RESERVED

EMPLOYMENT TRIBUNALS

Claimant: Mr K Samuels

Respondents: Lloyds Bank Plc

HELD AT: Liverpool (by in person) **ON:** 13, 14, 15 & 16 November 2023

BEFORE: Employment Judge Shotter

Members: Ms A Ramsden
Ms D Kelly

REPRESENTATION:

Claimant: In person
Respondent: Mr M Salter, counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant's claim of disability discrimination set out in allegations 5.1.to 5.1.1.8 brought under section 26 of the Equality Act 2010, allegations 9.2. to 9.2.4 brought under section 15 of the Equality Act 2010, and allegation 12.1 brought under section 13 of the Equality Act 2010 were not presented to the Tribunal before the end of the period of 3 months beginning when the act complained of was done (or is treated as done) the last date being the 17 June 2021. ACAS early conciliation commenced on the 10 November 2021, the was certificate issued on the 10 December 2021 and proceedings received on the 7 January 2022. The complaints are out of time and in all the circumstances of the case it is not just and equitable to extend time. The Tribunal does not have the jurisdiction to consider the complains which are dismissed.

2. In the alternative, the claimant's claims of unlawful direct discrimination brought under section 13, 15 and section 26 of the Equality act 2010 are dismissed. The claimant was not treated less favourably than a hypothetical comparator because of the

protected characteristic of disability, his claim for direct disability discrimination brought under section 13 pf the Equality Act 2010 fails and is dismissed. The claimant was not treated less favourably because of something arising in consequence of his disability and his claims of discrimination arising from disability brought under section 15 of the Equality Act 2020 fails and are dismissed. The respondent's conduct did not have the proscribed affect under section 26 of the Equality Act 2010, the claimant's claims of harassment fail and are dismissed.

3. The respondent was not in breach of the implied term of trust and confidence and the claimant's claim of constructive unfair dismissal brought under section 95(1)(c) of the Employment Rights Act 1996 as amended is not well-founded and is dismissed.

REASONS

Preamble

The hearing

1. This is an in-person hearing. The claimant, who is disabled was invited to request as many breaks as he wanted taking into account the Equal Treatment Bench Book and was given time (as was the respondent) to prepare written submissions before oral submissions were to be made. The documents the Tribunal was referred to are in a bundle totalling 277 pages together with additional documents produced by the claimant, the contents of which the Tribunal has referred to where relevant below.

Witnesses

2. The Tribunal was provided with a four witness statements in total, consisting of a written statement prepared by the claimant unsigned and undated, and on behalf of the respondent the Tribunal had before it the written statements of Daniel Hughes, debit fraud team manager and the claimant's line manager, dated 16 October 2023, Patrick Hazelwood, senior team manager, and line manager of Daniel Hughes, and Jodie Grue, team manager in fraud and disputes, who took over the line management the claimant in July 2021.

3. There were a number of conflicts in the evidence between that given by the claimant and the respondent's witnesses which the Tribunal resolved largely through the contemporaneous documents and notes taken at the time, which it was satisfied reflected the true position. The claimant was asked why the Tribunal should accept his oral evidence when it came to conflicting evidence given the contemporaneous notes and the fact the claimant took no notes. His response was that he had discussed the evidence with friends, family and his partner and therefore remembered it all.

4. Mr Salter in submissions referred the Tribunal to the well-known case of Gestmin SGPS SA v Credit Suisse (UK) Limited [2013] EWHC 3560 (Comm) [16] – [22]. The claimant's evidence is unsupported by any documents apart from his written resignation (a key document) and one medical report, in direct contrast to the respondent's evidence which is largely supported by contemporaneous documents with the exception of the 18 May 2021 wellness meeting when Patrick Hazelwood took notes of what was said by the claimant and Daniel Hughes, but did not think to take notes of what he said during the meeting.

5. Gestmin (above) set out a number of principles that are highly relevant to the case before the Tribunal, the claimant's evidence, which the Tribunal found was largely unreliable on the basis that he had made up his mind before any meeting with Daniel Hughes to move from the department either by internal transfer or into a different business and having done so has attempted to build a case of disability discrimination on which a claim of constructive unfair dismissal can be established after discussing the way he had been treated with family and friends. The key principles are::

a. "We are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are;
b. **Memories are fluid and malleable, being constantly rewritten whenever they are retrieved**;
c. External information can intrude into a witness's memory as can his or her own thoughts and beliefs; both can cause dramatic changes in recollection;
d. **Memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions** about an event in circumstances where his or her memory is already weak due to the passage of time;
e. e. **The best approach for a judge to adopt is to base factual findings on inferences drawn from the documentary evidence and known or probable facts**" [the Tribunal's emphasis].

6. In short, when it came to the conflicts in the evidence, the Tribunal accepted Mr Salter's submission that the claimant's responses on occasion lacked detail and could not be relied upon. The Tribunal noted that when the claimant gave evidence he was unable to remember dates and misremembered what happened on certain dates including the date of the causes of action, and it was inconsistent with the contemporaneous notes taken at meetings which gave rise to the discrimination complaints. In oral evidence the claimant stated that he had changed his mind about wanting to leave as he was happier in his role which he enjoyed, the respondent having made reasonable adjustments followed by a change in line manager, and yet he accepted a job offer at a higher rate of pay, which the Tribunal found as recorded below, was his original intention.

7. The Tribunal concluded that the evidence given on behalf of the respondent supported by contemporaneous documents was truthful, straightforward and honest. With reference to the 18 May 2021 welfare catch up meeting the Tribunal took into account what was said before and after this meeting, concluding that the impression given to the claimant was that his absence affected the business and was not sustainable. The principles set out in Gestmin apply equally to Patrick Hazelwood, who identified in his witness statement that the notes taken by him on the 18 May 2021 were incomplete. Patrick Hazelwood has attempted to recall what was said some 2-years past. It is notable that the ability to recollect the minutia of what was said and done in the distant past can become more problematic in cases where proceedings are not received within the statutory time limit and no criticism or grievance was raised by the claimant soon after the alleged event complained until years down the line.

Claimant's disability

8. The respondent concedes the claimant is disabled with epilepsy of which it had knowledge, Knowledge is not an issue in this case.

List of issues

9. A list of issues was prepared in draft and amended following discussions and agreement with the parties as follows following the same numbering:

1. **Time limits**

1.1 Has the Claimant brought his discrimination claims within the time limit set by Section 123(1) of the Equality Act 2010? This gives rise to the following sub-issues:

1.2 Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates? The Claimant accepts the last act he complains of as discrimination occurred in June 2020

1.3 If not, was there conduct extending over a period?

1.4 If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the end of that period?

1.5 If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:

1.5.1 Why were the complaints not made to the Tribunal in time?

1.5.2 In any event, is it just and equitable in all the circumstances to extend time?

2. **Unfair Dismissal**

2.1 Did the Claimant terminate the contract under which they were employed in circumstances in which they were entitled to terminate it without notice by reason of the Respondent's conduct? This gives rise to the following sub-issues:

2.1.1 Did the Respondent do things listed at 5.1.1.1 to 5.1.1.8, 9.2.2, 9.2.4, 9.3 and 9.4?

2.1.2 Was this a breach of the implied term of trust and confidence?

2.1.3 Was the breach repudiatory in nature? The Respondent accepts that any proven breach of the implied duty of trust and confidence is repudiatory: Morrow v Safeway Stores [2002] IRLR 9

2.1.4 Did the Claimant affirm the contract and/or waive the breach of contract?

2.1.5 Did the Claimant terminate their employment in response to the breach?

3. **Reason for dismissal**

3.1 Has the respondent shown the reason or principal reason for dismissal was capability?

3.2 Was it a potentially fair reason under section 98 Employment Rights Act 1996?

3.3 If so, applying the test of fairness in section 98(4), did the respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?

3.4 **Remedy for unfair dismissal**

3.5 What basic award is payable to the claimant, if any?

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

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

3.7.1 What financial losses has the dismissal caused the claimant?

3.7.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

3.7.3 If not, for what period of loss should the claimant be compensated?

3.7.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

3.7.5 If so, should the claimant's compensation be reduced? By how much?

3.7.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

3.7.7 Did the Claimant unreasonably fail to comply with it by failing to utilise the Respondent's grievance procedure prior to his resignation?

3.7.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

3.7.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?

3.7.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

3.7.11 Does the statutory cap of fifty-two weeks' pay apply?

4. **Disability**

4.1 It is agreed that, at the material time(s), the Claimant was a disabled person within the meaning of the Equality Act 2010, their disability being epilepsy.

Disability related harassment: Equality Act 2010 s26

5. **Whether incidents/events complained of occurred**

5.1 Did the Respondent do the following alleged things?:

5.1.1 Between February 2021 and April 2021 in the course of the discussions about the formal wellness plan by Mr Daniel Hughes:

5.1.1.1 pressuring the claimant to seek treatment with BUPA despite fact that would involve him having to pay an excess of £150 and the claimant telling Mr Hughes that there was no alternative treatment;

5.1.1.2 pressuring the claimant to contact mental health charities;

5.1.1.3 telling the claimant that he was not a doctor;

5.1.1.4 telling the claimant that he was not trying hard enough to get better;

5.1.1.5 telling the claimant to complete a seizure diary, provide information about what happens during a seizure, how the claimant feels, what his medication is and what its side effects are.

5.1.1.6 pressuring the claimant to attend a formal hearing by Teams in May 2021 which did not adhere to standard procedures;

5.1.1.7 telling the claimant that if he did not agree to a meeting Mr Hughes would look at disciplinary action; and

5.1.1.8 In late May 2021 during a meeting between the claimant, Mr Hughes and Mr Patrick Hazelwood, Mr Hazlewood telling the claimant that his absence was not sustainable and offering support to write a CV to help him find a new job.

6. **Whether conduct related to disability**

6.1 Was the conduct in question related to disability?

7. **Whether conduct unwanted**

7.1 Was the conduct in question unwanted?

8. **Purpose/effect of conduct**

8.1 Did the conduct in question have the purpose of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

8.2 Did the conduct in question have the effect of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, taking into account: the Claimant's perception, the circumstances of the case, and whether it was reasonable for the conduct in question to have that effect?

Discrimination arising from disability: Equality Act 2010 s15.

9. **Whether Claimant treated unfavourably**

9.1 Did the Respondent do the following alleged things?:

9.2 Between February 2021 and April 2022 in the course of the discussions about the formal wellness plan by Mr Hughes:

9.2.1 pressuring the claimant to seek treatment with BUPA despite fact that would involve C having to pay an excess of £150 and the claimant telling Mr Hughes that there was no alternative treatment;

9.2.2 telling the claimant to look for a new job;

9.2.3 telling the claimant to complete a seizure diary, provide information about what happens during a seizure, how the claimant feels, what his medication is and what its side effects are; and

9.2.4 not believing the information provided by the claimant including information in a previous occupational health report.

9.3 By Daniel Hughes, pressuring the Claimant to attend a formal hearing by Teams in May 2021 which did not adhere to standard procedures.

9.4 On 3 June 2021 by Daniel Hughes offering the claimant the medical redeployment programme (without calling it that) and telling him that if no position became available within 6 months or if he refused an offer in that time, his contract would be terminated.

9.5 Was this unfavourable treatment?

10. **Reason for treatment**

10.1 Was the unfavourable treatment because of the claimant's sickness absence which had led to the formal action plan being put into place.

11. **Whether treatment justified**

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

11.2 If so, was it a proportionate means of achieving that aim?

12. **Direct Discrimination**

12.1 Did Mr Hughes pressurise the Claimant to seek treatment by BUPA even though he would have to pay an excess to do so.

