Case Number: 3311627/2021
3306968/2022

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr D Jenkins	**v**	Perkins Engines Company Limited

Heard at: Cambridge (Hybrid by CVP)

On: 6, 7, 8, 9, 13, 14, 15, 20 and 21 February; and
6, 7, 8 and 9 June 2023

In Chambers: 5 June and 25, 26, 27 and 28 July; and
7 September (am) 2023

Before: Employment Judge Tynan

Members: Ms K Omer and Mr C Davie

Appearances
For the Claimant: Mr L Varnam, Counsel
For the Respondent: Ms J Duane, Counsel

RESERVED JUDGMENT

1. The Claimant's claim that the Respondent discriminated against him, by failing to comply with its s.20 Equality Act 2010 duty to make reasonable adjustments, succeeds in part in respect of Issues 20 and 21 of the List of Issues as set out in the Tribunal's Reasons below.

2. Pursuant to s.123(1)(b) of the Equality Act 2010, the Tribunal determines that it would be just and equitable to extend to 14 June 2021 the time for the Claimant to bring the claims referred to in paragraph 1 above.

3. Whilst the Claimant's claims:

   3.1. pursuant to s.26(2) of the Equality Act 2010 in respect of Mr Simon Collins's comments on 11 September 2015 that the Claimant was "changing tactics" (Issue 27(4) of the List of Issues);

3.2. pursuant to s.20/s.21 of the Equality Act 2010 in respect of PCPs (7), (10), (13) and (14);

3.3. pursuant to s.19 of the Equality Act 2010 in respect of PCP (7); and

3.4. pursuant to s.15 of the Equality Act 2010 in respect of the Respondent's failure to pay the Claimant company sick pay after 14 March 2016 (Issue 6 of the List of Issues)

are potentially well-founded, the Tribunal has no jurisdiction in these matters, the claims in respect of them having been presented outside the time limit for presenting such claims in s.123 of the Equality Act 2010. The Tribunal determines that it would not be just and equitable to extend time for the Claimant to bring those claims.

4. The Claimant's remaining claims that:

4.1. he was discriminated against contrary to s.15, s.19, s.20/21, s.26 and s.27 of the Equality Act 2010;

4.2. the Respondent made unlawful deductions from his wages; and

4.3. the Respondent was in breach of his contract,

are not well founded and are dismissed.

REASONS

INTRODUCTION

1. The Claimant commenced employment with the Respondent on 1 July 1999. His employment terminated on 11 March 2022 when he was dismissed by the Respondent with a disputed payment in lieu of notice. Accordingly, he had over 22 years' service with the Respondent by the date of his dismissal. For nearly the final seven years of those 22 years the Claimant was absent from work on long term sick leave.

2. The Claimant has brought two claims against the Respondent, including various claims of disability discrimination. As we shall return to, he has been diagnosed with an Autism Spectrum Disorder, specifically Asperger Syndrome. The issues in the case are documented in an agreed 35-page List of Issues that comprises approximately 250 discrete issues.

3. The first claim was presented to the Employment Tribunals on 14 June 2021, following Acas Early Conciliation between 6 and 14 May 2021. The second claim was presented to the Employment Tribunals on 10 June 2022, following Acas Early Conciliation between 7 and 8 June 2022. It follows, subject to there having been conduct extending over a period and subject also to the Tribunal's discretion to extend time as it considers just

and equitable, that any claim in respect of acts or omissions prior to 7 February 2021 (in the case of the first claim) and 8 March 2022 (in the case of the second claim) have been brought out of time.

4. The Hearing Bundle is arranged in six lever arch files, the first five of which extend to some 2687 pages. The page references in this judgment correspond to those files. The sixth lever arch file is arranged in two paginated sections that contain the Claimant's GP records (204 numbered pages) and handwritten notes kept by Mr Johan Truter of psychotherapy sessions with the Claimant over a period of approximately ten years (364 numbered pages).

5. We refer briefly below to the adjustments we made in the course of the proceedings to ensure, as far as practicable, that the parties were on an equal footing and to enable the Claimant to give his best evidence. We also refer to several issues that impacted the hearing and, indeed, caused it to be adjourned part-heard.

6. Extensive reference was made in the course of the hearing to a talk on Youtube by Patrick Lencioni, an American author of books on business management. The parties refer to it as the Lencioni video, which we shall also adopt for consistency. The Lencioni video was shown to employees within the Claimant's Division on 28 January 2015 at a strategy event they were attending. The Claimant was particularly affected by two sections in the video. We were able to view the Lencioni video in its entirety, including the offending sections. As we shall come back to, the complaints in respect of the Lencioni video are pursued under s.19 and s.20/s.21 of the Equality Act 2010 ("EqA 2010") rather than as a s.26 claim of harassment.

7. The Claimant made a 70-page written statement in support of his claim. Whilst, he undoubtedly endeavoured to provide a truthful and accurate account of events as he perceived them, as did the Respondent's witnesses, we have not approached his, or their, evidence uncritically. We have borne in mind the growing judicial recognition that when a witness is doing their best to recount events as they recall them, even when these events are presented with confidence, their evidence may not always be a reliable guide to what happened. In Gestmin SGSP S.A. v Credit Suisse (UK) Limited and Another [2013] EWHC3560 (Comm), Mr Justice Leggatt (as he then was) made observations about the distorting effects of litigation on the reliability of oral evidence and, in the context of a commercial dispute, stressed the importance of contemporaneous documents when making findings of fact. Memory can be unreliable when it comes to recalling past beliefs because there is the risk that past beliefs may be revised to make them more consistent with present beliefs, especially when there are competing accounts of meetings and conversations. It may be more reliable to base findings on inferences drawn from contemporaneous documents and known or probable facts. Although it was, as we say, a commercial dispute and, to our knowledge has not necessarily established principles of wider application, we have

regard to Leggatt J's insightful observations at paragraphs 16 to 22 of his judgment, observations that were recently revisited by Mr Justice Johnson in the course of his comprehensive judgment in TZV & Others v Manchester City Football Club Ltd [2022] EWHC 7 (QB), a personal injury case. Johnson J noted that human memory is fallible, and that Courts should be alive to the dangers of reattribution and confirmation bias. He thought it necessary to treat oral recollections of events, particularly oral evidence as to the cause of events, with considerable caution. He was deciding claims in respect of events that had occurred decades ago. Whilst there was no scope for mistake or misunderstanding, and very little scope for fallibility of memory, on the fundamental question of whether the Claimants in TVZ had been sexually abused, so far as the consequences of the abuse was concerned, Johnson J noted the significant scope for reattribution and confirmation bias.

8. Notwithstanding the events in this case occurred within the last ten years, rather than decades ago, we have been mindful of the scope for reattribution and confirmation bias, including as to the impact upon the Claimant of critical feedback following a staff cultural survey in 2014 and his exposure in January 2015 to the Lencioni video. On the Claimant's own account, he is prone by reason of his condition to ruminate, has to be persuaded to change his views about matters, and where things are grey will create mechanisms to try and get them in a certain box. These, and other aspects of the Claimant's autism, together with the potentially distorting effects of time and litigation, carry with them an increased risk of reattribution and confirmation bias.

9. We also have regard to the fact that the Claimant has experienced significant long term mental health issues. He has a history of depression and a long standing anxiety disorder that is a feature of and/or co-morbid with his Autism Spectrum Disorder. We find that these adversely impacted both his concentration and his ability to recollect events when giving evidence at Tribunal and, as we shall come to, his ability to attend Tribunal on two days. We have made allowance for this. Equally, however, we have born in mind that they may have impacted his perception of key events at the time and continue to impact his perception to the present day. The fact for example that the Claimant reports experiencing heightened anxiety in the supermarket and a 'flight' response, provides just one example of how he can perceive everyday situations in ways that others do not.

10. Towards the end of her incisive, sometimes compelling, written submissions, Ms Duane addresses the issue of the Claimant's credibility. Amongst other things, she invites the Tribunal both to accept her submission that the Claimant was evasive in his evidence regarding two individuals' purported acceptance that the Lencioni video was "inappropriate" and further submission that the Claimant's evasive behaviour was a common theme in the these proceedings. We consider it an unfortunate mis-reading of the Claimant on her part. We refer in this

regard to the Practice Guidance issued by the President of the Employment Tribunals on 22 April 2020;

> *"Particular difficulties may arise when giving evidence in the tribunal. Legal language or terminology can create barriers to understanding the tribunal process. Vulnerability can be both cause and/or effect in understanding questions asked during a hearing – for example, in cross-examination. This can impact negatively upon their conduct and demeanour in the hearing room and to their exclusion and disadvantage."*

Similarly, the Equal Treatment Bench Book includes the following guidance in relation to Specific Learning Disabilities:

> *"People with SpLDs will be concerned about how their behaviour might be perceived: inconsistencies could imply untruthfulness. Failure to grasp the point of a question could come across as evasive. Lack of eye contact could be misinterpreted as being 'shifty' and an over-loud voice might be regarded as aggressive. The overriding worry is that a loss of credibility occurs when they do not 'perform' as expected".*

The guidance goes on to say:

> *"Misunderstandings on their part will not be treated as evasiveness and inconsistencies will not be regarded as indications of untruthfulness."*

11. We observed the Claimant to have a particularly discursive style of communication, ill-suited not only to the 'cut and thrust' of cross examination but to the pace of everyday communication. It is a feature of his condition. Quoting from the extensive professional evidence in the Hearing Bundle, he lacks flexibility of thought, has difficulties with the 'to and fro' of conversations, does not cope well with quick responses, requires information and context around a situation, and will go around in circles on certain things unless someone redirects him. Notwithstanding he could not always immediately or directly address the issue at hand during cross examination, given time and space it was always clear to us the point he was seeking to make. He is an able, intelligent and truthful individual with extensively documented communication difficulties. His social isolation and mental health issues are deeply rooted in those difficulties. As we have said, he endeavoured to provide a truthful and accurate account of events, as he perceived them, even if the evidence which Ms Duane highlighted in relation to the Lencioni video is one of a number of matters in respect of which his perception and recollection ultimately proved unreliable. Notwithstanding his truthfulness, there is also an abundance of material within the Hearing Bundle that evidences significant differences between how the Claimant perceives events and how they are perceived by others, and as a result how the Claimant might recount such events after the event. In our view, these perceptual issues and challenges, which do not pertain to the Claimant's honesty or integrity, have been exacerbated in this case by the Claimant's significant propensity to ruminate, by the distorting effects of time and litigation, and by inherent communication difficulties, both verbal and non-verbal, that are a central feature of the Claimant's disability.

12. The Claimant's psychologist, Mr Johan Truter made a statement and attended Tribunal on 13 February 2023 to support the Claimant. However, the Claimant took the decision not to call him to give evidence. Whilst we inevitably give his witness statement less weight in those circumstances and indeed have certain observations to make as to his objectivity (see paragraph 311 below), his reports, correspondence and notes of sessions with the Claimant within the Hearing Bundle contain contemporaneous record and insights that corroborate evidence and impressions found elsewhere.

13. On behalf of the Respondent, we heard evidence from:

    a. Claire Izod, formerly an Occupational Health Advisor with Hampton Knight, but now retired - Ms Izod is a Registered General Nurse and Registered Midwife;

    b. Simon Collins, who worked for the Respondent for over 16 years in a variety of HR related roles and in 2015 was appointed to act as an intermediatory mediator between the Claimant and managers at the Respondent;

    c. Matthew Coleman, currently Product Manager for Medium Engines at the Respondent - Mr Coleman was the Claimant's line manager from June 2013 until after the Claimant went on long term sick leave from the business in May 2015;

    d. Zoe Webster, now employed by Caterpillar UK Limited, but formerly by the Respondent in a variety of HR related roles - Mrs Webster was involved in relation to the Claimant during 2015;

    e. David Goldspink, Vice President and General Manager of the Respondent – Mr Goldspink heard the Claimant's grievance;

    f. Richard Cotterell, also Vice President and General Manager of the Respondent – Mr Cotterell heard the Claimant's grievance appeal;

    g. Sarah Webb, HR Business Partner with the Respondent, who took over providing HR support and communication from Mrs Webster;

    h. Christopher Blin, Global HR Manager, who took the decision to dismiss the Claimant from the Respondent's employment;

    i. Andrew Curtis, Sales Manager, who heard the Claimant's appeal against his dismissal.

14. Although she did not give evidence, extensive reference was made in the course of the hearing to Pauline Gordon, an external consultant who was engaged by the Respondent from time to time and was closely involved in the Respondent's 2014 staff cultural survey, an employee engagement

initiative. Amongst other things, Ms Gordon presented feedback to managers and staff on 24 and 27 October 2014 about the results of the survey.

ADJUSTMENTS

15. In her closing written submissions, Ms Duane identifies a range of adjustments that were made for the Claimant. We do not repeat them here. Ms Duane is critical of the Claimant and his representatives in respect of two matters. As regards the first, namely the effective loss of two hearing days on 9 and 10 February 2023, she refers to the Claimant's 'refusal' to enter the Cambridge hearing centre on 9 February 2023 without someone (other than Mr Varnam) to physically accompany him and to the absence of any medical evidence about the matter. Mr Abbs, who up to that point had been attending Tribunal with the Claimant, was unable to attend as he had become unwell and tested positive for Covid-19. Even at that relatively early stage in the hearing, but all the more so having since been able read into the significant volume of evidence in the Hearing Bundle regarding the Claimant's condition and mental health issues, we are in no doubt that the Claimant was overwhelmed by the prospect of attending Tribunal without Mr Abbs. Mr Varnam told us that the Claimant was having a 'meltdown'. At that moment, apparently sitting in his car somewhere in Cambridge, and indeed over the following 48 hours, we are satisfied that there was no realistic prospect of the Claimant being able to secure a medical report to support his non-attendance at Tribunal.

16. As we return to in this judgment, one of the three key areas of difference necessary for a diagnosis of Autism Spectrum Disorder, focused upon in the World Health Organisation International Classification of Diseases, is a lack of flexibility of thought and difficulty adapting to sudden or unexpected change. To this, we would add that the 'flight' responses of people with anxiety disorders are well understood. Mr Abbs' ill-health and resulting absence from Tribunal was entirely unexpected and there was no contingency plan in place. We find that the Claimant was unable to manage this unexpected development and was genuinely unable to attend Tribunal on 9 and 10 February 2023, notwithstanding our suggestion of a range of potential adjustments to facilitate his continued attendance and participation. Whilst we are particularly critical of the lack of basic thought that was subsequently given on the Claimant's side to the ongoing infection risk posed by Mr Abbs (realised when the Claimant subsequently tested positive for Covid-19) and how easily the hearing might have been derailed had the Respondent's witnesses also become infected, none of this detracts from the very real impact that Mr Abbs' unexpected absence on 9 February 2023 had on the Claimant.

17. As to Ms Duane's second criticism, namely the Claimant's late arrival at Tribunal on one day when it was hoped that the hearing might start a little earlier in order to make up for lost time, Cambridge is plagued by traffic issues that regularly cause parties, representatives, witnesses and, sometimes, even Judges to be delayed getting to Tribunal.

ISSUES IMPACTING THE HEARING

18. In due course we shall address the time taken to deal with the Claimant's 2016 grievance, as well as his appeal against the outcome of his grievance. We think it relevant in this regard to highlight certain unexpected events that impacted the hearing, as they are illustrative of the real world difficulties and issues that can impact any process.

19. The case was originally listed to be heard in person over four weeks. However, there were no Judges available in Cambridge to sit in person uninterrupted for that period. Employment Judge Tynan cancelled three of five days' planned annual leave in order to avoid the hearing potentially being postponed, though with the result that the Tribunal sat remotely by CVP on 14 and 15 February 2023 rather than in person. As noted already, 9 and 10 February 2023 were effectively lost. There were pauses in the proceedings when the Claimant became distressed and the start of the hearing was delayed on 13 February 2023 because the Claimant had tested positive for Covid-19. Arrangements had to be put in place to further limit the risk of others becoming infected, including reconfiguring the seating arrangements in the principal hearing room and arranging for the Respondent's witnesses to observe the proceedings remotely from an adjoining hearing room. Over the weekend of 18/19 February 2023, Mr Davie suffered a detached retina, necessitating emergency surgery a few days later. The hearing was adjourned part-heard on 21 February 2023. Inevitably there was a delay of some months in the hearing resuming, as consideration had to be given to Mr Davie's recovery and to Counsel's respective availability and the availability of several of the Respondent's witnesses. When the hearing resumed on 6 June 2023, Ms Omer attended remotely and there was an extended break in the early afternoon to enable her to attend a funeral. Later that week, Ms Webb gave her evidence remotely as she had become unwell and was unfit to attend Tribunal in person.

20. On one view, this represents an unusual and unfortunate kaleidoscope of events, yet it is indicative of the range of issues that can potentially derail even a four-week process. It is something we have borne in mind when considering the length of time that the grievance and grievance appeal processes took and the unexpected series of events that impacted them, including the global pandemic.

FINDINGS OF FACT

21. Our primary findings of fact are set out below. Given the significant number of discrete issues we have to determine and in order to give structure to this judgment, we largely address the claimed PCPs in the Conclusions section of this judgment (including many of our findings relevant to whether or not the contended for PCPs have been established).

The Claimant's disability

22. It is agreed between the parties that the Claimant is, and at the relevant times was, a disabled person within the meaning of section 6 of the Equality Act 2010, by reason of having Asperger Syndrome (or, as we refer to throughout this judgment, Autism Spectrum Disorder/ASD). We shall use the terms 'autism' and 'autistic' where these were used at the time, particularly when quoting from documents. For the purposes of liability, the Claimant does not rely on the condition of Post-Traumatic Stress Disorder, a particularly contentious issue between the medical experts.

Medical and other professional evidence

23. In our closing remarks on 9 June 2022, we cautioned the parties that we would inevitably need to make reference in this judgment to personal issues affecting the Claimant and, potentially, other witnesses. Certainly in the case of the Claimant, it is unavoidable. We have sought to avoid including information that we anticipate might cause particular distress, where we are satisfied that its relevance and any context it provides is outweighed by the potential for distress.

24. In the detailed overview that follows we refer to various adjustments that were identified by the professionals who were involved in relation to the Claimant during his employment with the Respondent. Ultimately, any decision as to whether the Respondent breached its s.20/s.21 EqA 2010 duty to make adjustments is a matter for this Tribunal. We do not intend this as a criticism of any of the health professionals involved, but in recommending adjustments for the Claimant none of them approached the matter as a legal practitioner might do, namely by identifying practices etc at the Respondent that put the Claimant comparatively at a substantial disadvantage or why, in all the circumstances, it might be reasonable for the Respondent to take the identified steps to avoid the practice etc causing that disadvantage. We recognise, given their training and experience, that occupational health practitioners will often act intuitively in this regard. By contrast, if we are to avoid making an error of law, we must approach our task in a more structured and methodical way: firstly by considering the PCPs contended for by the Claimant; secondly, if they are established, by then going on to identify any disadvantages to which they gave rise; and finally thereafter, as regards the s.20/s.21 claims, the steps that ought reasonably to have been taken to avoid them.

25. Later in this judgment we address an incident in 2013 involving one of the Claimant's colleagues (the "Entwistle incident"). In the aftermath of the incident, the Claimant was referred to Julie Routledge, an Occupational Health Manager with the Respondent's independent occupational health providers, Hampton Knight. Her notes of their meeting on 26 June 2013 (in particular at page 399) confirm that the Claimant disclosed to her that he was autistic, though they also indicate that they did not discuss how his condition impacted his day to day activities. At that time the Claimant had

not received a formal diagnosis. He volunteered to Ms Routledge that he had never completed psychotherapy in the past, by which we understand that he had not previously persevered with it. One of the documented reasons was that he was fearful the consequences could be more severe. Ms Routledge spent two hours with the Claimant on 26 June 2013 and issued a report the same day to Mr Coleman, which was copied to the Claimant and Anna Haynes, an HR Business Partner in the business (pages 2649 and 2650). Ms Routledge referred to increased work demands affecting the Claimant and to the Entwistle incident itself, but neither matter was specifically framed with reference to the Claimant's disclosed autism. Indeed she did not identify in her report that the Claimant was a person with autism. Instead she referred to a "chronic underlying mental health condition" though did not provide any further detail as to the nature of the condition or its effects, including on normal day to day activities. We find that she did not then have the Claimant's permission to disclose his autism to the business. His ASD means that he is sensitive about disclosing personal information about himself to others. Ms Routledge went on to say in her report that her impression was that the issues at that time were not primarily medical, rather an acute stress reaction to events at work. On reading her report, we find it would not have been apparent to Mr Coleman that this stress reaction was the potential manifestation of the underlying mental health condition she alluded to. Indeed, we find that Ms Routledge herself did not perceive the situation in that way, rather she described it as a workplace conflict. She said the Equality Act 2010 would not apply to the reactive stress, but might apply to the chronic underlying condition, albeit she said she had not discussed in detail with the Claimant how it affected activities of daily living or work. She recommended to Mr Coleman to meet with the Claimant to discuss options and what support or adjustments from the Respondent would be beneficial. We return to this issue at paragraph 92 below.

26. Some weeks later, on 31 October 2013, the Claimant completed the Autism Spectrum Quotient AQ-10 questionnaire with Mr Truter (page 17 of Mr Truter's notes in the second part of the sixth lever arch folder). The questionnaire is recommended by NICE as an initial recognition and referral tool in the diagnosis and management of adults on the autism spectrum. It is relevant, we think, that the Claimant had been seeing Mr Truter for about two and half years by the time this basic one-page, ten-question indicative questionnaire was completed, and note that it would be a further year before the Claimant underwent the detailed assessment that produced a formal diagnosis of Asperger Syndrome. We find that the time taken to progress the issue reflects both the Claimant's reticence to disclose information about himself to others, an aspect of his condition, but also because he was anxious about the potential implications should he go down the path of a formal assessment and diagnosis. We find that his reservations and concerns in that regard at least partly reflected his associated or underlying anxiety disorder. As noted already, the Claimant had touched upon these concerns with Ms Routledge in June 2013.

27. The Claimant was assessed by Dr Andrea Woods, a Clinical Psychologist at Cambridge Lifespan Asperger Syndrome Service ("CLASS") on 7 October 2014. In a detailed assessment report dated Friday 24 October 2014 addressed to the Claimant's GP and copied to the Claimant (the "First Report" - pages 449 to 455), Dr Woods expressed her professional opinion that the Claimant met the formal diagnostic criteria for an autistic spectrum condition (or ASD), specifically that he met the DSV-IV criteria for Asperger Syndrome. Dr Woods noted that the Claimant showed 15 out of 18 symptoms on the Adult Asperger Assessment. His results in this regard were contained in an Annexe to her Report, a copy of which has not been included in the Hearing Bundle.

28. The First Report was issued on the same day that the Claimant attended a cultural survey feedback presentation by Ms Gordon to managers, this presentation and her further presentation to staff on 27 October 2014 being at the heart of the first, by date, of the Claimant's complaints within these proceedings. We have noted but not thought it necessary to recite the Claimant's background history in this judgment given the sensitive personal and family information contained within it. Dr Woods noted that the Claimant was undertaking psychological therapy to help him find ways of managing his mood and to support him with his issues. She referred a number of times in her report to the Claimant suffering from long standing depression and anxiety. She said he had had difficulties with depression *"for many years"* and that anti-depressant medication had once been prescribed *"a long time ago"*. In the 'Summary' section of her report she referred to difficulties in social communication as having significantly impacted personal and work relationships, resulting in the Claimant "feeling highly anxious and stressed for a lot of his life, particularly since his teenage years". She noted that it was only recently that he had been able to make sense of the fact he felt different from his peers. At the date of her report, the Claimant was 38 years old. Dr Woods noted that the Claimant had seen a counsellor in 2005, when he would have been 29 years old, seemingly linking this to difficulties with depression and anxiety (page 451) and that he had been referred to Mr Truter by his GP in 2011. In our judgement, the Claimant's difficulties from 2013 can only properly be regarded as part of this continuum and seen through this background lens. We do not agree with the Claimant's medical expert, Dr Lewis when she states that up until 2013 the Claimant was able to function well and did not suffer with any significant mental health difficulties. His history of difficulties is laid bare in Dr Woods' First Report.

29. Dr Woods' First Report was not immediately shared with the Respondent. Neither Mr Varnam nor Ms Duane are certain as to when it was eventually disclosed to the Respondent. We find that neither Hampton Knight nor the Respondent had sight of the First Report before the Claimant went on long term sick leave on 8 May 2015. It is possible that it was only disclosed within these proceedings. For example it was not available to Mr Curtis in May 2022 when he heard the Claimant's appeal against his dismissal.

30. Dr Woods produced a second, shorter, three-page report that was addressed *"To Whom it May Concern"* (the "Second Report" - pages 446 to 448). The report is undated. In his 'Preparation Document' for a grievance appeal meeting with Mr Cotterell on 21 August 2019 (page 1720), the Claimant identified that the Second Report had been prepared by Dr Woods at his request at some unspecified later date to the First Report and that a hard copy had been shared with the business in December 2014/January 2015. We return to this at paragraph 93 onwards below. The Second Report combines Dr Woods' observations with the Claimant's own comments on his condition and experiences within the workplace, in a way that brings the issues to life in readily accessible language.

31. In terms of s.20/s.21 EqA 2010, whilst we are concerned with what the Respondent knew, or ought reasonably to have known, which in turn depends upon what information was reasonably available to them, it is worth noting the following matters, amongst others, documented in Dr Woods' First Report, even if the Respondent was unaware of its contents for some considerable time:

    i. The Claimant experienced difficulties in social interactions and in his relationships with people at work;

    ii. he was quite rigid in the way that he did things, repetitive in some of his behaviours, and preferred structure, routine and organisation;

    iii. he could become very frustrated when other people did not work to the process or follow the rules (he was a stickler for rules);

    iv. he had clear principles and would get upset with people who did not do the "right thing";

    v. he was dependent on work / the workplace as a safe and stable place;

    vi. he had a very direct communication style which had upset people or caused them to become defensive;

    vii. he was very organised and used the internet to do most things he needed to do;

    viii. he disliked crowds and interacting with people;

    ix. he had some tendency when not busy to think about the same things repetitively and to ruminate;

    x. he had a variable sleep pattern; and

    xi. he had sensory sensitivities.

32. We have focused on these matters since the Equality Act 2010 is concerned with the things a disabled person cannot do or can only do with greater difficulty, rather than the things they can do or may even excel at.

Dr Woods noted in her First Report, for example, that the Claimant's clear thinking and technical understanding had been a real asset to him (and, we are sure, to the Respondent) in his career, and that he had persevered in pursuing his goals when most other people would have given up.

33. Whilst Dr Woods' two reports undoubtedly evidence that the Claimant had insight as to his condition and its effects, we find that at least in one important respect his perception did not fully align with the objective reality or at least that it reflected an incomplete picture. In her Second Report, Dr Woods noted the following comments by the Claimant under the heading 'Particular skills and strengths',

> *"I am generally very clear and structured in my approach and communication"* (Page 448)

As Dr Woods noted in her more detailed First Report, the Claimant presents with some impairment in verbal and non-verbal communication, even if he has learnt to consciously adapt and monitor his communication. In the course of his assessment with Dr Woods, the Claimant acknowledged that his communications had the potential to upset people and to make them defensive. The Claimant may well have a direct communication style but that does not necessarily mean he has an entirely effective communication style, something we observed directly over the course of his evidence and which is also evident from extensive documentation in the Hearing Bundle. As we have noted already, communication difficulties were identified by Dr Woods as a major factor in the stress and anxiety the Claimant has experienced for much of his life. She was of the professional opinion that he displayed a range of qualitative impairments in social interactions; she wrote of a history of difficulties in peer relationships and problems in social judgement, emotional reciprocity and understanding social situations and other people's thoughts and feelings. As we shall return to, certain of his interactions in the matters we are concerned with were characterised by miscommunication or misunderstanding. It also seems to us that the Claimant's reaction to the 2014 cultural survey feedback stemmed from his inability to understand, and therefore accept, his colleagues thoughts and feelings.

34. Dr Woods' Second Report was in a format clearly intended for employers. It provided an overview of Asperger Syndrome, i.e. identifying common features of the condition, emphasising that many features of the condition are also strengths that facilitate achievement and success in a number of spheres. The report went on to identify the kinds of difficulties the Claimant had experienced historically and, in some cases how these might be overcome, *"with some re-thinking on the part of Managers in future employment, as well as some extra guidance."* For convenience, although it was not structured in this way, we shall refer to the part of the Second Report which summarised the Claimant's difficulties as Section A. Although the language of the Equality Act 2010 was not deployed, Dr Woods was plainly referring in Section A to specific situations in which the

Claimant might be said to be at a disadvantage in relation to others. The Claimant's documented difficulties were as follows:

> *"1. I find it difficult to work in an environment where roles are not clearly defined …*
> *2. I find teambuilding activities … very difficult to engage in.*
> *3. Any activity where someone tries to analyse me or define my personality or character does not generally go down well …*
> *4. Situations where perceptions contrary to facts or data are taken as reality. …*
> *5. … Work has been a safe environment for me with structure and order. Where that has been challenged I find it difficult to rebuild coping mechanisms and feel secure again.*
> *6. Where my views on a matter are challenged then the rigidity of my structured mind can cause issues. I need to be persuaded to change in the right way, particularly on matters of fairness, rights and wrongs etc.*
> *7. I like black and white, grey not so much. I need help in trying to make things as binary as possible. Where things are grey I will create mechanisms to try and get them in a certain box. This sometimes means labouring points or going in circles."*

These difficulties manifested in quite a pronounced way over the following years, as we shall come to.

35. Dr Woods' Second Report went on to highlight things that were said to have worked well. We shall refer to this further part of her report as Section B. Once again, whilst the 2010 Act was not referred to, Section B described workplace adjustments. We note the last of the five identified adjustments:

> *"5. I have asked for advanced notice of any of the psychometric tests and activities planned in order to prepare and constructively approach them in a way which allows me to engage."*

Later in this Judgment we return to the question of what 'advanced notice' might entail, specifically in the context of claimed PCP (1).

36. Dr Woods' Second Report contained further sections that addressed 'Communication', 'Time Management and Planning', 'Routine and structure', 'Social interaction' and 'Sensory sensitivities', as well as the Claimant's 'Particular skills and strengths'. The report concluded with the following summary:

> *"Mr Jenkins, like many other individuals with AS, presents with a range of skills and weaknesses. It is important that his skills are recognised appropriately in his place of employment, whilst some re-thinking on the part of his management can alleviate some of the difficulties in his organisation/approach to work, social interactions and rigidity of thinking. To facilitate the continued development of self-confidence, he needs to be acknowledged for those domains in which he functions well, as opposed to only recognising his areas of relative weakness, namely those mentioned above. With more specific guidance and support, he will be better placed to demonstrate his full potential"*

37. There are a series of occupational health reports in the Hearing Bundle as well as extensive notes of meetings between the Claimant and the Respondent's occupational health advisers, often attended by representatives from the business, including Mr Coleman and members of the Respondent's HR team. The initial occupational health reports were authored by Ms Routledge. Having read all of the occupational health reports in the Hearing Bundle, and indeed between us having read a great many occupational health reports during our respective careers, Ms Routledge's reports are notable for their quality and insights. In a report dated 10 December 2014, Ms Routledge wrote:

> *"Dave is currently under psychological support. He has informed us that following an assessment a report will be provided with information which will assist us further in understanding his condition to date this has not been received."*

We find that the reference to "psychological support" was to the Claimant's sessions with Mr Truter which had been ongoing since 2011. The "assessment" was the CLASS assessment just referred to. We do not think that Ms Routledge's reference to a singular report was a slip on her part, since we find that the Claimant initially only intended to and in fact did disclose Dr Wood's Second Report to her. Further confirmation in this regard is to be found in the Claimant's 'Preparation Document' for the grievance appeal meeting held on 21 August 2019 (page 1720).

38. As we shall return to, the fact that Ms Routledge and the Respondent had to wait some time for Dr Wood's Second Report to be released to them is relevant in terms of their understanding of the Claimant's disability and how he might be put comparatively at a substantial disadvantage.

39. We find that the Claimant had been able to digest the contents of Dr Woods' First Report when he met with Ms Routledge, Mr Coleman and Ms Picollo (HR Shared Services Supervisor) on 7 and 24 November and 10 December 2014, and accordingly that he was in a position to bring the contents of the report to bear in his discussions with them, even if the report itself was not made available to them. It is less clear at what point the Second Report was available to him, though given that various aspects of the agreed approach that emerged from those three meetings reflect the contents of Dr Woods' Second Report, we conclude that he was in possession of the Second Report by no later than 10 December 2014, such that he also brought its contents to bear in the ongoing discussions. We return to this again at paragraph 105 below. We find that the documented "agreed approach" to supporting the Claimant that emerged from the three meetings referred to (pages 460 and 461) reflects the particular issues which the Claimant had taken from Dr Woods' reports and/or to which he attached significance.

40. Ms Routledge documented the *"agreed"* approach to support the Claimant, following the three meetings, under six headings as follows:

40.1 Flexible working - this corresponds to Sections B.3 and B.4 of Dr Woods' Second Report.

'

40.2 Public speaking - this corresponds to the 'Social interaction section of Dr Wood's Second Report

40.3 Team building - this corresponds to Section A.2 of Dr Wood's Second Report, the issue for the Claimant, we find, being the concept of team building exercises, rather than specifically their content, since it was noted that he continued to express discomfort in attending strength finder team building sessions planned for January 2015 notwithstanding information had been provided in advance for him to prepare for them. As Dr Woods had noted in her Second Report, the Claimant said he found teambuilding activities very difficult to engage in.

Ms Routledge noted that the Claimant had expressed that "this type of approach" would cause him discomfort and distress, but she did not elaborate further as to what the "approach" referred to was. We find that the Claimant was referring to the use of psychometric testing, analysis and methodologies as part of leadership strategising and team building. It is consistent with him reporting to Dr Woods that he found difficulty with any activity where someone tries to analyse him or define his personality or character.

Ms Routledge recommended that,

> *"Further communication and consideration is required as to how to mitigate the effect this could have on Dave, or to consider alternative solutions and if there is a possibility of him not taking part?"*

40.4 Open communication - this corresponds broadly, though not exactly, to Section B.5 of Dr Woods' report. It was not specifically identified that the Claimant felt he lacked information or detail about the January 2015 event. We find that this related more generally to planned events / situations outside the routine and structure of normal day to day work activities.

40.5 Structure - this corresponds to Section A.1 of Dr Wood's Second Report.

40.6 Payment for Psychological support - this was not referred to in either of Dr Woods' reports.

41. Accordingly, it seems that the issues identified in Sections A.4 (situations where perceptions contrary to facts or data are taken as reality), A.5 (being attacked at a personal level, particularly in front of others), A.6 (the Claimant's views on a matter being challenged), A.7 (seeing things in 'black and white', with a resulting tendency to labour points or to go around in circles), B.1 (having his own office as a means of creating a "safe"

environment") and B.2 (having a balance of short and long term tasks) of Dr Wood's Second Report were either not raised or highlighted by the Claimant in his discussions with Ms Routledge, Mr Coleman and Ms Picollo, likewise that he did not highlight his sensory sensitivities to them.

42. The next occupational health report is dated 15 January 2015 Ms Routledge was again the author. The stated purpose of her report was to update the Respondent on previously agreed actions relating to 'Flexible Working', 'Leadership Strategy Meeting' (a forthcoming strategy day that Ms Gordon was expected to attend), 'Cultural Survey Feedback' and 'Payment for Psychological support'. On this latter point, it was said that the Respondent would fund 24 sessions for the Claimant with Mr Truter but nothing beyond that. In the event, as we shall return to, the Respondent went on to fund a significantly greater number of sessions as well as Mr Truter's attendance at various occupational health reviews and grievance and grievance appeal meetings. In the second page of her report, Ms Routledge addressed "other considerations for reasonable adjustments as previously *agreed".* She made the following observations in relation to Communication and Structure:

> *"1. Communication – Ensure where reasonable any changes or communication is shared with Dave to allow him time to analyse and prepare before it occurs.*
> *2. Structure – Dave requires structure and organisation around roles or strategy/direction and does not cope well with ambiguity or quick responses as he requires time to analyse and consider all options. This needs to be taken into consideration in his work role and will need to be monitored as his new role is in its infancy stages.* (page 483)

43. Ms Routledge went on to express concerns for the Claimant's emotional wellbeing, noting that the Respondent was reporting that he was not coping with his normal strategies. She noted the Claimant's dilemma, namely that work was seemingly triggering him but that being at home would simply leave him with time to think and analyse. Her professional opinion was that the Claimant was probably unfit to work, but she left it to the Claimant to make the final decision. Notwithstanding how the Claimant now perceives events in 2015, and indeed beyond, as having impacted him, it is clear that by late 2014, early 2015 he was already significantly unwell.

