EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr. M. Mobeen	v	**Secretary of State for Work & Pensions**

Heard at: **Birmingham** **On:** **17,18,19 and 20 July 2023**

In chambers on 21 July 2023

Before: **Judge Wedderspoon**

Dr. G. Hammersley

Mr. P. Wilkinson

Representation:

Claimant: **In Person**

Respondents: **Mr. Ryan, Counsel**

JUDGMENT

1. The claim of constructive unfair dismissal is not well founded and is dismissed.
2. All of the claims of harassment related to disability are not well founded and are dismissed.
3. All of the claims of direct disability discrimination are not well founded and are dismissed.
4. All of the claims of a failure to make reasonable adjustments are not well founded and are dismissed.

REASONS

1. By claim forms dated 3rd January 2022 and 16 May 2022 the claimant brought complaints of a failure to make reasonable adjustments, harassment related to disability, direct disability discrimination and constructive unfair dismissal.
2. The claimant's case is that the respondent failed to make a reasonable adjustment by requiring him to attend the Walsall office to have his smartcard updated when this aggravated his mental health. He also alleges he was subject to two comments from Ms. Mercaudi which amounted to disability related harassment and/or were acts of direct disability discrimination. Further he contends that by reason of 11 acts the respondent was in breach of the implied term of trust and confidence and as a result he was constructively unfairly dismissed.
3. The claim has been subject to two preliminary hearings. The first before Judge Algazy K.C. on 10 August 2022. The second preliminary hearing took place on the 17th of February 2023 before Judge Faulkner.
4. Judge Faulkner set out the final agreed list of issues as follows:

Failure to make reasonable adjustments section 20 of the Equality Act 2010

5. Did the respondent apply a provision criterion or practise of requiring staff to attend one of its offices to resolve any issues with smart cards in default of which they would be marked as absent on sick leave.
6. Did the Deputy Manager Karen Mercuriadi apply this to the claimant on 4 November 2021 and by a manager, Lisa Cottrell on 8 November 2021
7. Did the PCP put the claimant at a substantial disadvantage compared with persons who were not disabled namely the claimant was unable to travel because of his anxiety and depression
8. If so, did the respondent fail to take reasonable steps namely
   (a) send him a replacement smart card by recorded delivery;
   (b) allowed him to work from home;
   (c) recorded his absence as a form of leave other than due to sickness.
9. Did the respondent know or could it reasonably have been expected to know that the claimant was placed at the alleged substantial disadvantage. It is accepted that the respondent knew the claimant was disabled from March 2020.

Harassment related to disability

10. Did Karen Mercuriadi say to the claimant on or around 4th November 2021 *“don't you think the department has done a lot for you”*
11. Did Karen Mercuriadi say to the claimant on or around 4 November 2021 *“it's not our fault your brain doesn't work”*
12. If so, whether the conduct was unwanted
13. If so, was it related to disability
14. Did the conduct have the purpose or effect of violating the claimant’s dignity or creating an intimidating hostile degrading humiliating or offensive environment for him taking into account the factors at section 26 (4).

Direct disability discrimination

15. Did the respondent subject the claimant to the following treatment;-
    (a)Did Karen Mercuriadi say to the claimant on or around 4th November 2021 *“don't you think the department has done a lot for you”*
    (b)Did Karen Mercuriadi says the claimant on or around 4 November 2021 *“it's not our fault your brain doesn't work”;*
16. If so whether it treated the claimant less favourably than it would have treated someone in not materially different circumstances who did not have the claimant’s disability;
17. If so whether this was because of disability

Unfair dismsal

18. Whether any acts or omissions of the respondent were a cause (they do not have to be the sole cause) of the claimant's resignation relying on the following factual allegations
    (a)Around due to August 2021 Kuldip Higgs offered the claimant ill health early retirement
    (b)The respondent gave the claimant a first written warning regarding his attendance record on 24 August 2021
    (c)In November or December 2021 the claimant received a text message from an unknown number he believes it to be a work colleague saying so “you mental shite you are a waste you will be terminated from Ravenhurst”
    (d)The respondent did not provide the outcome of an investigation into a grievance he raised against Ms. Cottrell and Ms. Mercuradi on 7 December 2021

(e)The respondent did not respond to his inquiry about the same
(f)The respondent did not redeploy him even though occupational health services advised that he should be redeployed
(g)In mid-February 2022 Ms. Williams a manager asked him what times he was logging on and off his computer
(h)In mid-February 2022 Ms. Williams asked him what he had read;
(i)A few hours before his resignation Ms Williams refused his request to leave work one hour early on a flexi time arrangement saying that he would have to request permission on each occasion he wished to do so
(j)On 14 February 2022 Ms Williams asked when told by the claimant he had completed a task to share his screen;
(k)On 16 February 2022 the respondent gave the claimant a final written warning regarding his attendance record.

19. The claimant alleges allegations (j) and (k) above constituted the final straw that led to his resignation.
20. The claimant relies upon the implied duty of trust and confidence namely the obligation of the respondent not without reasonable proper cause to conduct itself in a manner calculated or likely to undermine his trust and confidence.
21. If the respondent was in fundamental breach of the claimants contract the Tribunal will be required to decide whether the claimant affirmed the contract. The respondent should confirm in any amended response whether it maintains that he did and specifically on what grounds.
22. If the claimant did not affirm the contract and was thus dismissed the respondent says that the dismissal was fair the reason for dismissal being his absence record which she says was a substantial reason justifying dismissal of someone holding the claimant's position. The Tribunal will be required to decide whether the respondent has shown the reason for dismissal whether it was a fair reason within section 98 of the Employment Rights Act 1996 and if so whether a dismissal for that reason was fair and reasonable in all the circumstances pursuant to section 98 (4) the ERA.

Remedy

23. Whether the claimants basic award for unfair dismissal should be reduced under section 122 (2) ERA because of any conduct of the claimant before dismissal;
24. In respect of the compensatory award whether the claimant has complied with his duty to mitigate his losses where the compensation should be reduced on the basis that he should have would have been fairly dismissed by the first respondent in any event and if so to what extent following **Polkey v AE Dayton services Limited 1988 ICR 142** and whether compensation should be further reduced on account of the claimant's conduct having caused or contributed to his dismissal to any extent section 123 (6) ERA.
25. If any of his complaints under the Act are successful, the amount of an injury to feelings award plus interest.

Hearing

26. The Tribunal was provided with a bundle of 1200 pages. The claimant added to the bundle a decision which removed a warning about his sickness. The claimant gave evidence. The respondent called 6 witnesses; Lisa Cottrell, former Higher Executive Officer (now Senior Executive officer); Karen Mercuriadi, former Executive Officer for DWP (now Decision Maker

for Fraud and Error Specialist Team); Lorraine Brownhill, Executive Officer; Melanie Williams, Operational Manager Universal Credit Dispute Resolution Service; Sandra Sims, Investigator Government Internal Audit Agency and June Ann Cunningham, Disputes Resolution Service, Glasgow.

<u>Facts</u>

27. The claimant commenced work with the respondent on 17 November 2017 as an executive officer. He was a decision maker for the dispute resolution service. He undertook mandatory reconsiderations on decisions for universal credit claims. In 2021 the claimant's salary was (see page 1121) £27,565 per annum. He was based at Ravenshurst, Moseley. He was initially managed by Monica Patel. The claimant was previously known as Mr. Arfan Ali but changed his name to Mr. Mobeen.
28. There is no dispute by the respondent that the claimant was at all material times a disabled person within the meaning of section 6 of the Equality Act 2010 by reason of depression and anxiety and it was aware of these impairments. During his employment the claimant was referred to Occupational Health on a number of occasions.

<u>Occupational Health Reports</u>

29. The occupational health report dated 24 March 2020 (page 106) referred to the claimant being unfit for work by reason of reactive depression. In the report dated 13 May 2020 (page 116) the claimant was described as having poor mood and severe anxiety. In a report dated 1 & 2 July 2020 (page 138-139) the claimant was referred as being fit for work with immediate effect but would require further support to remain at work. He perceived his stress was related to work. It was recommended that the claimant be redeployed to an alternative office where he does not have any contact with the team members involved in his grievance he raised at the end of March 2020.
30. A further occupational health report dated 5 October 2020 (page 160) noted that the claimant was fit for work with an immediate return with a redeployment to another office. Occupational Health also stated that homeworking on a temporary basis while waiting for a new office may also be an option. The advice given was that the claimant was likely to be able to return to a role similar to his current role (decision maker) but that it was unlikely he could carry out a role with face-to-face customer contact this would potentially impact further on his mental well-being.
31. On 12 April 2021 (page 169) occupational health advised the claimant was fit for work with adjustments and if operationally feasible he could continue with adjustments in his current team. Further it advised that the claimant may benefit from redeployment to a different office. It was recommended that the claimant has daily support to assist him with his decision making. OH advised that the claimant was likely to be considered to have a disability.
32. An occupational health appointment was arranged for 28 July 2021 but the claimant failed to attend the scheduled appointment see page 211. OH attempted to contact the claimant but he was unavailable. Three calls were made and two voicemails were left
33. On 13 September 2021 page 246 Occupational Health advised that the claimant had been absent from work since 9 June 2021 due to covid vaccine side effects and then tested positive for COVID. The claimant was not fit for work in any capacity. It was stated that the claimant has an underlying health condition where relapses in the future can occur potentially leading to

sickness absence. Occupational Health was unable to predict the frequency or duration of any future absence. It further stated that research suggested individuals with prior frequent and or long-term absence remain at risk of further absence. The claimant was considered not fit to return to work at present. The claimant had informed occupational health that his anxiety does not stop him working as he is on medication and rehabilitated. The claimant planned to return to work on a phased return starting with one hour per day. Occupational health recommended a minimum of four hours per day and advised discussing this with management. None of the occupational health advice suggested that the claimant was unable to travel to Walsall Wolverhampton or out of Birmingham for work or suggested that regular travel to these work destinations could impact the claimant's disability.

34. In the occupational health report dated 17 December 2021 at page 338 the claimant was likely to be fit on the date of his current fit note expired. The claimant planned to return on a phased return to work and wished to start on one hour per day. OH advised a minimum of four hours per day so this would need to be discussed with management.

