EMPLOYMENT TRIBUNALS

Claimant: **Mr K Ahmed**

Respondent: **National Westminster Bank Plc**

Heard at: Croydon (by CVP) **On:** 16, 17, 18 and 19 May 2023; 4 and 5 July 2023 (in chambers)

Before: Employment Judge Leith
Mrs Brooks
Mr Townsend

Appearances
For the claimant: In person
For the respondent: Miss Masters (Counsel)

JUDGMENT

1. The claimant was unfairly dismissed.
2. The claimant would have been fairly dismissed in any event within one month of the date of his dismissal.
3. The claimant contributed to his dismissal, and it is just and equitable to reduce both the basic and compensatory awards by 100%.
4. The complaint of direct discrimination is not well founded and is dismissed
5. The complaint of discrimination arising from disability is not well founded and is dismissed.

REASONS

<u>The issues</u>

1. The claimant makes complaints of direct disability discrimination, discrimination arising from disability, and unfair dismissal.

2. The issues in the claim were set out in the Case Management Order of EJ McAvoy Newns, dated 18 October 2022, as follows:

> "<u>Unfair dismissal</u>

42. What was the reason or principal reason for the dismissal? The Respondent says the reason was a substantial reason capable of justifying dismissal, namely that the relationship between the Claimant and the Respondent had allegedly irretrievably broken down. In this regard the Respondent relies specifically but not exclusively on the Claimant's:

> 42.1 allegedly threatening and inappropriate behaviour towards colleagues which the Respondent concluded posed a risk to the welfare of its other employees; and
>
> 42.2 alleged failure to engage with the Respondent.

43. Was it a potentially fair reason?

44. Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

45. The Claimant relies upon the matters set out at paragraphs 29-33 of the amended particulars of claim dated 8 September 2022, which should be read in conjunction with these issues.

Remedy for unfair dismissal

46. Does the Claimant wish to be reinstated to their previous employment? It appears from the claim form as though the Claimant does not.

47. Does the Claimant wish to be re-engaged to comparable employment or other suitable employment? It appears from the claim form as though the Claimant does not.

48. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

49. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

50. What should the terms of the re-engagement order be?

51. If there is a compensatory award, how much should it be? The Tribunal will decide:

> 51.1 What financial losses has the dismissal caused the Claimant?
> 51.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
> 51.3 If not, for what period of loss should the Claimant be compensated?

51.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? If the Respondent seeks to rely upon this, they should include particulars of this in their revised response.
51.5 If so, should the Claimant's compensation be reduced? By how much?
51.6 If the Claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct? If the Respondent seeks to rely upon this, they should include particulars of this in their revised response.
51.7 If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?
51.8 Does the statutory cap apply?
51.9 What basic award is payable to the Claimant, if any?
51.10 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If the Respondent seeks to rely upon this, they should include particulars of this in their revised response. If so, to what extent?

Disability

52. The Respondent has accepted that the Claimant had a disability as defined in section 6 of the Equality Act 2010. The disability pleaded and accepted is Bipolar Affective Disorder. It is accepted by the Respondent that the Claimant was disabled with Bipolar Affective Disorder during the entire period of the Claimant's employment with the Respondent.

Direct disability discrimination (Equality Act 2010 section 13)

53. The Respondent accepts that it dismissed the Claimant.

54.Was that less favourable treatment? The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant has not named anyone in particular who he says was treated better than he was.

55.If so, was it because of disability?

Discrimination arising from disability (Equality Act 2010 section 15)

56. Did the Respondent treat the Claimant unfavourably by dismissing him?

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

the threatening and inappropriate conduct he says he was dismissed for arose in consequence of his disability. In this regard the Claimant relies upon the contents of an occupational health report dated 13 December 2019.

58. Was the unfavourable treatment because of any of those things?

59. Was the treatment a proportionate means of achieving a legitimate aim? The Respondent shall say what its aims were in its updated response to the Claimant's claims.

60. The Tribunal will decide in particular:

60.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;
60.2 could something less discriminatory have been done instead;
60.3 how should the needs of the claimant and the respondent be balanced?

61. Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

Remedy for discrimination

62. Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

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

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

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

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

67. Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result? If the Respondent seeks to rely upon this, they should include particulars of this in their revised response.

68.Should interest be awarded? How much?"

3. We discussed the list of issues with the parties at the start of the hearing; they confirmed that the list captured the issues as the understood them to

be. We indicated at the start of the hearing that we would deal with issues of liability (plus *Polkey*/contributory fault) only.

The hearing

4. The hearing was originally listed for 3 days. EJ McAvoy Newns' CMO, following the Preliminary Hearing on 5 October 2022 did not reflect that either party had requested additional time or indicated that a 3 day listing would insufficient.

5. On 22 February 2023 the respondent applied for the hearing to be extended to 8 days. That application was refused by EJ Wright on 10 March 2023. The Respondent renewed its application, giving more detail. On 19 April 2023 EJ Andrews responded that the parties ought to be able to have the matter heard in the originally listed 3 days, but added one further day to the listing.

6. At the start of the hearing we were presented with a timetable, with which both parties broadly agreed. The timetable provided for the first day to be used for reading and hearing submissions on preliminary matter, all of the second day and until 3pm on the third day for the Respondent's evidence, the final hour of the third day and until 3pm on the 4th day for the claimant's evidence, with oral submissions on the final hour of day 4. Judgment was to be reserved.

7. Having considered the preliminary matters, we endorsed that timetable.

8. The timetable provided for an allocation of time for each of the respondent's witnesses. We indicated to the claimant that we would not cut him off when the timetabled allocation for that witness had expired, and that it was open to him to take longer with some witnesses provided he was then shorter with others. We reminded the claimant on each occasion when he was getting towards the end of the timetabled allocation for that witness.

9. The claimant struggled to keep within the allocated time, and by the end of day two (despite finishing later than normal) we were one hour behind the timetable. We started at 9.30am on day 3 in order to make up time. At the start of day 3, we proposed that rather than dealing with submissions orally, we would take written submissions. The respondent's evidence could then go on until the end of day 3, with the claimant's evidence taking all of day 4. The parties agreed, although Miss Masters expressed some concern about getting through all of the claimant's evidence in one day. We started at 9.30am on day 4, and finished evidence shortly after 4pm.

The "*Without Prejudice"* material

10. Both parties, for different reasons, wished to rely on a meeting which took place on 18 May 2020. It was common ground that the meeting was

intended to take place under the cloak of without prejudice privilege, and in accordance with section 111A of the Employment Rights Act 1996.

11. The respondent's position was that the way the claimant had conducted himself in that meeting constituted unambiguous impropriety, and engaged s.111A(4) ERA 1996. The claimant's case was that the way that the Respondent sent up and conducted the meeting also constituted unambiguous impropriety and engaged s.111A(4) ERA 1996, in that it was in breach of the Equality Act 2010. Because of their differing rationales for seeking to assert that aspects of the meeting were not privileged, the parties did not agree a joint waiver privilege in respect of the meeting.

12. Having heard from both parties at the start of the hearing, we decided, for the reasons we gave orally at the time, that we would hear all of the evidence before making a decision on the admissibility of the meeting of 18 May 2020. We heard the evidence regarding the meeting on 18 May 2020 in private.

13. The claimant had additionally made an application for specific disclosure of any internal notes and documents regarding the 18 May 2020 meeting. The Respondent's position was that any such notes and documents would necessarily be privileged if the 18 May 2020 meeting was privileged.

14. We indicated to the parties that, given that privilege was being asserted in the documents sought, and given that such privilege would stand and fall based on our findings regarding the 18 May 2020 meeting, we would not direct such disclosure at the start of the hearing. We noted that, if we concluded that the 18 May 2020 meeting was not covered by both without prejudice privilege and s.111A ERA 1996, we would invite further submissions from the parties before deliberating on the substantive outcome of the case (and may direct further disclosure if appropriate).

Evidence

15. On behalf of the respondent, we heard evidence from the following witnesses (in each case, the reference is to their role at the relevant times):
    a. Teresa Dougan, Case Consultant in the respondent's HR Policy & Advice function;
    b. Elaine Priest, Chief Data Officer;
    c. Aled Roberts, CDO Data Profiling Service Manager;
    d. Chris Bouwers, Head of Data Capability;
    e. Graham Ward, Head of Data Management Service; and
    f. Zachary Anderson, Chief Data Analytics Officer.

16. We heard evidence from the claimant, Mr Ahmed.

17. All of the witnesses gave their evidence via pre-prepared witness statements, on which they were cross-examined.

18. A witness statement was also tendered from Barry Latter. Mr Latter did not give evidence. There was in evidence before us a letter from Mr Latter's GP, addressed "to whom it may concern". The letter noted that Mr Latter was experiencing a significant amount of stress in relation to the hearing, which was causing him debilitating anxiety. The letter then said this "…I would be grateful if you could consider the impact of the case on his own mental health and provide additional support wherever possible. Given his current symptoms, he feels he would be unable to cope with the court case, and is currently unfit to attend".

19. The GP letter drew a distinction between the GP's advice, which was that additional support should be provided to Mr Latter, and Mr Latter's own opinion, which was that he was unfit to attend the hearing. We do not read the GP's advice/evidence as being that Mr Latter was medically unfit to attend. The respondent did not apply for the hearing to be postponed in light of Mr Latter's unwillingness or inability to attend. In the circumstances, because Mr Latter has not attended to be cross-examined, we give only limited weight to his witness statement.

20. We had before us:

    g. A core bundle of 1373 pages
    h. A supplementary bundle of 1014 page
    i. A "without prejudice" bundle of 217 pages, the majority of which constituted unredacted copies of the witness statements (redactions having been made in respect of the meeting of 18 May 2020).

21. We indicated to the parties that we would only read documents that we were specifically taken to in the course of evidence and submissions.

22. We received written submission from the respondent on 30 May 2023, and from the claimant on 6 June 2023, on accordance with the directions we had given at the end of the evidence. The respondent had been given the opportunity to provide brief submissions in response to the claimant's written submissions, but elected not to do so. We do not set out the submissions in this judgment save by reference; however we have had regard to them in reaching our decision.

Findings of fact

23. We make the following findings of fact on balance of probabilities. We have not made findings on every factual matter that was canvassed before us. We have focused on the key factual matters necessary to reach a conclusion on the issues in the claim.

24. The respondent is a major retail bank. The claimant was employed by the respondent as a D&A Analyst from 8 March 2018. The role of D&A Analyst fell within the respondent's Technical Specialist job category.

25. The respondent has a disciplinary policy. The policy contains a list of examples of Gross Misconduct, including the following:

> "Physical or verbal assault
> Bullying or harassment
> Serious and/or persistent neglect of NatWest Group instructions
> Any other unacceptable conduct, inside or outside of work, considered to be, or have the potential to be, seriously detrimental to the bank, its reputation, property, employees, customers or members of the public or which otherwise irreparably damages the working relationship and trust between you and the bank"

26. The claimant's role sat within the respondent's Chief Data Office. The claimant initially reported to Mike Aungier, Lead Developer. The claimant already knew Mr Aungier; they had a friendly relationship outside work.

27. In October 2018, Mike Aungier left the respondent's employment. Barry Latter became the claimant's line manager. Both Mr Aungier and Mr Latter reported to Aled Roberts, Chief Data Office Data Profiling Service Manager. Mr Roberts reported to Elaine Priest, the Chief Data Officer.

28. In the early part of his employment, the claimant was involved in devising an architecture for a software product that would be used within the Chief Data Office. The claimant was asked by Elaine Priest to present his work to the CDO management team. The claimant delivered the presentation on 5 November 2018. The software was called "InfoMap", and the project to develop it was referred to as Project Tungsten.

29. The claimant was recognised by Elaine Priest for his work on InfoMap. He was awarded an "Acclaim" for his work in developing it. An Acclaim is a type of staff recognition within the respondent. It takes the form of a voucher recognising work contribution.

