied that it was unwanted conduct.

631. It was not made with the purpose identified in section 26(1)(b) EQA.

632. Although we accept that the Claimant found the remark offensive, and believed that Ms Godfrey should not require him to make phone contact in the event of sickness absence, we do not consider it reasonable for the conduct to have the effect identified in section 26(1)(b) EQA. We must not cheapen the words in that section. The remark (whether misguided or not) was an attempt to reassure the Claimant that a brief audio call was sufficient. It would, perhaps, have been preferable for Ms Godfrey to proactively instigate a more thorough discussion about whether she would permit other options (a voice call from a relative, possibly combined with regular texts or emails or instant messages from the Claimant, for example). However, the context was a general catch up meeting (on 3 January 2019) which did not take place during a period in which the Claimant was unable to communicate.

633. This harassment complaint fails.

Row 15. Remark: "You need to call us, not e-mail, as that's policy."

634. This is alleged to be indirect discrimination, failure to make reasonable adjustments and harassment.

635. The alleged PCP is requiring telephone reporting of sickness rather than email

636. In fact, the general policy wording, as cited above said that employees could "arrange for a friend or relative to do so on their behalf". It also said that managers could and would notify local arrangements that were different.

637. Based on the evidence presented to us, it seems that Ms Godfrey had imposed a local requirement for the Respondent's employees to personally contact her by phone (not via friend or relative). On that basis, we are satisfied that the Respondent had the applied the alleged PCP to a group of staff which included the Claimant.

Reasonable Adjustments complaint

638. The Claimant was placed at a substantial disadvantage in February/March 2019 by this requirement in that, because of his disability, he was unable to make a voice call to Ms Godfrey to discuss his sickness absence.

639. In relation to this disadvantage, the Respondent was aware, or ought reasonably to have been aware, of it by no later than the Claimant's 24 October messages to Ms Godfrey (about the October absence and possible hand over), which included "Unfortunately, I won't be able to take a voicecall at the moment – as that will exacerbate the issue" And "depends on what that entails, as i'm certain i can't currently communicate verbally".

640. In relation to February March absence, Ms Godfrey and the Respondent were reminded of the disadvantage by no later than 13 March 2019 (the Claimant's text message to Ms Godfrey and his partner's email message to Ms Robinson).

641. In their respective replies to those communications, Ms Godfrey and Ms Robinson did not immediately repeat a requirement for voice contact directly from the Claimant.

641.1 Robinson referred to the Claimant communicating with the manager, but did not rule out written methods. She also highlighted that the Claimant could provide written authorisation for Ms Tearall to have direct discussions with the Respondent.

641.2 Godfrey asked for a GP fit note to be obtained and "shared" with her and HR, but said nothing, in her text on 13 March 2019, about requiring a voice call.

642. Ms Godfrey was potentially willing to conduct a home visit and/or to meet with the Claimant's mother. The Claimant did not supply consent to either.

643. After there was no response to Ms Godfrey's text reply to the Claimant, and Ms Robinson's email reply to the Claimant's partner (at the Claimant's email address), Ms Godfrey attempted to make contact by phone before sending the letter of 28 March. The letter of 28 March did not purport to insist on a phone call.

644. Our decision is that the duty to make reasonable adjustments did arise.

645. Our decision is that the Respondent breached that duty by the purported insistence (on 3 January 2019, in particular) that the Claimant should contact it by phone. A fairly straightforward adjustment could have been allow a friend or relative, chosen by the Claimant, to make the voice call. It would have been reasonable for Ms Godfrey to have had to implement that adjustment taking into account that it was the Respondent's general policy in any event.

646. We have taken into account that the Respondent did express willingness to communicate via the Claimant's partner or mother provided he gave consent. However, Ms Godfrey never expressly informed the Claimant that her instructions to contact her directly with a voice call were retracted.

647. Another potential adjustment would have been to allow the Claimant to make text-based notifications of sickness absence only. The Claimant would have been likely to be able to comply with that at least some of the time (he sent a fairly lengthy email to the Respondent on 13 March 2019, as well as a short text to Ms Godfrey the same day; similarly, he had also been able to send written notifications of the start of his October 2018 absence.) If allowing the friend or relative to make the voice call was not sufficient in and of itself, then it would have been reasonable for the Respondent to have had to make the adjustment to allow the Claimant to supplement the information given by voice call by written communication during his absence (or during that part in which oral communications were too difficult). At the end of the absence, there would be the opportunity for the Claimant and his manager to discuss issues orally.

648. The complaint of failure to make reasonable adjustments is upheld. To the extent that it is out of time, we consider that the prejudice to the Claimant of refusing the extension outweighs the prejudice to the Respondent of granting it.

Indirect discrimination complaint

649. We have not been provided with specific statistical evidence about the percentage of employees without ASD who would find it difficult to comply with the requirement to make a voice call to Ms Godfrey. As far as we are aware from the evidence presented, 100% of the employees without ASD were able to make voice calls to Ms Godfrey.

650. We are satisfied that the PCP puts (or would put) persons with ASD at a particular disadvantage when compared with persons without, and that it puts the Claimant at that disadvantage. The disadvantage is the same as the one discussed above in relation to reasonable adjustments.

651. The Respondent had a legitimate aim in seeking to ensure that that there was communication to the Respondent about absences. Apart from any duty to the employee who is ill (so that the Respondent can discuss if there is anything it can do to help), the Respondent has sound business reasons for needing to know if someone is off, so that customers can be informed, and/or replacement assistance for customers arranged.

652. The Respondent has not persuaded us that it was proportionate for Ms Godfrey to insist on a voice call directly from the employee. The Respondent's general policy acknowledges that calls from friends or relatives are generally acceptable.

653. We extend time for this complaint.

654. This indirect discrimination allegation succeeds.

Harassment

655. Ms Godfrey did not have the purpose or (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

656. Our decision is that the conduct (purporting to insist on a direct phone call) was unwanted conduct, but did not have the effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment. Ultimately, she went no further than telling the Claimant that he had to do it. When he did not do it, he was not disciplined; rather she just attempted to make contact. The threat of action in relation to the unauthorised absence was not specifically in relation to the lack of voice call, but more generally in relation to the lack of any further contact (after 13 March) and the failure to supply a GP note.

657. The harassment allegation fails on the merits. Further, it is out of time and we do not extend time.

<u>Row 16. Remark: 'If you think the job is stressful, you should try building your own home. That's stressful.'</u>

658. This complaint is of harassment.

659. This is out of time as a freestanding complaint (it is alleged to have been said). Furthermore, the Claimant was no longer managed by Ms Godfrey after 7 April 2019 (though she completed the end of year review later).

660. The Respondent is prejudiced by the delay in bringing this complaint. We are satisfied, on the balance of probabilities that it was made, but also satisfied that Ms Godfrey has no clear recollection of the exact conversation, and is therefore unable to offer context.

661. There is room for argument both ways about whether it would be reasonable, in all the circumstances, to regard this remark as having the effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment. We think it unlikely that we would have decided that that had been the Claimant's purpose when making the remark. Either way, the prejudice to the Respondent of extending time would be significant, and, on balance, we decline to do so.

662. This complaint is out of time and the Tribunal does not have jurisdiction to decide it.

<u>Row 17. Disclosure of confidential personal health and work information to C's mother without consent or other lawful excuse.</u>

663. This is alleged to be harassment or, if not, in the alternative, direct discrimination.

664. The Claimant did not want Ms Godfrey to have any telephone discussion with his mother. From the Claimant's point of view, any contact with his mother at all (other than a text reply to say something like "we cannot talk to you unless you provide the Claimant's written consent") was unwanted conduct.

665. There was some information flowing from Ms Godfrey to the Claimant's mother. On 2 April, she replied to the text which said that the Claimant was using his laptop by saying that the sickness absence was over. Her discussion about what jobs the Respondent potentially had available was, by implication, suggesting that the jobs she was referring to were potentially suitable for the Claimant.

666. We are not persuaded that Ms Godfrey revealed details of when the absence started, or that the Claimant had failed to contact the Respondent. To the extent that the Claimant's mother had this information, she had it from reading the Claimant's letters, not from hearing it from Ms Godfrey.

667. We are not persuaded that Ms Godfrey said that the Claimant could have voluntary redundancy or that he was at risk of compulsory redundancy.

668. We are not persuaded that Ms Godfrey told the Claimant's mother that the Claimant wanted a change of department. The Claimant's mother had acquired that information from the Claimant, or from a friend or relative of the Claimant's, not from Ms Godfrey.

669. We do think that the phone call was longer than was appropriate, bearing in mind that the Claimant's mother's messages confirmed that the Claimant would not like

the idea of her contacting the Respondent. This information, in our view, negates any argument that (in other circumstances) an employer might have to face allegations that a refusal to communicate with an employee's close relative might be a failure to make an adjustment for an employee who was not capable of direct communication themselves at the relevant time.

670. However, we are entirely satisfied that it was not Ms Godfrey's purpose to (a) violate the Claimant's dignity or (b) create an intimidating, hostile, degrading, humiliating or offensive environment for him. She was concerned about the lack of contact, and wanted more information. She was potentially willing to consider the suggested home visit.

671. The tribunal unanimously agrees that the unwanted conduct was related to the Claimant's disability. It was his disability-related absence which caused the mother to make the contact. Furthermore, it was the disability which caused the Claimant to have difficulties in communicating with Ms Godfrey: without those difficulties, the Claimant's mother would not have been able to read a letter relating to unauthorised absence.

672. The tribunal's decision, by a majority (Non-Legal Members Barratt and Harris) is that this harassment complaint succeeds.

672.1 The effect on the Claimant was severe. He was extremely upset to find that his mother and Ms Godfrey had spoken by phone (and exchanged text messages). His firm belief was, and remains, that his mother had information which could only have come from Ms Godfrey, not another source, and was his own personal data which ought not to have been shared without his consent.

672.2 It is reasonable in all the circumstances to regard the unwanted conduct as having the effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment. The Claimant's belief was that his mother was being allowed to interfere with his life by his employer because the employer perceived the Claimant's disability as being such that he needed a parent to do his talking for him, and this violated the Claimant's dignity. There was a humiliating environment in that the Claimant perceived that Ms Godfrey might again go behind his back (as he perceived it) and liaise with his mother.

672.3 It is just and equitable to extend time. The incident, having occurred on around 18 and 19 March 2019, is more than three months before the start of the ACAS conciliation for Claim 1. However, the Claimant raised Grievance 1 about a month after the incident when it was fresh in Ms Godfrey's mind. At the time he raised it, she still had access to the phone handset from which she could answer questions about call times (to Mr Dryden and Ms Sabey). Further, the matter was still fresh in the minds of the HR advisers with whom she had discussions. The prejudice to the Claimant of refusing an extension is greater than the prejudice to the Respondent of granting it.

672.4 Since the majority upheld the harassment complaint, the direct discrimination complaint is dismissed.

673. The minority (EJ Quill) would not have upheld this harassment complaint.

673.1 It was wrong of Ms Godfrey to have phoned the mother back. She already had a template from Ms Robinson's email to Ms Tearall of all that needed to be said. She could have asked HR to contact the mother (by text message, or similar, or else by a voice call) or she could have sent a text herself which duplicated what Robinson had said to Tearall. However, taking into account the limited extent of the personal data that was shared then (even though no personal data at all should have been shared), it is EJ Quill's opinion that it is cheapening the words of Section 26 EQA to regard this particular conduct as having had the effect set out in section 26(1)(b).

673.2 Had EJ Quill shared the majority's opinion about the merits of the complaint, he would also have agreed to extend time.

673.3 Since the minority would have rejected the harassment complaint, it would have had to consider the direct discrimination complaint. There is no actual comparator here. The specific circumstances are unusual and would also have to include a parent contacting the employer while expressly telling the employer that the employee was unaware and would not like it. However, the comparator's circumstances would also have to include having been absent for more than 3 weeks, without having supplied a fit note, and with the only contact at all being a text (and an email from partner) about 5 or 6 days earlier. EJ Quill does not think that there are facts which cause the burden of proof to shift. He is not persuaded that the Claimant has been treated less favourably than a hypothetical comparator. He would not have upheld the direct discrimination complaint.

<u>Row 18. Putting C under unreasonable pressure to obtain a Med3 GP certificate (via email and text) whilst on sick leave with low communication episode / social withdrawal</u>

674. This is alleged to be failure to make reasonable adjustments.

675. The PCP is alleged to be: requiring communication with manager and acquisition and provision of Med3 GP Certificate

676. The Respondent did have this PCP.

677. We accept that the Claimant might been placed at some disadvantage by his disability in meeting these requirements, even though this particular PCP is not referring to oral communication with Ms Godfrey.

678. Our decision is that It would not have been a reasonable adjustment for the Respondent to have had to agree to no contact from the Claimant, or to seek no doctor's note for the absence.

679. The Respondent was offering a range of options for communication, including via partner or mother, home visit, email contact with HR, text, email or instant message contact with Godfrey. In relation to the fit note, this was already overdue by 13 March when the Respondent first sought it, and then a further 15 days were allowed to elapse before a written chaser.