12.2 If so, did the Claimant reasonably see this treatment as a detriment.

12.3 If so has the Claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances without a disability would have been treated? The Claimant relies upon a hypothetical comparison,

12.4 If so, has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of disability?

12.5 If so has the Respondent shown that there was no less favourable treatment because of disability?

13. **Remedy**

13.1 Is it just and equitable to award compensation?

13.2 What amount of compensation would put the Claimant in the position they would have been in but for the contravention of the Equality Act 2010?

13.3 Has the Claimant taken reasonable steps to mitigate their loss?

13.4 Was the Claimant guilty of contributory fault and, if so, to what extent should any compensation be reduced?

13.5 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? Did the Claimant unreasonably fail to comply with it by failing to utilise the Respondent's grievance procedure prior to his resignation?

The pleadings

10. In a claim form received on 7 January 2022 following ACAS early conciliation undertaken between the 10 November and 10 December 2021 the claimant, who confirmed in the ET1 form that he stated new work on the 4 October 2021, brings claims of constructive unfair dismissal and disability discrimination relying on epilepsy. In short, the claimant claimed that his line manager, Daniel Hughes, attempted to force him to attend a "formal meeting through TEAMS" when the claimant was signed off, or he "would face formal action," and "tried pushing me to go to BUPA for treatment…as part of my wellness plan…and questioned as to why I had not spoken to publicly available mental health services and charities. I was told I was not trying hard enough to get better…my attendance was not sustainable, and I was offered help to write my CV which I did not request…when discussing again my progress in seeking a new job…I told him I did not want to leave…In July 2021 my team was moved to a new manager but my enthusiasm for work had been eroded…In September 2021 I left…as I felt unable to continue with the role due to constant harassment and anxiety. It was made clear that I was not wanted in the business…" The claimant has contradicted his own pleading as recorded below in the findings of facts.

11. The claimant provided further and better particulars on the 2 February 2023.

Facts

12. The respondent provides banking services and employs thousands of employees throughout the United Kingdom, Channel Islands and Isle of Mann, including Liverpool at premises opposite Dobies Garden Centre near Liverpool Airport. The respondent often used Dobies Garden Centre as an agreed venue for informal discussions with staff, for example, concerning sickness absence.

The Health, Wellbeing and Attendance Policy

13. The respondent operates a Health, Wellbeing and Attendance Policy ("the Wellbeing Policy") with the aim of managing absences and poor health within the workplace. The Policy changed in late 2020, under which employees who were unable to return to work due to ill health or improve performance were dealt with under an informal procedure that moved onto an formal procedure ultimately resulting in dismissal on the grounds of capability.

14. The "Key Principles" set out in a Health, Wellbeing and Attendance Policy include:

14.1 A provision that employees "take responsibility for your health and wellbeing" and "work with your line manager to identify ways to help you back to work…" Employees can expect "**your line manager will talk to you about supporting back to work or making sure you can stay in work. We are committed to doing this as soon as possible…we will always try to find ways to help you stay in work or support you to return so that you can meet your contractual obligations.** In most cases great conversations and good relationships make that possible. **You and your line manager will normally shape a Wellness Action plan to support you**. If you have been unable to return or improve your attendance, and we have done everything that could reasonably be expected, we'll introduce a more formal framework in order to reach a sustainable outcome for you and the business" [the Tribunal's emphasis].

14.2 The Policy provides for formal meetings after the informal discussions between employee and line manager with the aim of "finding the right support you will be able to return or improve your attendance to a level that is sustainable. Where that isn't possible employment may be terminated on the grounds of incapacity."

15. The claimant was employed by the respondent as a fraud consultant from 10 October 2016 until 30 August 2021 when he resigned. The claimant was provided with a contract of employment which referred to the respondent's policies in respect of sick pay and sick leave at clause 12. The claimant was provided with the benefit of a BUPA health insurance. The claimant worked on the telephone speaking to clients, and some but not all of the calls could be stressful.

16. The claimant had a number of disability related absences due to epilepsy and on 11 March 2020 occupational health provide a report confirming the frequency of the claimant's epileptic seizures had increased over the last 12 months, his medication had been increased and he had been referred back to a neurologist. Occupational health suggested the claimant "…has been waiting for an NHS appointment to see his specialist, **for a more time efficient service Mr Samuels may benefit from using your private medical insurer BUPA**" [the Tribunal's emphasis]. Various adjustments were suggested to take place after medical treatment upon his return to work including reduced working hours, stable shift pattern, agile working medical breaks and regular wellbeing meetings. Occupational Health advised "stress can be a trigger for epileptic seizures in general, and therefore I would recommend completion of the risk assessment…may be used to highlight and resolve any potential stressors. " Review of this was also recommended on a regular basis.

17. The claimant had a number of lengthy absences in 2020 relating to his disability, a second formal absence plan had been put in place under the original Absence Policy until it was replaced on 15 September 2020.

<u>Secondment and decision to seek new employment.</u>

18. Between 5 June to 28 December 2020 the claimant was seconded to work back office which did not require him to be on the phones. His contractual role was almost entirely telephone based, however, he preferred the non-telephone role and to stay back office. The claimant was not happy when he returned to his contractual role on the 28 December 2020 and started to look for alternative work outside the respondent "almost immediately" as confirmed by the claimant in oral evidence.

19. On the 30 January 2021 the claimant requested a reference from his line manager for "something I'm applying for" and she agreed to provide him with a reference. The claimant applied for a different job for the sole reason that he was unhappy with his contractual duties and believed the stress of taking difficult telephone calls adversely affected his disability.

20. The claimant returned to work the contractual telephoned based role until a sickness absence from 7 February 2021 to the 22 February 2022 due to dizziness and epilepsy which resulted in the first informal welfare meeting held with Daniel Hughes on the 22 February 2021 by telephone. Daniel Hughes typed up the conversation on his laptop as he was having the discussion with the claimant, and tidied it up immediately after. The claimant in submissions stated that some of notes could not be relied on. Nowhere in the claimant's witness statement does he question the validity of the notes disclosed by the respondent with the exception of the meeting held on 18 May 2021. The claimant did not take notes himself and the Tribunal concluded that his recollection of events could not be relied on in its entirely, his evidence was not entirely credible and it preferred the evidence given by the respondent's witnesses corroborated by contemporaneous documentation.

21. On the 22 February 2021 the claimant applied to HMRC for the role of Generic Compliance Caseworker based in Liverpool at a substantial increase in salary. The claimant's evidence was that this application was made following a formal action set in his wellness plan. Taking into account the factual matrix the Tribunal did not accept this was the case as the Wellbeing meeting took place on the same day and no formal action was set out in any plan. The Tribunal concluded on the balance of probabilities that the claimant applied for the role, as he had applied for other positions earlier, because he was unhappy with the work and would have preferred a role with no or little telephone work with a substantial increase in salary.

Informal wellbeing meeting 22 February 2021

22. During the conversation Daniel Hughes discussed the claimant's absence record and "the best thing for us to do is open a wellness plan for yourself, just an opportunity for me to support yourself" and he referred to obtaining a second occupational health report as it appeared the claimant's medical circumstances had changed and in addition, he was working from home. The claimant stated he was "still not feeling right…I'm still out of it. I can sort of concentrate on what I'm doing at the time but then looking back I don't really know what's going on." The claimant confirmed he was "not fantastic" about work and when invited to do so offered information about his medical condition and how it was affected by a call he had taken. The claimant explained his medication may be changed and he was "struggling with depression and anxiety and she thinks that's a trigger for my epilepsy. So when something gets stressful then that's going to trigger a seizure."

23. The Tribunal concluded, having considered the notes of that meeting, Daniel Hughes asked relevant questions in a polite and positive way about the claimant's health and the effect of the work on it. The claimant referred to his GP; "I have spoken to her a couple of times because it's happened a few times over the past two weeks" confirmed when asked "is this in light of your current absence "Yeah." When asked by Daniel Hughes whether there was any support the respondent could offer to which the claimant responded that he had felt a "lot better" working in the back office "I felt a lot healthier, and it was better for my mental health…and since going back on the phones it has made me feel terrible."

24. Daniel Hughes responded "do you think the job role has an effect on your condition, do you think it brings it on" to which the claimant responded "yeah…I didn't realise how

difficult I was finding it until I came back on the phones…since I've been back on the phones that's where I've found it more difficult." It was at this point that Daniel Hughes said "Would/have you looked at the likes of job shop and what opportunities are out there?" The claimant responded that he had, and put in applications. Job Shop is an internal communication advertising job vacancies within the respondent and by this stage the claimant was voluntarily seeking different employment which included applying for external and internal vacancies.

25. During the meeting the claimant volunteered the information that he was on two types of medication explaining "one is a sort of depressant and some of the side effects are like depression, suicidal thoughts and stuff like that and the other one is the opposite. The other antiepileptic is also prescribed for anxiety and depression, so I'm thinking to reduce one and increase another, then it should help with everything but I have to wait and see what the neurologist says." In direct contrast to his claim form and evidence to this Tribunal, the claimant volunteered the information about his health, treatment and medication and was not placed under any pressure to provide this information. Daniel Hughes in response offered to support the claimant who confirmed that he was due to speak to the neurologist and when asked "can they give you any advice in order to ease the symptoms that you that you're having" the claimant responded "no not really."

26. The conversation was open, positive, the claimant offered up information without any pressure from Daniel Hughes, who came across as positively wanting to support the claimant and referred him to the Bank Workers Charity and explained support was available through BUPA as previously advised by occupational health. The claimant's response was "There's not really anything they can do, it's not something that can be cured...it has to be a regular neurologist that keeps reviewing" Daniel Hughes responded "okay that's fine" and a discussion took place about the claimant's attacks and what the medication was, information offered up by the claimant freely. The claimant had authorised the release of the 11 March 2020 occupational health report and its reference to him benefitting from a BUPA referral. Given the claimant's response that the neurologist could not advise on easing symptoms and his ongoing medical problems, it was not unreasonable for Daniel Hughes to suggest a BUPE referral to assist the claimant both in respect of the expertise offered and circumventing NHS waiting lists.

27. The claimant confirmed that "I think it's more down to difficult situations if it's something sort of that sets me off, I don't know why but this is making me feel weird now. I keep getting a twitch." The claimant was offered a break, which he did not accept, and volunteered information about his deteriorating memory, sleep patterns triggering epilepsy and shift pattern. Daniel Hughes asked the claimant "what support do you need form me to be sure your happy and comfortable within the work or as comfortable as you can be" he said "I don't really know…just try and get on with it." Daniel Hughes responded "I wouldn't say getting on with it because there is a lot of support here for you…I think we can definitely do need to use the options that are available to us and the help on Thursday, I think it's paramount that I'm aware of what's said just so I can see what I can do..."

28. In short, an agreement was reached that after the claimant had seen the consultant there would be another meeting to discuss what support the respondent could put in place to assist the claimant, and the claimant agreed to "keep an eye out" for Job Shop. Contrary to the claimant's pleadings and evidence, no pressure was put on him to secure alternative employment either within or outside the respondent and he was in agreement that more suitable work was needed which did not trigger epilepsy and so the Tribunal finds. The claimant does not shift the burden of proof in respect of allegation 5 and the discussion which

took place did not have the purpose or effect proscribed in section 26 of the EqA, the reverse given that the way Daniel Hughes conducted the first informal welfare meeting did not have the purpose proscribed and the effect did not violate the claimant's dignity the Tribunal having found the claimant has exaggerated what took place for the purpose of bringing this claim.