44. Whilst we consider that Ms Routledge's 15 January 2015 report would not have added to or altered the Respondent's understanding of the Claimant's condition or its effects, it would have served to reinforce what had emerged from the meetings in late 2014.

45. Ms Routledge's report made reference to Mr Coleman and Ms Picillo as having provided the Claimant with some alternative solutions to previously discussed plans for the January team building sessions, but did not identify what those original plans were or the alternative solutions, though it was documented that these would allow the Claimant greater control and time to consider and plan. It suggests an agreed plan to support the

Claimant through an event the value of which he did not, or perhaps more accurately could not, recognise.

46. Just a few days prior to the January team building sessions, the Claimant emailed Ms Routledge and Ms Picollo in some detail regarding his condition and its effects (pages 485 and 486). The cultural survey continue to weigh heavily in his mind; he described it as an "open wound". He described his issues as being, *"…very difficult to manage. No one truly understands them and they are complex."* He referred to both his autism and depression, and identified the latter as "the risk". He went on to say, *"At present, I am not fully in control and without that control things get messy. That control is hugely important in terms of me managing issues and day to day life."* We think these comments capture the magnitude of the Claimant's mental health difficulties. Being fully in control is ultimately beyond all of us, yet it is something which the Claimant has a significant perceived need for and strives to achieve.

47. The Claimant went on in his email to highlight various risk issues, referring to risks that are unavoidable as they cannot be foreseen and to risks that are entirely avoidable and can be foreseen. It was a thoughtful email, though as with many of the Claimant's other communications it was somewhat discursive, albeit he concluded by identifying five specific adjustments or action points in addition to those that had been captured from the discussions to date. He described them as a *"subtle redirection of focus"*. We note that none of them related to the team building strategy event the following week or to advance notice of the content of such events more generally.

48. A subsequent report by Ms Routledge dated 1 April 2015 (page 521) likewise would not have added to or altered the Respondent's understanding of the Claimant's condition or its effects, though his adverse reaction to the Lencioni video and subsequent absence from work would, have served to highlight his vulnerability and reinforced the need to adhere to the agreed approach. At the time of the April 2015 report, the Claimant was on a phased return to work following sickness absence between 30 January 2015 and 24 March 2015. We note that the report referred to a forthcoming workshop on 'Building an Empowering for Results Culture' and that,

> *"… we had not previously discussed the content or detail of this workshop as per the agreed reasonable adjustments from a risk assessment perspective"*.

The comments served as an action point reminder around Section B.5 of Dr Woods' Second Report. We return to this at various points later in this judgment, though note here that Ms Routledge's notes confirm that as early as 16 January 2015 she discussed with the Claimant the potential for a general risk assessment to identify and manage situations that might affect him (page 425). Her notes from 10 February 2015 evidence that the Claimant had started to complete a risk assessment document and that she returned to this issue on 12 March 2015, when she identified the

potential instead to risk assess specific activities prior to events so that tailored adjustments could be put in place. She seems to have this actively in mind, as it was discussed again with the Claimant at a meeting on 7 May 2015.

49. Mr Truter provided a report on the Claimant to Ms Routledge on 6 May 2015 (pages 596 – 598). It is marked as "DRAFT" but its inclusion in the Hearing Bundle and the fact witnesses were questioned about it evidences to us that it was sent to Ms Routledge. In his report, Mr Truter refers to an earlier report dated 15 December 2014. There is no copy in the Hearing Bundle, notwithstanding Mr Truter's subsequent description of it as intended to help facilitate more understanding of the Claimant's diagnosis and the mental health difficulties experienced by him. In the course of his report Mr Truter referred to "the CLASS report" as having been provided. As with Ms Routledge, we do not think this was a slip on his part. We find that he was referring to Dr Woods' Second Report, and find support for that conclusion in Mr Truter's reference to the report as having provided specific guidelines to business – as we have noted already, the Second Report was clearly intended for employers. Mr Truter did not identify to whom Dr Wood's report had been disclosed or when it had been disclosed.

50. As with his witness statement in these proceedings, Mr Truter's report reflects his tendency to report the Claimant's account of events, relayed in the course of their therapeutic sessions, as established fact. For example, whilst he referred in his report to the Claimant *"feeling"* scapegoated and exposed in front of the division as a result of the cultural survey feedback sessions, he went on to say that these feelings were intensified by *"negative statements he received from the business management consultant in front of his peers"*, which in turn had evoked depressive symptoms. At paragraph 219 of this judgment we set out why we are unable to place reliance upon the Claimant's evidence regarding Ms Gordon's alleged comments on 24 October 2014. Mr Truter, who is not a doctor of medicine, or indeed psychology, might have taken greater care to distinguish between what the Claimant had reported as having been said during the feedback sessions and his own professional opinions in the matter. We do not know whether he was qualified to offer any professional opinion as to the cause of any depressive symptoms. Nevertheless, Mr Truter's 6 May 2015 report was still an informative document even if it did not necessarily add anything to Dr Woods' Second Report in terms of an understanding of the Claimant's condition and its effects. It would certainly have served to reinforce the emerging picture in relation to the Claimant.

51. The next occupational health update report, again authored by Ms Routledge, is dated the following day, 7 May 2015 (page 599). She described the Claimant as vulnerable in his emotional wellbeing. She referred to a forthcoming Leadership Meeting on 20 May 2015 (we conclude that she was referring to the workshop on Building an Empowering for Results Culture) and the need for the Respondent to

complete a risk assessment with the Claimant that had been started the previous week,

> *"… to look at the agenda in more detail. How are the personality traits going to used and by whom etc.*
> ***Matt to action asap"***

Notwithstanding the events of 28 January 2015, we note that she focused upon the "agenda" for the meeting rather than necessarily the precise content, consistent with Section B.5 of Dr Woods' Second Report. Otherwise, Ms Routledge's report contained no further information regarding the Claimant's condition or its effects. The risk assessment itself is at page 677 of the Hearing Bundle. It is undated, though has been inserted in the Bundle (which is structured chronologically) between two documents dated 3 and 17 July 2020, when the Claimant was on sick leave (and from which he would never return). However, in her report of 7 May 2015, Ms Routledge referred to the assessment as having been started. It relates to an event that took place on 20 May 2015 and logically therefore it must pre-date that event.

52. Ms Izod took over managing the Respondent's case in July 2015 when Ms Routledge left Hampton Knight. In her first report on the Claimant dated 22 July 2015 (pages 700 and 701), Ms Izod noted that Ms Routledge had concluded that she had reached a stage where occupational health had provided all relevant information from a medical perspective. She referred to Mr Collins and Mrs Webster as having requested a copy of the Claimant's "CLASS report" (*singular*). We refer in due course to the fact that tight control was maintained over who had access to information and reports about the Claimant.

53. Ms Izod's subsequent reports of 29 July 2015 (pages 707 – 708), 21 August 2015 (page 713), 2 September 2015 (page 719), 18 September 2015 (page 740), 10 December 2015 (page 754), would not have added to or altered the Respondent's understanding of the Claimant's condition or its effects.

54. We note that in her 29 July 2015 report Ms Izod wrote,

> *"In my opinion it is unlikely that the Claimant's overall mental wellbeing will improve spontaneously without the resolution of his perceived work related concerns which continue to cause him considerable distress."*

Subsequently, in December 2015 she observed that the issues in the case were "not primarily medical".

55. In her 29 July 2015 report, Ms Izod identified strategies (or adjustments) that the Claimant might want to consider to help boost his emotional resilience, including a structured daily routine, set times for waking / retiring, eating healthily, maintaining alternative distractions, exploring different interests, social contacts and continuing with regular exercise.

Her report five weeks later at page 717 of the Hearing Bundle indicates that the Claimant had not taken steps to implement these strategies.

56. The Claimant was referred for assessment by Dr Martin Cosgrove in 2015. Dr Cosgrove's first report, dated 22 August 2015 is at pages 714 – 716 of the Hearing Bundle. The Claimant had by then been absent from work for three months. The focus of the report was the Claimant's absence and facilitating his eventual return to work. Dr Cosgrove anticipated that the Claimant would need several months before he would be able to work again as his depression required *"robust treatment for several months"*. That is consistent with the Claimant's own assessment in January 2015 that his depression was *"the risk"*.

57. In terms of the Respondent's understanding of the Claimant's condition and its effects, the Claimant's depression was identified as the reason why he was unfit to work. Dr Cosgrove wrote,

> *"Once his depression is resolved he will be able to work again in a suitable role and the issue <u>then</u> will be to negotiate a return to work and resolve the difficulties between his employer and himself."* (page 715 – our emphasis)

In summary, Dr Cosgrove regarded medication, therapy and, as Ms Izod did, lifestyle interventions as areas for immediate focus and that the resolution of workplace issues would be secondary to these.

58. Although this was not explored with the Claimant at Tribunal, Dr Cosgrove seems to have envisaged that the Claimant might not return to his substantive role, as he referred to potential suitable roles that might play to the Claimant's strengths as an experienced engineer and problem solver. Dr Cosgrove made one specific recommendation in terms of adjustments. Having advised mediation to resolve the difficulties, he said,

> *"It might be of benefit to seek the support of an organisation external to Caterpillar to act as his advocate with regards to the autistic spectrum disorder"* (page 716)

59. The available medical evidence in the Hearing Bundle includes correspondence from the Cambridgeshire and Peterborough NHS Foundation Trust's Peterborough and Borders Adult Locality Team ("CPFT") (pages 732 – 739). The Claimant was evidently in crisis by early September 2015. The Claimant reported, amongst other things, that he could not go back to work until his issues began to be resolved, that he was struggling with how he would get out of the situation in which he found himself, that he lacked structure to his day, and that there were

> *"Lots of issues of harassment at work…"*

Within these proceedings, the Claimant complains of four acts of harassment over the preceding six month period. However, as we shall come back to, when he told CPFT that there were lots of issues of

harassment at work he was then unaware of the fourth matter complained of, namely comments made by Mr Collins on 11 September 2015. Echoing the fears he had expressed to Ms Routledge in 2013 and 2014, he spoke of the lid as having been taken off and said that problems had increased with a lack of understanding.

60. The Claimant was seen by Dr Mansour, a Locum Consultant Psychiatrist on 26 October 2015 by way of a follow up review following the Crisis Intervention on 4 September 2015. The (amended) report of that review is dated 11 January 2016. We were not told the reasons for this significant delay. Dr Mansour referred to a *"change in medication"*, but did not identify when this was or when any medication regime first commenced. The Claimant was being prescribed Paroxetine which is used to treat depression and anxiety, amongst other things. Dr Mansour recorded the Claimant's ASD as *"mild high functioning"*. We are a little surprised that the Claimant's ASD might have been assessed as mild. Dr Mansour noted that the documented plan was to continue Paroxetine and private psychotherapy, with a follow up appointment with CPFT on 25 January 2016.

61. Towards the end of 2015, seemingly in response to a request from Ms Izod, Mr Truter provided a further report on the Claimant dated 23 November 2015 that addressed seven specific questions (pages 748 to 751). Mr Truter referred to the fact that people with ASD cover up how they experience life in order to protect themselves, and that they find it difficult to open up. In contrast to Dr Cosgrove, Mr Truter seemed to prioritise a resolution with the Respondent and, only once this was achieved, that the Claimant's mental health difficulties could be assessed with a view to a return to work. Whilst we consider that the two issues ultimately went hand in hand, we find that the immediate priority, as Dr Cosgrove had identified, was to begin to treat the Claimant's depression to facilitate early mediation or other discussions and actions that might address difficulties in working relationships that would in turn facilitate a return to work at the point in time that the depression no longer stood in the way of this.

62. Whilst Mr Truter referred in his 23 November 2015 report to the need for reasonable adjustments, he did not obviously identify any adjustments beyond those which had previously been identified for the Claimant. He highlighted that there was a need for clarity as to what the Claimant could expect when he returned to work. He referred in this regard to a clear job description and expectations of his role in written formant. He went on to identify that any return should be phased with clear support structures in place, including an advocate as suggested, he said, by CLASS. In fact, as indicated above and as far as we can identify, it was Dr Cosgrove who recommended an ASD advocate.

63. In other respects, Mr Truter's report lacked clarity. For example, he referred to associated difficulties with the Respondent due to

"how processes was [sic] managed not considering his ASD",

but he did not elaborate in terms of the processes he was referring to or how this related to the Claimant's ASD. As we read his report, he seemed to be suggesting that the Respondent had not accepted that ASD is a recognised disability. If so, his observation was unfounded, though seems to have found further expression in 2016 when, as we return to, the Claimant submitted a grievance in which he identified as one of his desired outcomes that there should be formal recognition of his disability. There are other areas of the report where Mr Truter expressed himself in slightly opaque, or at least generalised, terms. As we understand section 4 of his report, he seemed to be referring to issues that he and the Claimant might explore in the course of their therapeutic sessions. He wrote,

> *"Once the employment difficulties are resolved, it would be clear what is needed"*

64. Mr Truter's report concluded,

> *"I would recommend a speedy, clear and structured resolve to the difficulties Mr Jenkins experiences regarding his employer. As mentioned above it will give us a clearer picture how Mr Jenkins can return to work once he knows he has a safe and supportive environment that is not discriminating to his condition has been created. I do think it is important for the those involved in supporting him within the workplace to have a good understanding of Autistic Spectrum Disorder this would help to facilitate an informed and safe process "* (page 751)

The implication is that Mr Truter considered there to be a potentially unsafe, unsupportive and discriminatory work environment at the Respondent, something he was not realistically in a position to objectively evaluate and professionally might have refrained from expressing a view in relation to. Once again, his comments found further expression in the desired outcomes in the Claimant's 2016 grievance. If Mr Truter was not involved in crafting the Claimant's grievance, then at the very least the Claimant adopted his terminology and suggestions, such that it provides some corroboration of Dr Lyle's observations below regarding the emotionally dependent nature of their relationship.

65. The next available medical evidence in the Hearing Bundle is a further report from Dr Cosgrove dated 7 March 2016 (pages 786 – 788) following a review of the Claimant's case. As in his first report, Dr Cosgrove focused upon the Claimant's ongoing absence from work. He noted that the Claimant continued to have significant mental health difficulties related to depression and anxiety. Dr Cosgrove referred to the Claimant being on medication and observed,

> *"… I am of the opinion that all he has had are side effects from the treatment and no benefits in terms of improvement of either the depression or anxiety."* (page 786)

66. Under the heading "Fitness for Work" Dr Cosgrove wrote,

> *"He is not currently fit to work in any capacity as a result of the depression and anxiety and is going to need to improve substantially before he is well enough to consider a return to work. Barriers to his clinical improvement are the ongoing impasse between employer and employee and the lack of effective medical treatment so far."* (page 787)

We find this was effectively a reiteration of what he had previously said in August 2015.

67. There is a further occupational health report dated 16 May 2016 (pages 850 and 851), authored by Vicky Edwards, Occupational Health Manager, who had by then taken over from Ms Izod. The report followed a handover meeting on 23 March 2015, during which we note that the Claimant said only Ms Routledge and Dr Cosgrove *"understand this"*. Ms Edwards' report would not have added to or altered the Respondent's understanding of the Claimant's condition or its effects, though it confirmed that the Claimant had stopped his anti-depressant medication before resuming treatment with an alternative anti-depressant. She documented that this had resulted in unwanted side effects and negatively impacted on learnt coping strategies, that the therapeutic value of alternative medication would take time to evaluate, and in the meantime that he might experience a temporary increase / instability of symptoms affecting both his physical and mental health. The Claimant was continuing to see Dr Truter on a weekly basis. The focus by now was management of the process of determining the Claimant's grievance, specifically what adjustments might be made to the process. It was identified that the grievance process would be emotionally difficult and lengthy, and therefore additionally challenging for the Claimant. Ms Edwards advised that she supported Mr Truter's attendance at any grievance meetings.

68. There is a short email from Mr Truter at page 880 of the Hearing Bundle. It is not in the nature of an update on the Claimant, though does identify potential adjustments to the grievance process. Mr Truter recommended feedback after each grievance. We find, by this, that Mr Truter meant that after Mr Goldspink issued his decision on each part of the Claimant's grievance - it having been agreed between the Claimant and Mr Goldspink that the grievance would be broken down in this way as a reasonable adjustment for the Claimant – there should be an opportunity for the Claimant to provide feedback on the outcome before the process moved on to consider the next part of the grievance. Mr Truter also recommended that if the Claimant wished to appeal against any outcomes this should be deferred to the end of the process – what Mr Truter referred to as the *"parking thoughts"* strategy – and that the Investigating Officer should provide a rationale to the outcome of his decision. On this latter point, that would be expected of an employer in all cases, let alone required as a reasonable adjustment.

69. A report from Jo Keys at Autism Anglia dated 6 September 2016 (pages 982 – 983) would not particularly have added to or altered the

Respondent's understanding of the Claimant's condition or its effects, though as regards the Lencioni video she observed,

> *"I could understand why he felt offended but perhaps people who aren't fully aware of Asperger's may not understand"*

Her comments are consistent with comments by the Claimant during a meeting with Ms Routledge, Ms Picollo and Mrs Webster, on 18 February 2015 (the Claimant's detailed notes of which are at pages 493 to 493b of the Hearing Bundle) that he was concerned by the *"inappropriateness of the content with respect to protected characteristics and references made …"*, rather than his inability to prepare for the event if he did not know in advance what would be in the video or have the opportunity to view it. It seems therefore, notwithstanding Ms Keys' significant understanding of ASD and her interactions with the Claimant, that some 19 months or so after the video had been shown, Ms Keys understood and perceived the impact of the video in terms of its content rather than with reference to any need on the part of the Claimant to analyse and prepare for presentations in advance of them happening.

70. In her report, Ms Keys was critical of the Respondent's alleged failure to implement shorter, more focused meetings with clear agendas, outcomes and actions. She highlighted what she saw as a failure to progress certain actions i.e, that they were being spoken about again and that she felt the company was not listening to what the Claimant was saying about the difficulties he was having. She highlighted her concerns with specific examples, including that meetings were not being minuted. She went as far as to say that she felt a meeting that had taken place on 20 April 2015 had not been productive for anyone.

71. Pippa Dingley (now Walker) of the Respondent's HR department enquired of Mr Truter as to the Claimant's experience of the grievance process and received a detailed response from him on 10 September 2016. He reiterated a point made previously that not being at work meant the Claimant lacked *"any points of safety"* and lacked the structure and familiarity of a work environment in which he did not over-think or over-analyse i.e, ruminate. He referred to the distress experienced by the Claimant in reliving experiences in the grievance process and reiterated the Claimant's difficulties with social interactions (including the Claimant's need to interpret non-verbal cues) relating this latter issue specifically to the grievance process. He went on to refer to the Claimant's depressive and anxiety symptoms as having become more internalised and said that,

> *"Coping strategies need to be put in place within secure structures, followed by a period of normalisation facilitating the rebuilding of emotional resilience."* (page 986)

We understand the reference to coping strategies to be a reference to the therapeutic work the Claimant was doing with Mr Truter rather than work in respect of which the Respondent needed to take the lead. Echoing Dr

Cosgrove's comments from March that year, Mr Truter said that the Claimant's medication was having minimal therapeutic effect.

72. Mr Truter went on to observe:

> *"Having to go through the grievance process is a double edge sword for David. … Understandably, if outcomes do not appear to be supportive the negative potential becomes more established. With this in mind it is important to understand that ASD causes significant problems in this area in terms of both finding resolutions to move forward and ruminating on previous difficulties leading to a continuous cycle of negativity, further fuelling depression and anxiety."*

His prognosis, if that is what it was, was not encouraging. It provides the clearest early indication that the grievance/grievance appeal process might not in fact serve the Claimant's interests given the inevitable risk that the Respondent would not see things through the same lens as the Claimant, particularly in a multifaceted grievance.

73. Mr Truter also identified financial uncertainty as exacerbating the Claimant's negative cycle of thoughts and rumination. This was at a time when the Claimant had been without any income for about six months as he had exhausted his company sick pay. Mr Truter went on to acknowledge that the grievance process had adhered to agreements reached beforehand as to its conduct and seemed also to acknowledge that *"information is promptly responded to".* He requested that grievance meetings were booked at least two weeks in advance. We note that, as long as a rationale was given, the Claimant was said by Mr Truter to be able to adapt if meetings needed to be postponed. Mr Truter identified a need for the likely duration of meetings to be indicated in advance and for all meetings, including outcome meetings, to have an agreed agenda, circulated in advance, and to include both time-out and discussion time. He also gave feedback regarding the grievance "feedback", so called "grey areas", room set up, time-out and style of questioning, specifically the impact on the Claimant of open questions and use of timeframes.

74. When the Claimant was seen again by Dr Orsucci, Consultant Psychiatrist at CPFT, on 16 September 2016 (page 1002) he was prescribed a high level dose of Sertraline (to treat his depression) and Promethazine (for his anxiety). The Claimant expressed a strong desire to Dr Orsucci to be able to work. By now Mr Coleman was no longer his line manager. Dr Orsucci recorded that,

> *"he feels that he can work with this new Manager* [Mr Bond] *as he is more flexible and sympathetic"*

75. Ms Edwards issued an up to date report on the Claimant on 5 December 2016. She recorded that the Claimant had reported to her that

> *"… the support / grievance format "seems to work" "*

She also referred to the Claimant's desire to establish a means of formal communication with Mr Bond, something we shall return to in our findings below in relation to the grievance and grievance appeal. She went on to say,

> *"Completion of the grievance process and resolution of any other associated work related issues is required, before David is likely to be able to think about preparing himself both physically and mentally for a return to work environment."* (page 1103)

We have noted already at paragraph 72 the more complex or at least nuanced picture painted by Mr Truter.

76. The Claimant was seen by Dr Karin Laudin for a follow up review at CPFT on 4 May 2017. Her report dated 11 May 2017 confirms that the Respondent had recently undergone a 24-hour ECG in respect of chest pain and palpitations. She noted he had not been sleeping *"for years"* and was experiencing side effects from anti-depressant medication. She further noted that he struggled to go to the supermarket and that sometimes he would not leave the house: *"His safe space is home"; "The depression is constant"*.

77. There are a number of further reports in the Hearing Bundle by Dr Martin Pearson a Clinical Psychologist, Dr Iles a Consultant Psychiatrist, Dr Parkes a Consultant Clinical Psychologist, Dr Sharna Lewis a Chartered Clinical Psychologist, and Dr Lyle a Consulting and Chartered Clinical Psychologist. Dr Lewis and Dr Lyle are the parties' respective medical experts in these proceedings. We return to their reports in the course of this judgment, noting for the time being that Dr Lyle, is implicitly critical of Mr Truter. He observes that a high degree of emotional dependence seems to have resulted from what he says are 364 sessions of psychotherapy, and that there is little evidence of much improvement in the Claimant's medical condition *"for all this expenditure of money and effort"*. Given the dates of Dr Lewis and Dr Lyle's respective reports, their views were obviously not available to Mr Blin and Mr Curtis when they respectively dismissed the Claimant and subsequently upheld his dismissal on appeal.

<u>The terms and conditions, and policies and procedures applicable to the Claimant's employment</u>

78. It is not necessary for us to set out the Claimant's history of employment with the Respondent, which is detailed in the Claimant's witness statement. We simply note that the Claimant first joined the Respondent in 1997 as a placement student before being offered employment as a graduate and that his entire career was with the Respondent, securing regular promotions, including promotion to an Engineering Leadership role in 2005. The Claimant evidently found his roles and the work he did both challenging and interesting.

79. The Claimant's contract of employment was not included in the Hearing Bundle, though we were provided with a copy of the Respondent's template terms and conditions for grade SG26 staff.

80. The 2015 and 2018 versions of the Respondent's Grievance Policy are at pages 153 to 162 of the Hearing Bundle. The Policy refers to both parties making efforts to resolve any issues of concern. Mediation is identified as a potential tool to aid resolution. Under the formal procedure, employees are expected to outline their desired outcome and the relevant manager is required to respond in writing.

81. The 2015 Sickness Absence and Pay Policy is at pages 183 to 187 of the Hearing Bundle. It contains a section on 'Long Term Absence' (being continuous absence of 4 weeks or more). Under the company sick pay provisions, the Claimant was eligible for up 52 weeks' sick pay for absence. Pay in this regard is expressed to be "flat salary" exclusive of overtime, night shift or other payments. There is a specific section that deals with discretionary extensions to company sick pay. It provides:

> *"The intention of the scheme is to keep the need for discretionary extensions to an absolute minimum. On the exceptional occasions when a discretionary extension may be desirable, the decision must be authorised by the manager and HR."*

82. The 2018 and 2020 versions of the Respondent's Permanent Health Insurance ("PHI") Policy are at pages 168 to 176 of the Hearing Bundle. The Policy is expressed to be non-contractual. Notwithstanding the company sick pay arrangements above, eligible employees may be considered for PHI benefit once they have been unable to work as a result of the same illness, injury or disability for 26 weeks. The Policy explicitly provides that payment of any PHI benefit will be subject to the terms and conditions of the insurance provider, and that the Respondent shall not be liable to provide benefit if it is refused for any reason by the insurance provider.

83. The stated benefits under the PHI Policy are as follows:

> *"Once the employee has been accepted to receive PHI benefit, payments will be made monthly equivalent of up to 50% of the employee's basic annual salary whilst they qualify for the first five years. During this time, employees must continue to contribute at least 3% of their new income to the DC pension plan."*

Participating employees also receive company contributions to their pension, albeit based on their PHI benefit. They continue to receive any vehicle cash allowance at the same rate they were receiving it, accrue holiday at the rate of 5.6 weeks per annum, remain eligible to participate in Caterpillar's Employee Share Participation Plan and remain covered under the Respondent's private medical insurance arrangements. However, they have no ongoing expectation of stock options or Short Term Incentive Plan/bonus once they are in receipt of PHI benefit.

84. In the case of longer term absence, the 2020 version of the Policy provides:

> *"If the employee is still unable to work after a continuous five-year period of receiving the PHI benefit and they continue to meet the eligibility criteria, the dismissal process will be instigated. If the outcome results in ending employment with Caterpillar, the employee will receive payments directly from the insurance provider rather than payroll."*

This wording is a change from the 2018 Policy wording which specified that employment would simply end in such circumstances.

2013

85. Although much of the evidence presented to the Tribunal was concerned with events from the second half of 2014 through to the outcome of the Claimant's appeal against his dismissal on 23 May 2022, we begin with events in 2013, specifically the Entwistle incident in June 2013 and Mr Coleman's appointment as the Claimant's line manager around this time.

86. The Claimant alleges that in June 2013 he was on the receiving end of "a very direct, unprovoked and personal verbal attack'" in public by Mr Entwistle, a Product Director, that had a pronounced effect upon him. His evidence is that whilst he maintained his composure at the time, he subsequently *"unravelled"* in private and took some time off work sick. With dialogue and effort on both sides, the issue was resolved without the need for the Claimant to escalate it as a formal grievance.

87. In paragraph 13 of his witness statement, the Claimant states that he referred himself to occupational health in 2013 and made Ms Routledge and Ms Haynes aware of his autism. Having reviewed Ms Routledge's handwritten notes of her various meetings with the Claimant in 2013 and 2014, she documented that the Claimant told her he was autistic in their first meeting on 25 June 2013 and that he had been clinically depressed and undergone psychotherapy in the past. Ms Haynes was not at this meeting.

88. Ms Routledge recorded in her notes that the Claimant had not completed psychotherapy due to the complexity of his case, that there was no one willing to take it on and, as we have noted already, that he was fearful the consequences of psychotherapy could be severe. Over the course of several further meetings in June, July and August 2013, Ms Routledge noted that the Claimant was resolutely opposed to any form of mediation to resolve the issues that had arisen with Mr Entwistle. In her notes of a meeting with the Claimant on 29 August 2013 she documented that he had alluded to the fact that his underlying condition might be Asperger Syndrome (page 407).

89. Mr Coleman was appointed to the role of Division Manager in the Global Engines Development UK area of the business ("GED-UK") in June 2013

and became the Claimant's line manager. Mr Coleman recalls meeting with the Claimant and a member of the HR department before he formally took up his role to discuss the issues that had arisen. We conclude that he was referring to a meeting on 26 June 2013 also attended by Ms Routledge, indeed which seems to have been initiated by Ms Routledge with the Claimant's agreement when they met the previous day (see 'Agreed plan' – page 400). Ms Routledge's notes of the meeting at pages 401 to 404 of the Hearing Bundle do not evidence that there was any discussion of the Claimant's underlying condition during this further meeting on 26 June 2013, rather that the focus was on the Entwistle incident. Ms Routledge documented that the Claimant had wanted a guarantee that it would not happen again, prompting a discussion that the Respondent could not absolutely guarantee that there would be no further conflicts in the workplace.

90. The Claimant's evidence is that following his return to work he made Mr Coleman aware of his disability and vulnerability. However, we believe he is mistaken in his recollection as to the timing of when he shared this information with Mr Coleman. The relevant context is that he is, and was, extremely reticent about sharing personal information about himself with others. Moreover, his own understanding of his condition was still evolving at the time. Whilst Mr Truter's therapy notes evidence that he and the Claimant discussed Asperger Syndrome in their first session in March 2011 (pages 1 and 2 of Mr Truter's notes – Bundle 6) and continued to discuss the condition in their various sessions over the following two to three years, it was not until 31 October 2013 that the Claimant completed the AQ-10 questionnaire already referred to with Mr Truter. Even then, he scored 5 out of 10 which is below the level at which an individual would ordinarily be considered for referral for specialist diagnostic assessment. Nevertheless, Mr Truter's notes (page 18 – Bundle 6) confirm that he discussed with the Claimant the potential for a CLASS assessment. As we have noted already, it would be a further year before the Claimant was assessed by Dr Woods as meeting the formal diagnostic criteria for an autistic spectrum condition.

91. Against this background, we find that the Claimant himself did not have in mind in July/August 2013 that he might be disabled for the purposes of the Equality Act 2010, let alone that he shared his thoughts in that regard with Mr Coleman. As Mr Truter said in November 2015, people with ASD cover up how they experience life and find it difficult to open up.

92. On Ms Routledge's prompting, the Claimant did speak with Mr Coleman again in August 2013. We find that she was encouraging the Claimant to open up to Mr Coleman about his condition and the issues that were affecting him. It is evident from a follow up email Mr Coleman sent the Claimant on 23 August 2013 (page 376) that the Claimant had unfortunately felt unable to open up to Mr Coleman when they met notwithstanding both Ms Routledge's encouragement in that regard and Mr Coleman's openness to a discussion. We find, once again, that the Claimant's ongoing reluctance to open up reflected both his reticence as a

person with autism to share personal information about himself with others, as well as the fact that his learned coping strategy in life up to that point, and indeed beyond, was to 'mask' rather than address the behaviours associated with his autism. Moreover, the Claimant was still exploring his personal issues at his own pace in therapy with Mr Truter. Whilst it is entirely understandable that the Claimant did not feel ready to share highly sensitive personal information with Mr Coleman, Mr Coleman could only act on the information he had at that time. We find that Mr Coleman left the door open in August 2013 for the Claimant to share more information with him as and when he felt able to do so. As we find he had done when they spoke, Mr Coleman made clear his availability to the Claimant, writing in his email, *"I have offered whatever I can possibly do to help you out"*. It was an unequivocally supportive statement of intent in circumstances where the Claimant had told him that he did not want him to take any particular action, that there was nothing Mr Coleman could do and that *"it was down to himself"*.

The Respondent's knowledge of the Claimant's disability and any disadvantages to which he was put by reason of its PCPs

93. As regards the Respondent's knowledge or otherwise of the Claimant's disability and of the disadvantages to which he was put as a result of its PCPs, we have focused upon three specific points in time, namely prior to 27 October 2014, in the period from 27 October 2014 to 28 January 2015 and on the Claimant's return from sick leave on 24 March 2015 after seven weeks of sick leave. In our judgment, they are particularly relevant in terms of the reasonable adjustments claims identified within Issues 9 to 15 of the List of Issues.

94. Paragraphs 6.19 to 6.22 of the EHRC's Code of Practice on Employment (2011) deal with knowledge in the context of an employer's duty to make reasonable adjustments. Paragraph 6.21 states that if an employer's agent, such as an occupational health adviser, knows, in that capacity, of a worker's disability, the employer will not usually be able to claim that they do not know of the disability. The Code goes on to identify that there must be a means for bringing information from different channels together, subject always to the disabled person's consent. Hampton Knight were independent of the Respondent and professionally bound to maintain confidentiality in relation to the Claimant. He raised a formal grievance in or around September 2015 when he believed that confidentiality had not been maintained in relation to him, and raised confidentiality issues in the course of his grievance appeal. Various documents in the Hearing Bundle evidence that the Respondent's staff were required to sign non-disclosure agreements before they were permitted access to medical reports relating to the Claimant, and that the number of people who were told about the Claimant's ASD and mental health issues was kept to an absolute minimum. This was something over which the Claimant retained significant control, consistent both with his perceived need to be in control and Mr Truter's observations in 2015 that people with ASD cover up how they experience life and find it difficult to open up. The Claimant's difficulty

in opening up and his need to retain control are documented extensively in the Hearing Bundle. For example, Mr Bond was not apprised of the Claimant's condition or health issues even though he was asked to consider exercising discretion to extend company sick pay in the Claimant's case. Similarly, Mr Blin and Mr Curtis were afforded limited insight into the Claimant's condition notwithstanding they were deciding the Claimant's continued employment with the Respondent. At the appeal stage, the Claimant consented to Mr Curtis having copies of Dr Parkes' and Dr Cosgrove's reports, but the CLASS assessments were not available to him. Dr Woods' First Report was provided to Hampton Knight on the strict understanding that it would be kept secure within the organisation and not released to the Respondent or placed with his central HR file. Mr Coleman and Mrs Webster were not permitted to have a copy of Dr Woods' Second Report to be able to assimilate and reflect on its contents. Instead, as we return to, they were only permitted to read a copy of the report. The evident difficulties these arrangements gave rise to seem to be reflected in Mrs Webster's request in or around July 2015 to be provided with a copy of the report. An email at page 497 of the Hearing Bundle evidences that a colour coding system, as well as encryption may have been in place to ensure confidentiality. We find that the Claimant's desire for privacy, his reluctance to open up, and his pressing need to feel in control was at the expense of others having a more complete understanding of his condition and mental health issues. In the particular circumstances, Ms Routledge's more detailed knowledge in the matter cannot be imputed to the Respondent, though where she (and later on, each of her successors) was a party to any meeting or discussion with Mr Coleman and others from the Respondent, we have regard to the fact that she (and they) obviously came to those meetings and discussions equipped with whatever information had been disclosed to them by the Claimant such that it would inevitably have informed her (and their) contribution.

95. As we have noted already, the Claimant told Ms Routledge in June 2013 that he was autistic. Although she did not include this information in her 26 June 2013 report, referring instead to a chronic underlying mental health condition, we find that Mr Coleman only became aware some time in late autumn 2013 that the Claimant believed he was autistic. Whilst it is not possible, on the relatively limited evidence available to us in this regard to identify the precise date when this was, it seems that the Claimant and Mr Coleman established a positive rapport in the months following Mr Coleman's appointment as the Claimant's line manager and that this extended to occasionally going to lunch together. On Mr Coleman's own evidence the Claimant encouraged him to watch a BBC documentary about autism. Whilst this points to Mr Coleman potentially having some knowledge of and insight into the Claimant's condition, one of the difficulties that arises from the claims having been brought so many years after the events in question is that Mr Coleman, like other witnesses, has limited recollection of specific meetings and discussions, and is heavily reliant instead upon the limited contemporaneous documents from the time to prompt or even supply his recollection. It is essentially impossible

for him to separate his more recent understanding of the Claimant's condition and its effects from what he knew or understood in 2013 and how that knowledge and understanding evolved over the following 18 months or so.