680. This complaint fails.

Row 19. Appraisal (Third) being conducted without informing C and without C's input

681. This is alleged to be harassment (or direct discrimination) and failure to make adjustments.

682. The alleged PCP is conducting appraisals in the absence of the employee and without giving prior notice of its intention to do so

683. There is potentially some ambiguity about the phrase "conducting appraisals". What happened in the Claimant's absence was that Ms Godfrey and Nick White decided to award the Claimant "unrated" for his full year review, and to input that rating into the Respondent's systems.

684. The actual meeting to discuss the goals and competencies did not take place in the Claimant's absence. It took place at the end of April, and Ms Godfrey's actual inputting of the interview documents into the Respondent's systems took place later than that (in around May 2019).

685. The Respondent (or at least Ms Godfrey) did have the PCP of entering ratings to its systems (in order to meet deadlines) if the employee was absent. This might not have been an invariable rule, but nor was it a one off decision just implemented in February 2019 and affecting only the Claimant.

686. The Claimant received "unrated". This was not because of the PCP that he has alleged, but was because Godfrey's and White's opinion that there was not enough evidence. It was not uncommon for them to allocated unrated to Graduate entry employees in similar circumstances.

687. The Claimant was not disadvantaged by the fact that he could not meet Ms Godfrey until the end of April. He could not have met her before 1 April, because he was absent. Possibly she should have been more proactive to arrange promptly on his return, but by 15 April (two weeks after his return) it had been arranged for 24 April.

688. In terms of discussing the unrated rating with him, he was not notified of that prior to the meeting, but that was not a disadvantage caused by his disability. He had time prior to the meeting to prepare his arguments for why he should get a particular rating, and time after the meeting to reflect on Ms Godfrey's comments about why unrated was the Respondent's decision.

689. The reasonable adjustments complaint fails because there is no adjustment that it would have been reasonable for the Respondent to have had to make which would have alleviated the (alleged) disadvantage caused by the (alleged) PCP. Contacting the Claimant during the Claimant's absence to discuss appraisal ratings would not have been a reasonable adjustment.

690. Holding off a decision on an employee's rating until their return from sickness absence seems a more reasonable approach for an employer to take than not doing so. However, the Claimant's unrated outcome was based on the lack of project time through the year, and not on the fact that he was absent in February 2019. The fact that the Respondent did not wait until the Claimant was back did not cause him to get a "worse" outcome.

691. The failure to make reasonable adjustments complaint fails.

692. It was unwanted conduct for the Respondent to make the decision on the rating before the meeting. The Respondent's purpose was not (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

693. In all the circumstances, the effect on the Claimant was not that of (a) violating his dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him. The meeting took place within 4 weeks of his return from sickness absence. The score of "unrated" was not one that he like, but was reasonable in the circumstances, and did not adversely affect his bonus entitlement.

694. The "unrated" mark was not related to the Claimant's disability.

695. The harassment complaint fails.

696. The Claimant was not treated less favourably than a comparator in relation to the scoring. The comparator would have to be someone who had had a similar amount of project time, and who was the same in all relevant ways, including what evidence they had available against the goals set. The rating was not because of the Claimant's disability. The meeting could not have taken place during the Claimant's sickness absence, but was not unreasonably delayed following his return.

697. The direct discrimination complaint fails.

<u>Row 20. Remark: "We all find it hard but non-communication is inexcusable."</u>

698. This is alleged to be harassment.

699. The comment (or something similar) was probably made.

700. Neither Ms Godfrey nor Mr Welek recall the precise words.

701. The context was that Ms Godfrey was inviting Mr Welek (whom she knew was in contact with the Claimant) to ask the Claimant to contact her. There had been around 5 weeks of no contact and no sick note, other than on 13 March (which itself was more than 2 weeks previously). The context was also that the Respondent and Ms Godfrey had been willing to have indirect contact through the Claimant's partner or mother if he gave consent. The Claimant could also have given consent for Mr Welek (or his father, or somebody else) to be the point of contact, but he had done none of this.

702. The remark was not crafted with the same caveats that a lawyer or HR professional might have put on it, but nor was it said directly to the Claimant. It was Mr Welek who conveyed it to the Claimant, not Ms Godfrey.

703. The purpose of the comment was not (a) violating the Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

704. In all the circumstances, that was not the effect either. It would be cheapening the words of section 26 to say that this comment, in these circumstances, had that effect.

705. The comment was made around 1 April 2019, and is out of time. We do not extend time.

706. This harassment complaint fails.

Row 21. Ostracism by CG including failure to reply to emails and messages, not contacting C and not being aware of C being on/offline for work

707. This is alleged to be harassment, or failing that, direct discrimination.

708. The definition of ostracism is mentioned above, and our findings were that Ms Godfrey's actions were not within that definition.

709. In terms of following up with the Claimant in October, she replied back to him the same day (Thursday 24 October) when he said he would be off sick. Perhaps she could have sent a more detailed message, but she did reply.

710. She only followed up further the following Monday, 29 October. Perhaps she could have sent this more detailed message (which was supportive) sooner (on the Friday, or better yet the Thursday) but two working days after the start of the absence does not match the Claimant's characterisation that she was completely ignoring him.

711. It was the Respondent's opinion, as per the Grievance 1 outcomes, that Ms Godfrey ought to have noticed sooner that the Claimant was not at work from late February. In fairness to Ms Godfrey, she did, in fact, notice his absence in due course. The Claimant did not inform her of it. One of the Claimant's complaints about her was that she subjected him to greater monitoring (over timesheets) than she did his colleagues, and yet he also complains that her scrutiny of him, and his activities, was not sufficient that she noticed his absence. Furthermore, and in any event, when she did try – by phone and text, and emailed letters – to get him to respond to her, from 14 March to 1 April there was no response.

712. In terms of the Claimant's CV, while we accept that Ms Godfrey had a very high workload, the Claimant's CV, emailed to her in January, was fairly short. It would have been reasonably practicable to read it and make comments sooner than she did (which was April). That being said: (i) firstly the Claimant was on sickness absence from 25 February to 1 April, and it was reasonable that perusing his CV was not Ms Godfrey's main priority in her dealings with him at that time; (ii) secondly, even before coming back to the Claimant with her comments on the CV, she had circulated it.

713. On the facts, we do not find that Ms Godfrey's conduct matched that which is described by the Claimant in Row 21.

714. The failure to reply to him sooner re the CV was unwanted conduct.

715. We are not persuaded that not contacting him in more detail in October/November 2018, and not contacting him sooner in February/March 2019 was unwanted conduct. The Claimant's primary argument for several of his other allegations is that it was wrong of the Respondent to try to insist that he participated in communications during sickness absence.

716. In any event, the conduct did not have either the purpose or effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment.

717. The harassment complaint fails.

718. The Claimant was not treated less favourably because of his disability. The reason for the delay in replying to the Claimant with comments on his CV was that Ms Godfrey was very busy. The reason for not asking the Claimant, before 13 March 2019, about his absence from 25 February, is that Ms Godfrey was not aware of the absence until around 13 March. In relation to the 24 October 2018 absence, she acknowledged his correspondence the same day, and asked some questions to which the Claimant replied. She said she would discuss his replies with Mr Tolgyesi and get back to him. We have no specific evidence (other than Ms Godfrey's generalised comments about workload) for why she did not contact him on the Friday, but he was off sick. There are no facts from which we could conclude that she might have contacted him on the Friday if he had no disability, or a different disability.

719. The direct discrimination complaint fails.

<u>Row 22. Being unjustifiably put at risk of redundancy and subjected to rumours of such. C became aware 20/04/19</u>

720. This is not true. The Claimant was not placed at risk of redundancy.

721. If there were any rumours, then they did not originate from Ms Godfrey or Mr Lockwood or any manager in a position to make decisions which affected the Claimant's employment.

722. Complaints based on this factual allegation all fail.

<u>Row 23. Giving C an "unrated" in the Third Appraisal due to work created absence and lack of opportunity resulting in C not being awarded a pay rise</u>

723. This is alleged to be failure to make reasonable adjustments.

724. The alleged PCP is: applying an "unrated" assessment on an appraisal where the reason for the lack of rating was disability related absence from work

725. The Respondent did not have such a PCP. They did have a PCP of using unrated if it was decided that there was insufficient evidence to specifically decide that the rating should be "meets" or better, or to specifically decide that the employee had failed to meet their goals. However, that did not only happen if there was disability

related absence. As per the Claimant's discussions with Dan White and others, there was generally dissatisfaction when an employee was given unrated on the basis of insufficient project work. However, it was not a rare event.

726. While it is true that the Claimant was not doing project work in his two absences during the year 18/19, it is not true that he was doing project work often even when not absent. His disability-related absences were not the cause of the "unrated" outcome. He would have still been "unrated" with zero absence.

727. The complaint of failure to make reasonable adjustments fails.

Row 24. Being criticised at Third Appraisal meeting for "not communicating enough", lack of project work, failing to deliver SymfoniWE project, for the amount of sick leave taken and failure to provide time sheets

728. This is alleged to be harassment and discrimination because of something arising in consequence of the Claimant's disability.

729. The "something arising" is said to be "communication issues".

730. This related to the 24 April 2019 meeting.

731. The written content of the Ms Godfrey's appraisal document was produced later.

732. During the meeting, it was repeated to the Claimant that he needed to contact the Respondent at the start of, and during, sickness absence. It is not necessary for us to repeat everything we have said above in relation to the Respondent's stance about this. However, there is nothing unreasonable in principle about raising the matter during an appraisal meeting.

733. During the meeting, there was a discussion about the number of days' sickness absence, and the Claimant's entitlements in relation to sick pay, and how absence would affect sick pay. There is nothing unreasonable in principle about raising the matter during an appraisal meeting. If it is alleged that this was done with malice, we reject that.

734. The outcome of projects was discussed, as was the feedback which Ms Godfrey had received from Mr Van Damme. It was right and proper for that feedback to be communicated to the Claimant, and the appraisal meeting was an appropriate time to do it.

735. Asking the Claimant if using the large screen in the meeting room was a polite and simple query. There was nothing wrong with Ms Godfrey asking this.

736. It was not unwanted conduct for the meeting to take place and for Ms Godfrey to give the Claimant feedback on his goals. Some of the particular remarks made were unwanted conduct because the Claimant did not agree with them.

737. Ms Godfrey's purpose was not (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant

738. We do not think the remarks had that effect either. The Claimant disagreed with the comments about contacting the Respondent during sickness absence (believing that his disability meant that he should not be asked to do this) and Mr Van Damme's comments. However employees should expect that sometimes they will receive comments about performance that they do not agree with. Appraisal meetings are a two way process. The Claimant had the opportunity in the meeting to give his version of why the Symfoni project had not worked out. The remarks that Ms Godfrey made could not reasonably be said to have violated the Claimant's dignity, etc.

739. The harassment complaint fails.

740. It is true "communication issues" was something arising from the Claimant's disability.

741. We do not agree that it was treating the Claimant unfavourably to remind him of the need to contact the Respondent about sickness absence. He was aware that he could authorise someone else to speak to the Respondent. However, in any event, the Respondent had a legitimate aim (the provision of efficient business and customer service) and reminding the Claimant of the need to let them know about sickness absence (and keep them informed) was a proportionate means of pursuing that aim.

742. Other comments made during the interview, including giving the Claimant the feedback from Mr Van Damme, were not caused by something arising from the Claimant's disability.

743. The complaint of discrimination because of something arising in consequence of the Claimant's disability fails.

<u>Row 25. R's failure to properly and/or fully address the Claimant's grievances regarding disability discrimination and to provide satisfactory grievance outcome</u>

744. This allegation is harassment or direct discrimination.

745. Mr Dryden and Ms Sabey formed different opinions to this Tribunal panel in relation to the issue of whether Ms Godfrey made certain comments. They decided that there was insufficient evidence that she did (and that it was one person's word against another). We decided that there was sufficient evidence, and that the disagreement was more a matter of nuance than substance. More could have been done to investigate this aspect of the complaint. These alleged remarks were what was written under the heading "disability discrimination". Had the Respondent made the decision that Ms Godfrey did indeed utter the alleged words (or similar) then it would have had to go on to say whether, in light of the Claimant's disability, the words were appropriate/acceptable or not. The decision

that there was insufficient evidence of the words being said meant that the Claimant did not get a specific answer on whether the comments were discriminatory.

746. It was not unreasonable to conclude that no formal disciplinary action was appropriate against Ms Godfrey, and not unreasonable to inform the Claimant that any precise details of what action (if any) was taken by the Respondent in relation to Ms Godfrey was confidential.

747. The Claimant was upset by the comments made that those who dealt with Grievance 1 were not offering any personal guarantees about what would happen in the future. Possibly those sentences could have been worded better, but it is clear to the panel that the intention was to tell the Claimant that his complaints would be taken seriously if he raised complaints about fresh issues in the future, but there was no guarantee that he would not need to do so.

748. Neither Mr Dryden nor Ms Sabey had the purpose of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant when they communicated their respective decisions.

749. They each wrote what they genuinely believed to be true.

750. The panel thinks that it is understandable that the Claimant was dissatisfied with the approach to the issue of whether Ms Godfrey did, or did not, utter the words in question (especially taking into account what she says in her tribunal written statement and oral evidence). However, in all the circumstances, including the detailed written responses to Grievance 1, including the parts that were upheld, our decision is that the investigation and outcomes did not have the effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

751. The harassment allegation fails.

752. For the direct discrimination allegation, an appropriate hypothetical comparator would be someone whose relevant circumstances were the same as the Claimant's but for disability. There are no facts from which we could decide that the burden of proof has shifted. The failure to uphold the Claimant's allegations that Ms Godfrey had made the remarks in question was not because of the Claimant's disability.