<u>The claimant's sickness absence</u>

35. The claimant had a substantial sickness absence (see the record at page 369). From 28 May 2019 to 21 July 2019 the claimant was absent from work with "an injury/poisoning related". From12 November 2019 to 2 March 2020, the claimant had a career break and then was absent from work from 5 March 2020 to 31 October 2020. In effect the claimant was absent from work for a period of 12 months. The claimant was then absent from the 4 January 2021 to 7 January 2021 because of "respiratory system/ epidemic/ pandemic" and then off sick from 9 June 2021 to 8 August 2021 with a muscoskeletal issue. He was absent from work from 9 September 2021 to 24th September 2021 by reason of respiratory system/ epidemic/ pandemic . The claimant had special leave from 13 October 2021 to November 2021 and was absent with anxiety and depression from 5 November 2021 to 16 January 2021.

<u>The respondent's policies</u>

36. A number of versions of the respondent's attendance management policy were included in the bundle. For the purposes of this case the relevant polices can be can be found at page 940-1005 (dated April 2021). A trigger point is reached under the policy at 8 working days in a 12 month rolling period or four spells of any duration in a rolling 12 month period. A disabled person may have the 8 day trigger point increased. When a trigger point is reached the employee is invited to a formal Heath and Attendance Improvement Meeting (HAIM). The meeting is welfare focused and assists the manager as to what might be done to achieve satisfactory attendance. Formal warnings may be given where absence must be below 50% of the employee's trigger point for attendance at a 6 month review and a final written warning is given when attendance is unsatisfactory during a first written warning review period or sustained improvement. This is also followed by a six months review; an absence must be below 50% of the employees normal trigger point for attendance to be considered satisfactory. When an employee reaches or exceeds the trigger point following a final written warning or whilst in a sustained improvement. Following a final written warning or when a continuous sickness absence can no longer be supported the respondent can consider dismissal or demotion.

37. In deciding if a warning is appropriate a line manager will consider what is fair and reasonable in the circumstances and have regards to
    (a) the level frequency and nature of the sickness absence;
    (b) information about the treatment of the employee is undergoing and the likelihood of improvement; occupational health advice might be sought on this;
    (c) the employee's overall attendance record;
    (d) the employee's length of service and overall performance and attitude to work;
    (e) the steps the employee is taking to improve their own health and well-being;
    (f) the whole context of the case to determine what feels right and fair as an outcome when standing back from the detail and considering the whole of the case.

38. In respect of long-term absence pursuant to paragraph 54 of the policy at page 952 it stated if it becomes apparent during a long term absence that a return to work within a reasonable period is unlikely the manager must consider whether the absence can continue to be supported and be clear about the business reasons for not doing so these reasons must be fully documented so that they can be presented to the decision maker. Pursuant to paragraph 55, the manager should consider whether the employee is likely to meet the criteria for ill health retirement. An appeal process it also provided under the policy.
39. The special leave procedure permits managers to award special leave to employees. When considering a special leave application, a manager must consider what is reasonable and appropriate in the circumstances taking into account business needs; the employee’s needs; the impact on colleagues and the department's reputation. In respect of employees with disabilities at paragraph 50 page 967 managers may grant special leave with pay to help employees manage a disability or long-term health condition where ongoing treatment is needed after the employees fit enough to work. In the case of disabled employees this might be a reasonable adjustment or one of several reasonable adjustments made to help the person to participate equally at work.
40. The respondent's reasonable adjustment policy can be found at page 1064. It envisages the possibility of a workplace transfer or move as a potential reasonable adjustment. The grievance procedure set out at page 1069 sets out an informal process of a formal process of investigation; meeting; outcome and appeal.
41. The civil service code (page 912 to 918) sets out the core values required by civil servants including integrity; honesty; objectivity and impartiality.

    From March 2020
42. The claimant was absent from work from March 2020. He lodged a grievance on 31 March 2020. The Tribunal was not advised as to the content of this save that it is accepted that the claimant no longer wanted to work at Ravenshurst or to be managed by the same manager.
43. Following a four week absence, the claimant’s then manager, Huw Davies, met with him (see pages 109). The claimant advised he was waiting for counselling and was taking anti-depressants of 5mg per day. He had received a 3 to 4 months career break as a support to him to deal with his ill

health. A different line manager would take over the claimant's absence because the claimant had listed Mr. Davies in the grievance.

44. On 7 May 2020 page 113, a further review of the claimant's absence took place with him with Monica Patel. At this point the claimant had been diagnosed with asthma. The claimant was not happy to return to the same team when well. It was agreed to keep up weekly contact.
45. On 12 June 2020 the claimant met with Kuldip Higgs see page 118. His antidepressant dosage had been increased from 5m.g. to 10m.g. The claimant was happy with the OH recommendations. The claimant was asking for a change of office. Kuldip Higgs at that time was considering the claimant working from home so that the claimant could manage his stress and anxiety better. The claimant had some counselling. He described his underlying chronic condition as severe depression and anxiety. Kuldip Higgs informed the claimant that the respondent was trying to do is to support the claimant back into work working from home will remove the disruption of moving to an office.
46. On 13 July 2020 a HAIMS meeting took place via telephone with the claimant and Kuldip Higgs (page 142). The claimant stated that his medication had started to help and he was more positive and starting to sleep better. He was unable to say whether he could return to work and he did not want a set back. He stated that he wanted to move offices and not return to Ravenhurst. Kuldip Higgs asked whether the claimant had thought anything more about working from home as he had an underlying health condition of asthma and would offer the claimant flexibility for when he was having a bad day or unsettled sleep the night before. The respondent had currently 60 people working from home. The claimant was looking for a transfer and suggested not getting what he wanted would have a negative effect and he may get worse. In respect of a return to work plan the claimant suggested he could do 2 hours a day Monday to Friday. Kuldip Higgs referred to the availability on 26 June 2020 of a work coach opportunity and asked the claimant whether he had applied for any of the vacancies. The claimant said he had not because his anxiety was increasing and suggested the only support he needed was to move to another office. A letter sent to the claimant dated 29 July 2020 (page 152 to 153) confirmed the discussion on 13 July. It was confirmed that the department would continue to support the claimant's absence due to being in the process of exploring a transfer's recommended in the OH report and the manager would not consider dismissal or demotion at this point; the claimant's absence was to be regularly reviewed and the decision may be reconsidered if it was unlikely the claimant returned to work within a reasonable period of time.
47. On 20 July 2020 a further meeting took place with the claimant and Monica Patel (page 148). In respect of moving offices Monica Patel informed the claimant that as a business the respondent had to look at several factors namely whether the business can sustain the workload of the transfer; whether the accommodating site had a demand for more resource; it was not as simple as the claimant wishing to be transferred for it to be sorted. The claimant was informed that the process can be lengthy and some people have to wait for a long. The claimant indicated he wanted to move to sites at Wolverhampton, Walsall or Erdington. He was not keen to work at Five Ways because he had a lot of friends and family that work there. The claimant was told that on a transfer list if he was offered a role and refuses it

he will be moved to the bottom of the transfer list. The claimant had not completed the wrap and stress plan and stated he would do so the next day.

48. On 23rd July 2020 (page 151) Monica Patel tried to call the claimant four times between 10:03 a.m. to 12:24; she had left voice mails but had not heard anything back from the claimant. She also raised she still had not received the wrap or individual stress plans.
49. On 12 August 2020, a five month review took place between the claimant and Monica Patel (page 154). The claimant described his health as being up and down and that he continued to have counselling via his GP. The claimant was advised that Ms. Patel had liaised with relevant offices and it was unclear whether a transfer would be available. Ms. Patel suggested the claimant could work from home under a different line manager just doing Ravenhurst's work and he would not have to attend site; whether the claimant could return to work. The claimant stated *"once the transfer was agreed he could consider it".* The claimant stated that he was claiming benefits as he was not getting paid. Ms. Patel stated she was doing all that she could to support the claimant. The claimant was reminded about vacancies that he could apply for.
50. On 14 September 2020 the claimant was made aware by Kuldip Higgs there was a full-time available post at Walsall as a work coach. The claimant did not apply for that role.
51. On 8 October 2020 (page 162) the claimant again met with Monica Patel. Two potential posts were discussed. The claimant rejected the Five Ways role. In respect of the work coach job at Walsall, the claimant stated that the location was perfect but not the role. The claimant said he wanted to come back on a phased return, as long as his transfer was agreed with a new leader. The claimant was unable to confirm whether he would return to work at the end of his medical sickness certificate. The claimant asked and was given time to think about this. Confirmation of this discussion was set out in a letter dated 14 of October (page 168). The respondent advised the claimant it would continue to support his sickness absence as he has provided a return-to-work date. The respondent would not consider dismissal or demotion at this point.
52. On 14 October 2020 (page 166) Ms. Patel contacted the claimant to state that the respondent would be able to conduct one last request for any suitable vacancies but beyond that the respondent would not be able to keep looking into a transfer as the respondent had exhausted all avenues open to the respondent. Ms. Patel stated the respondent could support the claimant in any preparation for vacancies he applied for.
53. Following an absence of approximately 12 months, the claimant returned to work on 1 November 2020 working from home. As set out above the claimant was absent on 4 January 2021 to 7 January 2021 with a respiratory/epidemic/pandemic illness. From 9 June 2021 to 8 August 2021 the claimant was absent from work due to a musco-skeletal issue.

<u>From 4 August 2021</u>

54. From August 2021 Lisa Cottrell commenced line management of the claimant. On 4 August 2021 (page 232) a telephone call was made by Lisa Cottrell team leader to the claimant. The claimant said he was not feeling too good. The claimant described that he was in a lot of pain at the moment. He was asked whether he thought about returning to work at all; possibly on part-time medical grounds; he could do some reading and checking emails.

The claimant was unable to give a specific time when he would be able to return to work. He said he wanted to work full time. Lisa Cottrell suggested part-time working might be better initially. The claimant said he would talk to his G.P. Ms. Cottrell said she would book another meeting for a stress management plan and that her goal was to get the claimant back to work healthy. Ms. Cottrell was supportive.