29. The claimant did not return to work and was signed off until 16 March 2021. He was aware that a second welfare meeting was to be held following the 22 February 2021 welfare meeting to discuss health and update Daniel Hughes, and yet the claimant objected to a second catch up meeting taking place because he had been signed off sick and was not at work. A number of text messages were exchanged concerning this issue. The claimant argued that had he not been working from home he would not be expected to come into the office for a meeting to discuss absence and a TEAMS video link meeting should not be held on this basis. Daniel Hughes explained meetings should be regular "so we keen [keep] on top of the support" and "I would still do a check in over the phone, and you having a laptop will just make the process easier." When asked if there was any reason why the claimant did not want to do it the claimant responded "it seems more like an official meeting over teams with you and Patrick rather than a check in." The claimant did not refer to being too unwell to take part, and nor did he provide any medical evidence to that effect.

30. Daniel Hughes assured the claimant by text that "it's an informal plan the reason for Patrick attending is just to take notes and he is also there to offer support so that if there is anything you need he can agree he can sort if while on the call…I will always check in with colleagues I have on plans on a regular basis…it is a check in based on the wellness plan, in the plan I did make you aware that I will want regular updates." The claimant by text set out a medical update including changes in medication making it clear that he was "not feeling up to a proper meeting yet, that will wait until I'm back."

31. Daniel Hughes responded "I need to check in with you, I have a duty of care to yourself and as colleague policy states you will need to be available for contact with myself during contracted hours. You are more than welcome to get a union rep on the call providing they are adding value as **the wellness plan is informal**." The claimant continued to refuse; "I have no obligation to attend any meetings while I'm off**, I have already taken advice from Unite**." Daniel Hughes assured him "it is not a formal meeting it is an informal check in while you're off to check in on your wellness plan that is put in place for your support…" The claimant argued that it was not an informal meeting and "I don't have the energy to deal with stress right now."

32. The meeting was to take place on 11 March. Daniel Hughes texted the claimant explaining "I know you was having issue with the role and shifts and Patrick wanted to be on the call to agree any support you need then and then…if the reason for you not wanting to check in is due to Patrick being on the call and it coming across as to formal I'm more than happy for me and you day to have a catch up." The claimant texted in response that he was exhausted, not feeling good and "don't have energy for a meeting" with the result that Daniel Hughes agreed to postpone it "till you are feeling more up to it."

33. In text messages sent on the 12 March 2021 Daniel Hughes reiterated that he had the option for only the claimant and Daniel Hughes to attend. The claimant responded; "a video meeting is the main thing I am struggling with at the moment. I would prefer to give you a call later. As I mentioned before if I didn't have a laptop I wouldn't be expected to come into the office so a call is good enough…can I give you a call at 3."

34. The claimant complains he was pressurised to attend a formal meeting by TEAMS which the claimant stated in his submission the meeting he was referring to in the issues was March 2021 not May 2021. He claimed the meeting did not adhere to standard procedures, and the Tribunal concluded from exchange of text messages 5 to 12 March 2021 the process was made clear to the claimant, it was informal, the offer of Patrick Hazelwood was to take notes and offer any support the claimant could agree to with Patrick Hazlewood. The main issue for the claimant was not to have a video call, and he proposed a telephone call with a time for that call, which Daniel Hughes agreed to. The text messages were reasonable and conciliatory on the part of Daniel Hughes, and did not fall under the statutory definition of harassment under section 26 of the EqA and so the Tribunal found, concluding Daniel Hughes had not attempted to force the claimant to attend a formal meeting through TEAMS as alleged, and the claimant's evidence was found to be unreliable and not credible.

Welfare meeting 12 March 2021

35. With agreement the welfare meeting took place on the 12 March 2021 with Daniel Hughes and the claimant, who did not bring a union representatives despite being given the opportunity to do so. At no stage did he inform the respondent that he had been told by the union representative should he refuse to attend the welfare meeting disciplinary proceedings would follow. Given the tenor of the claimant's communications, the Tribunal concluded that had he been threatened with disciplinary action the claimant would have made reference to this, and there was no mention by the claimant or any representative from UNITE the Union. The Tribunal concluded on the balance of probabilities that at no stage was the claimant told by the Daniel Hughes, other managers from the respondent and/or a UNITE union representative that should he fail to attend the 12 March 2021 he would be subjected to a disciplinary procedure, preferring Daniel Hughes' more credible evidence that he was not.

36. On the 12 March 2021 Daniel Hughes took notes of the meeting, the claimant did not. It is clear from the notes, written in the third person, Daniel Hughes was picking up from the last welfare meeting. The claimant updated Daniel Hughes on the medical position in greater detail compared to the text he had sent earlier, including a reference to him taking online courses advised by the GP for anxiety and depression, a side effect of the medication, and requesting a phased return. The claimant confirmed "**as for the role he believes that his time working in back office has made him realise how much he dislikes being on the phone**"[the Tribunal's emphasis]. Coping mechanisms were discussed, the comment made on the 22 February by the claimant that "he felt a prisoner in his own home" when working from home, whether the wellness recovery action plan ("WRAP") had been completed and the support offered which he had not taken up such as BUPA and the bank workers charity. Contrary to the pleadings the claimant was not pushed to go to BUPA for treatment and not questioned on why he had not spoken to a publicly available mental health services and so the Tribunal finds. The bank workers charity is not a publicly available mental health service, and the suggestions made by Daniel Hughes were aimed at assisting the claimant should he chose to take up what was on offer, including BUPA.

37. The claimant confirmed that he had not accessed the available support, was happy to "stick" with the NHS and see how things go as there is no reason to speak to BUPA "they can do nothing different and cannot be cured." The notes reflect the following exchange: "Dan questioned 'is this is something he had discussed with BUPA or is this his non medically trained opinion. Keith explained he is not medically trained but is aware of his illness and BUPA cannot do anything different. Dan understood there may not be anything different they could do but they might be able to support in different ways and quicker…Dan expressed

Keith is choosing not to take the support the bank is offering as in his opinion nothing more can be done. Keith agreed." The claimant disputes that this was said, maintaining Daniel Hughes had told the claimant he was not a doctor. the Tribunal preferred to rely on the contemporaneous document, the gist being the claimant and Daniel Hughes were not medically trained, which was a fact, and a BUPA referral may be an option for the claimant.

38. Daniel Hughes asked the claimant about the roles he had applied for, and was told he had applied for an analyst role, a job in the police in December 2020, and confirmed he had not looked for any roles during the current absence. The claimant did not inform Daniel Hughes that he had applied for the role at HMR and invited for interview on 20 March 2021 (the interview took place on the 31 March 2021,) despite the respondent being aware that the claimant was applying for new jobs which was not an issue and one of the claimant's managers following the claimant's request on 30 January 2021 had agreed to provide him with a reference. The HMRC vacancy was at a much higher rate of pay and is the role the claimant accepted before resigning from his employment with the respondent.

39. Daniel Hughes mentioned a diary for the first time, asking whether the claimant kept one "as speaking to mental health advocates in the past it has been recommended with colleagues who are struggling with mental health as it can track any triggers and give the colleague a good indication of may bring his attacks." The claimant responded that he had "kept a diary…but does not anymore." Daniel Hughes asked "can we please keep a diary from today going on checking your mood or any attacks or anything that you feel relevant and we can discuss in next check in to see if any triggers are identified." The claimant did not object. A number of actions and expectations were set out before their next check in including "compete WRAP, stress and DSE form before the next meeting. Keith is to apply for roles that he feels will be more beneficial to his health. Keith to start a diary from today so can be reviewed by both in the next check in and see what can be taken from the findings." The claimant did not object to this.

40. The claimant returned to work on the 18 March 2021.

<u>19 March 2021 return to work meeting claimant with Daniel Hughes</u>

41. Adjustments to the claimant's role was discussed together with an online training course which the claimant was invited to undertake. As before, Daniel Hughes took notes, the claimant did not. The contemporaneous notes reflect the following.

42. The claimant when asked about the actions he had taken "**replied that on reflection he did not agree with the action to look for a new role. Dan explained to Keith that as this role was impacting his mental health and his ability to attend work then looking for a new role is appropriate to his health and wellbeing plan as this is in place to support him, Keith understood**" [the Tribunal's emphasis]. At this return to work meeting the claimant referred to applying for a position at the "tax office," stating he had not completed DSE or WRAP and was given time in which to complete them. The claimant also confirmed he had not started to keep a diary "and does not feel it necessary. Dan informed Keith it is an action set in the last plan he requires a diary to be logged from today onwards as he would like to review with Keith and get an understanding of his mood and any potential triggers during his days. Keith understood."

43. The claimant understood the need for the information requested by Daniel Hughes, he was waiting for the outcome of his application to HMRC made on the 22 February 2021, and there was a reluctance from the claimant to engage in the wellness process. The

claimant progressed his application to HMRC, and attended the interview arranged on the 31 March 2021 after the 20 March invite. The claimant had every intention of continuing with his application because he was unhappy with the contractual role and wanted to move, and so the Tribunal found. The Tribunal found the management of the claimant by Daniel Evans was not causative of the claimant seeking alternative employment and continuing with his HMRC application for role that paid substantially more salary and was better suited to him and his health. Whatever Daniel Hughes said or did after the job applications were made, was irrelevant, and his suggestions about support that could be offered to the claimant was rejected on the basis that the claimant felt he did not need it and would be working elsewhere in any event.

44. The claimant continued to be absent from work until he returned to work on the 29 March 2021. The claimant completed a Work Related Stress Assessment and Access Disability Network in which the claimant confirmed "stressful situations, especially confrontational and aggressive customers" was a mental health trigger and listed medication prescribed. No complaints are made about the welfare meetings and Daniel Hughes and there was no reference to any of the claimant's allegations now raised in this litigation.

Occupational Health Report 26 March 2021

45. Occupational Health reference the claimant's phased return, time off for medical appointments and new shift pattern he had been working, and recommended he was fit to work with adjustments. It is undisputed that all the adjustments necessary were put in place,. Under the title 'General Recommendations' the report confirmed; "stress and anxiety are known triggers to epileptic events…**there appears to remain some work related perceptions which are driving your colleagues symptoms. These should be reduced as soon as possible in order that there is no further impact upon…physical or mental health…if there is any opportunity for Backoffice/administrative duties this may be helpful in reducing the anxieties involving the colleagues role being off the phones whenever possible is likely to be beneficial**" [the Tribunal's emphasis].

46. In written submissions the claimant argued that the reference to "work related perceptions" related to a call with the nurse where he expressed concerns about pressures put on him about his disability, repeated requests to contact BUPA, "continual disbelief of my own knowledge of my condition and how this was causing stress and anxiety". The claimant did not give evidence under oath to this effect, and the report from Ruby McMillan, the nurse is question, was not the occupational health nurse and whose report makes no reference to alleged harassment at work as described by the claimant. On a common sense interpretation of the second paragraph within the occupational health report, the "work related perceptions" was a reference to the claimant's stress and anxiety which triggers epileptic events. Occupational Health made no reference to any complaints concerning Daniel Hughes and the allege discriminatory acts, and the Tribunal concluded that the claimant did not mention this as he now maintains he did in written submissions giving further rise to credibility issues with the claimant's evidence.

47. The claimant was invited to an interview on the 20 March 2021 for the HMRC vacancy.

3rd welfare catch up meeting 29 March 2021

48. Daniel Hughes had read the occupational health report referred above, and in light of its content discussed a number of issues with the claimant. He took notes; the claimant did not.

49. At this meeting the claimant was asked to reflect on the earlier meeting and he confirmed the reduced hours was helping him, explained he was waiting for blood test results and medication had been changed. Daniel Hughes had agreed previously to take away from the claimant's contractual responsibilities "Account Take Over Calls" referred to as ACTO as requested by the claimant who stated they were a possible trigger for his condition and it would help him with his stress levels. Daniel Hughes asked how he was feeling and the claimant responded that he was happier. Daniel Hughes in addition to reducing the claimant's hours agreed a change of shift to a non-standard shift with start and finish times set by the claimant. A phased return to work was also agreed. The claimant raised no complaint either to Daniel Hughes or anybody else within the respondent that he was being constantly harassed as he now alleges, and the Tribunal conclude that there was no evidence to this effect and it did not happen.