30. As of early 2019, the claimant was working on Project Tungsten for a significant part of his working week. Barry Latter had some concerns about whether the claimant had the right skill set to implement the architecture he had designed, and concerns were also raised about the claimant being disruptive to the project. The claimant's evidence was that Barry Latter removed him from the project without warning. Mr Latter's evidence was that the claimant asked to stop working on the project, but he would have removed the claimant had he not asked to stop working on it. We do not need to resolve that factual dispute; it is in any event common ground that the claimant stopped working on the project in March 2019.

31. Meanwhile On 16 January 2019, Barry Latter and Aled Roberts met with the claimant to discuss concerns about the claimant's approach in work. The claimant emailed Mr Latter and Mr Roberts that afternoon to thank them for their time. He indicated that he would make more of an effort to check with Barry before doing things, and that he would double-check all of his

communications at work to ensure that they were appropriate and reduce the risk of upsetting anyone.

32. On 22 February 2019 the claimant emailed Mr Roberts to complain that Barry Latter was "persecuting" him. He asked Mr Roberts to arrange a three way meeting. Mr Roberts did so; the meeting took place later that day. The meeting became heated, and Mr Latter raised his voice towards the claimant. The claimant's evidence, which Mr Roberts agreed in evidence was broadly accurate, was that Mr Latter told the claimant "you think you're so special Karim, you have ruined my weekend with my girlfriend" then got up and walked out of the meeting.

33. The claimant, Mr Latter and Mr Roberts met again on Monday 25 February 2019. Mr Latter apologised for the way he had spoken to the claimant on the previous Friday.

34. The claimant's evidence was that Mr Latter's reaction, and more broadly the breakdown in the relationship between the claimant and Mr Latter, was caused by Mr Latter having problems in his private life that were affecting his anger management. Mr Roberts agreed in evidence that he was aware that Mr Latter was going through difficulties in his personal life, and also had health problems. Mr Roberts acknowledged that there were challenges on both sides of the relationship between the claimant and Mr Latter. His evidence was that when he arranged the three-way meetings, his intention was to get to the bottom of the issues between them.

35. On the following day (26 February 2019), the claimant emailed Mrs Priest to complain about Mr Latter. He explained that he wanted mediation with Mr Latter. Mediation did subsequently take place.

36. On 27 February 2019, Mr Latter emailed Mr Roberts to complain about the claimant. He indicated that he had concerns about the claimant's behaviour, and that he felt that the claimant was difficult to manage.

37. On 2 March 2019, the claimant emailed Mr Latter. The email started "Our problem might be that you are struggling to manage a leader." It concluded "You need a different approach. That may sound harsh but I would betraying us both to claim otherwise, and be denying the plain truth. Mediation could work but it's only one part of the equasion [*sic*]". The claimant's evidence before the Tribunal was that he stood whole-heartedly by the email. His evidence was that he did not regard the email as inappropriate.

38. On 13 March 2019, Richard Lott emailed Mr Latter to indicate that the claimant had called him a "big baby". Mr Lott was a contractor engaged by the respondent. The claimant's evidence to the Tribunal was that he had called Mr Lott a "big baby", but that it was a jovial term.

39. On 19 March 2019, the claimant asked a question about secondments during a Q&A session with Frank Meere, the respondent's Head of Data and Analytics. Mr Roberts' evidence was that he considered that the question

was pointed at himself and Mr Latter, related to the claimant's work with Project Tungsten. His evidence was that it caused them embarrassment and created and awkward atmosphere.

40. The claimant was absent from work between 3 April and 11 April 2019, due to stress related problems.

41. At some point in April 2019, the claimant received an email from his Trade Union, Unite, indicating that redundancies were being proposed in another part of the respondent's organisation, Enterprise Solutions.

42. It is common ground that after receiving that email, the claimant discussed with colleagues in CDO the possibility that there may be redundancies. It was common ground also that two colleagues raised the matter with Paul Braddick, CDO Data Profiling Team Leader. Mr Braddick discussed it with Aled Roberts as the claimant's senior manager. He did so because the staff who had raised it with him were concerned about the possibility of redundancies.

43. On 16 April 2019 the claimant emailed Mr Roberts to ask if the respondent was planning to make any redundancies in CDO. Mr Roberts indicated that there were no planned redundancies in CDO. The claimant replied "I'll sleep better!".

44. There was a dispute about the date on which the claimant mentioned the possibility of redundancies to colleagues in CDO. Mr Braddick's evidence to the claimant's subsequent grievance was that it had taken place on 15 April 2019. The claimant's evidence to the Tribunal was that he did not discuss it with colleagues until after his email exchange with Mr Roberts. During the internal grievance process, the claimant was shown Mr Braddick's statement. He did not take issue with the chronology set out in it at the time. His evidence to the Tribunal was that that was an oversight on his part.

45. We find that the claimant discussed the possibility of redundancies with colleagues on 15 April 2020, before he had emailed Mr Roberts. We consider that if the chronology set out by Mr Braddick was wrong, the claimant would have raised that during the grievance process (which he was given the opportunity to do). We consider it is also less likely that the claimant would have discussed possible redundancies with colleagues after he had been told by Mr Roberts that here were no redundancies planned in CDO; particularly as his response to Mr Roberts appeared to show that he was satisfied by the answer Mr Roberts had given him.

46. Mr Roberts subsequently discussed the matter with Elaine Priest. We find that he did so in order to check that he was right in his understanding that there were any proposed redundancies within CDO; his intention was not to cause trouble for the claimant.

47. The claimant was upset that Paul Braddick had raised the matter with Aled Roberts, and that Mr Roberts had discussed it with Elaine Priest. On 26 April 2019 he emailed Mr Roberts, Mr Braddick and Mr Latter with the subject line "Please read this VERY important article then book in a meeting with me to discuss it when Barry is back". The article was entitled "Workplace Betrayal". On 29 April, the claimant emailed Mr Roberts stating that "the door is still open for a frank and honest apology by both Paul and yourself by the way". On 30 April 2019, he emailed Mr Roberts, Mr Braddick and Mr Latter with a link to an article entitled "how complaining turns co-workers into friends".

48. On 2 May 2019, Aled Roberts had a documented discussion with the claimant regarding the redundancy issue. The notes of that meeting indicated that the outcome, in terms of the expectation on the claimant, was recorded as follows:

> "Do not discuss unsubstantiated rumours with colleagues that will cause alarm, but rather raise the topic with your manager."

49. On 9 May 2019, the claimant raised a grievance about Mr Roberts and Mr Braddick (referred to for reference as "G1"). He alleged that he had been bullied, in that discussions he had had with colleagues about his concerns had been escalated to Elaine Priest as being "disruptive" behaviour. Bianca Partington was appointed to investigate the claimant's grievance.

50. On 23 May 2019, a colleague emailed Mr Latter complaining about the claimant's behaviour. The complaint noted that the claimant's behaviour had left another colleague "cowering". The claimant was taken to the complaint email in the course of cross-examination. His evidence to the Tribunal was that the fact that the colleague appeared to be cowering may have indicated that she had an insecure personality. His evidence was that all he (the claimant) had done was to be assertive, and that he sometimes raised his voice for emphasis.

51. The claimant was absent from work between 28 May 2019 and 26 July 2019. He was then on annual leave, so he did not return to work until 19 August 2019 (on a phased return to work).

52. While the claimant was absent, Ms Partington's investigation into his grievance continued. She met with Aled Roberts, Paul Braddick and Elaine Priest. The claimant was sent the minutes of those meetings before his own grievance meeting, which took place on 26 June 2019.

53. Ms Partington concluded that the claimant's grievance was not upheld. She wrote to the claimant on 23 July 2019 explaining her outcome. The claimant appealed, and Tom Devlin was appointed to hear claimant's appeal.

54. On 29 August 2019, Mr Braddick emailed Mr Roberts to raise concerns about continuing to work with the claimant. He indicated that he considered that it was unacceptable that he and other members of the team were being

asked to continue to carry out work with what he described as “a disruptive influence”.

55. The claimant had a documented discussion with Bary Latter on 26 September 2019. Emma MacRae attended as a note-taker. Mr Latter explained that the purpose of the meeting was to discuss concerns around the claimant’s performance and behaviours, and to support the claimant to get back on track. At the end of the meeting, Mr Latter set the claimant some expectations around work and around behaviours. He explained that he also had concerns about the time that the claimant was spending away from his desk, and the length of the breaks he was taking. It was agreed that the claimant would be referred to Occupational Health.

56. In the period following that meeting, Barry Latter raised concerns internally about the claimant on various occasions:

    a. By email to Graham Ward, Head of Data Management Service and ePrivacy, on 30 September 2019, in which he referred to the claimant’s emails becoming “untrue, unreasonable, hostile and offensive in tone”, and indicated that the claimant did not tolerate negative feedback. He noted that, since the documented discussion on 26 September, the claimant had sent him what he described as “unreasonable and highly accusatory” emails.
    b. By email to Graham Ward on 1 October 2019, in which he asked for help in dealing with an email from the claimant disputing the substance of the documented discussion around working time.
    c. By email to Wendy Johnson in HR on 1 October 2019, indicating that he felt “manipulated and harassed” by the claimant.
    d. Verbally to Victoria Cole, Specialist Advisor in HR on 2 October 2019. In a follow up email he noted that he ended up taking the afternoon off after their call as he was still shaking an hour later.

57. On 7 October 2019 the claimant raised a grievance about Barry Latter and Emma MacRae, in respect of the documented meeting they had held with him (G2). Michael Clowes was appointed to hear the grievance.

58. The grievance appeal meeting in respect of the first grievance (G1) took place on 11 October 2019.

59. On 31 October 2019 the claimant consented to being referred to Occupational Health. The appointment took place on 11 November 2019, and the report was sent to the respondent on the same day [627].

60. Under the heading “Clinical Information”, the report included this:

> “Mr. Ahmed states he was diagnosed with depression by his GP in 2016 following a period of trauma, hospitalisation and being diagnosed with a mental health issue of which he contests.”

61. The report made the following recommendations:

> "After taking a clinical history from Mr. Ahmed today, it is within my professional opinion that he remains fit for work. Although Mr. Ahmed states he was diagnosed 4 years ago with a mental health issue, he does not appear to be affected by any of the known symptoms at present. In light of this information, I have arranged to gain Mr. Ahmed's consent to enable me to write to his GP for further clinical support.
>
> It may be useful to undertake a Stress Risk Assessment as Mr. Ahmed has disclosed work related issues as being the factors affecting his emotional health. Such an assessment would highlight perceived stressors within the role and provide focus on potential ways of eliminating these or reducing them to as low as is reasonably to as low as is reasonably practicable, since stressors may aggravate health symptoms. A Stress Risk assessment needs to be a living document and reviewed periodically to establish whether control measures have been implemented and if they have had the desired effect.
>
> I have carried out a psychological screening assessment today with Mr. Ahmed, which is designed to measure key indicators of mental health. His symptoms were measured at no clinical concerns for depression (4) and a mild level for anxiety (6) using the mental health screening tool. These results indicate that he does not currently require any clinical support at present but may wish to share the results with his GP for reference."

62. Meanwhile, in light of the breakdown of the relationship between the claimant and Mr Latter, on 8 November 2019 Aled Roberts took over line management of the claimant.

63. Mr Devlin investigated the claimant's grievance appeal (G1) by interviewing Mr Roberts, as well as considering relevant documents. He concluded that the appeal was not upheld. He wrote to the claimant on 25 November 2019 to explain his decision. The claimant emailed Mr Devlin challenged the outcome, and indicated that he may raise a grievance against Mr Devlin.

64. On 27 November 2019, Amanda Gwilliam from the respondent's HR function wrote the claimant to explain that the grievance appeal (in respect of G1) was final and matter now closed.

65. Meanwhile, on 25 November 2019 the claimant emailed Graham Ward making allegations about Aled Roberts and Barry Latter. He accused them of discriminating against him, harassing him and making a "bogus" attempt to discipline and dismiss him.