55. On 12 August 2021 (page 238) the claimant was invited to a Microsoft Teams meeting with Lisa Cottrell to discuss his absence. At this stage the claimant was absent for 127.5 days and had three spells of absence between 11 of August 2021 and 11 of August 2020 so that the claimant had reached or exceeded his trigger points of 8 days and 4 spells of absence. The claimant was told by Ms. Cottrell she needed to consider whether any formal action would be appropriate.
56. On 19 August 2021 (page 240) a further HAIMS meeting took place. Ms. Cottrell offered assistance to the claimant at any time stressing that if he was not feeling well there is support available and the main thing is that he had confidence that if he was not feeling well, he could call her to discuss how he is feeling so help could be put in place. She reminded the claimant that communication was key and that she was glad he was feeling better. The claimant was very happy with his new manager. The claimant at this point was working one hour per day and that on 19 August was his first 2.5 hours day. Ms. Cottrell informed the claimant not to suffer in silence and let her know if he needed anything.
57. On 24 August 2021, page 243, the claimant received a first written warning because of the high levels of his sickness absence over the past twelve months namely 127.5 days and three spells of absence. This was in accordance with the Attendance Management Policy and in fact the respondent could have acted more quickly. The claimant was warned that if his attendance over the next six months was unsatisfactory, he may be issued with a final written warning. The claimant appealed the first written warning but this was dismissed on 22nd September 2021 page 250. The manager considered looking at the claimant's attendance record overall it was within reason and a fair outcome to issue a written warning.
58. From September 2021 the claimant's activity online (working from home) was quite sporadic. Ms. Cottrell noted that on occasions the claimant was available to speak but at other times the claimant informed her that his broadband was not working. The claimant advised his manager that having spoken to his internet provider there was something wrong with the wires and the router so there were a couple of reasons why he could not log on. Ms. Cottrell organised for the claimant to have a week of special leave with pay due to the internet issues he was having as a reasonable step to assist him and to avoid any unnecessary stress for the claimant.
59. On 7 October 2021 the claimant advised Ms. Cottrell by text message in the morning that his smart card was blocked. He was advised to contact DWP digital place to log the incident. A smart card is blocked when a member of staff incorrectly inputs their password or pass code into their computer following the insertion of the smart card. He later stated he had access to the system but a few hours later then said his card had been blocked again. Ms Cottrell contacted DWP digital place for the claimant and then advisor claimant they could fix it for him. Later that day the claimant stated it was fixed.

60. On 8 October 2021 the claimant sent a message to Ms. Cottrell saying he had some family issues and could not log on. On 12 and 13 October 2021 the claimant advised he could not log on due to IT issues with his Wi-Fi. The claimant advised his new Wi-Fi box would be sent on 15 October 2021. Ms Cottrell organised 3 days special leave to cover the fault until his box arrived as a reasonable step to support and assist the claimant. Ms Cottrell's thinking was that this would avoid causing any stress or anxiety recognising the claimant’s health condition.
61. On 29 October 2021 the claimant informed his manager he was still experiencing issues with his Wi-Fi. Ms Cottrell informed him she could not allow the situation to continue and he would have to take annual leave as she could not authorise 3 weeks special leave with pay. The claimant was not happy with this. On the Saturday of that week the claimant messaged Ms. Cottrell to say that his wi-fi had started to connect. Ms. Cottrell instructed the claimant to turn on his Surface Pro and check that everything was working.
62. On 1 November 2021 the claimant informed Ms. Cottrell that his smartcard was blocked. Ms. Cottrell advised the claimant he needed to attend the Walsall office to get a new one. A smartcard cannot be sent via recorded delivery because of data protection issues; the smartcard has a significant amount of personal material concerning names, addresses and benefits received and claimed by members of the public. Once a smartcard is activated it gives access to DWP’s security systems. At this time, the claimant did not request for the smartcard to be sent via recorded delivery. He was invited to attend the Walsall office to rebind the smartcard as he had experienced issues with it and it was blocked. He mentioned on 1 November 2021 that he was anxious and could not attend the office that day. He was not required to attend the office that day.
63. On 2 November 2021 the claimant contacted Ms. Cottrell to say his smartcard was still not working and his father would bring him down to the office. He did not say he would have any difficulties coming into the Walsall office. He sent Ms. Cottrell a text message at 9:00 a.m. to confirm he would be coming in and his father would bring him because of the effects of medication he was on. He did not mention his anxiety as a reason as to why he could not attend the office. Ms. Cottrell, along with other employees was working from home, but to support the claimant and ensure there was a familiar face, she went into the office on 2 November. The claimant did not attend the premises and Ms. Cottrell contacted the claimant. He informed his manager that he was not on his way and that his father was busy. He said he was unsure if he could make his own way into the office because he felt *“full of charge”* and that his medication was making him drowsy. He said he would provide a further update. Ms Cottrell sought advice from human resources. The claimant did not contact his manager so she contacted him around 16:25 that day. The claimant advised he had not managed to get into the office. Ms. Cottrell advised the claimant that he would have to have to take a day of sick leave if he was unwell or unpaid special leave for the rest of the day. The claimant chose to use unpaid special leave as he did not want to use up his annual leave. Ms. Cottrell advised the claimant, he would need to attend the Walsall office the next day and she would provide a taxi for him if he could not drive due to his medication or if his father could not

give him a lift. The claimant said that would be perfect and that he would prefer this and thanked Ms. Cottrell for all her support.

64. On 3 November 2021 the claimant drove himself to the Walsall office and did not request a taxi. He contacted Ms Cottrell by text message and stated that he would be going into the Walsall office shortly to get his smartcard but may not log on until later because his neck was hurting and he needed to go to hospital. Ms. Cottrell stated that if he was not well enough to log on, it would have to be recorded as sick leave. Ms. Cottrell emphasised the claimant's absence should be recorded accurately. The claimant asked about unpaid special leave or annual leave and whether that could be used. Ms. Cottrell advised that the business could not allow the claimant to use annual leave to mask sickness absence if he was unwell. The claimant was not happy with this and sent a message to Ms Cottrell stating *don't I have the right to use my annual leave instead of having it as a sick day as it's gonna cause me grief in terms of my previous sick* see page 577. The claimant then went on to say *I understand your role and responsibility and I appreciate you recording it accurately.* The claimant requested by asking if he could use his flexi time. He was informed that if he was not well enough to work then it would be classed as a sickness absence. The claimant responded *I said it's uncomfortable pain. I disagree with your action this morning….do what you want* page 577. The message from the claimant was unnecessarily aggressive. The claimant confirmed he would use flexi time instead.
65. On 3 November 2021, the claimant attended the Walsall premises and Ms. Brownhill sought to assist him to rebind the smartcard. Unfortunately, the portal was down. The claimant stated he was unable to wait too long because he had medical conditions and he needed to take his medication then leave. Ms. Brownhill agreed that the claimant could re-arrange on a different day. Ms. Brownhill informed Ms. Cottrell, the claimant's manager about this. Ms. Cottrell was on annual leave on 4 and 5 November 2021 so she arranged for Karen Mercuradi to arrange for the claimant's attendance at the office.
66. On 4 November 2021 in accordance with arrangement made by Ms. Cottrell, the claimant should have attended the office at about 9.30 a.m. Ms. Mercuardi who was deputising for Ms. Cottrell contacted the claimant by text to check what time he was attending the office. The claimant responded he would arrive about 12. Ms. Mercuardi asked if he could make it a bit earlier and the claimant stated he could try (page 277-8). He stated his landlord was inspecting the property and he would ask if he could attend in the evening (page 279). Louise Brownhill who was due to meet the claimant was in a meeting from 11.45 a.m. so to collect the claimant from the car park on arrival to ensure he was safe. The claimant attended the Walsall office (page 277-9). The portal was down and the claimant needed a new smartcard. Ms. Mercuradi contacted the claimant by text message to see if he had got home. The claimant said the drive was fine save for a bit of traffic (page 271). The issue with the smartcard had not been resolved so Ms. Mercuradi informed the claimant he needed to return to the Walsall office 9.30 am the next day. She mentioned "sharp". The claimant was upset about the use of the word sharp (page 315-6, 507, 534, 744). The claimant stated he had been travelling for the past two days with high levels of anxiety and did not wish to be pressured and in case he had a breakdown

again. The claimant stated he would attend if he slept fine but if he had issues with his health condition he would not attend. Ms. Mercuriadi said she understood and he should relax for the evening (page 270). The text messages between the claimant and Ms. Mercuradi were friendly and convivial.

67. On Friday 5 November 2021, Ms. Mercuradi contacted the claimant to see how he was. He responded about one hour later to say he had been on the phone to his mental health and had issues all night (page 273). The claimant stated he was unable to attend the Walsall office. He said he had been advised by the mental health team he required 2 months off for special leave. Ms. Mercuradi was unsure as to how to deal with a special leave application and asked the claimant if he was happy for her to discuss it with Mufaza Arooj and Kuldip Higgs. The claimant was happy for her to do so. The advice received was as the claimant was unwell it needed to be recorded as a sick day. The claimant stated that he had spoken to his GP who asked the claimant to see him face to face that afternoon. He later told Ms. Mercuradi that there was no GP appointment and he had to arrange the following week. Ms. Mercuradi explained that to the claimant that if he was unwell it had to be recorded as sick leave. He needed to apply for special leave; it would not be granted until the respondent was aware of the basis for the application. At his request Ms. Mercuradi copied and pasted the special leave criteria to the claimant pages 353 to 363.

68. There was a direct conflict of evidence between the claimant and Ms. Mercuradi as to what was said on 4 November. The claimant alleged that Ms. Mercuradi stated *"Its not our fault your brain doesn't work"* and *"Don't you think the department has done a lot for you"*. Ms. Mercuradi disputes she made these comments but recalls stating the gist was stated as "*Is there something further that could be done that we have not already mentioned to you".* The Tribunal rejected the claimant's evidence and preferred Ms. Mercuradi's recollection of the conversation. Ms. Mercuriadi was a caring manager evidenced from the compassion she showed towards the claimant in ensuring he was assisted into the building so he was not left stressed alone in the car park when he arrived at the building; ensuring she checked on his well being and how his journey home was and generally the light hearted messages with emoji exchanges between herself and the claimant; see pages 267 to 279. The claimant's version was not credible. Further the Tribunal determined in this conversation that the claimant praised his manager Ms. Cottrell.

69. On 8 November 2021 Ms. Cottrell contacted the claimant. He requested the smartcard be sent via post to him at home. This was not possible because of the confidential information contained on the card. Further where the card is blocked the employee has to log onto a secondary computer to go through their security questions in order to bind the card. Ms. Cottrell informed the claimant that his absence on 5 November had to be recorded as sick and not special leave as ill health should not be masked and his reason did not fall within the special leave policy page 960-979. The policy stated that it should not be used to mask sickness absence. The claimant stated that he was not feeling any better. Due to the claimant's sickness absence he was on nil pay. He did not mention to his manager anything about actual sick pay itself or the monetary value of any sick pay.