96. Knowledge of a mental impairment, whether that be autism, ASD or Asperger Syndrome, is not of itself knowledge that a person is disabled within the meaning of the Equality Act 2010. Knowledge in that further regard derives from a respondent's additional knowledge that an impairment has lasted or is likely to last 12 months or more, and that it has a substantial adverse effect upon day to day activities. In the case of s.20/s.21 EqA 2010 complaints, a respondent must additionally know, or be on notice, that the employee is likely to be placed at the relevant disadvantage (paragraph 20, Schedule 8 of EqA 2010). Employers have the burden of establishing (on the balance of probabilities) that they lack the requisite knowledge.

97. For his part, the Claimant has not put forward positive evidence as to the Mr Coleman's knowledge in relation to these matters. He has not referred to any specific discussions between them, whether over lunch or otherwise, when they discussed the Claimant's autism, ASD, Asperger Syndrome, or his issues more generally. Mr Coleman was not questioned about the content of the BBC documentary, certainly in terms of what it said about autism or its effects, and whether Asperger Syndrome featured at all in the documentary. The Claimant's witness statement does not address the documentary.

98. When the Claimant refers in paragraph 15 of his witness statement to Mr Coleman being fully aware of the *"issue"*, the issue to which he appears to be referring, since it is also referred to in paragraph 14 of his witness statement, is the Entwistle incident rather than the issue of his autism or its effects. As regards the latter, he asserts in his statement, without more, that Mr Coleman was aware of his disability and vulnerability. Mr Coleman's email of 23 August 2013 evidences that in fact he had little or no understanding or insight at that point in time as to the chronic underlying mental health condition that Ms Routledge had referred to in her June 2013 report. In so far as Mr Coleman understood the Claimant's concerns, he noted on 23 August 2013 that they related to historic issues rather than current working arrangements, though he did make reference to role clarity, an issue in these proceedings. We cannot identify that Mr Coleman understood in August 2013, or indeed over the following months, that any current or historic issues affecting the Claimant were other than as a result of a potentially poor working relationship with a colleague, as opposed to somehow linked to an underlying chronic mental health condition or, as Mr Coleman subsequently came to understand it, autism.

99. We have regard to the fact that the Claimant was 38 years of age by the time he was assessed by Dr Woods and that he had been in therapy with Mr Truter for over three years before he took that step. Assuming for these purposes both that the PCPs and related disadvantages asserted by

the Claimant in paragraphs 9, 10, 11 and 12 of the List of Issues (PCPs (1) to (4)) are established, we find that as at 24 and 27 October 2014, when the results of the Respondent's employee cultural survey were fed back, the Respondent, whether through Mr Coleman or otherwise, did not know that the claimed PCPs gave rise to the claimed disadvantages. The Claimant had been exploring his condition and mental health issues with Mr Truter for at least two and half years by the time he told Mr Coleman that he believed he was autistic. Depending upon when exactly this was in 2013, it was approximately another year before the Claimant was assessed by Dr Woods. We see no basis to impute to Mr Coleman, and thereby to the Respondent, prior to 24 October 2014 a knowledge and understanding which the Claimant himself did not then have, particularly given he had yet to receive copies of Dr Woods' reports. It is not the Claimant's case that the Respondent ought reasonably to have commissioned its own expert report in 2013 or 2014 on being informed by the Claimant that he believed he might be autistic. In any event, it is difficult to see how any such report might have been secured sooner than autumn 2014, or indeed even 2015, given that for an extended period the Claimant was weighing up with Mr Truter whether he should have an assessment, and was open with Ms Routledge that he was concerned about opening 'Pandora's box'. Even were it to be suggested (which it has not been) that the Respondent ought reasonably to have been aware of the AQ-10 questionnaire and to have completed it with the Claimant, a score of 5 would not have warranted recommendation for a full autism evaluation.

100. There is no evidence before us to suggest that Ms Routledge, Mr Coleman or anyone else at the Respondent knew, or even suspected, prior to 24 October 2014 that not giving the Claimant prior notice of the content of the feedback session presentation would, or even could, cause the Claimant considerable stress and anxiety if he did not have time to prepare for it in advance or that he would, or could, suffer profound distress, substantial adverse effects and/or severe or serious stress if subjective opinions were included as part of the presentation and/or if he was denied a right of reply if these were inaccurate or he perceived them to be critical of him. In our judgement, the Respondent has established that it lacked knowledge of the claimed disadvantages identified in paragraphs 9(7), 10(7), 11(7) and 12(7) of the List of Issues prior to 27 October 2014.

101. What then of the period after 27 October 2014 through to 28 January 2015, when the Claimant viewed the Youtube video of Mr Lencioni's talk on the 'Five Dysfunctions of a Team' at a team building strategy day? We have endeavoured to identify when Dr Woods' reports were disclosed to the Respondent and to whom they were disclosed. It is, surprisingly, a question to which the parties had not actively turned their minds. Ahead of our discussions in Chambers, we invited Counsel to indicate whether the parties were in agreement in this regard, though this prompted separate representations from them and, in the case of Mr Varnam some introduction of additional evidence by way of further instructions.

102. Mr Varnam states on those further instructions that Dr Woods' Second Report was provided by the Claimant in December 2014, albeit he does not identify to whom it was provided. Ms Duane makes reference to a date stamp indicating that it was provided to Hampton Knight on 13 January 2015. Like Mr Varnam, there is no obvious date stamp on the copies of the report in the Tribunal's Hearing Bundles. It may be that Ms Duane has access to a clearer copy or indeed the original. Mr Varnam's instructions in the matter are at odds with Ms Routledge's report of 10 December 2014; it is apparent from her comments in the third paragraph of the report that she had not by then received a copy of Dr Woods' Second Report. Indeed , her comments suggest that the Claimant had not shared information from either of Dr Woods' reports with her, or certainly that she was unaware that the Claimant had copies of the reports and that they were informing his discussions with her; she wrote to Mr Coleman that the reports would contain information which would assist in an understanding of the Claimant's condition. It seems to us highly unlikely that she would have made those observations if detailed information from the reports had already been provided to herself, Mr Coleman and Ms Picollo. Further evidence in support of Dr Woods' Second Report having been supplied to Hampton Knight on 13 January 2015 is to be found in Mr Truter's report of 23 November 2015 (page 749) in which he refers to the report having been provided on 13 January 2015.

103. Although Mr Coleman and Ms Picollo were at the meeting on 15 January 2015, Ms Routledge's reasonably detailed handwritten notes (pages 421 to 424) evidence that the report was not discussed during the meeting. We find that is because she did not then have the Claimant's consent to share the contents with Mr Coleman or Ms Picollo.

104. The Hearing Bundle contains an email from the Claimant dated 20 January 2015, which was by way of follow up to the meeting on 15 January 2015. Although he referred to the *"report from the CLASS clinic"*, he did not identify that Mr Coleman and Ms Picollo had seen it or that the contents had been discussed with them. There is no reference to Dr Woods' reports in a subsequent occupational health review on 18 February 2015, also attended by Mrs Webster who was taking over from Ms Picollo (the detailed typed notes of the review are at pages 493 to 493b of the Hearing Bundle). Given his marked reluctance, as part of his condition, to share personal information about himself with others, we conclude that he would not have granted Mrs Webster access to any medical reports about him without first meeting with her and establishing some basic level of trust. The Respondent's notes of the occupational health review of 20 March 2015 record that Mr Coleman and Mrs Webster had by then read the CLASS report *"some weeks ago"* (page 511). We find that they first had sight of Dr Woods' Second Report at some point after the review meeting of 18 February 2015, the Claimant having agreed that they should be permitted access to the report in order that they should have a better understanding of his condition and need for adjustments ahead of the 20 March review meeting and the Claimant's eventual return to work. Although they were able to read the report they were not

permitted to have a copy of it. In coming to a view as to their knowledge of the Claimant's disability and any disadvantages to which he was put, we bear in mind that they were not permitted to take away a copy of the report. In the Claimant's need to maintain full control, their ability to gain a complete understanding of his condition and its effects was somewhat impeded in so far as they effectively had to commit the contents of the report to memory. That stands in marked contrast to our ability to return to Dr Woods' reports throughout the course of the hearing and, indeed, in coming to this judgment.

105. The Claimant had certainly seen Dr Woods' First Report by the time he met with Ms Routledge, Mr Coleman and Ms Picollo on 7 November 2014 and, accordingly, it would inevitably have informed his discussions with them even if the report itself was not shared with them. The Claimant was asked by Mr Cotterell about the timings in this regard in the course of the grievance appeal. We have briefly referred already to the Claimant's 'Preparation Document' of 21 August 2019 (page 1720) in which he noted that the Second Report had been requested after the meeting on 7 November 2014. The Claimant also said in his 'Preparation Document' that relevant content from "the CLASS report" was "discussed in depth" on 7 November 2014. That is not reflected in Ms Routledge's handwritten notes of the meeting. It is unfortunate that the Claimant did not provide copies of Dr Woods' reports to Hampton Knight and the Respondent sooner than he did, but this was his decision in the matter. We have identified in paragraph 40 above what matters emerged from the three meetings with Ms Routledge, Mr Coleman and Ms Picollo. The Claimant does not suggest that Ms Routledge's resulting report dated 10 December 2014 failed to reflect or capture the issues discussed. On the contrary, the adjustments identified in the letter informed their ongoing discussions and were also central to the first identified element of the Claimant's grievance. As we have identified already, the issues identified in Dr Wood's reports do not correspond exactly to the six issues that emerged from the three meetings. For example, although the Claimant had said to Ms Routledge on 27 October 2014 (page 414) that any study in 'perception' was *"not fair"* and an injustice as far as he was concerned, this is not reflected in the 10 December 2014 report or in Ms Routledge's handwritten notes of the discussions attended by Mr Coleman and Ms Picollo.

106. Later in this judgment, we set out why we consider that there was a 'requirement' that employees within Mr Coleman's team should watch the Lencioni video and we address whether it put people with Asperger Syndrome at a particular disadvantage compared to people without the condition. However, as regards the s.20/s.21 complaint, we find that neither Mr Coleman nor Ms Picollo were aware as at 28 January 2015 that the Claimant was disproportionately likely to become distressed or at risk of becoming distressed and of developing a stress reaction to the video, including because he perceived the Scottie Pippen element of the video to apply to him as someone who had sought reasonable adjustments. Curiously, the Claimant's medical expert, Dr Lewis was not asked to address the Lencioni video in her report. In section 2.3 of her report, Dr

Lewis details the Claimant's recall of events relevant to the case – the Lencioni video was seemingly not mentioned or, at least, was not captured by her as part of the relevant history of events. Perhaps because she was not asked about the video, she does not identify a likelihood/risk of distress and of developing a stress reaction to it.

107. In so far as discomfort and distress were identified in Ms Routledge's report of 10 December 2014, we find that this related to participation more generally in team building events in the course of which participants might be invited, encouraged or even expected to reveal personal information about themselves rather than because it might involve viewing a motivational video that informed or contributed to the overall content and themes being explored. Even had both of Dr Woods' reports been available to Mr Coleman and/or Ms Picollo, we find that neither would have known, nor should they have reasonably understood, that the Claimant was likely to be disadvantaged in the way that has been identified in paragraph 14(7) of the List of Issues or at all. Although Ms Routledge was in possession of Dr Woods' Second Report by 15 January 2015, there was nothing in the report that put her on notice of that, or any similar, disadvantage either. Notwithstanding her professional qualifications, training and experience, and recommendation on 15 January that "*communication is shared with Dave to allow him time to analyse and prepare before it occurs"*, neither the seven identified areas of work referred to in Dr Woods' Second Report nor the documented support that had emerged from the three meetings in 2014, would or should have put Ms Routledge on notice that the Claimant would or could have been disadvantaged by watching the Lencioni video in the way now identified or at all. Whilst the claimed disproportionate likelihood of distress and of developing a stress reaction does not in fact involve a high threshold test, being no more than something that might well happen, the Respondent has satisfied us that it did not know and should not reasonably have known that these could well be the risks and reactions of exposing him to the Lencioni video. We are reinforced in that conclusion by detailed notes that were kept of a meeting between the Claimant and Mr Collins on 3 July 2015 in which it is documented that the Claimant made the following comments regarding Mr Coleman's alleged lack of understanding around the need for a safe, healthy and supportive work environment:

> *"That it is not a question of giving DJ prior access to material such as that in the video but that, per conversations [with SC (and Stephen Robinson), JR, Hayley Picollo, ZW, Autism Anglia, Dr Truter et al], the video should never be shown at all as the content is discriminatory and contravenes various policies and legislation."* (page 665)

Over five months on from viewing the video therefore, the Claimant was emphatic that the issue was the video content rather than not having access to it in advance. If that was his view of the matter in July 2015 (and indeed he had effectively made the same point to Ms Routledge, Mr Coleman and Mrs Webster on 23 February 2015, when he referred to the video as offensive (page 429)), we do not understand on what basis the

Respondent should have known by 28 January 2015 that the Claimant could well be at risk by not being given specific advance notice of the content of the video.

108. However, we find that the Respondent's knowledge and understanding had evolved by the time the Claimant returned to work on 24 March 2015, particularly as a result of his adverse reaction to the video, even if his concerns were expressed to be around the content. In her report of 1 April 2015, following the occupational health review of 20 March 2015 and a significant number of interactions with the Claimant, Ms Routledge emphasised a need for increased information and detail to be provided to the Claimant rather than just advance notice of psychometric activities as per Dr Woods' reports.

2014/2015

109. There are three further complaints that directly concern events in late 2014 / early2015. The Claimant claims that he was victimised by Mr Coleman on 7 November 2014 (Issue 33(1)), that the Respondent breached its s.20 EqA 2010 duty in relation to him by organising meetings at times when he was not due to be at work (Issue 25) and that it also breached its s.20 duty by not holding a one-to-one follow up meeting between himself and Ms Gordon in circumstances where he felt aggrieved or was unhappy about her feedback as part of the cultural survey (Issue 13)

Issue 33(1)

110. The Claimant claims that on 7 November 2014, Mr Coleman spoke to the Claimant in a derogatory and dismissive manner, by saying that he did not have time to deal with him, did not have the requisite expertise, and did not need the pressure of dealing with him. They are very specific allegations. Whilst the comments are not documented in Ms Routledge's notes of the meeting, the notes extend to less than a page notwithstanding the meeting lasted nearly two and a half hours. We are faced with a direct conflict in their evidence, in respect of an interaction more than eight years ago. The Claimant did not raise concerns about Mr Coleman's alleged behaviour as part of his formal grievance. We have identified some potential reference to the matter in the notes of an occupational health handover meeting on 23 March 2016 when Ms Edwards assumed responsibility for the Claimant's case (page 802) and also at page 1651 of the Hearing Bundle when the Claimant told Mr Cotterell on 13 February 2019 that Mr Coleman had got up to leave the room when the Claimant had first verbally shared information from Dr Woods' Second Report. Whether or not he was referring to the meeting of 7 November 2014, he did not additionally report the alleged comments he now complains of. That is surprising given he was reporting an adverse response by Mr Coleman to the disclosure of detailed information about his condition.

111. We refer again to Leggatt J's observations in Gestmin that it will often be more reliable to base findings on inferences drawn from contemporaneous

documents and known or probable facts. Mr Coleman became the Claimant's line manager at a time when the Claimant was absent from work on sick leave as a result of the Entwistle incident and he was involved in managing the Claimant's return to work. Mr Coleman was aware that the Claimant's sickness absence was triggered by publicly critical comments about the Claimant. It is certainly not impossible that Mr Coleman was under pressure of time, became frustrated with the Claimant or the situation and, as a result, made ill-advised comments on 7 November 2014. If he got up to leave a meeting that could support such a conclusion, but equally it may just have been that he naturally got up to leave a meeting because he believed it was concluding or because it was running on longer than expected and he was seeking to bring it to a conclusion. Our difficulty is that Mr Coleman was not asked about this aspect or given an opportunity to comment, even assuming he would now remember such detail. The specific complaint in these proceedings is that he made certain comments during a meeting, rather than that he got up to leave during this or any other meeting around the same time. Mr Coleman's comments were alleged for the first time in the Claimant's first Tribunal claim, namely some six and a half years after they were allegedly made. It seems to us improbable that Mr Coleman would have behaved in the way alleged given the recent background events involving Mr Entwistle of which he was not only aware but which he was tasked with managing and moving beyond. When Ms Picollo was interviewed in connection with the Claimant's grievance on 30 August 2016, she referred to the meeting of 7 November 2014 and made no mention of any concerning behaviour on the part of Mr Coleman. The Claimant has failed to establish, on the balance of probabilities that the alleged comments were made. For all the reasons that we conclude it would not be just and equitable to extend time in respect of Mr Collins' comments on 11 September 2015, we would not in any event have extended time in respect of this complaint had the Claimant discharged his burden in the matter.

Issue 25

112. The Claimant claims that he was placed at a substantial disadvantage because the Respondent organised meetings throughout the full working week (9am to 6pm, Monday to Friday), including at times when individual employees were not due to be at work. He pursues the matter under s.20/s.21 of EqA 2010 but not as a claim of indirect discrimination. He makes a separate specific complaint about team meetings being held on Mondays from January 2015 (Issue 26), which we address at paragraphs 283 and 284 below.

113. The only meeting about which complaint is specifically made is an off-site meeting in December 2014 involving Mr Coleman and his first line reports to discuss follow up actions in light of the cultural survey feedback. In a meeting with Mr Cotterell on 13 June 2018, the Claimant referred to this as a "blip" (page 1485).

114. Even allowing for the fact that there is no claim of indirect discrimination such that we are concerned with how any PCP may have disadvantaged people with ASD or Asperger Syndrome, there is no evidence or analysis on either side as to the pattern of meetings within GED-UK or the wider business to enable us to reach a fully informed view as to the extent of any disadvantage resulting from what is an admitted PCP. The issue is addressed at page 42 of Ms Duane's submissions but, surprisingly, was not addressed by Mr Varnam in closing. To some extent, facts and matters pertaining to Issue 26 have been conflated with Issue 25 in Ms Duane's submissions, though in fairness that is understandable given the somewhat unstructured and imprecise way in which the complaints are advanced by the Claimant. Ms Duane submits that no specific examples of the alleged meetings that the Claimant could not attend were provided by the Claimant during the grievance processes, in his claim form or in his witness statement, rather the evidence only emerged during cross examination. Although the detail was not in his Claim Form or witness statement, the minutes of the second and third grievance appeal meetings evidence for example that the Claimant told Mr Cotterell on 13 June 2018 that there were approximately two meetings that he had been mandated to attend outside his agreed 3pm finish albeit he did not have the meeting invites (page 1485). Mr Cotterell explored this again with the Claimant on 4 July 2018. Whilst the Claimant was unable to add any further detail in terms of any second meeting, he said the *"most significant"* meeting had concerned 'mandatory roll-out for the cultural survey' (page 1509). It was also raised by the Claimant at the time in a meeting with Ms Routledge in early January 2015 (page 420) and is documented in various spreadsheets that were used to identify the agreed adjustments and progress against them. Nevertheless, it is unsatisfactory that this information was not in the Claimant's 48-page Particulars of Claim or 70-page witness statement and that the issue was not addressed in Mr Varnam's written or oral submissions. Be that as it may, we are satisfied that an off-site meeting was arranged in December 2014 after 3pm that the Claimant felt obliged to attend.

Issue 13

115. Ms Gordon was an independent external consultant who had no knowledge of the Claimant's condition or its effects. The Claimant accepted that the Respondent did not have the same level of control or authority over her as an employee. Mr Coleman asked her whether she would meet with the Claimant but she declined his request. There were certain contradictions in terms of the Claimant's evidence on this issue. His recollection is that he repeatedly asked for a meeting with her. However, Ms Routledge's contemporaneous notes at the time evidence some fairly firm opposition on the part of the Claimant to engaging with Ms Gordon, in the same way that he had emphatically rejected engagement and mediation in 2013 to address his concerns in relation to Mr Entwistle. He told Ms Routledge that he had a *"major issue"* with Ms Gordon (page 422), *"would not have anything to do with her at any level"* (page 427) and would *"not be involved in any strategy leadership days with Pauline"* (page

429). Ms Routledge, Mr Coleman and Ms Picollo were evidently taken by surprise during a meeting in March 2015 when the Claimant suggested that he had put his hand out on several occasions to overcome any issues with Ms Gordon and offered to meet her. The suggestion at the time was entirely at odds with the contemporaneous record of his views and it is unsurprising that they reacted with surprise. Nevertheless, Mr Coleman followed up with Ms Gordon, albeit to no avail. We accept his evidence that he sought to convince her to attend a meeting with the Claimant but that he was slightly constrained in that he was precluded from sharing details of the Claimant's condition and situation with her given the Claimant's request that strict confidentiality should be maintained in relation to him.

116. Ms Duane's points out in her submissions that the Claimant's evidence in his witness statement that he requested a meeting with Ms Gordon on 13 February 2015 did not stand up in cross examination, an observation with which we agree.

2015

117. A number of the Claimant's complaints concern events in 2015. We have dealt with the Respondent's knowledge in the period up to 28 January 2015. As with the Entwistle incident, the Claimant says that he unravelled in private after being shown the Lencioni video. He was signed off work with stress on 30 January 2015.

Victimisation – Issue 33(3)

118. The Claimant alleges that Mr Coleman avoided speaking to him other than in scheduled business meetings following the Claimant's return to work on 23 March 2015.

119. We cannot identify that this allegation was raised by the Claimant until he presented his first claim to the Employment Tribunals, namely some six years after the alleged detrimental treatment in question. We have dealt with the Claimant's allegations regarding Mr Colemans' conduct towards him on 7 November 2014 at paragraphs 110 and 111 above.

120. The question is whether, as the Claimant alleges, Mr Coleman withdrew from all personal interactions with the Claimant. Ms Duane identifies that the allegations relate to a six week period of time, during which Mr Coleman was absent from the office on two occasions, meaning that we are effectively concerned with a four week period. Moreover, the Claimant worked a compressed four-day week and left work at 3pm as a result of the adjustments agreed in November/December 2014. He was also on a 50% phased return to work when he initially returned from sick leave on 24 March 2015. He had also transitioned into a new role. All these factors would have reduced the opportunities for interaction with Mr Coleman, so it is unsurprising if the Claimant perceived some change in their working relationship.

121. The Claimant's evidence is that they no longer went to lunch and that all non-work chats ceased. We accept Mr Coleman's evidence that when he went to lunch with the Claimant, this was usually because the Claimant came to his room to see if he was free to join him. The Claimant did not identify any specific occasions when he had approached Mr Coleman in this regard and been rebuffed, or when Mr Coleman had effectively declined to engage in a non-work related conversation. Mr Coleman was as certain as he could be, given the passage of time, that his behaviour to the Claimant had not changed and that ignoring anyone would be alien to him.

122. Ms Duane suggests that if any individual's behaviour had changed, it was the Claimant's.

123. On 30 October 2014 the Claimant told Ms Routledge that he felt let down by Mr Coleman and unsupported by him in defending him in the matter of the cultural survey (page 453). He reported to her on 16 January 2015 that he was getting frustrated that he felt Mr Coleman did not fully understand the situation (page 424) and followed up with an email to Ms Routledge which was implicitly critical of Mr Coleman. He discussed his ongoing issues with Mr Coleman at a further meeting on 18 February 2015. In her report dated 25 July 2022, Dr Lewis refers to individuals with autism having greater difficulty accepting perceived injustices or accepting that issues do not always get resolved and moving on from this. In her First Report, Dr Woods said of the Claimant, *"He has clear principles and gets upset with people who won't do the right thing."* The Claimant's notes of the meeting held on 18 February 2015 evidence that the Claimant identified the potential for him to fall out with Mr Coleman (page 493a), albeit in the event he pursued a formal grievance. Nevertheless those comments indicate his thinking at the time, namely he anticipated potentially falling out with Mr Coleman. In our judgement, it is relevant on this issue to have regard to how the Claimant responded when he perceived that Mr Entwistle and then Ms Gordon were responsible for injustices affecting him. Ms Routledge recorded the following comments by the Claimant in relation to Mr Entwistle; *"if the Senior Manager apologised now he feels it would be too late"* (page 398); and "he admits that nothing will now appease him" (page 405). She also noted that he refused any mediation with Mr Entwistle. As regards, Ms Gordon she recorded the following comments: *"Dave re-iterated that as previously discussed he would not have anything to do with her at any level unless the cultural survey results were 'undone' …"* (page 427; and *"will not be involved in any strategy leadership days with Pauline"* (page 429).

124. In her First Report, Dr Woods' noted that the Claimant reported difficulties in relationships with people at work at times. The implication of other comments by her at page 449 of the Hearing Bundle is that the Claimant had very few friends.

125. The Claimant has the primary burden in this matter and in our judgement he has failed to discharge that burden. The principal difficulty is that he has not put forward evidence of specific occasions that might support his

allegation. Given the significant passage of time before the allegations were first raised, the Respondent has been significantly prejudiced in rebutting the allegations or offering an explanation for any specific matters that might otherwise have been put forward. We have regard to all the factors just referred to that would have curtailed the number of interactions the Claimant had with Mr Coleman over the four weeks or so that they were both in Peterborough. On balance, we find that if there was any subtle shift in their interactions after the Claimant returned from sick leave, the most likely explanation is that the Claimant withdrew a little and put some distance between himself and Mr Coleman as he felt let down by him and could not immediately move beyond the emotions this had provoked in him. There is certainly nothing in the notes of the meetings of 20 March and 20 April 2015, which relate to this period in time, which evidence any hostility or even embarrassment on the part of Mr Coleman towards the Claimant. The complaint is not well-founded.

Harassment – Issues 27 to 31

126. The Claimant alleges that he was harassed on four separate occasions in 2015. His first two complaints relate to comments allegedly made by Ms Webster on 20 March and 20 April 2015. He also complains of comments allegedly made by Ms Izod on 2 September 2015 and pursues a fourth complaint about comments attributed to Mr Collins in a meeting on 11 September 2015.

127. During an occupational health review meeting on 20 March 2015, Mrs Webster is alleged to have described the Claimant's condition as 'unmanageable'. We prefer Mrs Webster's evidence that towards the end of the meeting there was a discussion around managing foreseeable risks, during which Mrs Webster described zero risk scenarios as unmanageable, that is to say that employers cannot provide risk free working environments. This was in the context that during the meeting the Claimant had described in the course of the meeting steps taken by him to control risks, as he perceived them, in both his work and personal life. We find that the Claimant was engaged in avoidance behaviours (not an unusual coping mechanism in those with anxiety disorders) and, particularly away from work, that he maintained careful control over his environment, activities and interactions with others in an effort to avoid 'triggers' and reduce his feelings of stress and anxiety. We have referred already to the Claimant's communicated need to remain fully in control. We find that Mrs Webster was making the reasonable observation that the workplace was not an environment capable of being managed or controlled in the same way that the Claimant managed and controlled his home environment and personal life. We found Mrs Webster to be an articulate and credible witness. At the time of the meeting in question she had at least 5 years' HR experience. She has a level 7 post graduate HR qualification. It is not impossible that an HR professional might, for example through frustration or inexperience, express the view that they found a person or situation to be unmanageable. However, Mrs Webster was not inexperienced, and we were struck by the measured terms in

which she expressed herself at Tribunal. The comment now attributed to her was not recorded in the Claimant's own initial typed notes of the meeting, they were added subsequently by him. Even then, the edited notes do not document that she described his condition as unmanageable, rather *"that is unmanageable"*, the reference to *"that"* we find being a reference to zero risk working environments. The fact that *"that"* has become "your condition" in the Claimant's mind illustrates the points already made in this judgment regarding the fallibility of human memory.

128. The Claimant further alleges that Mrs Webster said during the meeting with Autsim Anglia on 20 April 2015 that she could not understand the Claimant and that he talked in code. The alleged comments, which Mrs Webster strongly denied having made, are recorded in the Claimant's mark-up of Jo Keys' minutes of the meeting. Notwithstanding her position as Autism Anglia's Head of Family Support and, we infer, her knowledge and insights, Ms Keys had not herself noted the comments attributed to Mrs Webster. We find that surprising. The comments are so obviously offensive that we consider had they been made in the terms recollected by the Claimant that they would have been noted by Ms Keys, indeed that she would likely have raised an issue with them in the meeting itself and that she would certainly have referred to them in her report of 6 September 2016 given her other documented concerns/criticisms. Mr Coleman, who attended the meeting, had no recollection of Mrs Webster stating that the Claimant talked in code. We have referred already to Mr Truter's letter of 6 May 2015 to Mrs Routledge, in which he was critical of the Respondent. He specifically referred to the 20 April 2015 meeting, which he too had attended, but made no mention of Mrs Webster's alleged comments or any other alleged comments that had caused the Claimant to feel harassed. The Claimant's mark-up of Ms Keys' notes were not shared with Mrs Webster and accordingly she was unaware of the alleged comments until these proceedings. It is relevant in this regard, we think, that in so far as Ms Keys noted a lack of understanding on the part of Mrs Webster this was specifically in the context of a brief discussion about the Claimant's inability to follow multiple threads in a discussion, during which Mr Truter referred to the use of 'stop words' and the Claimant spoke of the fact he could "talk about Pot A but not Pot B, we can put Pot B on the board to talk about later". The meeting minutes record that Mr Truter asked Mrs Webster if she understood what the Claimant was saying. We find that he was plainly referring to what the Claimant had just said. He was not asking Mrs Webster whether she understood the Claimant generally. She responded to Mr Truter's question by saying that she did not know what action points had emerged. The fact that these comments are now presented in terms that Mrs Webster was saying she did not understand the Claimant more generally and that he talked in code, once again illustrates the fallibility of human memory.

129. Although the Claimant referred in his meeting with Mr Cotterell on 21 October 2019 to a window of inappropriate comments (page 1734), Mrs Webster's alleged comments were not specifically referred to. They had been mentioned in their meeting eleven months earlier on 19 November

2018, so it is perhaps unsurprising if he did not recall them or connect them to the window of inappropriate comments. We reiterate our comments above regarding Mrs Webster's credibility. We find that the alleged comments were not made.

130. It is alleged that on 2 September 2015 Ms Izod said the Claimant was *"unfit for work", "unemployable"* and *"needed to prepare for job interviews"*. We find that she did say that the Claimant was unfit for work and that this reflected her professional assessment of the situation. The documented purpose of the meeting was to review Dr Cosgrove's report of 22 August 2015 in which Dr Cosgrove had also expressed the view that the Claimant was unfit to work and that it would be several months before he would potentially be able to work again. We shall return in our conclusions below to the question of whether Ms Izod's comment as to the Claimant's fitness to work was unwanted conduct that created an intimidating etc environment for the Claimant. However, in this regard, we do not uphold the allegation that she told the Claimant he was "*unemployable"* and "*needed to prepare for work interviews"*. Ms Izod kept detailed notes of the meeting which record that she asked the Claimant was his main goal was, to which he responded that he wished to return to work on a full time basis. Her documented response to this was that she would aim to facilitate this. Her notes further evidence that she went on to say that a change in the Claimant's mental wellbeing could be achieved but that the Claimant would have some personal responsibility in the matter rather than approaching the matter as purely a work related issue. In our judgement, that was uncontroversial albeit something that needed to be said. Ms Izod's notes evidence an appropriately professional interaction with the Claimant as well as the professional expression of her considered views in the matter, consistent with Dr Cosgrove's assessment of the situation. She returned to the question of a return to work, her notes recording that she identified a potential date to aim for in terms of the goal of a return to work. It is difficult for us to reconcile that documented discussion with comments allegedly made by her that the Claimant was unemployable and needed to prepare for job interviews. Had such comments been made they would indicate that Ms Izod was dismissive of the Claimant's prospects of achieving a return such that it is unlikely she would have explored the potential for a return to work, let alone identified a potential date to aim for in that regard.

131. We have asked ourselves how likely it is that a qualified occupation health professional would make such comments to an individual, particularly in the context of a conversation focused on their stated goal of a return to work. It would be highly unusual for such comments to be made and, in this case, we find they were not made by Ms Izod. To the extent she spoke of the need for the Claimant to be prepared, it was not a need to be prepared for job interviews but for a return to work. The preparatory work identified by her was for the Claimant to work closely with Mr Truter and his GP to achieve progress in his mental wellbeing. We note that the Claimant was apparently distracted during the meeting as a result of concerns that confidentiality may not have been maintained in relation to

him by the Respondent's HR team, and that he spoke of a loss of trust. Ms Izod noted that this issue, which we find the Claimant was ruminating upon, had detracted from the main purpose of the meeting. We conclude that in his distracted state the Claimant did not fully engage in the meeting, that he continued to ruminate away from the meeting and came to believe that things had been said in the meeting that had not been said or certainly not said in the way he subsequently perceived or remembered them. Some years later, during a meeting on 21 October 2019 as part of the grievance appeal, when the Claimant was struggling to recall a matter, Mr Truter intervened and said, *"With heightened anxiety, things become a blur when in that situation you may not recall being asked to do it as a result"*. It is worth noting that on 4 September 2015 the Claimant was seen by CPFT as he was in crisis. Echoing Mr Truter's comments, we find that the meeting was something of a blur for the Claimant on 2 September 2015 and as a result that he came to perceive the meeting in terms that did not reflect what was said.

132. Turning then to Mr Collins' documented comments on 11 September 2015, the Claimant was not an attendee at the meeting in question, but became aware of them when he read the meeting notes (a transcript of which is at pages 725 to 729 of the Hearing Bundle). The meeting was a case conference attended by Ms Izod, Mr Collins, Mr Coleman and Mrs Webster. It was obviously a week after Ms Izod's meeting with the Claimant just referred to. Ms Webster started the meeting with an overview of the situation to date and Ms Izod then recounted aspects of her meeting with the Claimant the previous week, specifically that the Claimant had been unwilling to consent to Dr Cosgrove's report being released to the business but had failed to clarify why this was, other than stating there was not enough information in the report. She also confirmed that it had been arranged for the Claimant to speak with Dr Cosgrove and that she had followed up with a letter to the Claimant setting a deadline for him to consent or otherwise to the report being released. Following initial comments by Mr Collins in which he expressed the view that further information gathering was required to satisfy the legalities, the meeting notes attribute the following comments to Mr Collins:

> *"SC noted that employee had changed his tactics and the way that he had been communicating – now less communication with business all parties – agreed this had been the case"* (page 726)

133. Mr Collins has no recollection of the comment. Whilst he thought it unlikely at Tribunal that his comments would have been noted down incorrectly, as he had no recollection of the meeting he could not confirm that the minutes accurately reflected what he had said, though during re-examination said that he recalled being *"frustrated"* by the Claimant's reduced level of communications and *"perplexed"* by the fact that he had not given consent to the disclosure of Dr Cosgrove's report to the business.

134. Mr Collins was invited by Mr Varnam to look at a note of a discussion which he had had with Martin Quinn, an external advisor, on 14 September 2015 in which he noted that the Claimant was not responding to him on several issues and that there seemed to be an impasse. Given that Mr Quinn was an external advisor, we find that the discussion was initiated by Mr Collins. They discussed whether the Claimant's employment with the Respondent might terminate and, if so, on what basis. It was a curious conversation for Mr Collins to be involved in given that his role was that of intermediatory mediator, the remit of which Mr Collins said at Tribunal was to be a neutral party to break an apparent impasse between the Claimant and his "supervisors". We feel bound to say that Mr Collins seems not to have acted as an entirely honest broker in the matter, and that engaging in a discussion regarding the options for terminating the Claimant's employment is hardly evidence, as Mr Collins repeatedly suggested at Tribunal, of seeking to break the impasse. We were unpersuaded by his evidence on this issue, including his repeated assertion that termination was just one of the options being explored and that his primary focus was on getting the Claimant back to work.

135. We are unclear as to how, why or precisely when the minutes of the 11 September 2015 meeting were provided to the Claimant, though find on the balance of probabilities that he first became aware of Mr Collins' comments in autumn 2019. The Claimant met with Mr Cotterell as part of the ongoing grievance appeal process on 21 October 2019; towards the end of the meeting Mr Collins' documented comments were referred to as *"new evidence"* that fell into *"the window of inappropriate comments"*. In our judgement, the timing is potentially relevant in terms of time limits, including whether it would be just and equitable to extend time if any claim in relation to them has been brought out of time. We shall return to this.