66. On 29 November 2019, the claimant lodged a grievance against Tom Devlin and Amanda Gwilliam regarding the conduct and outcome of his grievance

appeal regarding G1 (G3). The claimant was informed that he could not raise a grievance about his grievance appeal.

67. On 9 December 2019, the claimant requested further review of the grievance appeal outcome decision (regarding G1).

68. On 13 December 2019, the respondent received a further Occupational Health report. It was headed "Interim Report", although it was the last piece of Occupational Health advice the respondent received regarding the claimant. Regarding the claimant's diagnosis, it said this:

> "Within the Specialist report they state that Mr. Ahmed has been diagnosed with Bipolar Affective Disorder for which he remains on oral medication at night-time. Mr. Ahmed has contested this diagnosis and has had his case assessed by an independent specialist who has now concurred with the original Specialist diagnosis, as advised above."

69. In response to a question about whether the claimant was fit to attend meetings, it said this:

> Is the employee fit to attend meetings? Mr. Ahmed is currently fit to attend meetings. I would recommend that he is given an agenda prior to any meetings to enable him to prepare for such activities and may benefit from having a "buddy" with him from work for support.

70. Under the heading "Recommendations", it said this:

> "After taking a clinical history from Mr. Ahmed today, it is within my professional opinion that he remains fit for work with the guidance and advice recommended within my report.
>
> Mr. Ahmed has been diagnosed with a significant mental health condition, which is long standing (bipolar affective disorder). Individuals with bipolar affective disorder experience extremes of mood from the lows of depression as well as the highs of a very elated and overactive mood (known as mania). The elevated mood can be so extreme that sometimes the person loses contact with reality and starts to believe strange things. They can have poor judgement and behave in embarrassing, harmful or even dangerous ways. There is no cure for this condition and treatment is aimed at controlling symptoms to reduce the frequency, severity and length of any exacerbation.
>
> I would recommend that Mr. Ahmed and his manager have regular 1-2-1 meetings moving forward so that he has the regular opportunity to discuss any concerns he may have.

To support Mr. Ahmed in the work place I would recommend that he be allowed additional breaks and time out in a quiet area so he can refocus should his symptoms become exacerbated.

Mr. Ahmed will continue to be reviewed by his clinical team. I would recommend that he have the ability to take time off work to attend medical appointments to enable him to receive the most up to date clinical support and to have his chronic condition monitored.

A Wellness Action Plan (WAP) is recommended to help the employee to think about what he needs to keep well at work, how to identify the signs or triggers for ill health, what to do if a crisis occurs and how to get back on track after a crisis. WAP's can include strategies for keeping well, dealing with difficulties and crises, returning to work after a relapse and self management)…"

71. On 17 December 2019, the claimant was told that his grievance regarding the conduct and outcome of his grievance appeal (regarding G1) could not proceed (G3).

72. The claimant was absent from work from 18 December 2019 to 27 December 2019, and again from 14 to 18 Jan 2020.

73. On 9 January 2020, Mike Clowes sent the claimant copies of the witness statements he had taken from Barry Latter, Elaine Priest, Aled Roberts, Richard Lott and Emma MacRae (G2). He offered the claimant the opportunity to comment on their evidence. In response, the claimant provided further evidence.

74. On 16 January 2020, Mr Clowes sent the claimant a copy of the witness statement he had taken from Amanda Gwilliam (G2). Again, he offered the claimant the opportunity to comment on her evidence.

75. Mike Clowes subsequently concluded that the claimant's grievance was not upheld (G2). He wrote to the claimant on 2 February 2020 to explain his decision.

76. On 7 February 2020, Aled Roberts wrote to the claimant documenting and commenting on the standards required of him, and areas where improvement was required. The letter noted that concerns had been identified regarding:

    a. Prioritisation;
    b. Proposing ideas (and working on matters outside his BAU activity without discussing with his line manager first);
    c. Resistance to management conversations;
    d. Attendance and timekeeping;
    e. Spending an unreasonable amount of time (up to 30% of working time) dealing with HR processes such as grievances;
    f. Disruptive behaviour;

g. Attempts to influence opinion against management;
h. Discrepancies in feedback provided by the claimant for his end of year review.

77. In January 2020, Chris Bouwers took over line management of the claimant, as part of a restructure of the Data Management Service.

78. On 29 January 2020, Aled Roberts asked the claimant to complete a stress risk assessment. The claimant did so. He discussed the risk assessment form with Chris Bouwers on 4 and 5 Feb 2020. Mr Bouwers captured those discussions in an email of 14 Feb 2020. He noted that the claimant did not agree with his diagnosis of Bipolar Affective Disorder, that and that he did not require any adaptations related to his health, working pattern or environment (apart from an existing adjustment allowing him to take a two-hour lunch break).

79. On 18 February 2020, Mr Bouwers called the claimant. Mr Bouwers' evidence was that the claimant answered the phone as "James". Mr Bouwers understanding at the time was that the claimant must have been expecting a call from someone called James.

80. During the conversation, Mr Bouwers attempted to discuss why the claimant appeared to be offline at various times during the working day. He also attempted to discuss the claimant's working pattern. Mr Bouwers characterisation of that conversation, with which the claimant agreed when it was put to him in cross-examination, was that claimant kept moving the conversation with away from those topics. Mr Bouwers had to try on around eight occasions to return the conversation to the question of claimant's apparent absence during working hours.

81. On the same day, the claimant emailed Mr Bouwers entitled "Conflict resolution". The claimant explained that he regarded his relationship with Mr Bouwers as being a conflict situation where he felt unsupported and ignored by his manager. He then said this:

> "Please could we try to meet in the middle instead of me feeling like there is only one way to do things, which is how it's begining to feel....again."

82. The claimant's evidence was that he was trying to avoid raising a grievance. Given the claimant's previous history of raising grievances, and the reference to "…again", we find that the implication of the email was that the claimant was considering raising a grievance, and that he was letting Mr Bouwers know about it. We do not consider that the email was intended to be overtly threatening; rather it was an indication of the claimant's intended course of action.

83. On 19 February 2020 the claimant emailed Mr Bouwers with an extract from document he received via a Subject Access Request. The extract was of a note from the respondent's HR case management system. He asked Mr

Bouwers to arrange for either Barry or Aled to apologise for him for a comment in the note that suggested that "the Business" wanted to sack him. The claimant accepted in evidence that he was trying to find out who was responsible for the comment in the note, and trying to get Chris Bowers to confront them on his behalf.

84. Chris Bouwers arranged to meet the claimant on the afternoon of 21 February 2020. The purpose of the meeting was to discuss concerns that Mr Bouwers had regarding the claimant, which related to:
    a. Unexplained lateness at start of day and lunchtime;
    b. Leaving the office to go home during working hours, without prior explanation;
    c. Failing to deliver on BAU work activities;
    d. Failing to log on when the claimant was supposed to be working from home;
    e. The claimant stating he was unable to log on from home, but declining to report issues to support desks or work from his office location; and
    f. Failing to report sickness absence within a reasonable time.

85. So concerned was Mr Bouwers about the claimant's practice of leaving the office unexpectedly during working hours, he spoke to the claimant that morning and explicitly asked him to stay in the office until the meeting had taken place.

86. In advance of the meeting, Teresa Dougan provided Mr Bouwers with a script for the meeting. That script suggested that, after discussing the areas of concern, the claimant would be put on investigatory suspension.

87. Mr Bouwers evidence was that suspension was one possible outcome, but that it would depend on what explanation claimant gave in respect of the concerns.

88. The claimant was permitted to be accompanied at the meeting by Emma MacRae.

89. Mr Bouwers' evidence was that the claimant answered "no comment" to every question he was asked in the meeting, and that he became visibly angry and aggressive and told Mr Bouwers that he would "cause gross misconduct" against him.

90. The claimant's evidence to the Tribunal was that he could not recall saying "no comment", but that he regarded it as unlikely he would have done so given what he described as his "effusive nature". He did not, however, make any suggestion as to how he had answered Mr Bouwers' questions. Given that Mr Bouwers gave clear evidence about his recollection of the meeting, but that the claimant's evidence was only that Mr Bouwers' recollection sounded unlikely, we prefer Mr Bouwers' evidence. We find that the claimant refused to answer the questions he was asked by Mr Bouwers.

91. The claimant accepted in cross-examination that he felt angry during the meeting, but he denied becoming aggressive, clenching his fists or his face straining. He also denied saying that he would "cause gross misconduct" to Mr Bouwers. His evidence was that that was not the kind of thing he would ever say.

92. Mr Bouwers evidence on the point was clear and consistent. The phrase said to have been used was an unusual one; we consider that it is an odd detail for Mr Bouwers to have invented. The claimant accepted that he was angry during the meeting. We find that the claimant did present angrily and aggressively, although he may not have recognised that he was presenting in that way. We also find that the claimant did tell Mr Bouwers that he would "cause gross misconduct" against him.

93. At the conclusion of the meeting, Mr Bouwers explained to the claimant that he was suspended pending investigation under the respondent's Disciplinary Policy. He sent the claimant an outcome letter on the same day, confirming the suspension. The letter made it clear that while suspended, the claimant was not permitted on the respondent's premises.

94. On 6 March 2020, the claimant raised a grievance about the decision to suspend him (G4). The claimant indicated that the outcome sought was "Garden leave until I decide to resign – I will so as soon as my new business ventures are up and running". On 20 March 2020, the respondent wrote to the claimant to indicate that his grievance would be considered alongside the disciplinary investigation.

95. Tony Beales was appointed to investigate both the disciplinary allegations and the grievance (G4). On 27 March 2020, Mr Beales invited the claimant to an informal investigation meeting. The meeting was scheduled for 2 April 2020, although it took place on 7 April 2020. During the meeting, the claimant indicated that he could not answer questions about his whereabouts on any given day without access to his work calendar. Mr Beales agreed to give the claimant access to his calendar, and to reconvene the meeting once he had done so.

96. On 13 May 2020, Mr Bouwers emailed Samantha Miller to set out more detail regarding the reason for the claimant's suspension. The email explained why the respondent did not take any alternative to suspension. The concluded "Given the above, for his wellbeing it was decided that it was best to proceed with paid suspension to give time away from the office, and remove interaction from people who he was accusing of bullying to ensure his mental wellbeing, given his diagnosis of bi-polar I did not find it prudent to continue to add the extra stresses that come with working and the office environment he was describing."

97. Read in context, we do not consider that Mr Bouwers was saying that that was the reason for the suspension. The email was sent some three months after the suspension. We accept Mr Bouwers' evidence that the reason for considering suspension was the alleged misconduct. Mr Bouwers' email to

Ms Miller captured the reasons why there was no viable alternative to suspension (albeit that the detail set out in the email of 13 May might not have been at the forefront of Mr Bouwers' mind when he made the decision to suspend).

98. At some point in mid-May 2020, the claimant parked two campervans in the car park of the respondent's property at 149 Preston Road, Brighton (his normal place of work).

99. It was put to the claimant in cross-examination that he was living in the campervans at the time, which he denied. There was no direct evidence before us that he was doing so. We find that the claimant was not living in the campervans, but that he visited them from time to time during the time they were parked on the respondent's premises. That was, of course, in breach of the instruction in his suspension letter.

100. The property next door to the respondent's offices on 149 Preston Road was also owned by the respondent. It was not being used by the respondent at the relevant times. The respondent permitted people to reside there, to look after the property. The respondent referred to them as "guardians".

101. On Sunday 17 May 2020, it was alleged that the claimant had behaved in an aggressive and confrontational manner towards one of the guardians. The allegation was reported to Graham Ward and Chris Bouwers by the respondent's security team in the following terms:

> "…One resident called to him from the ground floor kitchen and asked him what was happening. He apparently became aggressive and confrontational, striding over and shouting through the window into the house at her. I understand this scared her. He continued to rant about several things, including interactions with his wife and having to hide from the Police, hence parking at the back of the car park. He has also been sitting on the wall at 149. I understand some of the guardians are very unnerved by his presence, the fact that he has recently been in Police custody and due to his propensity for erratic behaviour and sudden anger…
>
> I would conclude by reiterating that this is third party information from several, albeit from what I believe to be reliable sources, but would proceed with caution…"

102. The claimant's evidence was that he was "assertive" in response to what he described as an "ignorant response" from the guardian. The claimant denied behaving inappropriately, although he accepted that the interaction with the guardian turned in to a heated discussion on both sides.