70. On 9 November 2021 Ms. Cottrell advised the claimant the portal was up and running. The claimant said he was well enough to attend the Walsall office and his father would drive him down but he was still waiting for a GP appointment (page 581). Ms. Cottrell advised she would end his sickness absence but the claimant said it was best not to as he had not spoken to his G.P. Ms. Cottrell contacted the claimant again later and he advised he would be in the office at 11-11.30 a.m. He advised by message his father was bringing him in (page 582). Ms. Brownhill assisted the claimant on his arrival at the office. She asked the claimant to go through his application and ensure everything was correct and working before he left the office. He was anxious and rushing to leave the office.
71. Ms. Cottrell contacted the claimant again on 11 November 2021. On 12 November 2021 Ms.Cottrell completed a OH referral for the claimant including all the conditions the claimant had recently mentioned including anxiety, stress, back shoulder and elbow pain.
72. On 23rd November 2021 the claimant was invited to a meeting on 10 December 2021 because he had been absent for 33 days between the 5 of November to 7 of December. The respondent wished to meet with the claimant to discuss his progress and what it could do to assist him to return to work as soon as he is able. The claimant remained on long term sick leave until mid January 2022.
73. On 23 November 2021 Ms. Cottrell made a referral to the internal investigations team page 288-291 because the claimant was consistently unavailable and kept moving meetings with his manager and did not answer his phone nor did he respond to his manager.
74. On 29 November 2021 page 292 the claimant informed his manager Ms. Cottrell that he had not been feeling well since 5 of November 2021. He stated the current barriers to a return to work were his anxiety which is worse due to instances (the smartcard) with Ms. Cottrell and Karen Mercuradi and the change of medication to a higher dose that will need settling and his body getting used to.
75. On 7 December 2021 the claimant submitted a grievance (page 516) against two managers Lisa Cottrell and Karen Mercuriarid. The claimant complained that he had been forced and bullied to come into Walsall for his smartcard. He alleged he nearly crashed the car due to his anxiety (the claimant had not mentioned this to his manager at the time and his messages to the manager indicate he had suggested because the traffic was manic only). He complained that he had been marked as sick and alleged that Karen had made two remarks (set out above). The claimant received a text message at page 564. His evidence is that he believes that it was sent by Karen Mercuriadi or Lisa Cottrell because he gave them this number. Ms. Mercuriadi and Ms. Cottrell deny sending the text message to the claimant; Ms. Mercuriadi said that neither her nor her colleague would do such an act and put their careers on the line. They believe the claimant sent it to himself to set them up. The Tribunal believed Ms. Mercuriadi and Ms. Cottrell did not send such a text. It would be completely out of character and inconsistent with the way both individuals had sought to support the claimant in the workplace. The Tribunal determined that Ms. Cottrell and Ms. Mercuradi were honest witnesses and neither used this type of language nor would they seek to put their careers on the line by sending such an inappropriate message. It was not clear to the Tribunal who exactly sent the

message to the claimant but on the balance of probabilities the Tribunal do not find that either Ms. Cottrell or Ms. Mercuriadi did so.

76. On 10th December 2021 a HAIM meeting took place (pages 327 to 333). The claimant stated that he hoped to return to work. He wanted a phased return to work. The claimant expressed that Walsall was his preferred office. He said the problem in November was not his smart card or having to come into the office but he had come in when the system was down then he came back in another day and the tech team were not. He explained that this triggered his anxiety and that his disability was not considered at all in any way in planning for him coming in. He had refused the respondent's offer to pay for a taxi and he had expected everything to be in place when he got there especially on the second day.
77. Kuldip Higgs asked the claimant if the absence continued to reoccur whether the claimant had considered ill health retirement or does he know anything about it. The claimant said he had never thought about it and it was the first time it had been mentioned and asked what it was. Kuldip Higgs told the claimant that if someone's health did not improve and they were unable to work then sometimes the department can consider ill health retirement. The claimant said he was happy to receive any information on it but he feels it won't be necessary and is confident he will be better and be stronger. The claimant was requested to complete a stress risk self-assessment and was asked about returning to work on part time medical grounds on what he believed he could do. The claimant stated he could work two hours per day for six to eight weeks and build up over the weeks; the claimant said two hours a day would take it steady and he didn't want to rush back. The claimant had been assigned two buddies to help support him in his work and they were Emma Beckford and Sarah Woodford. The claimant was asked to delete all emails prior to the 4 November 2021 as he does not need any added pressure. The claimant agreed to do this. Kuldip said the respondent would review the claimant daily with him to see how he is getting on.
78. On being made aware of the content of claimant's grievance and the serious allegations made against them in respect of the text message, on 13 January 2022 Ms. Cottrell and on 17 January 2022, Ms. Mercuriadi, brought counter grievances against the claimant (see page 642 and 645).
79. On 17 January 2022 (page 372-3) a welcome back to work meeting took place between the claimant and Ms. Higgs. Melanie Williams took over his line management after this. The claimant did not want Ms. Cottrell to be his line manager and a stress risk assessment completed by Ms. Higgs on 10 January 2023 identified this as a high level stressor. On 17 January 2022 Melanie Williams contacted the claimant (following a handover from Ms. Higgs to discuss part time working on medical grounds; (see pages 383-7) and back to work plan (page 374-6).
80. The respondent designed a six week learning plan to support the claimant (see page 382). The claimant informed his manager Ms. Williams he was fine with making the type of decisions he had done before. The claimant was given a mentor because the Birmingham office no longer dealt with work capability decisions and a colleague in Milton Keynes (Ms. Church) agreed to act as the claimant's mentor and helped him with capability decisions. The claimant commented how brilliant and supportive she was to him. Ms. Williams had daily catch-up meetings on teams with the claimant which was a mixture of sending well-being links and sometimes ringing the claimant.

81. On 17 January 2022 Ms. Williams asked the claimant what time he was likely to start. The claimant stated he was an early bird and would like to be flexible with the start time of up to 11 a.m. (see page 377). Ms. Williams asked the claimant to message her to have a chat each day to see how he was getting on page (377-9). Ms. Williams had a duty of care to the claimant to monitor the claimant and ensure he was online only at the particular times it was agreed he should be working. In addition, the correct recording of times ensured that the claimant was paid correctly. The claimant did not raise any concerns in regard to Ms. Williams actions or questions about his logging on or off the system. The claimant informed Ms. Williams he had logged on at 8:45 and stated that she should have a nice weekend (see page 782). In another message, the claimant informed Ms. Williams when he logged on; he replied by liking the message and confirmed logging on at 9:45 (pages 429).
82. On 3 February 2022 page 393 the claimant attended a HAIM meeting with his trade union representative. The claimant had returned to work in January 2022 on a phased return to work. He had worked two hours a day for first week and then three hours for week 2 and 4 hours week 3. The claimant felt it was going brilliantly. He was being supported and mentored by a decision maker from Milton Keynes and he thought she was great. The claimant felt he had a very positive meeting with Ms. Williams his manager. They went through another stress document. His relationship was a good one with his manager and the claimant reported in glowing terms his present management.
83. On 14th February 2022 the claimant alleges that Ms. Williams invited the claimant to share his screen after he had told her he had completed a task. Ms. Williams provided some examples when she had requested the claimant to share his screen. One such request for the claimant to share his screen was to establish what the claimant had done. Ms. Williams was concerned that the large number of emails in the claimant's inbox could affect his anxiety levels and had directed that the claimant delete these old emails as a welfare issue. The claimant did not wish to delete all of them and wanted to retain some. Therefore Ms. Williams had directed the claimant to put old emails, he wished to retain, into a folder. Ms. Williams asked the claimant to share his screen so he could show her what he had done. When the claimant did share his screen with Ms. Williams, the claimant had placed emails into a side folder. The Tribunal preferred the evidence of Ms. Williams that he did not say prior to sharing his screen that he had created a folder and Ms. Williams invited him to share his screen so she could assist him in setting up a folder. When the claimant did share his screen the claimant had placed emails into the into a side folder. Ms. Williams had provided some guidance to the claimant about placing old emails into a separate folder and in the context of a caring manager concerned for the claimant's welfare who wanted to ensure the employees well-being Ms. Williams was entitled to ask the claimant to share his screen to ensure that he had done this. On another occasion Ms. Williams had scheduled a Microsoft teams call with the claimant to go through his redeployment checklist. The claimant was aware of the call because Ms. Williams had messaged the claimant on teams page 428 and informed him she wished to go through his redeployment plan. Part of that discussion would include how and employees getting on with applying for jobs. In the

course of the discussion the claimant stated he had been looking for DWP jobs. Ms Williams asked the claimant what he put in his search. The claimant stated that he had seen some jobs in HMRC but had not applied. Ms Williams asked the claimant to share his screen so that she could have a look at his profile and job search as the redeployment plan required her as a manager to see the documents. The claimant stated he did not wish to share his screen with his manager. Ms. Williams therefore said it was not a problem and they could do it at a different time if he wanted (page 659).

84. Ms, Williams indicated there was a basic expectation that two to three decisions on cases should be made on a daily basis. The claimant did not say that this was an unachievable expectation. The claimant was actually achieving only 9 decisions over a 12 month period.
85. On 16 February 2022 (page 452) the respondent gave the claimant a final written warning regarding his attendance record. The claimant had taken 47 working days of absence. This was imposed having taken into account the relevant factors set out in the attendance management procedure.
86. On 18 February 2022 the claimant asked whether he could have 1/2 day flexi leave (see page 431). Ms. Williams informed the claimant all leave requests needed to be agreed in advance (page 432). Further, as the claimant was on PTMG on agreed set hours he would either have to change the number of hours he worked or would need to take half a day's annual leave (page 433).
87. On 22nd of February 2022 a vacancy came through for business support in the counter fraud department which was different to the work the claimant was doing at the time. Ms. Williams sent a copy of the vacancy to the claimant. The claimant rejected the role stating that he had asked for a decision maker role and according to his disability would not be appropriate (see page 448).
88. On 21st February 2022 the claimant resigned his employment (see resignation letter page 680) The claimant stated
“regretfully I inform you that I Mohammed Mobeen ….must resign from my position as an executive officer effective immediately. I am resigning due to myself being subject to bullying and harassment and breach of disability Discrimination Act since being employed with DWP Ravenhurst. I have been subject to bullying harassment direct/indirect discrimination and victimisation/other harassment from the staff at the Ravenhurst office and has continued from manager to manager and I can no longer bear the stress I am suffering in this office/department. I should have been redeployed to another office; however my disability was not taken into consideration. My last day will be 21/2/2022 no later than 11 AM. I apologise for any inconvenience my resignation may cause I will not be returning to the office at all I will return all DWP property equipment as negotiated with the SEO. It is my hope by bringing this instant to your attention further harassment to existing/future employees will be spared. I do appreciate all the valuable experience I have earned while working at Raven Hearst. I wish the department DWP continued success and thank you for your arm to standing and patience with me during this time.”
89. The claimant made no reference in his resignation letter to being subject to the specific treatment he now contends caused him to resign and in particular did not raise that he relied upon a last straw.