<u>The Grievance</u>

136. On 7 April 2016 the Claimant raised a formal grievance (pages 825-827). The grievance began with a section headed, 'Factual and legal background' within which the Claimant referred to his disability, the Equality Act 2010 and the Respondent's duty of care. He identified that two issues that had arisen since August 2015 had been addressed informally via the grievance process, namely breaches of confidentiality and timeliness of dealing with issues. He went on to detail seven specific issues that he said required resolution, before identifying four desired outcomes as follows:

    (1) Formal recognition of disability and events to date.
    (2) Formal recognition of mistakes that have been made and the need to change approach.
    (3) Resolutions of issues that ultimately results in return to work in a safe, supportive and sustainable work environment.
    (4) Discretionary sick pay or PHI in interim, to mitigate any loss of income due to absence.

He went to on say that his intention was to have his issues resolved and to return to work.

137. Mr Goldspink was appointed to hear the grievance. At an early stage it was identified and agreed, by way of an adjustment for the Claimant, that the grievance would be heard and determined in stages which addressed discrete topics. Mr Goldspink issued his final decision on 16 November 2017, namely some 19 months after the grievance had been raised. Whilst, on the face of it, that represents a significant delay, the underlying picture is far more nuanced. There were nine grievance hearings and six outcome meetings with the Claimant alone. Mr Goldspink's evidence at Tribunal spanned two days. He was cross examined at length regarding the six topic areas that provided the structure for the grievance hearings and his investigations and decisions. It was only towards the end of his first day of giving evidence that Mr Goldspink was asked by Mr Varnam about the length of time it had taken to determine all elements of his grievance. Even then, he was simply asked whether 19 months was an unusual length of time, and he was not challenged further when he explained that the process had been structured so as to ensure the Claimant could cope with it and reflected the combined views of the Claimant, Mr Truter and Occupational Health as to the pace at which it should be progressed. In paragraph 84 of his witness statement, the Claimant asserts in the barest terms that the overall time taken was longer than it needed to be, but he does not for example identify any specific delays or where time was otherwise needlessly lost. In his submissions regarding the Respondent's alleged failure to comply with its duty to make adjustments in respect of PCPs (11) and (13) – not requiring grievances to be resolved and/or any decision in respect of them to be issued within a maximum time period – Mr Varnam focuses upon the fact he says that the grievance appeal became derailed, with regular and increasing gaps between intended meetings. He additionally refers to cancellations and related uncertainty, though again his comments relate to the grievance appeal process. None of his submissions obviously relate to Mr Goldspink's conduct of the grievance.

138. Although the s.20 EqA 2010 duty of adjustment complaints are pursued with reference to the length of time the grievance and grievance appeal took to be determined (albeit, we have to say, without any particular conviction in so far as the complaints are said to arise from Mr Goldspink's conduct of the grievance), we have not thought it necessary or proportionate to include a detailed narrative of the grievance within the findings that follow. That narrative is to be found instead within Mr Goldspink's witness statement and also in the Respondent's helpful chronology. We accept Mr Goldspink's evidence as to how the grievance was handled by him, including that he committed approximately 150 hours of his time to the matter. This is in the context that he leads a business area with in excess of 5,000 employees, with manufacturing facilities in the UK, US, Brazil, India and China. We find that he took his responsibilities in the matter seriously, approached the task in good faith, was focused

and compassionate throughout, and that he went above and beyond in terms of his commitment of time and effort.

139. Our conclusions in this regard are well illustrated by Mr Goldspink's handling of what, for convenience, we shall refer to as Grievance 3, which incorporated the second and third elements of the Claimant's grievance, namely 'Cultural Survey' and 'Cultural Survey Resolution'.

140. The outcome on Grievance 2 was delivered on 19 December 2016. It had been agreed that there should be 3 or 4 week gaps between each topic to afford the Claimant an opportunity for reflection and to 'put the lid back on them'. Mr Goldspink's initial meeting with the Claimant in relation to Grievance 3 took place on 23 January 2017. Thereafter he met with Charlie Cunnell, one of the Claimant's peers within GED-UK, on 14 February 2017. The same day, he advised the Claimant that the grievance timetable would need to be adjusted from 20 February to 6 March 2017 due to diary commitments. This was the first time we can identify in over nine months that he had needed to reschedule a meeting. Any delay was kept to a minimum. Mr Goldspink met with Mr Coleman on 21 February 2017 and again on 27 February 2017 (respectively their fourth and fifth meetings within the overall process) to discuss the issues raised in Grievance 3. And on 28 February 2017, he met with Mrs Webster and Ms Picollo. The outcome meeting went ahead as planned on 6 March 2017, with Mr Goldspink issuing a five-page outcome letter confirming his decision on Grievance 3. Even in the context that there were limited days when Mr Truter was available for meetings, that Mr Goldspink and Mr Coleman were senior managers in the business, and that Mr Goldspink needed to arrange meetings with four individuals in addition to the Claimant, Mr Goldspink issued a detailed decision on the grievance within less than eight weeks, and within eight days of his final investigation meeting.

141. However, Mr Goldspink's decision was not the end of the matter. Having determined Grievance 4 within four weeks by 24 April 2017 and thereafter having begun to embark upon Grievance 5, the Claimant reminded Mr Goldspink that he had raised two questions towards the end of the Grievance 3 outcome meeting on 6 March 2017 that remained outstanding. On 4 May 2017 he emailed Mrs Walker, stating that he was *"well beyond the number of ongoing issues I can keep on top of to a degree with which I feel comfortable matters are being completely addressed"* (page 1213). Although the substantive issues in Grievances 3, and indeed Grievance 4 had been concluded, it suggests to us that he not put a lid on the issues in his own mind and was becoming overwhelmed. In his email to Mrs Walker, he referred to the fact that he had matters to progress regarding PHI and his personal financial situation. This was very likely adding to his feelings of stress and anxiety. Mrs Walker cancelled a scheduled meeting on 8 May 2017 at the Claimant's request and told him that she would be in touch with an update on the open points. A few days later she said that Mr Goldspink was reviewing the points raised. There is evidence in the bundle of further timely follow up with others as to these points.

142. Mr Goldspink wrote to the Claimant on 1 June 2017 (though it is possible that the letter was only emailed to him on 8 June 2017) addressing the additional two questions or issues posed by the Claimant in relation to Grievance 3 – Cultural Survey. His one and a half page letter concluded with a recommendation that the Claimant spend some time with Mr Bond at an appropriate point to discuss the work environment and gain insight on how things may have changed. The Claimant responded to say that there was a significant amount of information for him to consider prior to making a response and that there was too much for him to process before they moved on to the next topic. Mr Goldspink and Mrs Walker accordingly agreed that the next meeting should be limited to 'historical points'. The minutes of the next meeting on 12 June 2017 (pages 1240 to 1246) evidence that the Claimant went back over essentially the entirety of the issues arising from the cultural survey. Given the Claimant's tendency to rumination and Dr Lewis' observation that, "*individuals with autism may find it more difficult than their non autistic peers to accept perceived injustices and be able to move on from negative life experiences.*" (page 1912), it is understandable that the Claimant felt unable to move on. Mr Goldspink might have taken the view on 12 June 2017 that if the Claimant had ongoing concerns, these were matters for him to pursue by way of an appeal. Instead, he re-engaged with the Claimant in some considerable detail and thereafter provided the Claimant with a supplementary five-page outcome letter on 26 June 2017. In our judgement, this went very significantly beyond the adjustment identified by Mr Truter in 2016 at the outset of the process that the Claimant should be permitted to give feedback on the outcome at the conclusion of each stage of the grievance. Instead, they had become fully re-immersed in the issues.

143. Aside from the time taken by Mr Goldspink to determine the grievance and issue his various decisions (*Issues 19 and 20/PCPs (11) and (13)*), it seems to us that the other substantive complaints in relation to Mr Goldspink are that he: (a) did not make proposals for redressing the Claimant's grievances; (b) did not seek to facilitate his return to work as part of the grievance outcome (*Issues 22 and 23/PCPs (15) and (16)*); (c) made manifestly incorrect findings (*Issue 7(1)(ii)*); and (d) failed to properly acknowledge the Respondent's wrongdoing (*Issue 7(1)(iii)*).

144. As to the first and second complaints, we have not seen fit to make detailed findings in respect of them since, for the reasons set out in paragraphs 233 to 235 and 280 below, we conclude that PCP (15) has not been established and that the Claimant was not put at a particular disadvantage by reason of PCP (16).

145. As regards the third complaint that Mr Goldspink made manifestly incorrect findings, the complaint proceeds largely on the strength of a bare assertion. We have referred already to the fact that Mr Goldspink was cross examined at some length. The major part of Mr Varnam's questions were directed at each of the six topics that were explored by Mr Goldspink within the grievance process. What emerged from a full day of evidence was that Mr Goldspink was said not to have upheld the Claimant's complaint in relation to reasonable adjustments, specifically a failure to

adhere to reasonable adjustments in respect of advance notice, both in respect of the Lencioni video and an invitation to a 'personality inventory'. We have set out already why the s.20/s.21 EqA 2010 complaint in respect of the video is not well-founded (and from which it follows that Mr Goldspink's findings were not manifestly incorrect). As regards the 20 April 2015 invitation, this was addressed by Mr Goldspink in section C.III of his outcome letter dated 19 December 2016 regarding 'Reasonable Adjustments'. He identified that it was a wider site initiative coordinated by the Business unit group. As strict confidentiality was maintained around the Claimant's disability, that group were entirely unaware of the Claimant's condition or health issues. Mr Goldspink noted that Mrs Webster had made arrangements for a session to discuss the content with the Claimant, but that as a result of an administrative error relating to a calendar invite the planned meeting had to be rescheduled. The meeting went ahead in advance of the session, and the Claimant had the opportunity in the meeting to review the training materials. Mr Goldspink concluded that Mrs Webster had worked hard to provide the Claimant with information to support with his preparation ahead of the session.

146. Finally, as regards the fourth complaint that the Respondent failed, within the grievance, to acknowledge its wrongdoing, this is said by Mr Varnam in paragraph 88 of his written submissions to relate to the Respondent's alleged failure to initially acknowledge its failures to adhere to the agreed reasonable adjustments or to engage with certain of the matters raised by the Claimant.

147. As to the first part of the complaint, Mr Varnam's submission lacks any further particulars to enable us to identify what 'initial' failure he is referring to. Mr Goldspink plainly could not pre-empt his findings in Grievance 2, which concerned 'Reasonable Adjustments', by indicating in advance or 'initially' what his conclusions might be, and could not reasonably be expected to acknowledge wrongdoing in respect of matters he had yet to investigate or discuss with the Claimant. The Claimant does not bring any further clarity to the issue in his witness statement. At paragraph 86.3 he refers to the Respondent's failure to acknowledge any fault without identifying who he says was responsible for this state of affairs, what period in time he is referring to or the issues in respect of which fault should have been acknowledged. Whilst he refers on this issue to paragraph 56 of his witness statement, in that paragraph he documents alleged failures to make reasonable adjustments, but does not build upon them by identifying where in the grievance process there was a failure to 'initially' acknowledge the failure to adhere to reasonable adjustments. It is particularly unsatisfactory that we should be left to try to discern the complaint when it is articulated and evidenced in such an imprecise way.

148. As to the second part of the complaint, it is correct that Mr Goldspink did not address the Claimant's allegation that Mrs Webster had said on 20 April 2015 that the Claimant talked in code. We find that this was an oversight on Mr Goldspink's part. That is understandable both in the context of a process that involved possibly over 150 hours of his time and

given that the alleged comment was not included as part of the formal grievance. Nothing turns on the matter. The issue is not that Mr Goldspink failed to acknowledge wrongdoing on this issue (we have already found that the words alleged were not said) rather that he overlooked the matter.

The Grievance Appeal

149. On 14 December 2017, the Claimant appealed against the outcome to the grievance. From the outset of the grievance process, and regardless of his ASD and related health issues, he had demonstrated an ability to put forward his concerns in a structured, logical and detailed. By contrast, his grounds of appeal were expressed in the broadest terms, for example that the facts, data and documentation were contradictory to the outcome letter content, and that the outcomes *"did not reflect the autism issues"* (page 1344).

150. Mr Cotterell was appointed in January 2018 to hear the hear the appeal. Ms Francis provided HR guidance and administrative support. Neither of them had any prior involvement in relation to the Claimant. It seems that they met with or spoke to Mr Truter by phone on 15 January 2018. There were a significant number of issues and there would have been a very considerable volume of material for Mr Cotterill to familiarise himself with. The purpose of the meeting/discussion with Mr Truter was apparently for them to gain an initial understanding of the Claimant's condition and current situation, and agree how to manage the appeal process.

151. Ms Francis wrote to the Claimant on 17 January 2018 seeking further clarity in respect of the appeal, including the specific outcomes being appealed against and the specific grounds of appeal in each case, explaining what she meant in this regard. Having sought that essential clarity from him, the Claimant responded on 1 February 2018 to say that he wished to review each point of his grievance which was not upheld (page 1357). In circumstances where, as we return to, he was being legally advised in the matter, and closely supported by Mr Truter, it was a slightly unhelpful response on his part. Nevertheless, Ms Francis responded constructively by preparing and emailing to the Claimant a spreadsheet which detailed the various points that were heard as part of his grievance, and inviting him to complete a column in the spreadsheet clarifying the points he wished to appeal and his reasons in that regard.

152. Mr Truter was on holiday between 5 and 19 February 2018. Although, the first meeting with the Claimant was not arranged until 14 March 2018, emails in the Hearing Bundle evidence that the Claimant required this time to complete the spreadsheet. In his initial interactions with Ms Francis in January 2018 he had written about needing time to pull everything together and ensuring there was *"time and space to prepare and discuss things properly"*.

153. In the event, the meeting on 14 March 2018 could not go ahead as Ms Francis had been unwell. It was the first in a series of issues affecting Ms Francis in the course of the appeal process that could not have been anticipated. It is not necessary for us to record the details in this judgement, as there are sensitive issues involved, including the untimely death of Ms Francis' sister in 2019. To her considerable credit, Ms Francis endeavoured to work through many of these issues, offering to attend meetings remotely rather than reschedule them. However, the Claimant's clear preference throughout was that all meetings should be in person, and that all attendees should attend in person.

154. In light of needing to cancel the meeting on 14 March 2018, alternative dates of 4 and 11 April 2018 were initially offered, but Ms Francis then found she was unable to attend any meeting on 4 April 2018 due to her ongoing health issues, so the meeting was scheduled instead for 11 April 2018. It was then cancelled at fairly short notice on 9 April 2018, the given reason being that Mr Cotterell had been called at short notice to attend a critical meeting in Mumbai. During cross examination, Mr Cottrell acknowledged the importance of the grievance and grievance appeal to the Claimant, agreed it was a high priority and said he was aware the grievance process had taken approximately 21 months. He struggled to give any further details regarding the matter that had taken him to India. He initially said that it was a significant customer issue that he had to attend to, but as Mr Varnam continued to question him on the matter he became less certain. Even if, which is unclear, his calendar entries are no longer available, we think there would be email and other records of his trip that would have enabled him, in the context that the List of Issues specifically identifies cancellation of the meeting as evidence of the existence of a PCP, to adduce evidence on the matter, including the reason for the trip, when it was booked and accordingly how much prior notice of it might have been given to the Claimant.

155. Ms Francis offered the Claimant a profuse apology for having to cancel the 11 April 2018 meeting. It seems unlikely to us that Mr Cotterill would have travelled to India without good reason, but however committed he may have been to the appeal process, we are not persuaded that he had at the forefront of his mind the need for timely communication with the Claimant, particularly in the context of an appeal which had by then been outstanding nearly four months. Mr Cotterell had still not met the Claimant by this point. The impression from Ms Francis' email of 9 April 2018 is that she recognised it was being communicated to the Claimant a little late in the day.

156. Mr Cotterell finally met with the Claimant on 14 May 2018. Given the delays that had occured, it is unclear why a meeting was not scheduled sooner following Mr Cotterell's return from India.

157. The first meeting was an opportunity for introductions and for the Claimant to provide an overview of the events that had led to the grievance, as well as the reasons why he was appealing against the outcome. He described

his grounds of appeal as *"not emotional, they are factual and it is data driven"* (page 1434). There was discussion of how the appeal process would be managed, including appropriate adjustments for Claimant, including that meetings should only take place once a month and not exceed two hours in duration, and that he would only pick up emails on Mondays and Thursdays. It was agreed, as was the case during the grievance process, that specific topics would be addressed at each meeting, though it seems that the Claimant drove the agenda in so far as he provided meeting scripts ahead of the meetings. At a subsequent meeting on 4 July 2018 there was some further discussion of the Claimant's sensory sensitivities and how the appeal process would be managed around these, including the layout and ventilation of the room.

158. The Claimant requested copies of current policies, including dignity at work, equality and whistleblowing, further indicating his awareness of the importance of the legal and policy framework. Towards the end of the meeting he spoke of needing to establish that the business was a safe working environment for if/when he was fit enough to return.

159. A further meeting on 13 June 2018 was structured as introductions and an opportunity to gain a clearer understanding of the Claimant's points of appeal, though the meeting minutes evidence that the Claimant began to go into the substance of his points of appeal in some detail. He covered events from the point at which Mr Coleman began to manage GED-UK, including the Lencioni video.

160. Following the meeting on 13 June 2018, the Claimant and Mr Truter met to discuss the process. Mr Truter emailed Ms Francis on 26 June 2018 and, notwithstanding the one month gap between scheduled meetings and that the Claimant was seemingly driving the meeting agenda, said there was time pressure to review material. He also said the nature of the issues under discussion as well as the *"severity of the situation"* (by which we infer he meant the Claimant's condition and health issues) meant that the Claimant was under significant pressure. He went on to say that this created a conflict in terms of trying to adhere to a timeline. He sought assurances in this regard in order to alleviate the Claimant's feelings of stress, specifically that the potential impact of 'unexpected tangents' should be considered and 'parking bays' used to place off-topic issues on a list to be revisited at a later date. He emphasised as a priority the Claimant's need to process information and identified certain other adjustments to how the discussions were structured.

161. The stated reason for the next meeting on 4 July 2018 was 'Review Appeal point 1'. This corresponded to Grievance 1 – 'Reasonable Adjustments'. Ahead of the meeting the Claimant prepared a detailed, structured written submission (pages 1490 to 1493). The first section, headed 'History' began with, *"Key words to bear in mind – Autism and Discrimination"* (page 1490). He claimed that he had been labelled a liar and accused unnamed individuals of presenting alternative versions of events, unsubstantiated by evidence, as a false account, namely that they were lying. In the meeting itself he touched upon a range of issues

including sick pay, the Lencioni video again, case management, the 20 April 2015 Autism Anglia meeting, PHI and payment of Mr Truter's fees. In the course of the meeting the Claimant referred to Mrs Webster's alleged comment that the Claimant talked in code.

162. On 16 July 2018, the Claimant said that he could not attend another meeting until the end of August 2018. He referred to the *"response to the matter of feedback is more difficult and detailed"*, from which we understand that he was finding the process of preparing and submitting his detailed submissions ahead of each meeting a difficult task even if he and Mr Truter had suggested this approach. A scheduled meeting on 25 July 2018 was therefore cancelled.

163. On 23 July 2018 the Claimant informed Ms Francis that he wanted the outcomes for each of the grievances conveyed to him once the entire process was completed (page 1514). This represented a change to the previously requested and agreed adjustment that decisions would be given at the time in respect of each topic to allow the lid to put back on them.

164. The next scheduled meeting on 29 August 2018 explored the Claimant's appeal in respect of the outcome in relation to the cultural survey and its resolution (corresponding to Grievances 2 & 3). His written submissions extend to seven pages and in the course of them he referred to the October 2014 feedback sessions as:

> "*Falsehoods and misrepresentations of fact being forcefully presented as reality, and any dialogue to the contrary being closed down regardless of the truth …It is not a process to formally present hearsay as fact and attribute deeds and actions to individuals which are not a reflection of reality – That is slander and libel.*"

He developed this further in the meeting in so far as he referred to*, "… people moving on with lies and leaving me in my current situation"* (page 1538). Mr Truter described it as *"autism discrimination"* and the Claimant himself referred more than once to having been discriminated against.

165. The next scheduled meeting on 26 September 2018 had to be cancelled as it clashed with a personal medical appointment that Ms Francis had been given. She tried to, but could not reschedule the appointment and offered her sincere apologies to Mr Truter with whom she was in contact. She offered to identify an alternative date for them to meet ahead of the next scheduled meeting on 17 October 2018 but for reasons that are not apparent from the bundle this could not be arranged.

166. The reason for the rescheduled meeting on 17 October 2018 is minuted as 'Questions following review of appeal points 2 & 3, review appeal point 4' though the Claimant's written submissions were prepared on the basis that it was to discuss 'Appeal Point 5: case management and duty of care' (page 1590), corresponding to Grievance 5 – 'Response to issues that

have been raised'. The minutes themselves support that this was indeed the topic area that was discussed.

167. The next meeting on 19 November 2018 was a continuation of Appeal Point 5. There seems to have been some discussion about adding an additional meeting date as the final minute was to the effect that Mr Truter would revert with possible dates for a further meeting in November. When Ms Francis followed this up on 20 November with Mr Truter and suggested 28 November 2018, Mr Truter responded to say that the Claimant would be unable to have another meeting so soon. It illustrates a point we develop later in relation to PCP (11).

168. A meeting was originally scheduled for 10 December 2018. However, on 29 October 2018 Ms Francis informed the Claimant (and by copy, Mr Truter) that she would be undergoing a medical procedure on 10 December 2018. On the basis that she was to be out of the office the previous week, she asked whether the meeting could be rescheduled to the following week. 17 December 2018 was initially mooted, but Mr Cotterell was on holiday that week as it was a family milestone birthday. Ms Francis suggested 3 or 5 December 2018 instead, on the basis that she would need to dial into the meeting, but the Claimant said such an arrangement would not work. He needed all attendees to be there in person.

169. The next scheduled meeting on 16 January 2019 was cancelled at short notice due to a medical emergency which resulted in Ms Francis being admitted to hospital. Mr Cotterell's daughter was also unwell and this information, though not the fact of Ms Francis' admission to hospital, was shared with the Claimant. It is understandable that Ms Francis would have needed to time to recover and accordingly that it would not have been appropriate for an alternative date to have been fixed ahead of the next scheduled meeting on 13 February 2018. The meeting went ahead. Mr Truter is minuted as having said, *"Open to these things happening, just about context and ensuring that David understands"*. The Claimant accepted Mr Cotterell's apology in the matter.

170. The meeting on 13 February 2019 was to 'Review appeal point 5 (continuation)'. Accordingly it was the third scheduled meeting to discuss how the Claimant's case had been managed. The meeting minutes evidence that it was a wide ranging discussion. We note the following comments by the Claimant towards the end of the meeting:

> *"Seeing Zoe on the way in today really bothered me, it bothered her based on the look on her face for very different reasons, my perspective, she is highly instrumental in my condition, I am paying for this physically, mentally and financially while other people are going about their life like nothing ever happened. Yet I've been denied that opportunity. The injustice is extraordinary. It is intentional/malicious …."* (page 1652)

Whilst the Claimant's anger regarding his situation was palpable and perhaps understandable, the comments directed at Mrs Webster were

unfounded, indeed unpleasant. It was agreed thereafter that any further meetings would take place at Mr Truter's office in Stamford.

171. On 27 February 2019 Ms Francis endeavoured to identify dates for further meetings. Mr Truter was away for a week during the latter part of March. The first proposed meeting date was 3 April 2019, with further meetings proposed for 17 April and 20 May 2019. The Claimant stated that he could not meet twice in April. As regards the proposed date of Monday 20 May 2019, he said that Mr Truter's office was only available on Wednesdays. This had seemingly not been made clear on 13 February 2019. On 1 April 2019 the Claimant emailed Ms Francis stating that the proposed meeting on 17 April was fine. Accordingly, it was his and Mr Truter's decision that the meeting should not take place on 3 April 2019, with the result that there was a nine week gap between meetings.

172. The meeting on 17 April 2019 was to discuss the Claimant's sixth point of appeal which corresponded to Grievance 6 – 'Cessation of sick pay'. In the course of the meeting the Claimant suggested that Mr Collins may have provided information to Mr Bond to enable him to make a decision on his sick pay. He would subsequently allege on 20 November 2019 that Mr Collins *"made a decision surrounding my sick pay without having a formal role"* (page 1743). Suspicions became fact.

173. During the meeting on 17 April 2019, the Claimant said he felt he was treated like someone who was trying to abuse the sick policy or someone who wasn't genuinely ill. His perception in the matter does not reflect the objective, contemporaneous evidence as to how he was treated in the matter, even if he has well-founded grounds to complain that the Respondent failed to discharge its s.20 duty in relation to this issue. It was never suggested by the Respondent that the Claimant was abusing its sick pay arrangements or other than genuinely very unwell.

174. The meeting minutes evidence that the Claimant proposed 29 May 2019 for their next meeting. On 23 May 2019 Ms Francis emailed the Claimant to see whether he and Mr Truter were still able to go ahead as planned on 29 May 2019. The Claimant responded on 27 May 2019, stating that he had been struggling and, whilst he had been minded to postpone, thought it was important to stick to the process and keep things moving forward. There are no meeting minutes from the meeting in the Hearing Bundle, but the Claimant's email of 6 June 2019 (page 1690) evidences that the meeting went ahead although there are no minutes of the meeting in the Hearing Bundle.

175. The next scheduled meeting was on 17 July 2019. The documents in the Hearing Bundle do not identify why there was no meeting in June 2019, though in an email dated 1 July 2019 (page 1702), the Claimant refers to having needed a bit of time out and also to Mr Truter being on holiday for a couple of weeks. Accordingly, we cannot identify any delay that was attributable to the Respondent.

176. Further emails from the Claimant on 1 July 2019 evidence that he felt the meeting on 17 July 2018 could not go ahead as he wished to meet with Mr Truter prior to the meeting but that as a result of Mr Truter's planned holiday his next appointment with Mr Truter was not until 18 July 2019. Having initially said that she would await to hear back from the Claimant with potential dates once Mr Truter was back from holiday, Ms Francis emailed the Claimant on 11 July 2019 suggesting four potential dates in August, including Wednesday 7 August 2019. On 22 July 2019 the Claimant contacted her to say that 21 August 2019 was convenient for himself and Mr Truter. Accordingly, this further significant gap between meetings was not the Respondent's responsibility.

177. The meeting on 21 August 2019 went ahead as planned. The minutes record that the purpose of the meeting was to review appeal points. The Claimant's prepared notes for the meeting evidence that he was focused upon his first point of appeal, namely reasonable adjustments, though the meeting minutes evidence a fairly wide ranging discussion in which the Claimant and Mr Truter raised issues of confidentiality, sick pay, PHI, total compensation, policy breaches. The Claimant complained that it felt the business had created distance, that he was ostracised and unsupported. That is at odds with the contemporaneous documents and the sensitive way in which Mr Cotterell and Ms Francis were handling the process, including their meetings with the Claimant. We note the following final documented comment:

> "*There is a point I cease to become an employee – what is the date?*"

178. The next scheduled meeting on 23 September 2019 was cancelled at short notice dues to the death of Ms Francis' sister. She had lived with Ms Francis during the final months of her terminal illness, receiving palliative care at home from May 2019.

179. The next meeting was on 21 October 2019. In view of the death of Ms Francis' sister we do not consider that the meeting could reasonably have been scheduled any sooner. The 21 October meeting was the meeting during which the Claimant raised Mr Collins' documented "changing tactics" comments. The meeting was largely devoted to discussion of the 2014 cultural survey and subsequent team building strategy day on 28 January 2015, as well as the Building an Empowering for Results Strategy event scheduled for May 2015. These issues had already been discussed in some detail in the process. Nevertheless, as Mr Goldspink did in June 2017, Mr Cotterell was evidently content to engage with the Claimant again on these issues rather than seek to close them down on the grounds they had already been discussed.

180. The last substantive appeal meeting was on 20 November 2019. The Claimant's broad focus was on how his case had been managed since he had been absent on long term sick leave, including what he referred to as the Respondent's duty of care. Again, this was a topic that had already been covered over the course of three previous meetings on 17 October and 19 November 2018 and 13 February 2019. The notes capture that

both Mr Truter and the Claimant referred to the Claimant as having been discriminated against. And the Claimant explained in quite some detail why, in context, Mr Collins' documented comments caused him concern. As he expressed it, *"… the language he used seems like he has a different agenda"* and *"in what capacity was he acting … as my advocate or not???"* (page 1744).

181. As the minutes of the 20 November 2019 meeting confirm, the intention was to set up dates for feedback meetings, that is to say, at which Mr Cotterell would provide the Claimant with his decision on the appeal and thereafter allow an opportunity for further questions and clarity once the Claimant had been able to reflect upon the grievance appeal decision.

182. There are no documents in the Hearing Bundle that shed light on what happened over the next three months. The first document is an email dated 24 February 2020 in which Ms Francis said that she would need to postpone the dates that were scheduled for feedback. She wrote,

> "*Richard is out of the country for the majority of March so I will be looking to schedule some time for us to meet in April.*" (page 1745)

There was no apology as such and no further explanation, including when it had become necessary for Mr Cotterell to travel abroad and why meetings could not be scheduled ahead of his trip.

183. On 12 March 2020 the Claimant advised that his mother had leukemia. In the context of the emerging and rapidly evolving circumstances of the global pandemic the timing could not have been worse. He suggested that it might be prudent to pencil in dates for May and June. He subsequently acknowledged in June 2020 that there could not be a meeting until September 2020 at the earliest. Indeed, demonstrating an insight that most people would have lacked at the time, the Claimant observed on 19 March 2020 that the situation taking hold was likely to last about 18 months. Such limited easing of restrictions as had occured over the summer months in 2020 gave way to a further mandate that people should, wherever possible work from home, rendering an in person meeting impossible. Ms Francis had already cautioned in an email dated 20 August 2020 that an in person meeting was unlikely. She referred to the Claimant's personal circumstances and to restrictions on travel and office working affecting all staff at the Respondent. She floated the possibility of a video conference, acknowledging that this was something the Claimant had previously identified was not an option.

184. A provisional meeting date of 13 January 2021 was scheduled, but the country entered its third national lockdown on 6 January 2021, so it was re-scheduled to 27 January 2021. We were not told why the parties had felt able to go ahead in lockdown. Unfortunately Ms Francis contracted Covid with the result the meeting could not go ahead, and she was unable to attend a subsequent meeting scheduled for 10 February 2021 as she was looking after her school age child. Given the uncertain national situation, in particular as to when schools would return to face to face

teaching, Ms Francis proposed and, having discussed the matter carefully with Mr Truter, the Claimant agreed that the hearing on 10 February 2021 should go ahead with Ms Francis attending remotely. The Claimant was clear that he did not wish a new representative from HR to attend the meeting in person (page 1794).

185. Mr Cotterell's grievance appeal outcome letter runs to eight pages (pages 1801 to 1808). He partially upheld the Claimant's appeal against Mr Goldspink's decision in respect of: 'Reasonable Adjustments' (in relation to 'Team building/Preparation ahead of time' – for the reasons that are set out at page 1803); 'Cultural Survey' (in relation to 'Meeting with external consultant did not take place'); 'Video shown during strategy session' (that the prior apology had not fully acknowledged the issue or upset caused); 'Response to issues raised' (in relation to HR support); 'Cessation of sick pay' (in relation to the lack of information regarding PHI); and 'Total compensation' (in relation to not being made aware of the changes at the time). His letter concluded with confirmation that the appeal process was at an end, thanked the Claimant for his patience, and wished the Claimant *"the very best"*. He did not make reference to the Claimant's potential return to work and, if relevant, how this might be managed, or indeed what might happen next.

<u>The Claimant's dismissal and appeal against his dismissal</u>

186. When the Claimant received the grievance appeal outcome the country was in its third national lockdown due to the Coronavirus pandemic. Between April and July all restrictions were lifted. On 6 May 2021 Ms Webb wrote to the Claimant explaining that as he had been in receipt of PHI benefit for over 5 years, in line with the Respondent's PHI policy his continued employment would be reviewed. The following month, the Claimant presented his first claim to the Employment Tribunals.

187. The Claimant was assessed by Mr Andrew Iles, Consultant Psychiatrist on 8 October 2021. It is unclear whether he self-referred to Dr Iles or was referred by his GP. In a report dated 28 October 2021, Dr Iles expressed the view that based on the symptoms which the Claimant reported, the threshold for post-traumatic stress disorder would be met on the basis that he presented with complex post-traumatic stress disorder. The Respondent's medical expert, Dr Lyle, when referring to the Claimant's tendency, as a person with ASD, to have strong opinions about matters, about what is right and what is wrong, black or white, states that the Claimant *"badgered"* Dr Iles into changing his diagnosis to one of complex post-traumatic stress disorder. He effectively describes the diagnosis as indefensible.

188. At the Respondent's request, the Claimant was assessed by Dr Charles Parkes, Consultant Clinical Psychologist on 1 November 2021 as part of the Respondent's review of his continued employment. Mr Truter was present throughout the assessment. Dr Parkes' report dated 23 December 2021 was received by the Respondent on 25 January 2022. In

it he reported the Claimant saying that the loss of his job would be quite devastating for him. It is not necessary that we quote extensively from the report or from the 'Conclusions' section of it, save to record the following:

> *"… it is highly unlikely that he will be fit to return to work in the foreseeable future or indeed in the longer-term, even with Reasonable Adjustments in place to accommodate and support his needs as an employee with Autism."* (page 1856)

189. On 28 January 2022, Ms Webb invited the Claimant to a meeting on 9 February 2022 which was to be chaired by Mr Blin. He was offered the options of a face to face meeting in the Learning Centre at the Respondent's Peterborough site, away from the main offices and factory site, or a 'remote' online meeting. He was also informed that he could be accompanied by Mr Truter. The meeting was scheduled to take place on the afternoon of Wednesday 9 February 2022 in anticipation that this timing would best suit Mr Truter. On 7 February 2022, the Claimant emailed to say that he would be unable to attend the meeting. He said that he had discussed the matter with Mr Truter who was of the view that the meeting represented an unacceptable risk to his health and accordingly that he should not attend it.

190. The meeting was initially rescheduled to 16 February 2022, albeit the Claimant indicated once again that he would be unfit to attend. He asked that the meeting be postponed for two weeks, indicating that he wished to provide a written response to the proposal. This was agreed by the Respondent and the meeting was rescheduled to 9 March 2022. In a detailed email dated 7 March 2022 the Claimant set out why he was opposed to the proposal to terminate his employment (pages 1866 and 1867). His email focused upon the matters raised in his grievance and grievance appeal, as well as the fact the Respondent had not adequately resolved his concerns, though he went on to say that he would like to return to work (expressing the view that with appropriate adjustments there was the potential for a return to work in the future) and expressed the further view that his continued employment would have little impact for the business. He concluded by stating that his dismissal would be discrimination by reason of disability related absence.

191. The meeting on 9 March 2022 proceeded in the absence of the Claimant. We accept Mr Blin's evidence that he retained an open mind in the matter and that he considered the Claimant's representations before coming to his decision, which was to terminate the Claimant's employment. His decision is confirmed in a letter to the Claimant dated 10 March 2022. The Claimant's employment terminated with immediate effect on 11 March 2022, with payment in lieu of notice. As we return to, the Claimant claims that he was paid incorrectly in respect of his notice.

192. At paragraph 20 of his witness statement, Mr Blin sets out why he says that dismissal was a proportionate means of achieving a legitimate aim. Essentially, he adopts the Respondent's pleaded position in this regard, as set out in paragraph 8(4) of the List of Issues. Mr Blin's letter of 10 March

2022 does not support that those specific aims were in his mind when he decided to dismiss the Claimant. Instead he relied upon Dr Parkes' conclusions quoted above.