103. We find that the claimant did act in an inappropriately aggressive and confrontational way towards the guardians on 17 May 2020, for the following reasons:

a. The claimant accepted in evidence that the interaction had turned "heated".
b. It was in the context of a situation where he was being challenged about parking his campervans in a place where he ought not to have been parking them.
c. It is in our view telling also that, in his evidence to the tribunal, he described the trigger for the situation as being the guardian giving an "ignorant response".

104. The claimant attended a Zoom meeting with Chris Bouwers on 18 May 2020. There were no notes of the meeting, but there was in evidence a script that had been prepared for Mr Bouwers to use. The claimant agreed in evidence that Mr Bouwers read the script out in the meeting.

105. The claimant was not sent an agenda in advance of the meeting. Nor was he explicitly asked if he wanted to bring a companion or buddy to the meeting with him. Mr Bouwers evidence was that if the claimant wanted a buddy or companion at a meeting, the onus was on him to organise it. We accept that that was Mr Bouwer's understanding of the Occupational Health advice.

106. At the start of the meeting, Mr Bouwers outlined the purpose of the meeting as being to have a confidential off the record conversation about a proposal. He explained that the discussion would be a protected conversation, which he indicated was a form of "without prejudice" discussion. He asked the claimant "is that OK with you? If so we can discuss the details."

107. The claimant accepted in evidence that he indicated to Mr Bouwers that he was happy to proceed with the meeting. His evidence to the Tribunal was that he did so because he was so traumatised at that point that he froze. We do not accept that evidence, for the following reasons:

a. Mr Bouwers evidence was that he understood that the claimant was already looking for a "managed exit" from the respondent. That is consistent with what the claimant said in his fourth grievance (G4), when he indicated that the resolution he was looking for was garden leave pending an exit from the respondent's employment. So we consider that a discussion about some form of "without prejudice" offer would not have come out of the blue.
b. It is inconsistent with the evidence the claimant gave about himself and his own character. He described himself, at various points in his evidence, as "assertive" "remarkable" and "exceptional in everything I do". We consider that in the circumstances, it is inconsistent that he would have "frozen" when a without prejudice discussion was proposed.

108. We therefore find that the claimant willingly agreed to enter into the without prejudice conversation with Mr Bouwers.

109. During the course of that meeting, Mr Bowers discussed the potential disciplinary matters with the claimant. He mentioned that there was a potential further disciplinary allegation in respect of a business the claimant was apparently operating called “Agile Love”, which was linked from the claimant’s LinkedIn page, and which in turn linked to a website sexually explicit content (we deal with this in further detail later on in our findings). The claimant accepted in evidence that when Mr Bouwers raised those points in the meeting, he accused Mr Bouwers of cyber stalking him.

110. The claimant accepted that he then told Mr Bouwers that he was “on [the claimant’s] list”. The claimant’s evidence was that he was making a list of people who had been visiting his LinkedIn profile, as he was considering taking legal action against them. His evidence was that the list included Mr Bouwers and Mrs Priest.

111. Mr Bouwers evidence is that the claimant additionally told him that he would “take [him] apart”. The claimant denied saying this. We prefer Mr Bouwers’ evidence, for the following reasons:

a. It was a very specific form of words; if Mr Bouwers had made it up, we consider it is unlikely that he would have made up such a specific form of words.
b. The claimant did not suggest to Mr Bouwers in cross-examination that he had made it up.
c. It flows from the comment the claimant made regarding his list; which was clearly intended to be threatening.
d. It is credible and consistent, bearing in mind the other occasions where we have found that the claimant behaved in an aggressive or threatening manner.

112. In the context, we do not consider that the comment that the claimant would “take [Mr Bouwers] apart” was a threat of physical violence. We consider rather that it was a threat of legal action or something similar.

113. The claimant was detailed under the Mental Health Act from 19 May 2020 to 5 June 2020.

114. On 16 June 2020, the claimant informed Mr Bouwers that he was under Police investigation and that his electronic devices had been seized. He did not explain why he was under Police investigation.

115. On 22 June 2020, Chris Bouwers wrote to the claimant. He reminded the claimant that he should not enter his place of work while suspended without his line manager’s agreement, and that this included the car parks. He informed the claimant that Tony Beales’ investigation, which had been put on hold while the claimant considered the contents of the meeting on 18 May 2020, would resume. He additionally informed the claimant that a further allegation would be added regarding the Police investigation that the claimant had disclosed.

116. On 23 June 2020, as a result of some queries raised by the claimant, Mr Bouwers wrote to him to confirm the basis of his suspension.

117. On 26 June 2020, Mr Bouwers to ask the claimant to consent to a further Occupational Health report. The claimant initially consented, and an appointment was arrange for 10 July 2020. The claimant did not attend the appointment, and on 18 July he sent a text message to Mr Bouwers to say that he did not want an Occupational Health assessment. Mr Bouwers asked the claimant to reconsider, but he did not give consent.

118. On 10 September 23020, Mr Bowers wrote to the claimant reminding him of the importance of keeping in contact in line with the suspension contact plan, and asking the claimant not to contact him outside working hours.

119. On 17 September Mr Beales wrote to the claimant to invite him to a further investigation meeting. He explained that the claimant could take a colleague with him to the meeting for support. He indicated that:

a. The claimant's calendar had been accessed, and the relevant extracts would be sent to the claimant by email attachment.
b. Two further allegations had come to light since the previous investigation meeting. The first was the existence of the Police investigation, which the claimant had disclosed. The second was the claimant's LinkedIn page, which mentioned his employment with the respondent, but also referred to other outside business interests.

120. The reference to outside business interests was to two external business apparently being operated by the claimant:

a. "Agile Business Development". There was in evidence before us a copy of the website of Agile Business Development, screenshotted on 27 August 2020. The website bore the claimant's name and photograph. It gave the address of the business as 149 Preston Road, Brighton (the respondent's premises, and the claimant's place of work). The website described the business as having an "airy Brighton office with free car parking". The claimant accepted in evidence that he had never asked permission to use the respondent's address for his business.

b. "Agile Love". There was in evidence before us screenshots from the Agile Love website. The website for Agile Love linked to a third business/website called "Skin Map". Screenshots from that website were also in evidence before us. The claimant accepted that the images on the website (of the claimant) were sexually explicit. The website offered £25 online sensual massages. The claimant accepted that what he was offering, via the Agile Love/Skin Map, was "sex work". The Skin Map website gave claimant's name as "James". The claimant linked to the Skin Map website from his LinkedIn profile. The claimant's LinkedIn profile made it clear that he was employed by the respondent. The claimant (fairly and sensibly) indicated in

evidence that he had "some sympathy" for the view that that linkage could damage the respondent's reputation. However when it was suggested to him that it might make colleagues uncomfortable, he said that he placed responsibility for that on gossip between colleagues, because there was no reasonable reason for colleagues to be gossiping about his website.

121. The claimant had difficulty opening the calendar extracts Mr Beales sent him, which Mr Beales acknowledged. He attempted to re-send the documents to the claimant, although the claimant remained unable to open them.

122. On 19 September 2020, the claimant emailed Mr Bouwers indicating that he believed that the respondent had engaged private investigators to follow and photograph him. The claimant did not provide any evidence, either to Mr Bouwers at the time, or to the Tribunal, beyond assertions that he believed he had been followed. We consider that it is inherently implausible that the respondent engaged a private investigator as the claimant alleged.

123. On 19 September 2020, the claimant emailed Chris Bouwers with an extract from an Instant Messaging conversation that he had apparently received via the a Data Subject Access Request to the Respondent. The conversation was between two of the respondent's employees. The email said "Chris, I would like to discuss this conversation between you and an unknown participant also:".

124. The names of the participants to the conversation were redacted in the extract disclosed to the claimant via the Subject Access Request. We find that Mr Bouwers was not, in fact, one of the participants. The claimant's evidence he guessed or assumed that one of the participants was Mr Bouwers. He denied in evidence that the he had confronted Mr Bouwers, and explained that he could not see why the email could be seen as threatening. His evidence was that he believed his behaviour was appropriate in the circumstances. We find that by sending the email of 19 September, the claimant did confront Mr Bouwers, based on his (mistaken) belief that Mr Bouwers had been one of the parties to the Instant Messaging conversation.

125. The email from the claimant to Mr Bouwers regarding the Instant Messaging conversation was sent at 11:18 on a Saturday morning. It was put to the claimant in evidence that the timing of the email would have felt threatening to Mr Bouwers. The claimant denied that, and explained in evidence that Mr Bouwers had given him his personal number. We deal with the point in our conclusions, below.

126. On 21 September 2020, Graham Ward became Claimant's point of contact. Mr Bouwers no longer felt he could manage the claimant. His evidence was that he was spending around 30% of his working time managing the claimant and dealing with issues raised by or relating to him.

127. On 24 September 2020 the claimant raised a further grievance (G5). The grievance related to:

a. The length of time that the disciplinary investigation had lasted;
b. An allegation that the claimant was stalked online by Mr Bouwers;
c. an allegation that the respondent had employed private investigators to “stalk” the claimant;
d. The potential eviction of the claimant’s campervans from the car park; and
e. Concerns on the claimant’s part regarding Mr Beales’ investigation.

128. On 29 September 2020, the claimant indicated that he was too unwell to attend the investigation meeting with Mr Beales.

129. During the weekend prior to 5 October 2020, it was alleged that the claimant threatened a female Guardian at the respondent’s premises. The alleged threat was reported to Graham Ward by the respondent’s security team, and it was reported that the matter had also been referred to the Police. The claimant’s evidence was that his vans had been vandalised by one of the guardians, who he claimed had slashed his tyre. His evidence was that when he attempted to fix it, the male guardian told him “F** off with your painty vans”.

130. At a catch up meeting on 6 October 2020, the claimant told Graham Ward that he would not participate in the disciplinary investigation process as “it would only go one way”.

131. On 8 October, as the claimant had not attended the investigation meeting, Mr Beales wrote to the claimant setting out a series of questions in writing, and asking him to respond to them.

132. On 10 October, the claimant responded to Mr Beales refusing to answer his questions. However later the same day, he provided a document responding to the questions posed, along the following lines:

a. In respect to questions about his working hours and policies, the claimant provided a response based on his own understanding of the position, and asked Mr Beales to confirm whether the claimant’s understanding was correct.
b. In response to questions about apparent gaps in his working time, the claimant responded “can’t remember”. He confirmed in the same document that he had still been unable to access the calendar extracts which Mr Beales had attempted to send him.
c. In response to questions about his outside business interest, he provided answers to each of the questions.
d. In response to questions regarding the Police investigation, he responded “I am not at liberty to discuss this”.
e. In response to questions about his grievance, in general he provided answers where answers were required. Some questions merely

offered him the opportunity to provide further detail if he wished to do so; he did not always take that opportunity. The only area where we find that he provided an evasive answer was in response to questions about the allegation that the bank had engaged a private investigator to follow him. He was asked to provide evidence, and he did not do so. We find that that made it impossible for the respondent to sensibly investigation the allegation.

133. The respondent sought to characterise the claimant's answers to Mr Beales as evasive or unreasonable. We do not agree with that characterisation. With the exception of the questions regarding the private investigator, we find that the claimant answered the questions where he was able to do so.

134. Mr Beales' letter contained a table setting out the times (between 3 February 2020 and 21 February 2020) when it was said that claimant had been absent from work or not logged into the respondent's systems. The claimant's calendar was not in evidence before us. The claimant had never been able to meaningfully comment on the times set out in Mr Beales' email, given that he had never seen the calendar extracts. We make no findings regarding the claimant's whereabouts on those occasions.