90. In December 2021 Sandra Simms an investigator at the government internal commenced an investigation into allegations that the claimant had been working in a second occupation whilst on sick leave. She had available to her an image containing registrations of cars used by the claimant to attend the office and that he had driven on both days; a copy of a receipt using different names; a sick note with a different address and using the name off Arfar Ali and a screenshot sent using a different name for NHS correspondence under the name of Arfar Ali see page 341. On 31st January 2022 Ms. Cottrell emailed Sandra Simms two fit notes relating to the claimant's recent absence remarking that the address on the second fit note was not showing because the claimant confirmed he had lost the other side of the second fit note but it was showing on the first fit note (see page 474 to 477). Sandra Simms asked Ms. Williams on 21 February 2022 if she could arrange an investigation interview with the claimant (see page 676). Ms. Williams responded that the claimant had been back now for six weeks and it was OK to proceed to an interview (page 675 to 676). On 21 February 2022 Ms. Williams confirmed the claimant's resignation to Sandra Simms.
91. An investigation invite letter was sent to the claimant date 25th March 2022 (page 687-689) the claimant stated he did not wish to participate in the investigation because it would be stressful (page 691). An investigation report was prepared dated 11 April 2022 (page 695 to 733). The investigation set out at page 698 -699 concerns that the claimant had become a sole director of Luxury Wedding Planners on 8 December 2019 Capital with reserves of £590,568. It was noted on 13 February 2020 the claimant's name was listed as a director of Midlands Bargains Limited; the directorship terminated on 8 January 2022 with profits of £556,305 on 30 November 2020. On 16 October 2020 the claimant's name showed an appointment as a director of Blue Star Solutions Limited. The investigation concluded that the claimant had not declared the same name and address on the respondent's HR system as he did not his universal credit claims. When asked about these matters the claimant was not willing to answer. Due to the fact that there appeared to be a suggestion not only that the claimant was working for another business whilst off sick with the claimant but that he was unlawfully claiming benefits but working, the Judge gave the claimant a warning about self incrimination. The claimant did not wish to answer any questions. It was put to the claimant that his personal email address "lwp@" was directly related to Luxury Wedding Planner the business also registered at his residential address. The claimant disputed this stating it was "Lima whisky papa" and a coincidence. The Tribunal were not persuaded by the claimant's evidence that the initials chosen were by mere coincidence; it was an incredible suggestion. The claimant maintained he was not a dishonest person and did not wish to answer.
92. Ultimately it was concluded by June Ann Cunningham there was no case to answer (page 1208 to 1209) in the absence of any engagement from the claimant. In her evidence to the Tribunal June Ann Cunningham stated now that the claimant had suggested in the course of his evidence that the company Luxury Wedding Planners had nothing to do with him it would have led to the conclusion that there was a case to answer because it was inconsistent with the material that she had and she would have taken it further. The Tribunal found this evidence rather confusing and could not follow the logic of the respondent's position. The civil service code of

conduct (page 912 to 918) sets out the civil service values. If a civil servant had failed to disclose a second occupation or had worked in a second occupation whilst off sick from the respondent, it would have been contrary to the values of integrity and honesty (914-5) within the code and it would also be contrary to DWP's disciplinary policy and procedure (1224 to 1248).

93. The grievance outcome was provided to the claimant by Mr. Banjay on 22 May 2022 (page 761-4). It was concluded that IT issues experienced by the claimant at the Walsall office could not have been foreseen in advance of him attending the office on 3 and 4 November. In respect the special leave request it was found that Ms. Mercuriadi acted on advice of a senior manager and it should be recorded as sick day rather than special leave. In his claim the claimant complained there was a delay in providing him with a grievance outcome but was unable to explain in cross examination why he failed to attend grievance investigation interviews himself or in fact identify at any time that he had chased for a grievance outcome.

The Law

Constructive unfair dismsal

94. Section 95 (1) (c) of the Employment Rights Act 1996 ("ERA") relevantly provides *"For the purposes of this Part an employee is dismsed by his employer if (and only if)-the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".*

95. An employee seeking to establish that he has been constructively dismsed must prove :- (1)that the employer fundamentally breached the contract of employment; and (2)that she resigned in response to the breach (see **Western Excavating (ECC) Limited v Sharp (1978) IRLR 27**).

96. It is an implied term of the contract of employment that the employer will not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee; **Malik v BCCI plc (1997) IRLR 462; Baldwin v Brighton & Hove CC (2007) IRLR 232.**

97. The serious nature of the conduct required before a repudiatory breach of contract can exist has been addressed by the EAT in **Pearce v Receptek (2013) All ER (D) 364** at paragraphs 12/13

"It has always to be borne in mind that such a breach (of the implied term) is necessarily repudiatory and it ought to be borne in mind that for conduct to be repudiatory, it has to be truly serious". The modern test in respect of constructive dismsal or repudiatory conduct is that stated by the Court of Appeal not in an employment context, in the case of **Eminence Property Developments Limited v Heaney (2010) EWCA Civ 1168** *"..the legal test is simply stated..it is whether looking at all the circumstances objectively that is from the perspective of a reasonable person in a position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract'.* That case has been followed since in **Cooper v**

Oates (2010) EWCA Civ 1346 but is not just a test of commercial application. In the case of **Tullet Prebon Plc v BGC Brokers LP (2011) EWCA Civ 131** Aikens LJ took the same approach and adopted the expression *'Abandon and altogether refuse to perform the contract. In evaluating whether the implied term of trust and confidence has been broken, a court will wish to have regard to the fact that since it is repudiatory it must in essence be such a breach as to indicate an intention to abandon and altogether refuse to perform the contract'.*

98. Where a fundamental breach of contract has played a part in the decision to resign the claim of constructive dismsal will not be defeated merely because the employee also had other reasons for resigning; **Wright v North Ayrshire Council (2014) IRLR 4 (paragraph 16).**

99. Where a Claimant relies upon a final straw to resign the final act may not be blameworthy or unreasonable but it must contribute something to the breach even if relatively insignificant **Omilaju v Waltham Forest London Borough Council (2005) EWCA Civ 1493.** Further, there cannot be a series of last straws; once the contract is affirmed earlier repudiatory breaches cannot be revived by a subsequent "last straw" and following affirmation it takes a subsequent repudiatory breach to entitle the employee to resign.

Harassment

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

101. In order to amount to disability harassment within 26 there must be found to have been
(a) unwanted conduct which
(b) is conduct related to disability and
(c) that conduct must either
(i) have the purpose of creating the necessary impact IE violating the claimants dignity or creating a hostile intimidating or degrading humiliating or offensive environment for him or
(ii) must reasonably have the effect of creating that impact taking into account all the circumstances.

102. The courts have repeatedly asserted that upset is not sufficient and that it is important not to lose sight of the force of the particular adjectives used in the Equality Act for example in the case of **Richmond and Pharmacology and Dwali 2009 ICR 724** at paragraph 22 "*not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done*

which are trivial or transitory particularly if it should have been clear that any offence was unintended. While it is very important that employers and tribunals are sensitive to the hurt that can be caused by racially offensive comments or conduct or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

103. In **Land Registry v Grant 2011 IRLR 748** per Elias LJ at paragraph 47 *"even if in fact the disclosure was unwanted and the claimant was upset by it the effect cannot amount to a violation of dignity nor can it properly be described as creating an intimidating hostile degrading humiliating or offensive environment. Tribunals must not cheapen the significance of these words they are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The claimant was no doubt upset that he would not release the information in his own way but that is far from attracting the epithets required to constitute harassment. In my view to describe this instant as the tribunal did as subjecting the claimant to a humiliating environment when he heard of it some months later is a distortion of language which brings discrimination law into disrepute."*

104. Langstaff P subsequently endorsed that view in **Betsi Cadwaladr University Health board v Hughes UKEAT/0179/13/joj 28 Feb 14** *"the word violating is a strong word offending against dignity hurting it is insufficient violating maybe a word the strength of which is sometimes overlooked the same might be said of the words intimidating etc all look for effects which are serious and marked and not those which are though real truly of lesser consequences."*

105. Hence the test is a high one.

106. It is also important that context and intention are relevant to whether any conduct created the necessary effect. As set out in Elias LJ in grant *"when assessing the effect of a remark the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect it will also be relevant to deciding whether the response of the alleged victim is reasonable."*

<u>Failure to make reasonable adjustments</u>

107. Section 20 the Equality Act 2010 provides that

"(1) where this act imposes duty to make reasonable adjustments on a person this section sections 21 and 22 and the applicable schedule apply; and for those purposes a person on whom the duty is imposed is referred to as A;

(2) the duty comprises the following three requirements…

(3) the first requirement is a requirement where a provision criterion or practise puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled to take such steps as it is reasonable to have to take to avoid the disadvantage;

108. Paragraph 20 of schedule eight of the Equality Act 2010 provides that

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

(b).. That an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first second or third requirement.

109. In order to amount to a PCP there must be something more than a one off response to a particular set of circumstances see **Williams v Governing Body of Alderman Davies school (2020) IRLR 589 at paragraph 79.** In the case of **Ishola v Transport for London 2020 EWCA Civ 112** the Court of Appeal in the context of a discussion about whether a practise could be a one off act confirmed that the words provision criterion or practise carried the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. At paragraph 38 it was stated the practise here connotes some form of continuum in the sense that it is the way in which things generally are or will be done; that does not mean it is necessary for the PCP or practise to have been applied to anyone else in fact something maybe a practise or done in practise if it carries with it an indication that it will or would be done again in the future if the hypothetical similar case arises therefore although one off decisions or acts can be a practise it is not necessarily one.

110. In respect of both forms of claim there is initial burden on a claimant to establish that the relevant PCP caused substantial disadvantage following **Project Management Institute v Latif (2007) IRLR 579** paragraphs 44-5, Elias P Observed at paragraph 45 that establishing the PCP and demonstrating the substantial disadvantage

“are simply questions of fact for the tribunal to decide after hearing all the evidence with the onus of proof resting throughout on the claimant.”