753. The discrimination complaint fails.

<u>Row 26. During C's second appraisal he was provided with a false explanation that the reason that he was mostly being allocated to support work or being placed 'on the bench' was because there was a lack of development work in the business area</u>

754. This is alleged to be harassment or else direct discrimination.

755. On the facts, we are not persuaded that the explanation was false.

756. The harassment allegation fails because the explanation did not have the purpose or effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

757. It was not uncommon for employees (entering as graduates) to spend a lot of time on the bench. This happened with the Claimant's intake and other years' intakes as well.

758. It has not been proven to us on the facts that the Claimant had more time on the bench than comparable colleagues.

759. However, even on the assumption that (others, including Mr Swanwick) did have less time on the bench, the burden of proof does not shift. There are no facts from which we could decide that the amount of time that the Claimant spent on the bench was because of his disability.

760. The direct discrimination complaint fails.

Row 27. Failure to arrange training and personal development plan at 1:1 line manager meetings and explain that this is the forum for making such arrangements

761. This is alleged failure to make reasonable adjustments.

762. The alleged PCP is: not explaining to employees or setting out in writing that 1:1 line manager meetings were the appropriate forum for arranging training and personal development plans.

763. We reject the Claimant's argument that the Respondent had such a PCP.

764. We are also not persuaded that, because of disability, the Claimant was disadvantaged by the hypothetical PCP that he suggests that the Respondent applied.

765. We do not ignore that Mr Dryden decided, for Grievance 1, that Ms Godfrey had exhibited some failings in relation to career development planning. However, he also looked at some specific training requests made by the Claimant and did not find that the Claimant had been denied training that he required.

766. The Claimant did make requests for training, and generally received answers, which were not always to his satisfaction. Mr Swanwick did too. They were not told (because it was not true) that the only time training could be requested was at 121 meetings.

767. This complaint of failure to make reasonable adjustments fails.

Row 28. Unreasonable delay in obtaining details of reasonable adjustments from HR

768. This is alleged to be harassment or else direct discrimination.

769. It refers to Ms Godfrey not having sight of the February 2018 OH report, or else a detailed summary of the adjustments proposed in it. All she had was an oral discussion with Mr Tolgyesi and oral discussion with the Claimant.

770. We do accept that the Respondent had a policy that it would not, by default, automatically supply new line managers with copies of OH reports obtained during the previous line management.

771. There is, however, a lack of clarity and consistency in the explanation for why Ms Godfrey did not get a copy in these specific circumstances.

772. To the extent that the Claimant's consent was required, we are not persuaded that he was asked for consent and refused. In any event, when Ms Robinson sent a copy to Ms Godfrey in March 2019, she did not seek the Claimant's express consent to do so.

773. Ms Godfrey may or may not have asked the Claimant if he was able to supply her with a copy of the report in 2018, but she has not persuaded us that she did, and she certainly did not make a clear and unambiguous request to him, or put it in writing.

774. Ms Godfrey did not ask Mr Tolgyesi or HR for a copy of the report before January 2019, and did not chase before March.

775. In terms of unwanted conduct, the Claimant DID want Ms Godfrey to follow the recommendations in the report and DID NOT want her to fail to do so. On that basis, it was unwanted conduct that she did not have the report (though, at the time, based on what he said to Mr Welek, it seems that the Claimant believed that she had it).

776. The Respondent ought to have done a better job of getting the report to Ms Godfrey. However, the harassment allegation fails. The unwanted conduct did not have the purpose of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant and did not have that effect either.

777. Ms Godfrey did implement the adjustments which Mr Tolgyesi and the Claimant had agreed. Her ability to understand what further adjustments might potentially be required was affected by not having the report, however, the lack of the report did not create a hostile etc environment.

778. She did have the report from March, and she ceased to be his line manager from 7 April. The harassment allegation fails. The complaint is also out of time and we do not extend time.

779. There are no facts from which we could conclude that someone with a different disability would have been treated differently.

780. There are no facts from which we could conclude that someone with the same relevant circumstances as the Claimant, except for the Claimant's disability, would have been treated differently.

781. The direct discrimination complaint fails. The complaint is also out of time and we do not extend time.

Row 29. Criticising C in the grievance outcome for not asking for help in the face of clear evidence to the contrary, in the grievance appeal outcome

Row 30. Criticising C for not employing reasonable adjustments that he was allegedly aware of and had control

782. These are alleged to be harassment and refer to Grievance 1 appeal outcome letter.

783. Ms Sabey did not have the purpose of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

784. It is inevitable and unavoidable that an appeal officer is going to comment on the points raised by the grievance, the information and evidence they receive during the appeal process, and set out their thoughts and opinions. That is what Ms Sabey did in this case.

785. It is not unusual for an appellant to disagree with parts of the appeal outcome (having presumably disagreed with parts of the grievance outcome and hence the appeal).

786. In her analysis, Ms Sabey had to make decisions about what Ms Godfrey knew, and about what the Claimant had told her and asked for.

787. In her analysis of the adjustments that had been recommended for the Claimant, and her analysis of which had been implemented and which had not, she commented on those which she believed the Claimant had control over, including breaking down projects into bite-sized pieces (which the Claimant had said to OH that he did), using headphones, working from home when required, working in a quiet room when required. Even if the Claimant perceived any of these remarks as a criticism of him, they were part and parcel of the analysis Ms Sabey had to do before deciding (as she did) that there were some things which Ms Godfrey ought to have done, which she failed to do.

788. Our decision is that, in all the circumstances, the comments did not have the effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

789. On the facts, we do not find that the Respondent or Ms Sabey did criticise the Claimant for not employing reasonable adjustments of failing to ask for help.

790. The harassment complaint fails.

Row 31. Criticising C's communication efforts, in the grievance appeal outcome

791. This is alleged to be harassment.

792. What Ms Sabey said in the appeal outcome letter was factually accurate, and was necessary to her decision-making and explanation of her decision.

793. We repeat the comments about the role of appeal officer made when discussing Rows 29 and 30.

794. For similar reasons, the harassment complaint fails.

Row 32. Failure to properly consider evidence provided by C in support of his appeal

795. This is alleged to be harassment.

796. This allegation fails on the facts. While it was unwanted conduct that the appeal was not fully upheld, we are satisfied that Ms Sabey did conscientiously investigate and she fully considered the available evidence when deciding the outcome.

797. The complaint of harassment fails.

Row 33. Failure to provide details about what future recommendations are to be made in relation to measures to prevent disability discrimination, and when, in the grievance appeal outcome

798. This is alleged to be harassment.

799. It is not true that the letter did not contain recommendations. It did contain recommendations and an explanation of why they were made.

800. In addition (not instead of) specific recommendations, she added:

> As a long standing Manager within Fujitsu, I can confirm that the Company policies and procedures are well publicised and are often measured to ensure they are effective. There are of course isolated incidents in which improvement can be made and as I am not able to legislate for the actions of others, it would be unrealistic for me to offer you any absolute assurances on behalf of the Company.

801. That was not an unreasonable comment, and was absolutely not suggesting that the Respondent would turn a blind eye to future discrimination, or was refusing to try to avoid future discrimination.

802. The complaint fails because Ms Sabey's comments did not have the purpose of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

803. To the extent that the Claimant argues that we should decide that they had that effect, we do not think that would be reasonable in all the circumstances.

Row 34. Failure to uphold C's grievance at appeal that his line manager 'did not recall' C asking for further or additional training in the face of evidence to the contrary

804. This is alleged to be harassment.

805. Mr Dryden had decided that the courses that the Claimant was rejected for were those for which he was not suited. Mr Dryden had agreed that Ms Godfrey had not put a clear and transparent career development structure in place.

806. This allegation is somewhat ambiguous as to what the unwanted conduct is, and what the "evidence to the contrary" was. Evidence that the Claimant had, in fact, requested specific training is not, in itself, evidence that Ms Godfrey was lying if she said (in the grievance process or elsewhere) that she did not recall the Claimant asking for training. It might be evidence of poor record keeping, perhaps, but the grievance outcome did not suggest that Ms Godfrey did have good records of training discussions with the Claimant. Furthermore, it was accepted that not every training request had been approved.

807. It does not seem to have been put to Ms Godfrey in express terms "you are lying because you said you do not recall the Claimant asking for training, but here is evidence that he did" (if, indeed, the Claimant is suggesting that the appeal outcome should have made a finding that there was an occasion when Ms Godfrey told a lie to that effect).

808. Taking into account the length of the grievance outcome and appeal letters, and the points that were upheld in the Claimant's favour, we do not regard it as an unreasonable failing that the specific point was not pursued with Ms Godfrey or expressly adjudicated in the appeal letter.

809. The harassment complaint fails because Sabey's conduct did not have the purpose or effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

810. Furthermore, even taking account of the burden of proof provisions, there is no reason to think that Sabey's conduct was related to the Claimant's disability.

Row 35. Falsely stating that C wanted to explore "ServiceNow training opportunities", in the grievance appeal outcome

811. This is alleged to be harassment.

812. It refers to Ms Sabey's comment in the Grievance 1 appeal letter that she had "noted that you would like to explore ServiceNow Training opportunities".

813. That comment was her genuine understanding of the position. She was not making a deliberately untrue comment. To the extent that it was a "false" statement (ie to the extent that the Claimant did not want to explore this) then it was unwanted conduct, but it was not related to the Claimant's disability.

814. The conduct did not have the purpose or effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

815. The harassment complaint fails.

Row 36. Falsely stating that the "other outcomes were discussed and are incorporated into the specific responses as documented above", in the appeal outcome

816. This is alleged to be harassment.

817. This is not a false statement. In her detailed appeal outcome letter, Ms Sabey did incorporate outcomes within the various sections of the letter as well as in the wrap up at the end.

818. This allegation fails on the facts. That is the Claimant has failed to prove that the alleged conduct occurred.

Row 37. Reaching an appeal outcome based on expectations of a neurotypical employee in relation to propensity to accept compromise in a cover-up or to resign

819. This is alleged to be harassment or else direct discrimination.

820. We are satisfied that Ms Sabey's appeal outcome letter stated what she genuinely believed to be the facts, and what she honestly thought were appropriate outcomes, for the reasons stated in the letter.

821. She was not trying to get the Claimant to resign, or sign a settlement agreement.

822. She did not do a shoddy or incomplete review because she thought that the Claimant would accept a shoddy or incomplete review, or because she thought someone with the Claimant's disability would be more likely to do so, than someone without.

823. Both the harassment and discrimination complaints fail because the Claimant has not proven that the alleged acts did occur. Furthermore, we are satisfied that if the appellant had been someone whose circumstances matched those of the Claimant, but someone with a different disability, or no disability, then the appeal process and appeal outcome letter would not have been more favourable to the employee.

Row 38. Telling C that it would not be in his best interests to be a mentor to Graduate trainees and apprentices

824. This is alleged to be harassment.

825. This was unwanted conduct. The Claimant did not want Ms Sabey to say this.

826. We accept that the conduct was related to disability (though the principal factor was that the Claimant was suggesting doing work for a business area which he had just left and which was the subject of his grievance).

827. It was not Ms Sabey's purpose to (a) violate the Claimant's dignity or (b) create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

828. In assessing all the relevant circumstances (to decide whether the conduct had the effect mentioned in section 26(1)(b) EQA) relevant factors include that this issue was outside the scope of the appeal, and so, strictly speaking, there was no need for Ms Sabey to pass any comment at all. However, in fairness to her, she did make offers to the Claimant to engage with him after the end of the appeal in an effort to help him to breakdown his workload and understand unspoken rules. She offered 30 minute sessions. That was also outside the scope.

829. At the time she made the remark, the Claimant replied by saying "I understand".

830. In context, this comment was part of a two way discussion (when made orally) and the Claimant did not express disagreement prior to the outcome letter. Ms Sabey was not the decision-make for whether he would ultimately do this or not (and it was not part of the grievance).

831. In all the circumstances, the conduct did not have the effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

832. The harassment complaint fails.

<u>Row 39. Unsatisfactory grievance appeal outcomes: -</u>

833. This is alleged to be direct discrimination.

834. Some parts of the Claimant's grievance were upheld. Others were not.

835. This allegation is not asking the panel to speculate about whether we would have upheld any of the parts that were rejected. It is asking us to decide whether any of the rejected (or part rejected) outcome which were decided that way because of the Claimant's disability. Specifically, it is asking us to decide whether there was less favourable treatment in that regard and whether a hypothetical comparator would have received different (and better) outcomes.

836. As we have already mentioned above, if acting fairly and reasonably, a grievance decision-maker and an appeal decision-maker, will have to set out their thought processes to explain how they have arrived at their conclusions.

837. We are satisfied that the reasons for each of Mr Dryden's and Ms Sabey's respective comments is that they genuinely believed them to be appropriate to the circumstances.

838. We are satisfied on the evidence that neither of them was consciously motivated by the Claimant's disability. Neither of them consciously gave the Claimant a less favourable outcome than they would have given to another employee, with matching circumstances, but who did not have the same disability as the Claimant.