135. On 13 October 2020, at a check-in meeting, the claimant told Graham Ward that his responses to Tony Beales were final.

136. On 15 October 2020, Ms Dougan encouraged the claimant to revisit his responses and go back to Mr Beales with further information. There was no evidence before us of the claimant responding to Ms Dougan, or of Ms Dougan's email being followed up with the claimant.

137. At some point in late October 2020, Zachary Anderson reached the decision that the claimant should be dismissed. In reaching that decision he took into account the following documents:

a. The claimant's grievance statement, minutes, evidence gathered and outcome, issued 22 July 2019 (G1).
b. The claimant's appeal statement, minutes, evidence gathered and outcome, issued 26 November 2019 (G1).
c. Letters rejecting the claimant's attempts to appeal further, dated 4 December and 17 December 2019 (G1/G3).
d. The claimant's grievance statement, minutes, evidence gathered and outcome, issued 3 February 2020 (G2).
e. Occupational Health reports dated 11 November and 18 December 2019.
f. Stress Risk Assessment, completed 31 January 2020.
g. Letter suspending the claimant from duties, dated 21 February 2020.
h. Invitation and minutes of Investigation meeting, dated 7 April 2020.
i. Letter from Mr Bouwer to the claimant, dated 22 June 2020.
j. The claimant's email declining an Occupational Health review, dated 20 July 2020.

k. Evidence gathered in respect of the claimant's work activities and outside business interests.
l. Invitation to a reconvened investigation meeting, written questions and your response, dated 10 October 2020.
m. The claimant's grievance statement, and additional points, and your email correspondence with Human Resources, dated 15 October 2020 (G4/G5).

138. He also took into account the contents of various conversations he had had with other employees of the respondent, including Elaine Priest, Tony Beales, Graham Ward, Chris Bouwers, Bianca Partington and Ashley Clifford. Those conversations were not minuted, and the contents of them were not expressly attributed.

139. A letter was prepared setting out the reason for the claimant's dismissal. Mr Anderson's evidence was that he reviewed the dismissal letter, but didn't draft it or sign it; he nonetheless described it as "his letter". The letter was signed by Elaine Priest.

140. Teresa Dougan's evidence was that she produced the first draft of the dismissal letter. She provided it to Elaine Priest on 20 October 2020. Mrs Priest then approved the letter and signed it. The letter was drafted in the first person; it would have appeared to the claimant that Mrs Priest was the decision-maker. But the evidence of both Elaine Priest and Zachary Anderson, which we accept, was that it was Mr Anderson's decision (albeit that Mrs Priest agreed with it).

141. The reason given for the dismissal was a significant and irretrievable breakdown in the claimant's relationships with colleagues and managers. This was broken down into four headings, each of which had a narrative explaining it in greater detail:
    a. "Behavioural and conduct concerns", the narrative for which included the following:
        i. "Consistently resisting and strongly challenging any management instructions or feedback, however well justified"
        ii. "Vocally criticising your colleague's work particularly that of contractors"
        iii. "You have unsettled colleagues by spreading unsubstantiated rumours of redundancies and job losses"
        iv. "…you were repeatedly late for work…"
        v. "You failed to engage with your colleagues and managers in a professional way"
    b. "Your complaints against the Group", the narrative for which included the following:
        i. The grievances raised by the claimant
        ii. Confronting colleagues about documents received via data subject access requests
        iii. Raising a further grievance in respect of assumptions reached about data requests, but refusing to answer questions that

would allow the Grievance Hearer to investigate those complaints

c. "Threatening, oppressive and inappropriate behaviour", the narrative for which included the following:
    i. Comments made to Chris Bouwers that the claimant would "cause gross misconduct against [him]" and "I will take you apart", and that he was "on your list".
    ii. Repeatedly contacting Chris Bouwers outside working hours and at weekends.
    iii. The claimant reportedly living in camper vans in the Group's car park from May 2020 to the end of October 2020, despite being specifically instructed not to attend his place of work.
    iv. The claimant threatening a Guardian in May 2020.
    v. The fact that the claimant was under police investigation (which had involved the removal of his phones), but did not provide information about the nature of the investigation.
    vi. The claimant advertising outside business interests, including Agile Business Development which gave as its address the Respondent's premises.
    vii. The claimant's Agile Love business, which was linked from his LinkedIn profile, containing sexually explicit material, including explicit images of the claimant, which caused detrimental harm to the claimant's relationship with the Respondent and his colleagues.
d. "Failure to engage" the narrative for which included the following:
    i. Failing to attend a further Occupational Heath appointment in June/July 2020.
    ii. Failing to maintain regular contact during suspension, and failing to co-operate in a way that would allow the respondent to reconvene the investigation meeting.
    iii. Responding to written questions from the investigator by saying "can't remember".
    iv. In a catch-up call on 6 October 2020, indicating that he would not participate in the investigation process.

142. The letter explained that it had been concluded that, even if the outstanding disciplinary and grievance were to be resolved, there had been such irreparable damage to the relationship with colleagues and managers ,and the respondent more generally, that ongoing employment was untenable.

143. The letter said this, regarding the process adopted by the respondent in considering the claimant's dismissal:

> "I considered whether I should meet with you to explain my decision but I decided that in all of the circumstances that would not be appropriate. In coming to this decision I have been heavily influenced by the fact that you have recently advised us that you were not fit to attend a meeting with the Bank as this would be harmful to your wellbeing; I do not wish

> to do anything which could have a detrimental impact on our wellbeing by placing you under the stress of attending such a meeting. I am also conscious that we have not been able to progress internal processes (namely the disciplinary and grievance processes) within reasonable timeframes and do not want to embark on another drawn out process. Finally, I have also thought hard about what it is I am required to make a decision on and ultimately I do not feel that having a meeting with you to discuss this would change the outcome of my deliberations. I hope that this letter has clearly articulated my reasons for coming to what has been a very difficult decision."

144. The dismissal letter was sent to the claimant on 28 October 2020. The claimant was not informed in advance that his dismissal was being considered on that basis. He was not invited to a meeting to discuss the possibility that his employment may be terminated. He was simply sent the dismissal letter, indicating that his dismissal was effective immediately with a payment in lieu of notice.

145. Mrs Priest's evidence was that she would not have felt comfortable meeting with the claimant even by video.

146. The claimant was not offered a right of appeal in the letter. Mr Anderson's evidence was that the claimant had been told, in the last line of the letter, that he could contact the bank if he had any questions regarding the arrangements for his termination. His evidence was that if an appeal had been received, the bank would have considered it.

Impact of the claimant's condition

147. The respondent accepted that the claimant was disabled at all relevant times, by reason of his condition of Bipolar Affective Disorder. In addition to the Occupational Health advice, there was some medical evidence before the Tribunal regarding the impact of the claimant's condition upon him. None of that evidence was shared with the respondent during the claimant's employment.

148. The evidence in the medical records was as follows:

a. The claimant was first diagnosed with Bipolar Affective Disorder in August 2016.
b. A letter of 16 May 2019 from Dr Alison Chalu, Consultant Psychiatrist, described the risks to the claimant as follows:

> "Vulnerable as presenting in a mixed affective state with grandiosity, paranoia, tearfulness and irritability resulting in conflicts at work, at home and with friends…"

c. The letter of 16 May 2019 noted that the claimant wanted the diagnosis of Bipolar Affective Disorder removed from his records.

d. The claimant's evidence was that he did not believe that he demonstrates irritability, and that any conflicts he may have got into at work would not have been caused by irritability. His evidence was that verbal aggression is not a symptom of his condition, although he can be perceived as verbally aggressive due to his personality.
e. The claimant's evidence was that grandiosity is a possible presentation of Bipolar Affective Disorder, and that he could see how some people may perceive that as being a symptom in his case because of his assertive nature. However his evidence was that his assertive nature was a feature of his personality, not of his condition.
f. A Care Plan dated 21 May 2019 recorded that the claimant was given strategies to help avoid the risk his condition posed to the viability of relationships. The claimant's evidence on that point was that he was given the care plan based on the clinician's perception that he may have behaviours associated with the diagnosis (rather than based on the claimant's own presentation).
g. A Social Circumstances Report prepared on 28 May 2020 noted that the claimant was arrested on 14 May 2020 for "stalking involving serious alarm/distress". It then noted that he was arrested again on 19 May 2020 for breach of the peace. The claimant's evidence was that he was not arrested on that occasion but rather was detained under the Mental Health Act, which is consistent with the chronology as we have found it to be.
h. The same report noted that the claimant, when manic, could be "irritable, verbally hostile and grandiose". It noted that the claimant lacked insight in the risk of a relapse. The report noted that the claimant was behaving in a way that was aggressive and intimidating towards family and friends. The claimant denied that characterisation of his behaviour.
i. The same report noted that there was a risk that the claimant was disinhibited and in danger of getting into conflict in his local area and public places. The claimant's evidence on that was that it was not a feature of his condition.
j. The claimant's evidence was that he had not been taking any medication since May 2019. His evidence was that the medical team would not engage with him.
k. The claimant's evidence regarding the Occupational Health advice received by the respondent was that he did not accept he could lose touch with reality, did not accept he could start to believe strange things, did not accept he could behave in embarrassing ways, and did not accept he could behave in harmful ways. It was put to him, based on that, that he essentially disagreed with the Occupational Health advice. His evidence in response was that the advice was a recommendation to his management and it should have been taken seriously as such because it was commissioned by the respondent, irrespective of whether or not he actually believed his condition affected him in that ways that the report suggested.

149. The claimant's evidence about his condition generally was that he has insight into it, and that he does understand when behaviour arises from

his condition. His evidence about the distinction between the effect of his Bipolar Affective Disorder, and his personality, was as follows:

- He is quite remarkable in his ability to present himself in an assertive way, which may be seen as aggressive.
- He has a challenging nature.
- He is remarkable in the challenge he brings to everything he does.
- His personality is such that he doesn't back down, and that when he feels something bad has happened to him he will "confront the perpetrators".
- Those are all features of his personality, not his condition of Bipolar Affective Disorder.
- The respondent had misinterpreted his personality as being a symptom of his Bipolar Affective Disorder.

Law

Without prejudice privilege

150. The without prejudice rule is a rule governing the admissibility of evidence. It is founded on the public policy of encouraging litigants to settle their disputes rather than to resort to litigation. The purpose of the rule is to ensure that parties are not discouraged by the knowledge that anything said in the context of such negotiations may be used to their prejudice in the course of litigation.

151. The Court of Appeal in *Unilver PLC v Proctor & Gamble* [2000] 1 WLR 2436 considered the application of the without prejudice rule. Having surveyed the authorities, Robert Walker LJ set out the main occasions when the rule would not take effect. Of particular relevance in this case is the following:

> "(4) Apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety" (the expression used by Hoffmann L.J. in *Forster v. Friedland* (unreported), 10 November 1992; Court of Appeal (Civil Division) Transcript No. 1052 of 1992). Examples (helpfully collected in *Foskett's The Law & Practice of Compromise*, 4th ed. (1996), para. 9-32) are two first-instance decisions, *Finch v. Wilson* (unreported), 8 May 1987 and *Hawick Jersey International Ltd. v. Caplan*, The Times, 11 March 1988. But this court has, in *Forster v. Friedland* and *Fazil-Alizadeh v. Nikbin* (unreported), 25 February 1993; Court of Appeal (Civil Division) Transcript No. 205 of H 1993, warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion.

Protected conversations

152. A separate regime is found in s.111A of the Employment Rights Act 1996, which provides as follows:

> 111A Confidentiality of negotiations before termination of employment
>
> (1) Evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under section 111. This is subject to subsections (3) to (5).
>
> (2) In subsection (1) " pre-termination negotiations " means any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee.
>
> (3) Subsection (1) does not apply where, according to the complainant's case, the circumstances are such that a provision (whenever made) contained in, or made under, this or any other Act requires the complainant to be regarded for the purposes of this Part as unfairly dismissed.
>
> (4) In relation to anything said or done which in the tribunal's opinion was improper, or was connected with improper behaviour, subsection (1) applies only to the extent that the tribunal considers just.
>
> (5) Subsection (1) does not affect the admissibility, on any question as to costs or expenses, of evidence relating to an offer made on the basis that the right to refer to it on any such question is reserved.]