111. In the case of **Allonby v Accrington & Rossendale College (2001) ICR 1189** paragraph 12 Sedley LJ explained the initial burden on the complainant as follows

it is for the applicant to identify the requirement or condition which she seeks to impugn. These words are not terms of art; they are overlapping concepts and are not to be narrowly construed Clarke v Eley IMI Kynoch (1982) IRLR 482. If the applicant can realistically identify a requirement or condition capable of supporting her case.. It is nothing to the point that her employer can with equal cogency drive from the facts a different and a new objectionable requirement or condition. The employment tribunals focus moves directly to the question of unequal impact.”

112. In the case of **Ishola v Transport for London (2020) ICR 1204** paragraph 35-6 Simler LJ confirmed the approach to be taken in identifying the PCP and determining whether that has been applied in the circumstances in issue as follows

“35. The words provision criterion or practise are not terms of art but are ordinary English words. I accept that they are broad and overlapping and in light of the object of the legislation not to be narrowly construed or unjustifiable

limited in their application. I also bear in mind the statement in the statutory code of practise that the phrase PCP should be construed widely..

36. The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee the PCP serves a similar function in the context of indirect discrimination with particular disadvantages suffered by some and not others because of an employer's PCP. In both cases the act of discrimination that must be justified is not the disadvantage which a claimant suffers but the practise process rule or other PCP under, by or inconsequence of which there's disadvantageous act is done. To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantaged caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply or a hypothetical comparator to whom they allege PCP would or would apply."

113. For the purposes of section 20 of the Equality Act when considering whether the employee has been placed at a substantial disadvantage that is to be understood as a disadvantage that is more than minor or trivial see section 212. A comparison exercise is thus required to test

"53.5 whether the PCP has the effect of disadvantaging the disabled person more than trivially in comparison with others who do not have any disability ***Sheikholesami v University of Edinburgh (2018) IRLR 1090 EAT****"*

114. This is not a question of strict causation and does not require exact comparators (see Sheikholeslami at paragraphs 48-53). As made clear in **Griffiths v Secretary of State for Work and Pensions (2015) EWCA Civ 1265 paragraph 58**

"The fact disabled and able bodied people are treated equally and may both be subject to the same disadvantage does not eliminate the disadvantage if the PCP bites harder on the disabled."

115. Put another way that disabled and able bodied people may both be affected by a PCP does not preclude substantial disadvantage in circumstances where the likelihood or frequency of the impact is greater for the disabled person. As Simler P explained at paragraph 49 **Sheikholesami**

"whether there is a substantial disadvantage as a result of the application of the PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability."

116. In determining the reasonableness of a proposed adjustment the Tribunal should consider to what extent it might ameliorate the disadvantage (see **Griffiths** per se LJ Elias paragraph 66). In this regard there is a relatively low threshold the adjustment need only have a prospect of achieving that result; see **Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10.** Although the Equality Act does not set out a mandate list of factors to be taken into account the EHCR employment code lists matters that might be relevant to the tribunal's assessment as follows

whether taking any particular steps would be effective in preventing the substantial disadvantage; the practicality of the step; the financial and other costs of making the adjustment and the extent of any disruption caused; the extent of the employees financial other resources; the availability to the employer of financial or other assistance to help make an adjustment and the type and size of the employer."

117. In **Smith v Churchills Stairlifts PLC 2006 ICR 524** the Court of Appeal confirmed that the test of reasonableness in the context of what is now section 20 is an objective one and it is ultimately the employment tribunal's view of what is reasonable that matters. Lord justice Kay made it clear where the employer objects to the proposed adjustment on the ground that it would be disruptive it is for the tribunal to determine objectively the extent to which the step would cause disruption not whether the employer reasonably believed that such disruption would occur. It is necessary for the tribunal to look at the proposed adjustment from the point of view of both the claimant and employer and then make an objective determination as to whether the adjustment is or was a reasonable one to make.

Knowledge

118. In respect of reasonable adjustments, even where an employer knows that an employee has a disability it will not be liable for a failure to make adjustments if it does not know and could not reasonably expect you to know that a PCP physical feature of the workplace or failure to provide an auxiliary aid would be likely to place that employee at a substantial disadvantage. In the case of **Wilcox v Birmingham CAB Services Limited EAT 0293/10** Mr Justice Underhill then President of the EAT stated that the effect of the knowledge defence was that an employer will not be liable for a failure to make reasonable adjustments unless it had actual or constructive knowledge both (a) that the employee was disabled and (b) that she was disadvantaged by the disability in the way set out by a PCP or physical feature of the workplace. In the case of **Thomson v Newsquest Herald and Times Limited t/as The Herald and Times Group (ET case number 121509/09** the tribunal distinguished between a significant difference between being aware that the claimant was ill even suffering from a mental illness that could constitute a disability under the Act and being aware of the specific effect that had on her in relation to mail opening and therefore the disadvantage that she was placed at as a result of the PCP being applied. It found that the employer had actual knowledge of the claimant's mental impairment but that nobody within the organisation knew or should reasonably have been expected to know of the disadvantage to which she was put by continuing to correspond with her by post in that case no letters had been returned and the employer was entitled to believe that these have been delivered to the claimant and read.

Submissions

119. Mr. Ryan on behalf of the respondent submitted that the claimant's evidence was not credible. His case was dependent on an elaborate conspiracy to remove him which is unsupported by the evidence. It was submitted that the claimant was dishonest; he was unwilling to discuss his addresses, or companies he is listed as a director of; he disputed he had anything to do with a wedding planning business and seeks to suggest his

email address namely “lwp@” by coincidence corresponds to the intials of the luxury wedding planning business registered at his home address for which he is listed as sole director.

120. In respect of the constructive unfair dismissal claim he referred the Tribunal to the case of Malik -page 621H. A balance had to be struck between managing a business and not treating the claimant unfairly. He emphasised the respondent can act with reasonable cause. He also referred to **Amnesty International v Ahmed UKEAT/0447/08** and **Freinkel Topping v King EAT/01606** and submitted there was a stringent test (paragraphs 12-15) that is applied to seriously damaging the relationship. The respondent has to be shown as abandoning the contract. He submitted that the claimant simply does not satisfy the test. The respondent submitted that the respondent was entitled to give the claimant a first warning about his attendance at p.243 dated 24 August 2021 in line with process. He had been given a lot of leeway and his attendance record was poor. The policy had been adjusted for disability.

121. In respect of the reasonable adjustment complaint it was disputed that a PCP to attend Walsall was in place. The claimant was not forced to attend Walsall. In fact he willingly attended but became stuck in traffic and he was unlucky. The respondent had no knowledge about the alleged disadvantage about travelling to Walsall. The respondent relied upon the case of **Thomas v Newsquest** – it was submitted that similarly the employer knew about mental health about claimant but like the respondent in Newsquest could not have known about the stresses of travelling to Walsall. He was aggrieved like anyone else that the smartcard did not work and that the system was down when he attended site. The claimant was not forced to come in to Walsall; he came in on 9 November with consent. The respondent relied upon p.577 where the claimant expressed how grateful he was to his line manager. His complaint was that he was placed on sick leave. The Respondent did not have the relevant knowledge to engage section 21 and the claimant did not challenge the data protection point in respect of the smartcard.

122. Further the respondent submitted the evidence did not establish tht the claimant was subject to disability related harassment 4 November 2021 by Karen Mercaudi. Being generous to the claimant he was confused about the 2nd part of the conversation.

123. The respondent did not send a text message to the claimant. The context is that the claimant changed his mobile number and he alleges he gave his new number to only two people and it was then he got the text message. Did they come across as people do such a thing? See the text messages; no evidence of conflict between Karen, Lisa and the claimant. The respondent submitted this was all contrived. The claimant is a dishonest witness. He has enemies in the world due to a family dispute and there were others out to get him.

124. In respect of any delay in a grievance outcome; it is accepted that this was not dealt with immediately. However, the claimant lodged the grievance before Christmas. The claimant was unable to attend meetings to discuss his grievance. If he has accepted the investigation take place. The grievance

was not dealt with in 7 days but the claimant did not chase up the grievance up. The Respondent did respond to the grievance.

125. On return to work working from home in January 2022 everything was looking very positive for the claimant and he had a new manager. He was searching for jobs and his return to work was agreed on terms. In order to redeploy the claimant needed to be willing to search for roles and needed the claimant to engage.

126. The request made by the manager for the claimant to log on and off shows a caring employer. The respondent had a responsibility to manage his return to work and comply with the return to work process. Further it was submitted that the request for leave had no real impact on the claimant. A request by a manager to share a screen falls short of the stringent test in Malik. The imposition of a final written warning was in line with policy.

127. The respondent submitted that in any event the respondent was likely to have dismsed the claimant fairly by reason of (a)poor attendance page 369; his productivity was extremely poor; or (b)for gross misconduct. The respondent referred to the investigation conducted by Ms.Simms and Ms. Cunningham. Had the claimant not resigned he would have been asked to attend a disciplinary hearing.

Claimant's submissions

128. The claimant submitted he was a very honest person. He has battled his health to represent himself and his legal experience was not the same as Mr. Ryan for the respondent. He submitted there was a failure to make a reasonable adjustment because the respondent did not give him extended trigger points for disability; failed to move him to another office and refused to accept he had a disability until the preliminary hearing. He submitted that the suggestion he sent an unpleasant text message to himself was an effort by the respondent to tarnish his reputation. He changed his number because he got divorced. Its clear from the evidence of Lisa that she was jealous about the car he drove. He should have been deployed. The business said they could not do it. He just left.

129. The claimant submitted that a request to screen share was not an authorised method and asking what he had read was not right. He submitted that Mel Williams did not make these requests of anyone else.

130. He submitted that the gross misconduct allegations were not proven. He was not informed about the allegations until after he resigned. He did not wish to get involved in any investigations because he did not want it to affect his mental health. He submitted that his poor attendance could have improved if he got real support and his trigger points would come down. He felt he was under constant attack and felt he was being told off.

<u>Credibility</u>

131. The claimant's evidence was unsatisfactory. The Tribunal found that the claimant tended to rationalise events in his evidence to fit the account he now sought to run in the Tribunal which made his evidence unsafe and incredible. His perception of events was simply not made out on the

evidence. The claimant had been very critical of Ms. Cottrell and Ms. Mercuradi and made some very serious allegations against them. The claimant's managers were diligent, caring and sought to genuinely support the claimant. The Tribunal found them to be compassionate and honest. The respondent referred the claimant on a number of occasions to OH to support him, regularly checked on his well-being; extended triggers under the attendance management process; made real efforts to seek a deployment opportunity for the claimant, obtained counselling for the claimant; permitted the claimant to work from home; offered him taxis to the office and granted him special leave. The claimant's perception of ill treatment was unsubstantiated.