839. There are no facts from which we could conclude that the burden of proof has shifted as to whether there was unconscious bias. We see no evidence of unconscious bias, and, on the contrary, each of them seems to have done a thorough job, and given detailed explanations of the outcomes.

840. The direct discrimination complaint fails.

Row 40. Failure to provide final appraisal feedback (Second Appraisal)

841. This is alleged to be failure to make reasonable adjustments.

842. The alleged PCP is: not providing appraisal feedback.

843. The Respondent did not have the alleged PCP. Ms Godfrey ought to have "published" her comments on the September half year review so that the Claimant could read them around September/October 2018.

844. Her reason for failing to do this was an error on her part. It was a misunderstanding of how the (ZinZai) system worked. She thought she had done it until, in the Grievance 1 interview, Mr Dryden pointed out the mistake to her. She then published the comments to the Claimant (in May 2019)

845. The written comment matched what Ms Godfrey had said to the Claimant orally.

846. The failure to make reasonable adjustments complaint fails, since the Respondent did not have the alleged PCP. However, and in any event, there was no disadvantage, caused by his disability, by the fact that the Claimant did not see this written comment until after he had left Ms Godfrey's team. He knew she was purporting to insist on time sheet completion, and complained about that insistence; the written comment (and the instruction mentioned therein) was no surprise to him.

847. This complaint fails.

Row 41. C being criticised for failing to comply with policy, process and absence reporting procedure in Third Appraisal feedback notes

848. This is alleged to be failure to make reasonable adjustments and relates to the Claimant perusing Ms Godfrey's written comments following the April 2019 end of year review.

849. The alleged PCP is: not providing clear and clean feedback on failure to follow policies and procedures.

850. The Claimant had been given clear instructions (even if he did not agree with them) about what he was supposed to do to report sickness absence, and to keep the Respondent updated, including when it was necessary to obtain and supply a fit note.

851. We do not agree that the Respondent had the alleged PCP, or that there was a failure by Ms Godfrey to explain what – as far as she was concerned – he should do. She had explained during the course of the year, as well as at this stage.

852. He had been told (via Ms Robinson's email, which was a direct reply to what Ms Tearall had written, but was to the Claimant's email account) that he could authorise his partner to liaise on his behalf. He also knew that Ms Godfrey was willing in principle to liaise with, for example, his mother or Mr Welek.

853. This complaint of failure to make reasonable adjustments fails.

Row 42. Comment: C "must take responsibility for his contributions to the team" (Third Appraisal) / failure to provide clean feedback

854. This is alleged to be harassment or else direct discrimination and failure to make reasonable adjustments.

855. The alleged PCP is: not providing clear and clean feedback on contributions to the team.

856. We are not persuaded that the Respondent had this particular PCP. The Respondent's, and Ms Godfrey's intention, was to provide clear information and feedback. This complaint of failure to make reasonable adjustments fails.

857. It is factually correct that this remark was written. As we mentioned in the findings of fact, it seems to have been written in March 2019, while the Claimant was still off sick (and had been since late February). It would have been better practice to either remove the remark completely following the 24 April meeting (by which time the Claimant had supplied a fit note, and been back at work for more than 3 weeks, and had moved to a new team) or else to have clearly dated that part of the text, and added another, dated, comment to show an update. (There was an update below, but not dated.)

858. It was unwanted conduct that Ms Godfrey wrote this paragraph, and since part of the paragraph referred to sickness absence, the paragraph was related to disability.

859. Ms Godfrey's conduct was not with the purpose of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. It was intended as guidance to the Claimant as to what Ms Godfrey believed was required.

860. In all the circumstances, our decision is that Ms Godfrey's conduct did not have the effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. It is commonplace for an end of year review to contain some positive comments and some negative ones, and we must not cheapen the words of section 26 EQA by too readily deciding that comments criticising an employee in this type of document meet the definition of "harassment". A few lines after the remark which is the subject of this complaint, Ms Godfrey wrote: "Tom demonstrates a passion

for driving through innovation and is eager to work on development projects, **for the benefit of the organisation**." (Our emphasis). While the sentence which is complained of, in isolation, might have called into question the Claimant's willingness to take responsibility for "contributions to the team", the document as a whole made clear that Ms Godfrey was acknowledging his loyalty and work ethic.

861. The harassment complaint fails.

862. Furthermore, even taking into account the burden of proof provisions, we are not satisfied that there was less favourable treatment because of the Claimant's disability, or that Ms Godfrey was motivated, consciously or unconsciously, by the Claimant's disability when she wrote the words complained of in Row 42.

863. The direct discrimination complaint fails.

Row 43. Comment: "Increase understanding of the market by building closer relationships with Fujitsu Sector and offering teams." (Second Appraisal) / failure to discuss and agree objectives etc.

864. This is alleged to be harassment.

865. This was a goal set for the Claimant and Mr Swanwick. We are not persuaded that actually setting this particular goal was unwanted conduct. Ms Godfrey did give each of the Claimant and Mr Swanwick a chance to comment on the goals.

866. Even if it was unwanted conduct to set the goal, it does not specify – for example – that the Claimant would have to have voice contact with people to meet the goal. Written communication methods were potentially acceptable.

867. Our decision is that the conduct of setting this goal did not have either the purpose or effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant

868. The harassment complaint fails.

Row 44. Comment: "It would be good to see more active engagement with other members of the team" (Second Appraisal)

869. This is alleged to be harassment.

870. It is a mild comment, and does not imply that Ms Godfrey is purporting to control the method of engagement. The Claimant is left free to engage in the ways that he feels comfortable with. There are lengthy Slack exchanges in the bundle, not just with Mr Welek and Ms Shelton, but with others such as Dan White and Nicola Roberts. The Claimant was able to engage with others, and, if he felt unable to so with other members of the team, the comment does not suggest that there will necessarily be adverse outcomes for him.

871. Our decision is that the conduct of making this comment did not have either the purpose or effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

872. The harassment complaint fails.

Row 45. Comment: "Over the next few months I would suggest Tom continues to develop and extend his links with colleagues, delight customers by being more proactive and interact with colleagues in the office." (Second Appraisal) / failure to discuss and agree objectives etc.

873. This is alleged to be harassment.

874. Our comments are similar to those for Row 44. These are mild comments, and made in the context of a half year review, which the Claimant did not read until after it was published to him in May 2019, by which time he was already on Mr Lockwood's team.

875. It would be cheapening the words of section 26 to regard this conduct as harassment. The complaint fails.

Row 46. Untrue evidence being given by C's line manager about claiming not to have shared confidential and personal health information with C's mother

876. This is alleged to be harassment or else direct discrimination.

877. We are not persuaded that Ms Godfrey has been deliberately untruthful in her account to the Tribunal hearing, or, in 2019, to Mr Dryden or Ms Sabey.

878. Our finding was that she has not shared "health information" with the exception of confirming, around 2 April 2019, that the Claimant's sickness absence was over. (The context being the Claimant's mother already being aware – and telling Ms Godfrey that she was already aware – that the Claimant seemed to be using his laptop and was potentially back at work.)

879. We will not repeat everything that we have already said about what information was disclosed, and why we believe that Ms Godfrey should have taken a different approach.

880. However, it was Ms Godfrey's genuine opinion that she did not share the Claimant's personal data. She was not lying about her opinion.

881. Even if we were to decide that she lied to Mr Dryden or Ms Sabey (and that is not our decision) then the most natural inference would be that she lied to avoid disciplinary action or other sanction, not that she was motivated by the Claimant's disability to lie.

882. The complaints of each of harassment or else direct discrimination fail on the basis that we do not think she lied. They would have alternatively failed on the basis that the (hypothetical) lying was not related to disability or because of disability.

Row 47. Remark: 'Take your stress and multiply it by 25 and you get my job.' re C stating he was feeling overwhelmed

883. This is alleged to be harassment.

884. Something along these lines was said (possibly not on exactly 20 August 2018, but around that date).

885. It is the panel's opinion that this was an unsympathetic comment and not one that a reasonable line manager should make to one of their direct reports who is mentioning workplace stress.

886. It would be unreasonable to say this to an employee without a disability (or whose disability was unrelated to any stress at work). It is even more unreasonable to say it in the particular circumstances of an employee who has a disability for whom Ms Godfrey knew (from the discussions with Mr Tolgyesi) reasonable adjustments had been implemented.

887. It is not our opinion that this particular comment was made in an attempt to assist the Claimant. On the contrary, it would reasonably be seen by the Claimant, or an independent bystander, as an attempt to brush off the Claimant's concerns.

888. The remark was unwanted conduct. It related to the Claimant's disability.

889. We are satisfied that it was not Ms Godfrey's purpose to (a) violate the Claimant's dignity or (b) create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

890. It was an unpleasant and unsympathetic comment. However, in all the circumstances (including other remarks made by Ms Godfrey prior to this) our decision is that it did not have the effect described in section 26(1)(b) EQA. The Claimant was genuinely upset by the comment, but the words of section 26 set a high threshold and we do not consider that these words violated his dignity, or created an environment that matched any of the adjectives in 26(1)(b)(ii).

891. The harassment complaint fails.

Row 48. Remark: 'We all get like that sometimes.' re C social anxiety, 1:1 meeting CG

892. This is alleged to be harassment.

893. We do not consider that this comment is in quite the same category as the one mentioned in Row 47. It is possible to view these words (in isolation at least) as an attempt to offer reassurance that the Claimant should not feel alone and/or that Ms Godfrey has had been nervous about interacting with others from time to time.

894. The Claimant's reasons for regarding it was unwanted conduct are understandable. The comment can be taken to imply that the communication difficulties caused by the Claimant's disability could be regarded as comparable to the shyness or nervousness sometimes associated with public speaking or

meeting new people that people without the Claimant's disability might sometimes experience. It was reasonable for the Claimant to regard the remark as significantly understating the issue that he was seeking to raise.

895. Furthermore, the remark was not in isolation. It was in the same meeting as the remark mentioned in Row 47.

896. However, in all the circumstances, taking the comments in Row 47 and Row 48 both into account, we are not persuaded that the conduct had the effect described in section 26(1)(b) EQA.

897. The harassment complaint fails.

Row 49. Failure to conduct Medigold recommended stress risk Assessment

898. This is alleged to be harassment or else direct discrimination.

899. We have upheld a similar complaint in relation to Row 2, and extended time for it. The reason that we considered it necessary to extend time is that we were satisfied that the Respondent had made clear to the Claimant that it was not going to do the stress risk assessment.

900. In those circumstances, we do not consider it appropriate to uphold Row 49 as a separate/different complaint. However, the fact that the stress risk assessment was not done after the Claimant moved to Mr Lockwood team will be taken into account at the remedy stage.

Row 50. Instructing C to attend the 'tech hack' ('just show up and see how it goes') on 07 April 2020 having been informed by C that he was probably not well enough to do so

901. This is alleged to be harassment or else direct discrimination.

902. The Scott Schedule also mentioned failure to make reasonable adjustments, but that had been struck out prior to final hearing.

903. Our finding is that Mr Kjelstrup-Johnson simply suggested to the Claimant that he try out the hackathon. There was no insistence that the Claimant carry out any particular task.

904. The Claimant's argument is that the conduct was unwanted in the sense that the Claimant would rather have been told that he did not need to take part in the team event at all. We accept his evidence to that effect.

905. Mr Kjelstrup-Johnson's conduct was not with the purpose of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

906. In all the circumstances, our decision is that Mr Kjelstrup-Johnson's conduct did not have the effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. At the

time the remark was made, the Claimant still had some time to think about what the hackathon would entail and to review whether he would like it or not. He was also able to either try it and leave quickly if he decided that he was not suited to it, or, if sick, to report that he was on sickness absence.

907. The harassment complaint fails.

908. For the direct discrimination complaint, there is no evidence that the Claimant would have been treated any differently but for his disability. The direct discrimination complaint fails.

Row 51. Requiring C to communicate primarily verbally, to 'avoid miscommunication'

909. This is alleged to be harassment and failure to make reasonable adjustments.

910. The alleged PCP is: requiring C to communicate primarily verbally.

911. Subject to clarifying that the Respondent was not suggesting that people would be disciplined if they used written methods of communication, we agree the Respondent had this PCP and applied it to the Claimant. It was the Respondent's practice (on Mr Lockwood's team at least) to encourage oral discussions as part and parcel of the work. Mr Lockwood said in his statement:

> …it is not always appropriate or particularly efficient to put everything in writing on every single occasion. Within the team, we work using agile methodologies and the only way that works is if colleagues talk about ideas, discuss them, formulate compromises, and agree on which solution is the best one to go forward with.

912. We find those comments to be accurate, both in their confirmation that the PCP existed, and in terms of Mr Lockwood's opinion as to why it was justified.

913. The Claimant was placed at a substantial disadvantage by this PCP. He was caused stress and anxiety and the same stress and anxiety would not be suffered by a neurotypical person (to the same extent).

914. While Mr Welek had been team lead (Mr Kjelstrup-Johnson's immediate predecessor in that role) the Respondent had been able to cope with their being primarily written communication between the Claimant and the Team Lead. It would have been a reasonable adjustment for the Respondent to have had to make to continue that arrangement. Put another way, it would have been a reasonable adjustment for the Respondent to have had to make to require Mr Kjelstrup-Johnson to adapt to the Claimant's preferred method of working, rather than vice versa.