193. The Claimant appealed against his dismissal in an email sent to Ms Webb on 17 March 2022 (pages 1869 and 1870). The appeal with heard by Mr Curtis. Nicola Hurley, HR Manager provided HR support and guidance. Unlike at the first stage, the Claimant attended the appeal hearing, accompanied by Mr Truter. The hearing took place at Mr Truter's offices on 9 May 2022. The minutes of the hearing are at pages 1889 to 1894 of the Hearing Bundle and Mr Curtis' decision on the appeal is at pages 1895 to 1897. Mr Curtis engaged with a wider range of issues that arise in these proceedings, as the Claimant alleged that the outcome of the dismissal and appeal hearings was pre-determined. Those assertions have not been pursued with these proceedings, for example there is no claim for unfair dismissal or that the allegedly predetermined outcomes were acts of victimisation or otherwise acts of unlawful discrimination.

194. The Claimant's other point on appeal was that if he remained in the Respondent's employment this would present no problems for the business whereas he would experience further mental health challenges as well as substantial losses due to the fact he would no longer receive certain benefits. Mr Curtis initially stated that he would not be reviewing the medical evidence in the case, though this seems to have been a little clumsily expressed on his part, since the minutes of the hearing and his appeal outcome letter evidence that there was in fact some discussion of the Claimant's health issues during the hearing and that Mr Curtis had available to him copies of Dr Parkes' and Dr Cosgrove's reports in coming to a decision. The Claimant did not obviously take issue with Dr Parkes' report, on the contrary he cited it as evidence that he had not really moved on since Dr Person's report. He did not identify that his dismissal would exacerbate his mental health issues, rather that predetermined timelines, as well as what he described as the Respondent's failure to provide information he had requested, and possibly the provision of inaccurate information, in order to gain a better understanding as to what the termination of his employment might mean for him, was *"not good"* in terms of his disability and mental health. The impacts to his mental health were clearly identified within his appeal email of 17 March 2022 as having been caused by the Respondent's conduct prior to the commencement of his sickness absence in 2015.

195. Mr Curtis did not uphold the Claimant's appeal for the reasons set out in the appeal outcome letter. These were structured by reference to the Claimant's stated grounds of appeal rather than with reference to the aims now advanced by the Respondent as justifying his dismissal. We return to this below.

LAW, FURTHER FINDINGS AND OUR CONCLUSIONS

196. For all the reasons set out above, the complaints identified as Issues 9(7) to (11) (in respect of the cultural survey feedback sessions and the

Lencioni video), 33(1), 33(3), 27(1), 27(2) and 27(3) (excluding the 'unfit for work' comment) in the List of Issues are not well founded. We address the Claimant's remaining complaints below.

The s.19 and s.20/21 Equality Act 2010 claims

197. Section 19 of EqA 2010 provides that,

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

198. Section 20 of EqA 2010 defines the duty to make adjustments as follows,

> Duty to make adjustments
>
> (1) …
> (2) …
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
> (4) …

199. It is not necessary in this case for the Tribunal to have regard to the second or third statutory requirements.

The claimed PCPs in respect of both the s.19 and s.20/21 complaints

200. The following PCPs are conceded by the Respondent:

> ***PCP (10): Not paying sick pay to employees with more than ten years' service who had been on sickness absence for more than 52 weeks.***
>
> ***PCP (11) Not requiring grievances (or grievance appeals) to be resolved within any maximum time period.***

PCP (13) Not requiring managers hearing grievances (or grievance appeals) to give a decision within any maximum time following the conclusion of the grievance/ appeal process.

201. What amounts to a PCP is not defined within the Equality Act 2010, though the expression is to be construed broadly, avoiding an overly technical approach. According to the EHCR's Employment Code, it extends to any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. In Carerras v United First Partners Research Ltd EAT 0266/15 the term "requirement" was said to be capable of incorporating an "expectation" or assumption", which might be sufficient to establish the existence of a practice. Something may be a practice if there is some indication that it will or would be done again were a hypothetical similar case to arise – Ishola v Transport for London [2020] IRLR 368.

202. The existence or otherwise of a PCP is to be assessed objectively. It is principally a question of fact.

203. The disputed PCPs relied upon by the Respondent in terms of both his s.19 and s.20/21 complaints, including our findings and conclusions in relation to them, are as follows:

PCP (1): Not giving employees advance notice of the content of presentations at events that they were required to attend.

204. We have set out already why the s.20/s.21 complaint in respect of this claimed PCP cannot succeed in respect of any alleged failure to make adjustments prior to 28 January 2015 given the Respondent's lack of knowledge that the Claimant would have been substantially disadvantaged in the way he claims by such a PCP.

205. The question, then, is whether the Respondent had such a PCP. Mr Varnam submits that *"there can be little doubt that such a PCP did apply"*, asserting, without more, that the Respondent did not routinely give advance notice of the content of presentations. We have not found the issue anywhere near as straightforward as Mr Varnam's submission would suggest, principally because, as formulated, the PCP is significantly open to interpretation. The PCP is said to be that employees were not given 'advance notice of the content' of presentations. The List of Issues offers no further clarity as to what that means qualitatively, since the claimed disadvantage and contended for adjustment are both framed with reference to observing presentations without notice of the contents. 'Notice of the content' could refer to an agenda or outline program of events, or be understood to mean a more detailed summary of the content, though if it is the latter it leaves unanswered what threshold level of detail might define the PCP. This ambiguity is exacerbated by a further lack of clarity as to what events, and what presentations at those events, fall within the ambit of the PCP. For example, we can envisage that employees might be required or expected to attend presentations to

visiting clients, politicians or dignitaries. We are reasonably confident that the claimed PCP does not have those events in mind, but aside from strategy related events (or at least strategy events with some form of psychometric content), it remains unclear whether the claimed PCP extends to the myriad other presentations that might take place at events organised by the Respondent in the ordinary course of its business, including trading updates, market insights, product launches, budget planning, redundancies/re-organisations and so on.

206. The factual basis for the contended for PCP is said by the Claimant to be set out in paragraphs 34-39, 46-48 and 56 of his witness statement. His evidence in this regard relates to the cultural survey 'initial findings' presentation given by Pauline Gordon on 24 October 2014, the showing of the Lencioni video on 28 January 2015 and the Building an Empowering for Results Culture training course.

207. The Claimant complains, respectively, of being given "no prior warning of the content of [Ms Gordon's] presentation", "no advance information about the [Lencioni] video or its contents" and "no advance information concerning the content of the [Building an Empowering for Results Culture] training course", without however identifying what content or information he believes should have been provided to him in advance. It begs the question again as to what the contended for PCP means qualitatively. Having read the notes of the grievance and grievance appeal meetings in their entirety, this lack of precision is a feature of various meetings, with neither the Claimant nor Mr Truter clearly or consistently articulating the relevant PCP or the adjustments that might remove or ameliorate any disadvantage resulting from it.

208. As regards the cultural survey, in paragraph 34 of his witness statement the Claimant refers to having been aware of feedback from early sessions i.e, before Ms Gordon gave her feedback presentation. He says that he expressed concerns to Mr Coleman that certain parties were using the process as a platform to push agendas and that facts of situations were being misrepresented. Those comments, which echo comments captured in Section A.3 of Dr Woods' Second Report, evidence to us that the Claimant was not in the dark as to the feedback that was starting to be gathered in the survey process, further that he believed, when presented, that the survey results would, from his perspective, likely include misrepresentative feedback and reflect subjective perceptions or even 'agendas'. If the PCP is to be interpreted as meaning that employees did not receive basic information in advance of presentations, the evidence in relation to the cultural survey suggests that employees, or at least managers at the Claimant's grade, did receive information in advance. Once again, it begs the question what level of content notification is said to define the PCP.

209. The Claimant's concerns in relation to the feedback presentation are principally focused upon a single slide. Headed, "Why would someone <u>not recommend</u> GED UK as a good place to work', under the sub-heading of

'Leadership', the feedback, which derived from 218 comments, was summarised within three bullet points as follows:

- *Culture of blame, fear and intimidation*
- *Lack of positive feedback*
- *Poor communication (lack of consultation, inappropriate choice of channels)*

In our view, there is no obvious reason why the Respondent ought to have singled out that content for disclosure to the Claimant. In which case, it is hard for us to see how prior warning of the content of the presentation might have been given except through the provision of a copy of the powerpoint presentation and possibly any speaker notes which Ms Gordon had prepared. It seems to us that in so far as the Claimant's claim arises out of the cultural survey feedback presentations, his complaint is not, as he states, that he had no prior warning as to the content of Ms Gordon's presentation, rather that he was not provided with a copy of the powerpoint presentation. In which case, the PCP might more accurately be said to be that the Respondent did not provide employees in advance with the content of presentations at events that they were required to attend. However, that is not how the PCP is framed.

210. Likewise, in the case of the Lencioni video, whilst the Claimant complains of a lack of prior notice of the video and its contents, it is clear from paragraph 47 of his witness statement that he believes he should have been able to view the video in advance. On this issue, we find that Mr Coleman informed the Claimant that the event on 28 January 2015 would be built around Patrick Lencioni's theories of the 'Five Dysfunctions of a Team', spent time discussing this with the Claimant and gave the Claimant a copy of Mr Lencioni's book of the same title to enable him to undertake some background reading and gain a better understanding of the underlying theories ahead of the event. Mr Coleman was adhering to adjustments that had been agreed in circumstances where the Respondent's practice was not to make any information or content available to employees in advance. Be that as it may, the fact the Claimant says he would have been able to review the video and highlight his concerns, evidences that he believes he was disadvantaged by not being provided with the content of the presentation in advance, or informed where he could find the content if it was available online without having to be provided to him. As with Ms Gordon's presentation, that does not reflect the wording of the PCP.

211. As regards the Building an Empowering for Results Culture training course, Mr Varnam's submissions are focused upon the Respondent's alleged failure to give the Claimant advance notice of the fact he would receive an invitation to complete a personality inventory. Thus expressed, the Respondent did not fail to give the Claimant advance notice of the content of a presentation at an event he would be required to attend, so that however the PCP is to be understood, the facts cited by Mr Varnam do not touch directly upon the existence or otherwise of the PCP. Instead, the Claimant's complaint is about the fact and/or timing of an email about

an activity to be undertaken by him ahead of an event, As he said in his email to Ms Routledge of 23 April 2015, *"I am not aware of any prior notice of this activity"* (page 547).

212. In any event, the Claimant was told he had until 11 May 2015 to complete the inventory, in which case he was given advance notice of the activity and the ability to discuss it further with Ms Routledge, Mr Coleman and/or Mrs Webster. The event itself, which was due to take place on 20 May 2015, had been discussed during occupational health review meetings on 23 February, 12 March and 20 March 2015 (pages 430, 432 and 502), including that the course would involve some emotional intelligence training. That alone would seem to us to have potentially met his requirement for advance notice of the content of the course/presentation, though he had a further meeting with Mrs Webster in due course to further build on his awareness and understanding. During the meeting on 12 March 2015 Mr Coleman had suggested adjustments, including whether the Claimant might take an alternative leadership role, without any impact on his salary grade, so that he would no longer be required to participate in leadership days that might for example bring him into contact with Ms Gordon or involve him in psychometric activities. It evidences that Mr Coleman was trying to work a way around the Claimant's difficulties in a constructive and supportive way.

213. It is not the function of the Tribunal to reformulate a PCP for a claimant, least of all one who has been professionally represented throughout the proceedings. The need for precision is illustrated by the EAT's decision in Francis and ors v British Airways Engineering Overhaul Ltd 1982 IRLR 10. PCP (1) is not framed on the basis that the Respondent's practice was not to provide employees in advance with the materials intended to be shown or distributed at events, or indeed the full presentation content inclusive of speaker notes (at least in those situations where a speaker is scripted). Doing the best we can given the ambiguities we have identified, we conclude that the intended PCP is to be understood as not providing employees with a detailed overview of the topics or broad themes that would be explored in the course of presentations they were required to attend, and that the PCP particularly has in mind events informed by psychometric tests, evaluation or analysis.

214. The fact that Mr Coleman in particular took time to ensure the Claimant had a detailed overview in respect of the January 2015 event, and that he, Ms Routledge and Mrs Webster explored the planned 20 May 2015 event with the Claimant on 23 February, 12 March and 20 March 2015, and that Mrs Webster then met up with the Claimant to go through the content with him, evidences to us that this was because the Respondent did have the PCP we have just described.

215. At paragraph 250 below we address whether that PCP gave rise to 'group' disadvantage. For completeness, we also consider below whether people with Asperger Syndrome would be put at a disadvantage if the PCP was

instead, "*Not providing employees in advance with the content of presentations at events that they were required to attend*".

PCP (2): Presenting employees' subjective opinions as part of cultural survey feedback, without including in the presentations of 24 and 27 October 2014 any assessment of whether those opinions were objectively accurate.

216. Although employee opinions were presented on 24 and 27 October 2014 in a fairly high-level, summary way, we agree with the Claimant that this involved employees' subjective opinions being presented without including any assessment of whether those opinions (or the summary that derived from them) were objectively accurate. We do not understand on what basis the PCP is denied, as opposed to justified, by the Respondent. Ms Duane's submission on the point amounts to no more than a bare denial. The PCP is established.

PCP (3): Not giving managers a right of reply to points raised in the cultural survey feedback, where the manager felt that the points raised were inaccurate.

217. As noted already, the Claimant's evidence is that he raised concerns with Mr Coleman whilst the survey was underway. It could be said that he pre-empted the formal feedback on the strength of what he had learned through feedback during early sessions and, in so doing, that he exercised a right of reply. He claims that he was encouraged by Mr Coleman to allow the process to run its course and implies that he was discouraged from persisting with his concerns by being told that anything he did to undermine it would reflect very badly on him.

218. It is not suggested by the Respondent that the sessions on 24 and 27 October 2014 were structured in a way that specifically afforded managers a right of reply or which captured or presented their responses to the feedback. Ms Gordon's powerpoint presentation does not obviously include any manager feedback or responses. Whilst the Claimant conceded during cross examination that he had been offered the opportunity to pursue a grievance in the early stages, but had declined to do so, that is not the same as being afforded a right of reply as part of the cultural survey process itself. Ms Duane is right to highlight the strategic work that was done following the survey to influence change and alter perceptions in the workplace in order to improve engagement, including by the Claimant himself who spearheaded a workstream around collaboration. She also notes, and we accept, Mr Coleman's evidence that discussions took place during which gaps in perception were explored. But, however constructive and pertinent these discussions and initiatives may have been, we find they did not amount to giving managers a right of reply. Notwithstanding the Claimant was able to raise concerns with Mr Coleman as the survey was underway, we are satisfied that the PCP has been established.

PCP (4): Presenting team-specific feedback from cultural surveys in general meetings of managers and/or in general meetings of all staff within a division, in circumstances where that feedback was or could reasonably be perceived as critical of the performance of individual employees.

219. The PCP is not established. Team specific feedback was not presented in either general meetings of managers or of staff. We have set out above the feedback about which complaint is made. The feedback was expressed in high-level terms, even if the Claimant believed that some or all of it related to him and his team. There is no evidence that it was perceived by others as critical of the Claimant's performance. For example, the Claimant does not refer in his witness statement to comments by or discussions with colleagues to the effect that they understood or perceived the feedback to relate to specific teams or managers, or more pertinently to the Claimant himself. During a significant exchange in the course of cross examination, the Claimant conceded that Ms Gordon had never expressly vocalised that the Claimant or any member of his team had created an atmosphere of bullying, harassment, fear or intimidation. This concession was in marked contrast to the assertion in paragraph 36 of his witness statement that Ms Gordon had *"repeatedly"* singled out his areas for criticism. Indeed, he said during cross examination that he could not remember *"the verbiage"* that went with the presentation and further conceded that he did not think Ms Gordon was specific in terms of an area. His evidence in his witness statement did not stand up under cross examination.

PCP (5): Not holding one-to-one follow-up meetings between employees and external consultants in cases where managers felt aggrieved or unhappy about feedback presented by external consultants as part of the cultural survey.

220. There were no one-to-one follow up meetings between the Claimant and Ms Gordon. However, that was because Ms Gordon's declined to meet with the Claimant rather than because the Respondent would not hold or facilitate one. We are satisfied that the Respondent had no objection in principle to holding or facilitating any such meeting. The record of extensive meetings with the Claimant to understand and address his issues of concern evidences the lengths to which the Respondent is willing to go to engage with employees who feel aggrieved or unhappy. The Claimant's complaint is more accurately that the Respondent did not compel Ms Gordon to meet with him. As framed, the PCP is not established.

PCP (6): Requiring employees within Mr Coleman's team to watch the entirety of a video of Patrick Lencioni's talk on 'Five Dysfunctions of a Team'.

221. We are satisfied that Mr Coleman's team were expected to attend the strategy day on 28 January 2015 and to participate in it, including by attending the presentations, and that the expectation in that regard was

tantamount to a requirement sufficient to establish the existence of a practice. The PCP is established.

PCP (7): Not providing employees at grade SG26 with detailed job descriptions.

222. Whilst there is some lack of clarity as to what this means qualitatively, on balance we are satisfied that the PCP is established. Grade SG26 employees were issued with generic job descriptions that were not tailored to their role or responsibilities. We are satisfied that can fairly be described as a practice of not providing detailed job descriptions.

PCP (8): Sending information regarding contractual variations to employees' work e-mail addresses only.

PCP (9): Sending information regarding the changes to total compensation in March 2016 to employees' work e-mail addresses only.

223. It is convenient to deal with these PCPs together.

224. In order for claims of indirect discrimination and breach of the duty to make adjustments to succeed, a claimant must respectively establish that the respondent applied the PCP in question and that it was the respondent's PCP. In our judgement, the contended for PCPs, if indeed they were PCPs, were not applied by the Respondent and were not the Respondent's PCPs.

225. As regards PCP (8), there is no evidence available to us as to the Respondent's approach to variations to staff contracts or terms and conditions of employment, specifically whether communications about such matters on the Respondent's part were always or habitually sent to employees at their work email addresses. Notwithstanding the Hearing Bundle runs to over 3000 pages of documents, we have not been provided with a copy of the Claimant's contract of employment or written terms and conditions of employment (in the course of the hearing we were provided with the standard template terms for employees at grade SG26) or copies of letters or emails notifying changes, for example as a result of his promotions or following the introduction of new benefits or revised terms and conditions more generally. In the circumstances, there is no documentary evidence to indicate how contractual variations were generally communicated. In our judgment, PCP (8) has not been established. In so far as it concerns the March 2016 changes to total compensation, it was not the Respondent's PCP in any event.

226. The Claimant addresses the two PCPs together in paragraphs 66 to 68 of his witness statement, without distinguishing between them. In the context that other employees at his grade are said by him to have had their contractual compensation varied, he refers to two letters regarding "the proposed changes" that were sent in February 2016 by email. He refers to pages 776 to 778 of the Hearing Bundle. The first page is a one page

communication addressed to him from Caterpillar notifying that his salary grade would no longer be eligible for an equity grant and identifying that Global Compensation would host 'informational sessions' to answer questions and provide further detail. These were arranged with reference to U.S. Central Time and the options for joining included U.S. toll-free and International numbers to call. The communication was evidently authored in America, with a global audience in mind. There is no specific reference to Perkins Engines Group Ltd or to the Claimant either being a UK employee or an employee of the Respondent. Pages 777 and 778 are a Frequently Asked Questions Document. Again, it is a Caterpillar document intended for a global audience that makes no reference to the UK or to the Respondent.

227. Although the standard terms and conditions furnished to a grade SG26 employee notes their eligibility to be considered for grants of Restricted Stock Units ("RSUs"), consistent with the Tribunal's experience of many such incentive arrangements which are intended to benefit the global workforce of a group with a US listed parent company, the scheme under which Caterpillar grants RSUs is established and administered under the laws of the relevant State, and participation, whilst incidental to employment in the participant's home country, is otherwise managed by scheme administrators based in the US, with the exercise of relevant discretions resting in this case with Caterpillar Inc.'s Board. We are in little doubt that the Claimant's contractual rights in respect of the grant and exercise of RSUs were governed by the relevant State laws, even if his rights in this regard were overlaid by his mandatory rights as a worker in the UK.

228. We find that the February 2016 communication was a communication from Caterpillar Inc. and, as such, that any claimed PCP was applied by it/was its PCP rather than the Respondent's. In her evidence, Ms Webb confirmed that the communication emanated from Caterpillar Inc.'s executive office in the US and that she had been unaware that employees at the Claimant's grade would no longer be eligible for equity grants or that the communication was to be issued. If the Respondent did apply a PCP, it seems to us that the PCP would be failing to communicate anything at all to its grade SG26 employees regarding the fact that its US parent had decided they would no longer be eligible for equity grants and that adjustments would be made to other elements of their remuneration to maintain their existing 'market-based total compensation'. In our judgement, for these reasons alone, the claim cannot succeed.

229. Even if, which might be indicated by Mr Varnam's comments at paragraph 83 of his written submissions, the issue is to be analysed in terms of agency, we do not consider that Caterpillar Inc. could be said to have been acting as the Respondent's agent in respect of communications regarding the RSUs. It was communicating about such matters on its own behalf, being the US based parent of a global organisation that made and administered equity grants in respect of its own US listed shares/stock. But even assuming for these purposes that such agency and authority is to

be inferred by reason that the Respondent was part of the Caterpillar group, the fact that on this occasion the communication may have been sent to employees at their work email addresses, does not evidence a wider practice of communicating contractual variations (or, indeed, adjustments to pay and benefits that did not amount to a contractual variation) by work email only.

230. As regards any indirect discrimination complaint, we would have said, in any event, that the approach was both legitimate and proportionate. Mr Blin said in evidence that perhaps 2-3,000 employees globally would have been affected by the changes. As Ms Duane's summarises it, there was a legitimate need for efficient, timely and consistent communication of relevant workforce communications on a large scale in the context of a business with a substantial global workforce. If the PCP was applied it involved the use of an established, secure and centralised network for communications emanating from an executive office in the US that had no knowledge or particular insight as to practices or specific issues in different countries, at specific sites, or affecting individual staff. We do not think it would have been proportionate to expect the executive office in the US to have taken steps to identify in advance how this information might have been communicated on a more timely basis to each affected individual.

231. As regards any complaint that the Respondent breached its s.20 duty to make adjustments, there must be an issue as to whether the Respondent's knowledge of the Claimant's disability (or of any disadvantages to which any PCPs gave rise) should be imputed to Caterpillar Inc., who otherwise had no knowledge of the Claimant's disability or of its effects. We have referred already to the strict confidentiality that was sought and observed in relation to the Claimant's condition and its effects.

PCP (14): Unilaterally cancelling grievance (or grievance appeal) hearings when that was deemed necessary/convenient by the manager conducting the grievance or grievance appeal.

232. The meetings identified in the List of Issues all relate to the grievance appeal process. The PCP is established in that, whether or not they were cancelled for a legitimate reason and regardless of the fact that meetings were also cancelled by the Claimant, the Respondent did unilaterally cancel meetings. We have found that the Respondent unilaterally cancelled the grievance appeal meetings on 14 March, 11 April and 26 September 2018, 16 January and 23 September 2019, January 2020, 11 March 2020 and 27 January 2021. Whilst we have no direct evidence of the Respondent's practice more generally, something the Claimant would not be privy to, we are satisfied that Mr Cotterell's conduct of the grievance is indicative of a general practice within the Respondent, rather than evidence of a one-off state of affairs solely impacting the Claimant. The fact that a number of meetings were unilaterally cancelled of itself points to the likelihood of recurrence, but also indicates that it was not a unique set of events particular to this case. In accordance with the principles in Ishola v Transport for London [2020] EWCA Civ 112, we are satisfied that

the Claimant's experience is indicative that this would happen again in future if a hypothetical similar case were to arise, and accordingly that the PCP is established.

PCP (15): Not requiring managers hearing grievances or grievance appeals to make proposals for redressing employees' grievances, even in circumstances where the employee in question had been signed off sick from work.

233. The PCP is not established. Managers were expected to make proposals for redressing employees' grievances in all cases. The Respondent's Grievance Policy states that managers will provide a written response to any grievance. We shall return to the length of time the processes took, which is a separate issue. However, the detailed grievance and grievance appeal outcomes (which we calculate, in the case of the grievance, runs to some 30 pages in total, inclusive of Mr Goldspink's decision on the Claimant's additional concerns) evidence to us that this claimed PCP was not applied by the Respondent. On the contrary, the outcome letters and the detailed notes of Mr Goldspink's and Mr Cotterell's many meetings with the Claimant provide extensive evidence of a Respondent whose practice was to actively seek resolution of employee concerns and grievances, and which made proposals for redressing grievances, including in some instances where they had not been upheld. In the case of the Claimant, the Respondent's commitment to resolution included funding Mr Truter's participation in the process and scheduling meetings around his more limited availability, as well as making available two very senior managers, with the requisite authority, to hear the Claimant's grievance and thereafter his grievance appeal.

234. At paragraph 195 of her written submissions, Ms Duane has summarised the redress that emerged during each stage of the Goldspink led grievance process. She notes, as we do, that the Claimant received an apology for the Lencioni video (notwithstanding we have identified above that the Respondent did not in fact know and could not reasonably have known that he would be put at a substantial disadvantage by being expected to watch it), and that the Claimant acknowledged in the course of cross examination that the provision of reassurances in relation to the video were *"a significant moving of the line" and "… very important in a positive way"*, even if he subsequently went on to suggest that it was a *"limited apology"* with a lot of conditionality around it. We cannot agree with that latter characterisation of the initial apology. Viewed objectively, the apology (page 1171) was meaningful, unequivocal and genuinely expressed. Critically, as Ms Duane notes in her written submissions, the Claimant was asked by her more than once during cross examination to identify what might have been done differently or what further steps might have been taken, but he could not really say. In his witness statement, he says, *"I needed things to be resolved"*. At Tribunal he said, *"I wanted the fire lit in my head to be under control".* Without more, those comments fail to engage with the specific complaint or to provide a practical illustration of how it is said that grievance/grievance appeal managers were not required to make proposals for redress of grievances.

235. During the hearing and in coming to this judgment, we have increasingly come to the view that the Claimant's complaint is less that the Respondent applied a PCP of not requiring managers hearing grievances or grievance appeals to make proposals for redressing employees' grievances, rather that the Respondent did not uphold all his concerns or see things as he saw them.

PCP (16): Not requiring managers hearing grievances or grievance appeals in circumstances where the affected employee was signed off sick from work as a result of matters connected with the grievance to seek to facilitate the employee's return to work as part of the grievance outcome.

236. The PCP is established. Save that the grievance outcome might support this indirectly, there was no requirement or expectation by the Respondent in cases where the employee was on sick leave as a result of matters connected with the grievance, that grievance/grievance appeal managers should seek to facilitate the employee's return to work as part of the grievance outcome. Ms Duane rightly highlights the efforts that were made to facilitate the Claimant's return to work more generally, but we find these were matters for Mr Coleman and thereafter Mr Bond, as the Claimant's line manager, with support, guidance and involvement from the Respondent's HR team as appropriate. We are reinforced in our view by Mr Goldspink's letter to the Claimant dated 19 December 2016 in which he identified that the business remained keen to engage with the Claimant to review the previously agreed adjustments and agree further clarity in relation to them (page 1109). He identified that this could be explored further with Mr Bond as soon as the Claimant felt able to do so. Subsequently, in his grievance outcome letter of 1 June 2017, Mr Goldspink encouraged the Claimant to spend time with Mr Bond to gain insight on how things had changed within GED-UK (page 1223). They were entirely sensible suggestions on Mr Goldspink's part, but in our judgement, notwithstanding any concessions by the Claimant during cross examination, it would be stretching the meaning of Mr Goldspink's words to conclude that they evidence that the Respondent did require grievance/grievance appeal managers to facilitate a return to work. The fact Mr Goldspink pointed the Claimant in the direction of Mr Bond, and at the conclusion of the process invited him to explore any outstanding issues with Ms Webb, evidences to us that the expectation was that the Claimant's return would be managed and facilitated through the usual channels in the normal way.

237. In conclusion, PCPs (1) (as clarified above), (2), (3), (6), (7), (10), (11), (13), (14) and (16) have been conceded or established.

<u>The further claimed PCPs in respect of the s.20/21 complaints</u>

PCP (17): Not paying for employees' private medical or psychological treatment.

238. The Claimant asserts that the Respondent had a PCP of not paying for employees' private medical or psychological treatment. The Claimant's concern is in fact that there were delays in certain of Mr Truter's invoices being paid by the Respondent. We heard evidence that the Respondent's standard payment terms are 60 days. It seems to us that the arrangements about which the Claimant is concerned is the Respondent's practice of settling third party supplier invoices up to 60 days after their submission or indeed, possibly even paying such invoices beyond its documented 60 day payment terms, certainly where administrative issues resulted in delays. If so, that is a different PCP to the one contended for. There is no evidence that the Respondent's practice is or was not to pay for employees' private treatment. The only available evidence is that over a number of years, the Respondent settled invoices from Mr Truter totalling over £32,000. That evidences, on the contrary, that the Respondent had a PCP of paying for private treatment at its discretion in appropriate cases. The Claimant has failed to establish the claimed PCP.

239. In any event, we have difficulty in understanding the basis upon which the Claimant might claim to have been put at a disadvantage as a result of the claimed PCP, namely how his ASD meant that he was more likely to have to settle Mr Truter's outstanding invoices himself (and thereby be left financially out-of-pocket).

PCP (18) – organising meetings throughout the full working week (9am to 6pm, Monday to Friday), including at times when individual employees were not due to be at work.

240. The PCP is conceded by the Respondent.

PCP (19): From January 2015, holding team meetings in Mr Coleman's division on Mondays.

241. We do not understand the Respondent's denial of this PCP which, at paragraph 160 of Ms Duane's submissions, seems to be based upon the claimed limited impact upon the Claimant. That goes to whether or not the Claimant was disadvantaged by it. We are satisfied that from January 2015 the Respondent applied, or operated, a practice of holding team meetings in Mr Coleman's division on Mondays. The PCP is established.

242. In conclusion, PCPs (18) and (19) have been conceded or established.

<u>S.19 of the Equality Act 2010 - the claimed group disadvantage and, if it is established, whether the Claimant was, or would have been, put at that disadvantage</u>

243. Mr Varnam has not directly addressed the question of the appropriate pool for comparison purposes, for example whether it should be the entire national workforce or an internal pool consisting of the whole of the Respondent's workforce or some discrete section of it i.e, those based at its Peterborough site(s) or those employed at grade SG26. However, as regards PCP (1), in his submissions he refers to "all of the Respondent's

employees", whereas "other" employees are relied upon in relation to PCP (2). "Managers" are seemingly the relevant comparator pool for PCP (3), whereas "another manager in the same circumstances" and "another manager" are referred to respectively by him in relation to the application of PCPs (4) and (5). The comparator pool for PCP (6) is indicated by the formulation of the PCP, namely that employees within Mr Coleman's team were required to watch the Lencioni video. However, Mr Varnam does not address that particular claim of indirect discrimination in his written submissions, and he did not address this gap in his oral submissions. The List of Issues refers to "people" in general with Asperger Syndrome being at a disadvantage by reason of PCP (6). Likewise, PCP (7) is not addressed by Mr Varnam in terms of the claim of indirect discrimination, so that again we must have regard to the List of Issues to seek to understand the basis of the claim. Mr Varnam says in his written submissions that the Claimant relies on the provision of a job description primarily as a reasonable adjustment. Notwithstanding his lack of submissions in respect of the indirect discrimination claim, we have proceeded on the basis that the issue is not conceded. PCPs (8) and (9) are referred to in Mr Varnam's submissions as complaints of both indirect discrimination and breach of the duty to make reasonable adjustments, though he goes on to address why he says the reasonable adjustments claim in respect of PCP (9) is "plainly made out". The indirect discrimination claims are not addressed, leaving us once more to look to the List of Issues to understand the basis of the claims. The List of Issues seems to make reference to the population at large, albeit the two PCPs are framed with reference to 'employees'. PCP (10) is addressed briefly by Mr Varnam in his written submissions, but again not in terms of indirect discrimination. The PCP itself is framed with reference to 'employees', though the List of Issues seems to make reference again to the population at large. Mr Varnam's submissions in respect of the indirect discrimination claims deriving from PCPs (11), (12), (13), (14) and (15) proceed in each case on essentially the same grounds – see paragraphs 95 to 98 of his written submissions. The comparator pool is identified as being "any employee in a similar situation". Mr Varnam makes no submissions in respect of the indirect discrimination claim deriving from PCP (16), so that again we must have regard to the List of Issues to understand the basis of the claim. The PCP itself is framed with reference to affected employees signed off sick from work as a result of matters connected with their grievance, though having regard to the List of Issues could extend to the population at large.

244. None of this is necessarily fatal to any of the indirect discrimination claims, but it makes the job of the Tribunal more difficult in a case involving 16 discrete complaints of indirect discrimination. Regardless of the appropriate pool for comparison purposes, many of the Claimant's complaints do not succeed because he has failed to show the requisite adverse disparate impact as required by s.19(2) of EqA 2010. He has the primary burden in the matter. That burden may be discharged, amongst other things, by statistical or expert evidence and other witnesses, including the Claimant himself. In appropriate cases, Tribunals may take judicial notice of matters that are well known, the most often cited being

the adverse impact upon women of employers not permitting flexible or agile working. Otherwise, however, Tribunals should avoid reaching conclusions intuitively or on the strength of their gut feeling in the matter. There must be a proper evidential basis for concluding that the relevant PCP has given rise, or would give rise, to disadvantage.

245. We are concerned with PCPs (1) (as clarified above), (2), (3), (6), (7), (10), (11), (13), (14) and (16). In all but one matter, the 'group' disadvantage for the purposes of the s.19 complaints is framed in the same terms as the 'individual' disadvantage for the purposes of the s.20/21 complaints. That includes PCP (6), in respect of which his particular susceptibility to the group disadvantage is said to be by reason of a particular element of the Lencioni video. As regards PCP (13), the Claimant additionally identifies that delay in resolving the grievance process prevented his return to work.

246. We have some difficulty with how the group disadvantage arising from the application of PCP (2) has been expressed, namely being caused considerably greater stress by being confronted with a situation in which objective accuracy was given less weight than subjective personal impressions. That does not reflect how the cultural survey results were presented. There was no relative assessment involved. The purpose of the exercise was to present the staff feedback from the survey without any further gloss in terms of its objective accuracy.

247. On some issues, insufficient thought has been given by the Claimant to how *"people with Asperger's Syndrome"* (this being how the claimed disadvantaged group is identified for the s.19 complaints) might have been put at a disadvantage compared to people who do not have Asperger Syndrome by reason of each PCP. The evidence is relatively limited and in the case of PCP (6) (*being disproportionately at risk of becoming distressed and of developing a stress reaction to the Lencioni video*), PCP (10) (*being disproportionately likely to be on long-term sick leave and as such to be deprived of sick pay*), PCP (16) (*disproportionately likely to be signed off sick and as such to remain off work as a result of a failure to facilitate a return to work*), the contended for group disadvantage comprises nothing more than a bare assertion on the part of the Claimant in his witness statement.

248. We have summarised the available medical evidence at some length already. Much of it relates specifically to the Claimant rather than more generally to those with Asperger Syndrome. Dr Wood's Second Report provides a brief overview of the condition and its common traits. Similarly, Dr Lewis offers an overview of the condition. Dr Lyle's report is focused upon the Claimant and offers no insights more generally regarding those with Asperger Syndrome. Although we were not taken to this in the course of the hearing and, to the best of our knowledge it is not referred to in either the Claimant's witness statement or Mr Varnam's written submissions, Jo Keys of Autism Anglia delivered a presentation to the Respondent about 'Autism in the Workplace' on or around 19 February 2015. It contains relevant insights, but unsurprisingly does not engage directly with the specific PCPs and claimed group disadvantages identified

in the List of Issues. Nevertheless, it is a useful additional source to which we have had regard in the findings and conclusions that follow.