50. A discussion took place about alternative job roles recorded as follows; "Dan asked in previous conversations we have spoken about new roles or jobs have you been looking around, Keith advised he has been looking for roles in the business and out being a chief security officer, this he was keen on but advised he will keep Dan posted if he needs any support with applications or references." The claimant offered to provide this information, he did not object to the conversation and made no mentioned of the imminent job interview with HMRC.

51. Daniel Hughes mentioned the diary and the claimant confirmed he "had been keeping one for the hospital…which didn't show anything." Daniel Hughes accepted this and "asked that we keep an eye on it as it may point to any potential triggers. Keith was happy to discuss this with Dan going forward." The Tribunal finds that the claimant did not object to this course of action and there was no suggestion he believed the request amounted to unfavourable treatment. The diary was not described as a seizure diary as alleged by the claimant; it was a record of any changes noticed by the claimant in his health. The reason for Daniel Hughes' request was to understand the claimant's condition in the light of the information that the stress of his role was a potential trigger for epilepsy, in order that reasonable adjustments could be made as the respondent wanted to minimise risk to the claimant of further ill-health incidents and absences and so the Tribunal found. Daniel Hughes' actions towards the claimant was considerate and he genuinely wanted to help him find a resolution, whether it be reasonable adjustments or providing assistance in order that the claimant be moved into a role that did not have the same risk factors. In short, the suggestion that the claimant kept a diary was a means of achieving a legitimate aim and proportionate taking into account the duty of care and requirement that his line manager understands what was triggering the epilepsy with a view to minimise the risk to the claimant and the number of absences.

52. The claimant was interviewed for the HMRC role on the 31 March and was told on the 20 April 2021 that he had passed the interview and would be kept on the reserve list for up to 12 months and appoint in merit order.

<u>30 April 2021 welfare meeting check in.</u>

53. The written record of the meeting reflect that claimant updated his health position stating he was not feeling 100% as he had had a seizure four days previously and Daniel Hughes asked what support he needed and the claimant responded none, but may need support in the future. The claimant stated he had seen a cadet role advertised "and would like some support, Dan asked Keith to send over his application and Dan will review it, Dan advised he was happy to endorse Keith and for him to pop his application over to review,

Keith then expressed he had looked into roles with police and Home Office but had not heard anything recently." At this point the claimant had heard and knew he was on the reserved list and chose not to inform Daniel Hughes of the position.

54. Daniel Hughes offered to endorse the claimant for "some coaching desk time, as he felt that this would break up the time on the phone and be a great opportunity." The claimant when asked confirmed he had not been keeping a diary but had a medical diary that showed no triggers, and this was accepted by Daniel Hughes who did not ask to see or explore the Diary any further. The claimant did not object to being asked about his diary.

55. The claimant was absent with sickness not related to his disability from the 5 May to 10 May 2021, returned to work on the 10 May with a return to work meeting arranged for the 11 May 2021 which did not take place as the claimant was absent again from the 11 May 2021 to 28 May 2021 with a "hoarse throat."

<u>18 May 2021 welfare catch up meeting during the claimant's absence.</u>

56. The meeting was by telephone attended by the claimant, Daniel Hughes and Patrick Hazelwood who took notes. Medication was discussed and the claimant was asked "what have you been doing to get yourself better" to which he responded "hot water and lemon." He was asked about triggers and confirmed his absence had "nothing to do with triggers." BUPA was raised as follows: "we previously have spoken about private health care through the bank have you explored BUPA with regards to this absence" to which the claimant responded "I wouldn't really see anything BUPA would do on this occasion" and the conversation went no further.

57. The conversation centred around what the respondent could do to "support you more with this absence" to which the respondent stated "no" confirming he had no issues with epilepsy recently, the medication had been increased and anxiety levels "fine….there has been times where I have felt anxious…I haven't had any issues with this since before my last absence."

58. The Tribunal questioned why a catch up meeting from what appeared to be an unrelated absence went into details about epilepsy, appointments with the neurologist, medication and the neurologist action plan to be sent to the claimant's GP. It accepted Daniel Hughes' actions were reasonable and not in breach of the implied term of trust and confidence, finding on the balance of probabilities that the discussion was to ascertain whether there was anything the respondent could do to support the claimant and reduce absences, and the claimant understood this to be the case.

59. The notes do not include input from Patrick Hazelwood who limited his notetaking to that said by Daniel Hughes and the claimant, not thinking that his part in the discussion should also have been recorded. The Tribunal found this surprising given Patrick Hazelwood's role was specifically notetaker, and as a senior manager he would have realised the importance of keeping an accurate record. The burden of proof shifted, however no adverse inference could be raised, the Tribunal accepting on the balance of probabilities Patrick Hazelwood's explanation that it was a mistake on his part.

60. It is agreed between the parties that Patrick Hazelwood offered to assist the claimant in drafting his CV. There is an issue as to exactly what Patrick Hazelwood said about the claimant's absence and whether his comment concerning the potential of continued absence was a general comment concerning the business (according to Patrick Hazelwood) or

specifically aimed at the claimant (according to the claimant). The Tribunal concluded on the balance of probabilities that the impact of Patrick Hazelwood's observations on sustainably of absence led the claimant to reasonably understand from the words used that his levels of absence were not sustainable to the business, preferring the claimant's evidence to that of Patrick Hazelwood on this issue.

61. It is notable that this was the last communication between the claimant and Patrick Hazelwood, with the result that the last discriminatory act in relation to Patrick Hazelwood was 18 May 2021. The claimant raised no issue with what he had been told by Patrick Hazelwood or Daniel Hughes until these proceedings. At no stage was any formal action taken against the claimant for his levels of absence during this period, in contrast to the formal absence procedure taken in 2020. The claimant was aware that (a) cumulatively he had poor levels of absence and (b) the absences continued with the result that there was the possibility in the future of formal action to manage his absences if they continued. It was incumbent on the respondent to remind the claimant in general terms about absences and unsustainability within the business including impact on colleagues, customers and the expectation of the Financial Conduct Authority that could result in fines or sanctions, given the claimant's absence history.

62. Daniel Hughes questioned the claimant "how is it going looking at alternative roles similar to what you enjoyed previously? Did you apply for the webchat team? Are you are aware of the business banking opportunity?" The claimant responded "there is also the ARA position too. I would say the position of the cadet and CRC is something I have been involved in previously. Last year I applied for the degree apprenticeship."

63. It was at this meeting the claimant was asked by Daniel Hughes "do you keep a diary of seizures? Do you keep a diary of these? If not, set an action." The claimant responded that he did and was asked "if this something that you are happy to share with me" and the claimant responded "there is nothing about the time of the day that I have them, just that I have had one. The 30 March was the last seizure" and he had not shared the information "with anyone". Daniel Hughes set the claimant an action of "sharing the diary for seizures, we can review this within your check ins to support to see how we can minimise that within work. Keith commented that there is nothing they can do apart from reviewing medication. The only triggers are stress and anxieties." The claimant raised no objection.

64. Two other actions were set out. The first "to have sight of the medication plan following the GP appointment referral from the neurologist and the second, "Dan to organise the WPA genius within to support around anxiety and stress." The claimant raised no objection. Taking into account the context of the entire note, the conversation centred around supporting the claimant which required the claimant to be open about his health, and the fact that that at no stage did the claimant disagree with this course of action. The Tribunal on the balance of probabilities concluded the claimant was not told he "he was not trying hard enough to get better" and the wellness plan was not aimed at making clear to the claimant he was "not wanted in the business" as alleged. It was made clear to the claimant that the business was prepared to assist him in which ever way it could, not least making adjustments, putting him on courses and supporting the claimant to find alternative employment which better suited him within the respondent. Under the respondent's Health Wellbeing and Attendance Policy the claimant was under an obligation to take responsibility, identify ways to help him at work and use Wellness action plans to support him in his health and attendance. It is against this background that the conversation took place.

65. The claimant returned to work 24 May 2021 working 9am to 5pm, not undertaking any ACTO work and having regular medical breaks. The claimant had changed shifts and following a shift review Jodie Grue took over the line management of the claimant in July 2021.

3 June 2021 Wellness meeting

66. Jodie Grue attended in the capacity of notetaker the Wellness check on the 3 June 2021 as part of the handover. The claimant provided updates about his health, medication and medical consultations, stating he suffered from headaches from the increase in medication. He confirmed the "plan was coming in the post and letter coming too." Daniel Hughes referred to reviewing previous check ins and "the absence you had in February anxiety was a big factor, would you say that was still a concern" to which the claimant responded "a lot of that was linked to epilepsy but its fine at the moment…my calls have been really nice recently, really nice VOYC too. Looking forward to new shift pattern." The claimant offered the information that he was tracking sleep. In contrast to the claimant's pleaded case there was no suggestion his "enthusiasm for work had been eroded" and he was being subjected to "constant harassment and anxiety" and the Tribunal found that he was not.

67. The claimant was asked about the effect his current role had on his mental health, he responded "it does yea if I get a difficult situation or difficult customer, if I don't get either of those I am fine. I might just need a break" and it was at this point that Jodie Grue suggested Headspace and resilience portal on life@LBG – resilience around difficult calls/situations. On being asked the claimant confirmed her had not thought of looking at the support available through the EAP Employee assistance Programme and the bank workers charity, which was not questioned by Daniel Hughes or Jodie Grue.

68. Daniel Hughes referred to the previous meeting clarifying that the business understands there will be epilepsy related absences but other illness "is where the issue lies." The note records "Keith understood and the only other thing is laryngitis."

69. The claimant confirmed his medical diary had not been updated, and that was then end of the matter. He also confirmed that "no I don't want to go back to phone bank" or a reduction in hours which led to a discussion about the search for a new role. The claimant stated he had looked at the "business banking one...I have been looking inside and outside the business for a new role. I want to progress. I applied for the cadet position but didn't get it…" The claimant did not inform Daniel Hughes that he was on the waiting list for a position at HMRC.

70. The note taken recorded the following; " Daniel Hughes referred to advice given by HR, that "he would like to offer Keith roles such as VCD but with the sustained off the phone due to illness a competency issue arises. Another option that was discussed…HR was medical redeployment." He explained the idea behind medical employment "we can help find another role for you. An overview we would set a date of 6 months, 3 months informal to find other opportunities, if successful you move onto the next role. HR would get involved…almost help and support you get the role. **Something to think about I have more information we can talk about our next check in"** [the Tribunal's emphasis]. The claimant expressed his concerns that his employment would terminate in 6-months and was told "it's intense but really good about getting you another role but I will go into more detail in next check in, something to think about."

71. The actions agreed were “send me plan when received & letter form GP” as offered by the claimant. “actively looking for roles” as agreed to by the claimant and “book half an hour off tomorrow to visit EAP and look on Life@LBG & resilience portal. The claimant’s response was “OK thank you. No other support needed from me at all…Keith advised no was happy.”

17 June 2021 welfare check in and last alleged act of disability discrimination.

72. Daniel Hughes conducted the welfare check on 17 June 2021, which was the last welfare meeting he had with the claimant. Daniel Hughes took notes, the claimant did not. The discussion picked up from the previous meeting and the claimant confirmed he had not completed the EAP and look on Life@LBG & resilience portal. He was offered a further 30 minutes to do so, with which he was happy. There were no issues with calls as “I have been getting nice customers.” A discussion took place about medication changes and “how the job search had been going. Any updates from the home office.” The claimant responded “no updates…**I’ve looked at other roles inside and outside nothing has caught my eye, there was a role…but I thought that would be boring so I left it**” [the Tribunal’s emphasis]. The claimant did not inform Daniel Hughes that he was on the waiting list for a position at HMRC.