132. The claimant stated in his grievance dated 7 December 2021 that his anxiety in travelling to Walsall nearly caused him to crash. This assertion in inconsistent with the contemporaneous messages between the claimant and his manager on the day was that the traffic was "manic". The claimant was only willing to return to work on his terms alone. The lack of contact with his manager whilst off sick or whilst working from home was not adequately explained by the claimant in his evidence. The timing of the resignation of the claimant was inconsistent with the very positive relationship he described he had with his new manager which led the Tribunal to conclude that he had become aware of an investigation into his conduct.

133. In contrast the Tribunal found the respondents witnesses to be honest and reliable.

Conclusions

Failure to make reasonable adjustments section 20 of the Equality Act 2010

134. *Did the respondent apply a provision criteria or practise of requiring staff to attend one of its offices to resolve any issues with smart cards in default of which they would be marked as absent on sick leave.*

The Tribunal found on the facts a slightly different PCP having heard all of the evidence. The respondent did apply a provision criteria or practise of requiring staff to attend one of its offices to resolve issues with smart cards (where it could not be resolved remotely). An employee is marked as sick only in circumstances where they are unable to attend the office by reasons of ill health. A smartcard contained confidential personal information about the names and addresses of members of the public along with any benefits claimed and received by individuals. Therefore, for security of data reasons where an employee required a new smartcard the respondent did require employees to attend an office. The way in which the claimant put his case was not made out on the evidence. There was no evidence that a member of staff would always be marked as absent on sick leave "in default" if they did not attend the office; there may be any number of reasons why a member of staff would not attend the office. The respondent could have marked a member of staff as having special leave depending on the particular circumstances. Therefore, the Tribunal did not find the alleged PCP as being a PCP actually applied by the respondent. However, following the guidance in the case of **Ishola** the Tribunal adopts a wide view of the PCP and it appeared from the evidence that if a member of staff was too unwell to attend the office to resolve an issue with a smartcard they were likely to be marked as sick. Therefore, the PCP the Tribunal found to be

applied was that the respondent applied a provision criteria or practise of requiring staff to attend one of its offices to resolve any issues with smart cards but if unwell they would be marked as absent on sick leave. The Tribunal found that this was applied here.

135. *Did the deputy manager, Karen Mercuradi apply this to the claimant on 4 November 2021 and or was it applied by Ms. Cottrell on 8 November 2021.* The Tribunal has set out its factual findings for the events on 4 November and 8 November 2021 above. On 4 November 2021 the claimant did attend the Walsall office (page 277-9). The portal was down and the claimant needed a new smartcard. Ms. Mercuradi informed the claimant he needed to return to the Walsall office 9.30 am the next day. The claimant stated he had been travelling for the past two days with high levels of anxiety and did not wish to be pressured and in case he had a breakdown again. The claimant stated he would attend if he slept fine but if he had issues with his health condition he would not attend. On Friday 5 November 2021, the claimant stated he was unable to attend the Walsall office and he said he had been advised by the mental health team he required 2 months off for special leave. The advice received by Ms. Mercuradi was that if the claimant was unwell it needed to be recorded as a sick day; sickness should not be masked and the circumstances did not meet special leave criteria (page 353 to 363).

136. On 8 November 2021 in a conversation between the claimant and Ms. Cottrell the claimant advised he was unwell and asked if a new smart card could be sent by post. Ms Cottrell advised that due to data protection risks and issues under the data protection regulations it could be. Further she explained that if an employee had blocked a smart card they were required to log into a secondary computer to go through their security questions in order to bind the card. Ms Cottrell asked the claimant if there were any issues with his health medication and that she could arrange for a taxi to collect him and take him to the office under the DWP's reasonable adjustment policy. The claimant informed Ms Cottrell that even a taxi would not help when his anxiety was high. Ms Cottrell explained to the claimant about the absence on 5 November 2021 and it would have to be recorded as sickness and not special leave (see pages 960 to 979). Under the policy, there were very specific categories such as non-routine appointments, fitting prosthesis, fertility treatment or bone marrow donation where an absence will be recorded as special leave. The policy clearly states that it must not be used to mark sickness absence and even employees unable to attend work due to sickness or injury must take sick leave. The only reason he gave to Ms Cottrell that he did not want to be on sick leave was because of the amount he had previously had in terms of days and the fact that he was in his first written warning. He did not mention anything to Ms. Cottrell about actual sick pay itself or the monetary value of any sick pay.

137. The Tribunal finds that the respondent did not apply the alleged pleaded PCP. The Tribunal finds that the respondent (by way of Ms. Mercuradi and Ms. Cottrell) applied a PCP of requiring employees to attend a respondents work site to bind a smart card and if the employee was too unwell to attend work, they would be marked as sick. The Tribunal finds that this would amount to a PCP because this is the way that the respondent would apply

its sickness absence policy and carries the connotation of a state of affairs as to how cases are treated (see **Ishola**).

138. Did the PCP put the claimant at a substantial disadvantage compared with persons who were not disabled namely the claimant was unable to travel because of his anxiety and depression?

The burden is on the claimant to prove substantial disadvantage following **Latif**. Disadvantage has to be more than minor or trivial. A non-disabled person with anxiety and depression or any other illness who was unable to travel to work by reason of anxiety and depression or other illness would similarly be marked as sick. However following **Griffiths,** the PCP places a disabled employee who was more likely to be absent from work on health grounds at a disadvantage; see **Griffiths v Secretary of State for Work and Pensions (2015) EWCA Civ 1265.** The Tribunal finds the claimant has established a substantial disadvantage.

139. The Tribunal considers whether the respondent failed to take reasonable steps.

(a)send him a replacement smart card by recorded delivery;

The Tribunal rejects that this was a reasonable adjustment. Although sending the claimant a replacement smart card by recorded delivery would have meant that the claimant would not have to attend the workplace simply sending a smart card out put the respondent's organisation at a significant risk. A smart card held a significant amount of confidential information about members of the public and due to a possible data protection risk and issues under data protection regulations it was not reasonable to simply send this out by recorded delivery. Further an employee who has a blocked smart card is required to log onto a secondary computer to go through their security questions to bind the card. The claimant only had access to one government computer at home. Employees are required to have access to a second computer so that they can input the responses to the security questions. The smart card then needs to be bound with the smart card holder present and the employee needs to insert their passwords. Employees are required to log on to a computer they have not previously logged onto as it will not pick up their profile they are also required to undergo a number of security checks to reactivate the smart card. For all these reasons the suggested adjustment was not reasonable.

(b) Allowed him to work from home;

The claimant was working from home at the material time and had been since October 2021. The claimant needed to resolve the smart card issues so that he could continue to do work from home. This was only feasible if he attended the workplace to sort out his smartcard for the reasons set out above. This was not a reasonable adjustment; he was already permitted to work from home.

(c) Recorded his absence as a form of leave other than due to sickness.

The claimant was too unwell to travel into work to resolve his smart card issue. The claimant's case before the Tribunal was that it should have been called "special leave". Pursuant to the policy see pages 960 to 979, there are very specific categories such as non routine appointments; fitting prosthetic, fertility treatment or a bone marrow donation where an absence will be recorded as special leave under the policy. The policy is very clear about what special leave should not be used for; it clearly states that it must not be used to mark sickness absence and even employees unable to attend work due to sickness or injury or the remaining symptoms must take sick leave. By this point the claimant had a very significant ill health absence. The respondent had consistently provided him with support and had already increased triggers in the attendance management policy to accommodate his disability related absence. In the circumstances it was not a reasonable adjustment to mask the claimant sickness absence as special leave.

140. Did the respondent know or could reasonably have been expected to know that the claimant was placed at the alleged substantial disadvantage. It is accepted that the respondent knew the claimant was disabled from March 2020 and in November 2021 had made the respondent aware he was too stressed to travel into work.

141. The Tribunal dismissed the claimant's reasonable adjustment complaint.

Harassment related to disability

142. Did Karen Mercurdai say to the claimant on or around 4th November 2021 *"don't you think the department has done a lot for you"*

143. The Tribunal rejected the claimant's version of events and preferred the witness evidence of Ms. Mercuradi who the tribunal found to be an honest witness. On the balance of probabilities Ms. Mercuradi did not say this to the claimant and the allegation of disability related harassment fails.

144. Did Karen Mercuradi say to the claimant on or around 4 November 2021 *"it's not our fault your brain doesn't work."*

145. The Tribunal rejected the claimant's version of events and preferred the witness evidence of Ms. Mercuradi who the tribunal found to be an honest witness. On the balance of probabilities Ms. Mercuradi did not say this. This allegation of disability related harassment fails.

Direct disability discrimination

146. Did the respondent subject the claimant to the following treatment;-

(a) did Karen Mercuradi say to the claimant on or around 4th November 2021 don't you think the department has done a lot for you.
The tribunal rejected the claimants version of events and preferred the witness evidence of Ms. Mercuradi who the tribunal found to be an honest and credible witness. This statement was not made by Ms. Mercuradi. The allegation of direct disability discrimination fails.

(b)did Karen Mercuradi says to the claimant on or around 4 November 2021 "it's not our fault your brain doesn't work";
The Tribunal rejected the claimant's version of events and preferred the witness evidence of Ms. Mercuradi who the tribunal found to be an

honest and credible witness. This statement was not made by Ms. Mercuradi. The allegation of direct disability discrimination fails.

Unfair dismsal

143. Whether any acts or omissions of the respondent were a cause (they do not have to be the sole cause of the claimant's resignation) relying on the following factual allegations

(a) Around June to August 2021 Kuldip Higgs offered the claimant ill health early retirement

An offer of ill health early retirement may cause damage to the relationship of trust and confidence if offered in circumstances where it could not be justified on the sickness absence of an employee. The Tribunal did not find this allegation made out on the facts. When the claimant and his trade union representative met with Kuldip Higgs on 10 December 2021 (see page 330) Kuldip Higgs asked *"if the absence continue to reoccur has he considered ill health retirement or does he know anything about it?* If the absence reoccurred. The client stated he had never thought about it and that's the first time it's been mentioned and asked what it was. Kuldig Higgs then explained to the claimant if someone's health does not improve and they are unable to work then sometimes the department can consider ill health retirement. The claimant raised no objection and in fact said he was happy to receive any information on it but he did not feel it was necessary and was confident he would get better and be stronger. The claimants trade union representative who was present at the time raised no concerns either. The way in which the claimant sought to convey this conversation to the Tribunal was not factually correct. An employer had just and reasonable cause to explain to an employee who had a significant absence record that ill health retirement may be an option if they wished to consider if as in this case the absence continued to reoccur. The Tribunal finds that Kuldip Higgs was providing the claimant with information as a supportive step and could not be considered to have acted in a manner which was likely to destroy or seriously damage the relationship of trust and confidence between employee and employer.