249. Our conclusions in respect of the relevant PCPs are as follows:

PCP (1)

250. We are not satisfied that people with Asperger Syndrome, whether within the population at large or within the Respondent's workforce, are or would be put at a disadvantage by not being given advance notice of the content of presentations, alternatively by not being provided with the content of such presentations, at events they are required to attend. The Claimant asserts that people with Asperger Syndrome are considerably more likely to suffer stress and anxiety when observing presentations without notice of the contents. We do not draw that conclusion from the three key areas of difference necessary for a diagnosis of ASD focused upon in the World Health Organisation International Classification of Diseases highlighted in paragraph 98.1.1.2 of the Claimant's witness statement, whether that be difficulties with social communication skills and reciprocal social interaction or lack of flexibility of thought and difficulty adapting to sudden or unexpected change. Whilst the Claimant experienced stress and anxiety in such situations (or was at increased risk in that regard), there is little or no evidence that it is a common or more common response in those with Asperger Syndrome or ASD. For example, the Claimant does not suggest that this is a shared or similar experience reported by others with Asperger Syndrome or ASD he has been in contact with. He cites statistics from the National Autistic Society that it is common for 40%-50% of autistic people to receive a clinical diagnosis of anxiety and 47% (we think he means of that group) fall into the severe anxiety category based on GAD diagnostic data (page 2481). However, those statistics do not indicate that such anxiety is, amongst other things, likely to be focused specifically on the content of presentations. We think this is a matter in respect of which the Claimant has assumed that his own very specific anxieties are shared by the group or even some part of it. We do not share that assumption. The group disadvantage has not been established.

PCP (2)

251. We are not satisfied that presenting employees' subjective opinions as part of cultural survey feedback carries with it a risk of perceived injustice. As we have noted already, we have difficulty with how the claimed group disadvantage is described. In our view, it is inaccurate to suggest, as the List of Issues identifies, that the PCP meant that employees who attended the presentation were confronted with a situation in which objective accuracy was dismissed in favour of subjective personal impressions. That is to mischaracterise the presentation and how it would have been perceived. If it is suggested that the presentation would be perceived in that way by those with Asperger Syndrome or ASD, we cannot identify any evidence to support the proposition. The group disadvantage is not

established. In any event, we would have said that the Respondent's practices in respect of collating and presenting staff feedback was justified.

252. As with PCP (1), we have already set out why we have concluded that the Respondent did not know, and ought not reasonably to have known, at the time of the survey or when the survey results were fed back that the Claimant was disadvantaged by the PCP in the way he identifies.

PCP (3)

253. By contrast, we consider that the group disadvantage is established in relation to PCP (3). In situations where a manager perceived the points raised in the cultural survey feedback to be inaccurate, then we have regard to Dr Lewis' observation in her report dated 25 July 2022 that "*individuals with autism may find it more difficult than their non autistic peers to accept perceived injustices and be able to move on from negative life experiences.*" (page 1912). The grievance, grievance appeal and these proceedings are each testament to the Claimant's evident difficulties in that regard. We consider that PCP (3) put the Claimant at the same disadvantage as the group.

PCP (6)

254. For the same reasons that the group disadvantage in respect of claimed PCP (1) is not established, we conclude that it has not been established in respect of PCP (6). There is no evidence that people with Asperger Syndrome or ASD in general or within Mr Coleman's team (by which we understand, in the absence of any submissions from Mr Varnam on the matter, GED-UK) are or would be disproportionately at risk of becoming distressed and of developing a stress reaction to the Lencioni video. As with PCP (1) we consider that the Claimant has assumed that identified risks specific to his own anxieties and unique experiences (particularly as a result of the Entwistle incident and the cultural survey feedback presentation) are shared by the group or some part of it.

PCP (7)

255. Notwithstanding Mr Varnam's statement that this PCP is primarily pursued as a s.20/s.21 EqA 2010 complaint, the group disadvantage is established. We agree with the Claimant that employees with Asperger Syndrome or ASD, characteristically have a greater need for structure, clarity and certainty than employees who are not autistic. In this regard, Dr Woods wrote in her Second Report of the issues that can arise when an individual with Asperger Syndrome lacks explicit instructions. We are satisfied that the lack of structure, clarity and certainty that resulted from not having a detailed job description put them, or those at grade SG26 within the Respondent's organisation, at a comparative disadvantage. We consider that PCP (7) put the Claimant at the same disadvantage as the group. There is a significant volume of evidence to that effect within the Hearing Bundle, and we have referenced some of it in our findings above.

PCP (10)

256. The Claimant asserts in paragraph 98.10.1.2 of his witness statement that people with Asperger Syndrome are disproportionately likely to be on long-term sick leave. We were not referred to any specific evidence or data on this point. We are concerned with those who are working and might need to access sick pay over an extended period of time due to long term ill-health. None of the medical experts refer to people with Asperger Syndrome or ASD who are in the workplace experiencing higher levels of sickness absence. The group disadvantage has not been established.

PCP (11)

257. In considering whether the PCP in question gives rise to a group disadvantage, we have regard to the fact that communication difficulty is common amongst people with ASD, as is rigid, inflexible thinking. As the Claimant described it to Dr Woods, *"Where my views on a matter are challenged then the rigidity of my structured mind can cause issues. I need to be persuaded to change in the right way …"* (page 227). These considerations point to those with Asperger Syndrome or ASD, and certainly the Claimant, requiring time and space within any process to respond to others' thoughts and views, in order to adapt their own thinking and views. It points to those with Asperger Syndrome or ASD being disadvantaged by time limited grievance and grievance appeal processes.

258. The Claimant's discursive style of communication is much to the same point. He is not someone who can be rushed or pressured to offer a view or explanation. We have referred at paragraph 159 above to the observations made by Mr Truter in his email to Ms Francis of 26 June 2018 regarding the conflict created for the Claimant in having to adhere to a set timeline, as well as his emphasis upon the Claimant's need to process information. He suggested many of the adjustments to the grievance and grievance appeal processes, including the 'parking thoughts' strategy. During both the grievance and grievance appeal processes the Claimant needed time out for reflection. The Claimant's email of 9 March 2017 (page 1161) is just one of a number of documents that illustrate the point. Suggestions by the Respondent that the process might on occasion be adjusted by the addition of meetings or by bringing forward meetings were met with resistance and, indeed, seemed to cause the Claimant a marked degree of anxiety. This points to the conclusion that even if the group disadvantage was to be established, the Claimant was not at that disadvantage, on the contrary that he would be disadvantaged by a time limited process.

259. The issue is not an easy one since, as we have said already, we agree with the Claimant that employees with Asperger Syndrome or ASD characteristically have a greater need for structure, clarity and certainty than employees who are not autistic. Of course, it may be that structure, clarity and certainty can all be provided within an open ended grievance or

grievance appeal process, or at least one which does not operate to fixed timescales. When we think of the Claimant's specific needs and the various disadvantages he laboured under, the question in our minds is whether his need for structure and certainty, certainly in so far as it is said that these ought reasonably to have been met through a fixed timetable and fixed periods between meetings, can be reconciled with his need over the course of the grievance and grievance appeal to deal with the issues in manageable sections, including closing off issues and allowing him time to reflect before moving on to a new issue. This conflict is evident when one considers what happened in relation to the second and third elements of the grievance, namely in respect of the cultural survey and its resolution. Had there been a fixed timetable for resolution of the grievance, the Claimant's evident need to re-visit the cultural survey issues with Mr Goldspink, which we conclude was driven by his condition, specifically his tendency towards rumination, his rigid inflexible cognitive style of thinking, and increased difficulty in accepting perceived injustices, would not have been met i.e, he would have been put at a substantial disadvantage. The same point can be made in relation to case management and the cultural survey at the grievance appeal stage.

260. Notwithstanding the contrary indicators, we conclude on balance that the group disadvantage has not been established and, if we are wrong in that regard, that the Claimant was not, in any event, at the same disadvantage as has been identified by him in relation to the group.

261. Although the group disadvantage has not been established, we have set out below why in any event we consider the PCP to be justified.

PCP (13)

262. As above, we agree with the Claimant that employees with Asperger Syndrome or ASD, characteristically have a greater need for structure, clarity and certainty than employees who are not autistic. But once again, there is insufficient or even no evidence before us that once the grievance or grievance appeal process is concluded, people with Asperger Syndrome or ASD are more likely to experience stress and anxiety if the decision itself is not given within a specified maximum time. In our judgement, any stress and anxiety results from uncertainty and lack of communication, for example not being given an indicative timescale and not being updated as appropriate, rather than by not being given a fixed date for a decision at the outset. As we have observed already, structure, clarity and certainty can still be provided within an open ended process or one that does not operate to fixed timescales in terms of a conclusion.

263. Although the group disadvantage has not been established, we have set out below why in any event we consider the PCP to be justified.

PCP (14)

264. We have already referred to the World Health Organisation International Classification of Diseases, specifically to the lack of flexibility of thought and difficulty adapting to sudden or unexpected change which is a key difference necessary for a diagnosis of ASD.

265. In her report, Dr Lewis states:

> *"In the case of David Jenkins the grievance appeal procedure exacerbated his symptoms of depression and anxiety and significantly impacted upon his mental health."* (page 1912)

With respect to Dr Lewis, this is ultimately a matter for this Tribunal. She has pre-empted our findings. It is, of course, a matter on which she may be asked to provide her further professional opinion in light of the Tribunal's specific findings as to how the grievance appeal was handled by the Respondent. Whilst her comments are relied upon by the Claimant in support of PCP (14), they do not assist us in identifying the specific aspects of the grievance appeal procedure that Dr Lewis might identify as having put the group, or indeed the Claimant, at a particular disadvantage. We can understand why it would be said that people with Asperger Syndrome or ASD would be put at a disadvantage by meetings being unilaterally cancelled with little or no notice and/or little or no explanation and/or little or no indication as to next steps. However, the PCP is not framed in those terms, rather solely with reference to the employer acting unilaterally in the matter. There is no evidence before us that the fact an employer acts unilaterally per se puts those with Asperger Syndrome or ASD at a particular disadvantage

PCP (16)

266. We set out at paragraph 276 below why we consider that the Claimant was not put at a particular disadvantage because Mr Goldspink and Mr Cotterell were not required to seek to facilitate his return to work as part of their grievance and grievance appeal outcomes. For all the same reasons, we consider that employees with Asperger Syndrome or ASD who are or might be signed off sick from work as a result of matters connected with their grievances are not, or would not, be put at a particular disadvantage by the Respondent's approach, which is to delegate responsibility for the matter to the employee's line manager and an HR Business Partner, with support as appropriate from occupational health or other relevant health professionals.

<u>Justification – the s.19 complaints</u>

267. In view of our conclusions above, we are only concerned with PCPs (3), (7), and (14), though address PCPs (11) and (13).

268. As to whether the Respondent has shown that the PCPs were a proportionate means of achieving a legitimate aim, the Respondent has the burden of proof in the matter. As the EHRC's Employment Code reminds us, the stated aim being pursued must represent a real, objective consideration. Once a legitimate aim is established, consideration of whether an employer acted proportionately in the matter requires an objective balance to be struck between its reasonable needs and the discriminatory impact of the PCP in question. Our conclusions are as follows:

PCP (3)

269. We agree with the Respondent that the cultural survey was in pursuit of its legitimate aim of continuous improvement in a competitive marketplace. In the experience of this Tribunal, employee engagement surveys are an accepted, long-established and extensively used business tool for securing feedback from employees to help implement change within organisations. Amongst other things, they provide an opportunity for employees to feel that they have been heard and that their views matter. The question is whether the Respondent's approach, including providing feedback to employees in the form of a presentation, was proportionate to its aims or whether a more proportionate approach would have involved affording managers a right of reply to points raised in the cultural survey feedback, where the manager felt that the points raised were inaccurate. In our judgement, to have offered managers a platform to air their points in reply would have significantly devalued the exercise and undermined employee participation in future surveys. It would have risked communicating to those who had participated in the survey and to the workforce more generally that the Respondent did not value their opinions, was not really listening and was unwilling to accept their feedback unless it accorded with its own settled views. We consider that the approach advocated by the Claimant would have been significantly detrimental in terms of employee engagement. The Respondent has satisfied us that the PCP was a proportionate means of achieving a legitimate aim.

PCP (7)

270. We agree with the Respondent that its use of essentially generic job descriptions to provide a framework for employees at the Claimant's grade, supplemented by separately discussed and agreed objectives was in pursuit of the legitimate aim of efficient management and handling of the business. We further agree that the Respondent's approach was proportionate to those aims. We were not told how many employees were employed at grade SG26 in the UK, though globally the population was said to be somewhere between 2,000 and 3,000 employees. Mr Varnam does not identify an alternative, more proportionate approach to the one adopted. The Claimant suggests that reasonable adjustments should have been made. We agree that this is a reasonable adjustments issue as we return to below. To the extent the PCP put grade SG26 employees

with ASD at a disadvantage, the Respondent has satisfied us that it was a proportionate means of achieving a legitimate aim.

PCPs (11) and (13)

271. Ms Duane's written submissions in respect of these PCPs extend over six pages. She has fairly and accurately summarised the evidence that emerged in the course of the hearing, including the various concessions made by the Claimant in the course of cross examination. Amongst other things, she highlights Mr Abbs' documented comments in the course of the grievance (he was acting as the Claimant's workplace companion at the time) that the Respondent was:

> *"…working hard and taking this seriously and being professional about the whole thing. Comes across in spades."* (page 1112)

As we shall return to, we agree with Ms Duane's analysis of the adjustments that were made to the grievance process for the Claimant's benefit and her description of them as *"significant"*, or at the very least that they were material, and that they impeded the timeline. In terms of justifying the PCP, we accept that not requiring grievances/grievance appeals to be resolved within any maximum time period and not requiring managers hearing grievances/grievance appeals to give a decision within any maximum time following the conclusion of the grievance/grievance appeal process, was because the Respondent wished instead to review employee grievances/grievance appeals in detail and carefully analyse/scrutinise them. We agree that this was a legitimate aim. We are further satisfied, notwithstanding the length of time taken to come to a conclusion in the Claimant's case (to which we return below) that the Respondent's general approach was proportionate to achieving that aim. We agree with Ms Duane that it would be disproportionate to curtail or otherwise impact that detailed review and careful analysis/scrutiny by adding or imposing an arbitrary timescale to the process which might lead to hurried and ultimately unfair and unjust outcomes, even if it is said that specific adjustments might reasonably have been made to ameliorate the particular disadvantages experienced by the Claimant as a result of the application of the PCPs.

<u>S.20 of the Equality Act 2010 – whether the PCPs put the Claimant at a substantial disadvantage and, if it did, the Respondent's knowledge in the matter</u>

272. We are concerned with PCPs (1) (as clarified above), (2), (3), (6), (7), (10), (11), (13), (14), (16), (18) and (19).

273. We have already set out why we have concluded that the Respondent did not know, and should not reasonably have known that the Claimant was disadvantaged by PCP (1) in the way he identifies prior to 28 January 2015; likewise, why we conclude that the Respondent did not know, and should not reasonably have known, that the Claimant was disadvantaged by PCPs (2), (3) and (6) in the ways he identifies.

PCP (1)

274. We conclude that the Claimant was at a disadvantage by reason of not being provided with a detailed overview of the topics or broad themes that would be explored in the course of presentations he was required, or expected, to attend, particularly events with some psychometric content. His need for structure, clarity and certainty, and rigid style of thinking meant that he needed time to prepare for such events, including information about the content in advance, to be able to participate constructively and effectively in them. For the reasons identified in paragraph 108 above, we are satisfied that this was understood by the Respondent by no later than 1 April 2015.

PCP (7)

275. For the reasons set out in paragraph 255 above, we conclude that PCP (7) did put the Claimant at a substantial disadvantage compared to individuals who are not disabled.

PCP (10)

276. By reason of his ASD, or perhaps more specifically his related depression and anxiety, the Claimant was disproportionately likely to be (and was) on long-term sick leave. In the circumstances, the provision under which company sick pay ceased to be payable after 52 weeks' sickness absence put him at a substantial disadvantage in comparison with persons who are not disabled.

PCP (11)

277. For all the reasons set out in paragraphs 257 to 261 above, we do not consider that the Claimant was put at a substantial disadvantage by the PCP, instead that he would have been substantially disadvantaged by a time limited grievance and grievance appeal process.

PCP (13)

278. In contrast to the group, and having weighed in the balance that his need to know the Respondent had 'done the right thing' meant the Respondent should not rush any decision, we nevertheless conclude that, particularly by reason of his depression and anxiety, the Claimant was more likely than non-disabled persons to be caused stress and anxiety if an outcome was not provided within any maximum period of time once any grievance/grievance appeal investigation was concluded, and accordingly that the PCP put him at a substantial disadvantage in comparison with persons who are not disabled.

PCP (14)

279. Again, we conclude that the Claimant has established that he was put at a substantial disadvantage even if persons with Asperger Syndrome or ASD were or would not be. We refer in particular to the minutes of the grievance appeal meeting on 17 October 2018 (page1598) in which the Claimant's stress and anxiety are palpable, even though Ms Francis had explained to him in September that there was a medical-related reason why the meeting planned for 26 September 2018 could not go ahead. Nevertheless, the rigidity of the Claimant's structured mind, his anxiety, his difficulty in processing information, and his particular difficulty in seeing things from the other viewpoint / impaired emotional reciprocity meant that he experienced this and other unilateral cancellations on the Respondent's part as disproportionately stressful and upsetting, even if he himself was responsible for meetings being cancelled.

PCP (16)

280. We conclude that the Claimant was not put at a particular disadvantage because Mr Goldspink and Mr Cotterell were not required to seek to facilitate his return to work as part of their grievance and grievance appeal outcomes. Within the Respondent, as we believe is the case with many employers, the primary responsibility for managing sickness absence rests with an employee's line manager, acting in partnership with an HR Business Partner and taking advice as appropriate from occupational health and other relevant professionals. The Claimant has not identified how he might be said to have been at a particular disadvantage because his absence, and potential return to work, continued to be managed through the usual channels in the normal way, rather than through Mr Goldspink and thereafter by Mr Cotterell. If anything, it might be said that the Claimant was in a better position than non-disabled employees, or employees who did not have Asperger Syndrome, in that Mr Goldspink gave thought within the grievance process to the issue of the Claimant's return to work. Given his seniority within the business, we think the very fact of his involvement together with any views he expressed around the Claimant's potential return would have carried weight and been more likely to be acted upon.

PCP (18)

281. We refer to our findings at paragraphs 112 to 114 above.

282. The fact that the Claimant has only been able to identify one such meeting outside his agreed reduced hours is not determinative of the matter, since scheduling even one meeting outside his core hours could put him at such a disadvantage. At the occupational health review meeting with Ms Routledge on 10 December 2014, attended by Mr Coleman and Ms Picollo, there was some discussion of whether the flexible working arrangements were working. The Claimant reported difficulties due to the

volume of workload, apparently linked to the year end. He was also in the process of transitioning into his new role. They went on to discuss the follow up work to the staff cultural survey, including the working party. When it was discussed that the Claimant need not participate in the ongoing process, or the working party in particular, Ms Routledge noted that the Claimant had expressed a clear wish to be involved. At a subsequent occupational health review in January 2015 (the precise date of which has been obscured by a hole punch in the Hearing Bundle), once again attended by Mr Coleman and Ms Picollo, the Claimant complained that the December 2014 working party discussion meeting had been scheduled outside his agreed revised working hours. The explanation offered by Mr Coleman was not that there was no need for him to attend or that he had not been disadvantaged by not attending or that he had participated entirely at his own choosing, rather that the meeting had been scheduled by Mr Coleman's PA who was unaware of the Claimant's working pattern. Notwithstanding he later referred to the matter as a *"blip"*, it was a significant initiative that it was important for him to continue to be involved in. We are satisfied that the Claimant was put at a disadvantage by having to attend the meeting outside his revised working hours, given that a 3pm finish had specifically been agreed as early on 7 November 2014 (page 416) to be a necessary adjustment for the Claimant in order to manage his stress and anxiety. Mr Coleman and Ms Picollo knew from that meeting that the Claimant would be disadvantaged if he was under some weight of expectation to attend relevant meetings outside his core hours. Mr Coleman's PA's lack of knowledge in the matter is irrelevant, since Mr Coleman and Ms Picollo's knowledge of the disadvantage is to be imputed to her.

PCP (19)

283. For essentially the same reasons as above, we conclude that PCP (19) likewise put the Claimant at a particular disadvantage as a disabled person after he returned to work from sick leave on 24 March 2015. By then, Mr Coleman and Mrs Webster had had sight of Dr Woods' Second Report and accordingly would, or ought reasonably to, have understood that he had significant communication difficulties, liked information and context around situations, and liked to know what is happening, where and when. In our judgment that level of detail would not have been supplied by reading notes of the team meetings or by relying on others to brief him as to what had been discussed. The resulting disadvantage was more than minor or trivial. It brought further potential pressure to bear on him.

284. The arrangements under which the Claimant worked a compressed four-day week did not reflect a lifestyle choice on the part of the Claimant, they were part of the overall arrangements in place to address his disability. It is clear from Ms Routledge's notes of the occupational health reviews on 24 November and 10 December 2014 that the agreed 3pm finish went hand in hand with the compressed working week arrangements. Mr Coleman and Ms Picollo were privy to those discussions. Whilst it is understandable that team meetings may have been moved to a Monday

during the Claimant's sickness absence to accommodate a colleague, the Claimant was disadvantaged when those revised arrangements remained in place once he returned to the workplace on 24 March 2015, not least in circumstances where he had been out of the business for approximately eight weeks as a result of disability related ill-health and needed to get back up to speed on developments in his absence.

Reasonable adjustments – the s.20 complaints

285. Paragraphs 9 to 26 of the List of Issues identify a range of adjustments that the Claimant asserts might reasonably have been made in relation to him. The burden of proof does not, of course, ultimately lie with the Claimant. He need only identify in broad terms the nature of the adjustments that would address the disadvantages for the burden to shift to the Respondent to show that the disadvantages would not be eliminated or reduced by the proposed adjustments or that they would not otherwise be reasonable adjustments to make.

286. As regards the established PCPs that we find disadvantaged the Claimant and of which the Respondent had actual or constructive knowledge, our conclusions are as follows:

PCP (1)

287. The Claimant's complaint is that he was not given notice in advance that he would receive the personality inventory invitation email of 20 April 2015. That is not a complaint within the ambit of the disadvantage that resulted from the application of PCP (1), and as such cannot succeed. In any event, in so far as he might complain more broadly about the Building an Empowering for Results Culture workshop, for the reasons already identified in paragraph 212 above, the Respondent discharged its duties to the Claimant, Once on notice of the disadvantage, it provided the Claimant with a detailed overview of the topics or broad themes that would be explored in the course of any presentations he would be required, or expected, to attend.

PCP (7)

288. The Claimant has identified in broad terms the adjustment that he says would have addressed the disadvantage, namely the provision of a detailed job description. Ms Duane submits that a detailed job description was shared and circulated with the Claimant for his input. That is incorrect. On 7 January 2015, Mr Coleman provided the Claimant with his *"thoughts on some near term objectives to get things going in your new role"* that he believed would augment clarity on the generic job role description. Of themselves, they did not serve to address the Claimant's stress and anxiety engendered by the ongoing uncertainty and lack of clarity around his substantive job content and responsibilities or the Respondent's expectations of him in the role. That is borne out by the Claimant's response the same day to Mr Coleman (pages 471 and 472) in which he

posed a number of questions arising out of the second stated objective regarding GED-UK 1st line MGPP construction, strategic priority setting and project list creation. Having done so, he wrote: "*I'd like some very clear outputs defined with respect to this and am happy to work towards something which gives us the ability to create some form of tool which allows us to work through scenarios"*. In our judgement he was not seeking a counsel of perfection, instead he made a limited number of what are, on the face of it, pertinent observations, before requesting clearly defined outputs. Mr Coleman did not come back to him to say that what he was requesting was incapable of being provided or was otherwise unreasonable, and that was certainly not his evidence at Tribunal. Instead, he simply failed to progress the matter further with the Claimant. We find his inaction in the matter to have been unreasonable, particularly given that Ms Routledge wrote to him on 15 January 2015 with an updated medical report on the Claimant in which she specifically highlighted two considerations for reasonable adjustments *"as previously agreed"*. She wrote:

> *"Structure – Dave requires structure and organisation around roles or strategy/direction and does not cope well with ambiguity or quick responses as he requires time to analyse and consider all options. This needs to be taken into consideration in his work role and will need to be monitored as his new role is in its infancy stages."*

Given the concerns she also expressed regarding the Claimant's emotional wellbeing and fitness to work, in our judgement her report should have triggered action by Mr Coleman to progress the discussion begun on 7 January 2015 regarding the Claimant's job role. There was a further missed opportunity in this regard following the meeting of 20 March 2015 at which it was discussed, and minuted by the Claimant, again under the heading of 'Structure' that, "clear need for definition of roles, expectations, organisation etc is important for me to understand relationships and accountability". Even had it not been appropriate for Mr Coleman or Ms Webster to explore this issue further with the Claimant whilst he was on sick leave between 30 January 2015 and 23 March 2015, in our judgement it should have been a priority on the Claimant's return to work. Instead, four weeks later, at the meeting on 20 April 2015 with Autism Anglia attended by Mr Truter, Mr Coleman and Ms Routledge, the issue had still not been progressed. Ms Keys' minutes of the meeting record that Mr Coleman initially stated that the role had been documented. In fact it had not been documented beyond the initial generic job description. Thereafter, Mr Coleman had offered some loosely structured thoughts on near term objectives but otherwise had not engaged further with the Claimant to progress what was an agreed need for an adjustment. His potential thinking on the matter is revealed in so far as he went on to refer to the job description on 20 April 2015 as being, "specific for that pay grade" and seemingly answered in the affirmative when Mrs Webster asked whether the job role was as a clear as it was going to be. However, as we shall come back to, the notes that follow are not as clear as they might be in terms of how the matter was left, other than Mr Coleman confirmed that it was ok for the Claimant to ask questions for clarity on his role and responsibilities. There are no obvious actions within the list of

Actions that relate to the Claimant's job role/description. Nevertheless, in our judgement the Respondent breached its s.20 duty to the Claimant. It was not sufficient that Mr Coleman was available to provide clarity when needed, though that was an additional reasonable adjustment. The Respondent should have put in place a detailed, tailored job description for the Claimant's role as strategic projects manager.

PCP (10)

289. The Respondent is a large, profitable, well-resourced organisation. In our experience, it operates generous sick pay arrangements, maintaining those with more than ten years' service on full pay for up to 52 weeks in the event of sickness absence. We do not lose sight of the fact that the Sickness Absence and Pay Policy itself, coupled with the PHI arrangements for employees, could be regarded as an adjustment for those individuals within the business who are or become disabled and experience higher levels of sickness absence by reason of their disabilities. The question is whether it would have been reasonable for this employer to have gone further.

290. We take on board Ms Duane's submissions, including as to the sensitive way in which the Respondent managed the Claimant's ongoing absence from the business and met the costs of his sessions with Mr Truter as well as the costs of Dr Pearson's report to support the claim for PHI. However, we give limited weight to the Respondent's stated need for consistency and clarity in its policies and procedures, an argument that would otherwise always defeat the needs of disabled workers. In any event, the Sickness Absence and Pay Policy provides that in a appropriate cases discretion may be exercised to extend company sick pay, even if this is in exceptional cases. The duty of adjustment arises precisely because a provision, criterion or practice puts a disabled person at a disadvantage, necessitating that policies and procedures are adjusted or disapplied altogether. Although, a claim under the Respondent's PHI arrangements could have been pursued once the Claimant had been absent for 26 weeks, for reasons that have never been explained (to the Claimant or within these proceedings), the Respondent failed to apprise the Claimant of the PHI arrangements or to pro-actively support an application for PHI benefit. At the very latest, in our judgement, the Respondent ought to have highlighted the PHI arrangements and its Policy to the Claimant when it wrote to him on 28 January 2016 to remind him that his company sick pay would be exhausted on 14 March 2016. Indeed, given the likely length of time for any application for PHI benefit to be processed and determined, of which the Respondent would have been aware given that other claims had been made under the arrangements, we consider that the Respondent ought reasonably to have alerted the Claimant to the arrangements and its Policy sooner than that.

291. By 25 August 2015 Dr Cosgrove was advising that the Claimant would likely be unfit to work for at least several months. That ought reasonably to have highlighted to the Respondent the potential need for a claim to be

made under its PHI arrangements. It seemingly did not give thought to the matter even when the Claimant asked in or around February 2016 for discretion to be exercised in his favour under the terms of the company's Sickness Absence and Pay policy by extending his company sick pay or when it wrote to him on 9 March 2016 to advise him that Mike Bond had decided that discretion would not be exercised in his case. Ms Webb had reminded him of the Employee Assistance Programme in her letter of 28 January 2016 but, inexplicably, not its PHI arrangements and Policy. The arrangements seem to have been discussed in the course of a meeting on 20 March 2016 attended by Ms Webb, Mr Bond, Ms Edwards, the Claimant and Mr Truter, though the detailed meeting minutes (pages 801-805)) evidence that the arrangements were barely alluded to in the course of the meeting, albeit that Ms Webb followed up by providing the Claimant with a PHI application to complete, even if she did not seemingly provide a copy of the PHI Policy or any further explanation as to how the arrangements operated in practice.

292. We are familiar with Mr Justice Elias' often cited comments in O'Hanlon v The Commissioners for HM Revenue & Customs UKEAT/0109/06 that disabled workers are not to be treated as objects of charity and that it will be a very rare case indeed where giving a disabled employee higher sick pay than would be payable to a non-disabled person would be considered necessary as a reasonable adjustment. However, we regard the Claimant's case as such a rare case, and that regard should be had to the Respondent's failure to alert the Claimant sooner to its PHI arrangements. The Claimant was at a substantial disadvantage not just by reason that his condition and related mental health issues meant he was more likely to experience long term absence, but because he experienced disproportionate worry and anxiety by reason of the financial uncertainty of his situation. His ASD meant that he had a pressing need for certainty, in all its forms and he was disproportionately likely to become stressed, anxious and distressed when that certainty was lacking. This went beyond the normal worry and anxiety that people experience in uncertain situations, including those affecting their financial security. It is extensively documented in the Hearing Bundle, for example in Dr Mansour and Dr Cosgrove's reports dated 11 January and 7 March 2016, in the minutes of the occupational health review in March 2016 (in which Mr Truter noted that he was seeing increased anxiety as a consequence of company sick pay having come to an end), and in the Claimant's April 2016 grievance in which said the loss of income was causing further health concerns. Dr Lewis says that it caused the Claimant significant distress. In our judgement, regardless of whether or not the Claimant's health issues had been caused or exacerbated by work or work related issues, the Respondent ought reasonably to have adjusted its sick pay arrangements by maintaining the Claimant on company sick pay beyond 52 weeks at a rate equivalent to PHI benefit until the application for PHI and thereafter any appeal against any refusal of his claim was determined. It would have been reasonable for this adjustment to have been subject to the following conditions so that the Claimant was not an object of charity and the

Respondent's financial obligations in the matter were kept within sensible bounds:

a) The Claimant would be required to co-operate with the insurance provider and the Respondent, and comply with any reasonable requests by them to enable the application for PHI benefit to be determined (and determined without unreasonable delay) – this would extend to any appeal against the provider's initial refusal of PHI;

b) The Claimant would be required to acknowledge and agree that any additional company sick pay would be in satisfaction of any PHI benefit payable in respect of the same period, and accordingly would agree to repay to the Respondent any sums paid directly to him by the insurance provider in respect of any period covered by additional company sick pay - in other words, that the Claimant should not gain a windfall as a result of the adjustment, but instead should fully account to the Respondent for sums subsequently received by way of PHI benefit in respect of any period during which he was paid additional company sick pay;

c) As regards any appeal, that company sick pay would only be maintained as long as the Respondent was reasonably satisfied that the appeal had reasonable prospects of success.

293. The Respondent's failure to make the above adjustment means that it breached its s.20 duty in relation to the Claimant.

PCP (11)

294. Had we been required to consider what adjustments ought reasonably to have been made to address the claimed disadvantage, for all the same reasons we have concluded that the Claimant was not disadvantaged as he claims, we do not consider that the claimed disadvantage would have been eliminated or reduced by the first three proposed adjustments. On the contrary we consider that the somewhat rigid approach contended for on behalf of the Claimant would very likely have aggravated his mental health issues by imposing arbitrary and artificial timescales that he could not have coped with. In our judgement, any claimed disadvantage deriving from the need for structure, clarity and certainty was capable of being addressed through a tailored, flexible approach, underpinned by indicative timescales that were kept under review and updated as appropriate, as well as clear and timely communications on progress and next steps.

295. We are in no doubt that these adjustments were implemented by Mr Goldspink and Ms Dingley/Walker and also by Mr Cotterell and Ms Francis. Subject to what we say below in relation to PCP (14), they approached their task in a focused, structured and, above all, compassionate way, working to ensure the Claimant's voice was heard,

that his concerns were understood by them, and that he received a fair and considered response from them on the various issues which he had raised. We do not underestimate the commitment of time and effort that was involved, which in the case of Mr Goldspink involved in the region of 130 hours of his time.

PCP (13)

296. In our judgment, the adjustments reasonably required of Mr Goldspink differ from those reasonably required of Mr Cotterell. As regards Mr Goldspink, we conclude that he ought reasonably to have provided the Claimant with a written decision on each topic within the grievance within four weeks of the last investigation meeting in respect of that topic. Because the Claimant requested that he receive a single outcome letter at the conclusion of the grievance appeal, Mr Cotterell was confronted with a larger task in November 2019 than Mr Goldspink had faced at each stage of the grievance process, albeit do not lose sight of the fact that the appeal outcome letter runs to just eight pages, as opposed to approximately 30 pages in total for Mr Goldspink. In terms of the duty to make adjustments, we conclude that Mr Cotterell ought reasonably to have provided the Claimant with a written decision on the grievance appeal with seven weeks of the last appeal meeting (we would have said six weeks, but that would have meant a decision was required on the appeal on New Year's Day).

297. All of Mr Goldspink's decisions were issued to the Claimant comfortably within the four week period we have identified. Mr Cotterell's decision on the appeal was not issued within the seven week period we have identified and the Respondent was thereby in breach of its s.20 duty in relation to the Claimant. The earliest date by which Mr Cotterell might have delivered his decision was on some unspecified date in March 2020 i.e, between three and four months after the final grievance appeal meeting of 20 November 2019, a meeting that was then derailed for the best part of a year as a result of the Coronavirus pandemic.

PCP (14)

298. We do not judge Mr Cotterell and Ms Francis by the very high standards set by Mr Goldspink and Mrs Walker. We are mindful that Ms Francis experienced significant health issues and the devastating loss of her sister. Nevertheless, Mr Cotterell struggled to explain two notable delays in the grievance appeal process, even though he was being asked about more recent events than others. We remain unclear why it took a full five months for the grievance appeal meetings to begin in earnest on 14 May 2018, particularly given that the meetings on 14 March and 11 April 2018 were cancelled on the Respondent's side, or why the business issue in April 2018 was considered sufficiently important that the meeting with the Claimant could not go ahead on 11 April 2018. There is also a significant gap in the evidence as to why the grievance outcome meeting was initially not scheduled until some point in March 2020 notwithstanding the final appeal meeting was held on 20 November 2019, or why in February 2020

the meeting had to be pushed back to April 2020 and could not, instead be brought forward or otherwise accommodated around Mr Coleman's other commitments. It is not that Mr Cotterell failed to commit time or effort to the grievance appeal. As Mr Goldspink did, he invested a very significant amount of his time to the task. The meeting minutes evidence that he was kind and compassionate in all of his dealings with the Claimant, and the outcome letter evidences that he engaged with the issues, upholding a number of points on appeal. Nevertheless, we were left with the impression that at those identified points in the process the appeal was not prioritised as it might have been and that other business issues came first. We conclude that Mr Cotterell failed to give sufficient consideration to the impact upon the Claimant of delays to the grievance appeal process. We think that there were moments when he needed to grip the process a little more firmly than he did. Whilst we do not consider that this necessarily went as far as securing the Claimant's agreement before any meetings could be postponed, by analogy with s.15 and s.19 of the Equality Act 2010, we consider that in discharging the Respondent's s.20 EqA 2010 duties to the Claimant, two adjustments ought reasonably to have been made. Firstly, on those occasions when Mr Cotterell found that he potentially needed to reschedule a planned meeting due to a competing business issue (as opposed to health issues affecting Ms Francis), or believed that he could not accommodate a meeting within a previously agreed timescale, he should have weighed in his mind the Respondent's legitimate business or organisational needs in the matter as against the likely adverse impact upon the Claimant of re-scheduling the meeting. In other words, he ought to have struck a proportionate balance between the company's and the Claimant's respective needs and interests, with the result that meetings were only cancelled where he was satisfied, acting reasonably and in good faith in the matter, that the Respondent's legitimate business interests outweighed the Claimant's needs and could not be achieved by other means, for example by asking a colleague to deputise for him in respect of any business matters. Secondly, whilst we do not consider that this first duty extended to cancellations necessitated by Ms Francis' health issues or the death of her sister, on those occasions it would have been a further reasonable adjustment to seek to prioritise the date of any new meeting with a view to keeping any further delays to a minimum. In our judgement, the Respondent breached its s.20 EqA 2010 duty in these regards in respect of the cancelled meetings on 14 March and 11 April 2018 and the outcome and feedback meetings in early 2020. We are satisfied that the Respondent discharged its duties in respect of the cancelled meetings on 28 September and 10 December 2018, 16 January, 17 July and 23 September 2019, and 13 January 2021. Had the Respondent made the adjustments we have identified, we conclude there is a real chance that the grievance appeal would have been determined and the outcome communicated to the Claimant by December 2019 or January 2020 at the latest. It does not really matter, the duty to make adjustments arises even where the desired outcome is not guaranteed. In our judgement, with greater focus on striking a fair and proportionate balance between the parties' respective needs and interests, there was a real chance of a reduced timescale, more in keeping with the 19 months

taken by Mr Goldspink. We uphold the Claimant's complaint that the Respondent breached its s.20 EqA 2010 duty in this matter.