73. The claimant was asked what other support he needed and he confirmed there was none. The actions were for the claimant to provide the GP update and test results he had promised earlier, “updates in regards to EAP and support available through the bank. I would also like an update regards the role applications and you to think about the medical redeployment we spoke about last time as we need to make a decision on that soon.” The claimant responded “that is fine.” There was no indication that the claimant objected to what was being proposed in the actions, or the contents of the meeting as discussed, and the Tribunal found he had not objected. Contrary to the claimant’s evidence at this hearing, he was not being pressurised to do anything he did not want to do. The claimant had agreed to a number of actions, which he had not followed up and there were no repercussions.

74. The claimant was aware that as far as the redeployment was concerned this was option for him to think about against a background of a raft of reasonable adjustments being made, including to the role itself, with a view to taking pressure off the claimant and avoid any deterioration in his health given the claimant’s indication as confirmed by occupational health, that stress was a trigger to his condition and ACTO contributed towards stress due to the difficult customers. In short , the claimant could only handle telephone calls with “nice” customers and this did bring into question capability. Against this background, from the time the claimant had returned to his contractual role though to resignation, he was seeking alternative employment and the only reason for this was that he did not like his work and was not prepared to apply roles that were boring.

75. The Tribunal is supported in its view by what transpired under the management of Jodie Grue, which the claimant enjoyed and yet at no stage did he withdraw his application to HMRC which offered a substantial increase in wage. The claimant worked under the line management of Jodie Grue from July through to his resignation on the 29 August 2021 with no issues. Contrary to his pleaded case the claimant was not being subjected to “constant harassment and anxiety.”

76. On the 27 July 2021 Jodie Grue carried out a wellness meeting with the claimant during which he confirmed when discussing health issues “I didn’t like I was getting a lot of ACTO calls…my anxiety is triggered by stressful situations…”

HMRC job offer 13 August 2021

77. The claimant was offered the position as HO Generic compliance caseworker and received a formal offer on the 13 August 2021 which he accepted. The respondent was aware of the claimant's application, and it would not have come a surprise when the claimant resigned having accepted the offer.

78. At a meeting with Jodie Grue medical redeployment was discussed as follows when Jodie Grue referred to speaking with HR; "**they advised they previously offered you medical redeployment due to you advising the elements of the role brought on stress and anxiety – so they offered this to support you…when we spoke in last week's check in you advised after moving from disputes and back to fraud on the phones it made you realise how much you hated this job and you had been trying to work back at it for some time**. How have you been feeling more recently? "

79. The claimant responded "ok now, my previous TM was asking me about other jobs I was applying for, I found it difficult coming from back offing off calls to come back to calls. I wasn't going to go for it if my contract was going to be ended in 6-months so I rejected the medical redeployment. **I want to focus on progressing now. When I have done extra stuff I get great feedback**" [the Tribunal's emphasis].

80. The support offered was reviewed including BUPA and the claimant confirmed "**this was previously recommended by Dan** but there is no treatment to help me." Other avenues of support such as the Headspace App and the claimant confirmed when asked no other support was needed and "I like to do extra things like complex cases like calling customers back." There was no indication from the claimant that he believed Daniel Evans had discriminated against him and breached the implied term of trust and confidence. The claimant gave every appearance of being happy in his role, he had "rejected" the offer of medical redeployment and continued without complaint in his contractual role with reasonable adjustments. The claimant has not questioned the reference in the note of the meeting to BUPA being "previously recommended" by Daniel Hughes, which is in direct contrast to his pleaded case and evidence that he was .pushed to go to BUPA for treatment to such an extent that it amounted to disability discrimination. The Tribunal concluded that throughout the time period leading to the last act of alleged disability discrimination on the 17 June 2021 the claimant was not "pushed" as alleged, BUPA was recommended and never taken up. There was no satisfactory evidence that the claimant was constantly harassed as he maintains in this litigation, the Tribunal concluding his evidence was not credible on this issue.

Resignation 29 August 2023

81. The claimant resigned by email sent to Jodie Glue on the 29 August 2021 giving one months' notice. He wrote "**I have accepted a new job after being set a formal action to look for a position elsewhere during a health and wellness meeting earlier this year**. I would like to thank you for the support you have given me over the past couple of months since becoming my manager. You have made it easier to continue in my role whilst seeking new employment, providing reassurance that I have not received since the decline in my health earlier this year" [the Tribunal's emphasis.] The Tribunal found the claimant's resignation letter disingenuous, especially given he was aware that there was no formal action for him to look for a position elsewhere, and he had been seeking a new job well before the first health and wellness meeting had taken place.

82. The claimant made no reference to disability discrimination and nor did he set out any specific acts of alleged harassment. In oral evidence the claimant stated that while he had found it difficult to move back into his role, "it calmed down he decided to stay in the business." The claimant had applied for vacancies before the first meeting with Daniel Hughes, and on the same day applied to HMRC. On the claimant's case he had decided to stay in the business, yet when offered the HMRC role accepted it, and the Tribunal concluded on the balance of probabilities that the claimant was unhappy in his original role, by the time the reasonable adjustments were made he was happier, and felt positive under the management of Jodie Glue and the work carried out with adjustments. The claimant accepted the job offer because it was at a higher rate of pay and was more suitable for him compared to his contractual position with the respondent which included telephone work and difficult calls, reduced as reasonable adjustments but with the prospect of future issues especially if the claimant's sickness absence for non-disability related illness deteriorated.

The claimant's medical evidence

83. The claimant has produced three medical reports, the first dated 26 January 2021 which was not given to the respondent, confirming the name of the consultant and medication. Reference was made to the condition falling under the definition of section 6 of the EqA. The second report dated 2 June 2021 was more likely than not before the respondent, although Daniel Hughes cannot recall receiving it. The letter referred to epilepsy surgery being a last resort, there is a reference to medication exacerbating the effect of the condition and the unpredictability of the claimant's seizures. There is no reference to the claimant's condition being exacerbated by his duties and the alleged discriminatory behaviour of his line managers. The 3 March 2021 report dictated 25 February 2021 was not before the respondent, it is incomplete with page 1 only included in the bundle and refers to the position when the claimant returned to the department describing how the claimant had no seizures for 6 to 7 months but "over the past couple of weeks had 3 seizure episodes…he is feeling anxious and stressed with work as he is working 11 hour shifts…" The report confirmed the position as described to the respondent by the claimant at the time as set out above, reinforcing the fact that the respondent via Daniel Hughes in keeping a close check and repeatedly asking what the respondent could do to assist the claimant, did not breach the implied term of trust and confidence and so the Tribunal found as stated below.

84. The effective date of termination was 30 September 2021 and the claimant commenced his new role at a higher rate of pay with HMRC on 4 October 2021 having accepted the offer of new employment on the 13 August 2021.

Law; Direct discrimination

85. S.13(1) EqA provides that direct discrimination occurs where "a person (A) discriminates against another (B) if, because of a protected characteristic [race] A treats B less favourably than A treats or would treat others.

86. An actual or hypothetical comparator is required who does not share the claimant's protected characteristic and is in not materially different circumstances from him. Para 3.23 of the EHRC Employment Code makes it clear that the circumstances of the claimant and comparator need not be identical in every way, what matter is that the circumstances "which are relevant to the [claimant's treatment] are the same or nearly the same for the [claimant] and the comparator." The Tribunal formulated a hypothetical comparator based on the evidence before it as the claimant did not rely on an actual comparator and gave no evidence

whatsoever on a hypothetical comparator; Chief Constable of West Yorkshire v Vent o (No.3) [2003] ICR 318 CA and Da'Bell v National Society for the Prevention of Cruelty to Children [2010] IRLR 19, EAT. In Vento the tribunal considered the circumstances of four other police constables (not all of whom were male) whose situations were not identical but were not wholly dissimilar either. It concluded that the claimant had been treated less favourably than a hypothetical male comparator. The EAT held that this was a permissible way of constructing a picture of how a hypothetical male comparator would have been treated. This approach was later approved by the House of Lords in the well-known case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL.

87. Section 13 EqA requires not just consideration of the comparison (the less favourable treatment) but the reason for that treatment and whether it was because of the relevant proscribed ground. These two questions can be considered separately and in stages; or they can have intertwined: the less favourable treatment issue cannot be resolved without deciding the reason why issue. As was observed by Lord Nicholls in Shamoon at paragraph 11: "…tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? … If the former, there will … usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable then was or would have been afforded to others."

88. A Tribunal should not assume a finding of unlawful discrimination from a finding that an employer acted unreasonably; there may be other explanations (if only simply human error): Bahl v Law Society [2004] IRLR 799 CA. More is required than simply a finding of less favourable treatment and a difference in the relevant protected characteristic. Where there is a comparator, the 'something more' might be established in circumstances where there is no explanation for the unreasonable treatment of the complainant as compared to that comparator; see per Sedley LJ in Anya v University of Oxford [2001] ICR 847 CA, and the discussion of those dicta in Bahl , per Maurice Kay LJ, observing (paragraph 101) that the inference of discrimination would not then arise from the unreasonable treatment but from the absence of explanation.

Law: Disability discrimination arising from disability

89. Section 15(1) of the EqA provides-

> (1) A person (A) discriminates against a disabled person (B) if –
>
> (a) A treats B less favourably 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.

90. Paragraph 5.6 of the Equality and Human Rights Commission: Equality Act 2010 Code of Practice provides that when considering discrimination arising from disability there is no need to compare a disabled person's treatment with that of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.

91. Unfavourable treatment is not the same as detriment. The test is whether a reasonable worker would consider that the treatment is unfavourable. Useful guidance on the proper approach to a claim under s.15 was provided by Mrs Justice Simler in the well-known case of Pnaiser v NHS England and anor [2016] IRLR, EAT:

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

2. The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it. The Tribunal examined closely the conscious and unconscious thought process of the respondent's witnesses, particularly Daniel Hughes, who gave evidence before it, concluding the explanations they gave were untainted by disability discrimination.

3. Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises…"

4. The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. …the statutory purpose which appears from the wording of s.15, namely, to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

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

92. Whether or not treatment is "unfavourable" is largely question of fact but this does not depend just on the disabled person's view that he should have been treated better - Williams v Trustees of Swansea University Pension and Assurance Scheme [2018] UKSC 65. There must be a measurement against "an objective sense of that which is adverse as

compared to that which is beneficial" - T-System Ltd v Lewis UKEAT/0042/15 *(22 May 2015, unreported).*

93. In Sheikholeslami v University of Edinburgh [2018] IRLR 1090*,* the EAT held that the approach to this issue requires :An investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment, then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence.

94. The actual disability does not need to be the cause of the unfavourable treatment under s.15 but it needs to be "a significant influence" or "an effective cause of the unfavourable treatment" - Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893, EAT. It will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability. The more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact – Pnaiser cited above.

95. It is not enough that but for their disability an employee would not have been in a position where they were treated unfavourably. The unfavourable treatment must be because of the something which arises out of the disability - Robinson v Department of Work and Pensions [2020] EWCA Civ. 859.

Objective justification

96. A legitimate aim for the purposes of S.15 of the EqA should not be discriminatory in itself and should represent a real, objective consideration. Case law has recognised a range of legitimate aims, including health and safety and the operational needs of the business.

97. The test of justification in S.15(1)(b) requires that the treatment complained of amounts to a proportionate means of achieving a legitimate aim. weighing an employer's justification against the discriminatory impact, considering whether the means correspond to a real need of the undertaking, are appropriate with a view to achieving the aim in question, and are necessary to that end.