915. The complaint of failure to make reasonable adjustments succeeds.

916. It is in time as it is part of Claim 2, and the failure started on 3 June.

917. This alleged remark was made. It was unwanted conduct as the Claimant believed that the Respondent and Mr Lockwood should be willing to accept, and accommodate, his needs to minimise, oral discussion.

918. Mr Lockwood's conduct was not with the purpose of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

919. In all the circumstances, we do not think it reasonable for the conduct to be regarded as having the effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. Mr Lockwood's phrasing acknowledged that he was asking for a big change from the Claimant, and he was seeking to suggest a new way of working (which he acknowledged) rather than criticising the Claimant for how things had been in the past. Further, there was no suggestion of disciplinary action.

920. The harassment complaint fails.

<u>Row 52. Criticising C for sometimes "barbed" and "rude" written communications</u>

921. This is alleged to be harassment and failure to make reasonable adjustments.

922. The PCP is alleged to be: Providing C with generalised criticism, failing to be specific about areas of concern and the reason for it.

923. The alleged PCP is framed as being specific to the Claimant. The Claimant has not persuaded us that the Respondent had a PCP similar to this which was applied to its employees. Rather we are satisfied that the Respondent was willing (with the Claimant and other employees) to be specific in its criticism and to give specific examples.

924. To the extent that it is suggested that a reasonable adjustment would be to make no comments whatsoever about the Claimant's work unless accompanied by an example of the alleged issue in question, then that would not be a reasonable adjustment. The context is important here. This is not the Claimant being told formally or informally that there is a disciplinary matter which requires improvement. It is a back and forth discussion in which Mr Lockwood explains (part of) his reasons for requesting that the Claimant communicate orally where possible, and not solely by email.

925. The failure to make reasonable adjustments complaint fails.

926. The comment was made, and it was unwanted conduct, as the Claimant would have preferred that it not be said.

927. However, the context was that Mr Lockwood was seeking to make clear that he, Mr Lockwood, did not regard the Claimant as a rude person, and was seeking to let the Claimant know that he might incorrectly be perceived as rude by other people based on his emails. Mr Lockwood's proposed solution (which was not one the Claimant agreed with) was to use more oral communication.

928. There is room for an employee to strongly disagree with their manager's opinion (as the Claimant does here) without the manager's voicing of that opinion amounting to harassment.

929. The harassment complaint fails. Mr Lockwood's conduct did not have the purpose or effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant

Row 53. Asking C for a "big change in normal behaviour"

930. This is alleged to be harassment and failure to make reasonable adjustments.

931. We have discussed, when commenting on Row 51, the context of this remark.

932. Mr Lockwood's intention with these specific words was to acknowledge that he was asking for something "big" from the Claimant. It was not to criticise the Claimant.

933. Neither complaint as per Row 53 succeeds as a freestanding complaint, that is separate from, or in addition to, our decisions about Row 51.

Row 54. Stating that C "sees things in black and white, while [JL] sees things in shades of grey

934. This is alleged to be harassment and failure to make reasonable adjustments.

935. It is the same PCP as for Row 52, and we repeat what we said there.

936. This failure to make reasonable adjustments complaint fails.

937. In terms of harassment, the remark was made. We are not persuaded that it was unwanted conduct at the time it occurred. The Claimant agreed with it.

938. In any event, our decision is that, taking into account the circumstances as a whole, including everything said in the meeting, the harassment complaint fails because the conduct did not have the purpose or effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

Row 55. JL staing that while something seems like a "small shade change" in [JL's] world, he sees that C might see it as changing the "entire rail he runs on"

939. This is alleged to be harassment and failure to make reasonable adjustments.

940. It is the same PCP as for Row 52, and we repeat what we said there.

941. This failure to make reasonable adjustments complaint fails.

942. In terms of harassment, the remark was made. We are not persuaded that it was unwanted conduct at the time it occurred.

943. This is another one of the remarks made by Mr Lockwood in the meeting that was not an attempt to criticise the Claimant, but an attempt by Mr Lockwood to acknowledge that (as he expected the Claimant to agree) the two of them potentially had different outlooks on life and on certain work-related issues.

944. In any event, our decision is that, taking into account the circumstances as a whole, including everything said in the meeting, the harassment complaint fails because the conduct did not have the purpose or effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

Row 56. JL stating "A lot of issues that I know in your mind are real are a misunderstanding of what's going on"

945. This is alleged to be harassment and failure to make reasonable adjustments.

946. It is the same PCP as for Row 52, and we repeat what we said there.

947. This failure to make reasonable adjustments complaint fails.

948. In terms of harassment, Mr Lockwood accepts the remark (or something similar) was made.

949. This is somewhat circular. By definition, Mr Lockwood (or anyone else) is likely to think that their understanding of a situation is correct. Some of the time they might be confident that if someone else has a different understanding then that other person is wrong. Some of the time they might thing that if someone else has a different understanding then they themselves are probably wrong. Other times, of course, they might think that the answer is unknowable, and it will never be possible in the future to look back and decide who had been "right" or "wrong".

950. We are not persuaded that this remark was related to the Claimant's ASD. It was a remark made, having listened to the Claimant's viewpoint, which showed Mr Lockwood disagreed with the Claimant's opinion as to other people's motives, but did not seek to criticise the Claimant for having those opinions.

951. Even if (contrary to our decision) it was related to disability, the harassment complaint fails as it would not be reasonable to expect Mr Lockwood to pretend to believe that something was true, when he did not believe it was true.

952. The conduct did not have the purpose or effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

Row 57. JL stating the only person who had come back directly with a problem was C, whereas C knew that several of C's colleagues had raised concerns (e.g. about problems with working conditions, lack of work and organisation, Outsystems) to R

953. This is alleged to be harassment and failure to make reasonable adjustments.

954. The PCP is alleged to be: Providing untrue comments by way of feedback

955. We reject the assertion that the Respondent had this PCP. The Claimant believed that other people had complained to the Respondent about the Respondent's use of certain applications. The Claimant was the only person who complained directly

to Mr Lockwood about it. In any event, the decisions had been made at a higher level than Mr Lockwood and he could not change them.

956. The failure to make reasonable adjustments complaint fails for those reasons.

957. For similar reasons, the harassment complaint also fails. Mr Lockwood answered the Claimant's questions truthfully, based on his understanding of matters.

Row 58. JL stating that C needed to recognise his behavioural traits – the black and white thinking

958. This is alleged to be harassment and failure to make reasonable adjustments.

959. It is the same PCP as for Row 52, and we repeat what we said there.

960. This failure to make reasonable adjustments complaint fails.

961. Although it is true that Mr Lockwood referred to "black and white" thinking:

961.1 We are not persuaded that he was doing to in the context of telling the Claimant that the Claimant had to change, and

961.2 We are not persuaded that it was unwanted conduct at the time it was said.

962. This is another one of the remarks made by Mr Lockwood in the meeting that was not an attempt to criticise the Claimant, but an attempt by Mr Lockwood to acknowledge that (as he expected the Claimant to agree) the two of them potentially had different outlooks on life and on certain work-related issues.

963. In any event, our decision is that, taking into account the circumstances as a whole, including everything said in the meeting, the harassment complaint fails because the conduct did not have the purpose or effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

964. The harassment complaint fails.

Row 59. JL stating that C needed to see that "things can be done gradually", implying C could not envisage incremental processes

965. This is alleged to be harassment and failure to make reasonable adjustments.

966. It is the same PCP as for Row 52, and we repeat what we said there.

967. This failure to make reasonable adjustments complaint fails.

968. Although the remark, or something similar, was said, it was in the context of planning ahead for a particular project. Mr Lockwood and Mr Kjelstrup-Johnson had sought advice from Patrick Hynes, and were entitled to make decisions which took that advice into account. The Claimant was entitled to think that the project could go ahead immediately, and Mr Lockwood was entitled to think that a more

gradual approach was needed. If the Claimant is right that Mr Lockwood was being over-cautious and/or did not understand that would not help the Claimant satisfy the Tribunal that the remark was related to the Claimant's.

969. We are not persuaded, in fact, that it was related to disability, or that it implied that, because of disability, the Claimant was unable to visualise – in any scenario - incremental progress.

970. In any event, our decision is that, taking into account the circumstances as a whole, including everything said in the meeting, the harassment complaint fails because the conduct did not have the purpose or effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. This is a fairly standard workplace disagreement about how "ready" a project was to proceed.

Row 60. JL stating that C had a "very academic view of the world", which wasn't necessarily aligned with what R wanted to do as a pragmatic approach

971. This is alleged to be harassment and failure to make reasonable adjustments.

972. It is the same PCP as for Row 52, and we repeat what we said there. In addition, this remark was in a very specific context; it was a reply to the Claimant's question about why other people were unable to understand that he had broken the project into chunks which were consistent with Mr Hynes Phase 1 and Phase 2.

973. This failure to make reasonable adjustments complaint fails.

974. Further, Mr Lockwood's remark did not have the purpose or effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant

975. The harassment complaint fails.

Row 61. Failure to consider or adopt email templates to encourage reasonably adjusted team behaviours providing concise written instructions, tangible agendas and goals for meetings

976. This is alleged to be harassment and failure to make reasonable adjustments.

977. The alleged PCP is: Uncoordinated procedures regarding provision of written information, meeting agendas and goals

978. It is not true that Mr Lockwood failed to consider the Claimant's suggestion. He did consider it, and he decided it would not work and so did not adopt it.

979. The Claimant's description of PCP is accurate. The Respondent (on Mr Lockwood team at least) did have an ad hoc approach to meetings. Mr Lockwood's own evidence was

> I also recall discussing it with the team who decided that this was too time-consuming and prescriptive, and didn't allow them any license to depart from the

> agenda / goals. In practice, many of our team meetings would be very dynamic and you may not end up focussing on the things that you originally thought you would because, after workshopping an idea, discussions then took a very different direction. But that was OK - that was just the nature of the work that we did and we needed that flexibility. Tom's ideas certainly would have been floated with the team before a decision was made but in order to implement something like that for everyone we needed the buy-in of the team first, which we did not get

980. We accept that account is accurate for the existence of the PCP, Mr Lockwood's belief that the PCP was justified, and Mr Lockwood's reasons for rejecting the Claimant's suggestion.

981. The Claimant was disadvantaged by the PCP. The lack of preplanning caused him stress and he was less able to participate in ad hoc meetings than an employee without his disability.

982. Our decision is that there was a failure to make reasonable adjustments.

982.1 Supplying some form of agenda in advance of meetings is something that an employer could reasonably be expected to have to do. The agenda would not necessarily have to be very detailed. It would not have been a reasonable adjustment to go as far as saying that there could be no departure from the agenda, or that every single discussion topic for the forthcoming meeting had to be listed.

982.2 Similarly, some brief written action points after a meeting is something that an employer could reasonably be expected to have to do. It is not just employees with the Claimant's exact disability who might need that type of adjustment. Employees with various types of disability (and disadvantage from the PCP) might need this to be done.

982.3 It is not a good enough reason to refuse to make reasonable adjustments for an employer to say that the disabled individual's colleagues might not be happy about it. In order to comply with its duties under EQA, there might be times when an employer is obliged to instruct its employees to take certain courses of action, even if that includes the threat of disciplinary action.

982.4 It is not necessarily the case that the only option for making a reasonable adjustment was to use the exact draft templates created by the Claimant. If the Claimant's versions were unwieldy, or if the Respondent believed that there was a more flexible solution, then it could (and should) have come up with something. However, there is a vast volume of instant messages in the bundle, and we do not accept that the Respondent was so committed to oral discussions that it would have been unduly difficult to make some slight tweaks to arrangements for meetings to provide written information before and after.

983. This failure to make reasonable adjustments complaint succeeds. For the avoidance of doubt, this row relates to the provision of information about meetings (before and after), not to the scheduling of meetings.

Row 62. To Rose Shelton (RS): JL says [KKJ] is "concerned about [Rose] from a work perspective".

984. This is alleged to be harassment.

Row 63. To RS: JL says "some of the difficulties processing what's being said to [C] might rub off on [Rose]"

985. This is alleged to be harassment.

Row 64. To RS: JL asks RS whether she consciously knows that the battle [C] is fighting, C thinks he's fighting for RS

986. This is alleged to be harassment or else direct discrimination.

Row 65. To RS: JL indicated that he thought the framework was a misguided attempt at creating a panacea

987. This is alleged to be harassment or else direct discrimination.

Row 66. To RS: JL stated that he wanted C to "fit in as best as he can"

988. This is alleged to be harassment or else direct discrimination

989. In relation to Rows 62 to 66, Mr Lockwood did state that he was concerned about Ms Shelton's work. This was not related to the Claimant's disability and was not unwanted conduct towards the Claimant.

990. We are not persuaded that he said that he said (words to effect that) any issue the Claimant might have might "rub off" on Ms Shelton.

991. He did say (words to effect of) that his (Mr Lockwood's) opinion was that the Claimant was fighting a battle on her behalf, and did ask her if she saw it that way too. This comment was not related to the Claimant's disability.