153. ACAS has produced a statutory Code of Practice regarding Settlement Agreements under s.111A. The Code of Practice provides the following guidance on what constitutes "improper behaviour" for the purposes of s.111A(4):

> "17. What constitutes improper behaviour is ultimately for a tribunal to decide on the facts and circumstances of each case. Improper behaviour will, however, include (but not be limited to) behaviour that would be regarded as 'unambiguous impropriety' under the 'without prejudice' principle.
>
> 18. The following list provides some examples of improper behaviour. The list is not exhaustive:
>
> (a) All forms of harassment, bullying and intimidation, including through the use of offensive words or aggressive behaviour.
>
> (b) Physical assault or the threat of physical assault and other criminal behaviour.
>
> (c) All forms of victimisation.

(d) Discrimination because of age, sex, race, disability, sexual orientation, religion or belief, transgender, pregnancy and maternity and marriage or civil partnership.

(e) Putting undue pressure on a party. For instance:

(i) Not giving the reasonable time for consideration set out in paragraph 12 of this Code.

(ii) An employer saying before any form of disciplinary process has begun that if a settlement proposal is rejected then the employee will be dismissed.

(iii) An employee threatening to undermine an organisation's public reputation if the organisation does not sign the agreement, unless the provisions of the Public Interest Disclosure Act 1998 apply.

19. The examples set out in paragraph 18 above are not intended to prevent, for instance, a party setting out in a neutral manner the reasons that have led to the proposed settlement agreement, or factually stating the likely alternatives if an agreement is not reached, including the possibility of starting a disciplinary process if relevant. These examples are not intended to be exhaustive."

154. The EAT held, in the case of *Faithorn Farell Timms LLP v Bailey* [2016] ICR 1054, that section 111A extends not merely to the content of the direct discussions between the protagonists but also to internal conversations within a corporate employer.

Unfair dismissal

155. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that they were dismissed by the respondent under section 95.

156. Section 98 of the 1996 Act deals with the fairness of dismissals.

157. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal. Section 98(1) provides as follows:

"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);

(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."

158. Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason. In that regard, section 98(4) provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case. In doing so, the Tribunal is not permitted to substitute its own views for that of the employer, but must instead consider whether the employer's actions in treating the reason for dismissal as sufficient to dismiss fell within the band of reasonable responses.

159. A dismissal where there has been a breakdown in relationships may be categorised as being for "some other substantial reason" (*Perkin v St George's Healthcare NHS Trust* [2005] IRLR 934), *Ezsias v North Glamorgan NHS Trust* UKEAT 0399/09). The EAT in *Eszias* said this, regarding such dismissals:

> "We have no reason to think that employment tribunals will not be on the lookout, in cases of this kind, to see whether an employer is using the rubric of "some other substantial reason" as a pretext to conceal the real reason for the employee's dismissal."

160. The Court of Appeal in the case of *Leach v OFCOM* [2012] EWCA Civ 959 made a similar point:

> "…The mutual duty of trust and confidence, as developed in the case law of recent years, is an obligation at the heart of the employment relationship. I would not wish to say anything to diminish its significance. It should, however, be said that it is not a convenient label to stick on any situation, in which the employer feels let down by an employee or which the employer can use as a valid reason for dismissal whenever a conduct reason is not available or appropriate."

161. The EAT in *Phoenix House Ltd v Stockman and Lambis* UKEAT/0264/15 considered whether the ACAS Code of Practice on Discipline and Grievances applies to dismissals for some other substantial reason. Mitting J reached the following conclusion:

> "21. …The Code does not in terms apply to dismissals for some other substantial reason. Certain of its provisions, such as for example

investigation, may not be of full effect in any event in such a dismissal. What is required when a dismissal on that ground is in contemplation is that the employer should fairly consider whether or not the relationship has deteriorated to such an extent that the employee holding the position that she does cannot be reincorporated into the workforce without unacceptable disruption. That is likely to involve, as here, a careful exploration by the decision maker, in this case Ms Zacharias, of the employee's state of mind and future intentions judged against the background of what has happened. Of course, it would be unfair, as it was found to be here to a marginal extent by the Tribunal, to take into account matters that were not fully vented between decision maker and employee at the time that the decision was to be made. Ordinary commonsense fairness requires that. Clearly, elements of the Code are capable of being, and should be, applied, for example giving the employee the opportunity to demonstrate that she can fit back into the workplace without undue disruption, but to go beyond that and impose a sanction because of a failure to comply with the letter of the ACAS Code, in my judgment, is not what Parliament had in mind when it enacted section 207A and when the Code was laid before it, as the 2009 and 2015 Codes both were."

162. In the case of *Gallagher v Abellio Scotrail Ltd* (UKEATS/0027/19), the EAT considered the fairness of a dismissal for some other substantial reason where there had been a relationship breakdown (described by the Tribunal at first instance as an irretrievable breakdown of trust and confidence). In that case, the Claimant was employed in a senior role as Head of Customer Delivery and Standards. Her relationship with her line manager, Ms Taggart, had broken down. The respondent decided to dismiss the claimant. Ms Taggart informed the claimant of the decision at a pre-arranged annual appraisal meeting on 20 April 2017. The claimant had a further meeting with a Mr Gibson, the respondent's Head of HR, on 2 May 2017, and her dismissal took effect on 13 May 2017. She was not offered a right of appeal.

163. The EAT upheld the Tribunal's decision at first instance that the dismissal was fair. Chaudhry P said this:

> "Dismissals without following any procedures will always be subject to extra caution on the part of the Tribunal before being considered to fall within the band of reasonable responses. Despite Mr Grant-Hutchison's careful and thorough submissions, I am satisfied that this Tribunal did exercise such caution and came to a conclusion that was open to it on the evidence that it heard."

164. In the case of *Jefferson (Commercial) LLP v Westgate* (UKEAT/0128/12) the EAT noted that section 98(4) does not require any particular procedure to be followed. Nor did *Ezsias* set out an absolute rule that a hearing was required prior to dismissal in each and every circumstance. Rather, what the Tribunal must consider is whether the

employer acted reasonably or unreasonably in the particular circumstances of the case.

165. On a similar note, the EAT in *Moore v Phoenix Product Development Ltd* UKEAT/0070/20 concluded that while a right to appeal against dismissal will normally be part of a fair procedure, that will not invariably be so. The Court of Appeal in *Gwynedd Council v Barratt and Hughes* [2021] EWCA Civ 1322 reached the same conclusion (albeit in the context of a dismissal for redundancy rather than for some other substantial reason).

Polkey

166. In the case of *Polkey v AE Dayton Services Ltd* [1987] UKHL 8, the House of Lords set down the principles on which a Tribunal may make an adjustment to a compensatory award on the grounds that if a fair process had been followed by the respondent in dealing with the claimant's case, the claimant might have been fairly dismissed. Further guidance was given in the cases of *Software 2000 Ltd v Andrews* [2007] ICR 825; *W Devis & Sons Ltd v Atkins* [1977] 3 All ER 40; and *Crédit Agricole Corporate and Investment Bank v Wardle* [2011] IRLR 604.

167. In undertaking the exercise of determining whether such a deduction ought to be made, the Tribunal is not assessing what it would have done. Rather, the Tribunal must assess what this employer would or might have done, on the assumption that the employer would this time have acted fairly though it did not do so beforehand: *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274.

Contributory conduct

168. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996.

169. Section 122(2) provides as follows: "Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly."

170. Section 123(6) then provides that: "Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

Discrimination

171. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee:
    a. In the terms of employment;
    b. In the provision of opportunities for promotion, training, or other benefits;
    c. By dismissing the employee;
    d. By subjecting the employee to any other detriment.

172. In order to be subjected to a detriment, an employee must reasonably understand that they had been disadvantaged. An unjustified sense of grievance will not constitute a detriment (*Shamoon v Royal Ulster Constabulary* [2003] UKHL 11).

Protected characteristics

173. Disability is a protected characteristic (Equality Act 2010 s.6).

Direct discrimination

174. The definition of direct discrimination is contained in section 13(1) of the Equality Act 2010:

> "(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."

175. The comparison may be to an actual or a hypothetical comparator. In either case, there must be no material difference between the circumstances relating to each case (s.23(1)). That is, the comparator must be in the same position in all material respects save only that he or she is not a member of the protected class *(Shamoon v Chief Constable of the RUC* [2003] ICR 337).

176. In considering whether a claimant was treated less favourably because of a protected characteristic, the tribunal generally have to look at the "mental processes" of the alleged discriminator (*Nagarajan v London Regional Transport* [1999] IRLR 572). The protected characteristic need not be the only reason for the less favourable treatment. However the decision in question must be significantly (that is, more than trivially) influence by the protected characteristic.

Discrimination arising from disability

177. The definition of discrimination arising from disability is set out in s.15 of the Equality Act 2010:

> "(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."

178. "Unfavourable" is not defined in the statute. The EHRC Statutory Code of Practice provides that it means that the disabled person "must have been put at a disadvantage".

179. Guidance for Tribunals on how to approach the test in s.15 was set out by the EAT in *Pnaiser v NHS England* [2016] IRLR 170:

"(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes

unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton* UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's

disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

180. The Respondent does not need to have knowledge that the "something" leading to the unfavourable treatment was a consequence of the claimant's disability (*City of York Council v Grosset* [2018] ICR 1492).

Burden of proof

181. Section 136 of the Equality Act deals with the burden of proof:

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

182. The provision prescribes a two-stage process. At the first stage, there must be primary facts from which the tribunal could decide, in the absence of any other explanation, the discrimination took place. All that is required to shift the burden of proof is at primary facts from which "a reasonable tribunal could properly conclude" on balance of probabilities that there was discrimination. It must, however, be something more than merely a difference in protected characteristic and the difference in treatment (*Madarassy v Nomura International* PLC [2007] EWCA Civ 33).

183. The burden of proof at that stage is on the Claimant (*Royal Mail Group v Efobi* [2021] UKSC 22). The employer's explanation is disregarded.

184. If the claimant satisfies that initial burden, the burden shifts to the employer at stage 2 to prove one balance of probabilities that the treatment was not for the prescribed reason.

185. Further guidance on the burden of proof provisions was given by the Court of Appeal in *Igen v Wong* [2005] EWCA Civ 142.

Chagger

186. In the case of *Abbey National PLC v Chagger* [2010] EWCA Civ 1202 the Court of Appeal held that, in assessing the compensation to be paid in respect of a discriminatory dismissal, the Tribunal must determine the chances that the dismissal would have occurred had there been no unlawful discrimination.

Conclusions
s.111A ERA 1996

187. In respect of the claimant's behaviour at the meeting on 18 May, we first need to consider whether it was improper behaviour, for the purposes of section 111A(4). We conclude that it was. We reach that conclusion for the following reasons:

i. The claimant behaved in a threatening and intimidating way towards Mr Bouwers (by telling him that he was "on [the claimant's] list" and that the claimant would "take [him] apart).
ii. Although we have found that that was not a threat of physical violence, it was nonetheless a clear threat; indeed the comment that the claimant would "take [him] apart" could not be interpreted as anything other than a threat.
iii. While the meeting was not instigated by the claimant, and while he may have felt defensive when the allegations regarding his outside business (and in particular Agile Love/Skin Map) were raised, the claimant's response was disproportionate to the circumstances in which he found himself.