98. The Equality and Human Rights Commission's Code of Practice on Employment (2011) ('the EHRC Employment Code') sets out guidance on objective justification that largely reflects existing case law in this area. In short, the aim pursued should be legal, should not be discriminatory in itself, and should represent a real, objective consideration. Although business needs and economic efficiency may be legitimate aims, the Code states that an employer simply trying to reduce costs cannot expect to satisfy the test (see para 4.29). As to proportionality, the Code notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see para 4.31). In short, the aim pursued should be legal, should not be discriminatory in itself, and must represent a real, objective consideration — para 4.28.

RESERVED

Harassment

99. The EHRC Employment Code provides that unwanted conduct can be subtle, and include 'a wide range of behaviour, including spoken or written words or facial expressions' para 7.7. Where there is disagreement between the parties, it is important that an Employment Tribunal makes clear findings as to what conduct actually took place.

100. Section 26 EqA covers three forms of prohibited behaviour. In the claimant's case the Tribunal is concerned with conduct that violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment — S.26(1) It states that a person (A) harasses another (B) if: A engages in unwanted conduct related to a relevant protected characteristic — S.26(1)(a), and 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 — S.26(1)(b).

101. The word 'unwanted' is essentially the same as 'unwelcome' or 'uninvited' confirmed by the EHRC Employment Code at para 7.8. Unwanted conduct means conduct that is unwanted by the employee assessed subjectively.

102. S.26(4) states that, in determining whether conduct has the proscribed effect, a tribunal must take into account the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. There can be cases where the claimant when alleging the acts violated his or her dignity, is oversensitive and it does not necessarily follow that an act of harassment had objectively taken place despite a subjective view that it had.

103. In order to decide whether any conduct has either of the proscribed effects under s.26 (1)(b) EA 2010, the ET must consider both (by reason of s. 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of s.4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). All the other circumstances must also be taken into account (s.4(b)) - Pemberton v Inwood [2018] EWCA Civ 564.

104. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended - Richmond Pharmacology v Dhaliwal [2009] IRLR 336. It is submitted that a claim based on 'purpose' requires an analysis of the alleged harasser's motive or intention.

Related to a protected characteristic.

105. This is a very broad test, but some guidance about how the Tribunal should approach the issue was provided in UNITE the Union v Nailard [2018] EWCA Civ. 1203. It should make findings as to the mental processes of the alleged harassers.

106. Whilst the view of a claimant might be that the conduct related to the protected characteristic is relevant, it is not determinative - Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495 *EAT.* The ET has to apply an objective test in determining whether the conduct was related to the protected characteristic in issue. The intention of the actors concerned might form part of the relevant circumstances, but it is not the only factor.

Burden of proof

107. Section 136 of the EqA provides: (1) this section applies to any proceedings relating to the contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

108. In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply, as affirmed in Ayodele v CityLink Ltd [2018] ICR 748. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that it did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondent and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case disability], failing which the claim succeeds.

Constructive unfair dismissal

109. Section 95(1)(c) of the Employment Rights Act 1996, as amended ("the ERA") states that there is a dismissal when an employee terminated his or her contract, with or without notice, in circumstances that he or she is entitled to terminate it without notice by reason of the employer's conduct.

110. "In order for the employee to be able to claim constructive dismissal, four conditions must be met:(1) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach. (2) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous, interpretation of the contract by the employer will not be capable of constituting a repudiation in law. (3) He must leave in response to the breach and not for some other, unconnected reason. (4) He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract" - Harvey on Industrial Relations and Employment Law.

111. The Tribunal's starting point was the test laid down by the Court of Appeal in Western Excavating (ECC) Ltd –v- Sharp [1978] ICR 221 whether the employer was guilty of conduct which is a repudiatory/significant breach going to the root of the contract. The issues to be decided upon in this respect were: Was there a fundamental breach on the part of the employer? Did the claimant terminate the contract by resigning? Did the claimant prove that the effective cause of her resignation was the respondent's fundamental breach of contract? In other words, what was the effective cause of the employee's resignation? Did the claimant delay and therefore act in such a way that is inconsistent with an intention to treat the contract as an end? The Court of Appeal "made it clear that questions of constructive dismissal should be determined according to the terms of the contractual relationship and not in accordance with a test of 'reasonable conduct by the employer."

The implied term of trust and confidence

112. There is an implied term in every contract of employment to the effect that the employer will not without reasonable and proper cause, conduct itself in a manner likely to destroy, or seriously damage the relationship of confidence and trust between employer and employee. In order to constitute a breach of the implied term it is not necessary for the employee to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it; or put another way, the vital question is whether the impact of the employer's conduct on the employee was such that, viewed objectively, the employee could properly conclude that the employers were repudiating the contract. The correct test of repudiatory conduct by an employer is set out in the Court of Appeal judgment in the case of Paul Buckland V Bournemouth University Higher Education Corporation [2010] EWCA Civ 121, and this is an objective test.

113. The House of Lords in Malik v Bank of Credit; Mahmud v Bank of Credit [1997] UKHL 23, held that the breach occurs when the proscribed conduct takes place. The employee may take the conduct as a repudiatory breach, entitling him to leave without notice. If the employee stays, the extent to which staying would be a waiver of the breach depends on the circumstances. Lord Steyn referred to the implied obligation covering a diversity of situations in which "a balance has to be stuck between an employer's interests in managing his business as he sees fit, and the employee's interest in not being unfairly and improperly exploited," and to the impact of the employer's conduct being objectively assessed to ascertain whether objectively considered, it is likely to destroy or cause serious damage to the relationship between employer and employee. If it is found to be so, then a breach of the implied obligation may arise.

Course of conduct

114. A course of conduct can cumulatively amount to a fundamental breach of contract entitling the employee to resign and claim constructive dismissal following a "last straw" incident. The last straw itself does not need to amount to a breach – Lewis v Motorworld Garages Limited [1986] ICR 157 CA. Glidewell LJ said at para 169F "The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, although each individual incident may not do so. In particular, in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?"

115. The Court of Appeal decision in Omilaju v Waltham Forest London Borough Council [2005] ICR 481 the Court of Appeal held that the act constituting the last straw need not be the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final last straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive on his or her own trust and confidence in the employer.

Employee must resign in response to repudiatory breach.

116. The employee must leave in response to a breach committed by the employer. This breach may be an actual breach or an anticipatory breach … it is not enough that the employee expects the employer to repudiate the contract and leaves in anticipation.

117. In the well-known EAT case of Walker v. Josiah Wedgwood & Sons Ltd [1978] ICR 744, IRLR 105 the EAT held "… it is at least requisite that the employee should leave because of the breach of the employer's relevant duty to him, and that this should demonstrably be the case. It is not sufficient, we think, if he merely leaves … **And secondly, we think, it is not sufficient if he leaves in circumstances which indicate some ground for his leaving other than the breach of the employer's obligation to him**" (per Arnold J). The Tribunal's emphasis as this point is relevant to Keith Samuel's case as it took the view the claimant left for reasons other than the alleged breaches of contract, namely, because he did not like the work he did for the respondent and left when he was offered a role with a substantial increase in pay.

Waiver of breach

118. Weston Excavating cited above; The employee "must make up his mind soon after the conduct of which he complains; for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged".

119. In the well-known EAT case of W.E. Cox Toner (International) Ltd v. Crook [1981] ICR 823 IRLR 443, EAT an employee censured by employer in July 1980 for taking leave without previously advising the employer. He demanded the withdrawal of the censure letter. He was informed on 6 February 1981 that the letter would not be withdrawn. He left four weeks later. The EAT held that he was precluded from claiming for unfair dismissal because he had remained for four weeks after it had become clear that his grievance would not be remedied and consequently must be taken to have affirmed the contract. This case is relevant to that Mr Samuel in that he did not resign until much later and after the alleged pressure which he perceived was being placed on him by Mr Hughes was removed.

120. Da'Bell v National Society for the Prevention of Cruelty to Children [2010] IRLR 19, an EAT decision also relevant to whether a delay in resigning following a repudiatory breach may indicate that the claimant has affirmed the contract. It may alternatively indicate that the repudiatory breach is not the effective cause of the resignation. In Da'Bell the EAT upheld an employment tribunal's finding that an employee had not been constructively dismissed when she resigned three months after her employer's fundamental breach of contract. The EAT reasoned: '[A] person who reacts to offensive conduct by an employer by writing a letter the next day will easily be adjudged to have acted by reason of it. But someone who leaves it for a year, who will not let bygones be bygones, who digs it up again, is likely to be acting for a reason which is not directly related to the breach. Those are matters of fact for an employment tribunal, to determine what the reason was.' On the facts, the claimant's delay indicated 'a detachment of that event from the reasoning of the claimant when she resigned'. The Tribunal concluded that the same can be said about Mr Samuels.

Conclusion – applying the law to the facts.

Time limits

121. With reference to the first issue, namely, has the claimant brought his discrimination claims within the time limit set by Section 123(1) of the Equality Act 2010, it is accepted by the claimant that he has not, the last act he complains of as discrimination occurred on 17 June 2020 and the claim made to the Tribunal was not made within three months (allowing for any early conciliation extension) of the end of that period. The issue before the Tribunal is whether it is just and equitable in all the circumstances to extend time.

122. The claimant left the respondent's business on 30 September 2021 and started work for HMRC on the 4 October 2021 as set out in the Grounds of complaint, a period in which the claimant could have undertaken ACAS early conciliation. ACAS early conciliation certificate commenced on the 10 November 2021 and was issued on the 10 December 2021. The claim form was received on the 7 January 2022. The claimant's complaint of constructive unfair dismissal was received in time, the disability discrimination claims were substantially out of time as the last act was on 17 June 2021 according to the claimant, who also relies on the allegations of discrimination as a breach of the implied term or trust and confidence.

123. With reference to the issue, namely, why were the complaints not made to the Tribunal in time, the claimant accepted his disability discrimination claim was out of time and explained that he did not know he had the right to claim in the circumstances and he did not want to address his mind to the respondent's actions because he found it upsetting for his mental health. The Tribunal, who found the claimant's evidence on a number of other issues not entirely credible, concluded that the claimant's explanation was most unsatisfactory. The claimant has given no cogent reason why the complaint were not made to the Tribunal in time. During the entire period when the claimant was allegedly subjected to acts of disability discrimination and harassment, he was able to apply for jobs, continued working, attended interviews, and he worked the contractual notice period. After termination of employment the claimant had time off work, then worked in his new role before he undertook ACAS early conciliation on the 10 November 2021. At the time of the alleged discrimination the claimant had and used UNITE to advise him, and had access to internet.

124. There was no satisfactory evidence to the effect that the claimant was too unwell to undertake ACAS early conciliation and issue proceedings. Contrary to his evidence the Tribunal found the claimant was well enough to issue proceedings in time. He had 2-days absence in August 2021 when working for the respondent, and there exists no medical evidence included within the reports produced by the claimant or occupational health referenced above, to the effect that the claimant was unable to undertake early ACAS conciliation due to mental health issues. The fact is that the claimant continued working, both for the respondent and then in his new role at HMRC, without issue or complaint, and there was nothing to stop him from undertaking AAS early conciliation and issuing his discrimination complaints within the statutory time limit.

125. Mr Salter submitted that in considering the exercise of its discretion, the "best approach" is for the Tribunal to "assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular … 'the length of, and the reasons for, the delay'": Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23 per Underhill LJ at [37]. He referred to the decision made by the Court of Appeal in Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194 held at §14-15, Habinteg Housing Association Ltd v Holleron EAT 0274/14. In Habinteg Langstaff J at [41] he said, (albeit obiter because he had allowed the appeal on other grounds): "I am satisfied too that the appeal also in respect of the question of time should succeed. The first consideration in the checklist derived from British Coal Corporation v Keeble at paragraph 10 is the reason for and the extent of the delay. Reasons

have to be capable of being established by the evidence. They need not, as the authorities show us, be direct evidence from the Claimant but may be inferred, but some evidence there must be. Otherwise, as Beatson J said in the case of Outokumpu Stainless Ltd v Law (October 2007, UKEAT/ 0199/07) at paragraph 18: "… Where a Claimant does not put evidence before a Tribunal in support of his application [that is, for an extension of time], explaining his delay and saying why an extension should be granted, how can the Tribunal be convinced that it is just and equitable to extend time? …" an observation that can be applied equally to Mr Samuels.