PCPs (18) and (19)

299. In our judgement, the Claimant has established that the Respondent breached its s.20 EqA 2010 duty by not arranging the December 2014 working party meeting at a time prior to 3pm to accommodate his attendance and participation, and further by failing after 24 March 2015 to schedule weekly team meetings on one of the four days worked by the Claimant at a time he could attend. There is no obvious explanation by the Respondent why these meetings could not have been scheduled on days and at times when the Claimant could attend. On the basis that the Claimant has established the primary facts in support of his complaint, the Respondent has the burden of explaining why the adjustments could not reasonably have been made. Absent any such explanation, we conclude that the adjustments ought reasonably to have been made.

The s.15 Equality Act 2010 claims

300. Section 15 of EqA 2010 provides,

> 15 Discrimination arising from disability
>
> (1) A person (A) discriminates against a disabled person (B) if-
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

The unfavourable treatment complained of

301. The Claimant pursues complaints in respect of the following alleged unfavourable treatment:

(1) ***The Respondent failed to inform or consult with the Claimant concerning the variation of his total compensation on 1 March 2016 (Issue 5*****(1)) .**

302. We have identified already that the Respondent failed to inform or consult with the Claimant and others at his grade, regarding the changes to their total compensation that resulted from the decision of Caterpillar Inc. that they would no longer be eligible for equity grants.

(2) ***The Respondent failed to pay the Claimant company sick pay after 14 March 2016 (Issue 6(1)).***

303. It is not in dispute that the Claimant stopped receiving sick pay after 14 March 2016;

(3) ***The Respondent:***

(i) failed to offer any remedy or redress for the Claimant's grievances (Issue 7(1)(i));

(ii) made findings on the Claimant's grievances which were manifestly incorrect (Issue 7(1)(ii)); and

(iii) failed to properly acknowledge its own wrongdoing (Issue 7(1)(iii).

304. Addressing each element of this complaint in turn:

(3)(i) – Issue 7(1)(i)

305. As the Claimant identifies in paragraph 81 of his witness statement, he raised seven issues in his grievance and identified four desired outcomes. Mr Varnam's submissions are focused upon the four desired outcomes, together with Mr Goldspink and Mr Cotterell's alleged failure to take steps to seek to facilitate the Claimant's return to work. The four desired outcomes were:

a) Formal recognition of disability and events to date;
b) Formal recognition of mistakes that have been made and the need to change approach;
c) Resolutions of issues that ultimately results in return to work in a safe, supportive and sustainable work environment; and
d) Discretionary sick pay or PHI interim, to mitigate any loss of income due to absence.

306. As regards the first part of desired outcome (a), namely recognition of the Claimant's disability, this did not relate specifically to the seven issues raised. The Claimant's ASD has never been in issue, on the contrary the extensive occupational health and other medical health records within the Hearing Bundle evidence that the Respondent acknowledged his condition and took steps to understand it, as well as its effects. This aspect of the desired outcomes is not addressed in Mr Varnam's submissions or in the Claimant's witness statement. If, which is not apparent, it is still asserted that the Respondent failed to recognise the Claimant's disability within the grievance process, or indeed before he embarked upon his grievance, no evidence to support the complaint has been adduced. It is not well-founded.

307. As to what was meant by the Claimant when, in the second part of desired outcome (a), he requested "formal recognition … of events to date", we conclude that the Claimant wanted the Respondent to uphold and endorse his account and perception of events. The Respondent did not do so because, having considered his grievance at length and in considerable detail, Mr Goldspink and Mr Cotterell came to a different view to the

Claimant in respect of various of his concerns. In any event, the Claimant conceded on numerous occasions during cross examination that the Respondent had in fact provided him with remedies and redress. For example, in providing an outcome on the first part of the Claimant's grievance, which was concerned with cessation of sick pay, Mr Goldspink acknowledged that communication regarding potential PHI entitlement and the availability of documentation was limited. He confirmed that the company was working on improving clarity around the process and had identified a need to be more proactive. That plainly amounted to recognition of events and redress of the grievance, even if it was not the redress sought in the fourth desired outcome, to which we return below.

308. In Shamoon v Chief Constable of the Royal Ulster Constabularly [2003] UKHL 11, the House of Lords held that the test of 'disadvantage' in s.19(2) of EqA 2010 is whether "a reasonable worker would or might take the view that he had been … disadvantaged in the circumstances in which he thereafter had to work". As the EHRC Employment Code confirms (section 4.9) an unjustified sense of grievance will not qualify. Given our findings and conclusions in this judgment, and bearing in mind that Mr Collins' documented comments of 11 September 2015 and the delays in the grievance appeal process did not form part of the Claimant's grievance, we conclude that the Claimant had an unjustified sense of grievance in respect of many of the matters now pursued in these proceedings, though not in respect of the Respondent's failure to schedule meetings in 2014/2015 accordingly to the Claimant's working pattern, to pro-actively progress a claim for PHI earlier, and its associated failure to extend his company sick pay pending a decision on his PHI application, or to issue him with a detailed job description. Nevertheless, for completeness, we return below to the question of whether the Respondent's failure to recognise events as the Claimant perceived them, and separately its failure to uphold those aspects of his grievance that we consider to be well-founded, was unfavourable treatment because of something arising in consequence of disability and, if so, the further question of whether the Respondent has shown that its treatment of him was a proportionate means of achieving its legitimate aims.

309. As with the first desired outcome, we find that the Claimant's second desired outcome was not, as stated, that the Respondent should identify where mistakes had been made and recognise these (which it did), rather that it should accept the Claimant's fixed view as to what mistakes had been made and to approach matters as he felt they should be approached (putting aside in this regard that his communications were not necessarily clear as to what the right approach would be).

310. In our judgement, as expressed, the Claimant's third desired outcome could not reasonably be met. He said that he wanted, "resolutions of issues that ultimately results in return to work in a safe, supportive and sustainable work environment". Firstly, his desired outcome was expressed in very broad, even somewhat abstract, terms, both in so far as he sought a "resolution of issues" and the provision of a safe etc work

environment. Perhaps more pertinently, the underlying premise was that the Respondent was operating an unsafe, unsupportive and unsustainable work environment. It is a central feature of the Claimant's condition that he perceives many situations and environments, including as we have already indicated, the supermarket, to be unsafe. For many years he perceived his workplace to be a safe environment. As Dr Woods noted in her First Report, he told her that he depended upon work as a safe and stable place; we find that dependence, his pressing need for work to feel a safe place for him, was because his lived experience away from the structure and security of his home and work environments was frequently and increasingly overwhelming for him. In the same way that, viewed objectively, supermarkets are not 'unsafe' places, equally the Claimant's work environment did not cease to be a safe, supportive or sustainable environment because, for example, Mr Entwistle directed critical or even hostile remarks at the Claimant in 2013 or because Ms Gordon gave high-level feedback in 2014 as to why staff might not recommend GED-UK as a place to work. Such events or incidents represent the vicissitudes of life, albeit by 2013 the Claimant increasingly lacked the resilience to navigate them. His perception of his work environment as a safe place undoubtedly changed, but in our judgement this change of perception was the direct result of his disability, rather than objectively reflective of how he was treated by the Respondent. The reasons why the Claimant came to perceive his work environment as unsafe are numerous, complex and multi-layered, though we are certain that his rigid thinking style, depression, anxiety, tendency to rumination and communication issues have all been highly significant factors in this regard. Echoing Johnson J in TVZ, and as we observed towards the beginning of this judgment, this is a case in which there has been considerable scope for reattribution and confirmation bias.

311. In our judgement, over the last ten years the Claimant has become increasingly entrenched in the view that the Respondent must be responsible for all the difficulties he experienced within the workplace, discounting altogether the possibility that his ASD and associated underlying mental health issues might have contributed in any way, let alone been a major factor in that regard. The extensive medical evidence in this case sadly paints a picture of an individual with profound difficulties (as well as significant abilities) that we conclude were always going to present a major challenge or obstacle for him in his working life. We are very reluctant to criticise any of the health professionals who have been involved in relation to the Claimant, but reading Mr Truter's witness statement there is little or no indication that he has explored this with the Claimant, including whether the Claimant's recollection and perception of events within the work environment may have been impacted by his disability. Mr Truter's witness statement and reports provide no indication of appropriate and constructive challenge or even the exploration of differing perspectives within the safe, supportive confines of the therapeutic relationship. On the contrary, when we read comments by Mr Truter such as, "David's mental health deteriorated due to the abuse he suffered at work" we are compelled to observe that Mr Truter's witness

statement indicates some loss of lack of objectivity on his part. It seems to us that Mr Truter's witness statement is essentially a restatement of the Claimant's case and perceptions. Mr Truter may unwittingly have reinforced the reattribution and confirmation biases to which we have referred.

312. So far as the Claimant is concerned, the Respondent plainly did not deliver his third desired outcome. However, it is essentially impossible for us to identify a specific, measurable outcome that might reasonably have been provided by the Respondent in this regard. We have difficulty in understanding Mr Varnam's submissions on this specific point, since he acknowledges five issues in respect of which the Claimant's grievances were upheld yet goes on to assert that neither the grievance nor grievance appeal took steps to bring about the Claimant's desired outcomes, seemingly framing this with reference to the Respondent's alleged failure to take steps to ensure that events did not recur. The only matter cited in that regard is the Lencioni video, overlooking that it was edited during the Claimant's initial sickness absence in 2015 to remove the offending sections and, further, that it was then agreed it would never be used again within the UK business. Steps were taken therefore to prevent a recurrence of the video incident, Mr Varnam's written submissions on this point conclude on the somewhat vague basis that "steps should have been taken to build awareness, so that a better judgement would be made in the future". In terms of the third desired outcome, we conclude that the criticisms of the Respondent reflect an unjustified sense of grievance on the part of the Claimant in respect of an outcome that could never be delivered to his satisfaction. He has failed to establish that he was treated unfavourably in respect of his third desired outcome.

313. Turning then to the fourth desired outcome, the Claimant sought "discretionary sick pay or PHI in interim, to mitigate any loss of income due to absence". His grievance in this regard was not fully upheld, though as noted already the Respondent partially upheld his grievance around communication and the availability of information, and identified how these aspects might be addressed. Given what we say at paragraphs 289 to 293 above, the Claimant was treated unfavourably in the matter and plainly had a well-founded sense of grievance.

314. As to Mr Goldspink and Mr Cotterell's alleged failure to take steps to seek to facilitate the Claimant's return to work, we refer to our findings and conclusions at paragraphs 236 and 185 above.

(3)(ii) – Issue 7(1)(ii)

315. The identified manifestly incorrect findings are said to be Mr Goldspink's initial grievance decision not to uphold the complaint in relation to reasonable adjustments notwithstanding an allegedly clear failure to adhere to reasonable adjustments in respect of advance notice, both in respect of the video and in respect of the 20 April 2015 email invitation to complete a personality inventory. We have not upheld the Claimant's

complaint that the Respondent breached its duty to make adjustments in respect of the video. As regards the 20 April 2015 email, we refer to our findings and conclusions at paragraph 212 above.

316. As Ms Duane points out in her submissions, under cross examination the Claimant accepted that he had not provided additional information to Mr Cotterell that would have led him to alter the decision reached by Mr Goldspink. Further, that whilst he may not have agreed with their respective findings, his points had been carefully considered by each of them and that detailed explanations as to why his concerns had been upheld or not, as the case may be, were provided. Particularly given his concession in this regard, and indeed given the Claimant's failure to address the matter in his witness statement, beyond asserting in the barest of terms that the findings were manifestly incorrect, we have considerable difficulty in understanding on what basis it is asserted that the findings in general or in respect of these two specific issues were incorrect, let alone manifestly so. The complaint is not well-founded.

(3)(iii) – Issue 7(1)(i)

317. In our judgement, the Claimant's complaint that the Respondent failed to properly acknowledge its own wrongdoing adds nothing further to his complaints that the Respondent failed to formally recognise events to date or mistakes that had been made and the need to change approach. Where his concerns were found by Mr Goldspink and Mr Cotterell to be justified, the Respondent's 'wrongdoing' was acknowledged by them. For all the reasons that his complaints above are largely unfounded, his complaint that the Respondent failed to properly acknowledge its own wrongdoing likewise largely cannot succeed.

(4) ***The Respondent:***

(i) Subjected the Claimant to a disciplinary procedure in the knowledge that such a procedure would worsen his condition (Issue 8(1)(i)); and

(ii) Dismissed him (Issue 8(1)(ii)).

318. Our conclusions in respect of these two issues are as follows:

(4)(i) – Issue 8(1)(i)

319. As with other issues we have been required to determine, the complaint is not addressed within Mr Varnam's submissions. Instead he addresses the Claimant's dismissal. The Claimant's evidence essentially comprises a bare assertion at paragraph 131 of his witness statement that he was subjected to "the dismissal procedure knowing that it was likely to worsen my condition". It is difficult to distil from paragraphs 114 to 130 of the Claimant's witness statement the facts and matters that are sought to be relied upon by him in support of this complaint. Ms Duane makes the point

that the pleaded complaint, reflected in the List of Issues, is that the Claimant was subjected to a disciplinary procedure. He was not subjected to a disciplinary procedure and there is force in Ms Duane's submission that the claim must fail on that basis. In any event, notwithstanding the absence of any submissions from Mr Varnam on the point, if the reference to a "disciplinary procedure" is to be construed more widely to include the dismissal and appeal procedure operated by the Respondent, there is no evidence before us that the Respondent knew that subjecting the Claimant to that procedure would worsen his condition as has been pleaded. The Claimant did not state in his written submissions to Mr Blin that this would be the case (pages 1866 to 1868). We have referred to the comments in Dr Parke's report of 23 December 2021 that the Claimant said the loss of his job would be devastating. We cannot identify that Dr Parkes' offered any view as to the likely impact upon the Claimant of dismissing him or subjecting him to the dismissal and appeal procedure. In the circumstances, it is unclear to us on what basis it is asserted that the Respondent knew that the procedure would worsen his condition. Whilst the complaint is not well-founded, we have gone on below to consider whether the Claimant's dismissal, including the procedure by which the decision to dismiss was arrived at, was because of something arising in consequence of the Claimant's disability and, if it was, whether the Respondent has shown that the treatment was a proportionate means of achieving a legitimate aim.

4(ii) - Issue 8(1)(ii)

320. The Claimant was dismissed. On any view, a reasonable worker would or might take the view that he had been disadvantaged.

<u>The reasons for the allegedly unfavourable treatment and, in each case, whether the reason was because of something arising in consequence of the Claimant's disability</u>

321. The claimed reasons for the alleged unfavourable treatment are identified in paragraphs 5(3), 6(3), 7(3) and 8(3) of the List of Issues. Given our conclusions above we are strictly no longer concerned with paragraph 8(3) in so far as it relates to Issue 8(1)(i), though address it in its entirety for completeness:

Issue 5(3)

322. The reason why the Claimant was not informed or consulted about the variation to his total compensation on 1 March 2016 was because the Respondent did not inform or consult with any staff who were so affected. We refer to our findings and conclusions at paragraphs 223 to 231 above. The fact that the Claimant was not accessing his work emails was nothing to do with it, anymore than for other employees who likewise received no communications from the Respondent on the matter. The complaint is not well-founded.

Issue 6(3)

323. As the Claimant asserts, the reason why he no longer received company sick pay after 14 March 2016 was because he had been on sick leave for more than 52 weeks. That was something that arose in consequence of his disability.

Issue 7(3)

324. The reason the Respondent did not offer the Claimant remedy or redress in respect of certain aspects of his grievance was because Mr Goldspink and Mr Cotterell came to a different view to the Claimant about certain of the matters about which he was aggrieved. Likewise, in so far as the Respondent did not agree that certain mistakes had been made or acknowledge its own wrongdoing, this too was a reflection of Mr Goldspink's and Mr Cotterell's genuinely held views and conclusions in respect of the matters raised by the Claimant. It is irrelevant that we have come to a different conclusion to them regarding the Respondent's failure to make reasonable adjustments in respect of PCPs (7), (10), (13), (18) and (19). They did not arrive at different conclusions to us because of something arising in consequence of the Claimant's disability. As regards the 'correct approach', Mr Goldspink, Mr Cotterell and others who were involved in managing the situation endeavoured to identify agreed approaches with the Claimant with significant input from Hampton Knight, Mr Truter and a range of medical professionals. To the extent the Respondent's approach differed to the Claimant's suggested approach, this again reflected genuinely held views from time to time as to how the situation should best be managed. As regards Mr Goldspink's failure to address Mrs Webster alleged comments that the Claimant talked in code, he did not overlook the matter because of something arising in consequence of the Claimant's disability but because it was a detailed and complex grievance in the course of which the Claimant raised various new strands. Finally, the Claimant's grievance regarding Mr Bond's decision not to exercise discretion in his favour by extending company sick pay was not upheld because Mr Goldspink and Mr Cotterell agreed with Mr Bond that the Respondent's policy was only to exercise discretion as a rare exception, essentially in cases where employees are terminally ill. The reason was not that the Claimant had been on sick leave for 52 weeks rather it reflected Mr Golspink's, and thereafter Mr Cotterell's, desire to apply the Respondent's policy as they understood it and ensure consistency of approach and treatment.

325. The Claimant's perception may, to varying degrees, have been affected by his disability but the Respondent's unfavourable treatment of him was not because of his perception in the matter, rather it was informed by its own conclusions. The reasons identified by the Claimant for his treatment are that the Respondent believed he would not return to work in any event and/or it was concerned that acknowledging wrongdoing would give him grounds on which to bring a claim. There is no evidence to support either

assertion. Mr Golspink, and in turn Mr Cotterell, did not shy away from upholding aspects of the Claimant's grievances where these were felt to be justified. Regardless of the delays in the grievance appeal process, we are in no doubt that both Mr Goldspink and Mr Cotterell approached their task in good faith and with a genuine desire to find some form of agreed resolution that would ultimately support the Claimant's return to work, however increasingly unlikely that began to look, certainly by the time of the grievance appeal. We do not think that either of them would have invested the very significant time which they did had they been engaged in a cynical 'tick-box' exercise in circumstances where they believed that there was no need or reason to uphold the grievance/grievance appeal because the Claimant would not be returning to work in any event. If, as the Claimant asserts, the Respondent was driven by a concern not to give him grounds for a claim, it seems to us highly unlikely that Mr Goldpsink and thereafter Mr Cotterell would have upheld any aspects of his grievance, acknowledged shortcomings or apologised to him on a number of occasions, as they did. For all these reasons, the complaint is not well-founded.

Issue 8(3)

326. The Claimant was subjected to the dismissal procedure and thereafter dismissed because he was on long term sick leave and, as set out in the Respondent's PHI policy, was still unable to work after a continuous five year period of receiving PHI benefits. His continued absence and the Respondent's conclusion that there was no foreseeable date for the Claimant to return to work, even with adjustments, were plainly because of something arising in consequence of his ability, namely disability related long term incapacity for work.

Justification

327. As to whether the Respondent has shown that its unfavourable treatment of the Claimant above (Issues 6(1) and 8(1)) was a proportionate means of achieving a legitimate aim, the Respondent has the burden of proof in the matter. As the EHRC's Employment Code reminds us, the stated aim being pursued must represent a real, objective consideration. Once a legitimate aim is established, consideration of whether the employer acted proportionately in the matter requires an objective balance to be struck between the discriminatory impact of the treatment and the Respondent's reasonable needs.

Legitimate Aims

Issue 6(1)

328. The legitimate aims advanced by the Respondent are not extending for any longer period than 52 weeks or for any further indefinite period an employee's entitlement to full pay in cases of continuing long term absence. We accept that it was legitimate for the Respondent to seek to

place some limit on employee's entitlement to full pay in cases of continuing long term absence. That is not inherently discriminatory, rather it reflects a real, objective consideration, namely supporting employees through periods of long-term ill-health whilst they recover, with a view to securing their return to work, but bringing that support to a conclusion if their recovery and return cannot be secured within a reasonable period of time.

Issue 8(1)

329. The legitimate aims advanced by the Respondent are as follows:

(i) Ensuring employees return to work to do their job in the interest of the service and operational efficiencies of the business;

(ii) Ensuring that effective control and management of the Respondent's finances was maintained;

(iii) Ensuring adequate attendance levels in order to meet the operational demands of the Respondent's business;

(iv) Avoiding the operational challenges in retaining someone on the Respondent's payroll who would not be returning to work;

(v) Reducing the costs of continuing to employ an employee who is unable to return to work.

330. Although Mr Varnam submits that (ii), (iv) and (v) are essentially facets of one single point, namely cost, and that (i) and (iii) are closely connected, he does not say that they are not legitimate aims. We differ from Mr Varnam in that we do not consider (iv) to be a pure facet of cost.

331. Mr Varnam has not taken the point that the legitimate aims advanced within these proceedings were potentially not in the minds of Mr Blin and Mr Curtis when they gave consideration to whether the Claimant should be dismissed. In our findings above, we have identified that the only material consideration in Mr Blin's mind when he decided to dismiss the Claimant was Dr Parke's advice that the Claimant was unlikely to be fit in the foreseeable future, or indeed the longer term, to return to work, even with reasonable adjustments. He did not address his mind to whether the policy was proportionate to the Respondent's legitimate aims. Mr Curtis had regard to a broader range of considerations, albeit in response to the Claimant's points of appeal rather than specifically as set out above. In Health and Safety Executive v Cadman 2005 ICR 1546, the Court of Appeal confirmed that there is no rule of law that prevents an employer from relying on considerations that were not in its mind at the time a PCP was applied. Notwithstanding therefore that the point is not taken by Mr Varnam, the Respondent is not precluded from seeking to justify its treatment of the Claimant because the five specific legitimate aims as set out above did not consciously feature in the decision-making process at the time. However, it does require that we carefully scrutinise the

Respondent's stated aims. Having done so, and regardless of whether or not they overlap to a greater or lesser degree, we are satisfied that the stated aims are legitimate and not inherently discriminatory. In particular, cost considerations may constitute a legitimate aim in combination with other factors. The question therefore is whether the Respondent acted proportionately in the matter.

Proportionality

332. For all the same reasons we conclude that the Respondent breached its s.20 EqA 2010 duty by failing to extend sick pay pending final determination of the Claimant's application for PHI benefit, we consider that it has failed to show that its treatment of the Claimant in respect of sick pay was proportionate. An objective balance was not struck between its reasonable needs and the discriminatory impact of not extending sick pay in the Claimant's case, at least until any application for PHI benefit was determined. It is apparent that when the Claimant requested that discretion be exercised in his favour, the Respondent approached the matter somewhat mechanistically, refusing to exercise discretion on the basis that discretion had only previously been exercised in favour of employees with terminal health conditions without regard to the Claimant's situation or specific needs. Even then, it effectively failed to offer any explanation for its decision when Ms Webb wrote to the Claimant on 9 March 2016. All she said was that Mr Bond had thought about the matter very carefully but that his decision was not to extend company sick pay beyond 14 March 2016. It was not just that the Claimant was thereby without any income whilst his PHI application was under consideration but that he lacked certainty, which was one of his clearly identified needs as a person with ASD. His further needs arising from his disability were for the Respondent to work to the process, follow the rules and 'do the right thing'. Ms Webb's letter would have suggested to the Claimant that the Respondent was not working to the process, potentially not following the rules and not 'doing the right thing', and accordingly failing to have regard to his specific needs. Although we consider this claim to be potentially well-founded, we return below to the issue of whether it has been brought in time.

333. In our judgement, the Respondent's decision to terminate the Claimant's employment was proportionate to its legitimate aims. In short, there was nothing more the Respondent could do to secure the Claimant's return to work. We are satisfied that it was not simply a case of the Respondent trying to reduce its costs. We do not think it would have funded Mr Truter to the tune of approximately £32,000, met Dr Pearson's fees for providing a medical report in support of the appeal against the refusal of PHI, or continued the Claimant's employment for as many years as it did, if that were the case.

334. Mr Varnam's submission that the Respondent's aims might equally have been achieved by taking positive steps to facilitate the Claimant's return to work at a much earlier stage cannot be sustained in light of our other

findings and conclusions in this judgment. As to the suggestion that the Respondent could have continued the Claimant's employment while keeping a watching brief on his progress, this flies in the face of Dr Parke's unequivocal assessment that it was highly unlikely the Claimant would be fit to return to work in the foreseeable future or indeed in the longer term, even with reasonable adjustments in place to meet his needs. The regrettable, objective fact was and remains that there is no foreseeable prospect of the Claimant returning to work. We cannot agree with Mr Varnam that it would have been proportionate to keep a watching brief in respect of a situation that was highly unlikely to change. Having regard to the history of this matter since 2013, specifically the very substantial commitment of time and resource to managing the Claimant, we consider that the operational challenges of maintaining the Claimant in the Respondent's employment and on its payroll are not to be underestimated, even if Mr Curtis expressed them at the time in perfunctory terms. The five-year grievance process may have concluded, but had the Respondent maintained the Claimant in its employment and on its payroll, we consider there is every likelihood that the Respondent would have continued to be drawn into a range of issues, not least the periodic reviews of the Claimant's PHI eligibility and managing the expectations of an individual who, even now it seems to us, is not entirely accepting of the fact that he is highly unlikely to return to work in the longer term.

335. We accept the analogous link that Ms Duane draws to the recent case of McAllister v Revenue and Customs Commissioners [2022] EAT 87 (paragraph 274 of her written submissions). In our judgement, dismissal was a proportionate means of achieving the wider aim of ensuring satisfactory workforce attendance in the context of a fair, effective and transparent sickness management regime. There is considerable force to Ms Duane's submission that maintaining the Claimant on the Respondent's payroll for over 20 years until statutory retirement age, in circumstances where there was no foreseeable date of return, did not represent a proportionate resolution. This was not an employer that cast its employee aside. There may have been financial implications for the Claimant of transitioning to directly paid PHI benefit, but the fact remains that he will continue to receive PHI benefit as long as he meets the insurance provider's eligibility requirements. Potentially, that will be for the rest of his working life regardless of the many other factors that typically cause those within the working population at large to leave active employment before they reach normal retirement age. In that sense he will enjoy greater certainty and security that the working population at large. For example, he has continued to receive PHI notwithstanding his former role has apparently ceased to exist and has not been replaced. In our judgement, the fact that financial support, security and certainty remains in place for the Claimant and accordingly that an important aspect of his need to feel 'safe' has been reasonably addressed, is conclusive in terms of the Respondent having acted proportionately in the matter. In the final analysis, an objective balance has been maintained between the parties' respective needs. The Claimant's complaint that he was discriminated against does not succeed.

336. We can deal fairly briefly with the fact that the Respondent subjected the Claimant to a formal procedure before it dismissed him. Had it not done so, we are certain that it would have faced further legal claims, not least a claim of unfair dismissal. The Respondent needed to reach a decision in respect of the Claimant's continued employment as part of an open and transparent process within which the Claimant was afforded a reasonable opportunity to provide his comments and objections, as well as a right of appeal if he was dissatisfied with the decision to terminate his employment. Both parties had a legitimate interest in ensuring that the matter was dealt with in a structured, fair and non-discriminatory way. Mr Varnam has not identified some more proportionate way in which the process might have been handled and any decision arrived at which took account of the Claimant's objections and representations. There is no complaint that the Respondent breached its s.20 EqA 2010 duty to make adjustments in respect of the dismissal and appeal processes or that it unfairly dismissed the Claimant. The Respondent was justified in its procedural handling of the matter; the complaint is not well-founded.

Harassment Claims

337. Section 26 of the Equality Act 2010 ("EqA") provides,

> (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.

338. In Richmond Pharmacology v Dhaliwal [2009] ICR724 it was observed,

> "A Respondent should not be held liable merely because his conduct has had the effect of producing a prescribed consequence: it should be *reasonable* that that consequence has occurred… overall the criterion is objective because what the Tribunal is required to consider is whether, if the Claimant has experienced those feelings or perceptions, and it was reasonable for her to do so. Plus if, for example the Tribunal believes that the Claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated,

> there will have been no harassment within the meaning of the section. Whether it was reasonable for the Claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the Tribunal as to what would important for it to have regard to all the relevant circumstances including the context of the conduct in question. One question that may be material is whether it should reasonably be apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the prescribed consequence): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt…
>
> (22) …dignity is not necessarily violated by what was said or done which was trivial or transitory, which should have been clear but any offence was unintended. But it is very important that employers and Tribunals are sensitive to the hurt which 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."

339. In Land Registry v Grant [2011] ICR 1390,CA, Elias J said,

> "It is not importing intent into the concept of effect to say that intent would generally be relevant to assessing effect. It would also be relevant to deciding whether the response of the alleged victim is reasonable".

340. The alleged conduct relied upon by the Claimant as being unwanted conduct is set out at paragraph 27 of the List of Issues. We have already indicated why the complaints at sub-paragraphs (1) and (2) do not succeed.

341. As regards Ms Izod's comment that the Claimant was unfit to work, that was also the view at the time of Dr Cosgrove as well as the view of her predecessor, Ms Routledge. It is not suggested that Dr Cosgrove's assessment that the Claimant continued to be unfit to work, a view also shared by the Claimant's GP who continued to certify the Claimant unfit for work, created a hostile etc environment for the Claimant. It is Ms Izod's other alleged comments that are presumably relied upon by the Claimant as altering the meaning and impact of her specific comments regarding his unfitness to work. Given that we have not upheld that she made those other comments attributed to her by the Claimant, there are no other facts from which we might infer that they had some other meaning or effect, or were other than Ms Izod's reasonably expressed professional opinion in the matter. It would be encouraging hypersensitivity on the Claimant's part if we were to uphold that the expression by Ms Izod of her professional opinion as to the Claimant's fitness to work, consistent with the views expressed by various other medical professionals, including the Claimant's GP, reasonably produced the effect of violating his dignity or creating an intimidating etc environment for him. The complaint is not well-founded.

342. As regards the comments by Mr Collins, whilst the Claimant may not have been present when they were spoken, whether as spoken or documented they were unwelcome and unwanted. Recognising the Respondent's

forensic prejudice in the matter, we are unpersuaded by Mr Collins' explanation for the comments. It may not have been his intention that his comments, spoken in the Claimant's absence and which we conclude he never anticipated might be made known to the Claimant, should violate the claimant's dignity or cause a hostile etc environment for him. However, in our judgement, that was the effect upon the Claimant when he read the comments some years later. In our further judgement, it was reasonable for the comments to have that effect upon the Claimant notwithstanding he was not present when they were spoken and also notwithstanding the passage of time. Words may equally offend when they are in writing, including in this case where they are a written record of what was said, and even though they may come to light at some later date. The notes were the Respondent's own record of a meeting and it was reasonable therefore for the Claimant to believe that they accurately reflected what had been said. It was also reasonable for the Claimant to perceive what had been said, and documented as having been said, as critical of him, namely that he was engaged in some form of tactical behaviour in response to the Respondent's ongoing efforts to understand his health issues and manage his absence and eventual anticipated return to work. In our judgement the comments were related to his disability, as they concerned his ongoing absence and the provision of medical information that directly addressed his condition, absence and likely return to work, including his future management.

343. Although the claim in respect of Mr Collins' documented comments is potentially well-founded, we return below to the question of whether it has been brought out of time and, if so, whether it would be just and equitable to extend time.

Victimisation Claims

344. Section 27 of the EqA provides,

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because-
>
> (a) B does a protected act, or
> (b) A believes that B has done, or may do, a protected act.

345. Section 27(2) goes on to define the protected acts as including,

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

346. It is agreed that the Claimant carried out protected acts on 7 November 2014, 10 December 2014, 10 February 2015, 23 February 2015, and 12 March 2015, as set out at paragraph 65 of the Particulars of Claim.

347. In Shamoon v RUC [2003] ICR 337 it was said that in order to determine whether an employee has been subjected to detriment a tribunal should ask itself whether the employee's treatment was such that a reasonable

worker would or might take the view that in all the circumstances it was to his detriment?

The detriments relied upon by the Claimant

348. The alleged detriments to which the Claimant was subjected are set out at paragraph 33 of the List of Issues. They are:

Issue 33(1) - on 7 November 2014, Mr Coleman spoke to the Claimant in a derogatory and dismissive manner, by saying that he did not have time to deal with the Claimant, did not have the requisite expertise, and did not need the pressure of dealing with the Claimant.

349. We refer to our findings at paragraphs 110 and 111 above. The essential facts upon which the alleged detriment is founded have not been established and the complaint cannot therefore succeed.

Issue 33(2) - Mr Coleman failed to implement agreed return-to-work arrangements following the Claimant's return to work on 23 March 2015.

350. There is a date error in the List of Issues, in that the Claimant returned to work on 24 March 2015.

351. Mr Varnam's written submissions on the matter are somewhat cursory and they were not developed further in his oral submissions. He refers to Mr Coleman's actions generally rather than to any specific acts or omissions of his. In her written submissions, Ms Duane engages with each alleged detriment and identifies the evidence to which she invites the Tribunal to have regard. Given how the List of Issues is drafted it is understandable that she has focused on the December 2014 agreed reasonable adjustments. In fact, the claimed detriment is asserted in paragraph 67(1) of the Particulars of Claim with reference to the facts pleaded in paragraph 25 thereof. These are a narrower set of issues than the reasonable adjustments. They concern the immediate practical arrangements in respect of the Claimant's return to work following his sickness absence in early 2015, rather than what needed to be done in the longer term. As captured in the Respondent's notes of the Claimant's meeting with Mr Coleman, Ms Routledge and Mrs Webster on 20 March 2015, the return-to-work arrangements comprised a phased return on 50% hours from 24 March 2015 and that one of the team would update the Claimant for an hour on what had been going on whilst he had been absent.

352. The Claimant does not address the matter in his witness statement beyond effectively re-stating paragraph 25 of the Particulars of Claim. He refers to the return to work arrangements and states in relation to them, "This never took place" (paragraph 52). He identifies the first of the arrangements to be a catch-up meeting with Mr Coleman and cross refers to page 512 in the Hearing bundle. Page 512, which we believe to be the Respondent's notes of the meeting, evidences that Mr Coleman made the

Claimant aware on 20 March 2015 that he would be out of the country and that the Claimant had asked therefore that one of the team should instead update him for an hour on what had been going on whilst he had been absent. It has not been suggested that the Claimant was disadvantaged by reason that his return to work catch-up meeting was delegated in Mr Coleman's absence abroad in the U.S. on leave. The Claimant's own notes of the 20 March 2015 meeting, whether amended or unamended (pages 501-509) accord with the Respondent's notes on this issue. It is a small point of detail – the catch-up meeting was to be with a colleague rather than with Mr Coleman – but in the wider context of disputed recollections as to what Mr Coleman and others are alleged to have said and done during this period in time, it provides at least some further evidence of the Claimant mis-remembering a small, but relevant detail.