992. Mr Lockwood did not see the Claimant's project (the Automation/Framework Project) as a panacea. What Ms Shelton's notes refer to is "golden bullet", and so it seems more likely that he used that expression rather than panacea. However, he did not see it as a golden bullet either, and Ms Shelton's notes are inaccurate to the extent that they imply that he did see it that way. In stating that he, Mr Lockwood, did not regard the project as "golden bullet" (or panacea), he was not seeking to imply that the Claimant regarded it as such. He was, however, seeking to convey to Ms Shelton his own opinion about the potential usefulness of the project. He was not purporting to say that it was definitely worthless; he was seeking to be clear in saying that, even if it was fairly successful then there would still be reliance on other systems too. He was entitled to express his opinion to Ms Shelton about a project that Ms Shelton was involved with. It was a 121 between her and him, and it was entirely the appropriate time and place for the discussion. His words were not related to the Claimant's disability, and were not about the

Claimant at all (save that the Claimant, like Ms Shelton, was working on the project too).

993. Ms Shelton's notes record Mr Lockwood saying words to the effect of "want tom to fit in as best as he can". We accept he did say something along those lines. According to the notes, the context was about the HWA that had been done (which Mr Lockwood had reported to Health & Safety, and been referred on to Ms Doherty) and about potentially getting the Claimant to work back (some of the time) in Bracknell. The context was about Mr Lockwood intending to meet the Claimant (and others) face to face. This was approximately 3 months after the start of the pandemic. Further, the context was that Mr Lockwood was reporting having printed an "autistic handbook" that the Claimant had supplied.

994. We are satisfied that the remark "want tom to fit in as best as he can" was not meant as implying that Mr Lockwood saw the Claimant's ASD as a barrier to the Claimant's being accepted by the Respondent. It was meant in the context that Mr Lockwood was aware (as was Ms Shelton) that the Claimant had reported several difficulties and that, while Mr Lockwood wanted him back in Bracknell as much as possible, he was not intending to heavy-handedly force the Claimant to do that type of thing too quickly, and he, Mr Lockwood, was seeking guidance along the way.

995. None of Mr Lockwood's comments had the purpose of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

996. In all the circumstances, including that the Claimant was not present, our decision is that none of Mr Lockwood's comments had the effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

997. The direct discrimination complaints also fail. The Claimant was not treated less favourably than someone with the same relevant circumstances as him, barring the Claimant's disability.

<u>Row 67. To C: JL stated he was "in awe" of the Claimant's predictions, and that he saw C's disability as "a superpower", because C "can see things [he] can't, and explain them to [him]".</u>

998. This is alleged to be harassment or else direct discrimination and failure to make reasonable adjustments.

<u>Row 68. To C: JL stated he didn't think C is the bad guy, and wasn't aware of anyone else saying bad things about him</u>

999. This is alleged to be failure to make reasonable adjustments.

<u>Row 69. To C: JL stated he acknowledged C's perception is his reality</u>

1000. This is alleged to be harassment and failure to make reasonable adjustments.

1001. The conversation referred to in Rows 67 to 69 did occur. It was 24 June, rather than 22 June. Mr Lockwood did make the comments (or similar) as alleged.

1002. We are not persuaded that these comments were unwanted conduct.

1003. The comment about superpowers was related to disability (taking into account what Mr Lockwood says in paragraph 68 of his witness statement). The others were not.

1004. Mr Lockwood's conduct did not have the purpose or effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. It would be cheapening the words of section 26 EQA to treat these fairly mundane comments in the context of a workplace catch up meeting as having the prohibited effect.

1005. The alleged PCP for rows 67 and 68 is "Providing untrue comments by way of feedback". The Respondent did not have that PCP. Furthermore, we are not persuaded that Mr Lockwood's comments on 24 June were "untrue" in Mr Lockwood's opinion.

1006. The alleged PCP for row 69 is the same as for Row 52, and we have commented on that already.

1007. In relation to Row 67, the Claimant was not being treated less favourably than a comparator. Mr Lockwood was seeking to praise him and boost his confidence.

1008. All of the complaints for Rows 67 to 69 (harassment, direct discrimination and failure to make reasonable adjustments) fail.

<u>Row 70. C being excluded from a mentorship meeting</u>

1009. This is alleged to be harassment or else direct discrimination.

1010. The Claimant has not proven, as a fact, that he was excluded from any meeting.

1011. Mr Lockwood suspects that the Claimant might be referring to the meeting on Tuesday 26 May 2020 at 1:30pm to which invitations were sent by Mr Kjelstrup-Johnson at 3.09pm. [Bundle 2254]. The Claimant replied the following day to say that he and Ms Shelton were on leave and so had missed the meeting. The Claimant also suggested that he would have been reluctant to attend without greater notice, in line with his interpretation of reasonable adjustments which the Respondent ought to have been making). [Bundle 2253]. An email discussion ensued which was discussed with Mr Lockwood and Mr Kjelstrup-Johnson on 3 June. [Bundle 3702].

1012. If the implication is that Mr Kjelstrup-Johnson deliberately arranged the meeting while the Claimant was on leave, we reject that argument as there is no evidence for it and it was not an allegation made at the time. (In any event, it would potentially require an amendment application). Furthermore, as per the

Claimant's 1 July 2020 email to Mr Kjelstrup-Johnson [Bundle 4640], the Claimant was invited to a later meeting about a related subject when he was not on holiday.

1013. The complaints of harassment and direct discrimination fail as the Claimant has not proved that the Respondent acted in the way alleged.

Row 71. To C: JL stated that he/R was not sure C wanted to be involved in mentorship

1014. This is alleged to be harassment or else direct discrimination.

Row 72. To C: R is doing its best to meet C's reasonable adjustments when it wasn't telling him how it was making reasonable adjustments and it was not true that they were being made

1015. This is alleged to be harassment and failure to make reasonable adjustments.

Row 73. To C: JL stated C's perspective was becoming his reality

1016. This is alleged to be harassment and failure to make reasonable adjustments.

1017. Rows 71 to 73 all refer to the 29 June meeting.

1018. In relation to Row 71 (mentorship), as Mr Lockwood made clear in meeting, he was seeking information from the Claimant which Mr Kjelstrup-Johnson had asked him for.

1019. In relation to comments about reasonable adjustments (Row 72), when the Claimant submitted a Timeline document to accompany Grievance 3, he included his version of the 29 June meeting [Bundle 3706 to 3707] and did not refer to this allegation at that time. The Claimant has not proven that the specific alleged words were used on 29 June.

1020. In relation to Row 73, although that is a remark Mr Lockwood had made in the past, according to the Claimant's own notes, what he said on 29 June 2020 was "it's a matter of people's perspectives becoming their realities".

1021. For all of Row 71 to 73, the harassment complaints fail as Mr Lockwood's words in the meeting did not have the purpose or effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

1022. In relation to 71 and 73, we are also not persuaded (even taking into account s136 EQA) that they were related to disability. In relation to Row 72, we are not persuaded the comment was made as alleged.

1023. The comments about mentorship (Row 71) are alleged to have been direct discrimination. This was not less favourable treatment. Mr Lockwood was simply asking if the Claimant was still interested and, if so, whether he wanted Mr Kjelstrup-Johnson to send him more information or not. This was not

because of the Claimant's disability, but because of the remarks the Claimant had made by email.

1024. The alleged PCP for Row 72 matches that for Rows 67 and 68 which we have commented on already (and decided that the Respondent did not have this PCP). . Furthermore, we are not persuaded that Mr Lockwood's comments on 29 June were "untrue" in Mr Lockwood's opinion.

1025. The alleged PCP for row 73 is the same as for Row 52, and we have commented on that already.

1026. All of the complaints for Rows 71 to 73 (harassment, direct discrimination and failure to make reasonable adjustments) fail.

Row 74. Unreasonable delay in addressing grievances raised on 08 July 2020 (and thereafter) regarding disability discrimination

1027. This is alleged to be harassment or else direct discrimination. It is also alleged to be failure to make reasonable adjustments and victimisation.

1028. The alleged PCP is: delay in addressing grievances.

1029. The protected act is ill-defined in the Scott Schedule. The Respondent has proceeded that the protected act for this complaint (and all the victimisation complaints) is the grievance submitted on 8 July 2020. However, our decision is that the following have been sufficiently identified as alleged protected acts. In each case, they actually are protected acts.

1029.1 Grievance 1 – 15 April 2019

1029.2 Grievance 2/3 – 3 and 8 July 2020

1029.3 14 April 2020 discussions with Mr Lockwood

1030. We do not agree, on the facts, that there was an unreasonable delay.

1031. Separating out the 3 July issues into two grievance was discussed and agreed on 8 July (so less than a week later). The decision to deal with Grievance 2 by mediation was what the Claimant was content with, and that was arranged for 14 July, and postponed because Ms Shelton/the Claimant wanted a later date. By 14 July, a date of 21 July had been fixed. Promptly after the Claimant's email of 14 July, the Respondent decided mediation was not appropriate and went down the formal route instead. There was a meeting on 23 July. A detailed outcome for Grievance 2 was issued by 13 August, so around 6 weeks after it was presented, and 3 weeks after the meeting with Mr Dryden.

1032. Further, Grievance 3 was not unreasonably delayed. At first, the Respondent was waiting for the Claimant to come back to it after he had spoken to his solicitor. Once the Respondent was aware, from early September, that the Claimant would like it dealt with formally (not by mediation or otherwise) the

Respondent promptly set up meetings, informed the Claimant of who the investigator would be and sought the documents. There was a bit of a gap between the main batch of documents (27 October) and the meetings between Ms Lindeque and the other interviewees. However, we are satisfied that was not an unreasonable delay taking into account the volume of the documentation and the fact that the Claimant continued to send further documents into November.

1033. In terms of alleged delay, the harassment and discrimination allegations fail on the facts. The amount of time which the Respondent took from September to 8 January 2021 was not unreasonable in all the circumstances.

1034. Furthermore, even taking into account section 136, our decision is that the amount of time taken was not related to the Claimant's disability or because of his disability.

1035. We do not think that the Respondent has the PCP as alleged. If it were tweaked to (say) "the Respondent takes a finite time to deal with grievance" or "the Respondent takes a proportionate amount of time to deal with grievance" then that would be meaningless or circular. We do accept that the Claimant was under stress while awaiting the grievance outcome. However, significant periods of the time which elapsed from when the grievance was lodged (even from early September when he said he wanted it to proceed formally) to when the outcome was issued was because the Respondent was waiting on the Claimant to do things that he wanted to do (namely supply additional documents). The remainder of the time spent was reasonable.

1036. The failure to make reasonable adjustments complaint fails.

1037. For similar reasons, even taking into account section 136, our decision is that the amount of time taken was not because of any of the protected acts.

1038. The victimisation complaint fails.

<u>Row 75. Unreasonable deprivation of opportunity to pursue software development proposals, as diverted to others</u>

1039. This is alleged to be direct discrimination.

1040. It is the Claimant's opinion that the same project (or ideas for a project) that he came up with (increasing automation of some internal processes) was one which Mr Kjelstrup-Johnson approved for others to work on after having told the Claimant that it was unworkable.

1041. It is Mr Lockwood's opinion that the project about which the Claimant complained in his 14 July 2020 email was for something distinct and different to the Claimant's proposals.

1042. The panel does not have the technical expertise (or the evidence) to decide whether we prefer the Claimant's opinion or Mr Lockwood's. However, we are

satisfied that each opinion is genuinely held, and each of them was truthful to us about what they believe.

1043. We have not been persuaded that Mr Kjelstrup-Johnson lied to the Claimant about any proposed difficulties. Mr Kjelstrup-Johnson arranged for Mr Hynes to meet with him and the Claimant to discuss, and he chased Hynes for written advice, and Mr Lockwood and Mr Kjelstrup-Johnson met Hynes to talk further, because Mr Kjelstrup-Johnson acknowledged that he did not necessarily thoroughly understand how the Claimant was envisaging it would work.

1044. We are not persuaded that the Claimant actually has been treated less favourably than anyone else in the manner alleged at Row 76.

1045. However, and in any event, there are no facts from which we could conclude that Mr Kjelstrup-Johnson would have treated a hypothetical comparator – whose circumstances were the same as the Claimant, but for disability – differently. The circumstances of the comparator would have to be that they explained the project, and created the same documentation for it, in the same way that the Claimant did.

1046. The direct discrimination complaint fails.

Row 76. To C: You're an entrepreneur, you're not a good fit for this company"; "You'd probably be better off in Sweden or Japan than the UK, the UK isn't for you"; [with reference to disability] "We all have problems in and out of work"; "Are you still on your apprenticeship or are you fresh off it?"; "Oh you have an answer to everything don't you?

1047. This is alleged to be harassment and victimisation.

1048. We have not heard from Mr Robinson, but the Claimant has not presented evidence that Robinson was lying to Lindeque about the reasons for the comments he made to the Claimant. We have no reason to doubt that Mr Robinson had called to have a discussion, and to see if he could offer any help or assistance, about a point that had been raised on Slack (and/or if he could gain any useful knowledge from the person who had made that post). We have no reason to doubt that he made the comments to the Claimant – a stranger to him – as part of what he regarded as a friendly exchange of views between colleagues.

1049. The victimisation complaint fails, as Mr Robinson was not aware of any of the protected acts (though he was told – in general terms - by the Claimant, during the conversation about complaints of discrimination that the Claimant had made).