126. Reference was made to Bexley Community Centre v Robertson [2003] IRLR 434 at paragraph 25: it is for the applicant to make that case, and the Tribunal concluded that Mr Samuels has failed to make a case that it should use its discretion to extend the time limits in the specific circumstances of this case given the finality and certainty of the time bar and the lack of a credible explanation by Mr Samuels for the delay.

127. With reference to the issue, namely, in any event, is it just and equitable in all the circumstances to extend time, the Tribunal found that it was not.

128. In the event of the Tribunal being wrong in respect of time limits and taking into account that the claimant was relying on the alleged discrimination claims as a breach of the implied term of trust and confidence, it has considered the substantive claims as recorded below, which in the alternative would have been dismissed on their merits.

129. With reference to the issue, namely, in any event, is it just and equitable in all the circumstances to extend time, the Tribunal found that it was not, preferring Mr Salter's submissions that the claimant had access to the services of UNITE, that there is no reason offered by the claimant for an inability to present a claim in time, he was attending work throughout the time that the limitation period was running and no explanation has been given for the delay. The Tribunal did not accept as credible the claimant's evidence that he was unaware of the ability to bring a claim until after he left employment, and accepts Mr Salter's observation that this does not explain the delay in acting with haste once he was aware: he took a full month in conciliation and then waited almost a month after that had ended before he presented his claim form.

130. In conclusion, the claimant's claim of disability discrimination brought in relation to allegations 5.1.to 5.1.1.8 brought under section 26 of the Equality Act 2010, allegations 9.2. to 9.2.4 brought under section 15 of the Equality Act 2010, and allegation 12.1 brought under section 13 of the Equality Act 2010 were not presented to the Tribunal before the end of the period of 3 months beginning when the act complained of was done (or is treated as done) the last date being the 17 June 2021. ACAS early conciliation commenced on the 10 November 2021, the certificate issued on the 10 December 2021 and proceedings received on the 7 January 2022. The complaints are out of time and in all the circumstances of the case it was not just and equitable to extend time. The Tribunal does not have the jurisdiction to consider the complains which are dismissed.

131. Having found the disability discrimination complaints were received out of time and dismissed, in the alternative, the Tribunal proceeded to consider the allegations of discrimination cumulatively and individually on the basis that the claimant relied on them in his constructive unfair dismissal complaint.

RESERVED

Unfair Dismissal

132. With reference to the issue, namely, did the claimant terminate the contract under which he was employed in circumstances in which he was entitled to terminate it without notice by reason of the Respondent's conduct, the Tribunal found that he was not entitled and his claim of constructive unfair dismissal was not well-founded and is dismissed.

133. . With reference to the following sub-issues:

13.1 Did the Respondent do things listed at 5.1.1.1 to 5.1.1.8, 9.2.2, 9.2.4, 9.3 and 9.4, the Tribunal found that the burden of proof had shifted in relation to 5.1.5 and 5.1.8, however as set out below the Tribunal found the respondent had provided a satisfactory explanation untainted by disability discrimination.

13.2 Was this a breach of the implied term of trust and confidence, the Tribunal found that it was not taking into account the respondent's Absence Procedure, and it was entitled to manage the claimant's absence in the way it did including suggesting a diary which the claimant kept for the hospital and chose not to share with the respondent, with no consequences to him. . It was appropriate for Mr Hughes to, in the words of the claimant, "recommend" BUPA and encourage him to make use of the respondent's Employee Assistance Programme and the Bank Workers Charity, and offer to support him in whichever way the respondent could including helping to draft his CV, make reasonable adjustments including a phased return, reduce his duties and when absent with a non-disability related illness remind him of the cumulative effects of his absence on the business and the sustainability of continued absence in the future.

13.3 Was the breach repudiatory in nature? The respondent accepts that any proven breach of the implied duty of trust and confidence is repudiatory: Morrow v Safeway Stores [2002] IRLR 9. The Tribunal found there was no repudiatory breach, and if it wrong it found the claimant affirmed the contract and/or waived the breach of contract. The claimant's words and actions showed that he chose to keep the contract alive even after the alleged last breach on 17 June 2021, for example, when he worked under the management of Jodie Glue with the continued raft of reasonable adjustments including avoiding the more difficult and stressful telephone calls. On the claimant's own evidence he had decided that he no longer wanted to leave because things had settled down, and by the 17 June 2021 had decided not to apply for a "boring" role with the respondent's business. In short, the claimant had decided to move from the respondent in December 2020/January 2021 and was prepared to wait until he was offered suitable alternative employment by HMRC before doing so, and the interpretations given to the various meetings with Mr Hughes have been slanted towards building up a constructive dismissal claim when there was no individual or cumulative breach of the implied term of trust and confidence to justify such a claim.

13.4 Finally, with reference to the issue, namely, did the Claimant terminate his employment in response to the breach, the Tribunal found that he did not, having resigned ultimately for the reasons given above, namely because he did not want to work on the telephone in his contractual role, increased pay and knowledge that if his non-disability absences increased in the future there could be consequences, for example, the possibility of a more formal procedure and if he agreed to it,

redeployment and/or the possibility of termination of employment if no alternative roles were suitable, for example, too boring or exacerbated his disability.

131 With reference to the issue, namely, has the respondent shown the reason or principal reason for dismissal was capability, there was no requirement for the Tribunal to deal with this in light of its findings that the claimant was not unfairly constructively dismissed as the respondent was not in breach of the implied term of trust and confidence given the non-discriminatory reasons for all of the conduct the claimant complains of when Mr Hughes attempted to support him in whatever way he could. It is notable that the attempts to support and assist continued despite the claimant's strenuous attempts to avoid being managed and his absence called into question. It is notable from the findings of fact that the claimant did not comply with the informal action plans and there were no adverse consequences resulting from this, and he was not threatened when refusing to attend a welfare meeting by TEAMS which eventually took place on the telephone at a time dictated by the claimant who was absent from work and under the respondent's Wellbeing Policy was expected to talk to his line manager about supporting him to return to work and meet contractual obligations.

Disability

132 It is agreed that, at the material time(s), the claimant was a disabled person within the meaning of the Equality Act 2010, his disability being epilepsy.

Disability related harassment: Equality Act 2010 s26

Whether incidents/events complained of occurred

133 With reference to the issue, namely, did the Respondent do the following alleged things, the Tribunal found as follows referring to its findings of facts above;

5.1 Between **February 2021 and April 2021** in the course of the discussions about the formal wellness plan by Mr Daniel Hughes:

5.1.1 pressuring the claimant to seek treatment with BUPA despite fact that would involve him having to pay an excess of £150 and the claimant telling Mr Hughes that there was no alternative treatment; the Tribunal found the claimant was not pressured in any way. Daniel Hughes made it clear to the claimant that there was no formal wellness plan, and the meetings were all informal under the respondent's procedure. The claimant indicated that BUPA would assist and Daniel Hughes whilst he reiterated the offer of support through BUPA, accepted what the claimant had to say as his personal choice and did not force the claimant to go down the BUPA route. The Tribunal heard no evidence from either party as to whether the respondent offered to pay the £150 excess or not, and the contemporaneous documents do not reflect that the claimant at any stage complained about the excess. In conclusion, the claimant was not pressured as alleged and the complaint is dismissed.

5.1.2 pressuring the claimant to contact mental health charities; this did not happen. Daniel Hughes referenced one charity only, described as the Bank workers charity in an attempt to support the claimant whose choice it was to contact the charity or not. The fact that Daniel Hughes asked about

whether the claimant had done so was not pressure, and nor could it have reasonably been considered to be pressure at the time. It is notable that later on the chronology Jodie Glue also referenced the Bank Workers Charity and the claimant raised no issue over this. Both Daniel Hughes and Jodie Glue were doing what managers were supposed to do when facing an employee whose disability was exacerbated by their contractual role, pointing them towards organisations that could provide assistance including by-passing waiting lists through BUPA to get professional medical advice.

5.1.3 telling the claimant that he was not a doctor; the Tribunal found that these words were not used, however, Daniel Hughes did refer to neither he nor the claimant being "medically trained," He asked whether the claimant's view that BUPA would not assist was "your non-medically trained opinion." The claimant was not medically trained, he was not a doctor and it was his personal opinion. It was occupational health in 2020 and not Daniel Hughes who initially suggestion that the claimant should approach BUPA, and there are no criticisms from the claimant in respect of this.

5.1.4 telling the claimant that he was not trying hard enough to get better; the Tribunal found that this was not said. At the 18 May 2021 meeting Daniel Hughes asked "what have you been doing to get yourself better" which is completely different to saying you're not trying hard enough to get better.

5.1.5 telling the claimant to complete a seizure diary, provide information about what happens during a seizure, how the claimant feels, what his medication is and what its side effects are, the Tribunal accepts that this was said by Daniel Hughes. Two diaries were requested at various times, a general diary dealing with health and a seizure diary. The claimant confirmed he did keep a diary for the hospital, and despite agreeing to "share it" the claimant never did and there were no repercussions . It was made clear to the claimant throughout that the diary was to assist and support him in the workplace, in order that adjustments could be made as and when necessary. As submitted by Mr Salter, the initial suggestion came about when the claimant stated that he could not identify the triggers for his seizures other than stress, and was a reasonable suggestion by a manager seeking to support an employee with adjustments with a view to avoiding worsening of condition and an increase in sickness relating absences.

5.1.6 pressuring the claimant to attend a formal hearing by Teams in May 2021 which did not adhere to standard procedures; the Tribunal found that the meeting held on the 12 March 2021 was not a formal hearing. The informal welfare catch up/check in meeting was to have been held by TEAMS on the 11 March, the claimant objected and the check in meeting was held on the 12 March 2021 by telephone on a date and time agreed with the claimant with no notetaker. The claimant was forceful in his refusal as set out in text messages, a cogent explanation for the meeting was given and the meeting adhered to the respondent's standard procedures which required such meetings to take place to assist employees return to work and minimise sickness related absence. The fact that the claimant did

not like to be managed does not equate to an act of harassment under section 26 of the EqA, and he could not have reasonably concluded that being required to discuss his absence and adjustments as set out in the Wellbeing Policy fell under the definition set out in section 26. Taking into account the positive way in which Mr Hughes carried out the welfare meetings, actively assisting to support the claimant in whatever way he could despite the barriers put up by the claimant at every stage of the process including his token agreement to a welfare plan which was not followed through by any threats or adverse comments/action.

5.1.1.7 telling the claimant that if he did not agree to a meeting Mr Hughes would look at disciplinary action; the Tribunal did not find this happened, and had it been the case either the claimant or his union representative would have raised it. The claimant's case is not that Mr Hughes told him he would be facing disciplinary but his union representative reported this as a possibility and yet there is no reference to any such threat in the contemporaneous documents including the letter of resignation.

5.1.1.8 In late May 2021 during a meeting between the claimant, Mr Hughes and Mr Patrick Hazlewood, Mr Hazlewood telling the claimant that his absence was not sustainable and offering support to write a CV to help him find a new job, the Tribunal is satisfied that at the meeting held on 18 May 2021 meeting (as conceded by the claimant) recollections of both parties have been adversely affected by the passage of time as to what was precisely said. On the balance of probabilities taking into account the factual matrix and the meeting which followed, the Tribunal accepted as recorded above, the claimant's evidence that he interpreted what was being said to him was that his absence was not sustainable. It was pointless for Patrick Hazelwood to make a generic comment if it was irrelevant to the claimant, and the fact that the possibility of medical redeployment was discussed at the meeting on 3rd June 2021 reinforces this. Medical redeployment is relevant to an absence no longer being sustainable.