188. We then consider whether it is nonetheless just for subsection 111A(1) to apply to the comments made by the claimant. We consider that it is, for the following reasons:

a. The respondent's purpose of the meeting was that it would be a no-blame/Without Prejudice meeting to discuss the claimant's future. That was the overriding purpose of the meeting.
b. The meeting instigated by the respondent. The claimant was not told in advance what the meeting would be about or that the respondent would be seeking to meet under those conditions.
c. The meeting put some serious allegations to the claimant, for the first time.
d. We do not consider that the claimant sought to use the protection of s.111A as a "shield" to make improper comments. His comments were not (and could not have been) premeditated. Rather, they were a heat of the moment reaction to the points being raised by the respondent in the meeting.
e. In the circumstances, we consider that it is not just for the respondent, who instigated the meeting and set the parameters for it (in terms of being covered by s.111A privilege), to be able to lift the veil of protection in order rely on the comments made by the claimant in the heat of the moment.

189. We then need to consider whether the respondent's behaviour was improper. The claimant says that the respondent acted improperly by (1) not providing him with an agenda in advance of the meeting, and (2) not explicitly informing him he could be accompanied by a colleague/buddy at the meeting. The claimant's case is that by doing those things, the respondent failed to make reasonable adjustments for his condition, which in itself would be an act of discrimination (and which would therefore engage the guidance in the ACAS Code). In considering the point, we bear in mind that there is not a reasonable adjustments claim before us.

190. It is common ground that the respondent did not provide an agenda in advance of the meeting, or tell the claimant explicitly that he could have a colleague or buddy. However we conclude that the respondent did not act improperly, for the following reasons:

a. It was reasonable of the respondent to want to discuss a potential settlement with the claimant verbally first, rather than to set it out in writing. Setting out even a high-level agenda in writing would have raised questions and risked setting off satellite correspondence before the meeting could take place.
b. Given the sensitive nature of what was being discussed, it was reasonable also of the respondent to form the view that it was not appropriate for the claimant to have a colleague or buddy at the meeting. The claimant did not request one.
c. We have found that the claimant was given the opportunity to say he did not want to proceed with the meeting, and that he nonetheless proceeded with the meeting willingly.
d. We are not satisfied that the duty to make reasonable adjustments was engaged by a one-off meeting to discuss a settlement. It was not suggested to us what provision, criteria or practice was said to be engaged or how the claimant was put at a substantial disadvantage. But even if there had been a duty to make reasonable adjustments in respect of meetings generally, we consider that it would have been reasonable for the respondent not to have made the adjustments of providing an agenda and buddy for that specific meeting, given the nature and context.

191. In light of that, we conclude that s.111A of the Employment Rights Act 1996 applied to the meeting on 18 May 2020.

Conclusions on without prejudice privilege

192. Both parties also sought to rely on the “unambiguous impropriety” exception to the “without prejudice” rule in respect of the meeting on 18 May 2020.

193. We first consider whether there was unambiguous impropriety on the part of the claimant in respect of the comments he made in that meeting. We bear in mind the guidance from *Unilever* that the exception applies where excluding the evidence would cloak “perjury, blackmail or other ‘unambiguous impropriety’”. That is a high bar. We bear in mind also the that the exception should apply in only the clearest cases of abuse of a privileged occasion. We have carefully considered the claimant’s comments. In that context, while the claimant’s comments were threatening and inappropriate, we do not consider that they can be properly regarded as constituting “unambiguous impropriety”.

194. We then consider the respondent’s conduct in calling the meeting. We have concluded above that the respondent did not behave improperly.

It follows from that conclusion that the respondent's conduct also did not constitute unambiguous impropriety.

195. All aspects of the meeting on 18 May 2020 (including any internal correspondence about the meeting) are therefore covered by both s.111A and Without Prejudice privilege. It follows that they are not admissible in respect of any part of the claim. We do not take any evidence regarding them into account in forming the remainder of our conclusions.

Unfair dismissal

196. We use the issues as identified by EJ McAvoy Newns.

What was the reason or principal reason for the dismissal?

197. We find that the reason for the dismissal was the relationship breakdown. The claimant accepted in evidence that the relationship had broken down. The claimant had worked his way through three different line managers, and had been the subject of complaints from a number of colleagues at different levels of the organisation. He was taking up a lot of management time (Mr Bouwers estimated up to 30% of his time). He was operating two external businesses, one of which in particular had significant potential reputational risks for the respondent. All of those factors went towards a breakdown in the relationship between employee and employer. We accept that breakdown is why Mr Anderson reached the decision to dismiss the claimant.

Was that a potentially fair reason?

198. *Perkins* and *Eszias* are authority for the proposition that a relationship breakdown is a potentially fair reason for dismissal, under the rubric of SOSR. We conclude therefore that the respondent's reason for dismissing the claimant was a potentially fair reason one.

Did the respondent act reasonably in all of the circumstances in treating it as a sufficient reason to dismiss the claimant?

199. We have accepted that Mr Anderson believed the things he put in his dismissal letter. We have carefully considered whether he had reasonable grounds to believe those things.

200. For a number the points referred to in the dismissal letter, Mr Anderson's evidence was that he was aware of them because he had been informed of them by colleagues. We bear in mind that Mr Anderson was not considering dismissing the claimant for his conduct; rather, what was relied upon was the a breakdown in the relationship. Nonetheless, in our judgment, in considering a matter as serious as the dismissal of an employee, it was in general not reasonable of Mr Anderson to rely on unattributed comments and information gleaned from ad hoc conversations with colleagues without further investigation or supporting evidence as to the effect on the employment relationship.

201. We take each of the key points relied upon by the respondent in turn.

202. Heading 1 - Behavioural and conduct concerns:

a. Consistently resisting and strongly challenging any management instructions or feedback, however well justified.

> We conclude that Mr Anderson had reasonable grounds for believing that. He had seen the claimant's grievances. The claimant had raised a grievance about the documented discussion conducted by Mr Roberts (G1), and another about the documented discussion conducted by Mr Latter (G2). The claimant had demonstrated a marked resistance to accepting the outcome of G1. Those alone suggested that the claimant was resistant to feedback and management instructions.

b. "vocally criticising your colleague's work particularly that of contractors.

> Mr Anderson had evidence of the claimant being critical of Mr Lott, including the incident where he described Mr Lott as a "big baby". However insofar as the letter suggested that the claimant was vocally critical of other colleagues, we consider that it was painted on too broad a canvass, and went beyond what Mr Anderson could reasonable have been satisfied of given the evidence before him.

c. "You have unsettled colleagues by spreading unsubstantiated rumours of redundancies and job losses"

> Mr Anderson had seen the paperwork from G1, including the notes of Paul Braddick's investigation meeting. The evidence before him was therefore that the claimant's conversations with colleagues took place on 15 April 2019, before he had emailed Mr Roberts on 16 April 2019. Based on that, we conclude that he reasonably reached the conclusion that the claimant had spread unsubstantiated rumours of redundancies and job losses.

d. "…you were repeatedly late for work…"

> Mr Anderson had seen the table of times set out with Mr Beales' letter during the disciplinary investigation. He had also seen the claimant's response to Mr Beales' questions. The claimant was clear in the answers to those questions that he had not had a chance to review his calendar. We consider that Mr Anderson could nonetheless reasonably have concluded, based on what he had seen, that the claimant was late for work on those occasions and that (in essence) even if the claimant had seen the calendar it was unlikely anything he

had said would have caused Mr Anderson to form a different view.

e. "You failed to engage with your colleagues and managers in a professional way"

Mr Anderson had seen evidence from G1 that the claimant was aggressive and confrontational towards Paul Braddick regarding the redundancy point. We consider that it was reasonable for Mr Anderson to reach that conclusion that he did based on the information before him.

203. Heading 2 - "your complaints against the Group"

a. The grievances raised by the claimant:

Mr Anderson was aware that the claimant had raised or sought to raise five grievances (including a grievance about the appeal against the outcome of his first grievance). It was reasonable for him to conclude that the claimant had raised a number of grievances. Strikingly, the grievances related to attempts to manage the claimant.

b. Confronting colleagues about documents received via DSARs.:

It was reasonable for Mr Anderson to conclude that the claimant had done so, based on the evidence regarding the way he had confronted Mr Bouwers.

c. "Raising a further grievance in respect of assumptions reached about data requests, but refusing to answer questions that would allow the Grievance Hearer to investigate those complaints

It was reasonable for Mr Anderson to conclude that a grievance was raised by the claimant. We do not consider that it was reasonable for him to conclude that the claimant had refused to answer the questions raised in respect of that aspect of his grievance. The claimant had made it clear what his grievance was, and had answered the questions posed by Mr Beales. Mr Anderson was aware of that, as he had seen the response to Mr Beales' questions.

204. Heading 3 – "Threatening, oppressive and inappropriate behaviour"

a. Comments made to Chris Bouwers that the claimant would "cause gross misconduct against [him]" and "I will take you apart", and that he was "on your list".

We consider that Mr Anderson acted reasonably in concluding that the claimant had made a threatening comment to Mr

Bouwers in that he told him he would "cause gross misconduct against [him]". In the circumstances, he did not act reasonably in concluding that the claimant had made other threats to Mr Bouwers, and in taking those into account in considering the relationship breakdown. It does follow, however, that he reasonably concluded that the claimant had displayed overtly threatening behaviour towards Mr Bouwers on at least one occasion.

b. Repeatedly contacting Chris Bouwers outside working hours and at weekends.

   There was some evidence before Mr Anderson of the claimant contacting Mr Bouwers outside working hours. However we do not consider that he acted reasonably in concluding that that constituted threatening, oppressive or inappropriate behaviour towards Mr Bouwers, or that it contributed towards the relationship breakdown. Mr Bouwers did not have to read emails sent to him at the weekend. The respondent understood that the claimant was an employee who had a mental health condition. He was suspended from work for a lengthy period of time, so would not be expected to be in a normal Monday-to-Friday routine. We consider that it was not reasonable to expect him only to send emails during Mr Bouwers' normal working hours.

c. The claimant reportedly living in camper vans in the Group's car park from May 2020 to the end of October 2020, despite being specifically instructed not to attend his place of work.

   There was no reasonable basis for Mr Anderson to conclude that the claimant was living in campervans at the respondent's premises. There was simply no direct evidence before Mr Anderson that the claimant was doing so. It was, however, reasonable of him to conclude based on the evidence before him that the claimant's campervans were parked on site, despite the claimant having been instructed not to attend his place of work.

d. The claimant threatening a Guardian in May 2020.

   We consider that it was reasonable for Mr Anderson to conclude that this had occurred, based on the evidence available to him.

e. The fact that the claimant was under police investigation (which had involved the removal of his phones), but did not provide information about the nature of the investigation.

Again, we conclude that it was reasonable for Mr Anderson to conclude that that had occurred. He had seen the claimant's response to Tony Beales' investigation questions which dealt with the point (and in which the claimant indicated that he could not provide further detail).

f. The claimant advertising outside business interests, including Agile Business Development which gave as its address the Respondent's premises.

Mr Anderson had seen evidence regarding the claimant's outside business interests. It was reasonable for him to conclude what he did about the claimant's outside business interests, given what was stated on the Agile Business Development website.

g. The claimant's Agile Love business, which was linked from his LinkedIn profile, containing sexually explicit material, including explicit images of the claimant, which caused detrimental harm to the claimant's relationship with the Respondent and his colleagues.

It was again reasonable of Mr Anderson to conclude what he did regarding the Agile Love business. We consider that given the nature of the business and the nature of the material on the website, it was reasonable also for him to infer that it had the potential to damage the claimant's relationship with colleagues.

205. Heading 4 – Failing to engage:

a. Failing to attend a further Occupational Heath appointment in June/July 2020.

It was reasonable of Mr Anderson to conclude that that had occurred. However we consider that it was not reasonable of him to have taken that into account as part of the relationship breakdown (and consequently the reason for dismissing the claimant). It was a matter for the claimant whether he engaged with Occupational Health, and it was not suggested to us that he was under a specific duty to do so (although of course his unwillingness to be re-referred did limit what the respondent could do to support him).

b. Failing to maintain regular contact during suspension, and failing to co-operate in a way that would allow the respondent to reconvene the investigation meeting.