1050. Furthermore, our decision is that the Claimant was not subjected to a detriment. Hypothetically, Mr Robinson could have simply said nothing at all in response to the Claimant. Hypothetically, he could have said something along the lines of agreeing that the Respondent was treating the Claimant terribly. Instead he

offered what was (as far as we know) an honest opinion which was not to the Claimant's liking, but we do not consider that to be a detriment.

1051. Mr Robinson's comments did not have the purpose or effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. It would be cheapening the words of section 26 to treat these mild comments, from someone who was not involved in line management of the Claimant, and who did not know him as having the prohibited effect.

1052. We are also not persuaded, even taking into account section 136, that the comments were related to the Claimant's disability.

1053. The harassment complaint also fails.

Row 77. Unreasonable delay in processing C's 'Disability Passport'

1054. This is alleged to be harassment or else direct discrimination.

1055. We accept Ms Doherty's evidence about the chronology of her interactions with the Claimant, and the reasons that the document was not ultimately signed off by the Respondent.

1056. We do not agree that there was delay in actually responding to the Claimant's drafts. So in that sense, there was no "unreasonable delay in *processing*". Ms Doherty responded promptly to the Claimant each time, and sought Mr Lockwood's responses (and received them promptly) where needed.

1057. As mentioned in the findings of fact, there was no obligation for either employee or employer to agree to passport wording that they were not happy with.

1058. From the employer's point of view, if the proposed adjustment was one that it did not think it was obliged to make, and was not one it was willing to voluntarily agree to, then it could just say "no" to that adjustment being included, and offer the employee a passport which had that omitted.

1059. From the employee's point of view, if the passport that was offered included some adjustments, but not all that they thought the Respondent was obliged to make, then they had the option of accepting the (from their point of view) imperfect passport, or else rejecting the whole thing.

1060. The content of the passport is a separate issue to whether or not the employer has complied with its duty to make reasonable adjustments. For one employee, there could be no passport, but no failure to make reasonable adjustments either (eg because the adjustments were made anyway). For another employee, a passport could exist, but there could be a failure to make reasonable adjustments (eg because what the employer agreed to write in the passport did not go far enough).

1061. The requirement was for there to be a two way discussion with the aim of reaching agreement, and we are satisfied that that it was the Respondent did.

1062. Furthermore, Ms Doherty gave the Claimant detailed and specific written feedback.

1063. The reason that no passport was agreed was that the Claimant was submitting drafts which contained complaints about past issues, whereas the document was supposed to be a neutral document that would record what adjustments had been agreed, and which were (therefore) supposed to be implemented by whichever line manager the Claimant had from time to time going forward.

1064. The Respondent's conduct in not agreeing to the Claimant's drafts did not have the purpose or effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. At the time (June to October 2020), the Claimant was satisfied with the feedback and assistance that Ms Doherty was providing.

1065. There are no facts that could lead us to conclude that the Claimant's particular disability was the reason for not signing off on the passport. The hypothetical comparator would be someone with a different disability, but whose drafts for the passport also contained complaints about on-going/historic issues, as opposed to only the information that was needed for the passport.

1066. All the complaints for Row 77 fail.

<u>Row 78. Cancellation of 1:1 meeting at short notice</u>

1067. This is alleged to be failure to make reasonable adjustments.

1068. The alleged PCP is: short notice meeting cancellation.

1069. It is true that the Respondent had a practice where it would sometimes cancel a meeting at short notice, and it did this for the Claimant as well as other employees.

1070. The alleged disadvantage is "Causing C stress and anxiety The same stress and anxiety would not be suffered by a neurotypical person or not suffered to the same extent". We accept that the PCP placed the Claimant at that disadvantage.

1071. The context was that the Claimant was to log on from home to a video meeting. Furthermore, instead of meeting Mr Lockwood at 11.30am (by himself) he was still going to meet him that same day, but as part of the pre-planned 1.30pm meeting with Mr Kjelstrup-Johnson.

1072. Mr Lockwood did seek the Claimant's views before implementing the change, and he waited 24 hours for a reply before cancelling.

1073. It is a business reality that meetings sometimes are cancelled or rearranged. The Respondent was under a duty to make reasonable adjustments in relation to this PCP. However, our decision is that the cancellation of this particular meeting in these particular circumstances did not breach the duty. It would not be reasonable for us to set the bar so high that the Respondent's duty to make reasonable adjustments required it to never rearrange any meeting with the Claimant, even with more than one clear day's notice.

1074. This complaint fails.

Row 79. Subjecting C to a greater level of scrutiny in relation to Personal Development Plan detail by requiring the Claimant to colour code his PDP to provide greater detail

1075. This is alleged to be harassment and victimisation.

1076. In terms of decisions about whether training was either approved or refused, we do not think that it is true that the Claimant was subjected to greater scrutiny than others by Mr Lockwood and/or Mr Kjelstrup-Johnson. The Respondent's preference was that, if there was a training need, it would be met internally, where possible, without incurring a fee to an external provider. Furthermore, whether the training was free or came at a cost, the Respondent considered how many hours the training would last, and considered whether there was a business need to the particular employee to have the particular training.

1077. In terms of whether it was truly necessary for the PDP to be colour coded, the answer is "probably not" in our opinion. Other approaches could have been taken instead. However, form reading Ms Shelton's notes of the 29 July meeting, it seems to us that Mr Lockwood genuinely was having difficulty in understanding how much time the Claimant was spending on training, and what the costs were, and what requests were outstanding. We do not think the request for a colour coded version was being used as an excuse to not approve some training. We believe he genuinely wanted a clearer understanding of the situation before making a decision. Had he not suggested the colour coding, then the other option was for the oral discussion to continue at greater length, but either way, it was entirely reasonable for him to want clarity.

1078. The request for colour coding was asking the Claimant to do something fairly straightforward, and it would not have been unduly time-consuming. For the reasons mentioned in the previous paragraph, we do not regard it as a detriment; rather it was simply the method chosen by Mr Lockwood for how the necessary information could be communicated to him.

1079. However, even if we are wrong about that, and even if the fact that the Claimant was being asked to do something that other employees did not have to do was a detriment, we are satisfied that it was not even partially, and not even unconsciously, motivated by any of the protected acts. It was for the reasons mentioned above.

1080. Furthermore, the request for colour coding did not have the purpose or effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

1081. These complaints all fail.

Row 80. C being ostracised generally and after C raised his concerns about reasonable adjustments and disability discrimination with R, in [the ways itemised in Scott Schedule]

1082. This is alleged to be harassment and victimisation.

1083. In terms of Mr Kjelstrup-Johnson allegedly ceasing to speak to the Claimant, it has not been proven that he did so. The Claimant was working from home during this time. Mr Kjelstrup-Johnson did contact him and offer to have voice discussions (for example, 16 June). Meetings at which Mr Kjelstrup-Johnson and the Claimant (and others) were present did take place.

1084. In terms of Mr Kjelstrup-Johnson and Mr Lockwood allegedly ignoring emails, it has not been proven that they did so. One complaint of the Claimant's (which we have discussed above) is that there was a request that the Claimant engage in more oral discussions. We accept that Mr Kjelstrup-Johnson and Mr Lockwood were genuinely seeking to reduce email traffic because they thought it was more efficient. Even if there are some particular emails to which there was no specific and direct reply, that does not demonstrate that the content was not addressed.

1085. In terms of paying little attention to the Claimant's opinion, that is vague. On the facts, it is not true. There were disagreements, and Mr Kjelstrup-Johnson and Mr Lockwood gave their views on particular matters. Their opinions did not necessarily match the Claimant's opinions, but that is not the same as ignoring or paying little attention.

1086. In terms of the Claimant's working arrangements, Mr Lockwood did seek to engage with the Claimant over the HWA, and got Ms Doherty involved and approved equipment purchases. A theme through the whole case is that the Claimant asserts that he needed a week (whether 5 or 6 or 7 days) notice of (some) meetings. He was consistently invited to meetings with less notice than that. Mr Lockwood did not simply ignore that the Claimant was asserting it, however. It was discussed, even if the outcome was not the one which the Claimant would have liked. It is not factually accurate that the February 2018 report said that the Claimant required a weeks notice. The Claimant's most up to date suggestion for the disability passport was 13 October 2020 [Bundle 4511]. He was not ignored from June to October; there were regular discussions.

1087. In terms of "keeping matters from the Claimant" this is too vague. To the extent it refers to the type of decision made which were dealt with by Mr Dryden in Grievance 2, he explained that keeping employees informed was important, but

some decisions would be made by managers, and then communicated to employees later.

1088. In terms of excluding the Claimant from mentoring, that is not something which the Respondent did. The Claimant did act as a mentor, but the Respondent wished to be in charge of assigning which mentor to which mentee.

1089. In terms of directing communication via Ms Shelton, this is also vague. We have not been given examples of things that ought to have been said directly to the Claimant rather than to Ms Shelton.

1090. The Claimant has not proven that these alleged detriments occurred in the manner alleged. Even taking into account the burden of proof provisions, he has not proved that the treatment (as we have found it to be) alluded to in Row 80 was because of his protected acts, and nor has he proven it was related to his disability.

1091. These complaints fail.

Row 81. C being repeatedly refused opportunity to develop projects during 2020,

1092. This is alleged to be direct discrimination.

1093. Even if it is hypothetically true that Mr Kjelstrup-Johnson stole the Claimant's idea for a project, then the natural inference is that his reason for doing so was personal gain, rather than the Claimant's disability.

1094. More generally, the Claimant did do project work during 2020. He worked largely with Ms Shelton. They came up with various suggestions, some of which were approved and some of which were not.

1095. In our judgment, the Claimant's suggestions were not lightly brushed off. Mr Kjelstrup-Johnson and Mr Lockwood were willing to spend time considering and obtaining input from Patrick Hines.

1096. There are no facts from which we could conclude that the Claimant has been treated less favourably than any hypothetical comparator, or that the Respondent's reasons for rejecting particular ideas were because of the Claimant's disabiltity.

1097. The direct discrimination complaint fails.

Row 82. C being victimised for having raised his grievance on 06.07.20, specifically: Fabricated complaints from a group of employees, including alleged interruptions by C in a meeting on 11 August 2020; alleged refusal to cease copying a colleague on emails (August/September 2020); JL stating that C had offended colleagues without providing details or any right of reply (as reported to Robin Dryden)

1098. This is alleged to be victimisation.

1099. The specific protected act relied on is the 6 July grievance email.

1100. It is true that, near the end of the Grievance 2 outcome letter, Mr Dryden commented that some things the Claimant had said/written "have been viewed as inappropriate, have caused offence and as a result have had a negative impact".

1101. It is not true that Mr Dryden fabricated this allegation. It was his genuine opinion based on the information conveyed to him.

1102. It was a detriment that the Claimant was subject to the criticism in those paragraphs of the letter (set out in the findings of fact).

1103. It was not a detriment that, within the letter itself, there was no detailed explanation of which particular communications Mr Dryden had in mind. The letter explained that Mr Dryden was arranging for Mr Lockwood and Ms Boots to provide more detailed feedback and guidance.

1104. The reason that Mr Dryden made the comments is genuinely the reason he supplied in the letter, namely he thought that the Claimant did not always fully understand the impact that his communications could have on others and that the Claimant might benefit from a discussion about guidelines and parameters for appropriate communication going forward. He was not threatening disciplinary action in relation to past comments.

1105. Even taking into account the burden of proof provisions, we are satisfied that Mr Dryden was not motivated (even partially and even unconsciously) to subject the Claimant to a detriment because the Claimant's 6 July (or other) correspondence alleged breaches of the Equality Act 2010. The circumstances in which the concerns about the Claimant's communications came to his attention were that he was dealing with Grievance 2. However, the contents of the grievance were not his reason for highlighting the concerns to the Claimant (or for proposing the meetings with Boots and Lockwood).

1106. The victimisation complaint fails.

<u>Row 83. C being victimised for having raised his grievance on 06.07.20, specifically: Unfounded allegations of unauthorised absence from work in August 2020</u>

1107. This is alleged to be victimisation.

1108. The Claimant was actually at work on Monday 17 August 2020. Ms Donaghy's email of 4.30pm that day said that she had "been advised" that he had not attended. This seems to be a misunderstanding of what Ms Boots had conveyed to her, which was that Ms Boots was aware he was showing as offline (and not on annual leave) and so she asked Ms Donaghy to check he was OK.

1109. In Grievance 1, the Claimant had complained that in February/March 2019, it had taken too long for Ms Godfrey to notice his absence and/or to follow up on the fact that he was off-line. Mr Dryden (to some extent) agreed with him.

1110. The Respondent was being consistent, in August 2020, with what Mr Dryden said the previous year. Namely, a responsible person (in this case HR Business Partner, Hannah Boots) noted that the Claimant was off-line and asked for enquiries to be made.

1111. Although the tone of Ms Donaghy's response to the Claimant's clarification implied that there was still a problem that needed to be resolved, in fact, there was not, and Ms Boots told the Claimant that as soon as Ms Donaghy forwarded the email trail to her. [Bundle 3509]. The Claimant was happy with her clarification at the time. [Bundle 3506].

1112. Ms Donaghy's 4.30pm email was not a detriment. It was a (poorly worded, due to misunderstanding) wellbeing check. Her 4.48pm email was a detriment in that it implied that the Respondent was not satisfied with the Claimant's reply.