Whether conduct related to disability

134 With reference to the issue, was the conduct in question related to disability, the Tribunal found issue 5.1.1.5 related to disability but was not unwanted conduct, the claimant having offered to provide a diary and/access to the diary he was keeping for the hospital. Objectively assessed the claimant was aware that Mr Hughes was entitled to ask about his health under the respondent's welfare procedure, identifying for the claimant's triggers within the workplace was key to providing the adjustments needed, and when the claimant confirmed it was the stress of certain telephone calls these were taken away from him as an adjustment. As indicated above, S.26(4) states that, in determining whether conduct has the proscribed effect, a tribunal must take into account the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. There can be cases where the claimant when alleging the acts violated his or her dignity, is oversensitive and it does not necessarily follow that an act of harassment had objectively taken place despite a subjective view that it had. The Tribunal did not accept as credible the claimant's evidence that the proscribed effects under s.26(1)(b) had been met, perceiving himself to have suffered the effect in question. Secondly, was not reasonable for the conduct to be regarded as having that effect objectively assessed,

given the factual matrix including the increase in the number of seizures experienced by the claimant since the move in January 2021 – Pemberton (above). Mr Hughes' intention was to support the claimant and this would have been clear to the claimant at the time - Richmond Pharmacology v Dhaliwal (above).

135 Issue 5.1.1.8 related to disability and the claimant's absence history that was not disability related. The offer to support the claimant writing his CV was not related to disability, and were the actions of a manager offering to assist an employee who had made it clear he were seeking alternative employment within and outside the business having requested a reference from another manager earlier. The Tribunal repeats its conclusions above.

136 With reference to the issue whether the conduct was unwanted, the Tribunal found that it was not as the claimant did not object and offered up the diary. In relation to 5.1.18 offering assistance with drafting the CV was not unwanted, as the claimant had indicated he needed support earlier.

137 With reference to the claimant being told that his absence was not sustainable was unwanted conduct related to disability as the claimant did not want his sickness absences to be managed. The conduct of both Mr Hughes and Mr Hazelwood in the well-being catch up meetings were entirely appropriate and in accordance with the respondent's welfare procedure, including their expression of legitimate concern regarding absences against a background of sickness absence involving the progression to a formal process in 2020 and continued absences in 2021 including absences that were not related to the claimant's disability. Taking into account the mental processes and motivation of Mr Hughes and Mr Hazelwood their conduct did not have the proscribed effect and were the actions of reasonable managers attempting to put in place adjustments and support to keep the claimant in work when the claimant had made it clear that his contractual role caused stress which adversely affected his disability. In short, they owed the claimant a duty of care in addition to managing his sickness absence and they left no stone unturn to meet this duty in a supportive and proactive way.

Purpose/effect of conduct

138 With reference to the issue, namely, did the conduct in question have the purpose of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, the Tribunal found that it did not. Mr Hughes and Patrick Hazelwood's purpose was solely attempting to help and support the claimant, which included setting out clearly the reality of the claimant's position and the purpose was not the effect proscribed.

139 With reference to the issue, namely, did the conduct in question have the effect of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, taking into account: the Claimant's perception, the circumstances of the case, and whether it was reasonable for the conduct in question to have that effect, the Tribunal found that it did not referring to its conclusions above and the factual matrix in its entirety.

Discrimination arising from disability: Equality Act 2010 s15.

Whether Claimant treated unfavourably

140 With reference to the issue 9.2, namely, did the Respondent do the following alleged things it found as follows:

a. Between February 2021 and April 2022 in the course of the discussions about the formal wellness plan by Mr Hughes:

9.2.1 pressuring the claimant to seek treatment with BUPA despite fact that would involve C having to pay an excess of £150 and the claimant telling Mr Hughes that there was no alternative treatment; the Tribunal repeats above.

9.2.2 telling the claimant to look for a new job; the Tribunal found the claimant looked for a new job on his own initiative, and made it clear to the respondent that he was looking which he did as borne out by the factual matrix. The words used needs to be considered in context against a background the claimant being unable to perform the entirely of his contractual role, the effects it was having on his disability and his clear indication that he did not like his current role and "hated it."

9.2.3 telling the claimant to complete a seizure diary, provide information about what happens during a seizure, how the claimant feels, what his medication is and what its side effects are; the Tribunal repeats its findings above.

9.2.4 not believing the information provided by the claimant including information in a previous occupational health report, there was no evidence the information provided by the claimant was not believed, the reverse as there are occasions when the claimant provided information which was accepted. Daniel Hughes accepted the information and sensibly requested an update 18 months later given the changes to the claimant's health, medication, lengthy absences and confirmation that work was adversely affecting his disability and mental health which in turn resulted in absence.

9.2.5 (previously 9.3 in the list of issues) By Daniel Hughes, pressuring the Claimant to attend a formal hearing by Teams in May 2021 which did not adhere to standard procedures. The Tribunal has dealt with this above.

9.2.6 (previously 9.4 in the list of issues) On 3 June 2021 by Daniel Hughes offering the claimant the medical redeployment programme (without calling it that) and telling him that if no position became available within 6 months or if he refused an offer in that time, his contract would be terminated, the medical redeployment discussion did not take place as described by the claimant in this allegation. It was part of a check in meeting following up from the 11 May 2021 meeting, and as indicated in the 27 July 2021 meeting with Jodie Grue it was offered to support the claimant, who refused it and that was the end of the matter as the claimant had to agree redeployment in order for it to take effect. Once the claimant rejected the offer inviting him to become a member of the redeployment scheme nothing further was said to him.

9.5 Was this unfavourable treatment, the Tribunal found there was no unfavourable treatment for the reasons already given. The test is whether a reasonable worker would consider that the treatment is unfavourable and given the factual matrix in this case coupled with the reasonable adjustments made as a result of the information provided by the claimant, the Tribunal found no reasonable worker would have considered the treatment unfavourable taking into account all of the facts. In the alternative, the Tribunal concluded that had there been unfavourable treatment (which there was not) the principles set out in Paisner (above) applied.

Reason for treatment

141 With reference to the issue, namely, was the unfavourable treatment because of the claimant's sickness absence which had led to the formal action plan being put into place, the Tribunal found that there was no formal action plan, and the action plan set was not put in place purely as a result of absence but also due to the claimant indicated that he did not like his job, which put him at risk of stress and anxiety which in turn could lead to adverse effects on his epilepsy. Focusing on the reason in the minds of Mr Hughes and Mr Hazlehurst, the Tribunal was satisfied the explanations they gave as recorded above, were untainted by disability discrimination. Taking into account the evidence before it, objectively assessed, the Tribunal found Mr Hughes and Mr Hazlehurst were concerned with the claimant's well-being and supporting him in the workplace in whatever way they could. If the Tribunal is wrong on this issue, in the alternative, it would have gone on to find the respondent had met the justification defence.

Whether treatment justified

142 With reference to the issue, namely, was the treatment a means of achieving a legitimate aim, the Tribunal found, if it was wrong in relation to the issue above, the treatment was justified and a proportionate means of achieving a legitimate aim taking into account the risk to the claimant's health, the reasonable adjustments made and the attempt to leave no stone unturn to support him in whatever way the respondent could think off including BUPA referral, assistance programme EAP, Bank Workers Charity, Headspace and anything the claimant could suggest from changing dates and times for meeting which was to have been be TEAMS and as requested reverted to telephone to providing assistance in respect of seeking alternative employment that was more suitable to the claimant and did not exacerbate his disability.

143 The legitimate aim was meeting the duty of care owed by the respondent to the claimant not to exacerbate his medical conditions, managing absence which had an impact on other employees and the operational needs of the business, coupled the adverse effect of the claimant's contractual role on his disability, his general health and the stress he reported experiencing.

144 If so, with reference to the issue, namely, was it a proportionate means of achieving that aim, the Tribunal found that it was. As indicated above, the test of justification in S.15(1)(b) requires that the treatment complained of amounts to a proportionate means of achieving a legitimate aim, the Tribunal weighing an employer's justification against the discriminatory impact, considering whether the means correspond to a real need of the undertaking, are appropriate with a view to achieving the aim in question, and are necessary to that end. Taking into account the EHRC guidance and the need for the Tribunal to carry out a balancing exercise, the Tribunal concluded the respondent had acted proportionately against a background

of making a raft of reasonable adjustments for the claimant, seeking occupational health advice, undertaking informal welfare meetings to understand and make suggestions to the claimant of support for his mental health and disability including the BUPA insurance provided as a benefit to him. There were no less discriminatory measures available to the respondent in the circumstances of this case, and it was not proportionate given the legitimate aims, for the claimant to have been left to his own devices and not managed, as he clearly wanted, especially given the impact on his disability of the work he was carrying out, the need for the respondent to understand this and set in hand measures to protect him, which it did. The aim pursued was legal, not discriminatory in itself, represented a real, objective consideration and the means were proportionate.

Direct Discrimination

145 With reference to the issue, namely, did Mr Hughes pressurise the claimant to seek treatment by BUPA even though he would have to pay an excess to do so, the Tribunal found that he had not for the reasons stated. The claimant has produced no evidence relating to direct discrimination, he has failed to prove facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances without a disability would have been treated. The claimant relies upon a hypothetical comparison, however, he has produced no evidence by which the Tribunal can understand how a hypothetical comparator would have been treated, and no material from which an adverse inference can be drawn.

146 In conclusion, the claimant has not proven primary facts from which the Tribunal could conclude that there was less favourable treatment was because of disability, and the burden of proof has not shifted to the respondent. Had the burden of proof shifted, which it did not, the Tribunal would have gone on to conclude that the Respondent has shown there was no less favourable treatment because of disability, Mr Hughes and Mr Hazlehurst having provided a reason for the conduct complained of that was not tainted by disability discrimination as recorded in the findings of facts above.

147 In conclusion, the claimant's claim of disability discrimination set out in allegations 5.1.to 5.1.1.8 brought under section 26 of the Equality Act 2010, allegations 9.2. to 9.2.4 brought under section 15 of the Equality Act 2010, and allegation 12.1 brought under section 13 of the Equality Act 2010 were not presented to the Tribunal before the end of the period of 3 months beginning when the act complained of was done (or is treated as done) the last date being the 17 June 2021. ACAS early conciliation commenced on the 10 November 2021, the was certificate issued on the 10 December 2021 and proceedings received on the 7 January 2022. The complaints are out of time and in all the circumstances of the case it is not just and equitable to extend time. The Tribunal does not have the jurisdiction to consider the complains which are dismissed.

148 In the alternative, the claimant's claims of unlawful direct discrimination brought under section 13, 15 and section 26 of the Equality act 2010 are dismissed. The claimant was not treated less favourably than a hypothetical comparator because of the protected characteristic of disability, his claim for direct disability discrimination brought under section 13 pf the Equality Act 2010 fails and is dismissed. The claimant was not treated less favourably because of something arising in consequence of his disability and his claims of discrimination arising from

disability brought under section 15 of the Equality Act 2020 fails and are dismissed. The respondent's conduct did not have the proscribed affect under section 26 of the Equality Act 2010, the claimant's claims of harassment fail and are dismissed.

149 The respondent was not in breach of the implied term of trust and confidence and the claimant's claim of constructive unfair dismissal brought under section 95(1)(c) of the Employment Rights Act 1996 as amended is not well-founded and is dismissed.

Employment Judge Shotter
15.12 23

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

21 December 2023

FOR THE SECRETARY OF THE TRIBUNALS