Mr Anderson had seen the notes of the original investigation meeting with Mr Beales in April 2020, which was adjourned so that the claimant's calendar could be accessed. He had also seen the letter Mr Beales sent to the claimant inviting him to a reconvened investigation meeting, and attempting to send

him the calendar invites. That letter was not sent until September 2020. The reason why the claimant did not attend the reconvened meeting was because he was unwell. So we are not satisfied that Mr Anderson could reasonable have concluded that the claimant had failed to cooperate in a way that would have allowed the respondent to reconvene the investigation meeting.

c. Responding to written questions from the investigator by saying "can't remember".

The questions to which the claimant responded that he could not remember were those relating to his whereabouts. It was clear from the documents Mr Anderson had seen that Mr Beales had agreed (in the April investigation meeting) that the claimant would need to see his calendar in order to answer those questions. It was also clear from the claimant's responses to Mr Beales' questions that he had still not been able to do so. So we consider that it was not reasonable for Mr Anderson to characterise the claimant's responses to those questions as constituting a failure to engage.

d. In a catch-up call on 6 October 2020, indicating that he would not participate in the investigation process.

After that call, the claimant was sent written questions by Mr Beales, and he responded to them. Mr Anderson had seen the claimant's responses. We consider that it was not reasonable for Mr Anderson to take a throw-away comment made by the claimant in catch-up meeting as indicating a refusal to engage in the investigation process.

206. Taking a step back, we then consider whether the respondent acted reasonably in all of the circumstances in concluding that the relationship had broken down, and treating that as a sufficient reason to dismiss the claimant. We bear in mind that, in doing so, we are not considering what we would have done. Rather, we are considering whether the decision fell within the range of reasonable responses open to a reasonable employer.

207. There are a number of individual points where we have concluded that Mr Anderson's decision, or his characterisation of the evidence before him, was not reasonable. Set against that, we bear in mind the breadth of the evidence before him, and the weight of the points he reasonably took into account. We conclude that his decision that the working relationship had broken down irretrievably could not be characterised as falling outside the range of reasonable responses.

208. However, we conclude that the process the respondent followed did fall outside the range of reasonable responses. We reach that conclusion for the following reasons:

a. The respondent did not meet with the claimant to discuss the reasons they were considering dismissing him. Nor did they even warn him that they were considering dismissing him on the basis of relationship breakdown. The first time the claimant became aware that the respondent was even contemplating taking that course of action was when he received the letter informing him of his dismissal.
b. We are not satisfied that the respondent could not have met with the claimant in the circumstances. While he had behaved in a threatening way previously, a meeting could have been conducted by video (as other meetings with him were). Or he could have been sent a report setting out the concerns and asked to comment in writing before a decision was made (as he was by Tony Beales in the disciplinary investigation).
c. Nor were we persuaded that the claimant's ill health was a reason to make the decision without consulting him first. The claimant was in a relatively junior position; he was suspended from work. We were not persuaded that a short delay, if required, would have caused the respondent any unsurmountable difficulties.
d. The decision to proceed to dismiss the claimant without meeting him first appeared to rest in part on Mr Anderson's view that the claimant had not engaged with the respondent in the disciplinary investigation. For the reasons we have already given, we have concluded that that was not a fair characterisation of the way the claimant had engaged with Mr Beales.
e. The decision appeared to have been made very quickly. Teresa Dougan asked the claimant to engage further with Mr Beales on 15 October. Without waiting for a response, and without chasing for one, by 20 October she had produced the first draft of the dismissal letter.
f. The claimant did not know who made the decision to dismiss him. The dismissal letter was signed by Elaine Priest and referred to the decision in the first person. But Mrs Priest was not the decision-maker – Mr Anderson was. The claimant had no way of knowing, until the litigation, who actually made the decision to terminate his employment.
g. The claimant was not given an opportunity to appeal the decision. We were not persuaded by Mr Anderson's evidence that the claimant could have treated the reference to contacting the respondent if he had questions about the arrangements for his termination as a right of appeal. In light of the failure to canvass the reasons for dismissal with the claimant before reaching the decision to dismiss him, an explicit right of appeal would have been a particularly important procedural safeguard.

209. It follows that the respondent did not act reasonably in all of the circumstances in treating the relationship breakdown as a sufficient reason for dismissing the claimant. We therefore conclude that the dismissal was unfair.

Polkey – Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed or for some other reason? If so, should the claimant's compensation be reduced? By how much?

210. The question we must answer is not what we would have done, but what this respondent would have done had it followed a fair process.

211. We have reached the conclusion that, had the respondent followed a fair process, the claimant would have been fairly dismissed in any event. We reach that conclusion for the following reasons:

a. We have already concluded that it was reasonable for Mr Anderson to conclude that the relationship had irretrievably broken down. Indeed, the claimant's own evidence was that the relationship was beyond repair.
b. We bear in mind that the claimant showed little insight, in his evidence to the Tribunal, into the effect his behaviours were having on relationships with colleagues, managers, and the respondent more broadly. We have no reason to think that he would have presented in a more conciliatory way in an internal process, such as to suggest that the relationship may have been salvageable.
c. We therefore consider that had respondent canvassed the relationship breakdown with the claimant before making any decision, it would have reached substantially the same conclusion as that reached by Mr Anderson. It may not have reached the same conclusion on all of the points referred to in Mr Anderson's dismissal letter; but in our judgment that would not have changed the overarching conclusion that the relationship was beyond repair.

212. We have considered what the respondent would have needed to have done to have followed a fair process. We consider that, at a minimum, the respondent would have needed to have drawn together its evidence regarding the relationship breakdown, and to have discussed that with the claimant (either at a video meeting or by exchange of correspondence).

213. The work of drawing together the evidence that the relationship had broken down had already essentially been done by the point that the claimant was dismissed. That is what was captured in Mr Anderson's letter, and the evidence that he reviewed in reaching his decision. So all that would have been needed would have been to have presented it to the claimant, and either met with him or allowed him to comment on it in correspondence. The claimant responded to Mr Beales' letter within two days. We consider that, whichever approach the respondent had taken, it would not have taken more than one month. So we conclude that there is a 100% chance that the claimant would have been fairly dismissed within one month of his actual dismissal date.

Contributary conduct – if the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

Would it be just and equitable to reduce the basic award because of any conduct of the claimant before dismissal? If so, to what extent?

214. We conclude that there was blameworthy conduct on the part of the claimant, in that:
    a. He set up two external businesses without seeking the respondent's permission.
    b. He used the respondent's address as the address for one of his businesses, again without seeking permission.
    c. He linked, via his public LinkedIn profile, to a website which contained (startlingly) explicit photographs of himself and offering what the claimant described as "sensual services". That same LinkedIn profile stated that the claimant was an employee of the respondent.
    d. He threatened Chris Bouwers that he would "cause gross misconduct against him", and confronted him about a document he had received via a DSAR (based on a mistake belief that Mr Bouwers was a party to the document).
    e. He parked two campervans on the respondent's site after he was suspended, and came onto the site to visit them, despite having been clearly instructed not to go to his place of work.
    f. He behaved aggressively towards one of the guardians on 17 May 2020.

215. All of those points were ones which contributed to the relationship breakdown relied upon by the respondent. In the experience of the Tribunal, either of point c or point d alone would have given an employer reasonable grounds, in all of the circumstances, to dismiss an employee. The claimant's behaviour fell far outside what would be expected in the employment relationship.

216. In light of that, and bearing in mind the totality of the blameworthy conduct, we consider that it would be just and equitable to reduce both the basic award and the contributory award by 100%.

Direct disability discrimination

217. It was common ground that the claimant was dismissed by the respondent. The question for the Tribunal was whether, by dismissing the claimant, the respondent treated him less favourably than someone else. The claimant relied upon a hypothetical comparator.

218. We consider that the correct hypothetical comparator was someone who had behaved in the way that the claimant had behaved, and whose relationships with their colleagues and the respondent had broken down in the same way as claimant's had, but who did not have Bipolar Affective Disorder.

219. We conclude that the claimant has not surmounted the initial hurdle of showing primary facts from which a reasonable tribunal could properly

conclude that there was discrimination. There was no evidence before us to suggest that the hypothetical comparator would have been treated any differently. In light of the extent of the breakdown of the employment relationship, we have no difficulty in concluding that the respondent would have treated any employee in the those circumstances in the same way. Anyone who had conducted themselves in the way that the claimant had, and whose relationship with the respondent had broken down in the way that the claimant's had, would have been dismissed.

220. It follows that the claim of direct discrimination is not well founded.

Discrimination arising from disability
Did the respondent treat the claimant unfavourably by dismissing him?

221. It is common ground that the respondent dismissed the claimant. We have no difficulty in concluding that that constituted unfavourable treatment.

Did the following things arise in consequence of the claimant's disability: the threatening and inappropriate conduct he says he was dismissed for?

222. The claimant's consistent evidence to the Tribunal was that it did not. His evidence was that any clashes with his colleagues and any inappropriate conduct he exhibited was caused by his personality, not his disability.

223. We bear in mind that the medical evidence before us was that one potential effect of the claimant's Bipolar Affective Disorder was a lack of insight into the effects the condition had on him. We have taken that evidence into account. But we have concluded that we cannot look beyond the claimant's own evidence about the reason for the specific behaviours he exhibited at the relevant times. The claimant's evidence on the point was clear and consistent. We therefore conclude that the behaviour which led to the relationship breakdown for which the claimant was dismissed did not arise in consequence of his disability.

Was the unfavourable treatment because of those things?

224. It follows that the unfavourable treatment was not because of something arising from the claimant's disability.

Was the treatment a proportionate means of achieving a legitimate aim?

225. Because of our conclusion regarding the cause of the unfavourable treatment, we do not strictly need to consider the question of objective justification. But for completeness, and because we heard evidence on the point, we will deal with it in any event.

226. The legitimate aim relied upon by respondent was described as follows:

> "Protecting the wellbeing of its other employees;
> Protecting the respondent's reputation;
> Managing the respondent's resources and workforce in an efficient and effective manner; and
> Only employing employees who are willing to attend work and perform their duties (and conversely, not continuing to employ employees who are unwilling to attend work and perform their duties)."

227. The respondent had not seen the medical evidence we have seen. But they had attempted to gain more up to date Occupational Health advice regarding the claimant, and had been rebuffed in their attempts to do so.

228. We are satisfied that the aims pursued by the respondent were legitimate ones. We conclude that dismissal was a proportionate way of achieving them. We reach that conclusion for the following reasons:

a. In light of the threats the claimant had made and the aggressive behaviour he had demonstrated towards Chris Bouwers and the guardians in particular, the respondent had legitimate concerns about the wellbeing of its other employees.
b. The claimant had already had three different line managers. His relationships with managers had continued to break down. He had demonstrated a marked unwillingness to be managed – for example, his email to Barry Latter on 2 March 2019 suggesting that Mr Latter was incapable of managing him, his email to Mr Roberts, Mr Braddick and Mr Latter on 26 April 2019 regarding "workplace betrayal", and the grievances he raised regarding the documented discussions conducted by Mr Latter and Mr Roberts (G1 and G2). Managing the claimant, and the various processes he was engaged in, was taking up a significant amount of the respondent's management time and capacity.
c. The claimant demonstrated a marked lack of insight into the effect his behaviours were having on those around him, and the effect that was having on working relationships – for example, the evidence he gave around the colleague who was reported to have been cowering in fear during a meeting.
d. There was a significant reputational risk attached to the claimant's business ventures; particularly Agile Love/Skin Map.
e. In the circumstances, we cannot see any less discriminatory way of achieving the legitimate aims the respondent was pursuing.

229. It follows that the claim of discrimination arising from disability is not well founded.

Postscript

230. While we have found that claimant was unfairly dismissed, in light of our conclusions regarding *Polkey* and contributory fault, no compensation would be awarded to the claimant. There is therefore no need for a remedy hearing (and it would not be in accordance with the overriding objective to hold one). This judgment concludes the proceedings.

Employment Judge Leith

11 July 2023
Date