1113. Neither of those emails (nor Ms Boots contact with Ms Donaghy which prompted them) was because of the Claimant's protected acts. I

1114. The victimisation complaint fails.

Row 84. C being victimised for having raised his grievance on 06.07.20, specifically: Feedback from the leadership team that they had received false and misleading feedback about C, including being overly sensitive, unreasonable and that people can't say things without offending C

1115. This is alleged to be victimisation.

1116. This refers to what the Claimant asserts that Tim Moody said to him. However, taking into account the transcript of a recording which the Claimant himself made, our finding is that Mr Moody listened to what the Claimant had to say about the Claimant's interactions with others, and acted neutrally and did not commit. Without saying that the Claimant was "wrong" or "lying" he suggested that their might be two sides to the story and that others might have a different view. It was the Claimant, rather than Mr Moody, who said that he was aware that he was being painted as over-sensitive. Mr Moody said he could not comment.

1117. There are no facts from which we could conclude that the Claimant was subjected to a detriment by Mr Moody during the discussion because of any protected act.

Claim 3

(a) Unfair dismissal;

(b) Direct disability discrimination - the dismissal;

(d) Discrimination contrary to s.15 Equality Act ('something arising'). The unfavourable treatment being the dismissal. The 'something' is the conduct which led to dismissal, ie the language of the Slack traffic;

(e) Failure to make reasonable adjustment ie failure to delay the disciplinary process until the claimant was well enough and / or had concluded therapy;

(f) Failure to make reasonable adjustment ie failure to arrange advocacy.

1118. We will deal first with (f) and then with (e).

1119. The PCP for (e) and (f) is not defined. We proceed on the basis that it is: "the Respondent's disciplinary policy". That policy did not include arranging advocacy.

1120. The Claimant is potentially disadvantaged in comparison to an employee who is not disabled by the disciplinary policy.

1121. The policy said [Bundle 355]

> Employees with a disability must not be disadvantaged by the conduct process. Reasonable adjustments should be made to ensure that employees have sufficient support to enable them to participate at the same level as those without a disability. Some examples of adjustments that can be made are:
>
> - A friend or guardian can be present at a disciplinary hearing to provide support
> - In the case of speech difficulties/learning disabilities (i.e. dyslexia) the person accompanying the employee to the disciplinary hearing can speak on their behalf
> - If a learning difficulty / sight or hearing defect would affect the understanding of a written letter it will be necessary for the author to explain all written documents (invitation to attend / allegation / suspension letter / outcome etc.)
> - The location of the meeting must have access for a wheelchair if appropriate
> - Regular breaks during the disciplinary hearing if required

1122. Those were examples and not necessarily an exhaustive list.

1123. However, the Claimant was told he could have a companion, and told he could make written representations.

1124. He was not told that he could not send someone in his absence. Rather he was invited to contact Ms Walton to discuss with her if he could not attend. Based on what he wrote to her, it seemed to Ms Walton that he was inviting her to take his written representations into account and was not asking for any representative to attend in his absence.

1125. It would not be a reasonable adjustment for the Respondent to arrange the advocacy. Any advocate would have to be someone of the Claimant's choosing (or at least that he was happy with) and would have to receive instructions from the Claimant about the arguments that the Claimant wanted to make.

1126. Furthermore, the Claimant had the link for the meeting and did not send it to any representative. Nor did the union reply to Ms Walton's email sent in response to a voicemail she received, and nor did they agree to attend the appeal hearing in the Claimant's absence.

1127. It would not have been a reasonable adjustment to delay the hearing further. It had been postponed while his GP was certifying that he was not fit for work, and only arranged (for the third time) after the end of that sickness absence. The Claimant was stating that he wanted the process to be concluded asap (and that that was best for his mental health) not that it should be postponed again.

1128. The complaints of failure to make reasonable adjustments both fail.

1129. The other three complaints for Claim 3 are all about the dismissal, and so there is some overlap, but the legal tests are distinct.

1130. It is convenient to start with the comparators for the direct discrimination complaint.

1131. In the findings of fact, we have said that Ms Walton's dismissal reasons were those she sets out in the dismissal letter (and paragraph 19 of her witness statement).

1132. Even if Mr Welek were otherwise a valid actual comparator, he was dismissed too. However, for both Ms Shelton and Mr Welek, they are not actual comparators. The three of them were all part of the same Slack message exchange which contained comments which led to two dismissals and a written warning. However, each of them was judged based on what they had personally written. This was the reason that Ms Shelton received a lesser sanction. (She was also more junior than the Claimant in the organisation, which is another reason she is not an exact comparator; likewise Mr Welek was more senior.)

1133. A hypothetical comparator would have to be someone with the same abilities as the Claimant, but who did not have the Claimant's disability. They would have to have written the same things that the Claimant wrote.

1134. We do accept Ms Walton's evidence about the "reason why" she dismissed the Claimant. Even taking into account section 136 EQA, there is no evidence from which we could conclude that a hypothetical comparator would not have been dismissed.

1135. The direct discrimination complaint fails.

1136. It is convenient to next refer to the procedure briefly. As set out in the findings of fact, Ms Walton engaged with the documents which the Claimant supplied to her. As discussed in the findings of fact, and when rejecting the reasonable adjustments complaints, the Respondent gave the Claimant the opportunity to attend a hearing (and we do not ignore that the Claimant's reasons for not attending were based on medical advice) and to make written submissions (which he did). There would have been no basis to delay for a longer period of

time, and the Claimant did not want that. If the Claimant wanted the 1 March hearing to take place again, but with his union representative attending, then he could have asked for that, as could his representative. He could also have simply asked the union rep to use the Teams meeting link to join the meeting. There were no additional steps in the procedure that a reasonable employer would be expected to take before making a decision.

1137. In addition, after the dismissal, the Respondent provided an appeal. We are not criticising the Claimant for not attending the appeal hearing, but the fact is that he was given that option. He had the chance to address any errors or misconceptions that he believed formed part of Ms Walton's decision. Mr Marsden formed his own view of the merits and also decided that the dismissal had been warranted.

1138. The procedure as a whole was within the band of reasonable responses.

1139. For completeness, having considered the evidence available to her, Ms Walton had reasonable evidence that the Claimant had written almost all the comments in question. (However one of them "Bunch of cunts Let them burn") seems to have been made by Mr Welek not the Claimant.)

1140. For the section 15 complaint, the Claimant alleges that these comments are something arising from his disability. He argues that quite apart from communication difficulties being a feature of his disability, in addition, many of the comments are born of the frustration of the Respondent's failures (as he sees it) to make reasonable adjustments and the Respondent's disability related harassment and/or discrimination and/or victimisation.

1141. In terms of the latter argument, we do accept that, in principle, if there is a chain of causation, then that is potentially enough for section 15. Eg someone does something and they are dismissed for that; the reason they did it was that they were angry; the reason they were angry was a failure to make adjustments; the reason they needed adjustments was their disability. That can potentially be enough to demonstrate that the conduct for which they were dismissed was something arising in consequence of their disability.

1142. However, it is not enough to simply assert that the comments arose (directly or indirectly) in consequence of disability. The assertion has to be factually accurate.

1143. **We highlight for the Claimant's benefit that we are about to discuss some of the comments and the context in the remainder of these reasons**.

1144. The "stab stab stab" comment [Bundle 6142] on 14 April 2020 was not said in the context of any complaints about EQA breaches. The discussion started with dissatisfaction with Ms Jones and why criticism of her was justified, and then moved on to the allegation that it was the Claimant's perception that Mr Kjelstrup-Johnson was stealing his idea for a project.

1145. The “imma fuckin kill you” comment [Bundle 6137] was the Claimant telling Mr Welek that the Claimant did not like Mr Kjelstrup-Johnson because of what Mr Kjelstrup-Johnson had said about Mr Welek.

1146. The “ i just cant believe how much of a cunt he is” comment [Bundle 6145] was again in the context that Mr Kjelstrup-Johnson was allegedly stealing the Claimant’s ideas, but also in the context that Mr Welek and the Claimant were being disparaging of his technical knowledge.

1147. On [Bundle 6135] is Mr Welek talking about a meeting with colleagues that he had attended and found frustrating and said the room had been full of “business people”. The Claimant replied crossing out the word “business” and replacing it with “cunts”.

1148. The “he IS a cunt though” comment on around 5 March 2020 [Bundle 6160] was slightly connected to disability issues. A colleague supplied a supposed quote from Nick White, with the (apparent) intention of ridiculing Mr White. The Claimant replied to say that he thought the comment would help his “case” (in context, referring to his disability discrimination case, though it does not matter to the point at hand whether he meant the Claim 1 litigation or some proposed internal grievance or request). The colleague clarified that actually he had been making a joke (of sorts) and the comment “was somewhat edited to vilify”. The Claimant’s reply of “damn” and “he IS a cunt though” was not anger about ill-treatment, but rather disappointment that whatever Mr White had really said was not as potentially good evidence of discrimination as the Claimant had thought. The nail him to a cross comment also was part of the same discussion. (Ms Walton’s opinion was that the remarks were about Mr Lockwood rather than Mr White which does not matter to the point at hand.)

1149. Thus, for some of the comments at least, we are not satisfied that they were something arising from the Claimant’s disability.

1150. Some others are more closely related to the Claimant’s disputes with the Respondent (about his disability and the lack of willingness to adjust for it). We therefore will consider the Respondent’s alleged legitimate aims.

1150.1 Prevent the use of extreme foul, abusive, objectionable or insulting language about managers, colleagues, and the company;

1150.2 Prevent the use of used threatening language about managers and colleagues;

1150.3 Prevent the inappropriate use of the Respondent’s IT and communication systems;

1150.4 Maintain a workplace which is founded on mutual respect and trust;

1150.5 Ensure that every employee is treated with courtesy and respect;

1150.6 To prevent harassment and other behaviour that leads to a hostile work environment;

1150.7 To prevent threats of violence against colleagues (expressed to other colleagues but directed repeatedly and forcefully at colleagues and managers) in any work-related context.

1151. We accept that the Respondent did actually have each of these 7 aims and that each of them is legitimate.

1152. On the hypothesis that the words used (for some of the examples) were something arising from disability, we have to consider whether the discriminatory effect on the Claimant of dismissing him is a proportionate means of seeking to achieve the legitimate aim. A dismissal of any employee has major consequences for their finances and their emotional well being. For a graduate entry like the Claimant, it can also have very far reaching effects on their future career prospects. The Claimant was plainly passionate about his work.

1153. Some of the aims are slightly vague (the need for "courtesy and respect") and/or circular (prevent "inappropriate" use of IT systems).

1154. The Claimant argues that it is relevant that he was (i) joking and (ii) not making the so-called threats (and other comments) directly to the person, or with the intention that they would find out about it. We agree with the Claimant that these are relevant factors. To the extent, if at all, that he suggests the Respondent should have decided there was nothing wrong with these comments in those circumstances, we disagree.

1155. Our overall assessment (for the purposes of considering proportionality) is that the words used are very strong examples of foul language and abusiveness towards colleagues, and a profound lack of respect for the employer.

1156. There is no exact analogy to having made these remarks on Slack.

1156.1 We agree with the argument that this conduct is not nearly as bad as if these exact same comments had been said orally to the subject of the remarks, or put in a letter or email to that person, or placed on a message board (electronic or physical) where that person was likely to read them.

1156.2 The conduct is different in kind to making the comments at some social gathering that was not on work premises and not on work time. If the comments were made in someone's private residence, and not recorded, then how would they ever come to the Respondent's attention? Whereas if they were said in the pub and overheard, for example, then that might lead to all sorts of issues that do not necessarily arise in this case.

1157. The comments were, in fact, made in work time. It might not have been the Claimant's intention at the time that he made them that they would come to the Respondent's attention, but he ought to have been aware of that possibility.

1158. It seems to us that the Claimant was aware that the Respondent might regard the comments as misconduct, and that was why he chose to supply edited versions. We do not accept that the only edits were made to redact irrelevant material. He also made edits because he did understand at the time that – although he argues now it was an entirely private conversation and nothing to do with the Respondent – the Respondent might regard the comments as grounds for disciplinary action.

1159. We think it is important and significant that the Claimant's submission to Ms Walton on 24 February sought to justify the remarks and to claim that they were not abusive and not threatening.

1160. Overall, our decision is that it as proportionate to dismiss an employee for making these remarks in order to pursue the legitimate aims 2, 6 and 7 above, notwithstanding the fact that some of the remarks arose in consequence of disability. The legitimate aims 1, 3, 4 and 5, while important, would not in themselves justify dismissal without further attempt at warning and persuasion.

1161. Thus the complaint that the dismissal was disability discrimination within the definition in section 15 EQA fails.

1161.1 Some of the comments which caused the dismissal did not arise in consequence of disability

1161.2 In any event, for the remainder, the defence in section 15(1)(b) succeeds.

1162. We also have to consider whether the dismissal was within the band of reasonable responses. Our decision is that it was. These were extreme examples of foul language and insults to colleagues. It is irrelevant whether this panel would or would not have dismissed. There are some reasonable employers who would have dismissed.

1163. The unfair dismissal complaint fails.

Employment Judge Quill

Date: 28 June 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

29th June 2023

GDJ
FOR EMPLOYMENT TRIBUNALS