(b) the respondent gave the claimant a first written warning regarding his attendance record on 24 August 2021.

Giving a written warning regarding attendance, in the absence of following the appropriate procedure and with insufficient grounds, may be a matter which could seriously damage the relationship of trust and confidence between employee and employer. However, the Tribunal found that by 24 August 2021 (see page 238) the claimant had 127.5 days of absence over 3 spells between 11 August 2021 and 11 August 2020. The claimant's absence from work had reached beyond the trigger point of 8 days and 4 spells. In the circumstances the respondent had reasonable and proper cause to impose the written warning for absence.

(c) In November or December 2021 the claimant received a text message from an unknown number he believes it to be a work colleague saying " you mental shit you are a waste you will be terminated from Ravenhurst"
If this text message had been sent by a manager/s to an employee, it would seriously damage the trust and confidence between the employee and the respondent. The claimant identified that he believed the author of the text message was either or both Ms. Mercuradi and/or Lisa Cottrell. The claimant stated he had only given these two individuals his new telephone number. Ms. Mercuradi and Ms. Cottrell believe the claimant tried to set them up. The Tribunal rejected the claimant's assertion that it was either/both Ms Mercuradi /Ms. Cottrell. To do so would be completely inconsistent with the care and support they had offered the claimant and in contradiction to the relationship they shared with the claimant as evidenced by contemporaneous text messaging which was supportive. The Tribunal found both Ms. Mercuradi and Ms. Cotrell to be honest witnesses and upstanding individuals who would not treat the claimant or anyone else in this manner. This allegation was not made out.

(d) the respondent did not provide the outcome of an investigation into a grievance he raised against Ms. Cottrell and Ms. Mercuradi on 7 December 2021
This allegation was not put to any of the respondent's witnesses. The grievance lodged by the claimant was significant and required investigation. The claimant did not attend meetings at the respondent to discuss his grievance. The claimant did not take the Tribunal to any correspondence that he had been pushing for a response to his grievance. The Tribunal noted that the grievance was lodged by the claimant on 7 December 2021. On 16 December 2021 the respondent arranged to meet with Ms. Cottrell (page 334) on 23 December and arrange to meet Ms. Mercuradi on 24 December (page 980) to discuss the claimant's grievance. The respondent also conducted follow up meetings on 3 February 2022 (page 633) to discuss their counter grievances. The Tribunal concluded that the claimant's grievance was taken seriously by the respondent and it was investigating it. In the absence of this allegation being put the respondent's witnesses, or evidence that the claimant attended any investigatory interviews the Tribunal can not make any finding on this allegation.

(e) the respondent did not respond to his inquiry about the same .
The Tribunal was not taken to any evidence that the claimant was chasing the grievance and this allegation was not put to the respondent's witnesses. This allegation is rejected.

(d) The respondent did not redeploy him even though occupational health services advised that he should be redeployed
The respondent's policy of redeployment and the respondent's reasonable adjustment policy envisages redeployment where possible. The claimant 's requests for redeployment were very specific. The claimant was only willing to be redeployed to three different workplaces and nowhere else. The claimant also requested that he continue to undertake a decision-making role. This significantly narrowed the respondent's ability within a reasonable time scale to place the claimant into a different workplace conducting the same work. The occupational

health advice did suggest redeployment if possible or working from home. It did not suggest redeployment at only three workplaces and conducting only decision-making work. The Tribunal concluded that the respondent was making efforts to comply with the demands of the claimant. However as explained to the claimant a simple request to redeploy does not mean that it will necessarily occur; the business requires the claimant to be released to another workplace in effect there are other factors to be considered. The respondent did offer the claimant other roles such as a work coach in Walsall but the claimant was unhappy with the role. The claimant was invited to apply for vacancies but he did not do so. In the context of the fact that there was no redeployment to a decision-making role in Walsall or the two other work sites acceptable to the claimant, and the respondents were making efforts to support the claimant to obtain another role, there was reasonable and proper cause for the respondent not to redeploy the claimant to one of the three selected workplaces of his choice to conduct the job of his choice; there were no vacancies. Further occupational health in its report dated 5 October 2020 envisaged that home working would be an option (see page 160).

(e) <u>In mid February 2022 Ms. Williams (a manager) asked the claimant what times he was logging on and off his computer</u>
It is accepted by Ms. Williams that she did ask the claimant when he was logging on and off. A manager asking an employee what times he was logging on and off his computer maybe a matter which could damage the trust and confidence between employer and employee if there was no just or reasonable cause to do so. The Tribunal accepted Ms Williams evidence. In the context of the claimant's well- being having returned to work following a significant sickness absence on reduced hours the manager, Ms Williams had a duty of care to monitor how long the claimant was working so to ensure he was not working for longer than the agreed fixed him hours. Further this check also had the benefit of ensuring that the claimant was going to be paid correctly. The Tribunal found that Ms Williams had reasonable and proper cause to ask the claimant what times he was logging on and off his computer.

(f) <u>In mid February 2022 Ms. Williams asked him what he had read;</u>
In the absence of any responsibility for an employee to read anything, a request by the employer to the employee as to what he had read maybe a matter which could damage the trust and confidence between employee and employer. However, when the claimant returned to work, he was set the reasonable task of reading the universal credit guidance and decision makers guide. This was a means of ensuring the claimant who had a significant absence from work familiarised himself with process and procedures for his decision-making role. The claimant raised no concern about this request at the material time. In the circumstances that the respondent was entitled to provide the request to the claimant to read the procedures Ms Williams had reasonable and proper cause to ask the claimant in mid-February 2022 what he had read.

(g) <u>A few days before his resignation Ms Williams refused his request to leave work one hour early on a flexi time arrangement saying that he would have to request permsion on each occasion he wished to do so.</u>

The unreasonable refusal of a flexi time arrangement may be a matter which could damage the relationship of trust and confidence between employee and employer. The tribunal found on the facts of this case, that the claimant had returned to work following a significant absence and hours to be worked were agreed between the claimant, employer and occupational health. The part time hours were fixed as restricted hours to build up to the claimant's return to full time. The claimant therefore was on fixed restricted hours, the claimant was meant to complete these hours in order to get him back to work. In these circumstances he was not entitled to flexi hours; the hours were fixed. In this circumstances there was reasonable and proper cause for Ms Williams to refuse the claimant's request.

(h) <u>On 14 February 2022 Ms Williams asked, when told by the claimant he had completed a task to share his screen.</u>

It is not entirely clear which occasion the claimant referred to. Ms. Williams accepts that she did on occasions ask the claimant to share his screen. One such request for the claimant to share his screen was to establish what the claimant had done. Ms. Williams was concerned that the large number of emails in the claimant's inbox could affect his anxiety levels and had directed that the claimant delete these old emails as a welfare issue. The claimant did not wish to delete all of them and wanted to retain some. Therefore Ms. Williams had directed the claimant to put old emails, he wished to retain, into a folder. Ms. Williams asked the claimant to share his screen so he could show her what he had done. When the claimant did share his screen with Ms. Williams he had placed emails into a side folder. He did not say prior to sharing his screen that he had created a folder and Ms. Williams invited him to share his screen so she could assist him in setting up a folder. When the claimant did share his screen the claimant had placed emails into the into a side folder. The Tribunal finds that the act of asking the claimant when he said he had completed the task may seriously damage the relationship of trust and confidence because it could appear an employer did not trust the claimant. However, the Tribunal finds on the facts of this case that did not occur. Ms. Williams had provided some guidance to the claimant about placing old emails into a separate folder and in the context of a caring manager concerned for the claimant's welfare who wanted to ensure the employees well-being Ms. Williams was entitled to ask the claimant to share his screen to ensure that he had done this.

On another occasion Ms. Williams had scheduled a Microsoft teams call with the claimant to go through his redeployment checklist. The claimant was aware of the call because Ms. Williams had messaged the claimant on teams page 428 and informed him she wished to go through his redeployment plan. Part of that discussion would include how and employees getting on with applying for jobs. In the course of the discussion the claimant stated he had been looking for DWP jobs. Ms Williams asked the claimant what he put in his search. The claimant stated that he had seen some jobs in HMRC but had not applied. Ms Williams asked the claimant to share his screen so that she could have a look at his profile and job search as the redeployment plan required her as a manager to see the documents. The claimant stated he did not wish to share his screen with his manager. Ms. Williams therefore said it was

not a problem and they could do it at a different time if he wanted (page 659). The Tribunal finds that asking an employee to share their screen to check whether they had done something that they said they had may damage the relationship of trust and confidence between employer and employee. However, on the facts of this case the manager had an obligation to check on how the claimant was getting on with the redeployment plan which includes his applications for jobs. There was reasonable and proper cause for Ms Williams to request the claimant to share his screen so that she could assist and check his profile and job search in accordance with her role as his manager and ensuring he was getting on with his redeployment plan.

(i) On 16 February 2022 the respondent gave the claimant a final written warning regarding his attendance record.
The Tribunal finds that giving an employee a final written warning regarding their attendance in circumstances where it was not justified by policy or process could seriously damage the relationship of trust and confidence between employer and employee. However, by the time the claimant was given (on 16 February 2022) a final written warning regarding his attendance (see page 452) the claimant had had 47 working days of absence. The claimant already had a written warning regarding his attendance. Pursuant to the attendance management procedure the claimant had exceeded significantly the trigger point of 4 days. The respondent, prior to imposing the final written warning, had followed the procedure (see paragraph 33 page 1050) and taken into all account the relevant factors. In the circumstances the respondent had reasonable and proper cause to impose a final written warning.

144.The claimant alleges items (j) and (k) above constituted the final straw that led to his resignation. The tribunal determined that items (j) and (k) could not amount to a final straw because they add nothing in accordance with the case of **Omaliju.**

145. The Tribunal concluded that the claimant had failed to establish a breach of the implied duty of trust and confidence namely the obligation of the respondent not without reasonable proper cause to conduct itself in a manner calculated or likely to undermine his trust and confidence. The Tribunal finds that having failed to establish a repudiatory breach of contract, the claimant's case of constructive unfair dismissal fails and is dismissed.

146. All of the claimant's complaints are dismissed.

Judge Wedderspoon

21 August 2023

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