353. Be that as it may, what is clear from page 518 of the Hearing Bundle is that Mr Coleman did not put in place the arrangements for a catch-up meeting in his absence before he went on leave. He was prompted to do so when the Claimant emailed him on 24 March 2015 asking who the catch-up had been scheduled with. Notwithstanding he was on leave, Mr Coleman immediately forwarded the Claimant's email to his Administrative Assistant to action. She subsequently confirmed to Mr Coleman that Mr McCoy had spent time with the Claimant on 25 March 2015 – she described it as a corridor catch-up – and that two of his peer group had additionally caught up with him at an Ops meeting. She said that she would ensure he got some scheduled time with someone from Mr Coleman's team that day. The very clear impression that emerges is that Mr Coleman simply overlooked the matter, perhaps in the context that he was busy and also a little distracted ahead of his holiday. As soon as he was prompted in the matter by the Claimant, he took action on it notwithstanding he was on leave. In our judgement those were not the actions of someone who was subjecting the Claimant to detrimental treatment because he had done protected acts or who didn't have time to deal with the Claimant. Mr Coleman's emails and the constructive tone of the discussions on 20 March 2015 (including as captured in the Claimant's own notes) do not support that inference.

354. The only other matter captured in the Claimant's notes under the heading of 'Return to work' was an upcoming Leadership development exercise in which the Claimant had expressed a wish to be included, but this was scheduled for May and nothing else near term was noted. We find that the Leadership development exercise was the 'Building an Empowering for Results Culture' course already referred to in this judgment.

355. The Particulars of Claim refer to a review of potential risks to the Claimant's mental health and wellbeing. As noted at paragraph 48, a general risk assessment was commenced in February 2015. The Claimant's notes from 20 March 2015 confirm, as Ms Routledge had suggested on 12 March 2015, that activities should instead be risk assessed on a activity-by-activity basis, something she followed up with the Claimant on 7 May 2015. She did not neglect the issue. Her notes

evidence significant input by her during the 6 or 7 month period after the cultural survey feedback sessions in October 2014. We have identified in excess of 20 face to face meetings with the Claimant, as well as emails and telephone calls. In our experience that represents an exceptional level of intervention. Ms Routledge's notes evidence not only that she, Mr Coleman and Ms Picollo agreed the need for risk assessment, but that they discussed the upcoming leadership activities in some detail with the Claimant.

356. In the circumstances, save that the Respondent may not have given the Claimant advance notice of the fact he would receive an invitation to complete a personality inventory, the assertion of detrimental treatment related to return-to-work arrangements is not well-founded.

Issue 33(3) - Mr Coleman avoided speaking to the Claimant other than in scheduled business meetings following the Claimant's return to work on 24 March 2015.

We refer to our findings at paragraphs 118 to 125 above. The detrimental treatment complained of has not been established.

Issue 33(4) - Mr Coleman refused to provide the Claimant with a detailed job description.

357. We refer to paragraph 288 above. Mr Coleman failed, rather than refused, to progress the Claimant's job description, and we shall proceed to determine the issue on that basis. In any event, it makes no difference whether Mr Coleman refused or failed to provide the Claimant with a detailed job description since, either way, a reasonable worker would or might take the view that in all the circumstances it was to his detriment.

<u>The reasons for any detrimental treatment</u>

358. As regards any detriments, section 27 will only be infringed if the protected act materially influences (in the sense of being more than a trivial influence upon) the employer's treatment of the employee. In the case of a failure to deal with a protected act (or, in whistleblowing cases, a protected disclosure), simple incompetence in dealing with matters promptly may be an effective defence. However, where an employee who does a protected act is subject to a detriment without being at fault in any way, the Tribunals will need to look with a critical eye to see whether the innocent explanation by the employer for the adverse treatment is indeed the genuine explanation. The detrimental treatment of an innocent employee may provide a prima facie case that the action has been taken because of a protected act and will call for an explanation from the employer. Once an employer satisfies the Tribunal that it has acted for a particular reason, that necessarily discharges the burden of showing that the proscribed reason played no part in it. It is only if the Tribunal considers that the reason given is false (whether consciously or unconsciously) or that the Tribunal is being given something less than the whole story, that it may be

legitimate to infer detriment in accordance with the principles in Igen Ltd. v Wong. That question is essentially one of fact for the Tribunal. The issue is not whether the claimed non-discriminatory reason was a good reason but whether it was genuine.

359. Our conclusions in respect of the remaining issues are as follows:

Issue 33(2)

360. There is an entirely innocent explanation for the Respondent's failure to give the Claimant advance notice of the fact he would receive an invitation to complete a personality inventory. The 'Building an Empowering for Results Culture' initiative was a wider site initiative coordinated by the Business unit group. As strict confidentiality was maintained around the Claimant's disability, the group was unaware of the Claimant's condition or health issues. It cannot be the case that it issued the personality inventory email invitation to the Claimant because he had done protected acts, since it had no knowledge of them. As for Mr Coleman and/or Mrs Webster's failure to schedule a meeting with the Claimant to discuss the event, this was as a result of a technical issue which had nothing whatsoever to do with the fact the Claimant had done protected acts. The complaint is not well-founded.

Issue 33(4)

361. As noted already, it is unclear from Ms Keys' notes of the meeting of 20 April 2015 how the matter of the Claimant's job description was left, since the final minuted comments on the issue are as follows:

> "DJ – I need to ask questions but I don't have a job description.
>
> MC - It is ok for DJ to ask questions for clarity on the role and responsibilities."

It is impossible for us to know whether that represents an agreed resolution to the issue. As we have noted already, Ms Keys did not document any obvious actions within the list of Actions that related to the Claimant's job role/description. For his part, Mr Truter highlighted other matters when he wrote to Ms Routledge two weeks later on 6 May 2015. We cannot identify, and do not believe that we were taken to, any other contemporaneous materials in the Hearing Bundle which evidence that the Claimant expressed the view at the time that the issue of his job description was unresolved; it does not appear in a spreadsheet that was prepared by Mrs Webster in June 2015 as a record of 'actions taken', 'impacts', 'issues arising' and 'ongoing concerns' in relation to the identified agreed adjustments. Given that Mr Jenkins engaged constructively with the Claimant about the matter on 20 April 2015, and given the further facts to which we have just referred, in our judgement there are no grounds for us to infer that the Claimant's protected acts played any part in Mr Coleman's inaction in the matter. The fact that the Respondent was in breach of its

s.20 EqA 2010 duty to make adjustments does not support a further inference that it was also an act of victimisation. The complaint is not well-founded.

Unauthorised Deductions from Wages

362. The Claimant claims to have been underpaid in terms of the PHI benefit he received. Pursuant to s.13(3) of the Employment Rights Act 1996, the question is whether on any occasion he was paid less than the amount of the wages properly payable to him. His claim centres on whether his PHI payments should have been calculated by reference to his base salary as at 14 March 2016, being the date that his right to contractual sick pay expired, rather than on the basis of his salary at the end of a 26-week deferred period commencing with the first day of absence that counted towards his qualifying period of absence for the purposes of PHI benefit, namely. The latter date was calculated by the insurance provider to be 15 January 2015 (page 2687).

363. Following the Court of Appeal's decision in New Century Cleaning Co Ltd v Church 2000 IRLR 27, the first question for the Tribunal is whether there was some legal, though not necessarily contractual, entitlement to the payment of PHI benefit. We have referred already to the fact that the PHI Policy is expressed to be non-contractual. In order to succeed in a claim for unlawful deductions from wages, it is not sufficient for the Claimant to establish that he had a reasonable expectation to be paid PHI. The Claimant's witness statement does not address the status of the PHI Policy and Mr Varnam's submissions do not address the point, including for example whether any of its provisions were apt for incorporation into the Claimant's contract or had assumed a quasi-contractual status through something akin to custom and practice. We note in this regard that specific provision is made in s.27(3) of ERA 1996 for non-contractual bonus payments; they are treated as wages at the point at which they are paid (but seemingly not until they are paid). There is no equivalent deeming provisions in the 1996 Act in respect of other non-contractual benefits. However, we further note in Farrell Mathews and Weir v Hansen 2005 ICR 509 that once an employer told an employee they would receive a bonus on certain terms i.e, once a non-contractual discretion was exercised in favour of an employee, the employer was under a legal obligation to pay the bonus.

364. By analogy, we can see that an argument could be made that the Respondent exercised discretion in favour of the Claimant by agreeing in principle that PHI benefit should be paid in his case. However, even then, the Claimant would still need to address the fact that the Policy explicitly provides that the Respondent would not be liable to provide benefit if it had been refused for any reason by the insurance provider. In our judgement, that is fatal in terms of any claim that the Respondent was under a legal obligation to pay PHI benefit to the Claimant. But even if the Claimant was somehow able to surmount that hurdle, it would still leave unanswered the question of what his entitlement under the Policy was. Again, the PHI

Policy wording does not assist the Claimant since it refers to payment of up to 50% of base salary, and even then does not identify a specific point in time that is to be used for calculating the amount of PHI benefit. Whilst we can understand the logic of the Claimant's position, it is not based in the wording of the Policy or rooted in a clear legal entitlement. Regardless of the Claimant's suggestion that there may be an employee on long term sickness absence whose pay has been maintained by the Respondent in the exercise of its discretion, it is clear that the Respondent's commitment to pay sick pay to employees who fall ill is limited to a total period of 12 months and, thereafter, that any final decisions as to whether PHI benefit will be paid and, if so, in what amount (including the base salary by reference to which benefit is to be calculated), rests with the insurance provider. There is no suggestion that the provider has calculated the Claimant's benefit other than in accordance with its Rules and/or the terms of the insurance cover in place at the time the claim in respect of the Claimant was made. But, in any event, even if the provider failed to apply its own Rules correctly, or misinterpreted the terms of cover, this would at most have been a matter for the Respondent to pursue with the provider. We see no basis upon which it gives rise to any liability on the part of the Respondent. There is nothing in the Policy to suggest that the Respondent accepted some residual liability to its employees where the PHI provider miscalculated their benefit, be that innocently, negligently or otherwise. On the contrary, the Policy wording makes clear that the Respondent accepts no residual liability. The issue is not what may properly have been payable under the arrangements in place between the Respondent and its insurance provider, rather what was legally properly payable to the Claimant by the Respondent. In terms of monthly pay, as distinct from other benefits including holiday pay, the answer is that nothing was properly payable by the Respondent to the Claimant after 14 March 2016. The complaint is not well-founded.

Notice Pay

365. Although we were not provided with a copy of the Claimant's Statement of Particulars of Employment, it was not in dispute that this was in the form of the Respondent's standard template document in that regard, a copy of which was produced on 8 June 2023. Appendix A to the Statement, which is grade specific, provides in relation to grade SG26 employees that they may be required not to work during their notice period, but does not make provision for payment in lieu of notice. Accordingly, although the Respondent purported to terminate with payment in lieu of notice, as a matter of law it terminated the contract in breach and proffered a liquidated sum as damages for breach of contract.

366. As a result of the House of Lords' decision in Delaney v Staples (t/a De Montfort Recruitment) 1992 ICR 483, the circumstances in which an employee can pursue a claim to payment in lieu of notice as an unlawful deduction from wages are limited. It is only where the employee is effectively given an advance of their wages and instructed not to work, namely placed on garden leave, that the payment will be wages within the

ambit of s.27(1) of ERA 1996. That is not what happened here. The Respondent terminated the Claimant's employment with immediate effect and proffered a liquidated sum, expressed as payment in lieu of notice. That is one of three situations identified in Delaney where the payment is not wages within the meaning of s.27(1). In so far as the Claimant contends that the Respondent calculated the payment incorrectly, our jurisdiction is limited to determining the matter as a contract claim pursuant to and within the meaning of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

367. Ms Duane relies upon the provisions of s.222 of ERA 1996 in this regard. Mr Varnam has not referred to the provisions of the Act on this issue. S.88 is the starting point (to be construed in conjunction with s.87(4)). The Claimant was incapable of work because of sickness and in these circumstances (and given that, after four years' service, he was employed on statutory notice rights only) the Respondent was liable to pay him an amount of remuneration calculated in accordance with s.88, as opposed to sick pay in lieu of notice. The amount of remuneration is calculated by reference to a 'week's pay' (s.88(1) of ERA 1996). A week's pay is further defined in s.222 of ERA 1996. In the case of employees, such as the Claimant, whose remuneration does not vary with the amount of work done in the period, the amount of a week's pay *"is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week"* (s.222(2) of ERA 1996). The calculation date is 11 March 2022. We cannot identify that we have been told or provided with documentation in the Hearing Bundle that identifies what the Claimant would have been paid had he worked throughout a week at that date. The claim is pursued instead by Claimant with reference to a salary figure of £66,369.05 which is said to be the Claimant's average salary in his last working 12 weeks. However that is not the relevant period in time under s.222(2).

368. S.88(3) of ERA 1996 provides that any payment made by an employer to his employee in respect of the relevant part of the notice period (in this case, the full period of 12 weeks), whether by way of sick pay or otherwise, goes towards meeting the employer's liability. In our judgement, the PHI benefits paid by the insurance provider during the statutory notice period were, for these purposes, payments made by the Respondent. Although we are without the relevant information to identify the amount that should have been paid pursuant to s.88 and s.222 of ERA 1996, nevertheless we are certain that the sums paid by way of PHI benefit, together with the payment in lieu of notice, will have exceeded and therefore satisfied in full the Respondent's liability for that period.

369. If we are wrong and the PHI benefits paid during the statutory notice period were made by the insurance provider on its own behalf rather than on behalf of the Respondent, we would have said that the PHI benefits fall outside the narrow scope of the principle in Norton Tool Co Ltd v Tewson 1972 ICR 501, namely that an employee's earnings from new employment do not deprive the employee of his full contractual notice. The Norton Tool

principle derives from 'good industrial practice'. We do not consider that good industrial practice requires that an employee who was unfit to work their notice period should receive their full notice pay without giving credit for sums received by them during the notice period where those sums have been procured for the employee by their employer taking out a policy of insurance and paying the premiums on that policy.

370. If we are also wrong in that further regard, we are in full agreement with Ms Duane that the Respondent can in any event rely upon the defence of equitable set-off which is available to it where there is a close connection between the claim and cross-claim (in this case an overpayment to the Claimant of £19,733 in March 2019 due to an administrative error on the part of the Respondent), and where it would be unjust to enforce the claim without taking the cross-claim into account. The principles in this regard derive from Geldof Mettalconstructie NV v Simon Carves Ltd (2010) EWCA Civ 667 and have been recognised by the EAT in Ridge v HM Land Registry UKEAT/0485/12 to be equally applicable in breach of contract claims in the Tribunals (in which the Tribunals are simply applying the jurisdiction available to the civil courts). An equitable set-off may be raised even where, as here, a formal counter-claim has not been pursued. There is no dispute that £19,733 was paid to the Claimant in error. In our view, the Respondent is entitled to restitution of those monies pursuant to the law of unjust enrichment, regardless of whether or not the Respondent had the ability to withhold them through the Claimant's wages (though in that regard, s.14(1) of ERA 1996 provides that an overpayment of wages can be recovered through deductions from a worker's wages even if the deduction is not authorised by a relevant provision of the worker's contract and the worker has not previously signified in writing their agreement or consent to the deduction being made). No explanation has been provided as to why the monies have not been repaid notwithstanding the Claimant was advised of the need to repay these monies and provided with two potential options on how this could be done. Given his health issues, we can understand why the Respondent concluded that it should not take further steps to enforce its rights. Be that as it may, in our judgement, there is a close connection between the two claims, each of which derives not just from the contractual employment relationship, but from the remuneration arrangements under the contract, and in each case involves errors made by the Respondent rather than any wilful withholding of sums otherwise believed to be due. In our judgement, it would be manifestly unjust for the Claimant to take the benefit of the Respondent's error to the tune of £19,733 whilst at the same time holding the Respondent to account in respect of its more modest error in relation to his notice pay, not least in circumstances where the total sums received by him as a result of the Respondent's decision to put in place PHI arrangements for its staff were significantly in excess of what he might otherwise have received had he worked his notice period. This is not an employer that has sought to avoid its financial obligations to the Claimant. On the contrary, it has paid very significant sums to support his ongoing sessions with Mr Truter and so that Mr Truter could support him through the lengthy grievance and grievance appeal process.

Time Limits

371. For the purposes of this part of our judgment:

a) "Claim 1" refers to Issue 27(4) in the List of Issues – Mr Collin's documented comments on 11 September 2015 that the Claimant was "changing tactics";

b) "Claim 2" refers to Issue 15 in the List of Issues - the Respondent's breach of its s.20 EqA 2010 duty in respect of its PCP of not providing employees at grade SG26 with detailed job descriptions;

c) "Claim 3" refers to Issues 25 and 26 in the List of Issues - the Respondent's breach of its s.20 EqA 2010 duty in respect of its PCPs regarding the arrangement of meetings;

d) "Claim 4" refers to Issues 6 and 18 in the List of Issues - the Claimant's s.15 and s.20/s.21 claims in respect of the Respondent's failure to pay him sick pay after 14 March 2016; and

e) "Claim 5" refers to Issues 20 and 21 - the Respondent's breach of its s.20 EqA 2010 duty in respect of its handling of the grievance appeal.

372. The primary time limit under s.123(1)(a) EqA within which proceedings must be brought (or at least notified to Acas under the Early Conciliation Scheme) is three months starting with the date of the act to which the complaint relates (or the end of the period where there has been conduct extending over a period), though the Tribunal retains the discretion to allow a claim to be brought within such other period that it thinks just and equitable.

373. Concentrix CVG Intelligent Contact Ltd v Obi [2022] EAT 149 is a helpful recent reminder that the Tribunal's approach to just and equitable extension of time is not all or nothing. As the headnote to the EAT's judgment records:

> ***"The tribunal should consider first whether, taking all of the incidents as a course of conduct extending over time together, it is just and equitable to extend time, taking into account any issues of forensic prejudice by reference to the earlier incidents that are said to form part of the overall conduct. The Tribunal may conclude, having done so, that it is just and equitable to extend time in relation to the whole compendious course of conduct. But if, because of issues of forensic prejudice in relation to earlier incidents, the tribunal concludes that it is not just and equitable to extend time in relation to the whole of the compendious conduct over time, it may then need to give further consideration to whether it is alternatively just and equitable to extend time in relation to the most recent incident in its own right, standing alone, on the basis that the same***

forensic difficulties might not arise, or arise so severely, in relation to it."

These observations were in the context of circumstances in which a tribunal is considering a number of complaints of what it finds to be discrete incidents of discriminatory treatment, albeit which amount to conduct extending over a period.

374. The first thing we must decide is whether some or all of the incidents of discriminatory treatment in this case amount to a course of conduct extending over time. In Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA, the Court of Appeal made clear that tribunals should not take too literal an approach to the question of what amounts to continuing acts. The tribunals' focus should be on the substance of the allegations, as opposed to the existence of a policy; in Hendricks, whether the Police Commissioner was responsible for an ongoing state of affairs in which female ethnic minority officers were treated less favourably, or whether instead there was a succession of unconnected and isolated acts.

375. In our judgement, the matters identified by us that mean the Respondent was in breach of its s.20 EqA 2010 duty in respect of its failure to provide the Claimant with a detailed job description (Claim 2) and its organisation of meetings (including team meetings) on days and at times when the Claimant was not due to work (Claim 3) amounted to conduct extending over a period. They were failures on the part of Mr Coleman during a specific relatively short period in time after adjustments had been identified for the Claimant and Mr Coleman was responsible for overseeing their implementation. We return below to the issue of time limits in relation to those claims.

376. In our judgement, the matters identified by us that mean the Respondent was in breach of its s.20 EqA 2010 duty in respect of its handling of the grievance appeal (Claim 4) was conduct extending over a period. These were not discrete omissions within the grievance appeal process, rather failures on the part of Mr Cotterell, advised and supported throughout by Ms Francis, which directly impacted upon the grievance appeal process and the Claimant's experience of it. We return below to the issue of time limits in relation to that Claim.

377. Otherwise we conclude that Claims 1 to 5 are discrete, unconnected acts/omissions. In accordance with Aziz v FDA 2010 EWCA Civ 304, CA, a relevant, albeit not conclusive, factor is that different individuals were involved in these matters. Mr Coleman was essentially responsible for the Respondent's failure to provide the Claimant with a bespoke, detailed job description and for the December 2014 meeting and 2015 team meetings being scheduled when they were. Although Mr Coleman was at the case conference on 11 September 2015, he did not encourage and cannot reasonably be said to be responsible for any ill-advised comments by Mr Collins which were entirely unrelated to the Claimant's job description or

the scheduling of meetings, or the Claimant's need for structure, certainty and information in relation to those matters. Instead, Mr Collins' comments were directed at delays in securing the Claimant's consent to the release of Dr Cosgrove's report which was focused on the Claimant's absence and how his eventual return to work might be facilitated. It was Mr Bond's decision that discretion should not be exercised in the Claimant's favour by extending his company sick pay beyond 14 March 2016. He was advised in the matter by Ms Webb. This was unrelated to Mr Coleman's management of the Claimant in 2014/2015 or Mr Collins' one-off comment.

378. In his submissions, Mr Varnam identifies that the discrimination alleged falls into three categories: the underlying conduct between 2014 and 2016, the grievance, and the grievance appeal. He acknowledges that the earlier matters i.e, the underlying conduct, is "not quite so closely connected", but submits that it should still be seen as part of a single continuum. The principal means by which he seeks to present the underlying matters as part of a continuum is on the basis that they formed the subject-matter of the Claimant's grievances. It is an almost universal feature of claims that come before the tribunals that claimants will have raised grievances about the alleged discrimination and commonly the case that claimants additionally claim that they have been discriminated against, particularly victimised, in terms of how the grievance has then been handled. In our judgement, there ought to be something more than this fairly basic scenario in order for a tribunal to conclude that there has been conduct extending over a period. In any event, as Mr Varnam acknowledges, none of the alleged acts of harassment, including Mr Collins' documented comments, were pursued as grievances. Given our conclusions and the relatively limited number of complaints that are well-founded, we do not think that it can be reasonably said that the Respondent was responsible for a discriminatory state of affairs within its business generally or affecting the Claimant specifically or, as Mr Varnam submits, that there was a single pattern of the Respondent *"just not understanding the Claimant's disability"*. In our judgement, there were some isolated failures on the part of Mr Coleman in 2014/2015, a one-off comment by Mr Collins in September 2015, an inappropriate exercise of discretion in March 2016 and procedural shortcomings between 2018 and 2020. In a complex case extending over nine years, involving quite a number of different people and multiple allegations, we regard these as discrete, unconnected matters.

379. In the circumstances Claim 1 has been brought just over five and a half years out of time.

380. Time in relation to Claim 2 falls to be determined in accordance with s.123(3) and (4) of EqA 2010. Aside from his primary submission that there was a continuous act of discrimination, Mr Varnam has not identified the specific dates by which claims should have been presented in the event the alleged acts and omissions were to be regarded as discrete, unconnected matters. In our judgement, there is no evidence that Mr Coleman made a conscious decision that the Claimant should not be

provided with a detailed job description. Nor can we readily identify that they, or anyone else within the Respondent, did any particular act obviously inconsistent with making that adjustment. In which case, applying s.123(4)(b) of EqA 2010, the question is when the Respondent might reasonably have been expected to make the adjustment. Again, this is not addressed by Mr Varnam. The Claimant and Mr Coleman exchanged emails regarding the Claimant's job description on 7 and 8 January 2015. Even allowing for the Claimant's communication difficulties and tendency, as he said to Dr Woods, to labour points and go in circles, we consider that a detailed job description ought reasonably to have been in place within three weeks, namely by no later than 28 January 2015. As such, the Claimant's claim in respect of this matter was potentially presented over six years out of time. However, as we conclude that it is to be regarded as a part of conduct extending over a period, we have regard to the final date when any claim in respect of Issues 25 and 26 arose. Following the Claimant's return to work on 24 March 2015, team meetings continued to be held on a Monday. Accordingly, on Monday 30 March 2015 the Respondent did an act obviously inconsistent with making the adjustment. That is the date therefore from which time in respect of Claims 2 and 3 runs. The Claims have been brought nearly six years out of time.

381. As regards Claim 4, the Claimant highlighted to Ms Webb on 22 February 2016 that under the terms of the Sickness Absence and Pay policy there was a discretion in relation to company pay. Emails around this time in the Hearing Bundle indicate that it was intended that the Claimant, Ms Webb and Mr Bond would meet up to discuss matters. However, we cannot identify whether any meeting took place. On 11 March 2016, Ms Webb emailed the Claimant and attached a copy of a letter dated 9 March 2016 in which she confirmed that Mr Bond had decided not to exercise discretion in the Claimant's favour. The letter does not identify when the decision was taken, though the communication of Mr Bond's decision was obviously inconsistent with making the relevant adjustment (s.123(4)(a) of EqA 2010). We conclude that the Claimant's claim in respect of Claim 4 was presented just over five years out of time.

382. Given that the s.20 EqA 2010 breaches in respect of the grievance appeal (Claim 5) amount to conduct extending over a period, the final breach was Mr Cotterell's failure to have due regard to the Claimant's needs when he rescheduled the scheduled March 2020 meetings. We do not know when this was decided upon, though it was communicated to the Claimant on 24 February 2020. Applying the statutory presumption in s.123(4)(a) of EqA 2010, Ms Francis' email was an act inconsistent with the reasonable adjustment and accordingly, in our judgement, is to be regarded as the date of the end of the relevant continuous period. The Claimant's claim in respect of Claim 5 has therefore been presented just over one year out of time.

383. Tribunals have a wide discretion under s.123(1)(b) of EqA 2010 to determine whether it is just and equitable to extend time. However, time

limits are to be applied strictly - Bexley Community Centre (t/a Leisure Link) v Robertson [2003] IRLR 434 - and the burden is on the Claimant to demonstrate that it is just and equitable to extend time - Miller v Ministry of Justice (2016) UKEAT/0003/15/LA. There is no presumption in favour of the extension of time.

384. We are required to consider all relevant factors, which may include the factors set out at s.33(3) of the Limitation Act 1980, including the length of, and reasons for, the delay and the steps taken by the Claimant to obtain appropriate professional advice once he knew of the possibility of taking action. In Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23, the Court of Appeal cautioned against tribunals overly relying on the checklist of factors found in s.33 of the Limitation Act 1980, stating that they should assess all the factors in the particular case which they consider relevant to whether it is just and equitable to extend time.

385. A relevant consideration is whether any delay has prejudiced the respondent (for example, by impeding its ability to investigate the claim while matters were fresh). A respondent is obviously prejudiced by having to meet a claim which would otherwise be defeated by a limitation defence, but it may also experience forensic prejudice caused by fading memories, loss of documents or losing touch with witnesses. But it is not just the potential prejudice to respondents that tribunals are concerned with. Tribunals must equally have regard to the prejudice to a claimant of being denied a remedy in respect of potentially well-founded claims. These balancing considerations were all explored in the TVZ judgment already referred to.

386. The EAT in Ebay (UK) Ltd v Buzzeo UKEAT/0159/13 (5 September 2013, unreported) held that the first, and crucial, step for a Tribunal is to make findings as to the date of expiry of limitation, and the date on which the claim was in fact lodged to determine whether the claim was out of time and, if so, by how much. We refer to our conclusions in this regard set out immediately above.

387. In Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13 (18 February 201, also unreported), the EAT observed that, “The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is [the] reason why after the expiry of the primary time limit the claim was not brought sooner than it was”.

388. Although Ms Duane has set out the key legal principles in her written submissions, she has not specifically engaged with why she says that time should not be extended in respect of the specific matters complained of. She merely asserts that the Claimant has failed to convince the Tribunal that it is just and equitable to extend the time limit.

389. We conclude that we should not extend time in respect of Claims 1 to 4. As regards Claim 1, the Respondent has been significantly prejudiced in

having to meet this claim. Although the Respondent was able to secure a written statement from Mr Collins as well as his attendance at Tribunal notwithstanding he has left the Respondent's employment, and notwithstanding the notes of the 11 September 2015 case conference were available to him, Mr Collins had no recollection of making the comment, indeed he could not recollect any meeting on that date. It was both a meeting and a fine point of detail in a meeting that Mr Collins had no particular reason to commit to his long term memory. If a claim had been brought within a reasonable period of the Claimant becoming aware of the comments, Mr Collins would have been much better placed to recall the meeting, the discussion and his comments, in order to contextualise them and, indeed, whether he believed they had been said or accurately captured. His ability now to do so has been badly compromised by reason that five and a half years elapsed before a claim was commenced.

390. We have already addressed Ms Duane's submissions to the effect that the Claimant was evasive in his evidence. Whilst we do not accept that he was evasive, nevertheless there was a moment in his evidence when we were each struck by his reticence, namely when he was asked when he had first sought legal advice. He plainly did not want to say. As we have noted already, the Claimant's grievance began with a section headed, 'Factual and legal background'. He made explicit reference in it to the Equality Act 2010, to the Respondent's duty of care and to the need for reasonable adjustments. As with his many other communications in the Hearing Bundle it is articulate and well structured, and reflects an intelligent, well-organised mind. We are in no doubt that the Claimant's understanding of his rights as an employee extended at that time to the potential enforcement of his rights. Mr Truter's notes of his session with the Claimant on 7 April 2016 document that the Claimant had taken advice from a solicitor. We do not know whether it was the same firm of employment law specialists who have represented him in these proceedings, but any reasonably competent solicitor would advise as to the onerous time limits that operate in the tribunals. The Claimant has not suggested that he was badly advised in the matter. Instead his evidence is that he was focused upon trying to return to work. That may well be the case, but it evidences to us that he made a conscious decision at the time not to pursue a legal claim in respect of the matters raised within his grievance. We do not overlook that he first became aware of Mr Collins' documented comments in autumn 2019. However, it is clear that he continued to be legally advised over an extended period. In a further session with Mr Truter on 20 September 2018, the day after he had been informed that a forthcoming planned meeting as part of the grievance appeal process would need to be postponed as Ms Francis had a personal medical appointment, he told Mr Truter that the Respondent was not giving time to his case and that it was going in the direction of litigation (page 227 of the second part of the sixth lever arch file). On 26 September 2019 the Claimant told Mr Truter he had met with his solicitor the previous day but that he could not get his head around what had been said (page 273). Subsequently, on 24 October 2019 he spoke of wanting to avoid going down the legal route. He referred to a personal injury process, suggesting

that he may have had in mind an alternative claim in the civil courts. We conclude that the Claimant was taking legal advice throughout the grievance and grievance appeal processes, and that he had a good understanding of his rights as a disabled person, extending to the enforcement of those rights.

391. The Claimant is, of course, someone with complex mental health issues. He was absent from work on long term sickness absence when Mr Collins' comments came to his attention. Mr Truter's session notes from that time evidence that the Claimant told him that he found it hard to keep it all together and that he felt trapped in a perfect storm (page 274). They evidence that he was continuing to ruminate on issues of perception as compared to logic, facts and data. The grievance and grievance appeal processes evidence that the Claimant needed to compartmentalise issues and was not always able to focus on multiple different strands at the same time. Indeed there is fairly extensive evidence that over a period of several years the Claimant could not move beyond the cultural survey issue. Whilst these are weighty considerations, we have ultimately come to the conclusion that it would not be just and equitable to extend time in respect of Claim 1 given that the Claimant was legally advised throughout and given also the significant forensic prejudice to the Respondent of addressing what may have been meant by Mr Collins over seven years ago when he apparently spoke of the Claimant "changing tactics" in a meeting he cannot recall and which the Claimant himself did not attend, and accordingly cannot shed any further light on.

392. We decline to extend time in respect of Claims 2 and 3 for largely the same reasons. Again, there is significant forensic prejudice in expecting Mr Coleman to address, over eight years after the event, the reasons why he may not have responded to the Claimant's email of 8 January 2015 regarding his job description and what, if any, actions were agreed at the meeting on 20 April 2015, as well as the reason why a meeting in December 2014 and team meetings from 24 March 2015 were not rescheduled to accommodate the Claimant and any disadvantage that may or may not have resulted from this. Although contemporaneous documents are available to Mr Coleman, it has been impossible for him to offer any specific recollection or context in respect of the Claimant's job description, to recall what further discussions may have taken place between 8 January and 20 April 2015, or to fill in the gaps in the documents themselves. By no later than May 2016 the Claimant was of the view that the Respondent was in breach of its legal duty to make reasonable adjustments, citing his job role detail in his grievance as one of the Respondent's failings in that regard. He had taken legal advice, and he continued to be legally advised in at least 2018 and 2019. We were not told that his solicitors had written to the Respondent reserving his right to pursue claims once the grievance and grievance appeal process was concluded, and making clear their view that he should not be prejudiced in the matter by delaying. By the very latest, we consider that he ought reasonably to have filed a holding claim once he had received Mr Goldspink's final decision on his grievance on or around 16 November

2017. In fact he should have pursued any claim once he had Mr Goldspink's decision on Grievance 2, Reasonable Adjustments, namely on 19 December 2016.

393. Turning next to Claim 4, the Respondent is not faced with the same degree of forensic prejudice as it is in addressing Claims 1 to 3. The decision not to exercise discretion in the Claimant's favour by extending company sick pay pending the determination of his PHI claim is reasonably well documented, as are the Claimant's and Ms Webb's email interactions at the time. However, other than stating that Mr Bond had thought about the matter very carefully, Ms Webb's letter of 9 March 2016 did not elaborate as to the reasons why discretion had not been exercised in the Claimant's failure and accordingly it does not serve as a contemporaneous record of the rationale for Mr Bond's decision that might have promoted some clearer recollection. She was able to say in evidence that she was only aware of discretion having been exercised on two previous occasions, in each case where the employee had been diagnosed with a terminal condition, and that she believed there were many other cases, including serious traffic accidents and heart attacks, where discretion was not exercised.

394. Had the Respondent discharged its s.20 EqA 2010 duty to the Claimant he would not have been faced with an extended period of financial uncertainty, though given how we have framed the duty, he did not ultimately experience any or any material financial detriment in so far as his PHI benefit was backdated to the date from which his company sick pay expired. If we do not extend time, the principal injustice to the Claimant is that he will be denied a remedy in respect of injured feelings resulting from the Respondent's failure to make a reasonable adjustment. We weigh in the balance that he was being legally advised about his situation and, whether this was done on advice or simply acting on his own understanding in the matter, that he had asked Ms Webb in an email sent on 31 March 2016 to provide the rationale behind the decision, requesting that she identify who was involved in the decision, what information was considered, what matters would ordinarily be considered in the exercise of discretion etc (page 791). It demonstrates that he had a very clear grasp of the issues. When he submitted his grievance the following month he identified this as one of a number of issues that related to his disability and in respect of which an adjustment or resolution should be provided whereby he received discretionary sick pay or PHI in the interim. By the very latest, we consider that he ought reasonably to have filed a holding claim once he had received Mr Goldspink's final decision on his grievance on or around 16 November 2017. In fact he should have pursued any claim once he had Mr Goldspink's decision on Grievance 1, Cessation of sick pay, namely on 24 August 2016.

395. As regards Claim 5, we consider that it would be just and equitable to extend time, because the prejudice and hardship that would otherwise result to the Claimant if we were to refuse an extension and thereby deprive him of a remedy in respect of complaints that are well-founded,

outweighs the prejudice and hardship to the Respondent of permitting the complaints to be pursued over a year out of time. Upon receipt of the Claimant's grievance, but especially as the grievance and thereafter the grievance appeal progressed, we think the potential for litigation would have been apparent, indeed obvious, to the Respondent. The grievance appeal process is extensively documented, with the result that the Respondent cannot say that it is forensically prejudiced in the same way as it has been in respect of Claims 1 to 3, and to a lesser extend Claim 4. Mr Cotterell struggled to explain the reasons why he needed to cancel meetings, but that was not because documentary evidence in the form of calendar entries, travel plans and meeting schedules were said not to be available to him, rather he seems not to have refreshed his memory on the matter before giving his evidence. It is not necessarily a criticism, particularly given the significant demands on his time, but we were left with the impression that he had not perhaps prepared himself fully to give evidence at Tribunal. We are satisfied that the cogency of the evidence has been unaffected by any delay and, indeed, there has been no contention by the Respondent to the contrary. Discretion is exercised in favour of the Claimant to extend time.

NEXT STEPS

396. This case will be listed for a remedy hearing. Notice of that hearing together with any relevant case management orders will be notified to the parties separately.

_____
Employment Judge Tynan

Date: …11 September 2023…….

Sent to the parties on:

12 September 2023…….....

…….....
For the Tribunal Office